



BARREAU DE BRUXELLES
ORDRE FRANÇAIS DES AVOCATS



Ethics in mediation

Authors: Patrick Van Leynseele, Martina Doležalová
July 2012

Ethics in mediation

Mediation has its own codes of ethics.

Ethics in mediation has two aspects:

1. maintenance of independency and impartiality and
2. exclusion of conflict of interests

Ad. 1) In view of the typical manner in which a mediator is engaged in a dispute, we speak about two aspects – independency and impartiality. During his conduct, a mediator must refrain from all expressions of approval or disapproval, he may not make remarks or recommendations. His approach must be in all cases “mediating”, his approach must be non-directive and he must identify himself with it. It is to say that mediator’s independency is the basis of the trust invested in him. In view of the fact that he has no competence to resolve a dispute, even so little appearance of loss of independency or impartiality may be reprimanded to him. He may lose parties’ s trust in his capability to assist them in finding a resolution acceptable for all parties.

E.g. the Belgian Code of Ethics for Accredited Mediators (elaborated by the Federal Mediation Commission in 2007) states that a mediator may not try to settle a dispute if he is unable to perform his office independently and impartially, as required, due to personal, material or moral interests.

The following three examples are provided:

- a mediator may not engage in mediation in the case that he has personal or business relations with one of the parties;
- a mediator may not engage in a dispute if the result of mediation would provide him direct or indirect advantage
- a mediator may not engage in a disputes in which one of his co-workers or members/partners would represent one of the parties in a position other than a mediator

The Code imposes the obligation on mediators to maintain transparency. A mediator is obliged to inform parties in the beginning of mediation or during mediation about all facts in respect of which one could anticipate that they question his independency or impartiality, and he is obliged to withdraw from mediation or to continue mediation on the basis of the parties’ written approval. Thus, a mediator acknowledges that each of the parties has its own truth, and he does not hide this fact.

Ad. 2) Conflict of interests is involved in the case that mediator’s personal interests are in contrary with the interests of the affected parties and as a consequence there is a threat of loss of neutrality and impartiality. In practice, a mediator always tries to look “transparently” as much as possible in connection with all circumstances that might raise doubts with regard to his neutrality or independency. It is to say that should any of the parties have such doubts, trust may be impaired and trust is actually the building stone of mediator’s authority in relation to parties to a dispute. Breach of trust could mean termination of the mediation process. A mediator should conceal nothing and he should make an announcement also in the case of even so little appearance concerning the conflict of interests. Besides, practice proves that parties that chosen their mediator

appreciated such transparency. The result is strengthened trust in mediator from whom they expect assistance in resolving their dispute.

Examples from practice:

- E.g. Brussels Business Mediation Center introduces (since 2011 under the title “b Mediation”) the following rules governing conduct in cases of conflict of interests.

It is the task of a mediator to consider subjectively first whether he is able to carry out his obligations independently and impartially. Should a mediator determine in the course of mediation that he is unable to guarantee independency and impartiality anymore, he has to inform parties and stop performing his tasks. When doing so, he is not obliged to explain reasons of his withdrawal. In this way, he protects interests of the party with which he had closer relations.

A mediator may not participate in mediation if such participation is incompatible with his own interests, if he represents one of the parties or a person close to such party, or if he acted in any position in the name of any such person and could acquire confidential information concerning the dispute concerned in such manner.

If a mediator performs his profession jointly with other persons, regardless of in what manner, the reasons of conflict of interests concern also such other persons.

In connection with the above rule concerning maintaining trust it is necessary for the parties after receiving such information to inform whether they intend or do not intend to take the grounds they learned into consideration and whether they insist or do not insist on further assistance of a relevant mediator in resolving their dispute.

- CMAP Code

CMAP Code is worded similarly as the bMediation Code: a mediator is obliged to inform parties and the CMAP centre about all circumstances that could raise parties' doubts about his independency and/or his impartiality. He may start to perform his task (or to continue to perform it) only on the basis of the decision of the Committee for Approvals and Appointments and subject to the written approval of all parties.

Also in this case, a mediator has to sign a representation concerning independency. Should a mediator learn during mediation about existence of any element that might impair his independency and/or impartiality, he must notify parties in this respect. He may continue to perform his tasks only on the basis of the parties' written approval. In opposite case he is obliged to interrupt mediation and subsequently he is replaced by another mediator.

Rules we provided for illustration are also applied in many other codes for mediators or codes of ethics. Similar rules are, for instance, stipulated in the standard III of the Code for Mediators adopted by American Arbitration Association, American Bar Association and Association for Conflict Resolution (three the most important American institutions engaged in mediation) in 2005. In principle, it stipulates that a mediator is obliged to provide information on existence of conflict of interests or even only possibility of such existence. He is actually obliged to arrange for acquisition of information on all potential possibilities of conflict of interests. In the case that he informs about such circumstances,

parties have possibility to express their statements on his participation in mediation, or commencement or continuation of mediation. These obligations last for the entire duration of mediation. Should there be a justified reason to believe that a conflict of interests impairs integrity of the proceedings, a mediator is obliged to withdraw, if the parties require so. After termination of mediation, a mediator will refrain from all contacts with participants in relation to any matter that could give rise to fear about integrity of mediation. However, these standards do not stipulate a period during which a mediator must act in the above manner. Such period must be "appropriate", which term is considered according to various criteria, e.g. according to the length of period lapsed from mediation, or according to the nature of other contacts and provided services.

The Czech legal regulation specifies only the obligation of mediator's impartiality (§ 8/1c), in particular in relation to the case, to the parties being in dispute or their representatives. Issues specifying this term will be included in the Code of Ethics for Lawyers-Mediators to be issued by the Czech Bar Association in the form of the professional regulation.