

CONCEPT AND CONTENT OF PROFESSIONAL ETHICS OF A MEDIATOR**Veronica Horielova**

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Annotation. The article explores the content of a mediator's professional ethics. It asserts that although conflicts originate in the social sphere, they fall within the legal domain (arising and being resolved within the scope of legal consequences) when considered as objects of mediation. It is noted that the mediator's role is not solely a psychological phenomenon and should not be reduced to its practical application. Unlike a psychologist, a mediator operates within well-defined legal frameworks regarding the mediation procedure. Given the adversarial nature of the mediation object, a mediator cannot be either a party or an arbitrator. In other words, the mediator's work is carried out within institutional legal principles, while the psychological aspect is strictly non-institutional. It has been researched that the professional ethics of a mediator is based on ethical values: trust; justice, including the principles of neutrality, independence, and impartiality; conscientiousness; truth, including transparency and honesty; freedom, meaning respect for the mediator's autonomy; responsibility; conscience, which includes the principle of voluntariness, dignity, humanity, and compliance with the requirements imposed on the mediator. It is noted that at present, there are no codified norms of ethical conduct for mediators, and the legislator's attention is focused on regulating their activities. Emphasis is placed on the necessity of professional ethics arising from its socio-cultural purpose, which defines a system of values and principles that should correspond to the general concept of goodness for adequate professional communication. The article outlines some requirements for the ethics of mediators as mentioned in Ukrainian and foreign Codes of Ethics for Mediators. The main content of mediator ethics is defined in the article. The main features of the concept of professional ethics of a mediator are identified. An author's definition of the concept of professional ethics of a mediator is proposed.

Keywords: professional ethics, mediator, mediation, ethics code, ethical principles.

Problem statement. In Article 13 of the current Law of Ukraine «On Mediation,» it is stated that a mediator must adhere to the norms of professional ethics developed by associations of mediators. Accordingly, in accordance with Article 12 of the said law, a mediator is obliged to prepare for and conduct mediation in accordance with the mediator's code of professional ethics and, in the course of preparation for mediation, to provide the parties to the conflict (dispute) with the code of professional ethics for review (Law of Ukraine.2021). Thus, we are talking about the obligation of a mediator to comply with ethical criteria and principles that are not explicitly stated in the law and are not outlined in any single Code of Ethics, since each individual association of mediators may approve its own document that does not contradict the Law of Ukraine «On Mediation». In addition, no legislative document defines the concept of mediator ethics and does not define its main criteria, which is considered a significant gap, as it may cause confusion and certain differences in views on the ethics of the mediation profession, which may negatively affect both the professional activities of mediators

and the mediator's relations with the parties to the conflict.

Relevance of the research topic. Today, not only in Ukraine but also worldwide, the majority of conflicts are found in the field of law. Since the adoption of the Law of Ukraine «On Mediation», mediation has become an officially recognised form of conflict resolution between parties in various areas of law. In European countries, the practical application of mediation has proven its effectiveness, thus necessitating improvements in national legislation in light of Ukraine's integration processes into the European community. Given the above, it can be stated that the practical application of mediation requires addressing all significant issues in order to eliminate gaps in current legislation.

State of research. Despite the relatively new institution of mediation in the doctrine of national law, many works of Ukrainian scholars have been devoted to the study of issues related to the activities of mediators, the fundamental ones being: for example, in the field of criminal procedure law, works by N.V. Nestor («Introduction of Mediation in the Criminal Procedure of Ukraine», 2013); R.F. Arakelyan («Introduction of the Institute of Mediation in the Criminal Procedure Legislation of Ukraine», 2019); O.A. Nagornyuk-Danyliuk («Mediation in Criminal Proceedings against Minors in the Criminal Procedure of Ukraine», 2021), etc. In civil law: Hanna Ogrenchuk («Legal regulation of the use of mediation in the resolution of civil law disputes» 2016); M.Y. Polishchuk («Mediation as a way to resolve civil law disputes» 2017); S.T. Yosypenko («Mediation as a way to resolve disputes in private law relations» 2019), etc. In the field of administrative law: T.I. Shynkar («Application of Mediation in Administrative Proceedings: Domestic and Foreign Experience» 2018); N.V. Bozhenko («Administrative and Legal Support of Mediation as a Method of Resolving Administrative Disputes» 2018); S.O. Korinnyi («Implementation of Mediation in the Administrative Process of Ukraine», 2019); A.G. Bortnikova («Legal Principles of Mediation as a Method of Resolving Public Law Disputes», 2019); K.S. Tokareva («Administrative and Legal Regulation of Mediation: Current Status and Development Trends», 2021), etc. In the field of theory of state and law: N.M. Gren («Implementation of the human right to a fair trial through the procedure of court mediation: a theoretical and legal study» 2017); N.A. Mazaraki («Theoretical and legal principles of mediation in Ukraine» 2019), etc. As well as in other branches of law, the works of such scholars as A.V. Bitsai («Organisational and Legal Principles of Attorney's Participation in Mediation» 2016); I.G. Yasynovskyi («Implementation of the Mediation Procedure in Ukrainian Legislation: Theoretical and Legal Analysis» 2016); Z.V. Krasilovska («Establishment of the Mediation Institute in the Public Administration System: Theoretical and Legal Aspect», 2017); E.E. Borodin («Mechanism of Mediation in the Public Administration System», 2019); I.O. Lyakh («Problems of Theory and Practice of Implementing the Mediation Institute in Labour Law», 2020). In these and other works, the question of the content of the mediator's professional ethics was practically not studied or was outlined fragmentarily, which necessitates further elaboration.

The purpose and objective of the article is to outlining the content of professional ethics of a mediator and proposing the author's definition of the said definition.

Presentation of the main material. When studying the concept and content of professional ethics of a mediator, it is necessary to start with an approach to understanding the concept of such a philosophical category as «ethics». According to the general definition, the term ethics (from Latin *ethica*, from the Greek *ἠθικός* - custom, disposition, character) is defined as a philosophical science, the object of study of which is morality, a system of moral norms and values inherent in a particular community, social, professional or other group of people (Encyclopedia of Modern Ukraine. 2021). It is believed that the concept of ethics was established through the works of Aristotle and other ancient thinkers, on whose works researchers traditionally rely. The Ukrainian national tradition, however, has its own history of ethics, which, although little researched, can be confidently attributed to the high moral spirit of the modern Ukrainian people, given their character traits. According to O. A. Stasevska, the peculiar individualism of the Ukrainian people and the signs of its mentality have always been the desire for moral improvement of the individual, recognition of the equality of people and rejection of despotism (Stasevska O.A. pp. 30). By thoroughly studying the concept of ethics, based on a number of national studies, it can be argued that ethical considerations were born on the basis of theological virtues and built on the basis of virtues that were objectified by describing the behavioural patterns of the Ukrainian people. Accordingly, researchers have concluded that ethics is a spiritual and cultural mechanism for regulating people's behaviour in society based on ideas about moral values and principles of treatment of other people (Voznyuk M.N. 2013, pp. 279 – 280).

Scientists consider the category of «professional ethics» alongside the category of

«deontology» and conclude that these categories are necessary in those areas where a person in his or her professional activity deals with another person and has a significant social impact (Tkachenko K.O.2021, pp. 59). On the other hand, when studying ethics through the prism of coaching and leadership in any profession and work, scholars distinguish between consequential ethics, ethics of principle, ethics of values and personal ethics (Kryvoruchko S.V.2003, pp. 16). In addition, the researchers emphasise the need to update the understanding of the good-measure of people's actions for the purpose of quality human relations in professional activities and proper communication, which makes possible mutual understanding and appropriate reaction of the addressee to the information (Kryvoruchko S.V.2003, pp.14-15). It can be concluded that the necessity of professional ethics arises from its socio-cultural purpose, which determines a system of values and principles that must correspond to general concepts of goodness for the purpose of adequate professional communication.

Mediator ethics should be considered in the context of understanding of axiological, social, philosophical and legal dimensions. Referring to the works of specialists in the field of psychology, T.S. Tokaryeva refers to the opinions of scientists who recognize mediation as a form of practical psychology (2021, pp. 317), which appears controversial given that the object of mediation - conflict, while being a psychological phenomenon, the process of its resolution relates to the social sphere and occurs within the legal framework (emerging and being resolved within the confines of legal consequences). In other words, although the conflict between individuals is defined by private interests, it nevertheless arises and exists in the space of civil society. On the basis of these considerations, it can be stated that the specificity of the mediator's activity cannot be reduced to psychology, given the agonistic (competitive) nature of the object (conflict) of mediation itself, where the mediator can be neither a party nor an arbitrator. That is, the work of a mediator is carried out on an institutional legal basis, while the psychological aspect (like any human activity) is purely non-institutional. In addition, Tokareva notes the dual nature of mediator ethics, since conflict (as the object of mediation) is essentially a psychological category, while its resolution should be carried out within the framework of law. This means that a mediator must combine at least two roles in his or her activity: to take into account the ethical principles of representatives of the legal and psychological professions (Tokarieva K. S.2021, p.310), which should be agreed with. Accordingly, such statements are based on the following: The mediator must prepare and conduct the mediation in accordance with the law (clause 1, part 1, Article 12 of the Law of Ukraine «On Mediation»); inform the parties and other participants of the mediation about their rights and obligations, principles and rules (clause 6, part 1, Article 12 of the Law of Ukraine «On Mediation») (20-21); the mediation is terminated as a result of the parties to the mediation concluding an agreement on the basis of the results of the mediation, or after the expiration of the term of the mediation and/or the mediation agreement, or in case of the refusal of at least one of the parties to the mediation or the mediator (mediators) to participate in the mediation, or in case of the recognition of a party to the mediation or the mediator (mediators) as an incapacitated person or a person whose civil capacity is limited, etc. (Article 17 of the Law of Ukraine «On Mediation») (2021). In other words, unlike a psychologist, a mediator operates within a clearly defined legal framework with regard to the mediation process. It can be concluded that the legislator intended to balance the public-private nature of the mediator's professional activity.

In accordance with the requirements of Articles 12 and 13 of the Law of Ukraine «On Mediation», our country has a Code of Professional Ethics for Mediators of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry approved by the Presidium of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, which was developed on the basis of the European Code of Conduct for Mediators (2022). This Code fully reflects the ethical principles required of mediators in Article 4 of the Law of Ukraine «On Mediation», namely: voluntariness, confidentiality, neutrality, independence and impartiality of the mediator, self-determination and equality of rights of the parties to the mediation. At the same time, the said Code supplements the principle of competence, which seems unnecessary, since in accordance with the requirements of Articles 9 and 10 of the Law of Ukraine «On Mediation», a mediator may be an individual who has completed basic mediation training in Ukraine or abroad, i.e. must be competent (2021, article 9-10).

The Code of Professional Ethics for Mediators, approved by the decision of the General Meeting of the National Association of Mediators of Ukraine (2022), puts forward the same requirements for the ethics of mediators, adding to the principles of professional ethics of mediators «responsible attitude to maintaining an appropriate level of professional competence» (Code of Professional Ethics for Mediators, 2022),

which is considered more successful, as it encourages mediators to improve themselves. It can be concluded that various codes of ethics for mediators will continue to appear in Ukraine (as expressly provided for in Article 13 of the Law of Ukraine «On Mediation»), the content of which must not contradict the said Law, and that there may be many such codes at the same time. Although this situation does not contradict the general ethical principles of society (since the basic provisions of ethics are set out in the relevant law), can lead to confusion and misunderstandings.

An interesting provision of the Code of Ethical Standards for Mediators in Colombia is that the role of a mediator is limited to facilitating communication between the parties to a conflict. Accordingly, the mediator does not have the authority to impose a solution, but only to facilitate mutual understanding, to focus the parties on their interests and to help the parties reach their own agreement through creative problem solving. For example, according to the Code, a mediator should: encourage and assist the parties in deciding how best to resolve the conflict; refrain from ordering or condemning the parties or condemning the options they have chosen to resolve the conflict; adhere to ethical standards of practice; ensure that the mediation process is fair and balanced for all parties to the conflict; and not express personal beliefs or ideological preferences. It is also stated that if at any time during the mediation session the mediator believes that his/her personal values are in conflict with the Code of Ethical Standards, he/she must withdraw from the mediation (Code of Ethical Standards for Mediators.).

According to the JAMS (California) Code of Ethics, a mediator has a number of obligations, including Ensuring that the parties understand that their role is that of a neutral mediator, not a representative or advocate for any party; not providing legal advice to any party or parties; in the event that the mediator offers an assessment of a party's position or the likely outcome of a court case, or makes recommendations for the resolution of a dispute, the mediator must ensure that the parties understand that the mediator is not acting as an advocate for any party and is not providing legal advice; be particularly sensitive to the difference in roles of the parties to the dispute if such a party is not represented by counsel in the mediation, and fully explain the limitations of the mediator's role and obtain a written waiver of representation from each unrepresented party; in the case of assistance in drafting a settlement agreement where counsel for any party is absent, the mediator shall recommend to each unrepresented party that the agreement be independently reviewed by counsel prior to execution; endeavour to keep abreast of developments in legal practice. (Mediators ethics guidelines, 2022).

The peculiarities of mediator's professional ethics stem from the social purpose of mediation, which is to provide information services (negotiations) in the out-of-court settlement of an existing or possible conflict between the parties. It should be noted that the professional ethics of a mediator as a value in society will only take place if the mediator is responsible for ethical negotiation: using the tools appropriate to his or her profession; applying professional knowledge; creating a productive space of understanding for the parties to the conflict; providing space for the parties to make their own decisions regarding the resolution of the dispute. At the same time, the practical meaning of a mediator's professional ethics should be reduced to complete impartiality, confidentiality and avoidance of any psychological pressure or use of psychological tools to induce certain actions by the parties to the conflict.

The conclusion can be drawn that the professional ethics of a mediator are based on ethical values such as trust (for example, according to Article 12, Part 1, Clause 2 of the Law of Ukraine «On Mediation,» during preparation for mediation, the mediator must provide the parties to the conflict with a code of professional ethics that he adheres to in his activities); justice, which includes the principles of neutrality, independence, and impartiality (for example, according to Article 7, Part 1 of Article 7, and Clause 5, Part 1 of Article 12 of the Law of Ukraine «On Mediation,» the mediator must terminate mediation in case of conflicts between personal interests and mediator's duties, as well as in the presence of circumstances that prevent his participation or require termination of his participation in mediation); conscientiousness (for example, according to Article 6 and Clause 3, Part 1 of Article 12 of the Law of Ukraine «On Mediation,» the mediator must not disclose information obtained during the preparation and conduct of mediation); truthfulness, which includes transparency and honesty (for example, according to Part 3 of Article 21 of the Law of Ukraine «On Mediation,» the agreement resulting from mediation should not contain provisions that violate the rights and interests of other persons, the interests of the state, or public interests); freedom, which means respect for the autonomy of the mediator (for example, according to Clause 5, Part 1 of Article 18, the mediator has the right to withdraw from mediation at any time); responsibility (for example, according to Article 19 and Clause 8, Part 1 of Article 20 of the Law of Ukraine «On

Mediation»); conscience, which includes the principle of voluntariness, dignity, humanity, and compliance with the requirements imposed on the mediator (for example, Article 5, Article 9, and Article 10 of the Law of Ukraine «On Mediation»). (2021).

Conclusions. In view of the above, it can be said that today there are no codified norms of ethical behaviour of mediators and the attention of the legislator is focused on the regulation of their activity. The branching and non-systematic nature of ethical norms in various codes can negatively impact the institutional design of the mediator profession, especially considering the symptomatic lack of societal trust in the moral and ethical standards of the mediator.

Compliance with professional ethics by a mediator determines his or her ability to act as a regulator between the parties to a conflict. The signs of professional ethics of a mediator are:

- The ethical principles of the mediation profession are based on the principles of general ethics, but are specified in the law and codes of ethics and may not coincide with the personality (internal principles) of the mediator;

- the mediator's ethics are materially expressed in the mediator's Code of Ethics, which complies with the principles of law and is approved by the institution, organisation or association to which the mediator belongs;

Accordingly, professional ethics of a mediator are official, specialised forms of expression of social expectations reflected in the normative framework in the form of verbal formulas that indicate a certain variation of behaviour within a professional situation and should dominate the mediator's personal internal views and preferences.

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