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MEDIATOR IN CRIMINAL AND CIVIL PROCEEDINGS

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1. INTRODUCTION

In the Polish legal system, the issue of mediation is separately regulated in different branches of law. The regulations of mediation in criminal and civil matters have their own history and the two different regulatory systems result in differences in the development of a mediator's status. The article is an analysis of a mediator in criminal and civil proceedings.[1] The comparison of the existing similarities and differences makes it possible to answer the question whether the legal regulations analysed distinguish two specific professions: mediators in criminal matters and mediators in civil matters or whether we deal with one mediator's profession defined in different ways. It is also an attempt to answer the question whether it is purposeful to regulate a mediator's status separately in criminal and civil law.

2. MEDIATOR'S STATUS IN CIVIL PROCEEDINGS

After the amendment to the Code of Civil Procedure based on Act of 10 September 2015 amending some acts in conjunction with the support for conciliatory resolution of disputes,[2] civil mediation may be conducted by three groups of mediators: standing mediators listed in the registry of the president of a district court, non-standing mediators registered by social organisations and universities, and ad hoc

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[1] Due to the limited size of the publication, the comparison does not include the discussion of mediation in matters concerning minors, administrative and judicial administrative proceedings and the status of mediators conducting such cases.

[2] Journal of Laws [Dz.U.] of 2015, item 1595.

mediators.[3] All the three groups of mediators must meet the general requirements laid down in in the Code of Civil Procedure, which stipulates that a mediator may be a natural person who has capacity to enter into legal transactions and exercises all public rights (Article 183^2 §1 CCP). Standing mediators are accredited by being entered to the registry of the president of a district court. To that end, they have to meet the requirements laid down in Act of 27 July 2001: Law on the common courts system[4] and the Regulation of the Minister of Justice of 20 January 2016 on the registry of standing mediators[5]. The reliability of non-standing mediators is confirmed by the registries kept by social organisations and universities as part of their statutory activities. Being entered to the list means a mediator meets the requirements determined by an organisation or a university. Information about the lists is submitted to the president of a district court (Article 183^2 CCP).[6] Ad hoc mediators, appointed when necessary, do not have to meet any additional requirements. What is important, a mediator may be a standing mediator and at the same time registered as a mediator in a list kept by an organisation or a university.[7]

Parties may choose any mediator: a standing or a non-standing one (including an ad hoc one). However, if they do not choose a mediator, a court, referring them to mediation, appoints a mediator who has knowledge and skills in the particular type of cases after taking into consideration standing mediators first (Article 183^9 §1 CCP).[8] Thus, the differences between the various types of mediators consist in the fact that a standing mediator is assumed to be a mediation addressee indicated by a court (in practice, courts refer most mediation cases to this group of mediators). Moreover, a standing mediator can refuse to mediate only for important reasons about which he must inform parties and a court without delay (Article 183^2 §4 CCP), while the two other types of mediators may refuse to mediate because of any reasons.[9]

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[3] W. Głodowski uses different terms and distinguishes standing court mediators, standing non-court mediators and ad hoc mediators. W. Głodowski, *Stały mediator w sprawach cywilnych po nowelizacji Kodeksu postępowania cywilnego – wybrane zagadnienia* [Standing mediator in civil matters after the Amendment to the Code of Civil Procedure – selected issues], Kwartalnik ADR, No. 1, 2016, p. 20. K. Antolak-Szymanski and O.M. Piaskowska distinguish ad hoc mediators, standing mediators and mediators from lists of non-governmental organisations and universities. K. Antolak-Szymanski, O.M. Piaskowska, *Mediacja w postępowaniu cywilnym. Komentarz* [Mediation in civil proceedings. Commentary], Wolters Kluwer, Warsaw 2016, p. 113.

[4] Journal of Laws [Dz.U.] of 2016, item 2062, as amended.

[5] Journal of Laws [Dz.U.] of 2016, item 122.

[6] Before the amendment of 10 September 2015 entered into force, the lists of social and professional organisations submitted to the presidents of district courts (who did not have any rights to interfere in the lists content) were the only form of authentication of mediators. Persons entered in the lists were called "court mediators".

[7] The aspect of lists overlapping is emphasised, inter alia, in K. Antolak-Szymanski, O.M. Piaskowska, *Mediacja w postępowaniu...* [Mediation in civil proceedings...], p. 113.

[8] The appointment of a mediator in family matters, divorces or separation, or parental guardianship is a little different. If parties do not choose a mediator, a court refers the case to a standing mediator who has theoretical knowledge, especially education in the field of psychology, pedagogy, sociology or law and practical skills in mediation in family matters (Article 436 §4 CCP).

[9] More on this issue: W. Głodowski, *Stały mediator...* [Standing mediator...], p. 22.

2.1. RULES OF ENTRY INTO THE LIST OF STANDING MEDIATORS IN CIVIL MATTERS

The formal and substantive requirements that a standing mediator in civil proceedings must meet are laid down in Act: Law on the common courts system. In accordance with Article 157 of the Act, a standing mediator may be a person who:
1) has full capacity to enter into legal transactions and exercises all public rights;
2) has knowledge and skills in the field of mediation;
3) is 26 years old;
4) speaks the Polish language;
5) has not been convicted for the commission of intentional crime or intentional fiscal crime;
6) has been entered into the registry of the president of a district court.

A judge, except retired judges, cannot be a mediator (Article 183^2 §2 CCP).

The rules of entry to the registry are laid down in the Regulation of the Minister of Justice of 20 January 2016 on the registry of standing mediators.[10] In accordance with the Regulation, the president of a district court keeps the registry of standing mediators. A person applying to be entered to the list confirms that he meets the requirements by submitting relevant declarations and documents. The moment a mediator is entered in the list, not only formal issues but also his substantive qualifications, i.e. his knowledge and skills, are verified. The applicant is expected to submit the following documents: information about the number of mediation cases he has conducted so far, a list of publications about mediation, references from mediation centres or natural persons confirming a mediator's knowledge and skills, documents confirming education, certificates of training in mediation and specialisation (§4 and §5 Regulation on the registry of standing mediators). After positive verification of the documents, the president of a district court issues an administrative decision to enter an applicant in the registry of standing mediators.[11] This valid decision constitutes grounds for entering a mediator in the list of standing mediators in another district court (on a motion filed by the president of this court). An entry contains the following data: a mediator's given name and surname, date of birth, correspondence address, information about education and training, specialisation, and on a mediator's request also his telephone number, email address and information about the entry in a list of mediators kept by a social organisation or a university (Article 157d §1 Act: Law on the common courts system). In enumerated cases, such as a mediator's death, a motion to strike off, failure to meet any of the requirements and inappropriate fulfilment of duties, the president of a district court deletes a mediator from the registry (Article 157c §1 Act: Law on the common courts system). In accordance with Regulation on the registry of standing mediators, the action may be initiated *ex officio* (§10).

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[10] Journal of Laws [Dz.U.] of 2016, item 122.

[11] As W. Głodowski emphasises, a standing mediator plays the role of a standing mediator in a given court and does not have this status in the entire territory of Poland. W. Głodowski, *Stały mediator...* [Standing mediator...], p. 21.

2.2. MEDIATOR'S RIGHTS AND OBLIGATIONS IN CIVIL MATTERS

The Code of Civil Procedure indicates tasks that a mediator should fulfil in the course of mediation and regulates his basic entitlements. They are applicable to all groups of mediators regardless of their authorisation.

In accordance with the Code of Civil Procedure, having received a decision to refer a case to mediation, a mediator immediately schedules a meeting (Article 183^{11}). However, in case parties do not see such a need, a meeting may be dropped. Mediation may also be in the form of shuttle diplomacy. A mediator uses various methods aimed at conciliatory resolution of a dispute, including supporting parties in formulating their resolution proposals. If parties express such a will, a mediator may make suggestions for settlement of a problem but they are not binding for the parties (Article 183^{3a}). At the end of mediation, a mediator develops an official record in which he indicates the venue and time of mediation, the names and addresses of the parties, the mediator's name and address and the mediation outcome. The official record, signed by the mediator, is submitted to a court and parties involved (Article 183^{12}).

In the course of mediation, a mediator should be impartial and is obliged to immediately inform the parties about circumstances that might challenge this impartiality (Article 183^{3} §1). However, these are the parties who take the final decision whether, regardless of the premises indicating the lack of a mediator's neutrality, they want him to mediate or not. A mediator has the right to get acquainted with the case files, provided that none of the parties refuses their consent to that (Article 183^{9} §2). The Code of Civil Procedure introduces a guarantee of mediation proceedings confidentiality by stipulating that a mediator cannot be called a witness to facts that he learnt about in the course of mediation, unless the parties make him exempt of the obligation to keep the mediation secret (Article 259^{1}).

The rules of remuneration for a mediator are an important element of his legal status. The cost of mediation ruled by a court is included in the necessary costs of a trial (Article 98^{1} CCP). A mediator has the right to remuneration and refund of expenditures incurred in connection with his mediation, unless he declared doing the job without remuneration. The Regulation of the Minister of Justice of 20 June 2016 on remuneration and expenditures subject to refund in civil proceedings[12] regulates a mediator's remuneration in two ways, depending on the type of a case. In case of property rights, the remuneration accounts for 1% of the property value in dispute, with the minimum of PLN 150 and the maximum of PLN 2,000 for the whole mediation process. In cases where it is not possible to establish the value of property and in non-property related cases, a mediator is paid PLN 150 for the first meeting and PLN 100 for successive meetings, but the total amount cannot exceed PLN 450. In case of VAT payers, the amount is proportionally increased. Moreover, all documented necessary expenditures incurred by a mediator for travel (in accordance with the regulations concerning civil servants' travel), rent (up to PLN 70 per meeting) and correspondence (maximum PLN 30) are subject to refund.

[12] Journal of Laws [Dz.U.] of 2016, item 921.

In the event the parties do not take part in mediation, a mediator is entitled to a refund of costs of up to PLN 70 (§4 Regulation of 20 June 2016). The parties cover the cost of remuneration and expenditures refund (Article 183[5] CCP).

3. MEDIATOR'S STATUS IN CRIMINAL PROCEEDINGS

The main difference between a mediator's status in criminal and civil proceedings consists in the fact that not only a natural person but also an authorised institution may be appointed to mediate in criminal matters. The list of persons and institutions authorised to mediate is kept by a district court (§2 Regulation of the Minister of Justice of 7 May 2015 on mediation procedure in criminal matters[13]).

In accordance with the Criminal Procedure Code, a court or a judicial officer, and in preparatory proceedings a prosecutor or another entity conducting the proceedings may, on the initiative or with the consent of the accused and the aggrieved, refer the case to mediation to a selected authorised person or institution (Article 23a §1). In extraordinary situations justified by the need to mediate, a person or institution from outside the list may be appointed provided, however, that he/it meets the requirements indicated in the Regulation (§8 Regulation on mediation procedure in criminal matters). Thus, in fact, meeting the requirements laid down in the Regulation is a condition for being a mediator.

3.1. RULES OF ENTRY INTO THE REGISTRY OF INSTITUTIONS AND PERSONS AUTHORISED TO MEDIATE IN CRIMINAL PROCEEDINGS

The Regulation on mediation procedure in criminal matters determines the conditions that institutions and persons must fulfil in order to be authorised to conduct mediation in criminal proceedings. An institution applying for entry must prove that mediation is in compliance with its statutory objectives (inter alia, performing tasks in the field of mediation, social rehabilitation, protection of social interests, protection of important individual interests or protection of human rights and freedoms); it safeguards proper organisational conditions and the course of mediation proceedings by persons meeting the requirements laid down in the regulations. A person applying for entry into the registry, in accordance with §4 Regulation on mediation procedure in criminal matters, must prove that he meets the following requirements:

1) is the citizen of Poland, another European Union Member State, the EFTA Member State or another state provided that this citizenship gives him the right to employment or self-employment in the territory of the Republic of Poland in accordance with the EU regulations;
2) has good command of the Polish language in speech and writing;
3) is 26 years old;

[13] Journal of Laws [Dz.U.] of 2015, item 716.

4) has full capacity to enter into legal transactions and exercises all public rights;
5) has not been convicted for the commission of an intentional offence or intentional fiscal offence;
6) has knowledge and skills in the field of mediation procedure, dispute resolution and entering into interpersonal contacts;
7) guarantees proper fulfilment of duties;
8) has been entered in the appropriate registry of mediators.

Active judges, prosecutors, prosecutor's assessors or apprentices to those professional groups as well as lay judges, judge's or prosecutor's assistants, judicial officers and law enforcement officers cannot be involved in mediation (Article 23a §3 CPC). The Criminal Procedure Code also lays down strict requirements for a mediator's impartiality. A person whose impartiality is doubtful cannot conduct mediation proceedings (Article 41 §1). A mediator who is directly involved in a case, or is or was a spouse of a party, is or was in cohabitation with a party (or their attorney or statutory representative), is a close or distant relative of a party (or their attorney or statutory representative), was a witness to an act and gave evidence as a witness or an expert is excluded from mediation (Article 40 §1 CPC).

Similarly to civil cases, an entry into the registry is based on an administrative decision issued by the president of a district court on request of an institution or an organisation concerned, which has to submit relevant declarations and documents. The president of a district court, having recognised that an applicant has met the requirements laid down in the Regulation, issues a decision to enter him into the registry. The entry includes the name or given name and surname, the date of birth, correspondence address, telephone number and email address of an authorised person or institution (§6 Regulation on mediation procedure in criminal matters). The president of a district court strikes off an institution or a person on their request, in case of dissolution or death or having learnt that they fail to meet the requirements laid down in the statute. The president of a district court may also strike them off in case they do not perform or inappropriately fulfil obligations connected with mediation proceedings (§7 Regulation on mediation procedure in criminal matters).

3.2. MEDIATOR'S RIGHTS AND OBLIGATIONS IN CRIMINAL MATTERS

In accordance with §14 Regulation on mediation procedure in criminal matters, having received the decision on referring a case to mediation, a mediator immediately contacts the parties and schedule a preliminary meeting to explain the aims and rules of mediation, obtain the parties' consent for mediation and to inform them about the possibility to withdraw from it. Next, the mediation between parties takes place at meetings with the participation of both parties or, if it is not possible, at separate meetings with each party in the mode of shuttle diplomacy (§15 Regulation on mediation procedure in criminal matters). A mediator helps to formulate the content of a settlement, informs the parties about the rules of developing the text of a settlement and endorsing an enforcement clause. Having finished

the mediation, a mediator (an institution or a person appointed) develops a report including: the case file number, the mediator's given name and surname or the institution's name and information about the mediation results, and the mediator's signature (Article 23a §6 CPC). Pursuant to §15 Regulation on mediation procedure in criminal matters, a mediator is also obliged to check the implementation of the obligations resulting from the settlement.

In accordance with Article 23a §5 CPC, a mediator has access to the case files to the extent that is necessary to mediate. §12 Regulation on mediation procedure in criminal matters limits a mediator's access to sensitive material concerning the state of health of the accused, opinions about him, data concerning his record as well as data making it possible to identify an incognito witness and those that, if revealed to the aggrieved, might have influence on the criminal liability of the other accused who do not participate in the mediation. A mediator cannot be interrogated as a witness to facts he has learnt about from the accused or the aggrieved in the course of mediation proceedings, with the exception of information about crimes referred to in Article 240 §1 CC (Article 178a CPC).

The State Treasury covers the costs of mediation in criminal proceedings that include a mediator's remuneration and a refund of expenditures incurred in connection with the mediation. A mediator's remuneration for the whole mediation proceedings accounts for PLN 120, and in case of VAT payers, it is raised by the VAT amount. In addition, a mediator is entitled to a lump sum of PLN 20 for serving procedural documents (§4(2) and (3) Regulation of the Minister of Justice of 18 June 2003 on the amount and the system of calculating spending by the State Treasury in criminal proceedings[14]).

4. SIMILARITIES AND DIFFERENCES IN A MEDIATOR'S RIGHTS AND OBLIGATIONS IN CRIMINAL AND CIVIL PROCEEDINGS

At first sight, the regulations of criminal and civil law are totally different, at least in two basic formal and organisational aspects. In civil proceedings, only a natural person may conduct mediation. On the other hand, in mediation in criminal proceedings, it can be a person or an institution authorised. In mediation in civil matters, there are three groups of mediators: standing, non-standing and ad hoc ones. In criminal proceedings, as a rule, apart from institutions, there is only one group of persons in the registry of authorised mediators and, possibly, mediators meeting the requirements for entry into the registry. To tell the truth, in criminal proceedings, it is envisaged that authorised institutions mediate, but in practice these are natural persons meeting the requirements for mediators and acting within those institutions. From a court's perspective, only one category of mediators is important: those who were entered to the registry kept by the president of a district court. In criminal cases as well as in civil cases, a court refers a mediation case to a listed/registered mediator (or an institution). However, in some justified situations, it can

[14] Journal of Laws [Dz.U.] of 2013, item 663.

refer mediation to a person who has not been entered into the registry. Parties to the civil proceedings may choose such a mediator on their own. That is why, the comparison below concerns only “listed” mediators, i.e. standing mediators in civil proceedings, and “registered” mediators, i.e. persons authorised to mediate in criminal proceedings. For the purpose of the article, both groups are classified as “court mediators”.

4.1. FORMAL AND SUBSTANTIVE REQUIREMENTS

A standing mediator conducting court mediation in civil proceedings (a court mediator in civil proceedings) as well as a person authorised to conduct mediation within criminal proceedings (a court mediator in criminal proceedings), in order to be entered into the registry (i.e. to be listed as a mediator in civil proceedings or to be registered as a mediator in criminal proceedings) must meet similar requirements such as full capacity to enter into legal transactions and all public rights, 26 years of age, knowledge of the Polish language (in case of a mediator in criminal matters – good speaking and writing skills), knowledge and skills in the field of mediation (in case of a mediator in criminal matters – competence in conflict resolution and entering into interpersonal relations). Persons convicted of intentional crimes and intentional fiscal crimes as well as active judges cannot be mediators. The differences between regulations determining the status of a mediator in civil proceedings and one in criminal proceedings occur with respect to three criteria: citizenship (the citizenship requirement applies to mediators in criminal proceedings),[15] guarantee of proper fulfilment of duties (which also a mediator in criminal matters should give) and exclusion of some professions (people representing legal professions, holding posts in the justice system or officers of law enforcement institutions) from mediation in criminal proceedings (the limitation does not apply to mediators in civil matters).

The requirements concerning mediators’ substantive qualifications seem to be another important area of comparison. The provisions in the area are different because mediators in criminal proceedings, apart from knowledge and skills in the field of mediation, must also have skills in conflict resolution and entering into interpersonal relations, which is not a requirement for mediators in civil matters. The linguistic and logical interpretation, however, leads to a conclusion that the real content of the norms is actually the same as the skills in conflict resolution and entering into interpersonal relations are included in the concept of skills in the field of mediation. Another question that must be asked is whether the two similar wordings concerning mediators’ substantive competences mean other expectations of courts that verify them. The truth is that an application of a mediator in civil matters and in criminal proceedings must include documents confirming that an

[15] However, the criterion is not significant in practice. It does not seem there are many foreigners eager to become a Polish mediator meeting the linguistic competence criterion and not meeting the (broad) citizenship criterion at the same time.

applicant meets the qualification requirements, but the regulations do not determine substantive requirements such as training programmes, issues covered during classes, field and level of education, etc. that a mediator in civil or criminal matters should confirm.

The process of court mediators' competences authentication was organised in both proceedings in a very similar way. One can become a court mediator in civil and criminal matters by entry into the adequate registry kept in a district court. In case of mediators in civil proceedings, it is the "List" (*Lista*) kept by the president of a district court; in case of a mediator in criminal proceedings, it is the "Register (*Rejestr*) of institutions and persons authorised to mediate kept in a district court". In both cases, the president of a district court takes the decision to enter a mediator or strike him off. The entry is an administrative decision made on the request of an applicant. Both registries contain the following data: an authorised person's given name and surname, date of birth, correspondence address, telephone number and email address (in case of mediators in civil matters, the two latest pieces of information are entered on their request). In addition, an entry to the civil list contains information about education and training, specialisation and (on a mediator's request) information about being a mediator registered by a social organisation or a university. Grounds for striking a mediator off are the same for both categories. It takes place on a mediator's request, in case of his death, failure to meet the requirements indicated in the statute or inappropriate fulfilment of duties.[16]

4.2. OBLIGATIONS AND RIGHTS

Obligations and rights of both groups of mediators are in general similar. However, obligations and tasks of mediators in criminal proceedings are determined in a more detailed way. A mediator in criminal proceedings must spend more time and put more effort in initiating mediation (an obligation to organise a preliminary meeting to explain aims and rules of mediation and obtain the parties' consent to mediation) and has more informative obligations, e.g. with regard to the construction of a settlement or the possibility of its execution. In mediation in both civil and criminal proceedings, a mediator finishes mediation with a document for a court: in civil matters – an official record (*protokół*), and in criminal matters – a report (*sprawozdanie*). The content of the documents is similar. Both include: a mediator's given name and surname (or a name of the institution appointed to mediate), information about the results of mediation proceedings and a mediator's signature. The official record also contains information about the venue and time of mediation, first names and surnames of the parties and their addresses; the report must have the case files number. One more obligation of a mediator in criminal proceedings, which a mediator in civil proceedings does not have, is to check whether the terms of a settlement have been implemented.

[16] In case of mediation in criminal matters, also failure to fulfil duties is indicated. However, it seems that such conduct is enclosed in inappropriate fulfilment of duties.

The rights of mediators in civil and criminal proceedings connected with their access to files and confidentiality of the proceedings conducted are regulated in a similar way. However, there are some differences resulting from the specifics of the proceedings. A mediator in civil proceedings as well as a mediator in criminal proceedings have the right to get acquainted with the case files. However, in civil proceedings, parties to it may refuse to give consent to that and in criminal proceedings, there is a limitation of access to some classified materials, which a mediator does not have to know and might have negative impact on the proceedings. The principle of confidentiality applies to both types of mediation: neither a mediator in criminal proceedings nor a mediator in civil proceedings can be interrogated as a witness to facts that he has learned about in the course of mediation. However, in civil matters, parties may exempt a mediator from the obligation of confidentiality and in criminal proceedings, the principle does not apply to one type of crimes.

Clear differences appear in connection with impartiality and remuneration. A mediator in criminal proceedings whose impartiality is questioned is excluded from given mediation *ex officio*. In mediation in civil matters, a mediator is obliged to reveal any potential limitations to his impartiality but the parties to the proceedings (or a mediator himself) take the decision if they want him to mediate. As it is emphasised in the literature: "this way, a court is not involved in taking a decision to exclude a mediator and it is assumed that in case of justified doubts about a mediator's impartiality, he refuses to mediate or a party to the proceeding does not give consent to mediation conducted by that mediator."[17] Thus, the principle of autonomy of parties' is invoked again.

Mediators' remuneration is regulated in a different way, too. The remuneration of mediators in criminal proceedings is considerably lower than that of mediators in civil proceedings. The difference may be nearly 17-fold (PLN 120 for the whole criminal proceedings mediation and PLN 2,000 for the whole civil proceedings mediation concerning property cases). The source of funding is also different: the State Treasury pays for mediation in criminal proceedings, and parties to the proceedings pay for mediation in civil matters (with the exception of a situation when a party is exempt from court proceedings costs).

4.3. SUMMARY OF SIMILARITIES AND DIFFERENCES BETWEEN MEDIATORS IN CRIMINAL AND CIVIL PROCEEDINGS

The conducted analysis leads to a conclusion that, in fact, the legal status of mediators in civil and criminal proceedings is similar. The basis of the regulation in civil and criminal proceedings is the principle that a court appoints a mediator from among the persons whose competence is confirmed by an entry in the registry kept

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[17] A. Kościółek, *Cechy i zadania dobrego mediatora* [Characteristics and tasks of a good mediator], [in:] A.M. Arkuszewska, J. Pils, *Zarys metodyki pracy mediatora w sprawach cywilnych* [Outline of methodology of the mediator's work in civil matters], Lex a Wolters Kluwer business, Warsaw, 2014, p. 92.

by a district court. The requirements for court mediators are similar and the differences are not significant in practice also with regard to substantive competences. The only considerable difference between the regulations concerning mediation in civil and criminal matters consists in the fact that only natural persons can mediate in civil proceedings,[18] and in case of mediation in criminal proceedings, also authorised institutions can mediate.

The differences between the two groups of mediators start occurring at the stage of their competences, i.e. obligations and rights arising in the course of mediation proceedings and with respect to remuneration. The differences in a mediator's tasks, although noticeable, do not seem to be significant. A mediator in criminal proceedings has a few more duties but it does not mean that a mediator in civil proceedings does not perform them in practice.

The documents developed by mediators also have a little different form. The important difference consists in the mediator's duty to check the implementation of decisions laid down in a settlement agreement. However, the norm laid down in §14(5) Regulation on mediation procedure in criminal matters is a dead letter in practice because a mediator does not have legal measures to exercise it. Because of that, the provision was criticised in the doctrine and there is hope that in the future the rational legislator will decide to amend or delete it.[19] The issue of access to files and exemption from confidentiality is also regulated in a different way. Mediators in civil proceedings to a greater extent than mediators in criminal proceedings may adjust their activities to the parties' will. It seems that the above-described differences in the shape of the analysed legal regulations may result from a different formulation of needs and features of parties to criminal and civil proceedings. Axiological bases of the criminal law and its typical feature consisting in the use of coercive measures and asymmetric relations between the state and a citizen as well as of civil law based on the principle of equality of entities, parties' autonomy of will and the freedom of contract may be significant. However, the differences presented do not give grounds to state that mediators in criminal and civil proceedings form two different professional groups with different qualifications or competences.

5. PURPOSEFULNESS OF A SEPARATE REGULATION OF A MEDIATOR'S STATUS

The answer to the question about purposefulness of a separate regulation of a mediator's status in criminal and civil law requires that reference be made not only to axiological differences between those branches of law but also that one should take into consideration the aims and assumptions of criminal and civil mediation indicated in international law and literature.

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[18] K. Antolak-Szymanski, O.M. Piaskowska, *Mediacja w postępowaniu*... [Mediation in civil proceedings...], p. 108.

[19] Thus, inter alia, I. Pączek, *Postępowanie mediacyjne jako konsensualne zakończenie postępowania karnego* [Mediation procedure as a conciliatory resolution of a criminal proceeding], Ius Novum No. 4, 2016, p. 114.

5.1. SPECIFICS OF PARTICULAR TYPES OF MEDIATION

The Recommendation N° R (99) 19 of the Committee of Ministers (of the Council of Europe) to Member States concerning mediation in penal matters to be used as mediation in criminal proceedings[20] aims to: enhance active personal participation of the parties, recognise the rights and interests of victims better, encourage the offenders' sense of responsibility for their acts and increase their reintegration and rehabilitation and the preventive role of law. Mediation in penal matters is defined as "a process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime". The Recommendation N° R (99) 19 emphasises that mediation in penal matters requires that mediators should have special skills, inter alia, in working with victims and offenders and basic knowledge of the criminal justice system (para. 24).

The Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters adopted on 18 September 2002 defines the aims of mediation in a different way and indicates that the key objective is to reduce the number of conflicts and the workload of courts. Similarly, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters[21] specifies the aims of mediation in civil proceedings and states that mediation should simplify and improve access to justice and provide a cost-effective and quick resolution of disputes. Mediation in family matters occupies a separate place in international documents. In accordance with the Recommendation N° R (98)1 of the Committee of Ministers to Member States on family mediation and Explanatory Memorandum, this type of mediation aims to be applied to reduce conflict between family members, protect the interests of children, lower economic and social costs of separation and divorce, reduce the length of time otherwise required to settle conflict and simplify and shorten the legal procedures following. The Recommendation N° (98)1 emphasises the special characteristics of family disputes such as interdependent and continued relations between the people involved, the emotional nature of personal relations between parties and influence of the settlement on third parties, especially children. These specifics generate the need for mediators' special competences. In all the above-mentioned documents, it is emphasised there is a need to develop standards of mediators' selection, responsibility, training and qualifications. It seems that in this context these should be understood as standards taking into consideration potential differences in qualifications and competences of particular types of mediators.

The documents of international law clearly indicate that mediation in criminal, civil and family matters are proceedings with different specifics, which play different functions in the system of law. The special nature of mediation in criminal, civil and family matters translates into a different character of mediators' work and defines special qualifications (knowledge and skills) necessary to mediate professionally and

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[20] Recommendation N° R (99) 19 adopted on 15 September 1999, translation into Polish by E. Bieńkowska, *Archiwum Kryminologii*, Warsaw 1999–2000, Vol. XXV, pp. 228–243.

[21] The Directive, as a rule, applies only to cross-border disputes. However, extension of the adopted solutions to the area of domestic disputes is encouraged.

efficiently. There are proposals in the literature to determine special qualifications of mediators.[22] It is emphasised that a mediator in criminal proceedings "must (…) have adequate knowledge of the essence and significance of some consequences of crime as well as about ways of overcoming them".[23] He should also have knowledge of the importance of mediation for adjudication in criminal cases and its role in weakening the consequences of crime and preventing secondary victimisation.[24] Attention is drawn to the special nature of family mediation and it is indicated that the significant skills of a mediator include diagnosis of violence and addictions, the knowledge of basic child development psychology and a skill in dealing with the parties' and a mediator's own emotions.[25] It is also emphasised that: "it is necessary to have professional preparation to mediation in a particular field such as family dispute to achieve an agreement that is stable, high quality and meeting formal requirements".[26]

5.2. PROPOSAL TO DEVELOP SEPARATE REGULATIONS ON MEDIATORS' QUALIFICATIONS, RIGHTS AND OBLIGATIONS

The analysis of a mediator's status in the context of the specifics of functions and aims of particular types of mediation leads to the conclusion that at least to some extent it is purposeful to maintain separate regulations on a mediator's status in criminal and civil proceedings. The differentiation might be even broadened by taking into account the category of mediators dealing with family dispute. It is especially purposeful to maintain the separate regulations in the field of substantive qualifications, rights and obligations, i.e. broadly understood mediators' competences. It is necessary to conduct a critical analysis of the presently binding legal regulations. While in case of competences, the legislator to some extent differentiated mediators' tasks, taking into consideration inter alia the principle of the parties' equality and self-determination, on which civil law is based, and the need to additionally take care of the parties, especially the aggrieved in mediation in criminal proceedings; in case of mediators' qualifications, the proposed separate regulations have not been considered and introduced. The legislator did not determine any specific qualifica-

[22] Support for the opinion that there is a need to have specific knowledge and skills in various civil matters (family, employment, consumer or economic ones) can be found in K. Antolak-Szymanski, O.M. Piaskowska, *Mediacja w postępowaniu...* [Mediation in civil proceedings...], pp. 189–190.

[23] E. Bieńkowska, *Mediacja w projekcie nowelizacji kodeksu postępowania karnego* [Mediation in the Bill on amendment to the Code of Civil Procedure], Prokuratura i Prawo, No. 11, 2012, p. 61.

[24] E. Bieńkowska, *O unormowaniu mediacji w sprawach karnych* [On regulation of mediation in civil matters], Prokuratura i Prawo, No. 1, 2012, p. 28.

[25] K. Czayka-Chełmińska, M. Glegoła-Szczap, *O specyfice mediacji rodzinnej. Kilka refleksji na marginesie rozwiązań prawnych regulujących w Polsce stosowanie mediacji* [On specific features of family mediation. Several comments on the legal solutions regulating mediation in Poland], [in:] L. Mazowiecka (ed.), *Mediacja* [Mediation], Wyd. Oficyna a Wolters Kluwer business, Warsaw 2009, pp. 278 and 279.

[26] A. Gójska, *Mediacje w sprawach rodzinnych* [Mediator in family matters], Informator Ministerstwa Sprawiedliwości, Warsaw 2011, p. 8.

tions in the field of knowledge, skills or education, which a mediator in criminal proceedings should prove (e.g. knowledge of victimology or victim psychology) or in family matters (e.g. dealing with parties' emotions, child psychology). Despite the recommendations in the international law documents, there is also a lack of regulations determining the content of mediation training or developing the basis of accreditation system.[27] Summing up, although the solution assuming separate regulation of mediators' qualifications and competences as well as sources of financing mediation should be recognised as purposeful, the present regulations support this proposal insufficiently. In fact, it seems appropriate to treat the issue in the way that would extend the existent regulations by adding specific solutions in the field of qualifications of mediators in criminal and family matters and would thoughtfully and consistently lead to making the existent regulations concerning mediators' competences and tasks coherent in order to maintain their differentiation where necessary and give it up where possible.[28]

5.3. PROPOSAL TO UNIFY FORMAL REQUIREMENTS FOR COURT MEDIATORS

It seems purposeful to unify the existent regulations on formal requirements for mediators as well as some solutions concerning the appointment of mediators and their remuneration.[29] It is difficult to point out arguments that would rationally substantiate maintaining differentiation in this field in the present legal state. It is especially difficult to find grounds for the existent differentiation in the field of citizenship or guarantees. The differences in this area do not seem to result from the legislator's purposeful and thought-out activities but rather from some kind of inertia or the lack of effort to integrate regulations in the different branches of law. It seems that if we recognise the above premises as important, they should apply to mediators in criminal as well as civil proceedings. However, if we think their usefulness is low, we should give them up in both cases.

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[27] Thus, inter alia, L. Mazowiecka, who indicates that: "In the current legal state (…) there is no obligation of preliminary training for candidates for mediators and constant retraining for active mediators", *Prawa człowieka i praworządność: mediacja, a prokurator prokurator* [Human rights and lawfulness: mediation vs. prosecutor], [in:] L. Mazowiecka (ed.), *Mediacja* [Mediation], Wyd. Oficyna a Wolters Kluwer business, Warsaw 2009, p.163. Similarly, M. Białecki, *Mediacja w postępowaniu cywilnym* [Mediation in civil proceedings], Wolters Kluwer Polska, Warsaw 2012, p. 95, who treats the lack of requirements concerning training of mediators and a generally liberal approach to requirements from mediators as the reflection of civil law principle of the parties' autonomy of will.

[28] The proposal to raise the requirements for qualifications of people working as mediators is put forward, inter alia, by E. Gmurzyńska, R. Morek, *Poland*, [in:] G. De Palo, M.B. Trevor, *EU Mediation Law and Practice*, Oxford University Press, 2012, p. 264 and K. Antolak-Szymanski, O.M. Piaskowska, *Mediacja w postępowaniu...* [Mediation in civil proceedings...], p. 107.

[29] Doubts about sense of differentiation of formal requirements from mediators in civil, criminal and minors-related proceedings are raised, inter alia, by M. Białecki, *Mediacja...* [Mediation...], p. 106.

Thus, in the literature, it is proposed to unify mediation in criminal and civil matters in the field of independent choice or change of a mediator by parties (current CPC regulations do not provide such a possibility) and in the field of disqualification from mediation. It is emphasised in the doctrine that: "The fact that there is no solution similar to that laid down in Article 183[9] CCP, which stipulates that parties can choose a different mediator than the one recommended by an entity referring a case to mediation, should be deemed defective".[30] The approach to the issue of exclusion of a broad range of legal professions and employees of justice institutions from mediation in criminal proceedings also raises doubts in the literature. It is necessary to agree with the opinion that the limitations introduced in Article 23a §3 CPC are too extensive and it would be absolutely sufficient to exclude a mediator matching the features laid down in Articles 40 and 41 CPC. The provision automatically disqualifies law enforcement officers who have been involved in the former proceedings in the case in any way. At the same time, the regulation would take into account the specifics of criminal law and a stronger need, probably existing there, to guarantee the parties impartiality of a mediator conducting their case.[31] Inter alia, L. Mazowiecka emphasises the advantages of the regulation adopted in civil law, in accordance with which a mediator can be an active lawyer (including an employee of law enforcement and justice system), and indicates that: "it is this group of people who have the appropriate knowledge of law and, therefore, the settlements they will help parties to reach will be approved of by a court without any problems".[32]

The last issue that needs unification is mediators' remuneration and the refund of expenses. The current differentiation between mediators in criminal and civil proceedings seems to be totally groundless. It results in depreciation of the position of mediators in criminal proceedings[33] and may cause the outflow of professional mediators in criminal matters to more profitable mediation in civil matters. One of the possible solutions in this area would be to unify the provisions regulating mediators' remuneration for participation in mediation in criminal proceedings and mediation in civil proceedings in non-property matters. However, the differentiation in the field of financing mediation should be assessed as purposeful and understandable. If mediation is to become an instrument of remedial justice that parties will be ready to use, the State Treasury must incur its cost. On the other hand, it is hard to find reasons for the State Treasury to finance mediation in

[30] E. Bieńkowska, *Mediacja w projekcie...* [Mediation in the Bill...], p. 61.

[31] P. Karlik, *Potrzeba zmian mediacji w sprawach karnych* [The need of changes in mediation in criminal matters], Prokuratura i Prawo No. 6, 2013, p. 137.

[32] L. Mazowiecka, *Mediacja...* [Mediation...], p. 163. By the way, it is worth mentioning that in some European Union Member States, there are solutions allowing only trained judges and solicitors to be mediators. These are, inter alia, Denmark and Finland. For more, see: M. Flagstad, T. Monberg, C.K. Pedersen, *Denmark*, [in:] G. De Palo, M.B. Trevor, *EU Mediation Law and Practice*, Oxford University Press, 2012 p. 79 ff; P. Taivalkoski, *Finland*, [in:] G. De Palo, M. B. Trevor, *EU Mediation...*, p. 106 ff.

[33] The problem is raised, inter alia, by: P. Karlik, *Potrzeba zmian...* [The need of changes...], p. 137 and G.A. Skrobotowicz, *Mediacja w zmienionym modelu postępowania karnego. Zagadnienia wybrane* [Mediation in the changed model of criminal proceedings. Selected issues], Roczniki Nauk Prawnych, Vol. XXVI, No. 1, 2016, pp. 65–66.

civil matters. At the same time, it is necessary to approve of the solution that the State Treasury covers the costs of mediation in case parties are made exempt from court proceeding costs. The regulation really safeguards equal access to mediation of parties to civil proceedings.

5.4. PROPOSAL TO UNIFY RULES OF AUTHENTICATION OF MEDIATORS AND TO REORGANISE THE EXISTENT REGULATIONS

It seems that neither the differences between axiological bases for civil proceedings and criminal proceedings nor the differences between the aims and assumptions of mediation in civil and criminal proceedings justify separate regulations concerning authentication of mediators. There are many available methods of authentication of mediators: the system of licensing or accrediting, accreditation of mediation centres or other organisations (governmental, non-governmental, local self-governmental ones), letting mediators' self-government to look after their professionalism, etc.[34] One of the methods is that adopted in our legal system, i.e. the method of authentication of mediators by entry into a registry kept by the president of a district court. If we assume that the legislator decided to choose this method of authentication in a thought-out way, it is surprising that there are different regulations concerning mediators in criminal and civil matters. The decision does not find grounds in the different content of the regulations in force because, as it was indicated above, the differences concerning formal and substantive requirements for both groups of mediators are insignificant. Moreover, the introduction of one system of mediators' authentication by entry into the registry is not an obstacle to the potential introduction of the differentiation of the expectations that mediators will declare readiness to conduct certain types of proceedings (e.g. in the field of substantive qualifications, the content of expected training, etc.).

The existence of two separate registries, especially in a situation in which many mediators are entered to both the Register of persons authorised to mediate in criminal proceedings and the List of mediators in civil proceedings (and often also one or more lists kept by organisations and universities), is not transparent for potential parties to mediation. Moreover, two separate registries generate bureaucratic and

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[34] M. Białecki, *Mediacja* ... [Mediation...], pp. 88–90, describes an approach applied abroad: a model of accrediting used in Australia and Hungary (entry into the official registry as the confirmation of admission to mediation activities), an encouraging model applied, inter alia, in Austria and Japan (anyone can mediate but mediation has legal effects only when a mediator is registered) and a market model, which was used in Great Britain (a mediator may be any person chosen by the parties). The issue of authentication of mediators has also been discussed by American authors who focus on advantages and disadvantages of such categories as: regulated credentials, degree-related credentials, "substitute" credentials and rosters of mediators. B.M. Harges, *Mediator Qualifications: The Trend Toward Professionalization*, BYU L. Rev. 687, 1997; K.K. Kovach, *Mediation. Principle and Practice,* Thomson West, St. Paul 2000; M.L. Moffitt, *The four ways to assure mediator quality (and why none of them work),* Ohio State Journal of Dispute Resolution, Vol. 24, No. 2, 2009; Ch. Pou, *Summary of consultant's report on mediator quality assurance to MACRO and the Maryland mediator quality assurance oversight committee*, 2002; F.E.A. Sander, *Introduction*, Ohio State Journal on Dispute Resolution, Vol. 13, 1998.

organisational problems. Potential mediators in criminal and civil proceedings must submit the same documents twice and the presidents of district courts must analyse applications and take decisions concerning the same applicants twice. In addition, a question arises whether there is any type of link between the two registries. For example, whether, if somebody does not fulfil his obligations in criminal proceedings, which is a reason for deleting him from the Register of persons authorised to mediate in criminal proceedings, it also means that it should be the reason for deleting him from the List of mediators in civil proceedings. And if so, does it mean that the president of a district court is obliged to unify the Register and the List, i.e. in case of learning that a mediator does not meet the requirements for one registry, is the president of a district court obliged to verify if a mediator meets the requirements for the other registry?[35] Besides, there are other doubts that are legislative in nature. While one can understand the reasons why the status of a court mediator is regulated in the Act: Law on common courts system, which regulates such professions as expert witnesses or probation officers, it is not clear why the Act regulates only the status of mediators in civil matters; the more so as there is no differentiation between lists of expert witnesses and probation officers in criminal and civil proceedings.

It seems that it would be advantageous, also from the perspective of the rules of the legislative technique, to unify the regulations concerning the registry of mediators of all types (probably with special consideration of the specifics of mediators in criminal and family matters).[36] Such a regulation would increase the transparency of the provisions and would make their application easier.[37] In the present legal state, in order to determine the legal status of a mediator, it is necessary to take into account the provisions laid down in four different legal acts and four regulations.

In general, the status of a mediator in civil matters is laid down in the Code of Civil Procedure, the Act: Law on the common courts system (in the field of standing court mediators), the Act on court proceeding costs in civil cases (in the field of financing mediation) and the Regulation of the Minister of Justice of 20 January 2016

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[35] An additional question arises: what the procedure should look like in a situation when a mediator enlisted in a few different registries in a few district courts is struck off in one court because of inappropriate fulfilment of duties. There is a provision in civil law, which can be interpreted as a step aimed at connecting the registries in different district courts. In accordance with Article 157d §4 of the Act: Law on the common courts system: "Valid decision to enter a standing mediator into the registry constitutes grounds for entering him into the registry of standing mediators in another district court on the mediator's request submitted to the president of this court" (there is no similar solution in criminal procedure). In the context of this solution, it seems even more purposeful to assume that information about striking a mediator off should be passed to the presidents of other district courts.

[36] Doubts about regulating substantive qualifications of mediators in civil matters in the statute and mediators in criminal matters in a regulation are raised, inter alia, by R. Uliasz, *Kwalifikacje podmiotowe arbitrów i mediatorów* [Subjective qualifications of arbiters and mediators], Kwartalnik ADR No. 4, 2014, p. 84.

[37] The lack of coherent regulation of a mediator's status is criticised, inter alia, by R. Morek, *Jaki powinien być mediator? Przekładanie nieprzekładalnego: o wymaganiach wobec mediatorów w ustawie* [What should the mediator be like? Translating the untranslatable: on requirements from mediators in the statute], [in:] L. Mazowiecka (ed.), *Mediacja* [Mediation], p. 255. The criticism concerns the legal state of civil mediation in 2009. However, it remains up-to-date after the amendment.

on the registry of standing mediators (based on the delegation laid down in the Act: Law on the common courts system), and the Regulation of the Minister of Justice of 20 June 2016 on mediator's remuneration and expenditures that are subject to refund in civil proceedings (based on the delegation laid down in CCP). The status of a mediator in criminal proceedings is regulated in the Criminal Procedure Code and two regulations issued based on the delegation laid down in CPC: the Regulation of the Minster of Justice of 7 May 2015 on mediation procedure in criminal matters and the Regulation of the Minister of Justice of 18 June 2003 on the amount and method of calculating expenditures of the State Treasury in criminal proceedings. Therefore, it seems absolutely desirable to reorganise and unify the regulations. The form of regulating the status of a mediator seems to be of secondary importance, however, it would certainly increase the transparency and understanding of provisions if they were developed consistently. For example, tasks and rules of mediators' activities might be regulated in the Codes of Civil and Criminal Procedure, the procedure of entering a registry and formal requirements might be laid down in one document, e.g. the Act: Law on the common courts system or a regulation, and a detailed scope of mediators' substantive qualifications and details concerning remuneration might be regulated in secondary legal regulations.[38]

Also uniform norms for all mediators developed by mediators themselves and organisations involved in mediation support the idea of enacting one regulation in the field of authentication. The ethical codes that are in force, e.g. the European Code of Conduct for Mediators, the Code of Ethics of Polish Mediators, are not addressed to special groups. Similarly, the Standards for ADR Mediation or the Standards for Mediators' Training adopted by the ADR Civil Council are addressed to all mediators, regardless of their specialisation. Also the officially approved assumption that a court mediator is a profession is an argument for one regulation. This conviction is also expressed by enlisting a court mediator in the Classification of Professions and Specialisations (number 263507) kept by the Ministry of Labour, Family and Social Policy. In this case, a mediator is broadly defined as a person who "with the use of mediation techniques helps parties to reach an agreement in family, civil, employment, economic and criminal matters outside a courtroom".

Summing up, in the light of the existent differences between the branches of law and particular types of mediation, it seems justified to maintain regulatory differentiation in the area of mediators' competences and tasks. However, it is necessary to assess differentiation in authentication of mediators differently because it seems purposeful to fully unify the regulations in criminal and civil matters. At the same time, unification of the existent regulations should not be an obstacle to distinguishing specific qualifications (knowledge and skills) that are crucial for various groups of mediators, with special consideration of mediation in criminal and family matters.

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[38] Uniform regulation of mediators' qualifications is supported, inter alia, by A. Bieliński, who emphasises that: "it seems a reasonable solution to directly lay down the required qualifications of a mediator in civil matters in a legal act, e.g. a regulation", A. Bieliński, *Mediator w sprawach cywilnych – wybrane zagadnienia* [Mediator in civil matters – selected issues], Kwartalnik ADR No. 3, 2008, p. 33.

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MEDIATOR IN CRIMINAL AND CIVIL PROCEEDINGS

Summary

The article presents the comparison of the professional status of mediators in civil and criminal matters. It analyses such issues as: the way the legal status of mediators is regulated, formal and substantive requirements for the candidates for mediators as well as the rights and obligations of mediators. The comparison of similarities and differences between existing regulations

with respect to goals and functions of the respective types of mediation serves as a starting point for answering the question whether a separate regulation of the legal status of mediators in the area of civil and criminal law is indeed purposeful and practical. The analysis leads to the conclusion that it is in general purposeful to maintain separate regulations with respect to qualifications, competences and obligations of mediators. At the same time, there are considerable arguments in favour of further clarification of the legal situation and the unification of the rules for authentication of mediators and establishing formal requirements for their activity.

Keywords: mediator, court mediator, register of accredited mediators, mediator's qualifications, criminal procedure, civil procedure

MEDIATOR W POSTĘPOWANIU KARNYM I CYWILNYM

Streszczenie

Tematem artykułu jest porównanie statusu zawodowego mediatorów karnych i cywilnych. Analizie poddane zostały takie zagadnienia, jak: sposób uregulowania statusu mediatora, wymogi formalne i merytoryczne wobec kandydatów na mediatorów oraz przypisane mediatorom uprawnienia i obowiązki. Porównanie podobieństw i różnic między istniejącymi regulacjami w kontekście specyfiki funkcji i celów poszczególnych typów mediacji było punktem wyjścia do odpowiedzi na pytanie o celowość i użyteczność odrębnego regulowania statusu mediatora w obszarze prawa cywilnego i karnego. Prowadzone rozważania doprowadziły do wniosku o celowości zachowania odrębności regulacyjnej w obszarze kwalifikacji, kompetencji i zadań mediatorów, przy jednoczesnej potrzebie uporządkowania sytuacji prawnej i ujednolicenia obowiązujących regulacji w obszarze uwierzytelniania mediatorów oraz stawianych im wymogów formalnych.

Słowa kluczowe: mediator, mediator sądowy, lista stałych mediatorów, kwalifikacje mediatorów, postępowanie karne, postępowanie cywilne