

## Dr. Hayk Hovhannisyan (Armenia) Lawyer in mediation and other ADR processes: Ethical Challenges

DUAL ROLE: Challenges are closely tied with dual role of lawyer in mediation (i) as party representative and (ii) as mediator – lawyer.

- **Train yourself:** Before engaging in either role, lawyer must make sure he/she is fairly well trained as lawyer – party representative or as the case may be as lawyer-mediator. Party representation in court, arbitration and mediation substantially differs. Whereas in litigation and arbitration lawyers usually take a lead, in mediation lawyers should act as second pilot and leave first row for the client. However, preparing self and client to mediation requires specific set of skills that can be obtained only through special training.

The same is even more true for lawyer – mediator. Even lawyer acting as arbitrator will face serious challenges, should he/she dare to act as mediator without special training. Roles and goals of arbitrator and mediator, nothing to say about party representative are totally different and also require special set of knowledge and skills.

- **Be aware of dual role of lawyer in mediation and ADR:** Lawyer can act as party representative or mediator. Goals, tactics and approaches substantially differ dependent on role. While lawyer shall arrange a “day in court” for his/her client, make sure client selects an optimal candidate as mediator and a trustworthy communication is established between his/her client and the mediator and help client to explore different options in calculating BATNA/WATNA/RATNA, lawyer in mediation shall make sure there is no conflict of interest, fair and neutral procedure is guaranteed and parties are treated equally
- **Advocate mediation and ADR:** Once awareness of mediation and other ADR methods advantages is risen between lawyers, there is a fair chance lawyers will transform from mediation haters into its ambassadors. Professional associations like European Association of Lawyers, national BARs and Mediators SRO’s play important role in rising awareness and advocating mediation.

### ETHICAL CHALLENGES:

- **Competence and diligence before, during and after mediation:** General ethical rule for a lawyer is to the ethical rule to act competently and diligently while advising a client. Whether lawyer considers advising a client on mediation and other ADR methods as an effective mean to resolve a dispute? Under Armenian Advocates’ Code of Conduct, rule 3.7 lawyer *“is obliged to take reasonable steps to solve the dispute through conciliation. Lawyer is obliged to discuss reasonable settlement offer made by the opposite party.”* It is equally banned for a lawyer to initiate artificial disputes.

- **Neutrality** (advise or not? Conflict of interests): What if mediator – lawyer sees non-represented party goes wrong way. Shall he/she advise such party? Can a lawyer act as mediator between existing or ex-client(s)? Disclosures. Maintaining balance of powers.  
A question arises whether impartiality means substantive neutrality. Impartiality implies that the mediator is committed to a process which aids all parties, as opposed to an individual party
- **Mediation: marketing trick or effective DR tool?** Is it ethical for a mediator or lawyer to use mediation process to solicit future business from a party? How lawyer – representative and lawyer – mediator’s roles and goals differ.
- **Additional ethical dilemmas for mediator: When mediator can stop mediating?**  
Report or not lawyer-representative’s violation during mediation or shall confidentiality prevail? Facing fraud by one or both parties. Shall confidentiality be waived if a party alleges intimidation or duress in the mediation proceedings in post mediation process?

Conclusion:

None of the standards provide comprehensive set of guidelines to assist lawyer-mediators in dealing with ethical challenges they confront on a regular basis. When a dilemma arises, it then becomes the task of the lawyer – mediator to work through all applicable standards and rules of conduct in an attempt to comply with each.

Lawyers who mediate should continue with their efforts, working through the appropriate professional organizations, to promote the development of a uniform and comprehensive set of standards to ensure the protection of all participants to the mediation and favorable promotion of both practice of law and mediation.