

UDC 349.2

**PROFESSIONAL AND LEGAL REQUIREMENTS FOR A MEDIATOR
IN RESOLVING INDIVIDUAL LABOR DISPUTES IN UKRAINE**

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Annotation. *The aim of the work is to analyze the qualifications and ethical requirements for a mediator, considering the peculiarities of conducting mediation in individual labor disput. Philosophical, general scientific and special legal methods of cognition were used for the research.*

The article analyzes the qualification and ethical requirements for a mediator, taking into account the peculiarities of mediation in individual labor disputes. The personality of the mediator is an important element of the mediation procedure since the outcome of the mediation procedure largely depends on his attitude and behavior. First, the mediator should be a neutral third party who supports the parties to the conflict in reaching an agreement.

The tasks of the mediator include: establishing contact between the parties, providing the possibility of mediation, moderation, mediation in negotiations between the parties, accepting their positions, advising the parties on possible solutions, providing explanations, assistance in drawing up a settlement agreement.

In our opinion, the successful performance of these tasks depends on proper preparation and the availability of special skills. Due to the specificity of the mediator's qualification work, significant requirements are put forward. Thus, the issue of professionalism is ensured by the acquisition of high-quality professional education, and the presence of appropriate moral and ethical qualities and experience.

The article proves that the mediation procedure for solving an individual labor dispute will be more effective with a mediator knowledgeable in the legal field, who understands the legal nature of the labor dispute. The mediator, understanding the legal consequences of the decision made, can direct the parties to make a decision that fully satisfied them and did not contradict the law, and help with the drafting of a mediation agreement. We believe that a mediator with a legal education excludes the additional involvement of a lawyer when resolving an individual labor dispute.

Key words: individual labor dispute, mediation, mediator, mediation of labor disputes, principles of professional activity of mediators.

Introduction. Mediation takes place with the participation of a neutral third party - a mediator, whose figure is of great interest among representatives of jurisprudence and the community, and society, due to the combination of emotional, ethical, and practical components, taking into account the specifics of his activity.

Analysis of scientific publications. The legal status of a mediator, the problems of ethical and qualification requirements for a mediator are the subject of the work of N. Mazaraki, L. Romanadze, G. Ogrenchuk, A. Sheremet, T. Kyselyova, Ya. Lyubchenko and other scientists.

The aim of the work is to analyze the qualifications and ethical requirements for a mediator, considering the peculiarities of conducting mediation in individual labor disputes.

Review and discussion. The Law of Ukraine "On Mediation" contains three groups of requirements for a mediator: qualifications, ethical requirements, and personal qualities of a mediator.

Article 9 of the Law of Ukraine "On Mediation" [1] states that a mediator may be an individual who has undergone basic mediation training in Ukraine or abroad. The provisions of this law do not provide for requirements for the education, competence, or professional experience of a mediator. We will get an answer about

the necessity and features of such preparation as a result of the analysis of the mediator's role in the dispute resolution process.

Functions performed by a mediator during mediation are a set of actions aimed at achieving a specific goal of alternative dispute resolution. Achieving the multifaceted tasks of mediation to achieve an effective resolution of the dispute involves several interdisciplinary activities. Among the main functions of a mediator, it is advisable to distinguish organizational, informational, expert, educational, and consulting functions.

In general, the mediator's functions are aimed at providing the parties with a certain base of knowledge necessary for the independent resolution of the dispute through mediation. The mediator informs the parties about the peculiarities of mediation, the role and functions of the mediator, the mediation procedure, the legal consequences of mediation settlement, and the advantages and disadvantages of resolving the dispute in this way. By performing these tasks, the mediator teaches the parties to the dispute to independently formulate their requirements and also indicates ways to resolve conflicts in the future (the educational function is transformed into an educational one, and when applying special knowledge into an expert one). Adherence to the principles of neutrality, impartiality, and independence by the mediator affects the completeness of the advisory function. Restrictions refer to separate counseling of the parties to the dispute or imposing on the participant's options for the agreement and its content.

The organizational function is manifested in ensuring compliance with the main principles affecting the mediation procedure, voluntariness, confidentiality, self-determination of the parties, etc. In addition, due to the informal nature of mediation, the mediator must ensure compliance with the mediation rules that were agreed upon with the parties at the beginning of the interaction (for example, the order of participants' speeches). Performing an organizational function, the mediator controls the course of mediation, and manages its stages.

Depending on the nature of the dispute, the mediator performs a certain function. In particular, organizational functions are activated in civil legal disputes,

informational, advisory, and expert functions in economic disputes, and psychological functions in family disputes [2].

Thus, the mediator's task is to organize effective communication between the parties to the conflict, to provide assistance in understanding real needs and interests, to establish the lost contact between them, and to ensure cooperative relations in solving the existing problem. It should be emphasized that the mediator does not have the authority to make decisions regarding the settlement of the dispute. He doesn't work with the positions, but with the interests of the parties, to achieve a decision that will be adopted by both parties and will take into account their interests and wishes as much as possible.

With the help of special techniques, and recognition of obstacles that hinder communication and mutual understanding, the mediator creates an atmosphere of respect and helps to establish an effective dialogue. Such a specialist develops the parties' creative potential, which is necessary to resolve the conflict most acceptably.

The tasks of the mediator include: (1) establishing contact between the parties, (2) providing the possibility of mediation, (3) moderation, (4) mediation in negotiations between the parties, (5) accepting their positions, (6) advising the parties on possible solutions, (7) providing explanations, (8) assistance in drawing up a settlement agreement [3].

In our opinion, the successful performance of these tasks depends on proper preparation and the availability of special skills. Due to the specificity of the mediator's qualification work, significant requirements are put forward. Thus, the issue of professionalism is ensured by the acquisition of high-quality professional education, and the presence of appropriate moral and ethical qualities and experience.

The status of a mediator can be determined at the legislative level or by deontological norms of professional practice. A specialist in such a procedure can be a neutral person who has agreed to perform the function of a mediator and is not interested in the outcome of the case, chosen by mutual agreement by the parties, among the mediators included in the register.

The age qualification of the mediator remains a debatable issue. When determining the minimum age and education of a mediator, one should take into account the type of dispute he or she is handling. If these are disputes related to the violation of certain normatively established rights, which today only courts have the right to consider, then it is advisable to focus on the requirements for candidates for the position of judge.

Ukrainian legislation contains provisions regarding the age of applicants for some categories of positions. Thus, the provision of Article 69 of the Law "On the Judicial System and the Status of Judges" [4] provides that a citizen of Ukraine, not younger than thirty years of age, may be appointed to the position of a judge. The Constitutional Court considers the provisions of part two of Article 5 of the Law "On the Commissioner of the Verkhovna Rada of Ukraine on Human Rights" [5] dated 12.23.1997 to be following the Constitution of Ukraine (constitutional), according to which "a citizen of Ukraine may be appointed as the Commissioner, who turned 40 on the day of the election."

We are convinced that the mediator must have professional and life experience, and special skills for the specified work. Together, the decisions that are made, and the requirements for mastering the tasks correspond to the level of an adult.

Given the above, we consider age requirements to be discriminatory. We approve of the position of the Ministry of Internal Affairs in "On Mediation" [1] about the absence of requirements for the minimum age of a mediator.

The mediator's specialty remains the next debatable issue. Under the conditions of successful completion of special training, any natural person can become one. In Ukraine, the majority of mediators have higher education (psychological, pedagogical, legal, medical, etc.), and have additionally undergone special training. We believe that a separate specification of the specialty in which a mediator must have a higher education may lead to unjustified restrictions on access to the specified profession. After all, a mediator is an intermediary in the procedure of reconciliation of the parties. A person may be endowed by nature with the ability, and interest to find a common language with people, to analyze conflicts, and their potential, with

the help of which he manages to smooth out the conflict and reconcile the parties [6, p.679].

The question of the requirement of a legal profession for a mediator's practice has given rise to different opinions and active discussions both among foreign mediators who have many years of practical experience in mediation, and among Ukrainian specialists.

Sara Rickover, a former manager, HR consultant, attorney, and mediator with more than 20 years of experience, noted that education is not a prerequisite for being a successful mediator. Good mediators are not lawyers, but psychologists and social workers, because they know how to help people establish communication. But the best of them are well versed in legal issues in the cases they have worked on [7].

According to the Law of Ukraine [1], a natural person who has completed the basic training of a mediator in Ukraine or abroad can be a mediator. Mediation parties, state authorities and local self-government bodies, enterprises, institutions, and organizations regardless of the forms of ownership and subordination, public associations may set additional requirements for the mediators they engage or whose services they use. In particular, the availability of special training, age, education, practical experience, etc. Also, associations of mediators and entities providing mediation may set additional requirements for the persons they include in their registers, in particular regarding the presence of special training, age, education, practical experience, etc.

Also, the Law of Ukraine [1] stipulates that the basic training of mediators is carried out according to a program with a volume (duration) of at least 90 hours of training, including at least 45 hours of practical training. The mediator's basic training program includes theoretical training and the practice of practical skills.

We consider this number of hours of theoretical and practical training to be sufficient for obtaining knowledge of the basics of the mediation procedure. Mediators are trained by subjects of educational activity. In addition to the basic one, it may include specialized training following the training programs developed by the

subjects of educational activity. After passing the basic and/or specialized training and confirming the acquired competencies, a corresponding certificate is issued.

The European Code of Ethics for mediators [8] contains requirements regarding the competence of a specialist in alternative methods of dispute resolution, according to which the mediator undergoes appropriate training, acquires professional competencies, understands the mediation procedure, continuously practices, and updates knowledge following the standards and principles of accreditation requirements.

Directive 2008/52/EU [9] in Art. 4.2 suggests that EU member states promote the initial training and advanced training of mediators to ensure that mediation is conducted effectively, impartially, and competently for the parties. The recommendations of the Council of Europe are more demanding: EU member states must provide appropriate training programs for mediators, introduce regulations, and provide detailed instructions on the content of these programs.

The mediator is considered a highly qualified specialist, whose professional training is based on a competency-based approach to training, taking into account the basic requirements for competence and competence.

According to the international standard ISO 9000-2008, competence is defined as the demonstrated ability to use knowledge, abilities, and skills in practice, as well as the presence of experience, and a conscious responsible attitude, necessary and necessary for the effective performance of a certain professional or social function [10, p.57].

Specialists of the International Commission of the Council of Europe (Definition and Selection of Competencies program) define the concept of competence as the ability to successfully satisfy individual and social needs, to perform assigned tasks. Each competence is built on a combination of mutually relevant cognitive attitudes and practical skills, values, emotions, behavioral components, knowledge, and skills, all of that can be involved in active action [11].

The specified characteristics of the definitions, taking into account the multifaceted nature of mediation, make it possible to formulate a definition of the

mediator's professional competence. Namely, it is a set of business and personal qualities that reflect the level of knowledge, skills, and abilities of a mediator, and readiness to perform one's duties at a high professional level following modern theoretical and practical assets and experience.

Ensuring the appropriate quality of mediation services is provided through training through obtaining the appropriate level of competence sufficient to start practicing as a mediator. Continuous improvement of educational competencies under specialized programs in such areas as conflict-related, communicative, procedural, reflexive, and legal creates professional growth. The latter involves orientation in the legislation on mediation, the main normative provisions on the mediation procedure, regulation of the activity of the mediator, the legal basis of the interaction of the legal system and mediation, the responsibility of the mediator, the confidentiality of the mediation procedure, work with agreements in the mediation process [12].

Thus, the training of specialists in the field of mediation, considering the goal, tasks, principles, procedure, and functions of a mediator, should be based on knowledge and practical skills of Conflictology, Psychology, Law, and the acquisition of competences in relevant fields.

It should be noted that the main components of a mediator's competence are not only professionally significant knowledge, abilities, skills, qualities, and motivation but also: 1) experience; 2) individual basic characteristics of a person (age, gender, state of health, psychophysiological capabilities, abilities); 3) personal basic characteristics (cognitive activity, readiness for activity, value orientations, and ideals, emotionality, individual psychological properties, etc.); 4) objective basic characteristics (education, work experience) [13, p.65].

We emphasize that an important component of professional competence is constant improvement, and the acquisition of new knowledge, without which a specialist will not be effective, and will lose competitiveness. In particular, the Council of the EU recognizes the primary importance of education and training for economic and social changes. Rapid technological progress, the formation of relevant

requirements in job profiles, and the need for lifelong learning must rely on strong cooperation, and synergy between industry, education, training, and training. At the same time, education and training systems must adapt to meet today's reality. A formed need, as an important social value, the prospects of lifelong learning, the acquisition by a person of new and more relevant competencies [14].

To obtain the necessary additional competencies, a mediator who plans to mediate labor disputes, in addition to training in programs on the basics of mediation, must undergo specialized training on the peculiarities of mediating labor disputes. Thus, the Standard Standards for teaching the basics of mediation and mediation of labor and corporate disputes [15] provide for the minimum requirements that need to be taken into account when training mediators, including in the field of resolving labor and corporate disputes and conflicts. Among the necessary skills and abilities are the ability to determine the type and mediatability of a labor dispute; the ability to explain to potential mediation parties the advantages of resolving a labor dispute through mediation; the ability to recognize subjective and objective causes of a labor dispute; the ability to distinguish between intrapersonal and interpersonal conflicts in the labor sphere and understanding of their interrelation; the ability to conduct a mediation procedure with the participation of legal support engaged by the parties; the ability to hold an informational meeting with mediation participants who are not parties to the dispute and were engaged by the parties to participate in mediation as representatives, consultants, defenders, experts, etc.; the ability to balance the strengths of the parties to the mediation of a labor dispute; facilitation skills during mediation meetings with the participation of a large number of mediation participants; clerical skills of mediating labor disputes.

In our opinion, the mediation procedure for solving an individual labor dispute will be more effective with a mediator knowledgeable in the legal field, who understands the legal nature of the labor dispute. The mediator, understanding the legal consequences of the decision made, can direct the parties to make a decision that fully satisfied them and did not contradict the law, and help with the drafting of a

mediation agreement. We believe that a mediator with a legal education excludes the additional involvement of a lawyer when resolving an individual labor dispute.

In addition to legal requirements, a mediator must comply with several ethical norms. The nature and essence of mediation as a flexible, non-formalized way of resolving disputes determine the formulation of ethical provisions within the framework of "soft law" ("mediator ethics codes", "mediation rules", "mediator professional standards") at the national or institutional level. The European Code of Conduct for Mediators, adopted on June 2, 2004, defines a number of principles that mediators adhere to in their work. The popularization of mediation during the resolution of international commercial disputes causes discussions about the feasibility of formulating certain "global" codes of ethics for a mediator [16, p.14].

Organizations providing mediation services in Ukraine have already developed such codes of ethics, for example, the Code of Ethics of the mediator of the public organization "National Association of Mediators of Ukraine" [17], the Ukrainian Mediation Center [18], and others. These codes contain requirements for neutrality and impartiality, confidentiality, tolerance, voluntariness and self-determination of the mediator, and inadmissibility of conflict of interests of the mediator.

In particular, with the aim of streamlining the professional activity of mediators working in the field of resolving labor and corporate disputes, by establishing the basic ethical norms and rules of behavior of mediators, the Code of Ethics of a mediator of labor and corporate disputes was developed. Compliance with the provisions of the Code is mandatory to ensure high-quality mediation of labor disputes, as well as to promote the professional development of mediators and their awareness of behavior in difficult practical situations [19, p.4].

Regarding the personality requirements of a mediator, his activity is directly related to working with people, and resolving conflicts and disputes. As Mayer B. aptly noted, the participants in the dispute need more than the process to resolve it: they need understanding, creativity, strength, wisdom, strategic thinking, confrontation, patience, encouragement, humor, courage, and many other qualities that refer not only to the process of mediation [20, p. 146]. Among the most

important personal qualities of a mediator, Helen Collins singles out empathy, quick thinking that can cover several directions, emotional intelligence, neutrality, intuition, artistry and curiosity [21].

The specified personal qualities are of great importance for the formation and development of a mediator, they affect the mediation procedure, but the level of mastery cannot be fixed in normative acts, the mediator must develop and practice them independently.

Undoubtedly, the personality of the mediator is an important element of the mediation procedure since the outcome of the mediation procedure largely depends on his attitude and behavior. First of all, the mediator should be a neutral third party who supports the parties to the conflict in reaching an agreement. In addition, the ideal mediator should be honest, knowledgeable, and experienced in the field. These personal qualities of the mediator should contribute to the formation of trust, and the desire to express oneself sincerely and openly.

Conclusions. So, the mediator is a key figure in mediation, whose professionalism depends on the success and effectiveness of the process. The experience of countries where mediation has been successful for a long time indicates the implementation of quality control over the training of mediators. This function can be entrusted to both public and private organizations or public associations (organizations of mediators). Continuous improvement is an important component of the mediator's professional competence, the acquisition of new knowledge, and effectiveness form his competitiveness. This approach will encourage society to perceive mediation as an alternative way to settle disputes, build trust in it, and popularize mediation among Ukrainians.

In our opinion, the mediation procedure for solving an individual labor dispute will be more effective with a mediator knowledgeable in the legal field, who understands the legal nature of the labor dispute. The mediator, understanding the legal consequences of the decision made, can direct the parties to make a decision that fully satisfies them and does not contradict the law, and help with the drafting of a mediation agreement.

References:

1. Pro mediatsiiu: Zakon Ukrainy vid 16.11.2021 № 1875-IX.URL: <http://surl.li/diiid> .
2. Myślińska M. Mediation Functions Performed by Mediator during Mediation. Selected Problems. *Studia Iuridica Lublinensia*.2018. № 3. P. 73–78. DOI: <http://dx.doi.org/10.17951/sil.2018.27.3.73-88>.
3. Tabernatska M. *Perehovory ta poserednytstvo u publichnii sferi, biznes*. Varshava : Oficyna a Wolters Kluwer, 2009.
4. Pro sudoustrii i status suddiv : Zakon Ukrainy vid 02.06.2016. № 1402-VIII / VR Ukrainy.URL: <http://surl.li/oxnh> .
5. Pro Upovnovazhenoho Verkhovnoi Rady Ukrainy z prav liudyny : Zakon Ukrainy vid 23.12.1997 № 776/97-VR
6. Burova L. I. Pravovyi status mediatora pry rozghliadi sprav shchodo zakhystu prav intelektualnoi vlasnosti. *Pravove zhyttia suchasnoi Ukrainy: materialy Mizhnar. naukovoï konf. prof.-vykl. ta aspir. skladu, (m. Odesa, 16-17 travnia 2013 r.)* -Odesa, 2013. T. 2. S. 678–680.
7. Rickover S. Behind the Corporate Veil. URL:<https://sararickover.wordpress.com> .
8. European code of ethics for mediators. URL: <http://surl.li/dcome>).
9. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. URL: <http://surl.li/ewjgb> .
10. ISO 9001:2015 Quality management systems — Requirements. 2015. 29 p. URL: <https://www.iso.org/standard/62085.html>.
11. Definition and Selection of Competencies. Organization for Economic Co-operation and Development (OECD). URL: <https://www.oecd.org> .
12. Osnovni zasady navchannia bazovym navychkam mediatora / Za zah. red. K. B. Narovskoi. K.: Vydavets V. Zakharenko, 2019. 32 c.

13. Tsilmak O. Profesiina kompetentnist mediatora v haluzi vidnovnoho pravosuddia. Pravova systema: teoriia i praktyka. 2015. № 4. S. 63–65.
14. Council recommendation of 22 May 2018 on key competences for lifelong learning (Text with EEA relevance) (2018/C 189/01). Official Journal of the European Union. 2018. P. 1–13. URL: <http://surl.li/fpaxp> .
15. Typovi standarty navchannia osnovam mediatsii i mediatsii trudovykh ta korporatyvnykh sporiv. Zatverdzheno zahalnymy zboramy Chleniv Hromadskoi Spilky «Natsionalna asotsiatsiia mediatsii trudovykh ta korporatyvnykh sporiv» protokol № 4 vid 10.12.2021 r.
16. Romanadze L. Universalnyi kodeks etyky mediatora: utopiia chy realnist. Zovnishnia torhivlia: ekonomika, finansy, pravo. 2021. № 1. S. 14–22. DOI: [https://doi.org/10.31617/zt.knute.2021\(114\)02](https://doi.org/10.31617/zt.knute.2021(114)02)
17. Kodeks etyky mediatora. Natsionalna asotsiatsiia mediatoriv Ukrainy. URL: <http://namu.com.ua/ua/info/mediators/ethical-code->
18. Kodeks etyky mediatora. Ukrainskyi tsentr mediatsii ta perehovoriv. <http://surl.li/dcodu>.
19. Kodeks Etyky mediatora trudovykh ta korporatyvnykh sporiv / za zah. red. A. A. Nechai. Kyiv : Vydavnycha hrupa «Shkilnyi svit», 2021. 23 s.
20. Mayer BS. Beyond neutrality: confronting the crisis in conflict resolution, ossey-Bass. San Francisco. 2004.
21. Collins H. The most important personal qualities a mediator needs. 2005. February. URL: <http://surl.li/fpeaj> .