Attorneys and Mediation

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Author's thesis that Croatian judicial system is in a state of a serious crisis (overwhelming number of cases pending before courts, expensive and time consuming court proceedings etc.), is being analyzed by taking into account mediation as an alternative dispute resolution mechanism. Keeping in mind that lawyer's main duty amounts to the proper and efficient performance of his tasks, author concludes that mediation is often the best solution for lawyer because it is in the best interest of his party. Reasons why Croatian lawyers are still somewhat distrustful towards mediation are twofold: lawyers are not only concerned that mediation will reflect negatively on their overall income, but are still not familiar enough with the process of mediation itself. By analyzing why mediation is beneficial for both parties and their lawyers, author concludes that lawyers' contribution will be crucial for the proper implementation of mediation in everyday practice of dispute resolution in Croatia.

I. Why is Mediation good for Attorneys and Their Parties?

The fantastic pace of development of social relations is resulting in numerous and a varied dispute, such as society has never been faced with before. They have not only become more numerous, but also more complex. These unavoidable tendencies have been coupled with a legislative hyperactivity[1] that attempts, by issuing new legal regulations almost daily, to respond to the serious challenges presented by such powerful social changes. However, despite the application of new knowledge, improved procedures and new technologies, state courts, in performing their basic activity, i.e. ensuring the equal protection of the rights of all citizens before the law, have not succeeded in keeping up with the emerging changes and responding to these increased demands. The result is a kind of crisis in the judicial systems[2] of almost all countries, regardless of their legal traditions and level of development. This is manifested primarily in the slowness with which courts provide legal protection, thus leading to a justified dissatisfaction on the part of citizens, one of whose fundamental rights – the right to an independent and impartial trial – has been jeopardised. Thus, the public reputation of judges and courts, as well as lawyers and the legal profession in general, is rightly being called into question, regardless of the objective difficulties involved in their work. Whatever the reasons for such a situation, the fact is that the frustration felt by clients, their attorneys, judges and other participants in long-lasting court proceedings is growing every day.[3] In this paper, we shall try to answer the question of whether attorneys can contribute towards solving or alleviating this obvious and frequently highlighted problem. We believe that such a contribution is possible, by means of attorneys' increased activity in resolving disputes by alternative means, among which one of the most important is conciliation. In order to encourage attorneys to act positively in this direction, it is necessary to

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[1] "Frequent legal changes give an impression of constant experimentation, and thus generate a sense of legal insecurity. One feels uneasy in such an experimental environment. Rapid changes in law resemble the edictal legislation of the Roman praetors. They tire the world, spread ignorance with regard to the law, weaken legal and moral awareness, and cause legal collisions." S. M. Slijepčević, "Advokatura i društveni progres" ("The Legal Profession and Social Progress"), *Odvjetnik*, *Sto godina advokature u Hrvatskoj 1868-1968* (*One Hundred Years of the Legal Profession in Croatia 1868 - 1968*), no. 9, Year XVIII, September 1968, Zagreb, p. 378.

[2] "In the outside world, entrepreneurs have long since lost any illusion regarding the efficiency of judicial systems in resolving business disputes, primarily due to very high court and attorney's fees and extremely difficult access to court protection. Therefore, instead of availing themselves of court proceedings, they more frequently resort to negotiations or mediation and agree to out-of-court arbitration in order to resolve business disputes." I. Grčar, "Kako riješiti poslovni spor, Umjesto nagodbe, Hrvati još skloniji sudovanju, Globalne kompanije bježe od rješavanja sporova pred sudom. S obzirom na stanje u hrvatskom sudstvu, bilo bi logično da njihov primjer slijede hrvatski poduzetnici" ("How to resolve business disputes; Croats favour litigation more than out-of-court settlement; Global companies avoid resolving disputes before courts; Due to the situation in the Croatian judiciary, it would be logical for Croatian entrepreneurs follow their example"), Business, *Poslovni tjednik* (number not specified), p. 26.

[3] "We have to be honest and admit that the parties themselves (including attorneys and courts) bear a lot of the responsibility for long-lasting business disputes – particularly the plaintiffs, who are not well-prepared and do not submit high-quality documentation. Their failure to do so is often the reason for rescheduling hearings." Statement by Marija Šola of Partner banka d.d., I. Grčar, *ibidem*, p. 27.

identify and emphasise why mediation is good not only for their clients, but also for them professionally.

II. Introduction

Lengthy court proceedings[4] continually generate frustration in all participants and beneficiaries of the judicial system. This frustration is caused by legal insecurity, the result of an uncertainty regarding both the substance and the timeframe of the legal protection being sought. When this frustration is combined with the significant costs of court proceedings due to their duration, and when we take into consideration the participants' disturbed psychological and emotional balance, above all in the case of clients exposed to the stressful effects of litigation, we have all the elements indicating a crisis in a state's judicial system.

This crisis is not typical of Croatia alone. It has deeply affected the judicial systems not only of developing countries and countries in transition, but also those of most modern Western nations. Seeking an end to this crisis, most countries in the world, and particularly the USA and the European nations, have resorted to an intensive search for *alternative methods.* Means are being sought which would offer citizens other routes for resolving disputes, in order to avoid extremely slow, inefficient, expensive and often low-quality litigation before state judicial authorities.[5] The efforts being made in this direction are imperative from the point of view of citizens, whom the state must provide with suitable institutional methods for resolving disputes. Such alternatives to court proceedings are important for the courts as well, as they can relieve the pressure on them, taking over at least part of their workload and speeding up and improving the judiciary's work.[6]

In most European countries, legal education and case law are based on court proceedings, as the standard, regular, and sometimes also exclusive method of settling legal disputes. Until recently, the resolution of legal disputes was considered exclusively from the point of view of the state apparatus, which intervened in social relations by applying abstract legal norms to concrete cases. Therefore, a dispute among parties was viewed as grounds for activating the state apparatus, which had to demonstrate how justice was served in action, regardless of the expectations and interests of the parties – indeed, often contrary to them.

Today the perspective has shifted to a great extent. More and more pressure is being put on the state to ensure that citizens and legal entities have appropriate mechanisms for resolving their disputes. This pressure is being exerted from below, by citizens and their organisations, and above all by enterprise and the media. Attitudes in the legal profession have also changed, with the pragmatic aspect becoming more and more important: **how to settle disputes in a fast and effective way, rather than establishing abstract truth and justice at any price** (*fiat iustitia, pereat mundus*).[7] Until recently, in

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[4] "In a situation in which there are a large number of civil cases, and the parties are dissatisfied with the outcome and duration of court proceedings, traditional lawsuits resemble football matches, where the parties try to 'score' as many goals as possible. In conciliation, the parties control both the rules and the outcome of the dispute. Therefore, the expression 'justice with a human face' is often used to describe mediation." Aleš Zalar, president of the Okrožno sodišće (District Court) in Ljubljana, *Medijacija i druga iskustva Okružnog suda iz Ljubljane, Metodi efikasnog rješavanja problema zaostalih predmeta* (*Mediation and Other Types of Experience of the District Court in Ljubljana, Methods for Effective Solutions to Backlog Problems*), as part of the project entitled *Jačanje efikasnosti sudstva u Crnoj Gori* (*Enhancing Judicial Effectiveness in Montenegro*), Centar za obuku sudija Republike Crne Gore (Centre for Training Judges of the Republic of Montenegro), Podgorica, June 2003, p. 65.

[5] "The ideas initiated in the United States of America in the 1980s, the new approach to interests, can be an alternative to systems that do not function properly in transitional countries. By adopting negotiation and mediation we can establish a new and better-functioning system." V. Gotovac, Foreword, *Kako do Da? Do dogovora pregovorom, a ne predajom* (*How to Get a "Yes"? Reaching Agreement through Negotiation and Not Surrender*), R. Fisher, W. Ury & B. Patton, Neretva, 2nd edition, Zagreb, 2003, p. 8.

[6] A. Uzelac, "Mirenje kao alternativa suđenju" ("Conciliation as an Alternative to Litigation"), working materials for the workshop on introducing mediation programmes in Croatian courts, Zagreb, Arcotel Hotel, 28-29 October 2004, p. 1.

[7] An anonymous survey conducted among attorneys in the USA regarding the inefficiency of courts and long-lasting lawsuits showed that they would prefer losing a dispute within a year of filing a court action than winning it three years after the filing date. (Author's note)

some countries with a European legal tradition the state regarded any autonomous, non-governmental mechanism for resolving disputes as some kind of disloyal competition to the state judiciary,[8] resulting in suspicion and even open aversion.[9] The term **alternative dispute resolution** (or ADR for short) derives from just this psychology, according to which any alternative to court proceedings is considered exceptional. Nowadays such alternatives are being actively promoted by the state and the judiciary themselves, in the hope that their work will be made easier. Encouraging alternative methods of dispute resolution, above all mediation, has thus been declared a priority of the European Union.[10] Similar initiatives are becoming more and more pronounced in the Republic of Croatia as well.

III. The Social Climate of Litigation in the Republic of Croatia as an Element of the Crisis in the Judicial System

The crisis of the judicial system has not bypassed Croatia. By way of illustration, it is not hard to conceive that a lawsuit before a Croatian state court may last for around ten years. In most cases, all participants in the proceedings tend to contribute to their long duration.

An example: A case was initially assigned to an inexperienced judge, who needed a lot of time to even begin working on it and get his bearings, particularly since he was in charge of an additional 500 or even 1,000 other cases. In the end, several judges worked on this same case due to problems such as sick-leaves, promotions, and various other reasons. The judges often unquestioningly accepted the parties' proposals regarding adjournment of the hearings or the presentation of evidence. Due to its complexity, the case was referred on several occasions to various specialists, all of whom delayed the writing of their expert opinions for unjustifiably long periods of time, without any sanctions. The plaintiff and his legal representative often failed to comply with court orders within the prescribed periods of time. The defendant and his attorney did everything to prolong the case by using or misusing their procedural powers so as to postpone the defendant's obligation to cover the costs of this presumably lost case. Both parties and their attorneys often failed to respond to court summons. Due to their lack of preparedness, they often unilaterally or jointly proposed that the hearings be adjourned, even for unlimited periods of time. The attorneys, who were busy with other engagements, often sent inexperienced assistants from their own law offices to attend the hearings or, on a number of occasions, even colleagues (or their assistants) from other law offices, who were thus seeing the case and the parties for the first time in their lives. Due to the judge's workload, the interval between two hearings was at least two and a half months. The case was submitted to a procedure for determining whether the court was competent in this matter, and the first-instance decision was twice annulled by a higher court following lengthy appeal proceedings by both parties. Did all the participants in these litigation proceedings fail to act properly?

Working conditions in Croatian courts are better now than ever, and there are also more judges (and attorneys) than ever before. Most judges regularly meet their weekly, monthly and yearly quotas, and many even make an extra effort so as to exceed them. Nonetheless, the problems mentioned here have not decreased, but are becoming greater by the day. One reason for this is undoubtedly the large number of cases, leading to exhaustion among judges, the parties, their attorneys and all other participants in court proceedings.[11] Regardless of the reasons for such a situation, which could be the

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[8] "A civil action is a common, regular and basic method of protecting infringed and violated civil rights, as provided by a state judicial organ. Therefore, a civil action is often called the 'regular route of legal protection'." S. Triva, "Građansko parnično pravo" ("Civil Litigation Law"), Official Gazette *Narodne novine,* Zagreb, 1983, p.3.

[9] A. Uzelac, *supra,* footnote 6, pp. 2 and 3.

[10] See the European Union guidelines set forth in the basic document on mediation published by the European Commission in April 2002 as its "Green Paper": "ADR is a political priority, repeatedly declared by the European Union institutions whose task is to promote alternative techniques, to ensure an environment propitious to their development and to do what it can to guarantee quality." Green Paper on alternative dispute resolution in civil and commercial law, COM(202) 196fin, http://www.europa.eu.int/com/off/green(indeks_en.htm, p.5.

[11] "Judges will never be able to resolve in one day as many disputes as attorneys and their clients can initiate." A. Zalar, president of the District Court in Ljubljana, member of the Consultative Council of European Judges (CCJE), "Legislative and Judicial Incentives to Early (Amicable) Resolution", paper read at the 1st European Conference of Judges – Early Settlement of Disputes and the Role of Judges, Strasbourg, 24-25 November 2003, working materials, p. 51.

subject of broader analysis and discussion elsewhere, the fact remains that parties and their attorneys still turn to state courts as the most attractive forum for resolving their disputes, despite the great problems connected therewith.[12]

Indeed, it is almost by inertia that parties and their attorneys come to state courts[13] seeking to resolve a dispute and obtain a court ruling based on legal, contractual or judicial points of reference regarding their claims. In most cases, trials are merely a screen for the parties' concealed interests, concerns, wishes and conflicts, which cannot be interpreted legally. Legal disputes and the conflicts hidden behind them often do not overlap completely, or even do not overlap at all.

The disputes[14] which precede litigation usually arise when mutually dependent parties have, or seem to have, conflicting interests, understandings, goals and/or roles. Each dispute involves one or more disruptions in communication between parties who, for some period of time and in some way, have maintained mutual relations (professional and/or private). Apart from differing opinions regarding the substance of a dispute, this most often involves communication problems and the expression of more or less intense emotions.[15] A dispute where there is no disruption of communication, or which is free of emotions, does not exist; for if this were the case there would be no dispute at all, rather only a difference of opinion which the parties could resolve themselves. Generally speaking, disputes may be resolved on three different bases: force, legal regulations, and interests. If differing opinions have not yet grown into a dispute, negotiations based on the parties' interests are usually conducted until a solution is found. If the negotiating parties are overwhelmed by their emotions, they will turn to a form of dispute "resolution" where one party is always right and the other is always wrong. They may finally even make use of force as a weapon when nothing else seems to help, although most people will not resort to it directly.

A party in litigation expects to receive justice based on legal regulations. In order to achieve this, the party must interpret its dispute legally, turning personal interests into a claim or defence. As a rule, therefore, litigation represents a finite, inflexible, one-sided resolution of a dispute, based exclusively on the interest of the applicant. All "legally relevant" facts and evidence must be adduced, resulting in the parties having to dig into each other's pasts and engage in a genuine "legal battle",[16] presenting evidence (arguments) and facts that are relevant to the court's decision. This leads to a further

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[12] In Croatia, there are fewer than 40 arbitral proceedings and 10 conciliations per year, not counting mediation proceedings in class actions filed with the Government Office for Social Partnership, which currently has the best organised and most efficient system of mediation in Croatia. (Author's note)

[13] "Parties go to court seeking protection. They come bringing their conflicting interests, demands and ideas. The court must decide in favour of only one of them. In this kaleidoscope of differing viewpoints, this jungle of controversies, courts must establish truth and justice. The court must re-establish a disrupted harmony. No one wants courts to decide arbitrarily. Parties end up in disputes because they both think they are right, although this is impossible. In order to resolve a dispute properly, truth must be established; yet this gives rise to many difficulties (...) The court must establish truth in order to apply regulations properly. The truth established by courts is not perfect. It can sometimes be far from the real truth. When a judge assesses evidence, a very interesting cognitive process takes place: he assimilates his experience with his knowledge, and by doing so illuminates new facts and new experience by using his previous knowledge and experience. He adds the new to the old. This is typical of any process of acquiring knowledge. Any new knowledge is composed of the past experiences of the person who acquires it. This is also the case with judicial truth and knowledge. There is no uniform judicial truth. Not all judges have the same experience, the same knowledge, the same desire for truth, the same view of life and the world, the same power of perception and apperception, the same power of belief and judgement. If two judges were to search separately for the truth using the same means of evidence, they might come to the same results, or to different ones. What one judge considers the truth, another will regard as untruth. Relativism shows its face here, too. Truth is the centre of gravity in every process of hearing evidence, but different people regard such a centre differently. Truth, according to James, lives for the most part on a credit system; it is a collective noun covering all acts of verification. Judicial truth may coincide with reality, but it can also contradict it. It is experiential in nature, but can be refuted by new experience. The legal possibility of repeated court proceedings proves that legislators do not consider judicial truth to be perfect. It represents only the most probable assumption. This idea is also contained in the old saying: *pro veritate habetur*." S. M. Slijepčević, *supra*, footnote 1, pp. 378-379.

[14] "But isn't fighting human nature?, W. Ury, *The Third Side. Why Do We Fight, How Can We Stop*. Penguin Books, New York, 2000, pp. 27-56.

[15] "Injustice (…) results in quarrels and hatreds, and leads people to fight with each other. But when people behave fairly towards one another, harmony and friendship prevail." Plato, *The Republic*, A. Vilhar, 1983, p. 31.

[16] "The court, in other words, replaced war as a more sensible manner of fighting." W. Ury, *supra,* footnote 14, p. 151.

hardening of their conflicting positions,[17] which are actually not important to the real dispute between them. Their initial interests often become lost, and very often it happens that the parties no longer recognise the "forest" (their own interests) because they are concentrating on individual legal "trees" (their own viewpoints and the corresponding facts). Assuming a position (viewpoint) in disputes and court proceedings encourages people to focus their minds only on opposition and mutual differences. Various interests may be hidden behind these conflicting viewpoints: identical or different, capable or incapable of compromise.

In litigation, it is only the legal content that is formally at issue. The communication problems and emotions[18] that accompany disputes are not within the scope of the judge's decision-making power. Of course, this does not mean that emotions and damaged relations play no part in litigation. While all judges and attorneys know very well that this is not the case, nonetheless it is quite clear that litigation is not a suitable means for rebuilding relations or expressing emotions in an appropriate manner. On the contrary, the further escalation of the parties' disrupted relations is a component part and, not seldom, also a consequence of court proceedings. The explanation for this may be found in the fact that, through litigation, disputes which are quite different in nature get squeezed into the same mould.

Despite the aforementioned shortcomings of court proceedings and the general dissatisfaction with the work of Croatian judges, attorneys and their clients continue to turn to them almost exclusively for resolving disputes, overlooking all the aggravating circumstances that emerge during the trial, and neglecting the fact that, since they themselves are at the heart of the dispute, it is they who can resolve it in the fastest, cheapest and most appropriate way.[19] For when the parties cease to communicate due to an escalation of their dispute, there are no longer conditions for settling it in a peaceful manner. It is at this point that the parties, usually overcome by negative emotions and unrealistic expectations and demands, turn to attorneys, judges and other legal experts to help them resolve their dispute. By doing so, the parties transfer responsibility for their dispute to someone else, thus losing control of their "destiny" and relying on the slow-moving state judicial system to decide concerning their rights. For the most part, success in court proceedings does not correspond even to the winning party's expectations. One other consequence of a court's decision in a dispute, where only one party wins and the other loses, is that relations between the opponents are not re-established; rather, a further escalation of their disrupted relations occurs.

IV. Conduct of Parties to the Dispute

Parties who are not able, or do not wish, to resolve their dispute on their own usually turn to their attorneys for legal assistance in order to realise their infringed rights. They assume the active role of a plaintiff, or the passive one of a defendant. In doing so, the parties make use of permitted[20] and sometimes even impermissible means[21] to achieve the best possible legal protection, regardless of whether they are in the right or not.[22] The basic aim of litigation before a court thus ceases to be

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[17] "Litigants, blinded by passion and possessed of meagre legal knowledge, their moral and legal conscience often atrophied, burdened by their selfish interests (…)." S. M. Slijepčević, *supra,* footnote 1, p. 382.

[18] "A psychological wall of suspicion and hostility may separate the parties more definitively than any stone wall." W. Ury, *supra,* p. 163.

[19] "Lawsuits exist because many people do not know how to solve their problems by talking and discussing things." S. Petar, "Umijeće pregovaranja; U dobru timu zna se tko govori, a tko sluša" ("The Art of Negotiation. In a good team it is clear who talks and who listens."), Management, *Poslovni tjednik*, Zagreb, no. 35, 2002, p. 54.

[20] "Causing delay and sowing confusion not only are his right, but may be his duty." W. Rehnquist, Chief Justice of the United States Supreme Court, in *Walters v. National Association of Radiation Survivors*, 1985. *The Moral Compass of the American Lawyer: Truth, Justice, Power and Greed*, E. Zitrin and C.M. Langford, Ballantine Books, New York, 1997, p. 53.

[21] "Why do lawyers think that they can hide documents, lie about it, and get away with it? The reason, in part, is the adversary theorem, run amok to the point where some lawyers believe that anything they do on behalf of the client is justified if it is not clearly illegal and if their chances of being caught are low enough to be worth the risk." *Ibidem,* p. 59.

[22] The most important part is the proceedings before the court, where someone is to be persuaded that he (that is, his client) is in the right. This is exactly the opposite of what we want to achieve in mediation. The *mediator's task* is completely different from the task of a judge or arbitrator. A mediator must be capable of listening to the parties and their interests. What the parties and their attorneys should learn during mediation is that it is not necessary to convince the mediator that they are right, as this can even be very bad for mediation itself. The mediator must learn about the parties' interests and the problems

settling the dispute to their advantage;[23] instead, they seek to win the case at any cost, or lose it with the least possible sacrifice.[24] Categories such as time and cost seem to lie outside the parties' main sphere of interest.

Parties to the dispute often ask the following questions: How strong is our legal position? What value does the dispute have for us? What are our chances of succeeding in the dispute? Their initial, unrealistic expectations and demands make searching for the right answers to these and similar questions even more difficult. Often not even attorneys are able to dissuade them from their unjustified expectations, for parties are inclined to listen to arguments from their attorneys and others only insofar as the latter tell them what they want to hear.[25] And if their attorneys deliberately encourage them to pursue this course, then the possibility of resolving a dispute amicably is very small.

The interests of parties and their attorneys are seldom in complete accord. Attorneys can help their clients by explaining their legal position, but can also manipulate them by not providing all the information, or encouraging them to express strong emotions stemming from the dispute, all of which can lead to great difficulties in settling the matter. On the other hand, by making unrealistic demands or not disclosing certain information,[26] the parties may put their attorneys in a difficult position. No amount of legal fees can resolve this contradiction.[27]

All of the aforementioned circumstances clearly illustrate the shortcomings of the current judicial system. The protected position and increased professional independence, or even autonomy, of certain key legal professions, particularly judges and attorneys have undoubtedly contributed to these deficiencies. The position held by judges and attorneys in society have led to a kind of autarchy, which reduces their ability to quickly change and adapt[28] either themselves or the judicial system. In the legal

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that have led to the current situation. He must determine whether there are possibilities for a compromise or settlement, and must then find ways of reaching it. Mediators must help both parties reach a suitable solution, which sometimes involves some guesswork. Everyone tries to reach the best settlement for them, yet *it is everybody's duty to find an acceptable solution regardless of which party is 'right'*. Why? Primarily because it is considered that litigation and even arbitration are the worst possible ways of resolving disputes. First, they are long-lasting and expensive proceedings. Moreover, they prevent the future development of good relations between the parties. If negotiations are aimed at achieving mediation, a resolution of the dispute, then it is possible for the parties to continue their relationship based on mutual concessions. Moreover, one example of the success of mediation is the fact that, in most such proceedings ending in a settlement, the parties carry out the agreed settlement voluntarily. There are no enforcement proceedings." V. Rubčić, Zagreb attorney, "Alternativni načini rješavanja sporova" ("Alternative Means of Dispute Resolution"), notes for a round-table discussion at the jubilee 20th Croatian Attorney Days in Zagreb, 14- 15 March 2002, *Odvjetnik,* 3-4, pp. 36-37.

[23] Croatia's citizens and representatives of its legal entities, as well as the state (or state prosecutors), are not sufficiently aware of the importance of settlements as the most suitable means of dispute resolution, and usually seek to continue with court proceedings to the very end. Namely, the number of in-court settlements is very low compared to other outcomes of litigation before courts in the Republic of Croatia. According to statistics from Croatia's Ministry of Justice for 2002, only 2.5% of the total number of cases before municipal courts were resolved by in-court settlements, and only 2.6 % of cases before commercial courts. (Author's note)

[24] See A. Zalar, *supra,* footnote 11, p. 51.

[25] "It is not easy to say to a profession that has to support itself: go and mediate! I'm an enthusiast and I have my own law office, so this allows me to do it. I very often practice "one-sided mediation" or "reality checks" with my clients, in order to better understand their real legal position in the given dispute and their real interests. One very frequent result of such a practice is that these clients never come back. I don't charge anything for legal advice, and so in this way I lose a few hours without getting paid anything for it. If we cannot charge for mediation, it will be very difficult to promote it among attorneys. In reality, many attorneys do not have adequate means to permit themselves such a luxury. They need to be stimulated by other measures, such as charging by the hour as the most adequate form of remuneration." M. Vukmir, Zagreb attorney, from a presentation (audio recording) at a round-table entitled "Mirenje u Republici Hrvatskoj, Ocjena stanja i kako dalje?" ("Conciliation in the Republic of Croatia: Assessing the current situation and what to do next"), Zagreb, Novinarski dom*,* 14 June 2005.

[26] "Experience has shown, and according to Garson this is also true in France, that there are very few clients who want to tell their counsel the whole truth. This is the case with people in Croatia as well (…)." S. Strugar, "Filozofija jedne profesije, Advokatura – imanencija i emanacija slobode" ("Philosophy of a Profession. The Legal Profession – Immanence and Emanation of Freedom"), *Odvjetnik, Sto godina advokature u Hrvatskoj 1868 – 1968,* no. 9, Year XVIII, September 1968, Zagreb, p. 366.

[27] A. Zalar, *supra,* footnote 11, p. 52. Originally in Mnookin, R. H. 2000, *Beyond Winning*, Harvard University Press, Cambridge, Massachusetts, p. 52.

[28] A. Uzelac, *supra,* footnote 6, p. 1.

system as it is today, only legal experts as judges, attorneys, public prosecutors and other legal professionals, feel privileged. This privileged status in relation to other participants in legal disputes, above all the parties themselves, is reflected in the fact that they regard disputes from a certain distance, both in an emotional sense and with regard to interests. Their attitude is solely professional, free of any personal involvement. By so acting, they become "masters" or "doctors" for disputes,[29] and parties turn to them just as patients turn to physicians, or automobile owners to mechanics who repair their cars for them.

When a dispute between parties escalates to such a degree that all communication between them is disrupted, they are no longer capable of resolving it on their own. As a rule, the parties know nothing about the law, the procedural provisions regulating court proceedings, or their role in the formal process of litigation. Therefore, they turn for assistance to third persons, i.e. the legal experts who, for them, represent authorities on legal disputes.[30] In such a way, the parties to a dispute delegate responsibility for their success or failure to these professionals.[31] The consequence of this is almost always the parties' total passivity; they expect and are convinced that someone else will resolve their dispute, thus losing control over it. This leads to long-lasting lawsuits in which no one is directly involved, neither the parties nor their attorneys, and least of all the judges. Such lawsuits finally end in decisions which satisfy no one, not even the party whose claim is recognised.

V. The Role of Attorneys in Disputes between Parties

The proclaimed equality of all people before the law can be achieved only if legal subjects are offered compensation for the shortcomings which put them in an unequal position in court proceedings. One means of accomplishing this task is public recognition of the right to professional assistance, and the organisation of such assistance.[32] The Croatian Constitution defines the legal profession[33] as an autonomous and independent service[34] ensuring legal assistance to all in accordance with the law.[35]

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[29] M. Vukmir, *ibidem.*

[30] "They only consider the options they think their attorneys can obtain for them, and they often fail to contemplate alternatives that may actually be available." E. Brunet and C. B. Carver, *Alternative Dispute Resolution – The Advocate's Perspective*, 2nd edition, LexisNexis, Danvers, 2001, p. 64.

[31] For more details, see B. Sells, *The Soul of the Law*, Element Books Limited, Shaftsbury, Dorset, England, 1994. Cited from a copy of some unmarked pages from the Slovenian edition of this book: *Duša zakona,* Vodnikova založba, Ljubljana, 1997, the chapter entitled *Zakaj se tožarimo?*.

[32] S. Triva, *supra,* footnote 8, p. 46/1-2.

[33] "The legal profession is an achievement of contemporary civilisation which came into being as an expression of the gradual realisation of personal freedom and the rights and freedom of man. When, in his revolutionary history, man gained the right to defend his freedom and his individual rights against political authority, which stood above society, he had to establish an institution to enable him to achieve an equal position before this authority. The constitutional rule of law, as an achievement of modern civilisation, would be impossible if man were not able to make use of legal tools in fighting for his legitimate interests. This implies understanding these tools and being able to use them. However, the unavoidable complexity of the legal system in every modern state makes it impossible for the citizen to effectively defend his interests against others if their dispute requires an authoritative solution by a body invested with political power. Political authority is exercised by those who control the legal system. A citizen appears before political authority as a free and equal person. In order to be able to do so, he must be able to apply the norms of the legal system. Therefore, citizens need someone who knows the system well and is able to apply his knowledge in order to re-establish the disturbed balance. And this is not all. A person who represents a citizen and acts in his name must not only know the law, but also be the citizen's alter ego. This person must be free and independent in order to be able to become someone's alter ego. This is how the legal profession was created, as an achievement in the fight for freedom and the equality of people." L. Geršković, "Advokatura u političkom sistemu Jugoslavije" ("The Legal Profession in the Political System of Yugoslavia"), *Odvjetnik, Sto godina advokature u Hrvatskoj 1868 – 1968,* no. 9, Year XVIII, September 1968, Zagreb, p. 17.

[34] "The independent legal profession fights for moral freedom. The principle of freedom has been tested many times, and it is unnecessary to highlight the beneficial results of its practical application. Although freedom constitutes a sublime right, it still suffers from certain restrictions. No man is so perfect that the community would grant him unlimited powers. The independent legal profession fights against those dogmatic tendencies that regard a legislator, judge or member of the state administration as infallible. If man were infallible, it would not be necessary to restrict his freedom." S. M. Slijepčević, *supra,* footnote 1, p. 381.

"There can be no rule of law without the legal profession. This is an axiom. The legal profession is an important sociological, legal and ethical instrument of the community and its legal order. It makes an important contribution to social progress within the legal sphere, despite certain negative phenomena accompanying it. I would not be objective if I did not admit this. The mission of the legal profession, in spite of certain deviations typical of any profession, is much deeper and broader than is

The legal assistance offered by attorneys[36] includes the following: providing legal advice, drawing up documents (contracts, wills, statements, and so on), drafting claims, complaints, motions, requests, extraordinary legal remedies and other petitions, and representing clients.[37]

Attorneys are obliged to offer legal assistance conscientiously and in accordance with the Constitution of the Republic of Croatia and the law, the Statute and other acts of the Bar Association, and the Attorneys' Code of Ethics.[38] ***Attorneys have the right and the duty,*** within the bounds of the law and their given authority, ***to undertake any action which, in their judgment, is beneficial to their client***.[39] In fulfilling their professional responsibilities, attorneys must behave in such a way as to win and maintain the trust of their clients and the judicial and other bodies before which they appear.[40] ***Loyalty to the client[41] is the attorney's main duty. It is more important than the attorney's own interests*** and any considerations towards his colleagues.[42]

An attorney must treat the opposing party in a considerate and objective manner, seeking to establish conditions whereby the dispute may be resolved as quickly as possible in the mutual interest of the parties.[43]

It is the duty of every attorney to perform his professional activities properly and effectively.[44] The attorney's obligation to exercise his duty properly, conscientiously and effectively[45] contains the answer to the question: *Why is mediation good for attorneys?* – **Because it is in their clients' best**

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usually thought. It critically assesses social phenomena, acts by the state authorities, and the social values of legal regulations. In so doing, it emphasises the importance of legal and moral values." S. Slijepčević, *ibidem,* p. 374.

[35] Article 27 of the Constitution of the Republic of Croatia (Official Gazette *Narodne novine,* nos. 56/90, 8/98, 124/00 and 41/01).

[36] "Advocacy is defined as the art and science of pleading cases, particularly in oral form, on behalf of parties before courts and juries. It requires a thorough appreciation of the relevant facts, a good knowledge of the law, persuasive presentation and argumentative powers." (…). "Advocacy is the art of persuasion in court." Andreas Kapardis, University of Cyprus, *Psychology and Law*, 2nd edition, Cambridge University Press, Cambridge, 2003, p. 211.

[37] Article 3 of the Law on the Legal Profession (Official Gazette *Narodne novine* no. 9/94; hereinafter referred to as the LLP).

[38] Article 7, para. 1 of the LLP. "(…) in the contradiction between man's desire for ethics and justice and his readiness to misuse and violate them, it is the legal profession which tries to resolve this dilemma. It is always on the side of ethics and justice, as the essential prerequisites for the existence and preservation of freedom. This has always been its most important mission." S. Strugar, *supra,* footnote 25, p. 361.

[39] Article 7, para. 2 of the LLP.

[40] Point 5 of the general principles of the Attorneys' Code of Ethics (hereinafter referred to as the ACE), adopted at the Assembly of the Croatian Bar Association on 18 February 1995. The amendments were adopted at the Assembly of the Croatian Bar Association on 12 June 1999.

[41] "A lawyer who agrees to take a client's case takes on a 'fiduciary duty' to that client. This term includes loyalty to the client, zealous advocacy on the client's behalf, and the duty to protect the client's confidences and secrets. But the concept of fiduciary duty is even greater than the sum of these parts. It has often been defined as the duty the lawyer owes to each client by virtue of the lawyer's special position of trust in the client's affairs. Fiduciary duty requires the lawyer to place the client's cause above the lawyer's own individual interests, and to always act on the client's behalf in the utmost good faith." R. Zitrin and C. M. Langford, *supra,* footnote 20, p. 20.

[42] Point 40 of the ACE.

[43] Point 43 of the ACE.

[44] See T. Matić, Croatian Bar Association, *Odvjetnik,* July-August, Year 72, Zagreb, 1999, p. 6.

[45] "There are two types of attorneys who expose this distinguished profession to disgrace. First, those who are greedy for profit and defend clients in both just and unjust lawsuits according to the principle: 'If you've done something bad, deny it', which is one of the basic rules of injustice. Second, court magpies who do not know the law very well, and for all their impertinent noise have no legal expertise, wisdom, honesty or conscience. What these novice initiators of lawsuits sell their clients is only an illusion, with the aim of filling their pockets and ruining their clients. Attorneys must not only be scrupulous and honest, but also well-educated. They must know the law very well so as not use their profession to undermine the truth and increase the number of lawsuits, but rather to resolve and avoid them."
"Attorneys are prohibited from engaging in wanton litigation by starting groundless lawsuits, transferring them to different judges without reason, and prolonging lawsuits by submitting lengthy motions and hopeless appeals." The Statute of Attorneys (*Statutum per advocatos causarum seu procurators Regni observandum)* was prescribed by a patent dated 26 October 1694 and signed by King Leopold. The following year it was confirmed by the Croatian parliament in its conclusion dated 14 November 1695. It thus became binding throughout the entire territory of Croatia. Z. Herakov, "Slobodan prijevod Odvjetničkog Statuta iz 1694 godine prema izvornom latinskom tekstu" ("A Free Translation of the Statute of Attorneys of 1694 according to the Original Latin Text"), *Odvjetnik, Sto godina advokature u Hrvatskoj 1868 – 1968,* no. 9, Year XVIII, September 1968, Zagreb, p. 32.

interest! Therefore, if an attorney's first and most important duty is to act in accordance with the client's interests, and if reaching a peaceful, amicable solution to a dispute represents the client's best interest, then it is also the attorney's ethical duty not only to inform the client of this possibility, but to do everything possible to see that it is realised. Conversely, if the possibility of a settlement is in the client's best interest, it is also in the interest of the attorney. We shall discuss this point further below.

VI. General Remarks on Mediation[46]

For those encountering the concept of mediation for the first time,[47] it should be said that *mediation*[48] is a specific method of mediation in which the parties settle their dispute under the guidance and assistance of an independent third party – a mediator.[49] In mediation an attempt is made to settle the dispute is such a way that both parties are satisfied. The mediator must, first of all, focus on re-establishing communication between the parties so that they can start to negotiate. Unlike in court proceedings, in mediation all details of the dispute are brought to light, and not just their legal interpretation. The purpose of mediation is not to determine which party is right, but to find an acceptable solution in the interest of both parties.[50]

Mediation is the process of resolving existing disputes and avoiding future ones. It also aims at diminishing the negative effects of the dispute itself. Mediators assist the parties in their negotiations through a series of common meetings or confidential individual meetings with each party separately. They help the parties to understand their own and others respective positions, define their interests, identify possible solutions, and consider all the options and alternatives for reaching an agreement.[51]

Mediation is a voluntary, non-binding and private procedure. The parties' decision to submit to mediation and continue with it lies entirely in their own hands. The right to decide is theirs regardless of whether proceedings to resolve their dispute have already been initiated before the competent institution.

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[46] Mediation is any procedure, regardless of its name, in which the parties try to resolve their dispute amicably with the help of one or more conciliators, who assist them in reaching a settlement without any authority to impose binding decisions. *Zakon o mirenju* (Mediation Act; hereinafter referred to as the CA), Official Gazette *Narodne novine* no. 163/2003; the CA entered into force on 24 October 2003.

[47] For more details, see S. Šimac, "Medijacija – alternativni načini rješavanja sporova" ("Mediation – Alternative Means of Dispute Resolution"), *Hrvatska pravna revija* no. 5, May 5, 2003, Year III, Inženjerski biro d.d., Zagreb, pp. 126-135.

[48] "Mediation is one means of resolving disputes with the help of a neutral third party who is not authorised to make a binding decision, but rather only to assist the parties in reaching an agreement whereby their mutual dispute is resolved and their rights and duties newly established, all with the aim of ensuring good future relations." N. Betteto, "Metode in tehnike medijacije v pravdnem postupku" ("Methods and Techniques of Mediation in Civil Proceedings"), *Pravna praksa,* no. 1-2/2002, p. I.

[49] Mediator denotes one or more persons who, based on an agreement between the parties, performs mediation. (Art. 2, para. 1 point b) of the CA).

[50] For more details, see M. Pel "Upućivanje na mirenje u parničnom postupku: dodatna usluga ili neodređenost profesije?" ("Referral for mediation in Civil Proceedings: Additional Service, or Uncertainty of Profession?"). Paper submitted to the Round-Table on Alternative Dispute Resolution in Rijeka on 12 December 2002 (no pagination). The author is *doctor iuris,* vice-president of the Court of Appeals in Arnhem, The Netherlands, a mediator and the head of the national project "Mediation and the Judiciary".

[51] "Persuasion and negotiation are forms of communication. In *persuasion* we try to convince (persuade) another person to say or do something aimed at fulfilling our goals alone, while in *negotiation* we try to reach the best possible agreement together and achieve a common goal (…). The possibility of changing opinions is a sign of openness, honesty and the desire to become familiar with new viewpoints and events. Therefore, a negotiator who does not rigidly close his mind, but instead is willing to change and adapt his way of thinking, is always more successful than one who stubbornly sticks to his original ideas. Do not be afraid of being open. This does not mean that you have to accept whatever you are told, give up your point of view, or constantly change your mind. It only means that *negotiation is a two-way street.* So watch your behaviour, try to see yourself through others' eyes, and do not just listen to your own words. If you accept your collocutor's arguments, it does not mean that you have given up yours. If you know what you want, your collocutor will know what he wants as well. The right answer is somewhere in the middle." S. Petar, "Pregovaranjem do cilja, Tko ispuni očekivanja drugih, postići će što i sam želi" ("Reaching goals through negotiation: Whoever meets other people's expectations reaches his own goals"), Management, *Poslovni tjednik,* Zagreb, no. 42, 2002, pp. 50-51.

If the parties reach a mutual understanding' in the course of mediation and a settlement is reached, any court proceedings will be terminated by withdrawing the claim. If the parties do not reach a settlement during mediation,[52] they are obliged to inform the court thereof, whereupon court proceedings will be resumed. The advantages of such a procedure are obvious:

- if litigation is resumed, the parties need not wait again for their case to be assigned to a judge,
- improved communication between the parties during unsuccessful mediation greatly reduces the number of contentious issues, and usually contributes to faster completion of the resumed litigation.[53]

VII. The Attorney's Role in Mediation[54]

In most cases, three persons participate in mediation proceedings: the two parties and a mediator. Direct participation by an attorney in mediation proceedings before a mediator is not essential since, on the one hand, mediation is an informal procedure, and therefore does not require knowledge of the procedural provisions applied in court litigation; and, on the other, no one (not even an attorney) knows the parties' positions and interests better than they do.[55] If the parties are represented by their attorneys, then at least five persons will be directly participating in mediation proceedings. As a rule, the mediator informs a party not represented by an attorney if the opposing party has engaged one, so as to avoid putting the former in an unequal position at the very outset.

It is particularly advisable for a party to be represented by an attorney in mediation which involves complex legal issues and requires expert legal knowledge; in cases where payment of compensation is being sought, so that the party will make a realistic claim; and whenever the party feels unable to act independently or articulate its own positions and demands.

The most important function of attorneys[56] in mediation proceedings is their *consultative role*, regardless of whether such consultation takes place before, during or after mediation.[57]

a) Preparing the parties for mediation proceedings

The attorney of a party who has agreed to mediation[58] has the important task of preparing it for these proceedings. The attorney must first of all familiarise the party with mediation proceedings, the role of the mediator, the importance of the parties' mediation agreement, the parties' rights and obligations in mediation, and the roles of the parties and their attorneys. Having informed the party about the basics of mediation, further preparation focuses on determining its real position and examining its real interests.[59] It is important not to concentrate on identifying past mistakes by the opposing party which

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[52] "The District Court in Ljubljana performed a survey on the successfulness of mediation. In a questionnaire filled in by attorneys and their clients at the end of mediation, it tried to assess the work of mediators, the outcome of mediation, and the fairness and integrity of the proceedings. Surprisingly, this survey indicated that the parties were almost 100% satisfied, regardless of the final outcome of the proceedings." Aleš Zalar, *supra,* footnote 4, p. 71.

[53] See A. Zalar, *ibidem,* p. 71.

[54] For more details, see M. Pel, "Odvjetnici i mirenje" ("Attorneys and Conciliation"), a paper given at the Round-Table on Alternative Dispute Resolution, Rijeka, 12 December 2002, pp. 1-9.

[55] "In most mediations, having a lawyer directly participate with you is unnecessary. This is because you are trying to work out a solution to your problem with the other party, not trying to convince a judge or arbitrator of your point of view in a setting that puts a premium on knowing how to take advantage of lots of tricky procedural rules. Usually you will understand the problem and your own needs better then anyone else, including the lawyer." P. Lovenheim, *How to Mediate Your Dispute: Finding a Solution Quickly and Cheaply Outside the Courtroom*, Nolo Press, Berkeley, 1996, p.1.23.

[56] "Look for a lawyer you like. (…) As with most other relationships in life, you'll be happier in both the short and long run if you find a lawyer whose personality is compatible with your own." P. Lovenheim, *ibidem,* p. 13.9.

[57] Consulting with a lawyer before, during and after mediation. P. Lovenheim, *ibidem*, p. 6.51.

[58] "The most important indication in favour of mediation in a given matter is the desire of both parties to end their dispute. Therefore, it is not the type of the case which is crucial for the success of mediation, but the attitudes and opinions of both parties and their attorneys regarding mediation, i.e. their readiness to resolve the dispute via mediation." M. Pel, *supra,* footnote 48, *ibidem,* no pagination.

[59] "As lawyers explore client needs and interests, they must attempt to ascertain the degree to which their clients want particular items. Most legal representatives formally or informally divide client goals into three basic categories: 1) essential;

have resulted in destabilised relations, or on answering the question of who is right or wrong. Rather, it is necessary to focus on the parties' future interests. At this stage, the attorney can already discuss the emotions shown by his client in the course of the dispute and work together with him to alleviate them so as to create a better negotiating environment.

In the course of preparing for mediation proceedings, the attorney may pose the following questions to his client:

What was the reason for establishing relations with the opposing party (working together, doing business, etc.)?

What is the difference between your relations at the start of cooperation and now?

What has been critical in the deterioration of your relations?

In your opinion, what needs to happen in order for this dispute to be forgotten? What are the obstacles, and how can you contribute to eliminating them?

What do you think the opposing party's answers to these same questions would be?

Let us suppose that the court accepted your entire claim in litigation – would your dispute then be resolved?

What do you expect from mediation, as opposed to a possible court decision?

What kind of resolution of the dispute would you consider satisfactory?

What exactly do I want?

Why do I want this, i.e. what are my needs in this case?

The attorney and his client must discuss the most favourable resolution[60] which the latter wishes to achieve in mediation, but must also work with him to prepare the "best alternative to a negotiated agreement" (abbrev. BATNA[61] or "second best solution". This represents the lowest limit to which the party being represented is willing to go during conciliation.[62] In addition, the attorney must take all the alternatives into account, in case no settlement is reached with the opposing party during mediation. In that event, it is extremely important to realistically assess the party's chances in court proceedings,[63]

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2) important; and 3) desirable. 'Essential' items include the objectives the client must obtain if agreements are to be successfully achieved. 'Important' goals concern things the client would very much like to acquire, but which they would forego if the 'essential' terms were resolved in a satisfactory manner. 'Desirable' needs involve items of secondary value that clients would be pleased to obtain, but would be willing to exchange for more important terms. Advocates must accurately determine client preferences, because this information dictates the items that must be achieved and those that may be traded for other issues. When determining client needs and interests, attorneys should avoid substituting their values for those of their client." E. Brunet and C. B. Carver, *supra,* footnote 29, p. 65.

[60] "Although it is extremely important to have several possible solutions, people very rarely feel such a need when negotiating. As they engage in discussion, they are usually convinced that their own answers are correct; and thus it is precisely their own views which must be overcome. In negotiations aimed at reaching an agreement, they always think that their offer is reasonable and should be accepted, perhaps with some minor changes regarding the price or suchlike. It seems that all possible solutions lie somewhere along the line connecting your view with theirs. Creative thinking usually comes down to the idea of splitting differences of opinion in half." R. Fisher, W. Ury & B. Patton, *supra,* footnote 5, p. 81.

[61] R. Fisher, W. Ury & B. Patton, *ibidem,* pp. 125-135.

[62] "Once attorneys have become familiar with the relevant factual and legal matters on their own side, they must determine their BATNA (Best Alternative to a Negotiated Agreement). This establishes their bottom line. Lawyers should not enter into agreements that are worse than what would happen if no accord were achieved. Such agreements are worse than non-settlements." E. Brunet and C. B. Carver, *supra,* footnote 29, p. 67.

[63] "Last week, after ten years of litigation, Partner Bank received €36,000 from the sale of the debtor's real estate in enforcement proceedings resulting from its claim for €50,000. Attorney's and court fees paid by the bank amount to more

particularly taking into account the amount of time, money and emotional stress the party will have to bear.

The attorney also assists his client in choosing a mediator. It is he who gathers the necessary information concerning suitable mediators and advises his client on which one to choose. The client is always the one who makes the final decision. He must, in a sense, "invest" in the mediator both intellectually and emotionally, for the mediator is someone in whom both parties to the dispute must have complete trust. It is for this reason that they have chosen mediation, in the conviction that the mediator, as a neutral third party, will help them resolve their dispute. It is from this that the mediator's strength in fulfilling his task derives.

b) The attorney's role in mediation proceedings before a mediator

The role of an attorney who participates in mediation proceedings before a mediator is entirely different from his role in court, or even in arbitration proceedings. Namely, in mediation proceedings there is no need to persuade the mediator or opposing party of any legal viewpoint and, therefore, no need for the "performances" which attorneys sometimes give in courtrooms, either for their client's sake or for the presiding judge.[64] In mediation proceedings (as opposed to litigation), it is the parties who play the most important role, not the attorneys.[65]

In the course of mediation proceedings, the parties agree to reach a forward-looking settlement based on their mutual interests. Therefore, an attorney in mediation proceedings acts more like a diplomat who keeps a low profile[66] and, depending on the current phase of mediation, acts as a guide or adviser, helping his client to find a satisfactory solution. The parties play the central role in mediation proceedings, and the mediator, in joint or separate meetings, receives most of his information from them (and not from their attorneys), as this helps the mediator to decide which direction to encourage the parties to pursue in order to reach a settlement. However, the parties in mediation will still seek advice from their attorneys and rely on their opinion. Some parties feel ill at ease during mediation when they realise that they have the principal role in resolving their dispute. The parties' attorneys must anticipate such situations and seek to eliminate such feelings, in order to achieve a satisfactory resolution of the dispute.[67]

The attorney must see to it that everything which is in his client's interest is brought forth in mediation proceedings. The attorney ensures that his client's position is equal with regard to that of the opposing party, and may creatively engage in proposing and choosing solutions in the interest of both parties. It is the attorney's task to advise his client regarding the validity of the proposed settlement as well as its legal sustainability, permissibility and enforceability.

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than €31,000 (HRK 240,000,00)." *Kako riješiti poslovni spor, Umjesto nagodbe Hrvati još skloniji sudovanju, Globalne kompanije bježe od rješavanja sporova pred sudom. S obzirom na stanje u hrvatskom sudstvu, bilo bi logično da njihov primjer slijede hrvatski poduzetnici,* I. Grčar, copy of an article from *Poslovni tjednik,* issue and date not indicated p. 26.

[64] "Problems are particularly likely to develop if a lawyer does not have confidence in the mediation process, and tries to turn it into an adversarial battle." P. Lovenheim, *supra*, footnote 53, p. 6.49. "… the lawyer's role in mediation is not to be an aggressive advocate, but to help the client present his or her case, evaluate possible solutions and work cooperatively toward a settlement." *ibidem*, p. 6.50.

[65] "To be effective, a lawyer must constantly remember that the dispute belongs to the client. During mediation the client makes decisions about the case. (…) This apparent loss of control makes some lawyers feel uncomfortable." E. Brunet and C. B. Carver, *supra,* footnote 29, p. 197.

[66] "Ask your lawyer to stay in the background. If your lawyer does come to the mediation, she or he doesn't need to play the leading role. One good approach is to have her or him sit quietly and listen. Occasionally, you can have a private conference to be sure all the points which you are concerned about get discussed, and that you are considering all of the legal implications of various proposed settlement terms." P. Lovenheim, *ibidem*, p. 6.51.

[67] "While the lawyer's authority is derived from the client, it is the lawyer who appears to be in charge of the dispute. In most instances, the lawyer advocates the client's position while the client remains silent. In mediation, the client is more explicitly in charge of the dispute. The mediator needs to hear most things from the client, not the lawyer, in order to decide how best to move the dispute toward resolution. The client usually seeks advice from the lawyer, and relies upon the lawyer to explain the legal implications of a particular action, but the client is clearly in charge of the dispute. Being in charge may also make certain clients uncomfortable. Consequently, the lawyer needs to anticipate and eliminate some of the client's sources of discomfort." E. Brunet and C. B. Carver, *ibidem*, p. 197.

The parties and their attorneys may decide whether or not the latter will be present during the entire mediation proceedings before a conciliator. The attorneys' non-attendance may be justified in less complicated cases, or when the parties can express themselves independently and feel capable of looking after their own interests. Even when an attorney is not present during the entire mediation proceedings, it is advisable that the client contact his attorney by telephone during breaks to inform him of developments, so as to avoid possible surprises in the form of settlement proposals which do not correspond to the attorney's initial idea regarding the best resolution of the dispute. Such possible disagreements between attorneys and their clients can be fatal to the success of mediation.

c) The role of attorneys following unsuccessful mediation

If the parties do not reach a settlement in mediation, the attorney's advice becomes very useful in his client's decision regarding future steps in his dispute with the other party. This pertains most frequently to preparations for court proceedings or their continuation, and less often to preparations for possible arbitral proceedings.

VIII. Reasons why Attorneys still do not Accept Mediation as a Desirable Means of Resolving Disputes

In short, mediation represents a voluntary, informal, exceptionally speedy and low-cost procedure in which the parties maintain full control, and no one else makes a decision in their stead. They reach a settlement based on their common interests, and so both come out as winners. Mediation thus has incomparable advantages with regard to other methods of dispute resolution. These advantages are particularly evident when mediation is compared to court proceedings (even in cases where this leads to an in-court settlement),[68] which is the route that parties in Croatia almost always choose when seeking to resolve a dispute. This is the reason why Croatian courts are overloaded with cases, some of which are not even appropriate for settlement in court.

However, not all disputes are suitable for mediation, and not all parties (let alone all attorneys) are willing to make use of mediation proceedings. How can we identify and choose, among all the many cases "sitting" in Croatian courts, those which are suitable for mediation?[69] The easiest way is trying to identify parties who are willing to resolve their disputes amicably. Generally speaking, for mediation to be successful the type of dispute involved is less important than the parties themselves. Their readiness to resolve the dispute in a peaceful manner will usually result in successful mediation, regardless of the type or complexity of the dispute.

Attorneys play an extremely important part in encouraging their clients to choose mediation. As we have already said, when a dispute escalates to such a degree that the parties cannot resolve it on their own, they turn to legal experts, i.e. attorneys ("doctors for disputes"). From that moment on, they fully surrender to the authority of their attorneys, who assume total control of the case, while the parties most often assume a passive role, expecting the dispute to be resolved for them. Having "taken over" the dispute, in most cases attorneys will turn to state courts, this being the regular and ordinary route for seeking legal protection. They take this route knowing very well how busy the courts are, and how much time will pass before the case is even assigned to a judge. They are also aware of the significant costs (court fees, expert's fees, remuneration, attorney's expenses and the like), as well as the fact that the parties, particularly those who had close relations prior to their dispute, will be exposed to strong and repeated emotional stress. They also know that their clients will not have much influence on the course of the proceedings, let alone on the outcome, which is usually completely unpredictable, and often does not satisfy even the winning party. Finally, attorneys are aware of the fact that a judgment

[68] For more details, see S. Šimac, *supra*, footnote 45, pp. 127-128.
[69] For more details, see S. Šimac, "Mirenje i suci" ("Conciliation and Judges"), *Hrvatska pravna revija*, no. 7, July 2004, Year IV, Inženjerski biro d.d., Zagreb, pp. 105-107.

in court proceedings creates a winner on the one side and a loser on the other, which only leads to an escalation of the parties' damaged relations, even transforming them into a permanent condition.

Why is this so? The reasons for attorneys' reluctance to come to grips with mediation can be found in their lack of familiarity, or insufficient familiarity, with mediation as a method for resolving disputes. There is also their (unjustified) fear of diminished earnings if mediation were to become a more frequent means of settling disputes.

a) Lack of familiarity or insufficient familiarity with mediation as an alternative means of dispute resolution

People naturally fear the unknown.[70] Ignorance creates insecurity and fear, and fear prevents us from coming to grips with what causes insecurity.[71] This formula may certainly be applied to mediation as well. In the Croatian legal environment, mediation as we have discussed it here is still a novelty. Any novelty causes resistance in people, as considerable effort is required in order to master it. It also forces us to change our previous behaviour, which gave us the secure and pleasant feeling of having control over a given situation. Any change that results in losing such control is unpleasant, and our first reaction is to resist such a change.

All major innovations in the history of human civilisation[72] initially produced surprise, criticism, and a defence of the "old way of life." However, as soon as they were accepted, they produced a kind of revolution in human behaviour, in the behaviour of society as a whole. People eventually came to ask themselves: "How could we ever have done things differently?" We dare claim that mediation is just such a revolutionary novelty in a country's judicial system, and will contribute to a positive change of attitude regarding disputes and litigation between parties, thus becoming an essential achievement of our civilisation.

Insufficient knowledge among attorneys[73] and their clients about mediation as an alternative means of dispute resolution explains why we still do not grant it greater importance in the Republic of Croatia, even though two years have passed since the adoption of the Mediation Act. However, Croatia has recently voiced its full support for mediation, and many projects have been initiated[74] in order to follow European and global trends and harmonise Croatia's judicial system with those of other European countries. This will certainly help people to recognise mediation as the most suitable means of resolving disputes.

b) Attorneys' fear of diminished earnings if mediation is used more frequently

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[70] See B Sells, *supra*, footnote 30, in the chapter of the Slovenian edition entitled "Se bojimo posredovati med strankama?", no pagination.

[71] "It is not necessary for all lawyers to become mediators, but they must all understand the dynamics of mediation so as to be able to take part in it in an appropriate way. I think there is no reason to postpone the introduction of an obligatory course on mediation at the Faculty of Law. We will then remove the barrier of insecurity which exists when people have not been trained and do not know what happens when a mediator starts mediating. As a result, they feel uneasy about such proceedings, and advise their clients not to opt for mediation." M. Vukmir, *supra*, footnote 24.

[72] Let us recall the advent of computers. (Author's note)

[73] "However, some attorneys do not understand, or choose not to understand the mediation process. They act as if they were before an arbitrator or judge, trying to convince the mediator of the correctness of their client's position. Some quash all attempts at a dialogue, declaring ultimatums and 'bottom lines', or worse, discouraging their clients from accepting reasonable settlement offers because they 'could do better in litigation'." A. H. Goodman, *Basic Skills for the New Mediator*, Solomon Publications, 7th printing, Rockville, 2002, p. 40.

[74] In 2005, the Ministry of Justice of the Republic of Croatia produced its Strategy for Developing Alternative Means of Dispute Resolution. This strategy provides strong support for the development of alternative methods of resolving disputes, particularly conciliation. One of the first projects within the strategy is the Mediation Pilot Project in cooperation with courts, by means of which judges and courts will provide the initial incentive and contribution to peaceful out-of-court settlement of disputes. The first such project will be implemented at the Commercial Court in Zagreb and the High Commercial Court of the Republic of Croatia. We should keep our fingers crossed for the success of this project. (Author's note)

Most attorneys are still reluctant to advise their clients to settle their disputes by means of mediation, for they regard the quick achievement of a settlement as lethal to their business.[75] Many still ask themselves why they should give up lawsuits which, due to their long duration, generate continuous earnings. They think it more profitable not simply to engage in lawsuits, but to make them last longer.

When alternative dispute resolution, or ADR, first appeared in the USA, American attorneys jokingly explained that this abbreviation stood for "alarming drop of resources". However, when they realised after some time that their earnings had not decreased, regardless of their participation in mediation proceedings (both as attorneys and, increasingly, in the capacity of mediators), they devised a new slogan: "Happy clients pay their bills".[76] Today in the USA, where mediation has become the most frequent method of dispute resolution, more than 90% of all court proceedings end in an out-of-court settlement, and 80% of all mediation proceedings are successful. American attorneys have contributed to this situation by their initiatives and efforts. Had this not been the case, it is said that the American judicial system would have collapsed.[77]

Can we apply the same *ratio* to Croatia (where the judicial system likewise cannot meet the demands of the times we live in) and to Croatian attorneys?[78] Certainly we can. Yet in order to succeed in this, we must expect, request and receive the support of Croatia's attorneys. This is a very slow process, and we can probably anticipate "passive resistance" from a considerable number of Croatian attorneys who will oppose the wider application of mediation in everyday dispute resolution.[79]

In modern Western countries, particularly the USA, it has been shown that most mediators believe that an attorney has acted unethically if he files an action with a regular court on behalf of his client without first discussing the possibility of mediation or some other alternative means of dispute resolution. The theory supporting this view is very simple: a court action will probably generate higher earnings than may be expected from mediation or another alternative method. Mediators are therefore of the opinion that attorneys who file actions with regular courts without first informing their clients of the possibility of mediation and other alternative methods, including their advantages and disadvantages as compared to court proceedings, are in a conflict of interest with their clients.[80]

Such conduct is most likely not uncommon among Croatian attorneys. Due to the fact that mediation is not a procedural precondition for initiating court proceedings, there is no statutory obligation for attorneys to advise their clients to settle a dispute in this much faster and cheaper way. *Are attorneys acting in their clients' best interest by doing so?* This is the question that we shall try to answer in the following section.

IX. Why is Mediation good for the Parties and Their Attorneys?

[75] "In the early 90's, I discovered that many attorneys perceived mediation as a threat to their livelihood. A quick solution meant less billable hours." A. H. Goodman, *supra*, footnote 70, p. 40.
[76] G. Ristin, a judge of the High Court in Ljubljana, "Zakaj so ameriški odvjetniki podprli alternativno rešavanje sporov, torej tudi mediacije?" ("Why have American attorneys supported alternative dispute resolution, including mediation?"), from a written report following a study trip to the USA, undated, p. 1.
[77] S. Austermiller, a US attorney and representative of ABA/Celli in Croatia, "ADR u praksi – nekoliko naučenih lekcija" ("ADR in Practice – Some Lessons Learned"), *Odvjetnik*, 3-4, 2002, p. 24.
[78] "It is not easy to say to a profession that has to support itself: go and mediate! I'm an enthusiast and I have my own law office, so this allows me to do it." M. Vukmir, *supra,* footnote 25.
[79] "If we cannot charge for mediation, it will be very difficult to promote it among attorneys. In reality, many attorneys do not have adequate means to permit themselves such a luxury. They need to be stimulated by other measures, such as charging by the hour as the most adequate form of remuneration." M. Vukmir, *ibidem.*
[80] E. Brunet and C. B. Craver, *supra*, footnote 29, p. 250.

Let us repeat: it is every attorney's obligation to carry on his legal practice properly and effectively. An attorney's proper, conscientious and effective performance[81] is, at the same time, the answer to the question: *"Why is mediation good for attorneys?"* – Because it is in the best interest of their clients.[82]

Therefore, if the first and most important duty of an attorney is to act according to his client's interests, and if reaching an amicable settlement is in the client's best interest, then it is the ethical obligation of every attorney[83] not only to call his client's attention to such a possibility, but also to do everything within his power to see that this possibility is realised. Conversely, if the possibility of a settlement is in the best interest of the client, then it is also in the attorney's interest.

a) Why is mediation good for the Parties?[84]

Parties agree to settlements for one reason: they believe that it is in their best interest. Sometimes it is a question of simple mathematics, while at other times the reasons for seeking a settlement are more complex. It is the attorney's duty to analyse his client's prospects of success and assess which type of proceedings give his client the best chance of achieving his goal. The attorney is obliged to inform his client regarding this analysis and assessment, following which a decision is made regarding the most suitable way of resolving the given dispute.

i) Reasons why parties opt for mediation[85]

- mediation proceedings are informal and flexible, and give the parties the best possible opportunity to express their positions and conflicting interests in the dispute;
- in mediation, all details of the dispute are considered, not just their legal interpretation;
- the parties directly and freely exchange their opinions regarding the substance of the dispute;
- the parties retain control over the proceedings;
- mediation may be terminated at any point;
- there is less possibility for conflict between the parties and their legal representatives;
- the emotional frustration of the parties, which usually occurs in litigation (before a court), is avoided;
- the outcome is in the hands of the parties (in mediation, the parties achieve their own resolution of the dispute);
- when a dispute is settled, no one is declared the winner or loser (no one "loses face", it is a "*win-win solution*");
- in mediation, communication between the parties is improved;

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[81] "…the most important attributes of an ideal attorney should be: loyalty (in other words, a strong advocate for the client's best interest), 'lawyering skills' (in other words, to be knowledgeable about the law and the legal system), hard-working, and an effective deal-maker who possesses 'client relation skills'." A. Kapardis, *supra*, footnote 35, p. 213.

[82] During the 1st European Conference of Judges entitled "Early Settlement of Disputes and the Role of Judges", held in Strasbourg on 24-25 November 2003, I wrote this same question down on a piece of paper during a presentation and handed it to my colleague, Tony Allen, a conciliator and director of the Centre for Effective Dispute Resolution (CEDR) in London, who was sitting next to me: "Why is mediation good for lawyers?" To my surprise, his answer was the following: "Your question is a great challenge! The way we 'sell' mediation is because it benefits parties (quicker and creative outcome, better process, less formality and less of having to litigate and lose) and lawyers. So, if you get a happy client, it should be good for the lawyer."

[83] Article 1 of the Attorneys Act of the Kingdom of Serbs, Croats and Slovenes of 19 March 1929 recognised the legal profession as a public order profession. It stated that the task of attorneys was to help clients with their expert knowledge and legal advice in a fair and conscientious manner; to assist clients in their disputes in order to reach settlements; to represent litigants before courts of law and defend their rights and interests; and to assist in the application of laws before courts and other state and local authorities, so that the decisions rendered would be regular and fair." S. Strugar, *supra,* footnote 25, p. 368.

[84] For more, see S. Austermiller, *supra,* footnote 73, pp. 24-25.

[85] "Today, a modern understanding of mediation helps us to realise that mediation is not merely a certain formal procedure conducted prior to judicial or arbitral proceedings, but rather a highly specific means of dispute resolution which sets out from the assumption that, if the parties want conciliation, it will be the sole method of resolving their dispute. Some American statistics indicate that 90% of mediation proceedings are successful. In Croatia, it is often thought that mediation is just an arduous period prior to the main hearing. This may be because we have always had obligatory mediation in our marital law." V. Rubčić, *supra*, footnote 22, p. 36.

- unlike litigation, mediation eliminates the causes and consequences of the dispute;
- mediation maintains good relations between the parties and enables them to continue in the future;
- in mediation, it is not important which party is right;
- the parties' interests are established in conciliation, not their rights;
- a common solution leads to mutual satisfaction;
- the mediator is neutral;
- mediation proceedings are confidential (the risk of unwanted disclosures is avoided – business secrets, protection of business reputation, etc.);
- mediation is less time-consuming;
- mediation costs are lower (they are limited and shared);
- mediation offers many possibilities for resolving a dispute (a court decision offers only one solution);
- uncertainties regarding the law and the facts of the case are avoided;
- the risks of an unfavourable court decision are excluded;
- a settlement in the common interest, reached via open negotiations, gives fewer grounds for subsequently being challenged;[86]
- mediation ends in a settlement voluntarily enforced by the parties, thus eliminating the need for long-lasting and expensive enforcement proceedings before a court.

Given their large number and the strength of their arguments, the aforementioned reasons clearly point to the advantages of mediation compared to other means of resolving disputes.

Here are some examples from the experience of an American attorney,[87] which clearly indicate the reasons that led his clients to seek a settlement in mediation proceedings.

ii) Pure mathematical calculation

The most common reason why clients consider the possibility of reaching a settlement is simple mathematics, which will be favourable to the client in the given case.

Example: In the event of full success, the client's claim in court proceedings would have amounted to USD 100,000. After careful analysis based on the available information, the chances for this client's success, were estimated at 75%. It was also estimated that the additional costs of court proceedings and attorney's fees would have amounted to USD 30,000 before such final success was reached. In light of these facts, the value of the settlement in this dispute was estimated at USD 45,000 (EUR 100,000 x 75% - USD 30,000). Based on such a calculation, the attorney proposed a settlement strategy whereby the settlement amount should be as high as possible, and no less than USD 45,000. Hence a settlement of USD 45,000 would be worth seeking, regardless of the client's strong conviction that the opposing party owed him USD 100,000. An analysis was then made of the opposing party's chances for success, whereby it was estimated that the party might be willing to pay as much as USD 80,000.
Naturally, the client was initially very suspicious of these calculations, but he soon understood that they were realistic, and agreed to this approach. Finally, a settlement of USD 65,000 was reached, and both the parties were quite satisfied[88] because they had done better than their lowest expectations (not less than USD 45,000 on the one hand, not more than USD 80,000 on the other).
An analysis like this is very effective when a party must reckon with significant additional costs in the event of the continuation of a lawsuit (if mediation is unsuccessful). These costs help the party to devise a way of "saving money" by reaching a settlement, either before a court or in mediation proceedings. A problem may arise when a client wishes to include his previous expenses in this

[86] M. Menschik, an attorney and president of the mediation Committee of the Bar Association in Zurich, "Conciliation – Quo Vadis?", *Odvjetnik*, 3-4, 2002, p. 21.
[87] S. Austermiller, *ibidem,* footnote 73, pp. 24-25.
[88] "The best settlement is one with which both parties are equally dissatisfied" (statement by an unknown author).

calculation, as this usually changes the results of the analysis completely. In the above case, the client had already spent USD 20,000 on costs and fees. Had he insisted on their being included in the calculation, the lower limit of the settlement would have increased to USD 65,000, whereupon the risk of failure of the entire proceedings would have grown. Previous expenses are not relevant when calculating a settlement and a rational decision should be based primarily on an estimate of future gains and expenses.

iii) Exhaustion of the parties resulting from long-term litigation

Sometimes the parties will agree to a settlement simply because they feel litigation has exhausted them, so that they wish to bring it to an end and enjoy peace again.

Example: A client represented by the attorney bought some real estate together with his nephews. He set up a car mechanic's workshop on this piece of land, while the nephews regarded the land only as an investment. The three of them had had a dispute for many years over how much rent for the workshop should be, whether the roof should be fixed, the workshop enlarged, and so on. Each side was convinced that the other party was depriving it of large sums of money. The dispute was extremely complicated in that it involved family relations.

Conclusion: The attorney was able to reach an agreement only because his client was fed up with it all, and wanted a clean conscience and a normal life. The lawsuit they were all involved in had ruined their family relations, so that every Christmas gathering or wedding turned into a disaster. The party in question wanted to put an end to this, and that was the main reason why an amicable solution in the form of a settlement was possible.

iv) Party's public image as a business

Businesses are often ready to reach a settlement to prevent any unfavourable information from becoming public, as this could be harmful to their business.

Example A: The attorney represented a company which, among other things, produced gas bottle safety valves. They asked him to amicably settle a certain dispute, even though they could not lose it. This dispute involved a woman who had bought two bottles of propane that had valves produced by the company in question. The woman left the bottles in her car and went shopping. That day the temperature was over 45°C in the sun, and the car was left parked with its windows closed for five hours. Having finished her shopping, the woman got in her car, started the engine, and lit a cigarette. The gas bottles exploded. Luckily, the woman managed to jump out of the car in time and roll over to a safe place. She was not injured, but sued the valve producer for a million US dollars in damages.
If the company had opted for a lawsuit, it would have succeeded. The product was in good and safe condition, and the plaintiff had acted contrary to the written warning clearly affixed to all the gas bottles, as well as common sense. The client in question had a substantial budget for legal expenses and could afford a court "battle", which would probably have taken years. In spite of this, the parties reached an agreement because the company wanted to avoid any possible implications of a lawsuit. The media and, in particular, the company's competitors would have used this opportunity to encourage distributors to sell their products instead. Such an outcome would have caused more problems than the few thousand EUR which the plaintiff was paid by way of a settlement. Naturally, the settlement included a clause on absolute confidentiality.

Example B: Some parties are guided by a different logic than in the example above. A client represented by the attorney produced computerised irrigation and spraying systems. They refused a settlement offer by the party who had sued them, arguing that use of their irrigation system resulted in reduced cotton crops. The plaintiff also stated that too many chemicals had been sprayed in their cotton fields, likewise resulting in crop reduction. The attorney was of the opinion that the plaintiff's claim was well-founded, and that the amount offered to settle the dispute was reasonable, given the circumstances. However, the client refused the possibility of a settlement, fearing that it could result in

a series of actions by other farmers who had experienced the same problem. Therefore, the client believed that they should stand up to the plaintiff's action, so as to discourage any future litigation.

Conclusion: In the first example, there was no fear of litigation for two reasons. First, the attorney and his client agreed that any future lawsuit concerning the explosion of gas bottles would lead to court proceedings regardless of the successful settlement in this specific case. Second, the probability of "spreading rumours" among users of propane bottles was very low. These were mostly people from all over the United States who used them in their barbecue grills, and so there was very little chance that they could exchange information and discuss the product and the potential gains resulting from lawsuits or settlements with the producer. On the contrary, cotton growers in West Tennessee, such as the plaintiff in the second example, talk to each other continually about their crops, irrigation systems and similar topics. Any news regarding a settlement with one farmer would be disseminated (regardless of the confidentiality clause), and would result in other similar actions.

The calculations made in these examples were of great importance for the attorney's assessment of his client's options. In some cases, these calculations will result in an attempt to reach a settlement, while in others they will not. It is very important for attorneys representing companies and other business entities to recognise these differences and make their clients aware of them.

v) Uncertain success of litigation

In some cases, a party may want to resolve a dispute amicably because greater losses can be avoided in that way.

Example: The attorney represented a public office administering the property of persons who had died intestate. In one such case, a person had died leaving a legacy valued at one million US dollars. During the last few years of his life, the deceased had had no contact whatsoever with his relatives, and his only friend was a very young woman who took care of him. Upon his death, the young woman filed a claim to be considered as his sole heir. She claimed that the deceased had promised her his entire estate as compensation for her taking care of him, running the household, and so on. In this case there was a will, which had been drawn up nine years earlier, and in which she was not mentioned.

Conclusion: Although the young woman probably would not have succeeded in her claim, the family, which possessed all rights to the inheritance, agreed to pay her USD 20,000 as the result of a settlement. They did not like her, and believed that she wanted to take away their legacy. Nonetheless, they decided to reach a settlement because they feared losing all or a significant part of the estate if a judge were to believe her story and rule accordingly. As a necessary precaution against such a possibility, they decided to reach a settlement.

vi) Opposing party's need to make an apology

Many lawsuits are conducted in court because people are overwhelmed by their emotions, and do not want to admit they were at fault.

Example: The attorney represented an investor who had planned to demolish the interior and change the function of a 40-storey building, leaving only its exterior walls. Based on the construction permit and other conditions of the building work, as well as the fact that there was a protected lessee, i.e. a Chinese restaurant on the ground floor of the building, the developer wished to begin demolition six months before the restaurant lease expired. The lessee refused the very generous offers made by the client to compensate for all the costs of finding a new location and moving the restaurant six months prior to expiry of the lease. As a result, the investor started work from the top of the building, while the restaurant continued operating on the ground floor.
After several months, the owner of the restaurant sued the investor, stating that demolition and other building work had caused business in his restaurant to decrease. He claimed that the warning sign for pedestrians on the sidewalk hid the restaurant sign, that the noise disturbed his customers, and so on.

After several months of litigation, the owner of the restaurant told the investor's attorney that the fact that his client showed no due respect disturbed him the most. They agreed to a meeting of both parties, where the investor offered the owner of the restaurant the same amount as before, but now also included an oral and written apology to the restaurant owner in the settlement agreement. The latter accepted this offer, and a ceremony was organised at which a representative of the investor bowed and apologised to the owner of the Chinese restaurant and his family for all the inconvenience. This gesture was sufficient in itself to enable an amicable settlement of the dispute.

It is impossible to list all the reasons due to which disputes can and should be resolved in a peaceful manner. With some creativity and imagination in his daily work, an attorney can recognise the right moment and circumstances which make a settlement possible. He must then present this solution to his client and propose the most favourable option for resolving the dispute. As we have already stated, *the guiding principle for every attorney is to act in the client's best interest!*

b) Why is Mediation good for Attorneys?[89]

i) Good business reputation due to satisfied clients

It is in the interest of every attorney to consider the possibility of out-of-court settlements. Reaching settlements amicably helps in acquiring future new cases. A satisfied client will continue to use the services of an attorney who has been successful in out-of-court negotiations and mediation proceedings.[90] Research has shown that clients most often criticise their attorneys for stalling court proceedings while ignoring their clients' interests. In addition, research findings show that clients return more frequently to an attorney who reached an out-of-court settlement for them than to one who resolved the dispute via regular court proceedings.

ii) Faster realisation of earnings and decreased risk of non-payment of fees and expenses by dissatisfied clients

"Happy clients pay their bills". Although mediation does not include the fees for various procedural steps (e.g. filing suits, motions or appeals) which attorneys charge in litigation, client satisfaction with the settlements reached in mediation has a positive outcome for attorneys: namely, clients pay willingly and promptly for such services.[91] Such prompt payment results from attorneys' active engagement in securing the quickest possible resolution of their clients' disputes. A settlement in mediation proceedings rules out long-lasting lawsuits and, as a result, delays in the payment of attorneys' fees as well.

Prompt payment of an attorney's fees for services rendered before, during and after mediation proceedings is particularly likely when these fees are included as a percentage of the successful settlement. By reaching a speedy settlement in mediation proceedings, an attorney will be able to collect his fees much sooner than in lengthy court proceedings. Therefore, attorneys are able to make a much greater profit by reaching settlements very early on in mediation proceedings, since their time and energy investment is much lower. Although this claim touches on some controversial issues, it is nonetheless valid. Attorneys may well sometimes charge large sums for minor tasks. However, if the client is satisfied, and if it is in his best interest to reach a speedy settlement, why should the attorney not be entitled to a share of the resulting benefits? This is in accordance with the very nature of an attorney's representation of his clients.

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[89] See S. Austermiller, *supra,* footnote 73, p. 24.
[90] A. H. Goodman, *supra,* footnote 70, p. 41.
[91] The most recent table of attorneys' fees and remuneration (Official Gazette *Narodne novine* nos. 91/04 and 37/05) established the amount of remuneration for representation by an attorney in mediation proceedings (t. no. 7, point 7, in conjunction with t. no. 7, point 1) and, even more importantly, set the hourly rates for giving statements of opinion and legal advice (t. no. 30). These instruments may be used by attorneys when charging for services rendered before, during or after mediation proceedings.

When opting for amicable settlement of a dispute, an attorney should always be aware of the fact that in regular court proceedings he is exposed to the risk that, after much difficult and time-consuming work, the client will not pay for his services for various reasons.

iii) More efficient time management

Apart from what has been said above, by trying to reach out-of-court settlements whenever possible attorneys can manage their time more efficiently and work on other cases. Each successful settlement leaves more time for work on more profitable cases which are not suitable for mediation.

iv) Professional challenge

Taking part in mediation can represent a real professional challenge for attorneys, thus providing the motivation to acquire and master new skills that will augment their previous knowledge and experience.

v) Enhanced creativity at work

Mediation proceedings offer attorneys the opportunity to show great creativity in seeking and achieving the best possible dispute resolution in the interest of their clients. A court decision, on the other hand, always offers only one typical solution. In this respect, the story of two boys fighting over an orange is most enlightening. After they finally agree to split the orange into two equal pieces, one boy takes his half, eats it, and throws away the peel. The other boy throws away his half of the orange, takes the peel from both halves, and uses it to make a pastry. In just the same way, negotiators quite often "leave money lying on the ground" when they cannot reach an agreement favourable to both sides. Too many negotiators end up "giving half an orange to each party" instead of "giving the whole inside of the orange to one party and the whole peel to the other" via an agreement. Mediation, in which the parties meet, either together or separately, and openly discuss all the details, explaining their understanding of the dispute and expressing their wishes and interests, makes a mutually satisfactory resolution possible.[92]

vi) Eliminating tensions that accompany court proceedings

Successful mediation satisfies the interests of both parties. The parties and attorneys alike seek to avoid tensions of any kind, either between the parties themselves or between one party and the opposing party's attorney. A tension-free environment offers better prospects for a successful settlement in the common interest.

vii) Satisfaction at one's own contribution to finding the best solution for both parties

A settlement reached in mediation makes both parties to the dispute feel satisfied, because they are both winners. There are no losers. The attorney's contribution to this outcome will be highly appreciated not only by his client, but also by the other party. Such a positive environment brings attorneys greater satisfaction, and is more rewarding than their usual activities, in which they are concerned solely with the interests of the client they represent.

viii) Getting to know clients better through mediation proceedings

Through mediation proceedings, an attorney has a much better chance to become familiar with his client and all aspects of the dispute. This is because the client, in confidential proceedings before a

[92] For more, see R. Fisher, W. Ury and B. Patton, *supra*, footnote 5, in the chapter entitled "Find Solutions that are Beneficial for Both Parties", pp. 80-105.

mediator, openly discusses all details of the dispute. The same is true for the opposing party. Even in unsuccessful mediation, the consideration of many points of disagreement between the parties significantly contributes to the speedy termination of ongoing litigation. In such a way, the attorney's work is made much easier when a lawsuit is resumed, and he can thus economise his time and energy in order to concentrate on other tasks.

ix) Eliminating the risk of a possible unfavourable decision in court proceedings

Reaching a settlement in the interest of both parties during mediation proceedings eliminates the risks and consequences of an unpredictable court decision regarding the matter at issue. This also prevents the client's dissatisfaction with a potentially unfavourable court decision, which will then, as a rule, be transferred to his attorney.

xi) Possibility of choosing a mediator

Attorneys, together with their clients, are able to choose a mediator, a person in whom both sides have confidence, and who will help them resolve their dispute in a peaceful manner. In court proceedings, the parties and their attorneys have no influence on the choice of judge to whom their case will be assigned. There is very little they can do even if they are dissatisfied with the judge assigned to their case; nor do they have any influence on his replacement.[93] In mediation proceedings, however, not only can the parties and their attorneys choose the mediator, but they can also replace him if they are dissatisfied.

xii) Offering new legal services to clients

Legal counselling before, during and after mediation proceedings constitutes a new added service[94] in the legal profession. Mediation represents an entirely new forum in which attorneys have the opportunity to compete in rendering high-quality services to their clients. It thus offers a new opportunity for making income much more quickly than in the case of ordinary activities connected with courts and judicial proceedings. Attorneys should be aware of the fact that mediation is only one step in the process of resolving a great many disputes. If it does not succeed, the parties as well as their attorneys still have the option of following the traditional route of litigation before a state court.

In addition, there is no obstacle to attorneys being trained as mediators, so that they will be in a position to render additional services and thus increase their earnings.[95]

xiii) Knowledge acquired in mediation can increase attorneys' effectiveness

The special knowledge of new techniques such as negotiation, mediation and communication acquired during training as a conciliator can significantly increase attorneys' efforts to achieve a larger number of both out-of-court settlements and in-court settlements in cases pending before regular courts.

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[93] G. Ristin, *supra*, footnote 72, no pagination.

[94] M. Vukmir, "Medijacija kao pravna usluga" ("Mediation as a Legal Service"), PowerPoint presentation, 12th Days of Croatian Arbitration, Zagreb, 2-3 December 2004, p. 12.

[95] "It is very important to establish good cooperative relations with the State Prosecutor's Office, which represents the state in civil cases, the large insurance companies which most often appear as litigants in civil actions, and above all with the Bar Association. The support of the Bar Association has been critical to the success of the programme, since attorneys will never support mediation if they perceive it as a way of decreasing their earnings. In accordance with the principle: 'If you can't beat them, join them', the court supported attorneys' proposal for increased fees in the case of a court settlement, which is, after all, the final goal of mediation. In addition, attorneys were given free access to seminars on mediation techniques organised for judges, and were involved in our project as mediators. This turned out to be a very successful model for linking the private and public sectors in dispute resolution." For more, see A. Zalar, *supra*, footnote 4.

xiv) Contribution to wider community interests

The possibility of reaching out-of-court settlements, such as those in mediation proceedings, is in the wider community's interest of developing an effective judicial system. An increased number of cases resolved in mediation would significantly lower the Croatian judiciary's workload and increase the quality and efficiency of its work. Attorneys are one part of the current, improperly functioning system, and are thus also responsible for this situation. Through their initiatives and efforts, they should contribute towards improving the Croatian judicial system, to both their own satisfaction and that of all members of the community.

X. Conclusion

The case backlog in Croatian courts and their inefficiency and slowness in providing legal protection has created dissatisfaction among parties in court proceedings and in society at large. There is a pressing need for new solutions. One possibility for change is to make more extensive use of various alternative means of resolving disputes. *Mediation*, as a specific method of mediation in disputes between parties, has important advantages when compared to other forms of dispute resolution. In order to apply mediation in the everyday practice of resolving disputes in Croatia, attorneys must also make their own contribution, for they are part of the present ineffective judicial system and, therefore, partly responsible for how it functions (or does not function). The basic task of all participants in Croatian judicial proceedings, and thus also of attorneys, is to avoid bringing so many cases to court. It is necessary to educate[96] attorneys, judges, state prosecutors, business lawyers and other participants in judicial proceedings, as well as the public, and familiarise them with all the advantages of mediation as an alternative means of resolving disputes. This will then create a new social climate, in which litigation before state courts is no longer the only option. Croatian attorneys must demonstrate increased awareness of the fact that the best route for the clients they represent is usually that which offers the most favourable resolution of a dispute in the shortest period of time and at the lowest cost, and without involving the state judicial apparatus. Attorneys' contribution would have a strong impact on changing the current social climate surrounding litigation in the Republic of Croatia. Therefore, the answer to the questions: *Why should attorneys follow this course?* or *Why is mediation good for attorneys?,* is quite simply: **"Because it is in the best interest of their clients!"**

Članak objavljen:

- Mediarcom European Mediation Association, Estoril, Portugal, Annual Publication, *Mediation in Action*, Mediarcom /Minerva Coimbra 2009, str. 15-69.

- Croatian Arbitration Yearbook, Vol. 16, year 2009, Zagreb, Published by Permanent Arbitration Court, Croatian Chamber of Economy and Croatian Arbitration Association, str. 337-367.

[96] Increasing the number of disputes that can be resolved amicably requires a major change of social awareness, for people have learned to resolve disputes in only one way, i.e. before state courts. Education in various methods of peaceful dispute resolution is necessary not only for adults, but also children in elementary and secondary schools (one worthy example being the Centre for Peace, Non-Violence and Human Rights in Osijek) and university students. The knowledge acquired by younger generations of citizens about effective alternatives for resolving disputes will eventually result in significant changes in the general climate of litigation in Croatian society. (Author's note)