Seventh Report, of 3 July 2019, by the Ibero-American Committee for Judicial Ethics on the ethical principles applicable to the mediation process. Rapporteur: Rosa María MAGGI DUCOMMUN.

Introduction.

1. The High Court of Justice in the Province of La Pampa, Argentine Republic, in the session of 13 March 2019, ordered that a pronouncement on the following topics be requested from the Ibero-American Committee for Judicial Ethics (CIEJ): **"*what ethical requirements will apply to mediation processes? And, if applicable, how will it be ensured that those requirements are met (in particular, taking into account the diverse range of variables typical to mediation processes)?*"**

2. Such questions are formulated in the context of the Province of La Pampa itself where, via Law 2699 on Integral Mediation, the compulsory Judicial Mediation service was set up, establishing the High Court of Justice as its competent authority, and providing for relevant regulations to be issued in accordance with article 38 of the same law. The regulations on Compulsory Judicial Mediation mentioned in Title IV of the aforementioned Law 2699 have already been approved by the High Court of Justice of the Province of La Pampa, via Agreement 3277.

3. The consultation is related to ethical matters concerning the mediator and their work, aspects that have scarcely been developed, in the face of the many challenges that the process presents, mainly when dealing with oral interventions within the context of confidentiality, where the threshold for auditing would be relatively lower. It specifically asks what the ethical requirements within the mediation process are and how ethical practice can

be guaranteed when there are many different connected variables. Examples are given of difficult issues, such as those linked to confidentiality, lawyers who are simultaneously mediators, fees that depend on the amount of the settlement that the mediator is working on, self-determination of the parties, the possibility of subjective direction, legality with authorised informality, speed and adaptability to the various idiosyncrasies and people, etc.

4. The High Court of Justice highlights that, via Agreement 3408 of 9 March 2016, it accepted the Judicial Ethical Principles declared in Part I of the Ibero-American Model Code of Judicial Ethics, which serve as an orientation guide and a topic that judges may call upon to meet their requirements. Therefore, given the important contribution that mediators make to the justice service, their growing participation and the absence of a body of specific rules relating to ethics in mediation processes, a decision has been made to address this consultation to the Judicial Ethics Committee, in line with the provisions established in article 83 of the aforementioned Model Code.

Analysis of the subject of the consultation.

5. The guarantee of access to justice - conceived as a fundamental right that requires the State to make available to all citizens adequate mechanisms for resolving disputes that hinder the full exercise of their rights - entails the administration of justice affording an appropriate response, which takes as a starting point the very nature of the conflict and allows for it to be resolved effectively, fully and definitively. It is difficult to achieve this goal successfully without considering - at least within the scope of the available rights and interests - a system that prioritises adequate dispute resolution methods.

6. In this context, it is important to raise awareness among civil servants and citizens in general regarding the nature of alternative dispute resolution methods (ADR) as a complementary means of ensuring legal protection through applying principles that afford equality, impartiality, neutrality and effectiveness, as well as enabling access to justice for all citizens. Without prejudice to existing regulations, aimed at establishing the actions of the mediators, their powers and obligations, it is necessary to constantly and persistently reinforce the ethics of the mediator, in order to incentivise social behaviour and the correct performance of their professional role.

7. As a guarantee to citizens, access to justice must be wholly understood, in all of its aspects. It is therefore of the utmost importance that state bodies offer a wide range of alternatives. However, while there are valid reasons that the parties may take into consideration for resorting to alternative methods other than court proceedings, whether they are founded in the nature of the dispute or its subjective characteristics, it is appropriate to make it clear that it does not seem acceptable that citizens must resort to them as the sole viable option, due to failings in the administration of justice. In other words, the importance and relevance of the alternative resolution mechanism must not stem from a deficit of provision of justice on the part of the public system. Indeed, an essential and unmistakable characteristic of these alternative mechanisms is their voluntary nature, that is to say, that the parties involved in the dispute are the ones who freely and voluntarily access the mechanisms, through which they consolidate their autonomy and will.

8. As indicated, the questions and the examples provided by the High Court of Justice originate in the local context of the Province of La Pampa, Argentina, which has implemented a compulsory initial mediation procedure, which is run by lawyers.

9. This substantially determines the sphere that any response must fall within, and its basic characteristics show the need for a deeper and more extensive analysis aimed at establishing the ethical aspects of mediation, recognising it as an activity that has its own role, which is different from other dispute resolution mechanisms.

10. So, before responding to the requests of the High Court of Justice in La Pampa it seems useful to give an outline of a conceptual definition of mediation which will serve as a theoretical framework to steer the topic, and then set out the parameters that distinguish it from other alternative dispute resolution mechanisms (ADR).

Mediation. Conceptual definition.

11. In the topic at hand, mediation, and its close relationship with conciliation, has been acquiring particular importance and prominence in recent years, as a response to problems in the legal system. The latter often underestimates the parties' capacity to reach an agreement, and submits them indiscriminately to its procedures, as though there were no other institutional methods of bringing about justice.

12. Directive 2008/52/EC of the European Parliament, the objective of which is "*to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings*"[1], in article 3 defines extrajudicial mediation in the following terms:

    Art. 3. *'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.*
    It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

13. Despite the fact that the judge hearing the judicial proceedings cannot act as mediator, under the terms regulated by the European Directive, this requires the judge to take the initiative to set up the extrajudicial mediation. Therefore, a commitment is established on the part of the judge towards the mediation, in the terms laid out in Art. 5.1 on the judge's promotion of the mediation:

    Art. 5.1. "*A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available*".

14. Thus, the European Directive refers to a legal principle that also translates into an ethical duty of discretion and confidentiality on the part of the mediators, as laid out in Art. 7:

[1] OJEU no. L 136 of 24 May 2008, p.3.

Art. 7. "Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

a) *where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or*

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

A necessary distinction: mediation and conciliation

15. Firstly it must be stated that "*the distinction between conciliation and mediation is not obvious: both are confused in various legislations and doctrine: in different countries and even within the same country, for different legal fields, the institutions of mediation and conciliation are not clearly distinguished, and sometimes their names are used interchangeably*"[2].

16. There are, however, conceptual differences between conciliation and mediation. The former may be defined in two ways: one broad, which conceives it as any agreement or compromise between two or more persons who take differing positions and that can be brought via judicial or extrajudicial channels; and the other technical or procedural, which defines it as the result of a judicial process underway that ends precisely via this atypical channel when the law allows it, with or without the approval of the judge hearing the case.

17. The case of mediation is different; it does not require the intervention of the judge nor the existence of a lawsuit, nor the judicial ratification of the agreement, unless it deals with interests that are not available to the parties, specifically providing for the intervention of a third party to act as an intermediary in the dispute.

[2] Justice Studies Centre of the Americas, "Manual de Mediación Civil" (Civil Mediation Manual), Santiago, Chile (2017), p. 47.

18. An important element marks the difference between both mechanisms. The conciliator is allowed a greater degree of intervention to facilitate the agreement; including the possibility of presenting the basis for a settlement; whereas the role of the mediator consists of assisting the parties and bringing them together so that they can autonomously reach a solution to the dispute, without the mediator intervening in any way in the agreement that they reach.

19. For greater clarity, these mechanisms can be defined as follows:
"*Conciliation is a process in which a third party intervenes in a dispute in order to provide fair balance to it. This task may be carried out extrajudicially or intrajudicially. The majority of civil procedure codes in countries with the continental tradition regulate it as a power of the judge or magistrate assigned to the case. The purpose of conciliation is to try to resolve the case before the hearing or trial*"[3].
"*Mediation is a private process, whereby a neutral third person, called a mediator, without the authority to impose a solution, helps parties in dispute by promoting dialogue, so that, by themselves, they can reach a solution that is valid for everyone involved. The parties have the opportunity to describe the problems and discuss their interests, emotions and possible solutions.*
In some countries, the courts can order certain cases to go through mediation, or invite the parties to try mediation; in any case, the process remains voluntary since it does not require the parties to reach an agreement"[4].

20. This analysis will not extend to other alternative dispute resolution mechanisms, which have clear conceptual differences and must not be confused, such as arbitration, in which the parties in dispute agree to submit their dispute to be heard by one or more arbitrators charged with deciding upon it in accordance with law or equity; facilitation, a process in which an expert guides a group of people to analyse and discuss the topics that the group itself must resolve; or negotiation, in which it is the disputing parties themselves who, through dialogue, reach an agreement that satisfies their respective interests.

[3] Justice Studies Centre of the Americas, "Manual de Mediación Civil" (Civil Mediation Manual), Santiago, Chile (2017), p. 41.

[4] Justice Studies Centre of the Americas, "Manual de Mediación Civil" (Civil Mediation Manual), Santiago, Chile (2017), p. 42.

Legal framework applicable to mediation.

21. As mentioned above, mediation consists of an assisted negotiation the purpose of which is to help the parties involved resolve a dispute in terms that are mutually acceptable, with the intervention of a neutral third party to assist them during the process of reaching an agreement.

22. The benefits provided by mediation, which creates a relationship of trust between the disputing parties within the context of a flexible process that allows them to reach agreements, explain the notable increase that has been seen in the last few years. Some legislations have even imposed it as a compulsory preliminary step for accessing legal proceedings. This is the case, for example, in Chile, in the sphere of family and health cases.[5]

23. However, the surge in mediation is particularly seen in disputes regarding property, in which matters that are fully available to the parties are dealt with. In comparative law, this trend is particularly widespread insofar as it has been incorporated into commercial law in internal legislations, which can be seen in Latin America, for example in Colombia, Peru, Ecuador, Mexico, Argentina, in certain cases even as a prerequisite for accessing the legal system. Some European countries, such as Italy, Germany and the United Kingdom, have opted to incorporate a compulsory preliminary mediation or conciliation system in civil and commercial matters. Spain does not consider it compulsory, but equally assigns commercial mediation an important role as a dispute resolution mechanism in commercial disputes.

   "*In this regard, the paths chosen in the comparative field span from fully voluntary mediation (Spanish system) to compulsory preliminary mediation for all cases relating to property (Argentinian system), passing through intermediate stages in which the judge is authorised to subject the parties to this procedure, before or during the trial, at the behest of the judge or upon a request made by one of the parties (the English-speaking world's system of court annexed mediation), with financial sanctions aimed at discouraging a*

[5] Articles 106 of Law no. 19,698 and 43 et seq. of Law no. 19,966).

lack of sincere collaboration during the process (exempting the petitioner from costs, ordering the payment of the costs of the mediation, fees, etc.)".[6]

24. A brief mention of Spanish law is warranted given the different paths chosen in this subject - compulsory mediation lead by a professional mediator, in the case of Argentina, and voluntary mediation lead by a judge, in the case of Spain.

Mediation in Spain

25. In Spain, the Law of Civil Procedure, in regulating ordinary civil procedure in Spain, provides that once the petition has been responded to, and, if applicable, the counter-claim, the parties must be called to a hearing that has three fundamental functions, in which the judge takes on an active role: promoting conciliation between the parties, removing procedural obstacles or defects from the process and laying out the subject of the trial. The function of conciliation, which is what we are interested in for the purposes of this study, undoubtedly aims to promote the search for consensual solutions. In order to facilitate this possibility, unless the subject of the proceedings is unavailable, conciliation is established as a compulsory step. The parties are required to attend the hearing, prepared for any eventuality, entailing the agreement of at least the petitioner or via the representative before the courts with sufficient powers for this purpose.[7]
26. The fact that the law grants the judge the powers to urge the parties to reach an agreement has meant that certain queries have arisen over the way that this function should be exercised without affecting the principles of judicial ethics, especially impartiality, trying to determine whether the judge should

[6] Eduardo Jequier Lehuedé, La mediación como alternativa de solución de los conflictos empresariales en Chile. Razones y mecanismos para su regulación (Mediation as an alternative for resolving business disputes in Chile. Reasons and mechanisms for regulating it), Revista de derecho (Valdivia) vol.29 no.1 Valdivia jun. 2016. http://dx.doi.org/10.4067/S0718-09502016000100005

[7] Juan Damián Moreno, Estructura y principios del proceso ordinario en la ley española de enjuiciamiento civil (Structure and principles of ordinary proceedings in the Spanish law of civil procedure), in Revista General de Legislación y Jurisprudencia N° 2, March-April 2000.

take on a more or less active role in the negotiation, or maintain a distant role, as a mere spectator. In order to elucidate these questions and better define the way in which the judge should exercise the conciliatory function granted by law, the views of the Judicial Ethics Committee were consulted. In the Report (Consultation 11/2018), of 23 January 2019, it analysed the question in light of the principle of impartiality, which regulates judicial ethics as an essential premise of a fair trial and an ethical duty of the first order for the judge. The report shed some important light on the topic of the ethics of mediation.

27. In its analysis, the report states that the principle of impartiality "*is not, in any case, negatively affected by the fact that the judge, in accordance with the rules that regulate the process, urges or invites the parties to come to a conclusion*", but it then specifies that this invitation or exhortation "*cannot, in any way, become a direct or indirect imposition, and the judge must strive to ensure that none of the parties may view it as coercion*".

28. Further on it warns: "*Impartiality prevents the judge from taking part in the negotiations that the parties may undertake with the aim of reaching an agreement, given that it would easily involve taking a position*" ..."*If the judge takes part in the negotiation between the parties, there is a risk that his or her impartiality may be affected. The judge is not a mediator and cannot act as one, given that he or she is not an impartial third party without any decision-making power, but rather, on the contrary, someone who must decide upon the case if the parties fail to reach an agreement*".[8]

29. Thus, it differentiates between "*mediation, in which the parties in dispute meet with an impartial third party, who facilitates the communication between them to help them find a solution, without formulating a proposed solution; conciliation, in which the impartial third party facilitates the communication between the disputing parties, and suggests a solution; and arbitration, a method in which the impartial third party, who is not part of the public justice*

[8] Report (Consultation 11/2018), of 23 January 2019. Principle of impartiality. Exercise of the powers of the judge in judicial mediation http://www.poderjudicial.es/cgpj/es/Temas/Comision-de-Etica-Judicial/Dictamenes/Dictamen--Consulta-11-2018---de-23-de-enero-de-2019--Principio-de-imparcialidad--Ejercicio-de-las-facultades-del-Juez-en-la-mediacion-judicial

system and is appointed or accepted by the parties, resolves the dispute by means of a binding decision”.[9]

The mediation system in the Province of La Pampa, Argentina.

A. Federal and Provincial Justice System

30. Before describing the mediation regime in the province of La Pampa, it must be taken into consideration that the judicial system in the Argentine Republic feeds into the political structure of the nation.

31. The federal regime gives rise to the existence of a dual legal system, made up of the Judiciary of the Nation and the Judiciaries of the Provinces and of the Autonomous City of Buenos Aires. Thus, there is a distribution of competencies between the federal courts (of the Nation) and the ordinary ones (of the provinces), which determines which of them will act.

32. Article 121 of the Constitution of the Argentine Republic establishes that: “*The provinces retain all of the powers not delegated by this Constitution to the Federal Government, and those which were reserved by special pacts at the moment of their incorporation*”.

33. As the jurist and judge, Mariano Borinsky, says, “*One of those powers delegated by the provinces of the Federal Government is the judicial power, as long as the contested question deals with a subject related to the defence of public interests in general that is overseen by the central power*”.[10]

34. These subjects of federal competence are expressly assigned by constitutional laws and by laws dictated by the National Congress. Article 116 of the Constitution and Law 48 determine the matters that are to be heard by the federal justice system.

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[9] Ibero-American Judicial Summit, “The Brasilia Rules on access to justice for vulnerable people”, Brasilia, Brazil (2008), p.45

[10] Borinsky, Mariano: “La Justicia Federal Argentina: organización y funcionamiento” (Argentine Federal Justice: organisation and functioning). https://www.infobae.com/opinion/2016/08/09/la-justicia-federal-argentina-organizacion-y-funcionamiento/

35. At a federal level, on 15 April 2010, Law 26,589 was passed, on mediation and conciliation, which establishes compulsory mediation prior to any judicial proceedings subject to the provisions of that law. This mediation process governs the federal justice system, but not the provincial one.

36. However, by virtue of their autonomy, each province has adopted different solutions regarding mediation[11], one of which is the one covered in the following section, relating to the province of La Pampa.

B. Provincial regulation

37. Mediation in the province of La Pampa, Argentina, is regulated by Law 2699 and it has applied to the whole of the province, since 1 November 2015.[12]

38. Art. 2 of that law defines mediation as a "*method of alternative dispute resolution lead by one or more duly qualified mediators, who will encourage direct communication between the parties*" and classifies it into (i) voluntary extrajudicial, (ii) voluntary in a school context, and (iii) compulsory judicial.

39. The law also explains certain principles of the mediation process - understood as guarantees that the parties must be informed of - which are:
    a) Neutrality; b) Equality; c) Impartiality; d) Orality; e) Confidentiality of the proceedings; f) Direct communication between the parties; g) Speed; h) Economy; i) Satisfactory balance of the interests.

40. Given its integral character as a consensual method, mediation is foreseen for all disputes, except those expressly excluded in law. The system is structured around the Public Centres for Mediation and Alternative Conflict Resolution [Centros Públicos de Mediación y Resolución Alternativa de Conflictos (CPMRAC)] which, among other functions, awards licences and maintains the

[11] To this effect, see http://www.maparegional.gob.ar/accesoJusticia/public/verDetallePais.html?codigoPais=ar

[12] Law 2806 extended the implementation of Title IV of Law no. 2699 on "Compulsory Judicial Mediation" until 31 October 2015, for the 3rd and 4th Judicial Districts.

register of mediators, supervises the functioning of the mediation phase and receives complaints regarding ethical breaches involving it, applies those rules and sanctions and monitors their follow-up, all through the Court of Ethics and Discipline.

41. Voluntary extrajudicial mediation is carried out before the CPMRAC or in private authorised centres for extrajudicial mediation. Voluntary school mediation is organised, coordinated and implemented by the Ministry of Culture and Education, and lead by teachers, specialists and/or authorised professionals who are registered on the Public Register of School Mediators.

42. Compulsory judicial mediation - which is the type of mediation that the consultation is looking at - is provided for as a requirement in order for a case to be heard before the court, apart from a few exceptions, and is regulated by the High Court of Justice via the Public Centre for Mediation and Alternative Resolution of Judicial Disputes [Centro Público de Mediación y Resolución Alternativa de Conflictos Judiciales (CPMRACJ)].

43. The process requires compulsory assistance from a lawyer, failing which the process will be invalidated, and in particular, in order for the agreement to be enforceable. As for the requirements of the mediator, the mediator must have held a lawyer’s qualification for at least three years, have participated in an introductory course, obtained a provincial licence and registration, be registered with the CPMRACJ and prove that they have periodically attended refresher courses. The grounds for excusal and recusal are regulated in detail, the applicable grounds being those that the Code of Civil and Commercial Procedure of the province of La Pampa sets out for judges. The parties are also able to recuse the mediator without expressing a reason, just once.

44. It is established that a person may not act as mediator if they have had any link to any of the parties in terms of advice or financial support over the course of the year prior to the start of the mediation, nor during the course of one year after their intervention ceased. This latter prohibition is absolute in respect of any case in which they have intervened as a mediator.

The Law on Mediation in the Province of La Pampa. Ethical framework.

45. The mediator's neutrality in the process is a primordial characteristic of their function. The law that regulates mediation in the province of La Pampa, Argentina, when listing the governing principles and guarantees offered by mediation, expressly refers to the neutrality and impartiality of the mediator, the behaviour that he or she must display during the course of the process, ensuring equality of arms and opportunities for the disputing parties, and he or she must also be present at the moment of signing the agreement that the parties end up adopting, in which the mediator must not have any personal or financial interest. The impartiality of the mediator also requires that the mediator does not have any conflict of interests with either of the parties, which the law strives to prevent via legally applicable disqualifications, implications and challenges in this regard.

46. The principle of confidentiality, which the law also mentions, prevents the mediator from divulging information and criminal records that they have received from the parties or third parties, as well as proposed solutions that have been discussed during the process, thereby safeguarding the people's trust in the system.

47. Finally, the support and commitment of the State is essential for implementing an efficient system for mediating civil and commercial matters, which cannot be left solely to private initiative. In this regard, the law on mediation that is applicable in the province of La Pampa offers a regulatory structure that tends to ensure that the parties have the possibility of effectively mediating their disputes in conditions of equality, before qualified mediators, whose suitability has been certified, also taking into account control measures aimed at ensuring the efficiency of the system.

48. The same purpose was behind the decision of the High Court of Justice in La Pampa to adhere to the Principles of Judicial Ethics declared in Part I of the Ibero-American Model Code of Judicial Ethics, which serve as a guide for the mediator's conduct.

49. The legal principles outlined illustrate the numerous requirements applicable to the mediation processes, which - in conjunction with the ethical principles - must be considered when determining a line of behaviour to guide the function of the mediator.

Ibero-American Code of Judicial Ethics. Principles applicable to mediation.

50. The consultation formulated by the High Court in La Pampa requests clarification as to what the ethical requirements applicable to the mediation processes would be and how to guarantee them. This is a matter that must be analysed by this Committee in light of the principles enshrined in the Ibero-American Code of Judicial Ethics, which are applicable to the conduct of the mediator, which include the following:

The principle of impartiality.

51. The mediator is independent and neutral and does not usually have decision-making powers. Thus, impartiality emerges clearly as a fundamental ethical principle that should guide the mediator's conduct, the principle dealt with in Chapter III and, in particular, the articles that are transcribed below.

ARTICLE 9. Judicial impartiality is based on the right of litigants to be treated equally and, therefore, to not be discriminated against when accessing justice.

ARTICLE 10. An impartial judge is one who pursues the facts objectively and with a view to proving the truth, maintaining throughout the whole process an equivalent distance from the parties and their lawyers, and avoids all types of behaviours that may reflect favouritism, predisposition or prejudice.

ARTICLE 11. The judge is obliged to abstain from intervening in any cases in which his or her impartiality is compromised, or in which a reasonable observer may believe that there is a reason to think that it has been.

ARTICLE 13. The judge should avoid all manifestations of preferential or special treatment with lawyers and those being tried, arising from his/her own conduct or that of the other members of the judicial profession.

ARTICLE 16. The judge must respect the rights of the parties to make statements and rebuttals, as part of the due process.

52. Applying these regulations whilst respecting this fundamental principle, the mediator must remain impartial throughout the whole mediation process, providing both parties with the possibility of participating in the process with equality of opportunities, under the same conditions, avoiding any conduct that could give even an appearance of partiality or favouritism.

53. As has been reiterated, the role of the mediator must be limited to exploring the interests of the parties, warning them of situations that could affect those interests, revealing to them the strengths and weaknesses of their respective arguments and helping them to adopt a mutually acceptable decision, without ever forcing them to reach an agreement via that route.

54. The mediator must understand that the service he or she is providing aims to facilitate communication between the parties, even, eventually, assessing the actual possibility of negotiations taking place between them. In that scenario, the mediator must have an attitude that is open, absolutely impersonal, disinterested and respectful, trying to find the personal and professional tools to soften the parties' conciliatory spirit, without affecting their free will.

55. The mediator must believe in the parties' capacity for coming to a solution, regardless of their conciliatory capacity; understand that their role is mainly to serve as a bridge of communication between the disputing parties, and that, although the mediator may make prudent use of their knowledge and persuasive dialectic tools to make the relevant recommendations in order to avoid a greater conflict, they must not impose their own criteria on the parties.

56. Respecting the principle of impartiality, the mediator must avoid conflicts of interest and inform the parties of any disqualification that affects them and which may harm their impartiality. Likewise, they must abstain from having any personal or economic interest in the agreement or transaction that settles the dispute, taking care not to set their fees based on contingency fees.

57. Along these lines of thinking, it seems inappropriate for the mediator's fees to be set according to the amount of the litigants' economic claims or for success-based commissions to be agreed, thereby preventing the spirit of the mediation from being diverted towards obtaining personal benefit.

Professional secrecy.

58. The confidentiality demanded by the role of mediator means that the regulations on professional secrecy laid out in Chapter X of the Ibero-American Code, also apply, in particular the following articles:

    ARTICLE 61. The purpose of professional secrecy is to safeguard the rights of the parties and the people close to them against the undue use of information obtained by the judge during the course of his or her functions.

    ARTICLE 62. Judges have the obligation to maintain strict confidentiality and professional secrecy in relation to ongoing proceedings and to facts or details learnt.

    ARTICLE 66. The duty to maintain professional confidentiality and secrecy that falls on the judge does not just extend to institutionalised information media, but also to the strictly private sphere.

    ARTICLE 67. The duty to maintain professional confidentiality and secrecy corresponds both to processing the cases and the decisions adopted in them.

59. With regards to the ethical principle under examination, the mediator must keep all of the information, documentation and any criminal record they may obtain during the process or while exercising their role, confidential.

60. The above means that they may not reveal what is said during the course of the mediation to third parties, nor divulge the content of the private sessions held by the mediator with either of the parties in the absence of the other, except where they have express authorisation to do so.

61. It is necessary to highlight the huge importance that the ethical principle of professional discretion takes on in view of the role of the mediator, since it is the only way in which the parties can feel confident and free to express all types of arguments in the negotiation and even accept facts or circumstances that are unfavourable to their interests, all whilst relying on the certainty that if the conciliation fails, nothing that was said will hold weight or be able to be used against them.

62. The mediator can make the most of this space for dialogue, either to make the parties aware of the costs entailed by the process (in terms of time, emotional, physical and economic costs) or any type of latent conflict, and thus urge the parties to adjust their contributions and make a conciliatory agreement viable, which will ultimately be more advantageous to all, taking into account a full

panorama of the judicial process, which is usually lengthy, costly and with an uncertain result.

63. If the mediator obtains insider information that the parties give in order for their position to be precisely understood, he or she must withhold this knowledge absolutely and never use it for any purpose. Such information may only be used to understand the background of the case and to evaluate the possibilities for conciliation between the parties, and the most equitable and impartial way to achieve this.

Equity and justice

64. As well as the impartiality of the mediator and their obligation of confidentiality and professional secrecy, the mediator must naturally perform his or her role with equity and justice, respecting the provisions in article 39 of the Ibero-American Code, the wording of which is as follows:

    ARTICLE 39. In all processes, the use of equity shall be especially directed at achieving effective equality of all before the law.

65. Thus, the respect of equity imposes upon the mediator the obligation to perform his or her role with care, maintaining throughout the whole process equitable and prudent conduct, avoiding any discriminatory conduct and striving to ensure that the parties freely reach a voluntary decision, in accordance with their own will, having been duly informed and without any coercion.

66. It is necessary to insist that the mediator, as a facilitator of the dialogue, must not even attempt to favour any of the disputing parties, and must always strive to ensure that they reach a solution that meets the best interests of them all.

Professional honesty and integrity

67. The proper exercise of their role also requires the mediator to maintain conduct that transmits confidence to the parties, which means respecting the

principles of integrity and honesty, as laid out in articles 54 and 79 of the Ibero-American Code of Judicial Ethics:

> ARTICLE 54. Upstanding judges should not behave in a manner which a reasonable observer would consider to be a serious threat to the prevailing values and feelings in the society in which they work.
>
> ARTICLE 79. The honesty of the judge's conduct is necessary to reinforce citizens' trust in justice and contribute to its prestige.

68. It is necessary to highlight the importance of undertaking the task responsibly and honestly, aiming to ensure that the agreement satisfies the interests and needs of the parties. The aim of mediation is not limited to reaching an agreement, but to bringing the parties together and trying to reconcile their differences, and urging them to continue to manage their disputes by themselves in respectful terms and with better communication.

69. The responsibility that the mediator takes on when intervening in the disputes of third parties over which they have no decision-making power; but in which they do have influence to assist in neutralising the problem and cooperate actively in constructing a solution, whilst respecting the parties' self-determination; requires aspects of excellence in their personal qualities as well as ethical excellence to undertake the role of mediator.

Ethical monitoring of mediation.

70. Once the ethical requirements for exercising the role of mediator have been specified, the need arises to study mechanisms for supervision and monitoring, which ensure that people will receive decent treatment from upstanding and duly qualified professionals. For this purpose, legal requirements are established for practising the profession, the requirements for qualification and continuous training, and even the setting up of disciplinary tribunals.

71. However, the reinforcement of the individual ethical values, which naturally affect and extend to professional groups, is key to ensuring the quality of the process and ensuring that people receive quality mediation.

72. In this regard, the controls that the law may impose are not sufficient, and the importance of the mediator's ethics is presented as an essential tool to provide people with an excellent service.

73. The legal regulations and the establishment of monitoring bodies does not seem sufficient to ensure the ethical conduct of the mediator, which means it is advisable to keep in mind the principles contained in the Ibero-American Code of Judicial Ethics to which the High Court of Justice in La Pampa has adhered, since it constitutes an effective tool for developing and perfecting the activity of the mediator.

74. In the words of the distinguished Argentine senior professor Armando S. Andruet, "*while mediators are always restricted by the basic protocols of the profession, the controls regarding the psychological influence that the appointed person can have on the individuals who participate in mediation can be high, abundant and equally dangerous, and this results in an unquestionable effect on one of the principles of the same mediation process: the self-determination of the parties*"... "*The ethical codes in any professional field produce - inwardly - substantial improvements in the aforementioned moral resources, and - outwardly - promotion by generating obvious public trust in the institution at hand.*"[13]

75. The reinforcement of the ethics of the profession of mediator seems, then, to be the best path for achieving the aim sought, which is the common good.

[13] Armando S Andruet. La ética profesional en la práctica de la mediación judicial. Comercio y Justicia. (Professional ethics in the practice of judicial mediation. Commerce and Justice).

https://comercioyjusticia.info/blog/opinion/la-etica-profesional-en-la-practica-de-la-mediacion-judicial/