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## MEDIATION IN HEALTH SERVICES

**Summary.** The article is an attempt to emphasize a new approach to solving disputes in the field of medical services. It contains basic information on mediation and presents its beneficial effect in relations between conflicted parties. The significant attention is put on mediation's usefulness in conflicts between a doctor and a patient, especially in cases of a so called medical error.

**Keywords:** mediation, innovation, alternative, medical errors.

## MEDIACJA W SŁUŻBIE ZDROWIA

**Streszczenie.** Artykuł jest próbą zaakcentowania nowego podejścia do rozwiązywania sporów w obszarze funkcjonowania służby zdrowia. Zawiera podstawowe informacje dotyczące mediacji i ukazuje korzystny wpływ tej metody w relacjach między skonfliktowanymi stronami. W szczególności zwrócono uwagę na przydatność oraz wykorzystanie mediacji w sporach pomiędzy lekarzem a pacjentem, zwłaszcza w przypadkach wystąpienia tak zwanego błędu w sztuce medycznej.

**Słowa kluczowe:** mediacja, innowacja, alternatywa, błąd w sztuce medycznej.

### 1. Introduction

An essential quality of modern medicine is a constant appearance of innovative methods of treatment which are clearly related to the development of technology and the use of various diagnostic devices. In contrast to last century, modern medicine is based on computer systems, which causes that "human body is treated as 'a machine', while a medical

intervention may be compared to an activity connected with its repair”<sup>1</sup>. If so, a social conviction that at present providing medical services must be at a high level when it comes to knowledge as well as a technique cannot be surprising.

Moreover, patients’ greater awareness of rapidly growing possibilities of medicine and patients’ expectations that these possibilities will be used on them cause that high standards are set on modern doctors. People frequently expect “miraculous recovery” as if doctors had an absolute power over illnesses and death<sup>2</sup>. Such excessive patients’ expectations stem from using more and more effective methods of treatment which lead to a cure or a prolonged life. However, when it does not happen, a patient or their families display negative emotions as disappointment, anger, and even hatred towards a doctor.

Such a state of matters causes that patients’ emotions become more important than rational thinking. Consequently, all the arguments that aim at explaining a particular situation are not positively received by patients. It especially happens when a patient is convinced that they have been disadvantaged by a doctor in the aftermath of a medical error. It seems that a growing number of cases dealing with medical errors is caused by a changing approach of doctors towards patients. Because of use of modern specialist equipment, doctors more often rely firstly on medical devices, while they do not combine adequately medical results with their skills, knowledge, and what is very important, with a patients’ observation and contact with them.<sup>3</sup> This leads to a growing number of cases which are directed to courts by patients. These cases are generally very complicated which prolongs the time of their examination. Most often neither side of the conflict is satisfied with the court’s decision.

An alternative to court proceedings would be introducing to the Polish law new regulations in resolving cases which deal with so called medical errors<sup>4</sup>. In 2012 regional committees on deciding medical occurrences were appointed which aim at a “conciliatory” approach in disciplinary proceedings against doctors. However, the legislator does not clearly defines tools which can be used while resolving a conflict in a conciliatory manner.

Recently, mediation has become more visible as a conciliatory manner of resolving conflicts. Life in a today’s world, more and more complicated, various needs that people want to realize as well as a lack of skills when it comes to compromising cause that areas in which mediation is advisable are becoming larger. Undoubtedly it also stems from an ongoing globalization process in which “new human rights and old ones are modified”<sup>5</sup>; thus, mediation may be an effective panacea for eliminating and softening arising conflicts.

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<sup>1</sup> Tobiasz-Adamczyk B.: *Relacje lekarz – pacjent w perspektywie socjologii medycyny*. Uniwersytet Jagielloński Publishing, Kraków 2002, p. 8.

<sup>2</sup> Idem, p. 8.

<sup>3</sup> Gmurzyńska E., Morek R.: O problemach dotyczących rozstrzygania spraw o błędy lekarskie i o roli mediacji. *Quaterly ADR Arbitration and Mediation* No. 3 (15)/2011, p. 43.

<sup>4</sup> Idem, p. 43.

<sup>5</sup> Durcik V.: *Etyka praw człowieka z punktu widzenia globalizacji*, in: *Globalne konteksty poszanowania praw i wolności człowieka*, ed. A. Kuzior, Department of Social Applied Scienses Faculty of Orgnization and Management of Silesian Polytechnic Institute, Sosnowiec 2011, p. 23.

According to respect of human rights' dignity, resolving conflicts by mediation happens in the atmosphere of mutual understanding, without the need of using more drastic methods, where a common solution is worked out by both sides and happens at the level winner-winner.

I am convinced that mediation as a perfect instrument for resolving conflicts may be effectively used in a relation doctor-patient.

## 2. Definition of mediation

Mediation is a way of resolving disputes in which a mediator, who is neutral towards parties of a conflict and a conflict itself, helps them to come to an understanding without imposing any solutions to either party of a conflict.

Attempts of defining the term „mediation” may be found in many publications. An essence of mediation is very adequately presented in R. Morek who says that “in the broadest sense mediation aims at helping parties in finding a satisfactory solution in a voluntary, confidential and informal proceeding with the presence of an impartial agent – a mediator”<sup>6</sup>.

It stems from the essence of mediation that it is conducted in a conflict situation which is characterized by a lack of communication, which leads to an obstruction in resolving a problem.

Legal provisions on mediation first appeared in Poland in the 1990s in an act on resolving collective conflicts<sup>7</sup>, then in Code of Penal Procedure, while recently this out-of-court method of resolving conflicts has been introduced to Code of Civil Procedure. “By amending code of civil procedure in an act dated on 28 July 2005 on the change of the act – Code of Civil Procedure and some other acts, the legislator has introduced an institution which enables parties' reconciliation, resolving a dispute (compromise) with a tight engagement of their own actions and a presence of a third party (a mediator) which is not a court”<sup>8</sup>. Due to the fact that a court proceeding does not favor an open dialogue between parties, all cases decided by a court lead to a solution winner-loser. Therefore, in this combination one party always feels disadvantaged and unsatisfied. In a mediation process each party achieves a winner-winner level.

Mediation is not only an intervention in a conflict, but may also establish or foster relations based on a mutual trust and respect between parties apart from resolving a concrete problem. From a patient's perspective a case is not only about a compensation in the form of damages, but also about information why an error happened, confessing to an error and often

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<sup>6</sup> Morek R.: *Mediacja i arbitraż (art. 1831-18315, 1154-1217 Code of Civil Procedure) Komentarz*, C.H. Beck, Warszawa 2006, p. 31.

<sup>7</sup> *Journal of Law* from 1991, No. 55, position 236.

<sup>8</sup> Cebula R.: *Mediacja w polskim prawie cywilnym. Stan prawny na 1 grudnia 2012 r.* Ministerstwo Sprawiedliwości. *Mediacje w polskim systemie prawa*, Warszawa 2012, p. 3.

sincere apologies. For an opposite party very important is a conciliatory approach to resolving a conflict. For a doctor, a court proceeding may ruin his reputation even when he wins the proceeding.

### 3. Principles of mediation

An absolute use of basic principles of mediation allows realization of its essential aim which is a compromise between parties that is a necessary condition of an effective conflict resolution.

An invaluable impact on mediation's efficiency have principles of a mediator's voluntarism, confidentiality and impartiality

A principle of voluntarism in mediation reflects itself in the fact that in contradiction to a court proceeding, which course is regulated by legal provisions, parties decide on the course and organization of mediation on their own as well as on the person of a mediator.

Using a voluntarism principle, a mediator has to get an agreement for a mediation conduct before the first session. This principle also gives parties which take part in mediation a right to resign from it on its every stage without bearing any consequences.

Thanks to a confidentiality guarantee, parties may lead an open discussion without a fear that their arguments can be used against them in the future.

A mediator is obliged to keep in confidence all the facts that he was acquainted with during the course of mediation. This obligation applies both to successful mediations, which have an effect in a compromise, and those unsuccessful. Article 183 § 2 of Code of Civil Procedure clearly states the use of this principle: "a mediator is obliged to keep in confidence facts that he was acquainted with in relation to leading mediation unless parties release him from this obligation".

An impartiality principle obliges a mediator to treat both parties equally, without favoring any of them<sup>9</sup>. According to this principle, a mediator cannot act in a case in which at least one party is his relative, kinsman, or friend.

A mediator makes it easier for parties to come to a conclusion by creating a safe and confidential atmosphere, is neutral and does not impose his point of view or solutions, is impartial and takes care of parties' equality in the course of the whole mediation process. A mediator, as a person who is not directly involved in a conflict, often provides parties with a

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<sup>9</sup> Waszkiewicz P.: Zasady mediacji. in: Mediacje Teoria i praktyka, ed. E. Gmurzyńska, R. Morek, Wolters Kluwer Polska, Warszawa 2009, p. 96.

new look on issues that divide them and helps them in working out their mutual relations in order to resolve a problem<sup>10</sup>.

The use of above principles gives a high degree of guarantee that mediation will be successful. This statement is not only a result of a wellbeing of mediation's supporters who state that it is an important way of resolving conflicts, but also stems unambiguously from a conducted research. A table below is the best evidence of it.

Table 1

Interest of a doctor/ a medical unit	Mediation	Regional committee	Court proceeding
Średni czas trwania	1 – 30 days	1 – 120 days	~580 – 830 days
Impact on a pace and a course of procedure	Very high	Very high	None
Impact on results	Very high	Very high	Small
Confidentiality	Total	Total	None
Discretion	High	High	None
Risk of a loss of reputation of a doctor and a medical unit	Small	Small	High
Financial costs	Small	Small	High
Risk of negative psychic effects	Small	Small	High
Saving a bond "patient-doctor"	Possible	Possible	Impossible

<sup>11</sup> Source: Report „Doing Business 2012”, World Bank and IFC, p. 128.

While analyzing information from the table, it should be emphasized that mediation is almost always quicker than a court proceeding. What is also important, it is cheaper for parties. An understanding worked out during mediation always takes into consideration interests of both parties, which gives a chance of preserving a previously existing bond between patient-doctor in contradiction to a court proceeding. Another argument which says that mediation is more effective way of solving a “doctor-patient” conflict is its significant impact on the duration of mediation's result. In a court proceeding a decision, surely after a profound recognition of a case, is imposed on parties. However, in mediation terms of the agreement, which are accepted by both parties, are more satisfactory and stable for them, as

<sup>10</sup> Moore Ch.W.: *Mediacje praktyczne – strategie rozwiązywania konfliktów*. Wolters Kluwer Polska, Warszawa 2009, p. 30.

<sup>11</sup> <http://www.gazetalekarska.pl/xml/nil/gazeta/komunikaty/k2012/mediacja>, source: report „Doing Business 2012, World Bank i IFC, p. 128.

they take into consideration interests of both parties. It raises significantly the chances that parties will obey commonly worked out terms of a mutual agreement.

Moreover, a common agreement worked out in mediation includes psychological aspects, which is related to the fact that parties of a conflict may adjust an agreement's content to specificity of their situation<sup>12</sup>. As a consequence, they may avoid appearance of negative psychological effects.

#### 4. Mediation in health services

The essence of mediation is concluding an understanding between conflicted parties which is mutually accepted. Moreover, it takes into account interests and needs of both parties, while contributing to “self-knowledge, self-betterment and improvement of mutual relations”<sup>13</sup>.

Complaints against doctors do not always have their source in doctors' misconducts, as a very important role plays medical personnel whose actions, indispensable to right diagnostics and treatment, may contribute to errors<sup>14</sup> as well as behavior of a patient himself who do not obey doctor's prohibitions and orders. In a difficult position there are doctors who are vulnerable to accusations when a patient lacks an objective approach to results of his treatment which appear to be different than expected. They will thus understand this situation as a medical error<sup>15</sup>. In my opinion, this situation is well suited for mediation with in which chances of a parties' understanding are real. A mediator cannot guarantee parties that they will come to a complete understanding in the process of mediation; however, he gives a guarantee that both parties will listen to each other during mediation and they will come from “a fight over reasons and image to a talk over facts, emotions and values”<sup>16</sup>. Mediation creates for conflicted parties who take part in a mediating meeting conditions in which a real dialogue may appear. Consequently, there comes into being a new and different from a previous one arrangement of mutual relations between parties which contributes to a conciliatory resolution of a dispute.

According to binding provisions pursuant to article 113 of an act dated on 2 December 2009 on Medical Councils, both Screener of Professional Liability during an actual proceeding, and Medical Court during a proceeding before a medical court have a possibility

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<sup>12</sup> Skarb mediatora. Wybór tekstów. „Partners” Polska Foundation, Warszawa 2006, p. 24.

<sup>13</sup> Kalisz A., Zienkiewicz A.: Mediacja sądowa i pozasądowa, Wolters Kluwer, Warszawa 2014, p. 42.

<sup>14</sup> Marek Z.: Błąd medyczny, odpowiedzialność etycznie – deontologiczna i prawna lekarza. Medical Publishing, Kraków 2007, p. 8.

<sup>15</sup> Idem.

<sup>16</sup> <http://prawo.rp.pl/artykuł/1131205>

to direct a case to mediation with the consent of both parties or from an initiative of a disadvantaged and an accused.

According to provisions on a mediation proceeding, it 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, with the exception of the one having a function of Screener for Professional Liability, his substitute and a member of a medical court. Without a doubt, a doctor chosen as a mediator is a reliable person, however, I have some concerns when it comes to his impartiality because of the fact that he is both a doctor and a mediator.

A mediation proceeding is defined in articles of Code of Penal Proceedings, so a mediator acts as given:

He receives information from acts of a case in the scope indispensable for conducting a mediation proceeding.

As soon as he receives information on directing a case to a mediation proceeding, he makes contact with a disadvantaged and an accused to establish a place of a meeting with each of them.

He conducts with a disadvantaged and an accused an individual meeting to inform about an essence and rules of a mediation proceeding and their rights.

He conducts a mediation proceeding in the presence of both parties.

He helps with a conclusion of a possible agreement.

He prepares a report from the course of a mediation proceeding and its results<sup>17</sup>.

Thanks to the change of a legal act, there are no formal barriers in using mediation in health services. Therefore, there comes a question about the level in which mediation is used. Given below tables are going to show how the practice looks.

Table 2

<b>Cases examined by Regional Screener of Professional Liability</b>				
<b>Years</b>	<b>I term from 1 January to 30 June</b>		<b>II term from 1 July to 31 December</b>	
	Closed cases	Mediation	Closed cases	Mediation
2011 r.	1788	1	1610	2
2012 r.	1584	3	1553	0
2013 r.	1561	3	1737	5
2014 r.	1815	7	-	-

Sources: Report from action of The Supreme Screener of Professional Liability of the Supreme Medical Council, own elaboration.

<sup>17</sup> Detailed rules of a mediator performance are defined in Code of Penal Proceedings, article 23a of an act dated on 6 June 1997 (Journal of Law no. 89, position 555) and a decree of minister of justice in case of a mediation proceeding in penal cases dated on 13 June 2003 (Journal of Law no. 108, position 1020). [http:// www.oil.org.pl/xml/oil/oil68/wladze/mediator](http://www.oil.org.pl/xml/oil/oil68/wladze/mediator)

Table 3

Topic of complaints	Years				Together
	2011	2012	2013	2014	
Body harms, treatment complications	2		1	2	<b>5</b>
Conflict between doctors	1	1		1	<b>3</b>
Unethical doctors' behavior			6	4	<b>10</b>
Death		1			<b>1</b>
Other causes		1	1		<b>2</b>

Source: Report from action of The Supreme Screener of Professional Liability of the Supreme Medical Council, own elaboration.

Data presented in the table show that mediation is used in health services at a low rate. It is difficult to formulate general conclusions with such a low number of cases in which mediation was present. It seems to me that “the light at the end of the tunnel” is the existence of mediation itself. It may be hoped that it is a matter of time when mediation will be a way to resolve conflicts. All the more, it stems unambiguously from practice that mediation is highly efficient in many cases. I am personally convinced that if it will become common in health services, mediation will also prove itself to be effective.

It is highly uplifting that the legislator sees positive significance and the need of using mediation. This is the reason why it is worth mentioning the words of a former minister of justice, Krzysztof Kwiatkowski, who said: “Mediation is good for everybody who wants to talk about a dispute, as it gives opportunities for keeping good relations by parties. Consequently, it gives opportunities for a further cooperation. It helps in establishing a dialogue with the second party of the dispute, gives an opportunity to express oneself, and gives a chance of resolving a conflict in a way that will be satisfactory for each party. A dialogue is better than a fight with arguments. An understanding and a common search for solutions are better than a fight over reasons. And this is guaranteed by mediation<sup>18</sup>.

## 5. Conclusion

In conclusion, mediation undoubtedly „wins” with a court proceeding because of lower costs as well as the fact that it is quicker and allows making choices that are acceptable for both parties. Moreover, what is important, in a mediation process both a doctor and a patient have control and power over its course and a content of a compromise – any decisions are made without both parties' agreement. This process gives a fast and ultimate result, while

<sup>18</sup> A statement of the Minister of Justice Krzysztof Kwiatkowski from 2011 during a conference “Mediation in Poland – a state and perspectives” on occasion of International Mediation Day [http:// www. ms.gov.pl](http://www.ms.gov.pl).



parties follow decisions to a high degree, as they made them themselves. It is worth adding that mediation is characterized by a low risk level since both parties may retreat from it at any time. The most important is the fact that mediation allows each party to preserve its dignity and feeling that their rights are respected. Mediation creates a real chance for saving a patient-doctor relation, whereas it is not possible in a court proceeding, as its essence is a dispute between parties which often becomes a fierce fight.

Due to the fact that mediation is a relatively recent way of eliminating disputes, acting as a sort of innovation, it may be assumed that the range of its use will be constantly growing. I am highly convinced that cases which deal with patient-doctor conflicts should be a very important area of its use.

### **Bibliography**

1. Durcik V.: Etyka praw człowieka z punktu widzenia globalizacji, w: Globalne konteksty poszanowania praw i wolności człowieka, red. A. Kuzior, Katedra Stosowanych Nauk Społecznych WOiZ Politechniki Śląskiej, Sosnowiec 2011.
2. Fiutak A.: Prawo w medycynie. C.H. BECK, Warszawa 2013.
3. Gmurzyńska E., Morek R.: O problemach dotyczących rozstrzygania spraw o błędy lekarskie i o roli mediacji. Kwartalnik ADR Nr 3 (15)/2011.
4. Kalisz A., Zienkiewicz A.: Mediacja sądowa i pozasądowa. Wolters Kluwer, Warszawa 2014.
5. Karkowska D.: Prawa pacjenta. Wolters Kluwer, Warszawa 2009.
6. Marek Z.: Błąd medyczny, odpowiedzialność etyczno-deontologiczna i prawna lekarza. Wydawnictwo Medyczne, Kraków 2000.
7. Moore Ch.W.: Mediacje praktyczne – strategie rozwiązywania konfliktów. Wolters Kluwer Polska, Warszawa 2009.
8. Skarb mediatora. Wybór tekstów. Fundacja „Partners” Polska, Warszawa 2006.
9. Tobiasz-Adamczyk B.: Relacje lekarz – pacjent w perspektywie socjologii medycyny. Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2002.
10. Waszkiewicz P.: Zasady mediacji. w: Mediacje. Teoria i praktyka, red. E. Gmurzyńska, R. Morek, Wolters Kluwer Polska, Warszawa 2009.

### **Sources on-line**

<http://www.ms.gov.pl>

<http://www.oil.org.pl>

<http://www.prawo.rp.pl>

<http://www.gazetalekarska.pl>

**Omówienie**

Rozwój technologiczny medycyny powoduje znaczne rozszerzenie możliwości diagnostycznych i terapeutycznych. Świadomi tego pacjenci oczekują jak najszerszego korzystania przez lekarzy z tych możliwości. Ich ograniczanie jest odczuwane jako zaniedbanie i prowadzi często do kierowania spraw na drogę sądową z zarzutem popełnienia błędu w sztuce. Wady drogi sądowej doprowadziły do szukania alternatywnych sposobów rozwiązywania konfliktów w tym zakresie. Najnowszym z nich jest mediacja, analiza której wskazuje na jej dużą przydatność w rozwiązywaniu wielu rodzajów konfliktów, w tym także w układzie „pacjent-lekarz.”