

COMPETENCY PROFILE OF THE MEDIATOR. SELECTED ASPECTS

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Abstract. In the process of professionalisation of the mediator occupation, it is important to develop the mediator's competency profile and the profile update mechanisms in view of changes taking place in the social environment. A lack of the competency profile may have a negative effect on the quality of mediation proceedings and on the number of agreements concluded. In this study, in connection with the discussion on the professionalisation of the mediator occupation that has been going on in Poland for many years, the concept and essence of mediator's competencies, the relevant current legal requirements for mediators as well as selected results of empirical research on the status of the mediator, in particular the mediator's competencies and their verification, are presented.

Keywords: competencies; competency profile; mediator.

INTRODUCTION

The quality of the mediator – the mediator's competencies – largely determines the quality of the mediation proceedings [Cybulko and Siedlecka-Andrychowicz 2009, 167]. A good mediator knows what to do and does it skilfully, and his or her experience confirms that he or she is not a mediator by chance. A good mediator is the foundation and the critical element of the mediation process.

In this study, we will present the concept and the essence of the mediator competencies and the legal requirements for mediators. In the last part, we will present selected results of empirical research on the professionalisation of the mediator occupation in Poland.¹

¹ The research was conducted by a Research Team including Rev. Prof. Włodzimierz Broński, Ph. D. at the John Paul II Catholic University of Lublin, Marek Dąbrowski, Ph.D., Piotr Sławicki, Ph.D., and Michał Wiechetek, Ph.D., as part of the project entitled "Popularisation of Alternative Dispute Resolution Methods by Improving the Competency of Mediators, Establishment of the National Register of Mediators (KRM) and Information Activities" in the period from 01.11.2020 to 18.06.2021.

1. CONCEPT AND ESSENCE OF THE MEDIATOR'S COMPETENCIES

The mediator is a person who accompanies the parties to a dispute in the process of resolving the dispute through mediation proceedings. Ch. Moore defines the institution of mediation as “the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute” [Moore 2009, 30]. At its core there lies the belief that it can be used to reconcile the parties to a dispute without recourse to court adjudication and reach a mutually beneficial agreement that takes into account the interests of all parties.

The mediator is a third party to the mediation process, i.e. a person not directly involved in the dispute, so that he or she can manage the conflict and, acting as an “outsider”, provide the parties with new insights into their contradictory interests and possible ways to find an adequate solution. However, the owners of the dispute must be ready to include the mediator in the process of finding an agreement, accept the mediator's person and follow the mediator's guidance [ibid., 30-31]. Due to the very nature of mediation, the mediator does not have any authoritative powers, does not resolve the dispute and should remain impartial when conducting mediation (Article 183³ of the Code of Civil Procedure).² This principle is fundamental and is one of the two normative rules determining the nature of the relationship between the mediator and the parties to the dispute, apart from confidentiality (Article 183⁴ CCP). It is an indispensable element in ensuring the proper course of the proceedings, also being a guarantee of the proper performance of the mediator's functions. In addition to impartiality and confidentiality, the mediator is also obliged to observe the rules of neutrality and independence,³ the violation of which could lead to “deformation

² Act of 17 November 1964, the Code of Civil Procedure, Journal of Laws of 2023, item 1550 as amended [hereinafter: CCP].

³ Section 10 of the Recommendation of the Council of Europe No. R (98) 1 distinguishes impartiality and neutrality among the principles relating to the mediator. Similarly, section 4 of the Recommendation of the Council of Europe No. R (2002) 10 and sections 2.1 and 2.2 of the European Code for Mediators also emphasise that mediation should proceed in an independent and impartial manner. The Standards for the conduct of mediation and the conduct of the mediator also distinguish neutrality, next to the principle of impartiality, while Directive 2008/52/EC only indicates the requirement of impartiality of the mediator which is reflected in the wording of Article 183³ CCP. See the Recommendation of the Committee of Ministers of the Council of Europe No. R (98) 1 on family mediation and the Explanatory Memorandum of 21 January 1998, (*Recommendation No. R (98) 1 on family mediation*), <https://www.coe.int/en/web/cdcj/recommendations-resolutions-guidelines> [accessed: 03.10.2024], Recommendation of the Committee of Ministers of the Council of Europe No. R (2002) 10 on mediation in civil law cases of 18 September 2002, <https://www.coe.int/en/web/cdcj/recommendations-resolutions-guidelines> [accessed: 03.10.2024], European Code of Conduct

of the mediation proceedings by influencing their course, including the conduct of the parties or the outcome of the mediation, depreciating the importance of the rule of impartiality” [Dąbrowski 2019, 116]. Thus, a constitutive set of features of mediation is the presence of the mediator whose competencies in mediation proceedings derive, inter alia, from the very nature of this institution.

In Poland, there are 29,147,064 mediators, including approx. 3,500 permanent mediators.⁴ This offers a huge potential but also brings along dangers. The quality and thus the development of mediation in Poland depends on them, their competencies. In the doctrine, more and more is written about the professionalisation of mediation and the professionalisation of the mediator occupation, and in this context, about the mediator’s competencies. What is competency then?

The term “competency” (Lat. *competentia*) means suitability, conformity, authority to act. It is “the extent of someone’s knowledge, skill or responsibility” [Szymczak 1983, 977]. Competency becomes apparent when knowledge is translated into action, that is, into the ability to perform certain activities. It is based on knowledge and experience – it is a learned ability to act appropriately to a situation [North, Reinhardt, and Sieber-Suter 2013, 43].

Competent action is based on the effort and combination of knowledge, practical skills as well as social aspects and behavioural elements such as attitudes, feelings, values and motivation.⁵ By taking multiple actions, a competent person is able to exploit the potential of his or her resources, i.e. the entirety

for Mediators of 21 July 2004, https://e-ustice.europa.eu/63/PL/eu_rules_on_mediation [accessed: 03.10.2024], Standards for the conduct of mediation and the conduct of the mediator, adopted on 26 June 2006 by the Social Council for Alternative Methods of Resolving Conflicts and Disputes associated with the Minister of Justice, <https://www.gov.pl/web/sprawiedliwosc/dokumenty-i-deklaracja-o-stosowaniu-mediacji> [accessed: 23.04.2023], Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial cases (Journal of Laws, EU L 136 of 24.05.2008, pp. 3-8).

⁴ In Poland, one can distinguish up to four categories of mediators. Firstly, there are the so-called *ad hoc* mediators who are neither enrolled in the list of permanent mediators nor belong to any mediation centre and may be selected by the parties to conduct the proceedings on an *ad hoc* basis. Secondly, there are mediators entered in the list of a particular mediation centre who have not applied to the president of the regional court for enrolment in the list of permanent mediators or who do not comply with the criteria provided for them, just because they do not know the Polish language or are under 26 years of age. In the *a contrario* doctrine they were referred to as not being permanent (non-permanent). Thirdly, one can distinguish permanent mediators who have been included in the list by the decision of the president of the regional court and their status has been most extensively regulated. The fourth possible group is family mediators, distinguished under Article 436(4) CCP. See Dąbrowski 2019, 88.

⁵ OECD Annual Report 2003, https://www.oecd-ilibrary.org/economics/oecd-annual-report-2003_annrep-2003-en [dostęp: 28.09.2024], p. 2; Rychen and Hersch-Salganik 2003, 41-62.

of knowledge, skills, attitudes, personality traits, talents etc., combine individual elements into solutions and activate them in order to accomplish an assignment. In doing so, he or she is guided by a specific situation and by principles, values, norms and rules [Hurrelmann 2006, 11-18]. Competency is therefore a multidimensional construct. We can speak of it when a person concerned is able to use his or her knowledge and skills for a specific purpose, develop a realistic plan of action and is able to stay motivated to act and perform tasks successfully and appropriately for the situation.

Competency therefore, is the sum of skills that the mediator needs in order to fulfil his or her role and tasks in mediation proceedings in a professional manner. It includes, on the one hand, knowledge, practical skills - which calls for a practice-oriented process of training and verification/certification of mediators - and experience. On the other hand, competency also means aptitude, i.e. a natural inclination or ability to do something, e.g. to be a mediator. While we can acquire, shape and develop knowledge, practical skills and experience, aptitude comes from our personality. It is therefore more difficult to change but they should be learned. It can be a source of the mediator's strengths but also of potential threats to the course and outcome of mediation proceedings. We distinguish hard competencies, or specialised knowledge in the field of mediation and specific technical skills, and soft competencies, or skills attributed to the mediator's person, such as his or her traits, aptitude, way of acting and perception of the environment.

Mediator's competencies are the ability to combine knowledge, practical skills and experience in such a way that the tasks undertaken in mediation proceedings can be performed independently, autonomously and appropriately. These competencies should be reflected in the mediator's profile. The mediator's competency profile is a detailed description of traits (competencies) of an ideal mediator. This set of qualities (competencies) results from the nature of the institution of mediation, its objectives and the values laying at the foundation of it. If the mediator is to mediate then, as mentioned above, his or her qualities (competencies) should correspond to the nature of this institution and enable it to work in practice. Thus, the competency profile makes it possible to assess more quickly and easily whether a candidate is suitable to be a mediator.

In accordance with Principle V. of the Code of Ethics of Polish mediators adopted on 19 May 2008 by the Social Council for Alternative Methods of Resolving Conflicts and Disputes at the Minister of Justice, "A mediator should not undertake to help resolve a conflict when he or she does not have full confidence in his or her competencies to conduct the proceedings in a fair way"⁶. In this context, the aspect of the competencies

⁶ See <https://www.gov.pl/web/sprawiedliwosc/dokumenty-i-deklaracja-o-stosowaniu-mediacji> [accessed: 04.10.2024].

of the mediator who should be a professional creator of the agreement process having, on the one hand, a vision and concepts of the specific mediation process in a given case and, on the other hand, an active role in the mediation proceedings, gains significant importance for the proper conduct of the proceedings and for increasing the chances that the disputing parties have to reach an agreement [Pakuła 2023, 118].

2. LEGAL REQUIREMENTS FOR MEDIATORS

In Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, the mediator means “any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation” (Article 3 b). A point of reference for mediation practitioners and theorists is also the definition of the mediator formulated in the *Standards for the Conduct of Mediation and the Conduct of Mediators* adopted by the Social Council for Alternative Methods of Resolving Conflicts and Disputes at the Minister of Justice on 26 June 2006 defining a mediator as “a professionally trained, independent and impartial person who helps parties deal with the conflict with their consent.”⁷ The definitions cited above refer both to the manner in which the mediator’s role is played and to the need to possess relevant competencies. They are reflected in the current legal provisions which constitute the so-called boundary conditions for playing the role of a mediator and the process of his or her professional preparation to play this role [Cybulko 2023, 111-12].

The legal status of the mediator in the context of his or her professionalisation has been the subject of analyses and regulations at the European and EU law level for years. Recommendation No. R (98) 1 of the Council of Europe has highlighted that Member States should take appropriate steps to create mechanisms for the selection, qualification and standards that mediators should comply with.⁸ This position has been maintained and repeated in Recommendation No. R (2002) 10 of the Council of Europe. It has recommended measures to promote standards for the selection, responsibility and qualification of mediators,⁹ emphasizing the need for regulating their status more broadly. Similar assumptions have been included in clause 17 and Article 4 of Directive 2008/52/EC where it has been indicated that

⁷ See <https://www.gov.pl/attachment/e7e44ed1-085b-4265-9802-a9f930eff7a5> [accessed: 04.10.2024].

⁸ Clause II letter c.

⁹ Clause V training and responsibility of mediators.

Member States should ensure to the parties that the mediation process is conducted effectively, impartially and competently. The content of the cited documents therefore indicates that their common underlying assumption is professionalisation of services provided by mediators such as specific competencies as well as mechanisms for their selection, standards of conduct and rules of liability.

The need to regulate the status of the mediator more broadly and to professionalise it has also been recognised, *inter alia*, in the text of the statement of reasons for the Regulation of the Minister of Justice of 1 August 2005 on the establishment of the Social Council for Alternative Methods of Resolving Conflicts and Disputes.¹⁰ It emphasises that “persons to whom ADR has been entrusted to be conducted as part of the court proceedings must have proof of qualification, training or relevant experience which is assessed by the court each time or have a recognised official accreditation.”¹¹ Furthermore, since “courts refer parties to mediation, the state has an obligation to guarantee to the parties the highest quality of services provided by professional mediators.”¹²

It should be noted that the requirements set for mediators vary to some extent depending on the branch of law. The Code of Civil Procedure formulates minimum functioning criteria for all categories of mediators (Article 183²(3¹)). It stipulates that “when referring the parties to mediation, the court shall appoint a mediator with adequate knowledge and skills in the field of mediation in cases of a given type” (Article 183⁹(1) CCP) and the mediator may be a natural person having full legal capacity and exercising full public rights (Article 183²(1) CCP), except for a professionally active judge under the exemption in Article 183²(2). *De lege lata*, therefore, only a natural person can be a mediator.¹³ In criminal cases, on the other

¹⁰ An important source of knowledge on the status and competencies of the mediator are the so-called environmental regulations, i.e. documents containing regulations adapted by mediators themselves, such as professional and ethical codes, standards for the conduct of mediation or mediator’s training standards. They standardise the matters related to the mediator’s competencies in a more concrete manner but do not have a directly binding legal force. They do, however, have an effect on the way in which the Polish mediation environment functions. Therefore, regulations such as: the Code of Ethics for Polish Mediators of 2008, the Standards for the Training of Mediators of 2023 or the Standards for the Conduct of Mediation and the Conduct of Mediators of 2016, see <https://www.gov.pl/web/sprawiedliwosc/dokumenty-i-deklaracja-o-stosowaniu-mediacji> [accessed: 24.10.2024] provide information allowing to make complete the overall picture of the mediator’s status and competencies [Cybulko 2023, 115].

¹¹ Statement of Reasons for the Regulation of the Minister of Justice of 1 August 2005 on the establishment of the Social Council for Alternative Methods of Resolving Conflicts and Disputes at the Minister of Justice, Journal of Laws No. 5, item 19, p. 7.

¹² Statement of Reasons for the amendment of the CCP of 10 September 2015, p. 14.

¹³ The provisions of the CCP do not require a mediator to hold Polish citizenship.

hand, a mediator can also be an institution that has been legally authorised to conduct mediation. The Regulation of the Minister of Justice of 7 May 2015 on mediation proceedings in criminal cases requires that the mediator, among other things, has “skills and knowledge in the field of mediation proceedings, resolving conflicts and establishing interpersonal contacts” (clause 6).¹⁴ Mediators in criminal cases are also subject to additional requirements set out in para. 4 of this Regulation: holding citizenship of Poland, of another European Union Member State or of a Member State of the European Free Trade Association (EFTA) – a party to the European Economic Area Agreement or of the Swiss Confederation, or of another state, if the right to take up employment or self-employment in the territory of the Republic of Poland is granted under the provisions of European Union law) and giving a guarantee of due performance of their duties.¹⁵ As in civil and criminal proceedings, also in administrative proceedings, according to Article 96d(2) of the Code of Administrative Procedure,¹⁶ a mediator “having adequate knowledge and skills in the field of conducting mediation in cases of a given type” shall be appointed to conduct mediation. A mediator can be a natural person who has full capacity to perform legal acts and can exercise full public rights, in particular a mediator who has been entered in the list of permanent mediators or in the list of institutions and persons authorised to conduct mediation proceedings kept by the president of a regional court or in the list kept by a non-governmental organisation or a university, information about which has been provided to the president of a regional

The requirements for permanent mediators are, on the other hand, specified in the Act on the Common Court System Law of 27 July 2001 (Journal of Laws of 2024, item 334). A permanent mediator can be a person who complies with the conditions set out in Article 183²(1) and (2) CCP; has knowledge and skills necessary to conduct mediation; is at least 26 years of age; speaks the Polish language; has not been validly convicted of an intentional offence or an intentional fiscal offence; and has been entered in the list of permanent mediators kept by the president of the regional court (Article 157a).

¹⁴ Journal of Laws of 2015, item 716.

¹⁵ In para. 4 of the Regulation of the Minister of Justice of 7 May 2015 on mediation proceedings in criminal cases, the following requirements are additionally listed for a mediator in criminal cases: exercises full public rights and has full legal capacity; is at least 26 years of age; knows the Polish language in speaking and writing; has not been validly convicted of an intentional offence or an intentional fiscal offence; has skills and knowledge necessary to conduct mediation proceedings, resolving conflicts and establishing interpersonal contacts; provides the guarantee of due performance of duties; has been entered in the list of persons authorised to conduct mediation proceedings in criminal cases in the regional court. On the other hand, pursuant to para. 5 of this Regulation, mediation proceedings may not be conducted by an active judge, prosecutor, prosecutor’s assessor, trainee of the listed professions, juror, court registrar, judge’s assistant, prosecutor’s assistant and officer of an institution authorised to prosecute crimes.

¹⁶ Act of 14 June 1969, the Code of Administrative Procedure, Journal of Laws of 2024, item 572 [hereinafter: CAP].

court (Article 96f(1) CAP). On the other hand, the mediator cannot be an employee of a public administration body before which the proceedings are conducted (Article 96f(3) CAP). In a situation where the body conducting the proceedings is a participant in mediation, the mediator can only be a person who has been entered in the list of permanent mediators or in the list of institutions and persons authorised to conduct mediation proceedings or a mediator entered in the list (Article 96f(2) CAP).

As the above analysis shows, apart from the above-described formal requirements for mediators conducting mediation proceedings to resolve various types of disputes, the legislator does not regulate the requirements for the mediator to possess relevant competencies. It merely assumes that the mediator should have them.

3. PROFESSIONALISATION OF THE MEDIATOR OCCUPATION IN POLAND

There are significant differences among countries in terms of their approach to the professionalisation of the mediator occupation. Legal regulations applicable in this respect in different countries “can be situated on a continuum, one end of which is determined by the belief that the state should verify and control the competencies of mediators (full professionalisation of mediator’s services) while the other end marks the position according to which mediation is one of many services that should be subject to natural market verification (complete freedom to provide mediation services)” [Cybulko 2023, 128].¹⁷ The Polish approach to the mediator’s professionalism places our country in the middle of this continuum because mediation can be conducted by any mediator who meets at least the minimum formal requirements.

There is no doubt that high requirements for a mediator in terms of education, practice and training in mediation as well as ethics are necessary to conduct effective and efficient mediations [Gmurzyńska 2007, 367]. While appreciating the importance of the mediator’s personality, his or her individual aptitude, attention should also be paid to the competencies that he or she should possess and the need to improve and verify them. In fact, “the mediator’s experience, qualifications, knowledge as well as aptitude and abilities are of paramount importance for the success of the mediation” [Gonera 2005, 78].¹⁸ Considering this, a discussion on the professionalisation

¹⁷ The author discusses the ways in which mediator status is regulated in Austria, Belgium, France, Ireland, Lithuania, Germany, Sweden, Italy and Poland on pages 17-126.

¹⁸ See Bobrowicz 2004, 31; Maślikowska 2008, 164-67; Korybski 2019, 125-39; Bieliński 2008, 12-21; Białecki 2012, 104-13 and others.

of the mediator occupation and mediation services has been taking place in Poland since at least 2005. In particular, the amendments to the Code of Civil Procedure and the Common Court System Law were particularly important for this discussion in the doctrine and literature.¹⁹ The Statement of Reasons to the draft Act of 10 September 2015 on the amendment of certain acts in connection with the promotion of amicable dispute resolution methods emphasises the need to define the conditions to be met by mediators and to guarantee the possibility of their verification. The key provisions were included in the Act on the Common Court System Law where a chapter was added in Section IV: 6a Permanent mediators (Articles 157a-157f).

In order to ensure the quality and effectiveness of the mediation service, it becomes necessary to regulate the status of the mediator in a proper way. In Poland, this regulation is heterogeneous because permanent and *ad hoc* mediators as well as mediators of different specialisations (e.g. civil, criminal, administrative mediation) are distinguished, with no uniform criteria established for particular categories. Furthermore, the regulation of the institution of mediation is scattered in many legal acts and is not of a comprehensive nature.²⁰ There are separate legal regimes binding for different types of mediation depending on the branch of law into which they fall. Hence, numerous statements made by respondents to the research conducted as part of the KRM project show the need for a separate law on mediation [Broński, Dąbrowski, Sławicki, et al. 2021, 18].²¹

The professionalisation of the mediator occupation calls for taking a holistic view of the mediator's training and competency verification process.²² First of all, a common range of competencies should be established for all groups of mediators. In the light of the research conducted as part of the KRM project, every mediator should have three blocks of competencies. Block one comprises contents related to the psychological field

¹⁹ Act of 27 July 2001 on the Common Court System Law, Journal of Laws of 2024, item 334 [hereinafter: CCSL]. Amendments to the CCP and CCSL were introduced by the Act of 10 September 2015 on the amendment of certain acts in connection with the promotion of amicable dispute resolution methods (Journal of Laws of 2015, item 1595).

²⁰ Issues referring to mediation and the mediator are scattered in e.g. Belgium and France.

²¹ Acts on mediation laws have been adopted e.g. in Austria, Ireland, Italy, Lithuania, Germany and Sweden. In general, acts on mediation law regulate issues referring to mediation in civil cases. Issues concerning mediation in non-civil cases are generally enshrined in other laws. It should also be emphasized that acts on mediation law are not usually comprehensive.

²² In Poland, the legislator has not stipulated any requirements for the training of mediators but only limited itself to a general formulation of the mediator's competencies as possessing knowledge and skills in the field of mediation. Only mediators conducting mediation in divorce and separation, family and guardianship cases have been treated differently. Pursuant to Article 436(4) CCP, courts should refer parties to mediation to a permanent mediator who has theoretical knowledge, particularly having a degree in psychology, pedagogy, sociology or law along with practical skills in mediating family cases.

(e.g. psychology of conflict, communication, assertiveness, dealing with emotions). The mediator should not focus exclusively on the organisation and conduct of the mediation proceedings but should use the knowledge in the field of psychology in these proceedings. The mediator does not need to have a degree in psychology but a basic knowledge in this field is desirable. Block two comprises the mediators' basic knowledge of the law. Among other things, it is essential when drafting a mediation settlement agreement which should not contain unlawful provisions. Finally, the third block is the workshop – methods and techniques used in mediation work. The mediator should therefore have interdisciplinary knowledge to help him or her fully embrace different mediation situations. Some of these competencies should be acquired during training and professional courses preparing for the mediation occupation but elements of knowledge and skills acquired while accumulating life experience are also important. Competencies that are difficult to develop in a short training course are also important, relating to personal culture, empathy, ability to conduct dialogue and adapt one's behaviour to the parties in mediation, and knowledge of and adherence to ethical principles in mediation proceedings [ibid., 30-31].

The lack of a unified training system and uniformity of requirements results in mediators being prepared for their professional roles to varying degrees. A large number of respondents emphasised that a mediators demonstrate low level of legal knowledge which is a significant deficiency (e.g. lack of knowledge on how to correctly prepare settlements). This is particularly the case for those who have not graduated from law schools. In contrast, those graduating from law faculties and undertaking mediation activity experience deficiencies in aspects of soft skills related to contact with parties taking part in mediation sessions. Mediators also lack skills related to persuading clients to end their dispute amicably, so mediation is often reduced to negotiation rather than a joint search for a satisfactory solution. Therefore, the mediator training should include content on psychological aspects, including mediation techniques, styles of communication with clients in mediation, empathy in mediator's work and legal aspects, in particular drafting settlement agreements and changes in the provisions of the law. It is also worth using the training to make mediators familiar with tools from other professional areas that can be innovatively used in mediation (e.g. SWOT techniques, SMART, brainstorming). Finally, there is a need to develop mediators' knowledge of new phenomena that have been increasingly emerging in course of mediation. These include issues such as non-heteronormative partnerships, gender in mediation in the context of stereotypes, parental alienation or alternating custody [ibid., 31-32].

In view of the above, the new Standards for the Training of Mediators developed this year by the Social Council for ADR at the Minister of Justice

(23.03.2023) should be assessed positively.²³ They set out standards for the base training of mediators and recommend six specialised training courses. Each training – both basic and specialised – consists of parts on legal issues and psychological issues concerning the conduct of mediation, including communication, conflict and negotiation issues). The ADR Board recommends that mediation simulations, discussions and feedback should comprise about 50%, exercises and discussions about 40%, and lectures and presentations a maximum of 10% of the time. Recommended didactic methods include: mediation simulations, case study analyses, mediation demonstrations, individual and group exercises, participant discussions and reflections, questionnaires, tests, theoretical lectures and presentations. Finally, the Standards emphasise that specialised training prepares mediators for validation under the Integrated Qualification System.²⁴

However, it should be noted that the Standards discussed above are not binding regulations. They only serve as recommendations, good practices. There is still no sufficient regulation ensuring an adequate level of preparation for the function, both for permanent mediators and for other groups of mediators.

Another obstacle in the area of professionalisation of the mediator occupation in Poland is the ease with which random people can acquire the status of the permanent mediator.²⁵ The criteria for entry in lists of mediators are too general and not uniform.²⁶ As a result of that, people who have no adequate qualifications and no mediation experience are included in the lists of mediators.²⁷

²³ See <https://www.gov.pl/web/sprawiedliwosc/miedzynarodowe-i-polskie-standardy-dotyczace-mediacji> [accessed: 05.10.2024].

²⁴ See <https://kwalifikacje.gov.pl> The profession of the court mediator has been included in the Classification of Professions and Specialities (under number 263507) maintained by the Ministry of Labour, Family and Social Policy. Mediator's qualifications, including the conduct of court and out-of-court mediation in civil cases, the conduct of court and out-of-court mediation in business cases, the conduct of court and out-of-court mediation in family cases and the conduct of mediation in criminal and misdemeanour cases are also certified under the Integrated Qualifications System. However, this has not translated so far into statutory requirements set for mediators, in particular not even for judicial mediation conducted within the justice system. Works have been underway to develop a national register of mediators since 2020.

²⁵ Additional confusion comes from the existence of different lists, e.g. the list of permanent mediators, the list of mediation centres or the list of mediators in the field of collective disputes.

²⁶ In this study, we will limit ourselves to discussing only the issue of the list of permanent mediators maintained by Presidents of Regional Courts.

²⁷ The way in which the professional qualifications of the mediator are determined has been criticised by both mediation theorists and practitioners. Both judges and prosecutors as well as a large number of practising mediators negatively assess the current methods used to determine the minimum qualifications of mediators. The criteria are assessed as vague and too liberal [Pękala 2017, 488-502].

The purpose of lists of mediators is also unclear as it comes down to the registration of mediators while not confirming the professionalism of mediators. Lists of mediators are also of no practical significance as it is not uncommon for judges to refer cases to mediators outside the list of permanent mediators. Furthermore, permanent mediators are sometimes given cases in a field of specialisation other than that disclosed in the list of permanent mediators, or judges refer cases only to mediators with whom they have worked previously. Thus, the current regulation is insufficient and the criteria for inclusion in the list of mediators are imprecise, non-uniform and too general [Broński, Dąbrowski, Sławicki, et al. 2021, 17-18].

Another disadvantage of the current regulation is the lack of instruments enabling the president of a regional court to actually verify the applicant for entry in the list of mediators. This particularly applies to the mediator's experience. It is also problematic that the entry is made solely on the basis of documents without a verification process that consists in a personal meeting between the president of a regional court and the candidate for a permanent mediator. There are also no instruments to which mediation coordinators are entitled to verify whether mediators perform their duties correctly. In many cases, the entry is made somewhat automatically [ibid., 18-19]. It is therefore necessary to amend the Regulation of the Minister of Justice of 20 January 2016 on the maintenance of the List of Mediators.²⁸ The introduction in Article 157a, clause 2 of the Act on the Common Court System Law of the requirement to have knowledge and skills assessed in the light of the documents listed in para. 5, section 1 of the regulation on the maintenance of the list of mediators does not constitute a precise criterion that would allow for a real verification of the level of preparation of permanent mediators and does not guarantee that the level of quality of mediation services provided would increase. In fact, the subjective assessment made by the Presidents of Regional Courts becomes a decisive measure in assessing the level of knowledge and skills. This, in turn, generates a risk of discrepancies in the assessment of the level of preparation of persons applying for entry in the list of permanent mediators. The lack of precise regulations and objective measure tools relating to the level of required knowledge and skills, including a uniform certification system, should be assessed negatively.

CONCLUSIONS

In conclusion, it should be noted that the process of professionalisation of the mediator occupation implies the necessity to have a mediator competency profile, to update it and to develop mechanisms for solutions

²⁸ Journal of Laws of 2016, item 122.

aimed at filling up competency gaps. It should be shared by all categories of mediators and be reflected in the mediator training programmes and processes of verification of his or her skills and formation of appropriate attitudes. Following the example of some European countries such as e.g. the Netherlands, Germany, Italy, Spain, the profession of the permanent mediator should be comprehensively regulated by precisely defining the mode of acquiring qualifications along with a uniform certification and competency verification system. This will result in an increase in the quality of the mediator, which will unlock the potential of mediation and increase the level of its use.

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