

8.3 NON-JURISDICTIONAL METHODS OF PROTECTION OF HUMAN RIGHTS IN THE HEALTH SECTOR

In this guide, only one non-jurisdictional method of protection is examined: namely, mediation in the health sector. Mediation is one of the most common in the world alternative approaches to resolving conflicts which aims at achieving a “win-win” result.

The domain of health care is extremely emotionally charged, especially when it comes to the origin of a conflict, its “gradual escalation” from a moral and deontological plane to a legal plane. The health care industry often is riddled with pain, suffering, patients’ fears, distrust of people in “white coats”, emotions of relatives, on the one hand, and on the other hand, with a sense of professional responsibility, human and professional virtues of medical staff. Medical staff and patients and/or their family members usually constitute key figures in a health care conflict. Practical value of mediation in the health sector can be most clearly demonstrated through restorative justice (mediation in criminal cases). As the analysis of legal practice in this domain testifies, medical practitioners are usually held criminally liable under Article 140 of the Criminal Code of Ukraine (“Inadequate Carrying out of Professional Duties by Medical or Pharmaceutical Employees”).

Remember!

If the parties elect to resort to mediation as a method of protection of their rights, the lawyer should utilize the mechanism identified in Article 46 of the Criminal Code of Ukraine which makes provisions for the procedure of exemption from criminal responsibility in connection with reconciliation between the offender and the victim.

Reconciliation between an individual who committed the crime and the victim constitutes the grounds for applying the provisions of Article 46 of the Criminal Code of Ukraine, with the fact of reconciliation being recorded in the protocol of the case, using, for instance, the format of the victim’s motion to exempt the individual who committed the crime from criminal responsibility or, in the least, lack of objection to such an exemption

Remember!

Key preconditions for an exemption from criminal responsibility are: 1) an accused individual committed a crime for the first time, 2) a committed criminal act is of low severity (a punishment for this crime is imprisonment for a term that does not exceed two years or another more lenient form of punishment) or a crime of moderate severity committed due to carelessness (a punishment for this crime is imprisonment for a term that does not exceed five years) and 3) an individual who committed the crime compensates for or eliminates the damage caused.

Crimes referred to in part 1 of Article 140 of the Criminal Code of Ukraine are of low severity and crimes referred to in part 2 of this article are crimes of moderate severity committed due to carelessness. Article 46 of the Criminal Code of Ukraine makes provisions that offenders accused of these types of crimes are eligible for a mediation procedure, thus removing any obstacles for reaching a resolution if the health care worker has sincerely repented and reconciled with the victim, compensated for the damage caused, and committed the crime for the first time. Attorney(s) are assigned the task of facilitating with the resolution of the conflict between the parties of a medical relationship through the process of mediation, including the task of preparing an official reconciliation and reparation agreement.

Remember!

An attorney has the right to consult with both parties, if this consultation is conducted in the interests of both sides and aims at reaching an agreement between them. Under no circumstances can an attorney act as a mediator in the process of mediation if he/she previously acted as a defense attorney of one of the parties, or acted in defense of one party after a failed mediation process in which he/she acted as a mediator.

A mediator is required to be professionally trained, to respect honor and dignity of clients, to maintain confidentiality and neutrality, and to ensure balance of power (capacity) of the sides. According to Articles 7.1 and 8 of the Criminal Procedure Code of Ukraine, when the conditions specified in Article 46 of the Criminal Code of Ukraine are met, the court rules to close the case.

While calling attention to mediation in civil proceedings, we would like to emphasize that a reconciliation agreement is resorted to in this case. A reconciliation agreement may be put together either independent of court proceedings, under the provisions of the Civil Code of Ukraine, or in the process of utilizing one's right to a judicial method of protection. In the latter case, a reconciliation agreement may be put together after the proceedings in the case have been opened: it can be approved at the opening of the proceedings (Article 130 of the Civil Procedure Code of Ukraine) and at the stage when the case is examined (Articles 174, 175 of the Civil Procedure Code of Ukraine).

When enforcement proceedings have been opened, the parties may still enter into a reconciliation agreement that closes the enforcement proceedings and is recognized by the court (part 3 of Article 11.1 of the Law of Ukraine “On Enforcement Proceedings”).

Remember!

Initiation of court proceedings does not prevent the parties involved from contacting each other with the goal of putting together a reconciliation agreement independent of court proceedings.

Terms of a reconciliation agreement may not conflict with the interests of other persons involved in the case, including the third party (in medical cases – a health care employee). The Court should create conditions for all the interested parties to review the draft of the reconciliation agreement so that they have an opportunity to express their views on its approval by the court.

Remember!

Consent of the plaintiffs (co-plaintiffs) and defendants (co-defendants), as well as third parties who have their own independent demands with the terms of the reconciliation agreement, is confirmed by their personal signatures or signatures of their representatives (a representative must be vested by the represented party with special authority to sign the agreement). Third parties who do not have independent demands confirm that they have no objections against the approval of the reconciliation agreement by the court, which is recorded in the minutes of the trial.

In essence, a reconciliation agreement serves as a means of dispute settlement on the basis of mutual concessions and may affect only the rights and obligations of the parties involved and the claim

Remember!

A reconciliation agreement may be put together and approved by both the court of first instance and the courts of appeals and cassation.

A reconciliation agreement and its recognition by the court is the reason for closing the proceedings, which is reflected in the court ruling (part 4 of Article 205 of the Civil Procedure Code of Ukraine). When the case proceedings are closed, court proceedings regarding the same dispute between the same parties regarding the same issue and on the same grounds may not be reopened (part 3 of Article 206 of the Civil Procedure Code of Ukraine).