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Paradigmatic Models of Mediation, Mandatory Eclectics or a Direct Decision

Abstract

The paper conceptually reviews the paradigmatic models of mediation to understand the professional role of a mediator and the scope of ethical obligations. The description of each model presents the corresponding action of a mediator and the standard of intervention in the process, and examines their effectiveness in achieving the goals of mediation. In this regard, the paper examines the content of a mediator's ethical obligations and potential dilemmas in different mediation models that may be associated with a mediator's direct and uniform choice of a particular mediation model. The paper emphasises the importance of a mediator's competence for the proper functioning of a process and, at the same time, analyses the need for a strict demarcation from the professional role of an attorney, which is essential for the ethical execution of a mediator's role.

KEYWORDS: evaluative mediation, facilitative mediation, transformative mediation, styles of mediation, self-determination, informed consent.

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1 Introduction

Supporting the principle of party autonomy[1], achieving essentially fair outcomes for the parties, and ensuring procedural fairness is a fundamental obligation of a mediator However, the measurement of the scope of these principles and the methods for maintaining the balance between them differ according to philosophical and ideological perceptions of mediation and understanding of human nature, as well as mediation models. Mediation models are distinguished based on "the differentiated understanding of the professional purpose and the mediator's role, considering which values are of priority in the process"[2]. Mediation models are classified through different ideological approaches and perceptions of professional ethics, which leads to a variety of conclusions and ethical recommendations.

In the mediation process narrow and wide approaches to problem analysis may be applied,[3] however, they lead to radically different consequences. The narrow approach, often referred to as distributive mediation, is where parties share limited resources, specifically disputed property, without identifying the additional resources to be exchanged. Hence, as one party receives a certain part through negotiations, the other will get less by the same amount. In this case, the agreement is achieved by compromise and waiving a certain part of assets. Accordingly, this type of mediation, which

1 Klaus Hopt, Felix Steffek, *Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013), 135, 190; Hugo Luz dos Santos, *Towards a Four-Tiered Model of Mediation Against the Background of a Narrative of Social Sub-systems in Everlasting Cross-Fertilization* (Singapore: Springer, 2023), 114; Dan Simon, Rara West, eds. *Self-Determination in Mediation, The Art and Science of Mirrors and Lights* (Lan Ham, Maryland: Rowman & Littlefield Publishers, 2022), 4. On the universal recognition of party autonomy in the legal settings of EU member states (and not only), see: Martin Schauer, Bea Verschraegen, eds. *General Reports of the XIXth Congress of the International Academy of Comparative Law Rapports Généraux du XIXème Congrès de l'Académie Internationale de Droit Comparé* (The Netherlands: Springer, 2017), 220. Marian Roberts, *Mediation in Family Disputes, Principles of Practice* (London and New York: Routledge, Taylor and Francis Group, 2014), 163; Nadja Alexander, *International and Comparative Mediation Legal Perspectives* (Netherlands: Kluwer Law International, 2009), 345; Nancy Dubler, Carol Liebman, *Bioethics Mediation, A Guide to Shaping Shared Solutions* (Nashville, Tennessee: Vanderbilt University Press, 2011), 12.

2 Omer Shapira, „Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics" *Pepperdine Dispute Resolution Law Journal*, No. 2 (2008): 244.

3 Leonard Riskin, „Mediator Orientations, Strategies and Techniques" *Alternatives to the High Cost of Litigation*, No. 9 (1994): 111.

is only limited to sharing/dividing the disputed properties, is closer to a court settlement, where the parties give up a certain part of their demand and recognise the claim. Such mediation does not examine the additional opportunities, and resources for exchange and does not fully serve the achievement of the parties' wider interests. In most cases, this approach leads to a dead end, as the process takes on a semblance of trading, without seeking alternative resources for the actual interests of the parties and the corresponding satisfaction of a claim. The distributive mediation technically excludes a win-win principle, as the agreement is achieved through renouncing counter-demands and not by actualising wider interests.

The mediator, who starts a process with a wide orientation, a comprehensive approach towards understanding the core of the problem and the conflict, goes beyond the narrow aspects of a legal dispute and determines the mutual, covered interests of the parties. Often, in the mediation process, the identification of parties' interests (their own, as well as the opponent's) is achieved through self-determination. This leads the parties to cooperate and seek for inter-beneficial outcome. Such a setting explains the advantage of mediation over classic negotiations, where the neutral third party does not participate. More precisely, during direct negotiations, the parties often find themselves in a dead-end, as they are focused on the exchange of positions. At the same time, during the mediation process, a mediator obtains confidential information in the format of individual meetings with the parties, identifies their needs, and common interests, and leads the negotiations towards the direction of materialisation of these shared interests. With the help of a mediator, after transforming a conflict, the perspective of the materialisation of interests leads the parties to willingly reach an agreement.

Laurence Boulle distinguishes four paradigmatic models of mediation – problem-solving, facilitative, therapeutic and evaluative models[4]. „The mentioned models emphasise the diversity of a mediation practice and the reality, that the aims and values of mediation are determined by the model selected by a mediator based on the demands or expectations of parties. Classification of these models also highlights that there is no consensus among practitioners on the best model" [5].

4 Laurence Boulle, *Mediation: Principles, Process, Practice* (Butterworths: LexisNexis, 2011), 43-47.

5 Bobette Wolski, „An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making" *Ethics in Alternative Dispute Resolution*, No 1 (2017-2018): 69.

For the problem-solving model, mediators choose to support positional negotiation. Their intervention is aimed at moving the parties from fixed positions towards a compromise, a mediator's effort is focused on the initial positions and demands of the parties. The fundamental value of the said process is compromise and effectiveness[6]. In given circumstances, values such partyparty engagement and empowerment are not prioritised or seen as necessary[7]. The problem-solving model of mediation becomes similar to litigation without a judge, where the roots of conflict, interests and needs are not explored, self-determination does not take place, nor does the multiplication of exchange resources and benefits and the creation of new values – the parties settle, similar to court proceedings, within their claims.

The conceptual reason why the parties may not reach a settlement in the courtroom but may be able to find a creative solution in court mediation (another service of the court) is that in mediation there are opportunities to explore the best interests of the parties, their self-determination, expression, understanding, regulation of emotions and transformation of conflict into cooperation. Hence, where the mediation is carried out through the methodological approaches of the dispute resolution model, it cannot have a tangible advantage over court settlement. Moreover, it will be unjustifiable to pass the case over to the mandatory court mediation when the parties have been unable to reach a settlement within the scope of their claims. Therefore, the court's expectation, while passing the case over to mediation is that instead of positioning in negotiations, the true interests of the parties will be explored and negotiations will be based on the methodological approach to solve the conflict with the help of a mediator.

In the *facilitative model*, a mediator's effort is focused on enhancing communication and conducting an effective negotiation. In this case, mediation concentrates on the interests and needs of parties, rather than their positions, rights and obligations[8]. The foundations of the Facilitative Model are interest-based integrated negotiation, full engagement of the parties and application of active listening methods, so that the result achieved is

6 Ibidem, citing: Boulle, *Mediation: Principles, Process, Practice,* 63, ff.

7 Wolski, „An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making", 70.

8 Wolski, „An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making", 70 citing: Boulle, *Mediation: Principles, Process, Practice*, 44.

creative, and meets the legal and non-legal interests of the parties[9]. The said model recognises the prioritisation of interests over rights and the need for recognition and validation of emotions and visions[10]. Conflicts of interpersonal character[11] require less evaluative and more facilitative, or even more, transformational approach to conflict[12]. The cornerstone of transformative mediation is the orientation of the parties to each other's perspectives[13], supporting the mutual recognition of each other's visions and empowering the parties to reach an autonomous decision. In the conceptual understanding of transformative mediation, offering readily answers and opinions to the parties weakens them and their roles[14]. The purpose of transformative mediation is to transform the conflict and recover the relationship between the parties[15].

In the therapeutic mediation model, a mediator applies professional therapeutic methods and is focuses on the relationship between the parties. In this conceptual scheme, the agreement is not the goal of mediation. The process aims to explore the root causes of the conflict, to restore the relationship and to ensure the recognition and emotional satisfaction of the parties. The model strives to terminate the conflict between the parties, which, eventually, in most cases, leads to a solution to the conflict

9 Wolski, „An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making", 70; *Mediation in International Commercial and Investment Disputes*, ed. Catharine Titi, Katia Fach Gómez (Oxford: Oxford University Press, 2019), 72.

10 Boulle, *Mediation: Principles, Process, Practice*, 63.

11 People dispute vs legal dispute, see: Zena Zumeta, „A Facilitative Mediator Responds" *Journal of Dispute Resolution*, No. 2 (2000): 337.

12 Ibidem. Transformative mediation stands close to the purpose and methodology of Facilitative Mediation. In this regard see: Alan Stitt, *Mediation Practical Guide* (United Kingdom: Taylor & Francis, 2016), 5; *The Negotiator's Fieldbook, The Desk Reference for the Experienced* Negotiator, ed. Andrea Kupfer Schneider, Christopher Honeyman (Washington, DC: ABA Section of Dispute Resolution, 2006), 596; Robert Baruch Bush, Joseph Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (United States of Amerika: Jossey-Bass, 2005), 1-304; Simon and West, *Self-Determination in Mediation, The Art and Science of Mirrors and Lights*, 39.

13 Ronán Feehily, *International Commercial Mediation, Law and Regulation in Comparative Context* (Cambridge: Cambridge University Press, 2022), 102.

14 Art Hinshaw, Andrea Kupfer Schneider, Sarah Rudolph Cole, *Discussions in Dispute Resolution, The Foundational Articles* (Oxford: Oxford University Press, 2021), 142.

15 Timea Tallodi, *How Parties Experience Mediation, An Interview Study on Relationship Changes in Workplace Mediation* (Springer International Publishing, 2020), 21; Joseph Folger, Robert A. Baruch Bush, „Transformative Mediation, A Self-Assessment" *International Journal of Conflict Engagement and Resolution*, No. 1 (2014): 20-34.

and reaching an agreement[16]. This concept gives the parties a sense of productivity and empowers them in decision-making. At the same time, the process focuses on ensuring openness between the parties and building mutual acceptance[17].

In evaluative („directional"[18]) mediation, a mediator may share with the parties his or her own professional view of the possible legal consequences of resolving the dispute through court proceedings. The aim of the process is to facilitate a solution that is assessed against the possible risks of going to court, the rights of the parties and their legal positions. Lawyers and mediators with field competencies develop an opinion in evaluative mediation on the alternatives of optimal dispute resolution and to some extent, influence the parties to consider the options while keeping the legal risks in mind[19]. In evaluative mediation, a mediator's experience and competence in legal or other fields is essential[20], and used for the parties to explore the alternatives, which as per usual may be achieved through standard litigation[21]. The value of this process is the implementation of the legal rights of a person[22] and is mainly focused on ensuring that the agreement is achieved[23].

It is therefore difficult to separate evaluative and facilitative mediation models, and the attempt to do so is referred to in the academic literature as a "false dichotomy"[24]. Integrated facilitative and evaluative mediation

16 Wolski, „An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making", 70, citing: Boulle, *Mediation: Principles, Process, Practice*, 44.

17 Robert A. Baruch Bush, Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994), 89-91.

18 Anna Nylund, Kaijus Ervasti, Lin Adrian, *Nordic Mediation Research* (Switzerland: Springer International Publishing, 2018), 217; Schneider, Honeyman, *The Negotiator's Fieldbook, The Desk Reference for the Experienced Negotiator*, 596.

19 Boulle, *Mediation: Principles, Process, Practice*, 44.

20 Laurence Boulle, Miryana Nesic, *Mediation: Principles, Process* (London: Tottel, 2001), 114.

21 Laurence Boulle, *Mediation: Principles, Process, Practice* (Chatswood, N.S.W: LexisNexis Butterworths, 2005), 60.

22 Wolski, „An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making", 71.

23 Anna Nylund, Kaijus Ervasti, Lin Adrian, *Nordic Mediation Research* (Springer International Publishing, 2019), 217.

24 Jeffrey Stempel, „The Inevitability of the Eclectic: Liberating ADR from Ideology" *Journal of Dispute Resolution* 2000, No. 2 (2000): 247. See also, Dorcas

is often applied in family cases where the kids' interests are prioritised[25]. Moreover, even proponents of purely facilitative mediation recognise that even in the most facilitative cases, evaluative elements are applied and it is often impossible to determine where facilitation ends and evaluative methodology begins[26].

2 Orientational classification of mediation in facilitative and evaluative models

In 1996 Len Riskin developed the typology of conceptual approaches, models of mediation, which had a great impact on the methodological realisation of the field. This typology includes two main models – facilitative and evaluative mediation. The purpose of both models is to support achieving an agreement; however, they differ in methodological aspects[27].

The orienting classification of mediation into facilitative and evaluative models allows for the limits of a mediator's procedural intervention, the strategy to be applied and the implementation tactics to support the parties' self-determination and ability to make informed decisions.

2.1. The facilitative mediation model

Facilitative mediation assumes that the parties are intelligent, that they understand their role better than a mediator or lawyers, and that they are capable of negotiating with the other party[28]. Facilitative mediation relies

Quek Anderson, „Facilitative Versus Evaluative Mediation, Is there Necessarily a Dichotomy?" *Asian Journal on Mediation*, 66 (2013): 68.

25 Nylund, Ervasti, Adrian, *Nordic Mediation* Research, 217-220.

26 Kenneth Roberts, „Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement" *Loyola University Chicago Law Journal*, No. 1 (2007): 192.

27 Leonard L. Riskin, „Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed", *Harvard Negotiation Law Review*, No. 7 (1996): 8-51. See also, Anderson, „Facilitative Versus Evaluative Mediation, Is there Necessarily a Dichotomy?", 68.

28 Riskin, „Mediator Orientations, Strategies and Techniques", 111-114.

fully on the parties' ability to resolve the dispute and encourages them by using active listening techniques. Precisely through questioning skills and techniques facilitative mediator seeks to enhance parties' understanding of strong and weak legal positions and rationalising of resolution and non-resolution of the case. The facilitative mode is mainly based on negotiations that prioritise the interests of the parties[29] and serve the purpose of depersonalisation – detaching the problem from the person[30].

„The primary function of facilitative mediation is to support enhancing the communication so that the parties are able to seek and find a mutually beneficial solution through healthy communication"[31].

> A facilitative mediator resembles a symphonic conductor, who harmonises each instrument and helps them perform, however they do not technically increase the volume of a bass or a soprano. The mediator acts as a maestro and has a little influence over the melody played with the instruments[32].

A facilitative mediator is similar to a coach, who encourages the players to seek creative solutions and give the negotiations a collaborative spirit by adhering to the "give and take" point of view[33].

A facilitative mediator does not evaluate the rationality or reasonableness of an offer, dictate, or indicate to the parties the consequences of reaching or not reaching an agreement. From the perspective of facilitative mediation, the evaluative approach harms the impartiality of a mediator and the party's autonomy. Moreover, the impermissibility of advising and evaluating the issues is determined by the presumption that a mediator may not possess field competence about the topic of the dispute. Where the party stubbornly stands for their unrealistic position, a facilitative mediator's attempts focus on making the party move towards rationality only through asking questions. For facilitative mediation, a mediator's deep field competence concerning the topic of dispute is not essential[34]. Moreover,

29 Nylund, Ervasti, Adrian, *Nordic Mediation Research*, 215.

30 Tallodi, *How Parties Experience Mediation, An Interview Study on Relationship Changes in Workplace Mediation,* 21.

31 Riskin, „Mediator Orientations, Strategies and Techniques", 111-114.

32 Ellen Waldman, *Mediation Ethics, Cases and Commentaries* (San Francisco: Jossey-Bass, 2010), 20.

33 Ethical Mediation. Advocate, Vancouver Bar Association, Vol. 79, part 6, 857.

34 Waldman, *Mediation Ethics, Cases and Commentaries*, 19. See also, Riskin, „Mediator Orientations, Strategies and Techniques", 111.

according to Riskin, „specific comprehensive competence regarding the topic of dispute may impede a facilitative mediator and lean them towards adopting the evaluative approach. Moreover, this may also hinder the search for creative alternative solutions"[35]. The said opinion of Riskin may be understood in a manner, that when a mediator has a field competence in the topic of a dispute, e.g. in jurisprudence, they might encourage a resolution, which is closer to legal resolution or judicial practice. This may overshadow the alternatives which are usually present while seeking non-legal or other types of solutions.

Despite the substantiality of Riskin's opinion, on the other hand, the advantages of the field competence of a mediator shall be considered in terms of fulfilling the ultimate purpose of making an informed decision. A mediator's methodological approaches are often influenced by their professional qualification, education, previous profession, and experience[36]. More precisely, even in facilitative mediation, where a neutral third person aspires to rationalise the parties' positions through active listening techniques, for generating realistic offers, through proper use of the role of legal counsel analysing the best and worst alternatives of mediation settlement, effectively implementing the reality test, properly understanding the essence of the dispute, and hence, for asking the relevant questions to facilitate the rationalisation of legal positions, having a field competence is of immense importance for a mediator.

Professional competence concerning the subject of a claim might be crucial in obligatory judicial mediation, to which parties refer with a non-appealable ruling[37], unlike private mediation, to which the parties refer voluntarily, based on rational and informed consent. The absence of will to negotiate often derives from the parties being submerged in the vagueness of the case, caused by exaggerated, irrational perceptions of factual and legal realities. Even when legal counsels encourage cooperation and objective legal analysis of the case, often, the clients perceive such „effort" as a „weakness", being unqualified or even going against the client's interests, rather than as adherence to ethical obligations of honest and rational negotiations in the mediation process. In such cases, qualified questions of a mediator with a field competence within the limits of the legal reality

35 Riskin, „Mediator Orientations, Strategies and Techniques", 114.

36 For instance, former judges often tend to apply a narrow facilitative role.

37 Article 1871(2) of the Civil Procedure Code of Georgia: a ruling to transfer a case to a mediator shall not be appealed.

test (depending on the legal essence of a dispute), play an important role in enhancing rational perceptions. Therefore, the presence of a mediator's field competence, along with „dangers" as discussed by Riskin, to a large extent may carry valuable advantages in terms of reaching an agreement which is informed, well-reasoned, and evaluated against the legal risks. Hence, facilitative mediation neither excludes a mediator's obligation to facilitate the objective analysis of strong and weak positions in the case, nor the implementation of the legal reality test[38] through the application of questioning techniques[39]. It is precisely in this way that a mediator with expertise in the field rationalises the parties' positions in facilitative mediation.

The importance of field competence for a mediator will be further discussed below.

2.1.1. The wide facilitative role

In the wide facilitative role, a mediator helps the parties determine, understand and solve their desired issues through negotiations. A mediator encourages consideration of mutual interests instead of positions, for generating alternatives and enhancing the well-being of parties in the process of analysis[40]. Although it is not essential for a mediator in the broad facilitative role to have a detailed knowledge of the legal nature of the issue, he or she must be prepared to become aware of and properly understand the legal aspects within the dynamics of the negotiation.

In the wide facilitative role, encouraging the analysis, which helps a party to comprehend the reasonability of alternatives while having the perspective of acceptance from the other party in mind, is still relevant.

In the wide facilitative role, a mediator:

- During a common session encourages the discussion of mutual interests;
- During a common session encourages the development of offers, which reflect the mutual interests of the parties;
- Does not provide evaluative recommendations, yet to support the objective risk analysis, allows the parties to present and discuss

38 Bryan Clark, *Lawyers and Mediation* (Heidelberg: Springer, 2012), 159.

39 Stitt, *Mediation Practical Guide*, 4.

40 Jamila Chowdhury, *Gender Power and Mediation, Evaluative Mediation to Challenge the Power of Social Discourses* (Cambridge: Cambridge Scholars, 2012), 99.

their arguments, and legal perspectives during the session within the limits of feasibility.

- Leads he mediation sessions mainly with the direct involvement of the parties, recognises the importance of the rule of law in mediation, but assists the parties to identify individual, subjective standards of fairness within the limits of the law and to reflect them in the agreement.
- Focusing on the interests frees the parties from the limited approaches as developed in legal claims and transports them to the platform for actualising versatile and wide interests[41].

2.1.2. A narrow facilitative role

A mediator in a narrow facilitative role strives to provide the parties with realistic perceptions of their legal circumstances, yet, permitted techniques are largely different from the evaluative role. In this case, a mediator does not directly evaluate the issues, does not provide a possible prognosis of court decisions, does not provide the parties with possible outcomes in the form of specific alternatives, and therefore does not influence the parties by supporting their acceptance of particular options. A mediator, by mainly asking questions, encourages the parties to analyse the consequences of not reaching an agreement and the strong and weak positions in the case. During individual sessions, a mediator supports the consideration of provided offers by the parties, along with seeking innovative alternatives.

The corresponding questions for a mediator's narrow facilitative role are as follows:

- How do you assess the strong and weak points of your case? What is your opinion on the strong and weak positions of the other party in the court?
- Should the case proceed to court, what would be the best, the worst and the most probable alternative to mediation settlement? How, and what thought process brought you to this conclusion? Have you considered other aspects?
- How long will the litigation continue?

41 Riskin, „Mediator Orientations, Strategies and Techniques", 112.

- What might be the material, emotional and reputational costs associated with the litigation?[42]

2.2. The evaluative mediation model

An evaluative mediator assumes that the parties expect the mediator to guide them towards a reasonable basis for resolving the dispute, which may include legal, industrial and technological aspects. To carry out this role, from the parties' point of view, a mediator requires proper professional training, field qualification, experience and objectivity[43]. fundamental starting postulate of evaluative mediation is that a party is only capable of making an informed decision when they are fully informed on the best (BATNA) and the worst (WATNA) alternatives of the mediation settlement. The conceptual notion of evaluative mediation is that possessing information on the possible outcomes of litigation does not limit, but rather encourages the principle of party autonomy. It is impossible to have a discourse on the expression of a free and autonomous will in the context of limited access to information on legal risks. In the United States of America, in judicial mediation and mediation with legal counsel, the evaluative role became an integral part of a mediator's repertoire[44]. Moreover, many scholars and practitioners consider that a mediator's evaluative role may largely promote the self-determination of parties and making informed decisions[45]. In contrast, through facilitative mediation, a mediator's words

42 Ibidem.

43 Ibidem, 111.

44 Maureen Laflin, „Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators" *Notre Dame Journal of Law, Ethics & Public Policy*, No. 1 (2000): 486. Robert A. Baruch Bush, „Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field" *Pepperdine Dispute Resolution Law Journal*, No. 1 (2002): 122.

45 Rachael Field, Jonathan Crowe, *Mediation Ethics, From Theory to Practice* (Cheltenham: Edward Elgar Publishing, 2020), 32; Chowdhury, *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses*, 40; Jacqueline Nolan-Haley, „Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making" *Notre Dame Law Review*, 74 (1999): 797. James Stark, „The Ethics of Mediation Evaluation: Some Troublesome Questions And Tentative Proposals, from an Evaluative Lawyer Mediator" *South Texas Law Review*, 38 (1997): 795. James Stark, „Preliminary Reflections on the Establishment of a Mediation

may impact the parties to such an extent, that they might change their priorities and preferences in values. According to proponents of the facilitative mediation model, a mediator's evaluation tends to take away from, rather than promote, the self-determination of the parties.

Therefore, the ultimate purpose of the evaluative and facilitative models of mediation is to encourage self-determination, but their methodological approaches and the tactical functions applicable to a mediator differ in terms of the permissibility of sharing evaluations and opinions[46].

The evaluative role is adopted when the parties to mediation do not have experience in negotiations and face substantial obstacles in achieving an agreement in their dispute[47], the dispute is of a legal character[48] or might require special technical knowledge, when a mediator might have expertise[49]. The need for evaluative mediation might have the parties, who do not possess experience and legal education[50] on how to initiate negotiations and explore the key issues in a manner which will result in a mutually acceptable agreement based on common interests. „Evaluative mediation may be more effective when the parties have irrational perceptions of legal and objective realities. The proponents of the evaluative model believe that the evaluative role does not entail that a neutral third person dictates the path leading to dispute resolution, but rather that the parties based their negotiations on objective bases"[51]. Hence, the evaluative role of

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Clinic" *Clinical Law* Review, 2 (1996): 487. The selection of an evaluative mediator by parties and lawyers serves the enhancement of party autonomy and self-determination. See: Donald Weckstein, „In Praise of Party Empowerment And of Mediator Activism" *Willamette Law Review*, 33 (1997): 526; John Feerick at al., „Standards of Professional Conduct in Alternative Dispute Resolution" *Journal of Dispute* Resolution, No. 1 (1995): 101-102 (The evaluative role enhances party self-determination); Robert Moberly, „Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?" *South Texas Law Review*, 38 (1997): 772 (Criticises the failure to take the evaluative role. The principle of self-determination entails that a mediator is obliged to evaluate, where it comes from the parties' will and they require it)

46 Waldman, *Mediation Ethics, Cases and Commentaries*, 21.

47 Michael Moffitt, Andrea Kupfer Schneider, *Examples & Explanations: Dispute Resolution* (United States: Aspen Publishers, 2011), 86-87.

48 Field, Crowe, *Mediation Ethics, From Theory to Practice*, 29.

49 Stitt, *Mediation Practical Guide*, 3.

50 Jacqueline Nolan-Haley, „Court Mediation and the Search for Justice through Law" *Washington University Law Review*, No. 1 (1996): 65-66.

51 Abraham Ordover, Andrea Doneff, *Alternatives to Litigation, Mediation, Arbitration and the Art of Dispute Resolution* (Boulder: National Institute for Trial Advocacy, 2014), 129.

a mediator can be substantial in regulating the circumstances of a similar environment. Evaluative mediators can also assist competent negotiators, in overcoming contradictory issues, which seem unsolvable at a glance and which impede ongoing negotiations[52].

Evaluative mediators use private, individual sessions and explore the real interests of one party without the presence of another. By applying the questioning techniques, a mediator determines the needs of the parties and their desired results (self-determination[53]). After a mediator has a complete understanding of the key interests of all the parties, they develop the terms, which correspond to all the interests at the negotiation table and through the method of direct action will demonstrate the utility of these terms for all the participants (naturally, with full recognition of the party autonomy[54]). It is incorrect to perceive the mediator's role as one where they impose values and opinions onto the parties. On the contrary, a mediator works delicately, recognises and respects the values of the parties and assists them in developing such terms, which accumulate the needs of all the engaged parties. Therefore, negotiating parties which require a mediator's lead in substantive issues, in terms of developing agreement dynamics acceptable for all the parties, largely appreciate the role of an evaluative mediator, *inter alia* their intervention in the content[55].

The parties who choose evaluative mediation carefully select a mediator who has expertise and is able to help the parties adapt and develop the necessary terms based on their interests. Moreover, the parties are always free to disagree with the mediator's opinions and autonomously develop and elaborate desired terms of an agreement[56].

The difference between the facilitative and evaluative models of mediation is highlighted while applying the reality test. For instance, during a facilitative mediation, a mediator would have asked the lawyer: From your experience, would you be able to say that the court would have considered this action admissible? In evaluative mediation, a mediator would have defined

52 James Freund, *Anatomy of a Mediation: a Dealmaker's Distinctive approach to Resolving Dollar Disputes and other Commercial Conflicts* (New York: Practising Law Institute, 2012), 57-65.

53 The insertion of the author.

54 The insertion of the author.

55 The emphasis is provided by the author.

56 Charles Craver, „The Use of Mediation to Resolve Community Disputes, Washington University Journal of Law & Policy" *New Directions in Community Lawyering Social Entrepreneurship, and Dispute Resolution*, 48 (2015): 237.

to the lawyer: You understand, that the court would have never deemed this type of claim as permissible[57].

The evaluative mediation model has been criticised in academic literature, due to its inconsistency with the mediator's professional ethics[58]. According to practising scholars, the issue is highly polarised[59]. When a mediator assesses legal or factual circumstances, three fundamental principles of mediation are challenged[60]: the principle of self-determination (party autonomy), and the neutrality and impartiality of a mediator[61]. This changes the mediation perspective „dramatically[62]"[63]. As per practising scholars, expressing an opinion regarding the possible court decision is an inadmissible compromise for the neutrality principle of a mediator[64]. As per scholars, mediation is closer to non-mandatory arbitration[65] or pre-court Early Neutral Evaluation (ENE)[66], which are inherently different dispute resolution processes. It is especially concerning that during mediation the parties move into a specific mindset, making efforts to earn the benevolence of the evaluator in „a competitive climate"[67] and „win" the case by assessing the evidence. The parties strive to convince the neutral third person by confrontational and argumentative approaches[68].

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57 Ordover, Doneff, *Alternatives to Litigation, Mediation, Arbitration and the Art of Dispute Resolution*, 169.

58 Anderson, „Facilitative Versus Evaluative Mediation, Is there Necessarily a Dichotomy?", 68; Joel Lee, Marcus Tao Shien Lim, *Contemporary Issues In Mediation* (Singapore: World Scientific Publishing Company, 2016), 35.

59 Anderson, „Facilitative Versus Evaluative Mediation, Is there Necessarily a Dichotomy?", 75.

60 Schneider, Honeyman, *The Negotiator's Fieldbook, The Desk Reference for the Experienced Negotiator*, 596.

61 Roberts, „Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement", 198; Murray Levin, „The Propriety of Evaluative Mediation: Concerns about the Nature and Quality of an Evaluative Opinion" *Ohio State Journal on Dispute Resolution*, Vol. XVI (2001): 294.

62 Ibidem.

63 *Diksha Munjal*, „Tug of War: Evaluative versus Facilitative Mediator" *Pretoria Student Law Review*, 6 (2012): 72.

64 Lela Love, „The Top Ten Reasons Why Mediators Should Not Evaluate" *Florida State University Review*, No. 4 (1997): 939.

65 Stitt, *Mediation Practical Guide*, 3.

66 Early Neutral Evaluation.

67 Anderson, „Facilitative Versus Evaluative Mediation, Is there Necessarily a Dichotomy?", 68.

68 Munjal, „Tug of War: Evaluative versus Facilitative Mediator", 73.

Eventually, the focus is not on creative solutions, but on a purely legal justification, which devalues the achievements of mediation.

According to the opponents of evaluative mediation, the experience of the institutionalisation of arbitration must be considered too. It emerged as the alternative to litigation, however, it transformed into a competitive process. Allowing evaluative mediation might bring along negative effects in terms of forming a competitive process. To ensure high-quality mediation, as well as maintain it as a safe process for the parties and the mediator, it must remain in its initial form of a facilitative model[69]. It is obvious, that the facilitative mediation model safeguards a mediator from ethical violations, and self-determination and party autonomy principles from ethical compromises. Hence, evaluative mediation to support the informed decision-making by the parties may be substituted by the reality test, which can be more effective in resolving the dispute than predicting a court decision[70].

2.2.1. The wide evaluative role

A mediator with a wide evaluative role strives that the parties realistically understand their factual and legal circumstances and available options. Yet, the conceptual-tactical perception to achieve this objective is different. A mediator prioritises the interests of the parties over their positions, develops the terms of mediation settlement and similar to parties, points out their own opinion on the case circumstances. In this case, a mediator fundamentally studies the case materials, litigation documents, and evidence. The techniques used in this role are as follows:

- Defining to the parties the expression of party interests as one of the objectives of mediation.
- Encouraging the direct engagement of the parties (physical persons or organisation representatives) in the mediation process and actively involving them in the negotiation and decision-making process.
- Exploring the interests, needs, and long-term plans of the parties.
- Examining the true interests of the parties, presenting them and requesting their recognition and confirmation by the parties

69 Ibidem, 79.

70 Ordover, Doneff, *Alternatives to Litigation, Mediation, Arbitration and the Art of Dispute Resolution*, 130.

(For instance: As I see it, considering the reputational risks, timely and confidential resolution of the dispute is in your interest, is this so?)

In the wide evaluative role, a mediator presumes the possible decision of the court for the orientation and gives relevant recommendations to the parties. However, in this role, the mediator does not support compromising, distributive offers, but rather points out the alternatives, which introduce much wider interests and needs of the parties[71]. In a narrow facilitative role, the mediator would have encouraged the mutual exchange of pure monetary claims identified at the initial stage, the mutual compromise within the limited scope of the area identified in the court dispute; Using a broad evaluative role, the mediator promotes the interest of the parties in future cooperation, the initiation and realisation of alternatives and comparative advantages for future partnership, together with the parties' agreement on narrow monetary/legal claims[72].

2.2.2. The narrow evaluative role

For a mediator of a narrow evaluative role, it is a crucial strategy to assist the parties in assessing the strong and weak points of their case and foresee the likely decision of the court[73]. In this role, a mediator studies the litigation materials, claim and response, the proofs provided by the parties, etc. In this role, the following techniques may be used:

- Supporting the acceptance of the agreement and individual offers.
- Supporting the compromising agreement based on the positions through encouraging the mutual compromise from the parties.
- Orientational analysis of a court decision and likely costs[74].
- Convincing the parties in the evaluation provided by the mediator.

71 Hinshaw, Schneider, Cole, *Discussions in Dispute Resolution, The Foundational Articles*, 179.

72 Riskin, „Mediator Orientations, Strategies and Techniques", 112-113.

73 Hinshaw, Schneider, Cole, *Discussions in Dispute Resolution, The Foundational Articles*, 178-179.

74 Dorothy Della Noce, „Evaluative Mediation: In Search of Practice Competencies" *Conflict Resolution* Quarterly, 27 (2009): 209.

- Direct evaluation of the strong and weak positions of each party (mainly during the individual sessions[75]) and efforts to convince the parties[76].

3 The importance of the field competence for a mediator – an impeding factor or an advantage?

The skills for working on the notion of a dispute take a significant place in the system of a mediator's professional competencies[77]. The said competence entails systematic comprehension of the content of a dispute and determination of the issues to be discussed, dynamically leading the negotiations towards an agreement through managing mutual interests, encouraging creative and innovative solutions, rightly incorporating and utilising the role of legal counsel in the objective assessment of the legal perspective, provision of prognosis on BATNA, WATNA and the most probable outcome in arbitration or courts, scoping of the negotiation area, and promote informed decision-making by the parties, supporting the fulfilment of the terms and their implementation, effective application of the reality test, etc. Precisely in terms of effective work on the dispute content the issue of the importance of a mediator's competence – how impeding or advantageous can it be in a case for a mediator to have a knowledge in a specific field, technology or industry.

Mediation is recognised as a process which is often used by legal counsel not only to reach a settlement, but at least to analyse the legal positions and risks of both parties in relation to each other and to determine or choose an appropriate dispute resolution procedure. Considering that in the confidential mediation process, the lawyers of the parties often present and discuss legal evidence that they have not yet presented in court, it allows the lawyers representing in said mediation to objectively assess the risks

75 Ibidem, 208.

76 Riskin, „Mediator Orientations, Strategies and Techniques", 112.

77 „Competency Framework for Mediators" approved by the executive board of LEPL „The Mediators Association of Georgia" (November, 2021).

of the case being taken to arbitration or court, to process the weak legal positions of both parties in the case, and from this perspective to determine the total reasonableness and comparative advantage of mediation settlement or litigation in terms of realisation of legal interests and not only.

Hence, mediation is a perfect forum for objective legal analysis along with analysing non-legal interests. Scrupulous lawyers do not advise their clients to choose competitive legal processes unless they have clear evidence of their legal advantage and an obvious perspective of the case being decided in their favour either in arbitration or in court. Hence, the lawyers, who focus on interests often consider mediation as a safe mechanism for „legal self-determination" and a good safeguard against risks. It is precisely here that the lawyers decide whether the case should be decided within the contextual control of the parties and their autonomy within the framework of the freedom to determine the terms of the contract, or whether it is justified to rely on a third person as a decision-maker.

The value of mediation often corresponds to the safeguarded legal risks. In addition, there is the incomplete predictability of the law and the absence of uniform judicial practice in the relevant legal order concerning a separate legal issue. In terms of mutual adjustment of legal issues, a mediation process is safer than direct negotiations, as the safety of the information exchange is ensured by confidentiality guarantees and the legally mandated inadmissibility of revealed confidential information in courts and arbitration tribunals.

Hence, besides other advantages of mediation in terms of values, such as termination of conflict between the parties, recovery of the relationships, and wide range of opportunities for actualising non-legal interests[78], even from the narrow perspective of legal interests, referring to mediation is reasonable also in terms of rational and objective analysis of legal circumstances.

Along with various other advantages, if mediation is a good foundation even for legal analysis, what part does a mediator's competence take in terms of supporting the objective assessment process of legal risks? Is it possible that in addition to legal competence, another field-specific knowledge might be required? Would it be possible to replace the need for this competence with a third person - an expert in mediation - who would ensure an objective analysis of the data and make expert recommendations?

78 Titi, Gómez, *Mediation in International Commercial and Investment Disputes*, 109.

A mediator's field competence is crucial for a mediator when the parties require evaluative mediation, to ensure they (a mediator) perform their duties impartially and in line with the self-determination principle. Therefore, having knowledge in a specific domain is essential when mediators point such out while presenting themselves and performing duties which require the existence of the said qualification[79].

A mediator's field competence determines the quality of the process, the effectiveness in working on the content of the dispute, establishing the mediator's authority and building the parties' trust, bringing the lawyers into a cooperative format and effectively applying the reality test through relevant questioning techniques. For instance, if a mediator by questioning techniques leads the parties to consider the legal risks, which have not been indicated in a claim or a response, and the party representatives have not thought about them, this will substantially facilitate reaching an agreement while having these risks in mind and understanding the reasonableness of a settlement.

For example, a mediator in labour disputes asks an employer the following questions: Should the parties not achieve an agreement, hypothetically, what mechanisms can the parties refer to, theoretically assuming, to radicalise and dramatise the dispute? Is there a risk of transforming an individual dispute into a collective one? Do you believe, from your organisation's point of view, there is a possibility of the potential realisation of the said risk? Is there a risk that the Labour Inspection Service might take interest in the dispute? What are the material and reputational consequences that could be caused by the involvement of the Service in the examination of the matter? In inheritance disputes, a mediator may ask a party representative - should the other party's property rights be deemed legitimate on the part of a property, is there a risk that they demand compensation for damages caused by non-use of the property throughout the years? How these damages can be calculated? Etc. What are the risks in litigation of your case and what is the burden of proof? Have you thought about other challenges? Have you researched uniform judicial practice, which would substantiate your opinion?

Therefore, if a mediator is a facilitator and catalyst for foreseeing the risks of non-agreement, which leads to the rationalisation of the perception of the legal and objective reality by the radically positioned parties, should

79 Omer Shapira, *A Theory of Mediator's Ethics, Foundations, Rationale and Application* (Cambridge: Cambridge University Press, 2016), 174-175.

it not be admitted that the sectoral competence related to the subject of the dispute is the key to this role? A mediator is a person who moves lawyers from radical and competitive positions to a cooperative and constructive format, where they no longer need to protect their professional egos and present their skills to the client in a competitive setting (since the ethics of representation in mediation requires cooperation, not competition). Precisely the cooperation of the lawyers and the facilitation of a mediator form a rational and reasonable path to the solution of a problem. Correctly asked questions and inquired problems can substantially change the parties' perceptions about the possible legal outcomes of the case in the court. For the correct identification of the problem and risks, the presence of field knowledge is an essential precondition.

If the lawyers are so conflicted that they are unable to analyse the risks rationally in a collaborative format, it is still possible for a mediator to facilitate such analysis during individual sessions. Thus, considering the polarised and hostile environment, the presence of qualified legal counsel in the process is often insufficient for risk assessment and systematic analysis. From this viewpoint, the role of a mediator in promoting risk assessment is essential.

There is an opinion, that the presence of a field qualification of a mediator may hinder the process of seeking a creative solution[80]. This might happen when a mediator, e.g. with a legal education, stays narrowly focused on legal aspects. In similar situations, having field-specific knowledge may truly impede the purpose of seeking a creative outcome. Yet, when the mediator, along with the targeted use of knowledge in the domain, can expand the scope of negotiations and the perspective on the disputed issue, brings the non-legal interests of the parties, alternative resources and additional goods for exchange into the negotiation space, helps the parties in creating values and the transforming the conflict, the mediator's field competence is not a limiting factor. It becomes a great comparative advantage compared to colleagues who do not hold such qualifications. In such cases, a mediator's competence in the domain will be demonstrated as an advantage in terms of facilitating the rational decision-making process and possessing crucial skills for the reality test.

According to Article 4.2 of the „Professional Ethics Code of Mediators" of the Mediators Association of Georgia, a mediator ensures a balance between willingly solving a dispute and duly leading the process. This

80 Riskin, „Mediator Orientations, Strategies and Techniques", 114.

stipulation entails a mediator's direct obligation, that the principle of the willingness of the party shall be matched with the implementation of all the necessary measures, which empowers the opportunities for the parties to make informed decisions: applying the reality test, ensuring the direct involvement of parties in the process, supporting the obtaining of additional professional consultation from experts[81], effective use of the role of lawyers for supporting objective and rational assessment of legal perspective of the case, sharing the necessary knowledge to the parties, should they require such, while adhering to the principle of impartiality, etc. It is unimaginable to duly manage the process without providing the necessary conditions for the parties to make informed, reasoned and realistic decisions and an agreement reached in the absence of such circumstances harms the principle of willingness, as it is never the product of the party's free, reasoned and autonomous will.

4 The importance of substantive fairness and the ethical scope of sharing professional information for parties in evaluative and facilitative mediation models

For determining the scope of a mediator's competence, the following chapter will focus only on a facet of a mediator's complex systemic obligation to inform, which concerns the request submitted by the party to the mediator with sectoral competence regarding the analysis of the strong and weak legal points of the case, what should be the obvious recommendation of the Code of Ethics, the best practice of professional ethics for preventing negligent infringement[82].

The content of substantive fairness differs between evaluative and facilitative mediation models. In facilitative mediation, the fairness of a mediation agreement entails whatever derives from the free will of the

81 Clark, *Lawyers and Mediation*, 159.

82 Lela Love, John Cooley, „The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary" *Ohio State Jourbal on Dispute Resolution*, No. 1 (2005): 46.

parties (justice from below) and not what is mandated by the law (justice from high)[83]. Here, the meaning of fairness is mainly contextual and is determined by individual features of a specific relationship or a conflict. In facilitative mediation, the parties moralise the law into the mediation agreement upon their free will, whereas the scope or the quality of reflecting the legal stipulations do not singlehandedly determine the fairness of an agreement[84].

In evaluative mediation, since the mediator has competence in the subject matter of the dispute, they attach considerable importance to legal norms and regulations, engineering, economic or consumer practices in developing the content of the mediation agreement, thus recognising the moral power of these norms in the mediation process. Thus, for evaluative mediation, legal or industrial norms are not only strategic mechanisms of the process (e.g. for applying the reality test), but rather authoritative targets, which bring in a social value system and an understanding of social justice into the realm of agreement[85].

Sharing legal information to the parties may take the form of legal consultation, which is imperatively prohibited by legislation in certain states of the USA, whereas it is permitted in others. Distinguishing legal information from a legal consultation is often complicated. For example informing the parties about the current legislation and judicial decisions may fall within the scope of legal information. Whereas when providing the documents or citing them takes the form of defining their meanings, this shall be considered as the application of law to the circumstances and shall be qualified as a legal consultation or advice.

Some mediators avoid providing legal information in order to avoid any ethical norms. It is safer to encourage getting consultation from professional lawyers or even engage them in the mediation process[86]. Where the party refuses to get legal consultation and as per Article 3.3 of the Professional Ethics Code of Mediators requests from the mediator to provide such information, the issue arises of whether a mediator is entitled to reject such request. According to the definition of the mentioned norm of the Code of Ethics, sharing knowledge and information concerning

83 Jonathan Hyman, Lela Love, „If Portia Were a Mediator: An Inquiry into Justice in Mediation" *Clinical Law Review* (2002): 157.

84 Waldman, *Mediation Ethics, Cases and Commentaries*, 21.

85 Ibidem.

86 Ibidem, 101.

the case in compliance with the principle of impartiality is the mediator's right and not an obligation. Moreover, it depends on whether the mediator has relevant competence and knowledge of legal practice, which is not a mandatory requirement for starting in the mediator's profession. n order to avoid unfounded expectations on the part of the parties that the mediator will provide advice, it is essential that it is agreed before the start of the mediation (e.g. during the information meeting) whether the mediator will play a facilitating role[87] or, if the parties so wish, conduct an evaluative mediation[88].

This issue has such a significant impact on the mediator's scope of action and intervention in the substance of a dispute that it is essential to agree every detail with the parties in advance. The issue of a mediator's competence is an important criterion that guides the parties/legal representatives during the selection stage of the mediator. It is at this stage that they should agree on whether they can have and to what extent they can expect the mediator to share professional-legal knowledge and experience.

According to the Standards of Ethics and Professional Responsibility for Certified Mediators in the State of Virginia, a mediator must explain to the parties the mediator's role and their style, the methodological approach the mediator will use in the process. The parties should be allowed to express their expectations regarding the approach to managing mediation. The parties and the mediator should put in writing in the pre-mediation agreement which approach and mediation style they agree to use[89].

For instance, Florida Rules for Certified & Court-Appointed Mediators[90] stipulates that referring to court litigation or consequential results of

87 Cyril Chern, *The Commercial Mediator's Handbook* (New York: Informa Law from Routledge, 2015), 35.

88 On the obligation to explain the role of a mediator see: Article 8.1. of the Law of Georgia „On Mediation" (the explanation must take place before the initiation of mediation); Also see, Rules of Conduct for Mediators in Court-Connected Mediation Programs for General Civil Cases (California Rules of Court), 2007, Revised January 1, 2013, rule 3.857 (c) (3), (d) (relevant explanations shall be provided to the parties before launching mediation or during the first session); Mediators Ethics Guidelines, JAMS Mediation, Arbitration, ADR Services, Seq. I.

89 Standards of Ethics and Professional Responsibility for Certified Mediators, Adopted by the Judicial Council of Virginia April 5, 2011 Effective Date: July 1, 2011, Standard §D (a)(b).

90 Florida Rules for Certified & Court-Appointed Mediators, May 1992, Effective August 2021, Florida Dispute Resolution Center Office of the State Courts Administrator Supreme Court Building.

a mediation agreement is a mediator's right, not his obligation. However, a mediator has a direct duty to explain to the parties the importance of understanding the possible consequences of agreement or non-agreement and to encourage them, if they wish, to seek further information from the professionals[91].

The Florida Rules for Certified & Court-Appointed Mediators contain detailed rules regarding the exchange of professional knowledge and experience[92]. It is important to cite some of the rules:

RULE 10.370 ADVICE, OPINIONS, OR INFORMATION

(a) Providing Information. Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.

(b) Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel.

(c) Personal or Professional Opinion. A mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination, however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defence. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.

It is noteworthy to cite the official Committee Notes on the rules: „The lawyer-mediators should explain the risks of proceeding without independent counsel and advise the parties to consult counsel during the course of the mediation and before signing any settlement agreement that he might prepare for them. The primary role of the mediator is to facilitate

91 Florida Rules for Certified & Court-Appointed Mediators, May 1992, Effective August 2021, Florida Dispute Resolution Center Office of the State Courts Administrator Supreme Court Building, 10.370 Commentary.

92 Florida Rules for Certified & Court-Appointed Mediators, May 1992, Effective August 2021, Florida Dispute Resolution Center Office of the State Courts Administrator Supreme Court Building.

a process which will provide the parties an opportunity to resolve all or part of a dispute by agreement if they choose to do so. A mediator may assist in that endeavour by providing relevant information or helping the parties obtain such information from other sources. A mediator may also raise issues and discuss the strengths and weaknesses of positions underlying the dispute. Finally, a mediator may help the parties evaluate resolution options and draft settlement proposals. In providing these services, however, the mediator must maintain impartiality and avoid any activity which would have the effect of overriding the parties' rights of self-determination.

While mediators may call upon their own qualifications and experience to supply information and options, the parties must be allowed to freely decide upon any agreement. Mediators shall not utilise their opinions to decide any aspect of the dispute or to coerce the parties or their representatives to accept any resolution option"[93].

The Standards of Ethics and Professional Responsibility for Certified Mediators in the State of Virginia is distinguished by a uniquely high standard of informing the parties about the mediator's role. The rules dictate, that the explanation of the mediator's role be reflected, on the one hand, in the pre-mediation agreement between the mediator and the parties, as well as in the mediator's opening speech. Violating this obligation by a mediator leads to the annulment of the agreement. Thus, as per the said standards, a mediator shall explain the four legal principles:

1. The mediator does not provide legal advice;
2. Any mediated agreement may affect the legal rights of the parties;
3. Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so;
4. Each party to the mediation should have any draft agreement reviewed by independent legal counsel prior to signing the agreement[94].

93 Committee Notes 2000 Revision (previously Committee Note to 1992 adoption of former rule 10.090), Florida Bar Committee on Professional Ethics, formal opinion 86-8 at 1239.

94 Standards of Ethics and Professional Responsibility for Certified Mediators, Adopted by the Judicial Council of Virginia April 5, 2011, Effective Date: July 1, 2011, Standard §D 2 (a) (1-4).

The Tennessee Supreme Court Rules[95] prohibit a mediator from giving legal advice to the parties.[96] The mediator is not entitled to offer the parties a firm position on what decision a court will make, although they are allowed to outline the expected results of the case and offer the parties a personal opinion regarding the plausibility of the claim and response.

The Rules of Conduct for Mediators of the California Court Mediation Program for Civil Disputes stipulates that a mediator must explain to the parties before the proceeding, or at the latest, during the first session, that they will not provide legal representation or any other professional services to any party, except as an impartial mediator. The mediator must explain as well that, adhering to the principle of impartiality and self-determination, they will be entitled to share certain information and opinions with the parties within the scope of his competence, within the limits of their qualifications and experience[97].

Rule 2.4. of ABA Model Rules of Professional Conduct[98] provides: A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and the lawyer's role as one who represents a client.

It is of fundamental importance in mediation that the scope of a mediator's role and procedural intervention is agreed in the course of facilitating substantive fairness. During the mediation process, a dilemma may arise regarding the principles of party autonomy, informed choice, substantive fairness and the neutrality of a mediator.

Hence, the issue of what is a mediator's role and responsibility, when the parties make decisions in the circumstances of incorrect, incomplete or imprecise information, is substantive. Is it possible to say, that in given circumstances the parties realise the principle of autonomy, while the

95 Tennessee Supreme Court Rules, Rule 31, seq. 10 (b)3, 2007, As amended through October 26, 2021. https://casetext.com/rule/tennessee-court-rules/tennessee-rules-of-the-supreme-court/rule-31-alternative-dispute-resolution-mediation/general-provisions-applicable-to-all-rule-31-mediators/section-10-obligations-of-rule-31-mediators.

96 Irakli Kandashvili, *Mediation* (Tbilisi: Cezanne, 2022), 197 (in Georgian).

97 Rules of Conduct for Mediators in Court-Connected Mediation Programs for General Civil Cases (California Rules of Court), 2007, Revised January 1, 2013, rule 3.857 (d).

98 ABA Model Rules of Professional Conduct, adopted by the ABA House of Delegates, 1983, Rule 2.4. Lawyer Serving as Third-Party Neutral.

opportunity to make an informed decision is a substantively forming element of the principle of self-determination? How should the principle of party sovereignty be balanced against the most general requirements of fairness? How does a mediation agreement correspond to the rights of third persons, who do not participate in the mediation process?

While it is true, that a mediator is obliged to encourage the parties to receive consultation from other professionals (among them, lawyers), the dilemma is exacerbated when the parties are strictly against using the procedural right to make an informed decision. Or when the consultation is unqualified and/or without any ground serves to convince a party in futile guarantees of winning the case in court. In such circumstances, is a mediator entitled to supply the relevant information?

According to the Model Standards of Conduct for Mediators[99] of the USA a mediator cannot personally ensure that each party has made a free and informed choice to reach certain decisions, but a mediator should, where appropriate, make the parties aware of the importance of consulting other professionals to help them make informed choices.. Similarly, as per Article 4.3 of the Professional Ethics Code of Mediators, facilitating the principle of self-determination entails that the parties should be allowed to willingly make informed decisions on procedural issues of mediation, as well as its content. Moreover, a mediator is obliged to neither ensure that the parties make willing and informed decisions nor to continue mediations, where they believe that proceeding further is unreasonable and unjustifiable. Pursuant to Article 4.5., a mediator is entitled to encourage parties as needed and receive advice, including from independent professionals.

In this case, the objective of reaching an informed decision does not justify the provision of legal advice to one or both parties, since the provision of advice transforms the mediator's role into that of a lawyer and thus exceeds the limits of the professional ethics of a neutral third party. According to the Model Standards of Conduct for Mediators[100], the role

99 Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, Standard I am (2). The act was adopted in 1994 by three associations - American Arbitration Association, American Bar Association and Association for Conflict Resolution. In 2005, the same organisations amended the act to align it with mediation practice.

100 Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, Standard VI (5) The act was adopted in 1994 by three associations - American Arbitration Association, American Bar Association and Association for Conflict Resolution. In 2005, the same organisations amended the act to align it with mediation practice.

of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

Often, parties exaggerate their chances in litigation, either positively or negatively[101]. Lawyers prefer to discuss the dispute with an evaluative mediator who will help their client to rationalise legal risk[102], as the parties often see it as a weakness or lack of qualification when lawyers point out legal risks. Supplying the party with legal information and analysis of how it affects the validity of the legal position is a standard part of a lawyer's job description. Mixing the role of a mediator and the role of another profession is problematic from an ethical point of view. A mediator may provide information that the mediator is qualified by training or experience to provide, in the course of which adhering to the principle of impartiality is obligatory[103].

In the field of alternative dispute resolution, scholars researching the issue of consent encounter a scientific swamp, which is characterised by complexity and difficulty, which is revealed in the presence of different viewpoints, contradictory or silent ethics codes, and different definitions and rules[104]. For example there is a widely ongoing discourse on the topic of whether or not *pro se*[105] parties to the judicial mediation should be informed about their (legal) rights[106] before encouraging them to reach a mediation agreement, to what extent should the parties get information regarding confidentiality and its scope[107], the mediation process and the

101 Waldman, *Mediation Ethics, Cases and Commentaries*, 115.

102 Stitt, *Mediation Practical Guide*, 3.

103 Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, Standard VI A (5).

104 Love, Cooley, „The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary", 45. Nolan-Haley, „Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making", 797; Samuel Imperati, „Alternative Dispute Resolution Symposium Issue: Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation" *Willamette Law Review*, 33 (1997): 2-7.

105 A party without a legal representative.

106 Nolan-Haley, „Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making", 834-838.

107 Article 10.6 of the Law of Georgia „On Mediation": Before the initiation of mediation, a mediator shall be obliged to inform the parties about the obligation to maintain confidentiality and the scope of confidentiality. It is important that regardless of the numerous exemptions to the principle and the legal nature of

rights of a mediator, their qualification[108], mandate/role[109], as the Law of Georgia „On Mediation" and the Professional Ethics Code of Mediators the right to make an informed decision covers the phases of the mediation process, its procedures and its outcome[110].

5 Synthesis of methodological approaches and the selection of a Georgian institutional model

Despite the different typologies of a mediator's role, mediation models are transitional in the course of negotiation dynamics and no straight line can be drawn. Therefore, a neutral third person may take different roles

the issue, a mediator is obliged to explain the mentioned issue to the parties as clearly and comprehensively as possible.

108 In the state of Minnesota, mediators who receive remuneration for the mediation service, are obliged to supply the written information on their qualifications to the parties. The written explanation shall include the information on the mediator's education, training and field experience. Violation of this rule is a criminal offence. Minn. Statutes § 572.37, Presentation of Mediator to Public (2004); Minnesota Civil Mediation Act; For the critique on the criminal responsibility for violating the said rule see: James Richard Coben, Peter Thompson, „The Haghighi Trilogy and the Minnesota Civil Mediation Act: Exposing a Phantom Menace Casting a Pall Over the Development of ADR in Minnesota" *Hamline Journal of Public Law & Policy*, 20 (1999): 299-324.

109 Article 8.1 of the Law of Georgia „On Mediation": Before the initiation of mediation, a mediator shall explain to the parties the principles of conducting the mediation, the role of a mediator, the rights of the parties, including the right of participation in the mediation process through the representatives, the obligations of the parties, the possible outcomes of mediation and the procedure of enforcement of an agreement resulting from mediation drawn up by the parties as a result of reaching an agreement, as well as the procedure and conditions of payment of remuneration of a mediator.

110 Article 8.9 of the Law of Georgia „On Mediation": A mediator shall assist the parties in reaching an agreement for the purpose of settlement of a dispute, taking into consideration the principle of free, independent and informed decision-making by the parties in relation to the mediation process and the final outcomes of mediation. A mediator shall have the right to make a decision by himself/herself on a dispute between the parties. According to Article 4.3 of the Professional Ethics Code of Mediators facilitating the principle of self-determination entails that the

as needed throughout the different stages of negotiations. For instance, a mediator who has a narrow approach to the essence of the problem might take a wide evaluative or a facilitative stance, examining the interests of the parties, should they feel that legal framing of the dispute or distributive leading brought the negotiations to the dead-end[111]. It should be mentioned that transfer from a narrow approach to a wide one focused on the exploration of interests, may be overdue as it might be impossible to return from the dead-end and neutralise the radicalism. In addition, the parties might not tolerate the transfer to a new methodology of negotiations and this may lead to them losing hope and terminating the process. Thus, it is safer to choose the approach of comprehensive exploration of interests, as it brings in wider resources for exchange, which on its part, reduces the risks of non-agreement and dead-ends.

> Generally, mediators of wide conceptual approaches can move onto the narrow approach more easily, than vice versa. In the same manner, it is easier for evaluative mediators to take the facilitative role, rather than for facilitative mediators to take up evaluative orientation [...] However, when a wide facilitative mediator finds that it is impossible to achieve reasonable cooperation of parties, as an ultimate remedy, the mediator might adopt a wide evaluative role. Generally, being an effective mediator entails being flexible and able to enter into different roles as course and dynamics of negotiations and the needs of the parties require[112].

> It is difficult for the party to decide what type of a mediator they need for their dispute, especially when the parties have wrong expectations on the notion of mediation at the initial stage. When lawyers, who are focused on litigation, select a mediator who is expected to bring them closer to judicial decision, these legal representatives put more trust in a neutral third person with a narrow evaluative role (more often, such persons are former judges), as this mediation model is characterised by significant simplicity. However, the said lawyers do not take into account the substantial deficiencies of this model. E.g. a straight focus on legal positions might overshadow the opportunities for interest-based negotiations and creative solutions. Hence, it is

parties should be allowed to willingly make informed decisions on procedural issues of mediation, as well as its content.

111 Riskin, „Mediator Orientations, Strategies and Techniques", 114.

112 Ibidem.

reasonable to select a mediator, who possesses skills of navigating through different models and adapting to the parties' needs[113].

The Professional Ethics Code of Mediators of the Mediators Association of Georgia prioritises autonomous development of the terms of agreements by the parties and prohibits the provision of professional or legal advice, which forms a relationship between a party and a mediator into a lawyer-client relationship.

As per the Professional Ethics Code of Mediators of the Mediators Association of Georgia, a mediator shall not evaluate the alternative agreements and circumstances of the case, unless it is specifically requested by the parties. More precisely, according to Article 3.3. of the code, a mediator should encourage the parties to utilise their resources and independently develop the terms of the agreement. However, Article 8.10 of the Law of Georgia „On Mediation" allows the mediator to propose the terms of the agreement with the consent of the parties: upon the consent of the parties, a mediator may propose to the parties the conditions of an agreement resulting from mediation, taking into consideration their interests and their positions stated during the mediation process.

According to Article 3.3 of the Professional Ethics Code of Mediators, a mediator shall not, beyond their competence, give professional or legal advice to the parties, and shall not evaluate the alternative agreements and circumstances of the case, unless it is specifically requested by the parties. A mediator is entitled to share with the parties their knowledge and information related to the case while adhering to the principle of impartiality. Hence, the Professional Ethics Code of Mediators provides foundations for facilitative, and when parties require – evaluative mediation. The most important ethical threshold which must remain formidable even in evaluative mediation is that while sharing any type of information or knowledge with the parties, the mediator shall remain impartial. More precisely, such information-sharing must not entail elements of consultation for one or another party. A mediator must not in any case supply legal advice[114], or legal consultation, otherwise it will put any of the parties in a legally advantageous position and overall, will be considered a legal service. This violates

113 Ibidem.

114 Murray Russel, *The Mediation Handbook, Effective Strategies for Litigators* (Denver Colorado: Bradford Publishing Company, 2011), 195.

the principle of neutrality of a mediator and leads to a transformation of the functions of a lawyer-mediator into those of a legal representative[115].

6 Conclusion

Despite the dichotomy of the mediation models discussed in the paper, there is no vivid demarcation between mediation models. Considering the peculiarities of each case and the negotiation dynamics, within the scope of mediation of a private legal dispute, methodological application of different mediation styles may become necessary, and even more – it may happen so during the course of one mediation or a single session[116]. „An ideal mediator must be flexible enough to refer to the most corresponding orientation, strategy and techniques of mediation, keeping in mind the needs of the participants of negotiations"[117]. „Eclectic nature" and integrated use of paradigmatic models of mediation is the key to a successful future of mediation[118]. In this context, Article 3.3 of the Professional Ethics Code of Mediators of Georgia must be defined in a manner, that when requested by the parties, sharing professional information while adhering to the principle of impartiality shall be deemed ethical. However, even when the parties request, it shall be imperatively prohibited to supply the parties with professional advice or consultation[119]. For lawyer mediators this clearly means a prohibition on giving legal advice[120].

115 Washington State Bar Association Advisory Opinion №2223.

116 Dwight Golann, „Variations in Mediation: How – and Why – Legal Mediators Change Styles in the Course of a Case, Journal of Dispute Resolution" *University of Missouri School of Law Scholarship Repository*, No. 1 (2000): 42. See also, Roberts, „Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement", 192.

117 Riskin, „Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed", 35-36.

118 Stempel, „The Inevitability of the Eclectic: Liberating ADR from Ideology", 275. Charles Pou, „Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality" *Journal of Dispute Resolution* 2004, No. 2 (2004): 303-354.

119 On clarifying distinctions between information and advice see: James Alfini, „Evaluative versus Facilitative Mediation: A Discussion" *Florida State University Law Review*, No. 4 (1997): 926.

120 Levin, „The Propriety of Evaluative Mediation: Concerns about the Nature and Quality of an Evaluative Opinion", 294.

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