

MEDIATION AS A MEANS OF DISPUTE RESOLUTION IN THE FIELD OF HEALTH CARE

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INTRODUCTION

The increasing number of conflicts in the field of health care catalyzes the process of finding effective ways to resolve them in order to respect human rights. The field of health care provision is particularly sensitive because of the underlying values, primarily life and health. Expanding legal instruments, including the implementation of alternative ways of conflicts resolution, will serve to resolve disputes within a reasonable timeframe, ensure procedural competition, a balance of extrajudicial and judicial forms of rights protection.

Nowadays, the legal framework of Ukraine has been particularly conducive to the alternative means of dispute resolution and has been encouraging by a range of provisions to use not only judicial protection, which may not always justify the aspirations of the relations on legal aid provision actors in the field of health care, due to the complexity of balancing interest and achieving justice, on the one hand, and, on the other, due to the length and complexity of the process, reputational losses for healthcare providers, and “pausing time” for patients. Part 3 of Art. 124 of the Constitution of Ukraine stipulates that a mandatory pre-trial procedure for the settlement of a dispute may be determined by law. The Parties shall take measures for a pre-trial settlement of the dispute by agreement between themselves or in cases where such measures are binding by law (Article 16 of the Code of Civil Procedure of Ukraine (hereinafter – the CPC of Ukraine)). The national legal basis for restorative justice is Art. 46 of the Criminal Code of Ukraine (hereinafter – CrC of Ukraine), which provides for the release from criminal liability in connection with the reconciliation of the guilty with the victim, and Art. 468 of the Criminal Procedure Code of Ukraine (hereinafter – the CrPC of Ukraine), which provides for an agreement on reconciliation between the victim and the suspect or accused. Lawyers and judges play an important role in the pre-trial settlement. The lawyer facilitates pre-trial and extrajudicial settlement of disputes between the client and other persons (Part 3, Article 8 of the Rules of Attorney's Ethics, approved on 09.06.2017, as amended). Also, in

Chapter 4 “Settlement of a court dispute” of the CPC of Ukraine the algorithm of peaceful settlement of a dispute with participation of the judge is fixed.

Doctrinal issues of alternative dispute resolution, including mediation, have been the subject of study by numerous researchers (in particular, H. Haro, T. Vodopian, M. Inshyn, N. Krestovska, Y. Mykytyn, K. Narovska, M. Sayenko), the works of whom form the basis of this method of rights protection analysis with the projection on the scope of medical care.

1. Mediation in the field of healthcare: notion and types

There has been a norm-design process in Ukraine on the development of mediation laws, which still did not result in the adoption of the specific law. The attention shall be drawn to a new draft, namely the draft Law on Mediation No. 2706 of 28.12.2019¹, in which mediation means a voluntary, extrajudicial, confidential, structured procedure during which the parties, through a mediator (mediators), seek to resolve a conflict (dispute) through negotiation. Art. 2 of this draft stipulates that mediation may be conducted either before a court proceedings, arbitration court, international commercial arbitration, or during court proceedings, arbitration proceedings or during the execution of a court judgment, arbitration tribunal or international commercial arbitration.

In view of the above, it should be noted that mediation can have both non-jurisdictional and jurisdictional character, depending on its types, as follows:

1) mediation as an extra-judicial form of rights protection, which is exercised by the parties by applying to the mediator and entering into an agreement on the results of mediation;

2) mediation within the judicial form of rights protection, which is carried out in the process of entering into a settlement agreement (Article 207 of the CPC of Ukraine);

3) restorative justice: a) release from criminal liability under Art. 46 of the CrC of Ukraine at reconciliation of the guilty with the victim; b) when concluding a reconciliation agreement between the victim and the suspect or accused person (Chapter 35 of the CrPC of Ukraine);

4) mediation as a component of arbitration proceedings (Article 33 of the Law of Ukraine “On Arbitration Courts”).

¹ Проект закону про медіацію № 2706 від 28.12.2019 р. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67831.

The benefits of resolving disputes arising from the health care provision through mediation are the following:

- a) flexibility of procedure;
- b) voluntary involvement of the parties in mediation and possibility to refuse it at any time;
- c) confidentiality of information regarding the application of the mediation procedure;
- d) voluntary choice of mediator;
- e) adjusting the timing of mediation, as both the party may refuse and the mediator may declare it inappropriate to continue consultations;
- f) maintaining good relations between the parties;
- g) the obligation for the parties to execute the mediation agreement;
- h) possibility to bring the case to the court in case of failure to comply with the mediation agreement.

The principles of mediation under the draft Law No. 2706 include:

- a) voluntariness;
- b) confidentiality;
- c) independence and neutrality of the mediator;
- d) impartiality of the mediator;
- e) self-determination and equality of rights of the parties to mediation.

While conducting research² on mediation topics, the scientists distinguish the following principles of mediation, dividing them into two components:

1. Organizational principles which include: a) voluntariness; b) awareness; c) neutrality; d) independence and impartiality.

2. Procedural principles, which include: a) confidentiality; b) equality of rights; c) activity and self-determination; d) structureness.

It is important to draw attention to the agreement that is entered into as the result of mediation. Under Art. 1 of the draft it is an agreement on the settlement of a conflict (dispute) based on the results of mediation, which means an agreement that captures the result of the agreement of the parties to the mediation in an agreed form, taking into account the requirements of the legislation in which the parties may go beyond the subject matter of the conflict (dispute) that such an agreement does not violate the rights or interests of third parties protected by law.

² Медіація у професійній діяльності юриста: підручник за ред. Наталі Крестовської, Луїзи Романадзе. Екологія. Одеса, 2019.

The author's vision of the terms of the agreement, which can be entered into between the participants of legal relations in the field of health care provision in reconciliation is the following:

1) one of the most difficult issues is to plead guilty to a doctor who believes that he or she has fulfilled his/her duties in full. In order for the issue of guilt not to be a critical point that would be a barrier to entering into the agreement, it would be appropriate not to insist and prescribe it in the absence of compromise. The wording of the agreement can be as such: “The Parties acknowledge that a dispute has arisen between them as to the quality of the health care that has caused harm to the Party-1. Party-2 (physician), based on the principles of humanism and charity, charity and compassion enshrined in the Code of Ethics of the Doctor of Ukraine, adopted and signed on 27.09.2009, remembering that the main purpose of the doctor's professional activity is to preserve and protect the life and human health, recognizing the moral responsibility of the physician to society for his or her professional activity, agrees to voluntarily compensate for the damage caused to Party-1”;

2) taking into account the convention principle of just satisfaction, guaranteed in Art. 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ratified by Ukraine in 1997), compensation should be prescribed for compensation for damage caused by a conflict situation over the quality of care provided;

3) in order to preserve business reputation and data that constitute medical secrecy, it is appropriate to prescribe the “secrecy” of the terms of the agreement. The terms of the Agreement may be revised as follows: “The terms of this Agreement constitute confidential information and cannot be disclosed by any of its Parties. Party-1 undertakes to stop any dissemination of information about the circumstances of the dispute, including not to contact the mass media, social networks, any state bodies, local self-governments, enterprises, institutions, organizations.”;

4) Art. 525 of the Civil Code of Ukraine (hereinafter – the CC of Ukraine) enshrines the prohibition of unilateral waiver of the obligation, unless otherwise stipulated by the contract or law. Therefore, we consider it expedient to prescribe the possibility of unilateral termination of the agreement for failure to fulfill obligations with a possible statement of provisions: “This Agreement may be terminated by one of the Parties by unilateral termination of the Agreement in full due to a substantial breach of its terms by the Party. In the event of termination of the Agreement, the Parties have the right to demand the return of the obligation fulfilled.”

Draft Law No. 2706 enshrines the conditions that should be contained in the agreement based on the results of the written mediation, namely Art. 19 defines the following:

- 1) date and place of entering into the agreement;
- 2) parties to mediation and their representatives;
- 3) mediator (s), mediation agreement or mediation rules;
- 4) the obligations agreed by the parties to the mediation, the methods and terms of their fulfillment, as well as the consequences of their non-fulfillment or improper fulfillment;
- 5) other conditions determined by the parties to mediation.

2. Experience of mediation in the field of health care provision in foreign countries

According to European Hospital and Healthcare Federation, in the EU, mediation is becoming widespread because of its effectiveness, efficiency and ability to decrease stress³.

The research of foreign practice of introducing different ways of resolving conflicts is necessary both to improve national legislation, first of all, given that the mediation law has been on the agenda for a long time, as well as to find best practices for the protection of human rights in the field of health care. The peculiarities of the functioning of the mediation institute in different countries in order to form a national legal model shall be analyzed.

Slovenia

The Patients' Rights Act⁴ introduces mediation as a means of resolving disputes between a patient and a provider of medical services. The Commission for the Protection of Patients Rights offer mediation to parties of disputes. In addition, Rules on mediation, regulating its procedure, in the area of healthcare have been issued. They also determine, for example, the conditions under which one may become mediator in the area of healthcare and the control mechanisms concerning the provision of mediation services in this area⁵. The Ministry of Health keeps a database of mediators who work in the field of healthcare on the basis of The Patients' Rights Act.

³ Mediation in Health Care – European Hospital And Healthcare Federation. URL: https://www.mediate.com/pdf/91_HOPE_Publication-Mediation_December_2012.pdf.

⁴ Patients' rights act. URL: <http://www.varuh-rs.si/legal-framework/constitution-laws/patients-rights-act/?L=6>.

⁵ The Slovenian legislation implementing the EU Mediation Directive. URL: <http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19582/20110518ATT19582EN.pdf>.

If the healthcare provider decides to offer mediation irrespective of the Patient Rights Act, the costs of mediator and its payment is a matter of agreement between mediator and mediation participants (mediants).

First hearing for the patient, whose rights were infringed, will be held at healthcare provider's. If at this stage the method of dispute resolution is not chosen, the patient may file a request for treating the infringement of his/her rights before the Commission of the Republic of Slovenia for protection of patients' rights. Mediation can be one of the potential methods of dispute resolution between the patient and the healthcare provider on this stage.

The quality of mediation shall be ensured via foreseeing the requirements to the mediator in the field of healthcare and control mechanisms. For example, the Association of Health Institutions of Slovenia, that trains healthcare mediators, complies with standards formed by MEDIOS: the Association of mediation organizations of Slovenia in order to ensure the good quality of mediation services. Namely, to join the training, candidate shall have (cumulatively)⁶:

- successfully completed the basic mediation training (100 teaching hours);
- successfully completed at least one advanced mediation training in the duration of at least 50 teaching hours (regardless of whether the training enables obtaining a title or not) and
- at least 2 years of active mediating experience, 10 mediation cases and at least 50 teaching hours of carrying out mediation.

Poland

According to Art. 113 of an Act on Medical Councils of 02.12. 2009, both Screener of Professional Liability during an actual proceeding, and medical Court during a proceeding before a medical court have a possibility to direct a case to mediation with the consent of both parties or from an initiative of a victim and an accused. A mediation proceeding cannot last longer than two months, while this time is not included to the time of an actual proceeding.

A mediator is a doctor chosen by Regional Medical Chamber, for one-year cadence. The exception occurs, when the person performs duties of Screener for Professional Liability, deputy Screener and a member of a medical court⁷. (A doctor chosen as a mediator is a reliable person,

⁶ Mediation in Health Care – European Hospital And Healthcare Federation. URL: https://www.mediate.com/pdf/91_HOPE_Publication-Mediation_December_2012.pdf.

⁷ Agata Krawczyk-Kalitowska Mediation in Healthcare. URL: <http://www.woiz.polsl.pl/znwoiz/z75/9.%20Krawczyk-Kalitowska.pdf>.

however, when it comes to his impartiality because of the fact that he is both a doctor and a mediator.)

The order of mediation proceeding, defined in the Criminal Procedure Code, is as follows⁸:

- 1) receiving the information about the case by the mediator;
- 2) as soon, as information is received, the mediator contacts victim and accused to establish a place of a meeting with each of them;
- 3) individual meetings with victim and accused to inform about an essence and rules of a mediation proceeding and their rights;
- 4) a mediation proceeding in the presence of both parties;
- 5) entering into an agreement;
- 6) report from the course of a mediation proceeding and its results.

Belgium

In Belgium, mediation between patient (or relatives) and healthcare providers concerning patient rights is foreseen by Law on patient rights of 22 August 2002 (art. 11) and Royal decree of 19 March 2007 on the requirements for the mediator in hospitals. Law of 31 March 2010 on the compensation for damage caused by healthcare (art. 8, 5) foresees mediation between patient, healthcare providers and insurance companies in case of damage caused by healthcare⁹.

In Belgium, there is an “internal” mediator for hospital care and mental healthcare who is on the payroll of healthcare providers but is independent (cannot take a position)¹⁰. As to the other types of healthcare, the mediation concerning patient rights is conducted by a governmental authority, the Federal Ombudsdepartment, installed within the Federal Patient Rights Commission. There is also a list of “official, authorized” mediators in general affairs. However, the parties are not limited to the official mediators, they can choose any of non-official ones.

In Belgium, mediation agreements and enforceable mediation agreements are used in the case of general mediation. In contrast, mediation proceeding or labor disputes do not require any documents, because it is mainly an oral procedure.

Costs are covered by hospital or state budget (for non-hospital care).

⁸ Criminal Procedure Code of Poland. URL: https://www.legislationline.org/download/id/4172/file/Polish%20CPC%201997_am%202003_en.pdf.

⁹ Mediation in Health Care – European Hospital And Healthcare Federation. URL: https://www.mediate.com/pdf/91_HOPE_Publication-Mediation_December_2012.pdf.

¹⁰ Health Mediation models in the EU: Examples of good practices. URL: https://eea.iom.int/sites/default/files/publication/document/Health_mediation_Models_EU_IOM.pdf.

In Belgium, specific requirements for mediators who work with healthcare issues:

- higher education (however no university degree needed);
- cannot be related to the facts and persons of the complaint;
- incompatibilities: member of hospital management committee, hospital healthcare provider, active in a patient rights' association.

The mediators shall work under the principles of professional secret, independency and neutrality. However, their reliability and independence of mediators tend to be questioned, due to the fact that the mediators are directly employed from hospitals.

The main problematic issues concerning mediation in Belgium are the following:

- the internal mediators cannot be unbiased because they are on the payroll of the hospitals;
- lack of patients' knowledge of existence of the mediation system;
- lack of a true mediation system for non-hospital care, except mental healthcare.

Denmark

Healthcare providers shall offer mediation, a dialogue with patients who have sent a complaint to the national patient complaint system. It is up to the patient or the patient's legal guardians to decide if they want to undergo the mediation procedure. If the patient wants to participate in the mediation, the healthcare provider has to organize the procedure within 4 weeks. Costs are fully borne by the healthcare provider.

In Denmark, the five regions (healthcare providers) have developed different kinds of guidance for and e-learning material about how to obtain a successful mediation/dialogue. At the end of the mediation session, the representative of the healthcare provider has to fill out a form about the outcome of the mediation. This form is sent to the national patient complaint unit (Patientombudet).

Estonia

In Estonia, there is no central system of dispute resolution: hospitals have their own systems for resolving disputes between different parties, and there is no legislation for healthcare matters. In case of any dispute between different parties, the first step is to try to resolve the problems internally in healthcare establishments¹¹. Then, independent mediators can be involved. Mediation costs are fully borne by parties.

¹¹ Mediation in Health Care – European Hospital And Healthcare Federation. URL: https://www.mediate.com/pdf/91_HOPE_Publication-Mediation_December_2012.pdf.

During mediation proceedings in hospitals or in the pre-court mediation proceedings it is not possible for patients and patients' relatives to choose mediators, because the latter are assigned to them or there may only be one mediator (in hospitals), for example the head of health services quality management department.

The ways of dispute resolution may vary from one healthcare provider to another. In general, given that between the parties shall be concluded an agreement. In case of disputes concerning quality of services provided, the negotiations of the first level are conducted between the victim and healthcare provider. If they cannot reach an agreement, the patients have the right to ask for expert opinion from Expert committee on quality of health services. Nevertheless, the decision of the Committee is rather a recommendation and cannot be enforced.

Bulgaria

As of 2007, the mediation programme in health was included into the state policy. The state began to allocate to participating municipalities an annual health mediation budget. The profession of mediator in the field of healthcare is in the National Classification of Professions and the government adopted an official job description for the position¹².

In the majority of occasions, the mediator is a member of local community, in order to perform his/her duties properly. The mediators have a social function as well: they provide access to the social services vulnerable/isolated ethnic minorities. The mediator in healthcare field is not an administrator, but the ordinary employee, who works actively to identify the most vulnerable and marginalized community members. He or she initiates communication with local health and social institutions and specialists, and offers them assistance¹³.

3. Restorative justice

The use of mediation in criminal proceedings is certainly justified because of the peculiarities of bringing medical professionals to criminal responsibility, which, for example, are caused by: 1) the limitation period of liability, which expire, as a rule, before the judgment entry into force. It is worth noting that one of the most common articles in practice is Art. 140 of the CrC of Ukraine "Inadequate performance of professional duties by a

¹² Mediation in Health Care – European Hospital And Healthcare Federation. URL: https://www.mediate.com/pdf/91_HOPE_Publication-Mediation_December_2012.pdf.

¹³ Health mediation concept. URL: http://eurohealthmediators.eu/index.php?page_type=text&page_id=226&lid=2&organization_id=1.

medical or pharmaceutical professional”, which according to Art. 12 of the CrC of Ukraine includes: Part 1: the crimes of small gravity, and Part 2: medium gravity; 2) the length of the pre-trial investigation, in particular due to the numerous assessments of the quality of care and judicial review; 3) involvement of mass media, social networks in coverage of events.

First of all, the role of mediation in the application of Art. 46 of the CrC of Ukraine “Release from criminal liability in connection with reconciliation of the guilty by the victim” shall be revealed. In this aspect, it is important to remember the following:

1. In the event of such grave consequences as death as a result of improper health care, it is not possible to apply Art. 46 of the CrC of Ukraine. Case No. 439/397/17¹⁴ of the Grand Chamber of the Supreme Court of 16 January 2019 states:

«60. The term “victim” in Art. 46 of the CrC of Ukraine should be understood in its criminal law meaning as a person who directly suffers from physical, moral and / or proprietary damage as a result of criminal offense or was threatened to suffer it.

61. If, as a result of a criminal offense, the victim is killed, then no one else can express his or her will when dealing with issues related to compensation for death in the form of grounds for dismissal of criminal liability under Art. 46 of the CrC of Ukraine.

62. Damage in the sense of Art. 46 of the CrC of Ukraine should be recoverable (by its nature). Death is an irreversible consequence. Thus, damages in the form of death cannot be recovered or restored under the Art. 46 of the CrC of Ukraine.

63. In the case of causing by a criminal offense harm in the form of death of the victim, release from criminal liability in connection with the reconciliation of the guilty with the victim (Article 46 of the CrC of Ukraine) is not possible”.

2. If any grave consequences other than death occur, mediation may be used to reconcile the parties and to apply Art. 46 of the CrC of Ukraine. It should be noted that the definition of grave consequences in the composition of crimes against a person in the medical field in practice raises many questions. In Section 6.4. «Compositions of crimes against the life of a person in the medical field» Summaries of the High Specialized Court of Ukraine for Civil and Criminal Cases “On the judicial practice of criminal proceedings for crimes against the life and health of a person for 2014” of

¹⁴ Постанова Великої Палати Верховного Суду від 16 січня 2019 р. (справа № 439/397/17). URL: <http://reyestr.court.gov.ua/Review/79298600>.

03.06.2016, determined that grave consequences in the context of crimes against the life and health of a person include death of a victim, injury, infection with an infectious, serious or other illness, which significantly affects the normal course of life of the victim and requires a long treatment, get the victim grievous bodily harm, the occurrence of mental disorder or disease, a significant deterioration of the health of individuals.

3. It is useful to emphasize that when there are legal grounds for the application of Art. 46 of the CrC of Ukraine, it is not necessary to agree to the application of Art. 469 CrPC of Ukraine and conclude a reconciliation agreement between the victim and the suspect or accused. In Item 4 of the Letter of the High Specialized Court of Ukraine on Civil and Criminal Cases “On Supplement to the Information Letter of the High Specialized Court of Ukraine on Civil and Criminal Cases of 15.11.2012 No. 223-1679/0/4-12 “On Some Issues of Implementation of criminal proceedings on the basis of agreements”” of 05.04.2013, № 223-558/0/4-13¹⁵ stated that in cases where criminal proceedings simultaneously have grounds for the release of a person from criminal liability in connection with reconciliation of the guilty with the victim provided for in Art. 46 of the CrC of Ukraine, and for the purpose of imposing a sentence on the defendant on the basis of an agreement between the victim and the suspect / accused (agreement on conciliation was entered into between the parties), the court, considering that the article of the criminal law providing for such exemption from criminal liability is compulsory, and taking into account established circumstances, should:

a) if there are grounds for dismissal from criminal liability in connection with the reconciliation of the accused with the victim (committing the first offense of a small gravity or negligence: a crime of moderate gravity for the first time, compensation of the caused damage by the accused to the victim or elimination of the damage caused and, as evidenced, inter alia, by the victim’s consent to the release of the accused from criminal liability on this ground, and the consent of the accused to such release and closure of the proceedings on such grounds – to refuse in accordance with paragraph 3 of Part 7 of Art. 474 of the CrPC of Ukraine in approving the agreement on reconciliation and acquitting the accused of criminal responsibility on the basis of Art. 46 of the CrC of Ukraine;

¹⁵ Лист Вищого спеціалізованого суду України з розгляду цивільних і кримінальних справ «Про доповнення до інформаційного листа Вищого спеціалізованого суду України з розгляду цивільних і кримінальних справ від 15.11.2012 № 223-1679/0/4-12 «Про деякі питання здійснення кримінального провадження на підставі угод» від 05.04.2013 р. № 223-558/0/4-13. URL: <https://zakon.rada.gov.ua/laws/show/v0223740-13>.

b) if there are grounds for dismissal from criminal liability in connection with the reconciliation of the accused with the victim, if the victim objects to such release, since the result of their reconciliation with the accused is an agreement concluded between them, which stipulates a specific punishment or states release from its completion with a test, having checked the agreement for compliance with the requirements of the CrPC of Ukraine, in the absence of grounds for refusal to approve it: to adopt a sentence to approve the agreement and to appoint punishment under an agreement entered into by the parties.

4. It should also be taken into account that if it is impossible to apply Art. 46 of the CrC of Ukraine, but in the presence of the expiration of the limitation period and the possibility of applying Art. 49 of the Criminal Code of Ukraine, it is appropriate to use the mediation procedure for reconciliation and redress. This conciliation process is aimed at preventing civil litigation. Here is an example of case law, where there was a combination of conciliation and the application of Art. 49 of the CrC of Ukraine. On January 20, 2020, the Sykhiv District Court of Lviv ruled in Case 464/2185/17¹⁶ to release PERSON_1 and PERSON_2 from the criminal liability under Part 1 of Art. 140 of the CrC of Ukraine, based on Part 1 of Art. 49 of the CrC of Ukraine in connection with the expiration of the limitation period of criminal prosecution.

The body of pre-trial investigation found that in the period from 29.08.2016 to 05.09.2016, PERSON_1, being the head of the thoracic department of the Oncocenter, bearing personal responsibility as the head of the thoracic department, and PERSON_2, being in the position of the doctor-resident centrist, improperly fulfilled their professional duties as a result of their negligent attitude, namely: PERSON_4 made a decision in conjunction with the PERSON_2, who performed surgery on PERSON_5 and the treatment to provide further treatment without chemotherapist and radiologist; did not provide blood substitutes in a volume that could compensate for possible blood loss after surgery, resulting in intra-pleural bleeding of PERSON_5 was not compensated, which, on the background of severe disease, led to the development of hemorrhagic shock with impaired rheological properties of heart disease, which caused necrosis of the intestinal walls, multiple organ failure and death; allowed premature transfer of the patient PERSON_5 from the intensive care unit to the thoracic ward. Due to the above violations committed by PERSON_1 and

¹⁶ Ухвала Сихівського районного суду м. Львова від 20.01.2020 р. (справа 464/2185/17). URL: <http://reyestr.court.gov.ua/Review/87014360>.

PERSON_2 during the treatment of the patient PERSON_5, 05.09.2016 at 11.20 after the resuscitation, at the premises of the Lviv State Oncology Regional Medical Diagnostic Center, the clinical death of the latter was ascertained.

It should be emphasized that the victim and PERSON_1 and PERSON_2 have reconciled themselves, have concluded a contract for reconciliation and compensation of harm, therefore, the claim for compensation of harm in the course of civil proceedings was no longer filed.

Attention is also drawn to the possibility of using mediation in concluding a reconciliation agreement between the victim and the suspect or accused, which is provided for in Art. 468 of the CrPC of Ukraine.

The attention shall be drawn to the key considerations when using such a contractual instrument, reflecting the role of mediation, which can of course be a prerequisite for reconciliation and agreement. The following axiomatic positions are important:

1. An agreement on reconciliation can be concluded in the proceedings of minor and moderate crimes, i.e., Part 1 and Part 2 of Art. 140 of the CrC of Ukraine is subject to the possible conciliation agreements.

2. The following persons have the right to initiate a conciliation agreement: a) the victim; b) the suspect / accused. An attorney, a victim's representative, a legal representative, or another person agreed by the parties may also agree to enter into a conciliation agreement. The involvement of an investigator, prosecutor or judge is forbidden in this conciliatory initiative.

3. The conciliation agreement shall specify: a) the parties; b) the formulation of the suspicion or charge and its legal qualification, indicating the article (part of the article) of the CrC of Ukraine; c) material circumstances of the relevant criminal proceedings; d) the amount of the damage caused by the criminal offense, the period of its compensation or the list of actions not connected with the compensation of the harm which the suspect or accused is obliged to do in favor of the victim; e) the period of action for the benefit of the victim; e) the agreed punishment; g) the consent of the parties to the imposition of punishment or to the imposition of punishment and exemption from serving his sentence; g) the consequences of the conclusion and approval of the agreement; h) consequences of non-performance of the agreement.

4. Often, there is more than one victim in a criminal case in the field of healthcare. Therefore, an agreement can only be entered into with all the victims at once. However, the requirements of the victim to the suspect /

accused regarding the amount of damage inflicted by the criminal offense, the period of its compensation or the list of actions not related to the compensation of the damage that the suspect / accused is obliged to do for each victim may differ. However, the punishment, their consent to the imposition of such punishment or the imposition of punishment and release from probation shall be agreed between the parties (all victims and the suspect / accused). It should also be borne in mind that if several victims of various criminal offenses are involved in the criminal proceedings and agreement has not been reached with all victims, then an agreement can be entered into with one or more victims. In such a case, a conciliation agreement is being entered into with each victim individually, and the criminal proceedings agreed upon by the parties are subject to separate proceedings.

5. It also shall be noted that the court, before approving the agreement, in particular: a) inquires the defendant about the possibility of fulfill the obligations under the agreement, for example, to compensate the damage caused as a result of a criminal offense in view of the amount and term of the indemnity set out in the conciliation agreement; b) whether the agreement is voluntary and whether the parties have actually reconciled. If the above facts are not confirmed, the court refuses to approve the agreement.

CONCLUSIONS

Mediation is not a panacea, but it does have the qualities necessary to save the time of both the health care provider and the patient (legal representative, family member). “What do you want? – I want to waste time. – doesn’t like being wasted. If you didn't quarrel with it, you could have asked it whatever you want.” These words from the book “Alice in Wonderland” by Louis Carol are aptly projected on parties who often “kill” time in courts, support the flames of hatred, although the right strategy and tactics can save both time and optimal communication between the parties in future. Why is mediation so timidly implemented within the legislative boundaries, why is it so difficult to put its various types into practice? There can be many explanations: from lack of political will, imperfection of draft laws to special factors, that occur certain fields. In the field of medical care, it seems, first of all, it can be explained by the inability to admit the mistake.

Outstanding surgeon M.I. Pyrohov believed that a young practitioner “needed”, firstly, the ability to admit his/her own mistakes, to analyze specific cases and “to consider as the cause of the mistake his/her

ignorance or inexperience” – only such an ethical position can to some extent redeem the “defect” that happened in medical work. Secondly, recognizing medical errors as an absolute evil, M.I. Pyrohov opposed the recognition of them as inevitable evil, considering it unworthy of the high rank of doctor. Third, the demand to be honest with yourself by M. I. Pyrohov is not heroism and exclusivity, but a professional ethical standard of the doctor. Only the ruthless self-criticism of one’s mistakes can be adequate to pay for their high price. It should be emphasized that it is the legal conflict in this field that starts with the ethical.

Therefore, in the process of mediation, one will have to deal with very complex interests and needs, which will revolve around fundamental values: life and health, honor and dignity, being at the epicenter of acknowledgment and acceptance of professional error, awareness of guilt. The task of the mediator is to train in this steam tank, adjusting their movements, balancing. In this pair, the role of the lead will change, but the parties are in the pair. The skill of balancing will be to alternate: a step forward, perhaps two backwards and further movements, to reach a conclusion.

Among the problems that create obstacles in the way of the spectral embodiment of mediation in Ukraine are the following:

1. Absence of a special law on mediation.
2. The lack of a register of mediators, requirements for them, criteria for the quality of services, which create distrust, complicates the process of finding mediators. The draft law for the specialization of mediators seems to be accurate. Specialization would affect the quality of the mediation process, especially when mediation is applied in a jurisdictional form of protection.
3. The unwillingness of the parties to an alternative way of resolving conflicts, due to a number of factors: from ignorance of the essence of the institute to the opinion of a lawyer who does not always comply with Art. 8 of the Code of Ethics for Lawyers (2017, as amended in 2019).
4. Absence of regulatory fixing of the stage in resolving the conflict in the field of rendering health care as a mandatory pre-trial settlement. It would catalyze alternative ways of resolving conflicts, would serve procedural savings and appeal to the court only in certain difficult cases, and would ensure timely fair satisfaction.
5. Absence of compulsory professional liability insurance in medical practice, which would also provide a basis for alternatives, including mediation.

SUMMARY

The definition of mediation, its role in resolving conflicts in the field of health care, and the types of mediation in this field have been revealed. Foreign experience of mediation in health care has been explored, its different models have been found out. The principles of mediation, which are laid down in both the draft law and the doctrine and create an understanding of the basic system of mediation coordinates, have been created. The author's proposals for the provisions of the agreements based on the results of mediation have been formed and the normative project terms of the agreement have been analyzed.

The problem issues of the use of mediation in criminal proceedings within the jurisdictional form of defense has been revealed. Cases where reconciliation and exemption algorithms can be used based on Art. 46 of the CrC of Ukraine have been outlined. The possibility of combining other non-rehabilitative articles of the CrC of Ukraine, especially Art. 49 of the CrC of Ukraine, with mechanisms of mediation to prevent new civil proceedings. The features of concluding agreements on the reconciliation of the victim with the suspect / accused and the role of mediation in the activation of this process have been highlighted.

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