CHARACTERISTICS OF SOME PRINCIPLES OF NOTARIAL ACTIVITIES DURING MEDIATION

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The scientific article describes some principles of notarial activity during mediation. In particular, the following principles were identified: the principle of neutrality, which embodies the independence and impartiality of the mediator; the principle of confidentiality, which ensures the preservation of information; the principle of trust, which contributes to the establishment of mutual understanding; the principle of accessibility of mediation, which guarantees open access to the procedure; the principle of the rule of law and legality, which emphasizes legal correctness; and the principle of immediacy, which emphasizes direct communication.

One of the fundamental principles of notarial activity is the principle of dispositivity. Its manifestation is the freedom of will of interested persons to change their plans regarding the content and consequences of the notarial act at all stages of the notarial process. Persons exercise this right freely, according to their own beliefs. For example, an heir, endowed with the right to receive a certificate of inheritance after the death of the testator, has the opportunity to renounce his share in favor of another heir during the consideration of the notarial case on the merits. In its content, the principle of dispositivity of notarial activity is consonant with the principle of voluntariness in mediation, actually constituting its part.

According to Art. 44 of the Law of Ukraine «On Notarial Service», the duties of a notary include identifying the true intentions of each party to the transaction that he certifies, as well as checking the absence of objections from the parties to each condition of the transaction. In addition, the legislation provides that «establishing the true intentions of one of the parties to the transaction may be carried out by a notary in the absence of the other party in order to avoid the possibility of third-party influence on its expression of will». In his professional activities, in particular, when certifying a transaction, a notary certifies both the absence of pressure from one party to the transaction on the other, and the presence of free expression of the will of both parties. Therefore, a notary, as a legal specialist, has the opportunity to explain the legal consequences of the agreement based on the results of mediation to each party to the dispute in an accessible manner, making sure that there is no psychological or physical pressure, deception by the other party or third parties, and also checking the true will of the mediation participants.

Keywords: principle, administrative procedures, principles, notarial activities, dispute resolution, alternative methods, notary, mediation.

According to the provisions of the Law of Ukraine "On Mediation", a mediator must have a neutral attitude towards the parties to the dispute and be independent both from them and from state bodies, local self-government bodies, other individuals and legal entities [1]. In order to ensure an effective mediation procedure, the legislator has provided guarantees of independence and neutrality of the person conducting it. Thus, a mediator cannot be a party to the conflict (dispute) and a mediator in one mediation procedure at the same time, advise the parties and propose or make decisions on the merits

of the conflict (dispute), as well as perform the functions of a representative or defender of any party to the dispute in a pre-trial investigation, court, arbitration or arbitral proceedings, if he previously performed the functions of a mediator in resolving such a dispute. The mediator must perform his duties based on the circumstances of the case, taking into account the own opinion of the parties to the mediation, without imposing on them a certain decision regarding the conflict (dispute). The principles of neutrality, independence and impartiality should guarantee equal participation of the parties in the negotiation process. In this case, the parties may change the mediator if, in the opinion of at least one of them, there are grounds that will affect the mediator's further compliance with the specified principles. The mediator may also refuse to conduct mediation if he is aware of his interest in resolving the conflict (dispute) in favor of a certain party to the conflict (dispute) [2, p. 91].

The mediator's vocation is to provide assistance to the parties to the conflict or dispute, to assist them in the process of finding a rational solution to the existing contradictions that will satisfy all participants in the disputed relationship.

Since the participation of the parties' lawyers and psychologists in mediation is optional, there are risks of abuse of one of the parties to the dispute of its rights, especially if the other party has a weak position on the merits of the dispute, an unsatisfactory emotional state, is financially dependent on the other, etc. The main meaning of the principles of neutrality, independence and impartiality of the mediator is that such a person is able to prevent and eliminate such phenomena in the process of resolving the dispute. Although the mediator is not authorized to interfere in the discussion of agreements between the parties, enjoying the trust and respect of the participants in the procedure, he is able to prevent the adoption of unfavorable terms of dispute settlement for one of the parties.

Regarding compliance with the above principles, notarial mediation, in our opinion, will have advantages over the traditional procedure. M. M. Dyakovych characterizes a notary as a person who is trusted by the state, is independent and impartial, has clearly defined competence by law and is subject to disciplinary control [3, p. 25]. In everyday professional activities, a notary ensures a balance of interests of all participants in notarial legal relations. The essence of notarial activity and existing guarantees of the independence of the notary ensure the implementation of the principles under study during his performance of the functions of a mediator.

Confidentiality principle. Domestic legislation on mediation prohibits the mediator and other participants in mediation from disclosing confidential information, i.e. information that became known in the process of preparing and conducting mediation, except for cases when otherwise established by law or all participants in mediation have agreed otherwise in writing. In this case, such information includes information about the offer of the parties to the dispute to participate in mediation, about their readiness for mediation, facts and circumstances, judgments and proposals of the parties regarding the settlement of the dispute and the provisions of the agreement based on the results of the procedure. The mediator is provided with such guarantees to ensure his rights as: exemption from the obligation not to disclose confidential information in the event that a party to the mediation presents him with claims regarding non-fulfillment (improper fulfillment) of the terms of the mediation agreement; immunity of a witness in cases or proceedings regarding information obtained in the process of preparing and conducting mediation [13].

Confidentiality is common to the activities of a mediator and a notary. The requirements for the confidentiality of a mediator are less strict and formalized compared to the requirements for notarial secrecy. According to Art. 8 of the Law of Ukraine "On Notaries", such secrecy includes information obtained during the performance of notarial acts or an application to a notary by an interested person, including information about the person, his property, personal non-property and property rights and obligations, etc. [4].

The law provides for a list of exceptions when the disclosure by a notary of information classified as notarial secrecy does not constitute a violation of this principle. Thus, a notary may, in certain cases, provide documents related to notarial acts performed upon reasonable written requests from the court, prosecutor's office, state and private executor, etc. Like a mediator, a notary has witness immunity with respect to information that is a notarial secret, but the exception to this rule is cases when the notary's testimony is requested by persons on whose behalf or in respect of whom notarial actions were performed.

As we noted earlier, the particular effectiveness of notarial mediation should be predicted precisely in the category of family disputes. Thus, in cases of divorce, spouses mainly avoid public disclosure of the circumstances and reasons for the termination of marriage. Some individuals are afraid to express their feelings during the recording of the court session or in the presence of other persons. Mediation minimizes the risks of public disclosure of such information [5, p. 170]. At the same time, the draft Law «On Amendments to Certain Legislative Acts of Ukraine on Improving the Regulation of Notarial Activities» No. 5644 was adopted in the first reading, which proposes to supplement family legislation with the powers of notaries regarding the dissolution of marriages [6]. Given the specifics of the conditions for a notary to observe notarial secrecy, his observance of confidentiality during mediation is seen as unconditional and one that will inspire the trust of the parties to the dispute who are concerned about the non-disclosure of personal information [14].

The principle of trust. Trust plays a key role in mediation - both at the global level for its rooting in society and for each individual procedure for a specific conflict (dispute). Regarding the social significance of trust for mediation, in this issue R. Havrylyuk turns to the paradigm of solidary trust. Thus, solidary trust is inherent in civil society. It involves trust relationships between individuals and the trust of these individuals in social institutions, including the state. Often, trust is formed within individual social groups and is «grouped». It is the group, not the general public solidarity trust that prevails in Ukraine, which is one of the reasons for the slow introduction of mediation [7, pp. 24-25].

Trust as a principle of mediation consists in the internal volitional attitude of the subjects of relations in the field of mediation to the circumstances that are offered to them, which is expressed in the subject's belief that the actions of the persons he has trusted will correspond to his ideas. Each party to the dispute hopes for a clear and legal settlement of his dispute, trusting the actions of the mediator. In turn, the mediator seeks to demonstrate to the parties to the dispute an unlimited resource of trust and hopes for mutual trust of the parties [8, p. 204].

The notary mediator is obliged to establish equal and trusting relations between the parties to the dispute and with each of the parties separately. A high level of trust between the mediator, who is a representative of the notary, and the conflicting parties can be predicted given the well-known strictness of the notary's ethical rules. In addition, the notary's experience in the field of law and impartiality in his professional activities ensure the attractiveness of notarial mediation services for the parties to the dispute who are turning to alternative dispute resolution for the first time and are seeking to find a mediator they can trust [15].

The principle of accessibility of mediation. Accessibility includes many aspects, to which N. M. Gren rightly refers: the right of citizens to know about mediation; ensuring the possibility of physically receiving mediation services; access to premises for mediation, etc. The author also refers to the principle of accessibility the price for the services of a mediator, which should not be too high, because the low cost of mediation popularizes it in other countries of the world [9, pp. 78-79]. A private notary-mediator is able to satisfy the material and technical conditions for conducting mediation, since the requirements for his workplace, unlike the workplace of a mediator, are directly stipulated by the legislation, namely the "Regulation on requirements for the workplace (office) of a private notary and control over the

organization of notarial activities", approved by order of the Ministry of Justice of Ukraine dated March 23, 2011 No. 888/5 [10]. The amount of remuneration for a notary-mediator should also correspond to the initial principle of accessibility of mediation and, in our opinion, be lower than the amount of payment for notarial actions, since mediation requires relatively lower material and technical resources and costs. Payment for the services of a mediator in notarial mediation may depend on the specifics of a particular conflict (dispute), its complexity, the number of meetings of the mediator with the parties, etc.

The principle of self-determination (independence) and equality of rights of the parties. Issues that are attributed by law to the exclusive competence of the parties to the dispute in mediation include: choosing a mediator; choosing an entity that ensures its conduct; determining the list of issues that will be discussed; determining options for resolving the conflict (dispute); determining the content of the agreement based on the results of mediation, including the terms and methods of its implementation, etc. At the same time, according to Art. 8 of the Law of Ukraine "On Mediation", the parties are provided with equal opportunities in the process of resolving a dispute through mediation, and the obligations of the mediator are the same in relation to all parties [1].

Unlike litigation, in mediation the parties influence the course of the process, fully controlling the decision-making. The parties to the dispute are involved in the mediation process to the extent that they wish, and do not delegate their powers to the mediator. At the same time, the mediator, as noted earlier, does not decide who is "right" in the dispute and does not make any decisions [11, pp. 580-581]. It is the wide range of powers of the parties to the dispute and the limited powers of the mediator that are a manifestation of the principle of independence of the parties to mediation. The independence of the parties involves their activity in the process of resolving the dispute: the parties choose their own positions, set themselves a certain goal, offer possible options for resolving the dispute, and assess the prospects for implementing certain agreements [16].

The principle of equality of the parties is that the subjective rights of each party are equal in content and scope. This principle is both general law and general procedural. There should be no privileges or restrictions based on race, color, political, religious or other beliefs, gender, ethnic and social origin, financial status, language or other characteristics. The parties have equal rights to express their opinions and comments, set the agenda, assess the acceptability of proposals and terms of reconciliation [12, p. 91].

As a general rule, in accordance with the principle of equality, the parties are entitled to the same amount of time, which they spend during individual meetings with the mediator. All participants in the dispute take an equal part in the mediation process, cooperating with each other. It should be noted that, based on the nature of mediation as a social and legal phenomenon, which does not imply the presence of a winner and a loser, the equality of the parties also means their ability to perceive each other's desires, values, proposals, as well as the ability to interact [17].

A similar principle is applied in notarial activities and is based on constitutional and legal norms regarding the equality of all before the law. Participants in notarial proceedings are given equal rights to express their own opinion, comments, proposals and assess their acceptability. Also, persons who apply to a notary for the performance of notarial actions have the right to refuse to perform them before the end of the notarial proceedings. In this case, the notary performs the role of an impartial advisor. We agree with the opinion of Maykut H. V., who claims that the introduction of mediation, which is carried out by a notary, is possible due to the compliance of the basic principles of notarial practice with the principles of mediation [13, p. 458].

Thus, the following principles were examined during the conduct of mediation by a notary: the principle of neutrality, which embodies the independence and impartiality of the mediator; the principle of confidentiality, which ensures the preservation of information;

the principle of trust, which contributes to the establishment of mutual understanding; the principle of accessibility of mediation, which guarantees open access to the procedure; the principle of the rule of law and legality, which emphasizes legal correctness; and the principle of immediacy, which emphasizes direct communication.

References

1. On Mediation: Law of Ukraine dated 16.11.2021 No. 1875-ИХ. Verkhovna Rada of Ukraine: official website. URL: https://zakon.rada.gov.ua/laws/show/1875-20#Text.

2. Prytyka Yu. D. Content and Classification of Mediation Principles. Bulletin of the Ministry of Justice of Ukraine. 2010. No. 10. P. 86-92.

3. Dyakovych M. M. Notarial Act as an Instrument of Protection (Defense) of the Rights and Legitimate Interests of Participants in Civil Legal Relations. Bulletin of the Ministry of Justice of Ukraine. 2013. No. 9. P. 20-27.

4. On Notary Public: Law of Ukraine dated 02.09.1993 No. 3425-XII. Bulletin of the Verkhovna Rada of Ukraine. 1993. No. 39. p. 383

5. Kovalchuk O. S., Samilyk L. O. The Institute of Mediation as an Alternative Form of Divorce Dispute Resolution. Comparative Analytical Law. 2020. No. 1. P. 168-171.

6. On Amendments to Certain Legislative Acts of Ukraine on Improving the Regulation of Notarial Activities: Draft Law of 10.06.2021 No. 5644. Verkhovna Rada of Ukraine: Official Website. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72191.

7. Gavrilyuk R. O. Solidary Trust as a Paradigm of Mediation: Problem Statement. Human Rights and Public Governance: Collection of Materials of the IV International Legal Forum, Chernivtsi, May 21. 2021, Chernivtsi: Yurii Fedkovych National University, 2021. P. 22-26.

8. Shumova K. A. Trust as a Principle of Mediation. Bulletin of the Vladimir Law Institute. 2014. No. 1. P. 203-205.

9. Gren N. M. Implementation of the Human Right to a Fair Trial through the Procedure of Judicial Mediation: Theoretical and Legal Research: Dissertation ... Candidate of Law: 12.00.01 Lviv, 2017. 250 p.

10. On Approval of the Regulations on Requirements for the Workplace (Office) of a Private Notary and Control over the Organization of Notarial Activities: Order of the Ministry of Justice of Ukraine dated 03/23/2011 No. 888/5. URL: https://zakon.rada.gov.ua/laws/show/z0406-11#Text

11. Suleymanova S. R. Basic principles of mediation. Science and public life of Ukraine in the era of global challenges of humanity in the digital era (on the occasion of the 30th anniversary of the proclamation of Ukraine's independence and the 25th anniversary of the adoption of the Constitution of Ukraine): in 2 vols.: materials of the International Scientific and Practical Conference, Odessa, May 21, 2021 / edited by S. V. Kivalova. Odesa: Helvetica Publishing House, 2021. Vol. 2. P. 578-582.

12. Prytyka Y. D. Content and classification of principles of mediation. Bulletin of the Ministry of Justice of Ukraine. 2010. No. 10. P. 86-92.

13. Majkut H. Mediative aspect in notarial activity: some issues. Impact of modernity on science and practice: Abstracts of XII international scientific and practical conference. Edmonton, Canada 2020. pp. 457-459.

14. Sopilko, I. M. State Information Policy of Ukraine: Status and Ways of Implementation: Monograph; Institute of Legislation of the Verkhovna Rada of Ukraine. Kyiv: Lesya, 2014. 423 p.

15. Sopilko, I. M. Lenivskyi R.V. Administrative and Legal Means of Ensuring Lawfulness and Law and Order in Ukraine: Monograph, Ternopil: Osadtsa Yu. V., 2019. 219 p.

16. Tokareva, K. S. (2020). Comparative aspect of dispute resolution with the participation of a judge and with the help of mediation. Scientific Works of the Kyiv Aviation Institute. Series: Legal Bulletin "Air and Space Law", 4(57), 83–88. https://doi.org/10.18372/2307-9061.57.15068

17. Tokareva K.S. - Mediation in disputes regarding healthcare. Our Law. No. 4. 2020. P. 39-46. DOI: 10.32782/NP.2020.4.7

ХАРАКТЕРИСТИКА ДЕЯКИХ ПРИНЦИПІВ ЗДІЙСНЕННЯ НОТАРІАЛЬНОЇ ДІЯЛЬНОСТІ ПІД ЧАС МЕДІАЦІЇ

В науковій статті охарактеризовано деякі принципи здійснення нотаріальної діяльності під час медіації. Зокрема, було виявлено такі засади: принцип нейтральності, що втілює незалежність та неупередженість посередника; принцип конфіденційності, який забезпечує збереження інформації; принцип довіри, що сприяє встановленню взаєморозуміння; принцип доступності медіації, що гарантує відкритий доступ до процедури; принцип верховенства права та законності, що підкреслює юридичну коректність; та принцип безпосередності, що наголошує на прямому спілкуванні.

Одним із фундаментальних засад нотаріальної діяльності виступає принцип диспозитивності. Його проявом є свобода волі зацікавлених осіб у зміні своїх планів стосовно змісту та наслідків нотаріальної дії на всіх етапах нотаріального процесу. Особи реалізовують це право вільно, згідно власним переконанням. Наприклад, спадкоємець, наділений правом отримання свідоцтва про спадщину після смерті спадкодавця, має змогу відмовитись від своєї частки на користь іншого спадкоємця під час розгляду нотаріальної справи по суті. За своїм змістом принцип диспозитивності нотаріальної діяльності співзвучний з принципом добровільності в медіації, фактично являючи собою його частину.

Відповідно до ст. 44 Закону України «Про нотаріат», до обов'язків нотаріуса входить виявлення справжніх намірів кожної із сторін щодо правочину, який він засвідчує, а також перевірка відсутності заперечень у сторін стосовно кожної умови правочину. До того ж, законодавство передбачає, що «встановлення справжніх намірів однієї зі сторін правочину може бути здійснено нотаріусом у відсутність іншої сторони з метою уникнення можливості стороннього впливу на її волевиявлення». У своїй професійній діяльності, зокрема, під час засвідчення правочину, нотаріус засвідчує як відсутність тиску однієї сторони правочину на іншу, так і наявність вільного вираження волі обох сторін. Отже, нотаріус, як фахівець у праві, має можливість доступно роз'яснити юридичні наслідки угоди за результатами медіації кожній стороні спору, переконавшись у відсутності психологічного чи фізичного тиску, обману зі сторони іншої сторони або третіх осіб, а також перевіривши справжню волю учасників медіації.

Ключові слова: *принцип, адміністративні процедури, засади, нотаріальна діяльність, вирішення спорів, альтернативні методи, нотаріус, медіація.*