347.965.42

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NDËMJETËSIMI LEHTËSUES DHE EVALUATIV NË TË DREJTËN CIVILE

ОЛЕСНУВАЧКА И ЕВАЛУАТИВНА МЕДИЈАЦИЈА ВО ГРАЃАНСКОТО ПРАВО

FACILITATIVE AND EVALUATIVE MEDIATION IN CIVIL LAW

Abstract

The main purpose of this paper is to analyze the facilitative and evaluative mediation in civil law. Today, in theory and practice different styles of mediation are described. From the material aspect (as opposite to the formal aspect), there are two basic styles of mediation: facilitative and evaluative mediation. But, the mediation process can move between these two basic styles and thus create other forms of mediation. The differences between the styles of mediation are primarily based on the approach and principles under which the mediator works. This paper consists of introduction, two parts and conclusion. The introduction gives a brief overview of the basic information about the facilitative and evaluative mediation and the relationship between them, according to their contrasts. First part analyzes the key features of the process of facilitative mediation and the mediator-facilitator as well as the advantages and disadvantages of this style of mediation. The second part is dedicated to the key features of the process of the evaluative mediation and the mediator-evaluator as well as the advantages and disadvantages of this style of mediation. The conclusion includes

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assessments of the analyzed questions and recommendations for the possible collaboration between facilitative and evaluative mediation. Results in this paper are generated by analyzing official legal and political acts and using literature, studies and practical experience connected with the issue.

Keywords: facilitative mediation, evaluative mediation, dispute resolution, mediator-facilitator, mediator-evaluator.

INTRODUCTION

Until 1994 there was no common terminology to identify, classify and discuss the different types of mediation. Today, in theory and practice different styles of mediation are described. From the material aspect (as opposite to the formal aspect), there are two basic styles of mediation: facilitative and evaluative mediation. But, the mediation process can move between these two basic styles and thus create other forms of mediation. The differences between the styles of mediation are primarily based on the approach and principles under which the mediator works.

The most popular style of mediation is facilitative mediation. And the most appropriate definition of this style is contained in the paper "Getting to yes": "Facilitating negotiations between the parties, through the systematic application of the basic common principles of negotiation, which allows the parties to engage in an information exchange and resolving the dispute together." This style of mediation is a cooperative and requires mutual benefit through constructive dispute resolution or treatment of disputes as issues that need to be tackled through joint efforts of all parties involved in the dispute, including the mediator too.[3] If we take into consideration the fact that the heart of the mediation procedure is facilitating communications between the dispute parties, then we can conclude that facilitative mediation follows the classical format of mediation in which a neutral third party assists and facilitates communication between the dispute parties. It seems that, the geneses of this approach for dispute resolution are contained in the negotiation theory.[4] In this sense, Leonard Riskin describes mediation as facilitated

[3] Lim Lei Theng ; Joel Lee, A Lawyer`s Introduction to Mediation, Singapore Academy of law Journal, 1997, p.6.
[4] Carole J. Brown, Facilitative Mediation: The Classic Approach Retains its Appeal, available at: http://www.mediate.com/articles/brownc.cfm.

negotiations.[5] Focus in this style of mediation is placed on identifying the real interests of the parties.[6] Because it is based on the interests of the parties this mediation is also known as “interest based mediation” or “problem solving mediation”. Often is called “pure” mediation.[7] This style of mediation is developed in the era of voluntary centers for alternative dispute resolution, when volunteers were asked to be mediators and those mediators did not have substantial expertise for the dispute or for the procedure. At that time, mediations were usually attended by lawyers of the parties too. [8] The main objective of this mediation is for the dispute parties to negotiate in accordance with their needs and interests, not according to the positions that law provides for them. This style requires from dispute parties to distance themselves from their fixed positions, and to define the dispute in accordance with their basic needs and interests, which can be substantial (those which answer the question: What is ..?), procedural (those which answer the question: How is it done?) and psychological (those which answer the question: How do you feel?). The mediator-facilitator has knowledge of the mediation process and mediation techniques, but it is not necessary for him to have any specialized knowledge on the subject of the dispute.

On the other side, evaluative mediation is described as “the rights based mediation” or even as a “non-binding arbitration”. Alfini who studied the use of evaluative mediation programs connected with the court, in 1995, this style of mediation describes as "melting, hard hitting

[5] Leonard L. Riskin, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, University of Florida - Levin College of Law, 1996, p.13.

[6] The difference between interests and positions are very effectively explained in the book “Getting to Yes”. Goldberg, Sander and Rogers that difference summarize as follows: "... Your position is what you want. Your interest is why you want that ... " Also see: Roger Fisher, William Ury, Bruce Patlon, Getting to Yes, 2nd Edition, 1991, p. 36-55.

[7] Henry S. Kramer, Alternative Dispute Resolution in the Work Place, Law Journal Press, New York, Rel 9, 2003, p.4-6.

[8] Zena Zumeta, Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation, available at: http://www.mediate.com/articles/zumeta.cfm.

and rejection."[9] Boulle calls this style: quasi-arbitrage.[10] In this sense, Robert A. Baruch Bush says that evaluative mediation is substitute for arbitration, and the reasons that follow the story "goodbye arbitration" is just another convincing explanation for the widespread expansion of this style of mediation. [11] On the other hand Dorothy J. Della Noce in her study "Evaluative Mediation: In Search of Practice Competencies", points out that evaluative mediation does not exist for the accuracy of the estimate, but for generating solutions, and thus narrowing the scope of the negotiations until the final settlement.[12] Evaluative mediation is a procedure in which the parties ask the mediator and allow him to express an opinion, either on the merits of the dispute, or possible dispute solution, reached agreement or any other matter. It is based on the understanding that the mediator as an experienced professional and neutral person acquaints the parties with the decisions that court proceedings could bring. Very descriptive, but perhaps the most appropriate definition of evaluative mediation gives John Wade in his study "Evaluative and directive mediation: All mediators give advice": "A process for disputes resolution, in which a third party who possesses expert knowledge in a certain area meets with the parties, encourages them to negotiate, collects facts, evidences and arguments, provides information, opinions and advices that vary in time and content."[13] Evaluative mediation became especially popular, as a result of court referrals to mediation. It can be concluded that this style of mediation is very close to the actions taken in the proceedings.

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[9] See: J. Alfini, Should Lawyer-Mediators Be Prohibited from Providing Legal Advice or Evaluations?, Dispute Resolution Magazine, Spring 1994; James J. Alfini, Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?, 19 Florida State University Law Review 47, 1991.

[10] Boulle L, Mediation: Principles, Process, Practice Lexis Nexis Butterworths, Australia, 1996.

[11] See more: Robert A. Baruch Bush, Substituting Mediation for Arbitration: The Groving Market for Evaluative Mediation, and What it Means for the ADR Field, Pepperdine Dispute Resolution Lw Journal, Volume 3, Issue 1, 12.01.2012.

[12] Dorothy J. Della Noce, Evaluative Mediation: In Search of Practice Competencies, Conflict Resolution Quarterly Volume 27, Issue 2, Winter 2009.

[13] John Wade, Evaluative and directive mediation: All mediators give advice, Law Faculty Publications, 05.01.2012, p.1.

1. Facilitative mediation

1.1. Key features of the process of facilitative mediation and mediator-facilitator

The facilitative style of mediation is the most structured style of mediation. Its main feature is that it encourages the parties to engage in the process and to participate in the discussions. It begins with a joint meeting in which the parties give their opening speeches to their personal views on the dispute. Everyone agrees to listen without interruption. Then, depending of the mediator and the level of conflict between the parties, the proceeding may continue with joint meeting or pause and individual sessions. In fact, individual meetings with the mediator are practiced only for specific purposes. If this occurs, the mediator periodically "moves" between the parties. In fact, this model highlights common sessions in the presence of all parties so they can hear each other and discuss their views, but if the need arises, mediator can hold individual meetings and then, when the objective has been reached, again urged the parties return to joint meetings. [14] During the proceeding, the parties are encouraged to share what they have in mind regarding the dispute and why they believed their claims. [15] The mediator is a tool for providing the framework within which the parties discuss or in other words mediator controls procedure, but the parties control the outcome of that procedure. [16]

In this style of mediation, the mediator plays a role as a facilitator of the negotiations between the parties. The mediator-facilitator does not offer opinions on the settlement of the dispute, does not provide predictions of possible solutions on various issues in dispute, does not assert, does not provide legal advices, does not propose possible solutions to the dispute, but its main goal is to find needs that are hidden

[14] For example, when one of the parties doesn`t want to share certain information, but wants the mediator to know that information, then this could be done on an individual session, Sheldon J. Stark, Mediation Models, достапно на: http://www.starkmediator.com/practice-areas/mediation-services/mediation-models/.

[15] Mediator and arbitrator, Sheldon J. Stark, stresses the following: "My experience shows that when the parties will be given such an opportunity, the chance to resolve the dispute increases", *Ibid.*

[16] For the structure of facilitative mediation see more in: Doug de Vries, Mediation: Understanding Facilitative, Evaluative and Direct Approaches, достапно на: http://www.dkdresolution.com/articles/Mediation.Understanding.3.1.pdf; Boulle L and Alexander N: Mediation Skills and Techniques 2nd Edition 2012 Chapter 5; Boulle L: Mediation Principles, Process and Practice 3rd Edition 2011 Chapter 7.

behind the positions of the parties and directs the parties to come to a mutually acceptable solution themselves.[17] The mediator aims to facilitate communication between the parties, by providing a framework and mechanisms for communication and negotiation. As responsible for the flow of information and at the same time as a constraint and screen for emotional and psychological problems that can contribute to inflaming the dispute, the mediator can enrich negotiations with missing neutrality and objectivity, and he does so by asking questions aimed at finding out the real interests hidden behind the initial positions of the parties.

Mediator should often check the current situation to see if the parties have reached a point to move towards resolution of certain issues that arise during the discussions. These mediators believe that the parties could reach a permanent deal if they have enough information, time and support. In this style of mediation, mediators want to ensure that the parties reached agreement on the basis of exchanged information and mutual understanding. The actions of the mediator are aimed at ensuring that the parties have greater influence on the decision than their lawyers. Indeed, the tendency of mediators–facilitators is to avoid the solutions suggested by outside, believing that the best solutions are those prepared by the parties themselves, because such agreements arising from "cooperation" is more likely to meet the substantive, procedural and psychological interests of the parties.[18] Mediators-facilitators perceive themselves more as "process experts" than as an "expert for the dispute" and if it is necessary, they can bring expert in the mediation for specific substantive issues of the dispute. Globally speaking, the mediators-facilitators come from all backgrounds: lawyers, social workers, workers in the field of health and so on. [19]

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[17] Rule 572.35 of the Minnesota Civil Mediation Act is a good example for legal regulation of the role of mediator-facilitator and prescribes that for a binding mediation settlement, the parties, inter alia, must be familiar with the following: "... the mediator doesn`t have duty to protect their interests or to provide information about their rights..."

[18] See an example for this style of mediation: Lim Lei Theng, Joel Lee, A Lawyer`s Introduction to Mediation, Singapore Academy of Law Journal, 1997, p.106.

[19] On the role of mediator-facilitator also see: Alan Stitt, Mediation: A practical Guide, Cavendish Publishing Limited, London, 2004, p.3-5; John W. Cooley, The Mediator`s Handbook: Advanced Practice Guide for Civil Litigation, Second Edition, National Institute for Trial Advocacy, 2006, p.31-35; Jay Folberg, Ann Milne, Peter Salem, Divorce and Family Mediation: Models, Techniques, and Applications, The Guilford Press, New York, 2004, p.33-35.

We can conclude that the possibility of quality outcome in this procedure is developed through the process of communication and exchange of information between the parties, facilitated by the mediator, and it depends on the overall communications between the parties, the joint capabilities of the parties to meet their own interests and mediator who should continuously encourage the parties to seek options to achieve a negotiated solution. Some authors argue that to achieve the desired result, the facilitative mediation requires fair conduct of the proceeding, supported by the application of objective principles acceptable for all parties. Such objective principles may include legal principles too, that would provide the same position for the parties and can derived from the established practice between the parties.[20]

1.2. Advantages and disadvantages

The real strength of this style of mediation is that it allows the most efficient use of the possibilities offered through negotiations and controlled by the parties themselves. Its disadvantages are that it can be long-lasting, requires significant preparation, needs real involvement in the process primarily by the parties themselves, but the mediator too, and the existence of a genuine willingness for a settlement by all parties involved in the dispute.[21]

In the literature on mediation, facilitative mediation is particular supported by Robert A. Baruch Bush, Joseph Folger, Kimberlee Kovach, Lela Love and Joseph Stulberg. Bush and Folger especially support facilitative mediation known as transformative mediation.[22] Transformative mediation takes into account social aspect of the dispute. This form of mediation is realized through the transformation of the adversarial relationship to constructive one. The objective is achieved when the parties will recognize the interests and needs of the other side and show understanding for them. Bush and Folger oppose any kind of evaluation in the mediation procedure, because they believe that

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[20] See: Ibid.

[21] Legal Education Society of Alberta, Douglas A. McGillivray, Julie J. Inch, ADR, p.16, available at: http://www.bdplaw.com/content/uploads/2013/01/LESA-2008-JJI-DAM-Alternative-Dispute-Release.pdf.

[22] See: Robert A. Baruch Bush and Joseph Folger, The Promise of Mediation: Responding To Conflict Through Empowerment and Recognition, 1994, p. 81-95; Robert A. Baruch Bush, Efficiency and Protection, or Empowerment and Recognition? The Mediator’s Role and Ethical Standards in Mediation, 41Fla. Law Review 253, 1989, p.253, 265-266.

evaluative mediation undermine and suppress the creativity of mediation as a process for problems solving.[23] According to them, the evaluation necessarily involves coercion and pressure from the mediator. [24] Professors Kovach and Love as supporters of facilitative mediation, develop debate, arguing that evaluative mediation is not mediation, but another form of ADR.[25] However, unlike Bush and Folger, Kovach and Love support some evaluation behavior in mediation. They note that while the mediator does not take an active position in the process, as a judge, arbitrator or expert, his role is consistent with pure facilitative mediation i.e. such procedure is in accordance with the definition of mediator as a party who facilitates communication, promotes mutual understanding, focuses the parties on their interests and requires a creative solution for the problem in order to allow the parties themselves to reach an agreement.[26] Joseph Stulberg says that facilitative concept of participation and freedom to develop or rejection of the proposed solutions to the dispute becomes disruptive to mediation if the mediator appears as evaluator. [27] According to Stulberg, mediation should be exclusively facilitative,[28] and the differences between the facilitative and evaluative mediation are very important. He notes that only the mediator-facilitator is "in a position to build such an approach for solving the problem, which will anchor behavior and principles in a manner appropriate to consensus decision-making."[29]

Debbie Reinberg and John Rymers, in a study published by the Bar Association of Colorado in 2009,[30] notice the advantages and disadvantages of facilitative, evaluative and transformative mediation, separately. In terms of the facilitative mediation they suggest the

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[23] See: Robert A. Baruch Bush and Joseph Folger, The Promise of Mediation: Responding To Conflict Through Empowerment and Recognition, 1994, p. 275-278.
[24] Robert A. Baruch Bush, „What Do We Need Mediation For? Mediation`s Value Added for Negotiators, 12 Ohio State Journal on Dispute Resolution, 1, 35, 1996.
[25] Kimberlee K. Kovach & Lela P. Love, Evaluative Mediation is an Oximoron, 14 Alternatives to High Cost Litigation, 31, 1996.
[26] See: Kimberlee K. Kovach, Lela P. Love, Mapping Mediation: The Risks of Riskin`s Grid, 3 Harvard Negotiation Law Review, 71, 109, no.4, 1998, p.76.
[27] Joseph B. Stulberg, Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock, Fla. State University, Review, 1997, p.985-988.
[28] Ibid, p.1001.
[29] Ibid, p.1005.
[30] Colorado Bar Association, Elder Law Committee, "*Integeneration Conflict Management"*, October, 2009.

following benefits: promote confidence between the parties; promote more integration solutions; it allows for greater creativity in solving outstanding issues; a "good ground" to identify the substantive, procedural and psychological interests of the parties; particularly advantageous in disputes with complex family dynamics; then, in any case to which the parties have an interest in maintaining their mutual relations; enables narrowing of contentious issues and dispute settlement in earlier stages; its nature allows it to act therapeutically, because the parties have the opportunity to say things that are particularly important for them, in a "safe" environment.[31]

This study, highlights the following weaknesses of this style of mediation: the process of facilitative mediation may be more lasting than other styles of mediation; it is burdened with many difficulties if there is no common interest between the parties or that interest can`t be seen in the ongoing relationship between the parties; during the procedure strong emotions can be triggered, that could not be provided either by the mediator nor the parties; requires the mediator with significant planning and understanding skills for the parties' interests, especially in complex family dispute (this is one of the reasons why this procedure can last longer); sometimes it is difficult for the mediator to bring the opposing parties in facilitative mediation, especially when the controversial issues are not clearly defined.

Compared with the court proceedings this style of mediation has the following advantages: greater control on the dispute by the parties; the parties' right to choose a competent person who will help them to resolve the dispute; able to resolve other (sometimes non-legal) disputes between the parties; creating better perspective for the future relations between the parties and enhance their mutual trust.[32]

Studies show that the advantages of facilitative mediation are especially prominent in the terms of the satisfaction of the participants, the relationship between them and in increasing the likelihood of participants to discover a new value and upgrade of previous partnership. [33]

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[31] Во врска со ова види: Nadja Alexander, The Mediation Meta-Model-the realities of Mediation Practice, ADR Bulletin, Volume 12, No.6, 09.01.2011, p.4.

[32] Laura Ervo, Anna Nylund, The Future of Civil Litigation: Access to Courts and Court-annexed Mediation, Access to Courts and Court-annexed Mediation in the Nordis Countries, Springer International Publishing Switzerland 2014, p.153.

[33] See: Robert A. Baruch Buch, What Do We Need a Mediator For?: Mediation`s "Value-Added" for Negotiators, Maurice A. Deane School of Law at Hofstra

The real power of this method for dispute resolution is that it allows the parties to understand their own interests and at the same time to exchange their views on the dispute directly, in the presence of an independent third party, without any prejudice about their formal legal position in any litigation or arbitration which would have followed, making it easier finding a compromise solution acceptable to all. The main remark that puts the burden of this style of mediation is that, generally, it lust longer. However, in this context it should be noted the standpoint of critics of facilitative mediation, which says it is idealistic and unrealistic.[34]

2.Evaluative mediation

2.1. Key features of the process of evaluative mediation and mediator-evaluator

Focusing on the rights of the parties instead of righteousness usually directs the process of evaluative mediation to separate meetings with the parties. The mediation begins in the presence of all parties in the same room, but then the procedure continues at special meetings in separate rooms on separate meetings with the parties. Mediator “flies” back and forth between different rooms transmits offers and contra-offers. Whenever the mediator will meet a party an individual session, he has a similar meeting with the other party. However the time spent on each session is rarely equal. Mediators say that in most cases one of the parties require more time and effort than the other. Through this "shuttle diplomacy" the mediator sets the dynamics of this style of mediation different from the facilitator and gives considerable powers

University, Scholarly Commons at Hofstra Law, 1996; Marc Galanter, Reading the Landscape of Disputes: What We Know and Don`t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, The Regents of the University of California, UCLA Law Review, October 1983, 31 UCLA Law Rew.4; Herbert M. Kritzer, Let`s make a Deal: Understanding the Negotiation Process in Ordinary Litigation, The University of Wisconsun Press, London, 1991; Craig A. McEwen Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation, 79 Minnesota Law Review. p.1317- 1373, 1995.

[34] See: Robert A. Baruch Bush, Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation, Legal Issues 1, 1989-90; Leonard L.Riskin, Mediation and Lawyers, 43 Ohiao State, Law Journal 29, 1982.

of the mediator to convey information and to regulate the tone of the discussion between the parties. [35]

Typically this procedure involves an assessment of all costs separately versus benefits, which the parties would have in the court proceedings. On the other hand, this, per se requires mediators-evaluators often to come from the ranks of lawyers. Regarding the success of this style, mediators say “the time is everything”, and take care not to "give" too much evaluation too early.[36]

Riskin identifies the following key features of the mediator-evaluator: a mediator is willing to urge and to press the parties to accept a particular solution for the dispute; to develop a basis for settlement; to predict how the court would resolve the dispute; to assess the strengths and weaknesses of each party and to educate each party for its interests. In this style of mediation, the mediator structures the process, asks questions aimed at developing certain issues between the parties; he provides an analysis of the dispute, including its strengths and weaknesses; makes predictions about the results of any litigation; gives opinions, recommendations and advices, disregarding the feelings, interests and needs of the parties; suggests possible solutions or specific agreement for the dispute; applies pressure on the parties and directly affects the outcome of the dispute. During the procedure, the mediator can try to predict how the judge will decide regarding the dispute on the basis of the rights of each party. In order to give such opinions, recommendations and advices, it is necessary for the mediators to possess a great knowledge of the law (therefore, the best solution for the mediation procedure is if they are lawyers and judges). The successful implementation of this procedure requires mediators who have knowledge of the dispute in order to assess the strengths and weaknesses of the position of each party. But all previously could imply that the mediator loses its neutrality. The mediator remains neutral in the sense that he does not take a side, but only reveals his opinion on the merits

[35] For the structure of the evaluative mediation process see more: Jonathan B. Marks, “Evaluative Mediation”Oxymoron or Essential Tool?, The American Lawyer, 1996; Myron Pessin, Stages of a Non_Evaluative Mediation Session, 07.07.1999;

[36] Mediators on this issue highlight the experience of the most experienced mediators and say that the most experienced mediators do evaluation on the use of techniques for breaking the deadlock between the parties to the dispute. It usually takes some time to reach the point at which the evaluation becomes suitable for use.

of claims. If the parties have difficulties in terms of the value of the dispute, the mediator can share his opinion in this regard too.

According to this style of mediation, the mediator sees himself as an expert, he evaluates and suggests possible solutions to the dispute. Parties engage mediator because they are in a deadlock, without him would never have solved the dispute and they expect mediator to provide additional information for them and using his expertise to give them appropriate advice in reaching an agreement. The mediator, looks his role in learning the position of each dispute party, and then assesses the strengths and weaknesses of their positions, offering his opinion on whether the case is suitable for court proceedings and pointing out the possible solutions. Mediator-evaluator appoints its attention to lawyers not to the parties. In addition, stereotypical mediators-evaluators define substantive issues only through the legal issues and the only relevant outcome according to them is monetary compensation.[37] Professor Nadja Alexander advice, when it comes to a mediator-evaluator, is to look for the mediator with 50+ hues i.e. someone who can move around the evaluation continuum (and beyond).[38]

2.2. Advantages and disadvantages

The mediator Zena Zumeta[39] points out that support for this style of mediation comes from the fact that if the parties cannot reach agre-ement, they want answers and they want to know whether their answer to the dispute is fair enough. Many mediators and theorists who support

[37] For the role of mediator-evaluator see more: Keith Howe, Differing Styles and Models for the Conduct of Mediations, The Journal of the Bar Association of Queen-sland, Issue 20, September 2007; Jeremy Lack, A mindful Approach to Evaluative Mediation, Tijdschrift Conflicthanterin, Nummer 3, 2014; Dorothy J. Della Noce, Evaluative Mediation: In Search of Practice Competencies, Conflict Resolution Quarterly Volume 27, Issue 2, Winter 2009; Adam T. Rick, Evaluation Within Mediation and the Ideal of Neutrality, Americn Journal of Mediation, avaliabe at: http://www.americanjournalofmediation.com/docs/FINAL%20-%20E valuation %20Within%20Mediation%20and%20the%20Ideal%20of%20Neutrality.pdf; Philip L. Bruner, Evaluative Mediation of Complex Construction Disputes, Society of Construction Law (Singapore), January/February 2014 No.22; Katina Foster, A Study in Mediation Styles: A Comparative Analysis of Evaluative and Transformative Styles, June, 2003; Tony Whatling, Mediation Skills and Strategies: A Practical Guide, Jessica Kingsley Publishers, London and Philadelphia, 2012.

[38] Nadja Alexander, 50 Shades of Evaluation, Conflict Coaching International, 2015.

[39] Zena Zumeta: Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation, available at: http://www.mediate.com/articles/zumeta.cfm.

this style of mediation believe that evaluative mediation generate a fairer and more equitable agreements and thus acting therapeutic for the whole society.[40] They note that they support and encourage the adoption of autonomous decisions, but according to them, no one can bring autonomous decision without knowing the relevant legislation. Also, the proponents of this style of mediation argue that in certain situations, exactly evaluative mediation is the most effective for the parties and especially for the disputes in which the relationship between the parties is not so important, but compelling need for rapid predictions about their rights and positions is.[41] There are circumstances that require exactly this style of mediation: where the parties seek the best solution for everyone, but this solution is not in accordance with law; then, when the parties move towards a solution that is optimal for all (whether such a solution would be in line with those prescribed by law); also when parties are deadlocked and require the mediator to assess their positions.[42]

Debbie Reinber and John Rymers, as the advantages of evaluative mediation emphasize the following: it is particularly advantageous if there is no interest in maintaining the current relationship between the parties; leads to solutions which are based on law; it is useful if the parties are already moving to judicial proceedings; it is a good way to assess the legal position of the parties; often is shorter than other types of mediation.[43]

The obvious drawback of this style of mediation is that not always the mediator`s predictions are correct. Its other shortcomings are pointed out as follows: doesn`t take into account the relationship between the parties; often is limited to the legal rights of the parties, not taking into consideration all the needs and interests of the parties; solutions of the dispute tend to be framed in an appropriate legal framework and never outside it; it contains greater potential for abuse of mediator`s

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[40] See: Robert P. Schuwerk, Reflections on Ethica and Mediation, 38 State Texas Law Review стр.757-764; Ellen A. Waldman Identifying the Role of Social Norms in Mediation: A Multiple Model Approach, 48 Hastings Law Journal, 1997, p.742-753.

[41] Mills K.A*: Can a Single Ethical Code Respond to All Models of Mediation?* Bond Dispute Resolution News Vol. 21, Dec 2005.

[42] American Arbitration Association, Handbook on Mediation, Second Edition, Juris Net LLC, 2010, p.291.

[43] Also see: John Wade, Evaluative and directive mediation: All mediators give advice, Bond University Law Faculty Publications, 01.05.2012, p.6.

power because of his role; this style gives less opportunity for the solution of the psychological interests, because the issues are closely framed and often the dispute parties don`t feel that they are heard and understood.

In response to those who claim that evaluative mediation is not mediation at all, Riskin points out that it is too late, to be said to practitioners who are widely known and recognized as mediators, that, in fact they are not mediators.[44] The supporters that particularly stand out for the evaluative mediation are the fallowing: L. Randolph Lowry, John Lande, Donald Weckstein and Ellen Waldman. Lowry notes that while there is no consensus on what is an assessment against the negotiating behavior, the idea that the evaluation includes "a number of activities such as expressing an opinion on the position of the parties, recommending a solution to the dispute or prediction of the outcome of the dispute if the dispute should be resolved in other proceedings" is accepted.[45] John Lande claims that it is not possible to define mediation by excluding evaluative elements[46] and free expression of mediator`s opinion, which can be classified as evaluative. According to him, this is not as important as understanding the way is achieved that behavior and its effect on the quality of agreement between the dispute parties.[47] Also, according to him, it is logical that the mediators whose primary objective is to strengthen relations between the parties will usually use facilitative techniques, while mediators who are primarily aimed at settlement will more likely exercise evaluation techniques.[48] Weckstein claims that there are situations in which the mediator shall provide an opinion, evaluation, suggestion, recommendation, prediction and other relevant information or advice.[49] Waldman as a supporter of

[44] Leonard R. Riskin, Mediator Orientations, Strategies, and Techniques, 12 Alternatives to High Cost Litig. 111, (1994); Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 Harv. Negot. L. Rev. 7, 1996), p.24.

[45] L. Randolph Lowry, Training Mediators For The 21st Century: To Evaluate or Not: That is Not the Question!, 38 Fam. & Conciliation Cts. Rev. 48, 48, 2000), p.48.

[46] John Lande, How Will Lawyering and Mediation Practices Transform Each Other?, 24 Florida University Law Review, 1997, p.839, 849-561.

[47] Ibid p.873-877

[48] John Lande , Toward More Sophisticated Mediation Theory, Journal of Dispute Resolution 321, 2000, p.2.

[49] Donald T. Weckstein, In Praise Of Party Empowerment--And Of Mediator Activism, 33 Willamette Law Review p.505, 1997).

"therapeutic mediation" notes that many mediators and theorists support evaluative mediation because they believe that it generates fair and equitable agreements, and therefore it acts therapeutic for the society.[50] Since the mediation encourages the autonomy of the parties, this style of mediation resulted in agreements which are based on needs.[51]

CONCLUSION

This theoretical analysis of the styles of mediation, calls to question traditional issues relating to the mediation procedure, its users and mediators, enriched with increased insight into theoretical knowledge in this area and the lessons learned from the current application of mediation. No doubt that by giving names of the styles of mediation, mediators can better communicate about this area and its various approaches. Also there is no doubt that to understand how the mediation functions, when is effective, what are its advantages and disadvantages, it is necessary to identify, analyze and understand the different styles in which it appears. Then, it is important to bear in mind that each style of mediation has its own characteristics, field of use, advantages and limitations, but also in the theory, there is no consensus regarding characteristics of facilitative versus evaluative mediator. However, this study also mentions the following questions: Whether through proposing the style of mediation, that style may influence the specific outcome of the dispute or can take away or limit the autonomy of the parties and/or affect the quality of the settlement? Whether the commitment to the only one style of mediation, narrows the scope of discussion, by forcing it to move to what is expected to be possible solution for the dispute? As the only answer to these questions we can say that the application of the style of mediation in its extreme form can lead to negative consequences. It should also be borne in mind that in practice most prevalent is blurring the boundaries between the different styles of mediation.[52]

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[50] Ellen A. Waldman, The Evaluative-Facilitative Debate in Mediation: Applying The Lens of Therapeutic Jurisprudence, 82 Marq. Law Review, p.167 (1998).
[51] Ibid p. 157.
[52] "... There is no such thing as a purely facilitative mediation and every mediation needs evaluative methods too and even more, in practice, that is a difference that can never be significant because when properly analyzed the evaluative methods are inextricably associated with the facilitative methods ...", Kenneth Roberts, Mediating

Mediation usually involves a mixture of approaches i.e. mediators use multiple styles during the same procedure, and do many jumps from one to another style based on what they think will promote the purposes of the dispute.[53]

The procedure which will start as facilitative mediation can end as evaluative mediation.[54] In the course of the mediation procedure can be attempt for accommodating the interests of the parties, then there can be discussions regarding the rights of the parties and some discussions about the power of the parties. The decision about the style of mediation for resolving the concrete dispute pulls down questions about a competent mediator too, what he should be, and whether the co-mediation is necessary.[55]

It seems that some theoreticians and mediators are convinced that one style of mediation is more faithful to the basic philosophy and goal of mediation. But, in practice most mediators run on facilitative-evaluative continuum and their dispute resolution method can vary from case to case depending on the expectations and needs of the parties. Given the fact that, the two basic ideas of mediation are: a focus on the interests and improving communications between the parties, it can be concluded that choosing the right style of mediation for the dispute, requires knowledge of the unique needs of the dispute. Therefore, we believe that the mediators can make the mediation process more useful and more productive through the merger of the dispute with the relevant style of mediation and suitable mediator.[56] Robert Morrill, retired judge of the Supreme Court of New Hampshire and current mediator, gives the following suggestions on the question how to choose the style of mediation that would be most favorable for the dispute: first, it is necessary to analyze the dispute; then, the parties should be evaluated; the required style of mediation should be evaluated too and finally, to select a suitable mediator. This reasoning referring to the conclusion

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the Evaluative – Facilitative Debate: Why both parties are wrong and a proposal for settlement - Loyola University Chicago Law Journal, Vol. 39, 2007, p.187.

[53] Lairie S. Coltri, Alternative Dispute Resolution: A Conflict Diagnosis Approach, Second Edition, Prentice Hall, p.61.

[54] Natasha J. Cabrera, Catherine S. Tamis-LeMonda, Handbook of Father Involment Multidisciplinary Perspectives, Second Edition, Routledge, 2013, p.403.

[55]See: Anne Bachle Fifer, Selecting the “Right” Mediator for Your Case, available at: http://www.abfifer.com/resources/mediation_article1.pdf.

[56]See more: Robert Morrill, Improving Your Mediation, available at: http://www.bobmorrill.com/Documents/Improving%20Your%20Mediation.pdf.

that the variations of mediation in practice are deeply influenced by the different situations that mediation has to handle with. Also, if the parties are well informed about the mediation process, at the same time they will be relaxed, and will have a better impression of the overall process, which in turn directly affects the acceptance of mediation and participation in it.

We can conclude that the continued evolution of the mediation techniques is reflected in the different role that the mediator can fulfill. It is important not to decide which style of mediation will be used before the characteristics and needs of the particular dispute, being reviewed and evaluated. It seems that there are no studies that suggest that one particular style of mediation ultimately is much better than another. However, there are good reasons, determining which mediation style will be applied when solving a dispute, to put it into the hands of the mediator and the parties. No matter what style of mediation is concerned, the parties should be ready to have a mediator who is engaged in active listening, asks a lot of questions and focuses on the priorities of the parties that lead to a mutually acceptable dispute resolution.

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