

# **IS THE TRADITIONAL SYSTEM OF DISPUTE SETTLEMENT AT CRISIS?**

**Can lawyers use mediation and/or its postulates to change the negative perception of their profession and can they improve the traditional system of dispute resolution?**

## **INTRODUCTION**

Time we live in, fast way of life, demands put upon us lawyers, constant struggle for better and more, constant social pressure put upon our legal profession - all this alienates us from each other, but mostly from our clients and the entire public. All of us lawyers have quietly accepted the role of tough individuals to such an extent that we started to lose ourselves and each other, but also the environment we operate in.

The entire human race seems to be hypnotized by moving in the wrong direction: we are encouraged to love and own material things rather than people, we stopped searching for goodness in others, we rather choose to blame others for our situations than to take responsibility for our own actions, we rather not talk than have a warm human conversation, we talk rather than listen, we choose politeness over honesty<sup>1</sup>, lies over truth<sup>2</sup>, easy way over the hard one. Our lives start to lose sense

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<sup>1</sup> 'Why do people so rarely discuss what is really going on directly, immediately, and honestly with their opponents? Why do they want to be kind more than they want to be honest? Why do lies, secrets, and silence seem less risky and more powerful than honesty, sharing and communication? Everyone in a conflict has a different perception of what happened, who caused the conflict and why. Both sides tell stories that are accurate and honest – for them. They also tell stories that are inaccurate and dishonest – for each other. Their willingness to accept responsibility is distorted by their need for sympathy and support, on their desire to make themselves appear right by making others appear wrong. Everyone in the conflict wears a mask that can only be observed from the outside. Everyone in the conflict takes deliberate steps to protect themselves from the truth, because they know the consequences could compel them to leave the comfortable, albeit dysfunctional patterns they have created. Everyone knows it is dangerous to speak honestly, because doing so means accepting the possibility that the other person will speak honestly in return. People tell themselves that there is no need to be deeply honest. They don't want to hurt the other person's feelings. The other side could misinterpret what they are saying and they probably wouldn't be receptive anyway. It could put their relationship at risk. It is possible to reach settlement without taking risks. It could backfire and the problem could get worse. Nothing is going to change anyway. It is easy to formulate an opposite set of rationalizations that encourage honesty. It is possible to communicate honestly and not to hurt anyone's feelings. If they are accurate there will be less possibility for misinterpretation. Their relationship is at risk without honesty, they will create better solutions if they are honest. The problem will get worse if there is no honest communication and things only really change when people communicate honestly. Any truth we seek to elicit from others requires an equal openness to hearing the same truth about ourselves. Empathy and honesty encourage both sides to accept the responsibility for their lives and their choices.' Kenneth Cloke, *Mediating Dangerously, The Frontiers of Conflict Resolution*, Jossey-Bass, San Francisco, 2001, pg. 29-30.

<sup>2</sup> '...in a world suffocated by lies and cover-ups, the right message at the right moment.' Mike Casey, Democratic Congressional Campaign Committee director; Brad Blanton, *Radical Honesty, How to transform your life by*

when we choose to keep quiet about things that matter, when we stop listening to each other, when we stop communicating. Silence is the ending to every solution, every relationship, cooperation and collectiveness.<sup>3</sup> Is it not the perfect time for us lawyers to stop being silent<sup>4</sup> about things that matter to us? We witness an extremely powerful negative public perception of our profession.<sup>5</sup> When talking to *regular people*, the clients, it is possible to witness the real proportions of this perception. All of us individually, but also as a group, are seen as a negative social force.<sup>6</sup> Whether these sharp spears of the public are aimed at judges, state attorneys, lawyers or other legal officers, or even all of us together – it is completely irrelevant. We simply must not keep quiet about their existence nor should we ignore the negative perception and continue to convince each other about its nonexistence.<sup>7</sup> Instead of choosing passivity and silence we should be proactive. We should face the negative perception and consider our individual and common options for allowing positive changes to start taking place.<sup>8</sup> What can we do in order to improve the traditional system of dispute resolution, which obviously no longer satisfies anyone?<sup>9</sup> Can we make our own contribution to boost the satisfaction of all participants in legal procedures and, at the same time increase our own satisfaction with our profession? Can mediation postulates help us achieve this?

## **CHALLENGES OF THE LEGAL PROFESSION IN THE EXISTING SYSTEM OF DISPUTE RESOLUTION**

Legal profession must be one of the oldest professions in the world. There are many records of extraordinary legal minds that operated throughout history and strongly influenced the legal practice. Today more than ever legal topics occur in media, books, films, as well as reality. It is hard to remember a positive headline about Croatian judges and their work. Positive headlines about attorneys have probably never appeared, not to mention the corporate lawyers. Why is that the

*telling the truth*, VBZ d.o.o., Zagreb, 2007.; Harald Weinrich, *The Linguistics of Lying : And Other Essays*, Algoritam, Zagreb, 2005., pg 30.

<sup>3</sup> 'We can change the world if we start listening to one another again. Simple, honest, human conversation – where we each have a chance to speak, we each feel heard, and we each listen well.' pg. 3. (...) ...AND START TALKING ABOUT WHAT YOU MOST CARE ABOUT. pg.10 (...) We can change the world if we start listening to one another again.' pg. 11., Margaret J. Wheatley, *Turning to One Another, Simple Conversation to restore hope to the future*, Berrett-Koehler Publishers, Inc, San Francisco, 2002.

<sup>4</sup> 'This book (...) the first to break the code of silence about the legal profession.', Deborah Arron, *Running From the Law, Why Good Lawyers Are Getting Out of the Legal Profession?* Decision Books, Seattle, 2004.

<sup>5</sup> 'Judges: strict, slow, lazy, incompetent, unprepared, corrupted. Lawyers: arrogant, unreachable, self-absorbed, stalling, expensive, unreliable. Corporate lawyers: incompetent, passive, dependant on others, never interested, uncreative, without initiative.' Radio poll about the negative perception of legal profession; s.a., s.l.

<sup>6</sup> Mladen Vukmir, *Embracing the Negative to Achieve the Positive*, The European Lawyer, 2004, pg. 87.

<sup>7</sup> Richard W. Moll, *The Lure of the Law. Why People Become Lawyers and What The Profession Does to Them? Does Seduction Lead to Satisfaction?* Penguin Books, New York, USA, 1990, pg. 215-222 , There are differences between public perceptions and private reality (...) - author unknown.

<sup>8</sup> Steven Lubet, *The Importance of Being Honest, How lying, secrecy and hypocrisy collide with truth in law*, New York University Press, New York & London, 2008, 'If ever there were a time for lawyers, judges, and laypeople to think very seriously about the relationship between honesty and our legal systems, this is that moment.', Dahlia Latwick: 'The importance of being honest is funny and dangerous. In pulling the lid of the hypocrisy and delusions at virtually every level of the legal profession, he is in danger of touching of a chain reaction that could result in the average American's understanding and thus his ability to reform the legal system.' Alen Barra, Wall Street Journal, Steven Lubet.

<sup>9</sup> 'There is no question that rules, law, and regulations are essential for an ordered society to progress, but at the same time all that rational ordering can easily become oppressive and stultifying. The same rules that afford uniformity, safety, and protection of the norms often constitute the major source of an individual's or community's sense of powerlessness.' Henry W. Ewalt and Andrew W. Ewalt *Bringing Peace into the Room, How the Personal Qualities of the Mediator Impact the Process of Conflicts Resolution*, Jossey-Bass, San Francisco, 2003, pg 93.

case? Is the situation really so depressing when it comes to the legal profession? Are the media and the public really right?

Is it possible to inform the public about an entire army of diligent judges, state attorneys, attorneys and other lawyers who do their jobs honorably and professionally and carry the burden of Croatian judiciary? No matter how hard we try to convince ourselves that the negative perception of lawyers is just a consequence of acts by the few careless, incompetent and dishonest among us, and that everything else is an unfounded and unjust generalization of our profession, we must start to believe that simply doing our jobs diligently and professionally is not enough to cause a positive change. Without individual and collective widespread activities aimed at positive changes in approaching our everyday legal practice, the existing negative perception will not change.<sup>10</sup> When we talk about the negative perception of legal profession we must agree that it is mostly aimed at legal practitioners. That is why this paper will mostly focus on the work of those in majority: judges, attorneys and lawyers who work in various state institutions, trade associations and companies. They are usually the ones mostly criticized.

Although each of these professions has its own special role in our legal system, they all have one instrument in common – the law. Another thing they all share is the fact that by doing their everyday jobs they all somehow contribute to an unenviable condition the legal system is in as well as the discontent of all its participants. However, if they make their own contribution and apply a new approach where they put the client<sup>11</sup> in the spotlight, the improvement of the general situation will be possible.<sup>12</sup> We can only conclude that it is up to lawyers to decide whether they want to change the negative perception and earn the reputation and the authority in the society. That is the only way for them to improve the level of personal work satisfaction.

Special attention will be given to the position of judges, attorneys and corporate lawyers in practicing their everyday professions. Each of them has his own role which carries its own problems. It is necessary to point these problems out in order to emphasize how each of them is dissatisfied with the working conditions in the existing traditional system of dispute settlements. This paper will also suggest how each of them could improve their own personal satisfaction, but also the satisfaction of the clients as well as the entire public. These suggestions should not be seen as an attack on the traditional system of dispute settlements.<sup>13</sup> The system as such is an unquestionable and irreplaceable foundation of every community. It is suggested that it should only be redesigned in order to improve the entire social community.

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<sup>10</sup> Mladen Vukmir, IBID pg. 86

<sup>11</sup> 'We are service to others – that is the true distinguishing mark of our profession.' Mary Ann Glendon, *A Nation Under Lawyers, How the Crisis in the Legal Profession is Transforming American Society*, University Press, Cambridge, Massachusetts, 1994., pg 99.

<sup>12</sup> 'Primary purpose of legal profession is the public service.' Roscoe Pound, former dean at Harvard. Walter Bennett, *The Lawyer's Myth, Reviving Ideals in the Legal profession*, The University of Chicago Press, Chicago & London, 2001, pg 7.

<sup>13</sup> M. Teles, *The Rise of the Conservative Legal Movement, The battle for Control of the Law*, Steven Princeton University Press, Princeton & Oxford, 2008

## JUDGES

Judges are inevitably at the top of the legal profession. Besides the honor and the social reputation this profession implies<sup>14</sup>, the work of Croatian judges sometimes also implies certain masochistic characteristics. No matter what one thinks about the judges, their profession is the most independent of all, provided that the judge chooses such an autonomous approach. The autonomy is unquestionably something immanent to every judge. The press often mentions the courage of a certain judge for making a certain decision, although courage is an inevitable part of this profession.

Judges must always strive to be objective and unbiased as well as to fulfill the pressuring norm. It often seems that the burden of many social adversities is on them and so they often seem to be the ones to blame. They are harsh, formal, unapproachable and law-abiding. They ignore everything legally irrelevant, never deal with emotions and interests and they reach their verdicts entirely according to the law, which often brings them into a moral dilemma.

Today's parties almost exclusively go directly to courts. The results of this are courts swamped with cases, which most judges cannot handle within reasonable deadlines. It is often said that the number of judges in Croatia is too great, but it is rarely mentioned that the number of cases per judge is tremendously greater than in any other country in Western Europe.<sup>15</sup> One of the consequences of having too many cases in our courts, have been numerous demands from Croatia to pay reimbursements, due to unreasonably long court proceedings.<sup>16</sup> Dissatisfaction of all the participants is enormous. Yet, when talking about possible solutions, all eyes are on judges. They are not magicians and cannot solve all the piled up problems of the society, especially not by themselves. That is why they need all the help they can get from everyone inside the judicial system, as well as the entire community.

The thing is, the existing judicial system was built to last and, in maintaining it, everyone seems to be giving their best, even the clients. Taking this into consideration, do we need to keep the role of the judge who watches over the parties' rights and do we need to make him responsible when those rights are not exercised? *Vigilantibus iura* - 'Rights to those who watch over them'. Aren't the clients responsible for exercising, or not exercising, their own rights? Aren't the parties responsible for engaging in perilous affairs which eventually lead to disputes? Is it not their right and obligation to avoid the disputes to begin with and then try to solve the disputes themselves and then go to court as a final point?

Judges, as a part of the legal profession, are pressured daily by:

- the number of cases and their quota
- constant struggle with time<sup>17</sup>

<sup>14</sup> Richard A. Posner; *How Judges Think*, Harvard University Press, Cambridge, Massachusetts, London, 2008

<sup>15</sup> Croatia: 4,5 million people, 2,700,000 court cases; Finland: 5,2 million people, 130,000 court cases; *Vjesnik*, 3 April 2008, Biljana Bašić

<sup>16</sup> 'From 2002 – 2007 the Republic of Croatia had to pay 47,638,529,00 KN damages for abusing the rights for trial within a reasonable period of time, only in 2007 Croatia had to pay 21,563,817,00 KN' *Jutarnji List*, Zagreb, 24 April 2008, pg 2-3.

<sup>17</sup> 'A judge is a generalist who writes an opinion under pressure of time in whatever case, in whatever field of law, is assigned to him.' Richard A. Posner, *How Judges Think*, Harvard University Press, Cambridge, Massachusetts, London, 2008, pg. 206.

- frequent adopting of new regulations, as well as changing the existing ones
- constantly being blamed for insufficient work, incompetence and corruption
- inappropriate position within the society
- frequent immoral offers for better paid positions
- parties abusing their own rights
- inner struggle for having to choose between making a collegial or a strictly formal decision
- inner struggle between the feeling of justice and the feeling of legitimacy
- judging according to probability<sup>18</sup>, not certainty
- feeling that realization and violation of someone's rights depends solely on them
- need to gather as many facts and evidence as possible to make their decision substantiated
- the possibility for their decisions to be abolished
- conflict between the role as a public person and the need to protect one's privacy and professional dignity
- lack of a strong voice which would protect the interests of the legal profession
- struggle between a desire to inform the public about the difficulties of the legal profession and an internal opinion about the inappropriateness of judges appearing in the press
- numerous additional jobs which should not be a part of judicial area of work
- constant anger and dissatisfaction of many clients
- personal dissatisfaction with the existing judicial system
- material dependency of the courts
- weakness of the judicial government as one of the three independent parts of government in each society
- media generalization and sensationalism aimed only at the negative

## ATTORNEYS

Attorney's profession has been given a rarely dignified role: to watch over the rights of those who cannot do it themselves. In their everyday work they arm themselves and their clients with legal weapons and ammunition and prepare for a

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<sup>18</sup> 'Clients come to court asking for legal protection. They show up with conflicting interests, demands and understandings. The court has to take one side. In this variety of attitudes, one must find truth and justice. The court needs to reestablish the harmony. Nobody is asking for court's autocracy. The clients lead the case because they believe they are right, and not both sides can be right. Truth is necessary for a just dispute settlement, and discovering the truth is connected with great difficulties. (...) The court needs the truth in order to apply regulations. Judicial truth is not perfection; it can be very distant from the real truth. When a judge goes through evidence, there is an interesting cognitive process that takes place: he assimilates his experience with his knowledge, and so with his earlier experience and knowledge makes new facts, a new experience. He adds new to the old. This takes place in every cognitive process. In every new cognition there is a bit of history and past of the learning subject. The same goes for judicial truth and knowledge. There is no such thing as a unique judicial truth. Not every judge has the same experience, same knowledge, same hunger for truth, same point of view at the world and life, same power of perception and appreciation, same power of belief, same power of judgment. When two judges would look for the truth using the same evidence they might come up with the same, but also very different results. What one judge considers being the truth the other considers to be a lie. Relativism shows its face here. The truth is the gravitational center in every procedure, but different people see this center differently. (...) Judicial truth may and may not fit in reality. It is experiential and can be subverted by a new experience. Legal possibility to repeat the court procedure proves that even the legislator does not consider the court's truth to be perfection. The court's truth is only the highest probability. This opinion is expressed in an old proverb that says: *Pro Veritate habetur.*' , S. M. Slijepčević, *Advocacy and social progress*, Magazine Lawyer, 100 years of advocacy in Croatia 1868 – 1968, No 9, year 18, September 1968, Zagreb, pg 378-379.

judicial war that takes place in the court's arena. They often partake even when they know that they cannot win.<sup>19</sup>

They fight with deadlines, often unreachable and different judicial practice, judicial authorities and personalities<sup>20</sup>, personalities of their own clients and the entire system inside which they try to find a better position for themselves and their clients. In their work, attorneys are pressured by:

- success of their clients but also their own accomplishment
- the fact that the client will hear nothing of the weak legal position in a dispute
- client's aggression and the need to defeat the opponent
- client's negative emotions and frustrations
- a wish for a successful settlement of the dispute, but also an opportunistic desire for the dispute to last longer
- conflict between their own interest<sup>21</sup> and the one of the party
- struggle between professional and ethical regulations<sup>22</sup> and the client's need to succeed
- unsparing competition amongst lawyer
- expenses and earnings
- constant commitment to only one side, fairly or not.

Attorneys, as an individual profession<sup>23</sup>, are an inevitable part in realizing the desired changes inside our legal system. Although some of them think that it would be best to simply preserve the existing state, that opinion is considered to be wrong. Attorneys meet with new demands and the ones who meet them will be the first to board the train of upcoming changes that no one will be able to stop.

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<sup>19</sup> 'Where do individual rights stop and the interests of the society begin?', pg. 20. (...) While the lawyers and the legal system are seeking justice for the defendant, the American public is asking, 'What about justice for society? There is an increasing public perception that Justice is routinely done a disservice by lawyers who serve the needs of their clients by buying it at any price, even when they are clearly wrong. pg 22. (...) Protecting the rights of individuals is the best way to protect society.' pg. 23; Richard Zittrn and Carol M. Langford, *The Moral Compass of the American Lawyer, Truth, Justice, Power and Greed*, Brillantine Books, New York, 1999.

<sup>20</sup> 'Advocacy is the art of persuasion in court.' Andreas Kapardis, University of Cyprus, *Psychology and Law*, second edition, Cambridge University press, Cambridge, 2003, pg. 211.

<sup>21</sup> 'Let's look at each others eyes and admit how many times have we postponed a hearing in the interest of our client?' Branimir Tuškan, a question for his fellow lawyers during his speech on the Informative seminar on mediation, Croatian Chamber of Lawyers, Zagreb, 26 February 2009

<sup>22</sup> '(...) this contradiction between human tendency for ethics and justice and preparedness to abuse them at the same time, advocacy is the one that is always on the side of justice and ethics - the most important conditions for existence and the perseverance of freedom, which has been the mission of advocacy since its beginnings.' S. Strugar *Philosophy of a profession, Advocacy – immanence and eminence of freedom*, Magazine Lawyer, Magazine Lawyer, 100 years of advocacy in Croatia 1868 – 1968, No 9, year 18, September 1968, Zagreb, pg 361.

<sup>23</sup> 'Advocacy is an acquisition of the modern civilization created as one of the ways to realize freedom. When, in revolutionary history man demanded his right for freedom he had to form an institution that would equalize his position with the position of government. Constitutional and legislative government would not be possible if man was not able to fight for his rights. To fight using the legal methods means to know these methods and to know how to use them. Necessary complexity of the legal system disables every citizen to fight on his own, especially when the conflict demands an authoritative solution. Being a free man, the citizen looks for someone who understands the system, but that is not all. That someone becomes his 'alter ego'. The 'alter ego' also needs to be free and independent so that he could become someone else. And so advocacy was created as an inheritance of the struggle for freedom and equality.' L. Gršković, *Advocacy in the political system of Yugoslavia*, Magazine Lawyer, Magazine Lawyer, 100 years of advocacy in Croatia 1868 – 1968, No 9, year 18, September 1968, Zagreb, pg 17.

## CORPORATE LAWYERS

Corporate lawyers make up for the largest but often the most underestimated part of the legal profession. Most often they are diligent and loyal legal experts of their trade associations and very strongly care for the interests of the companies they work for. They are familiar with every detail of the dispute the company is in, the background, the causes of the dispute, and interests behind them as well as the people who caused them. Their warnings, mainly to the members of the boards are very often neglected, seen only as an obstacle. However, when there is a problem, the corporate lawyers are the ones to be blamed and it is expected from them to solve all the problems. All these circumstances put corporate lawyers in an unpleasant position in their everyday work, where they are pressured by:

- their own position within a company
- relationship with the company's board and unavailability of the members of the board
- underestimation of the importance of their role in a society compared to the main trade
- insufficient influence in the making of decisions
- too great expectations from them to act upon the consequences of already made decisions
- feeling of inconsistency between the real importance of their role in the society and their formal position
- underestimating of their potentials compared to the services of professional proxies
- they are often the ones to blame for the mistakes made by board members.

The fact that the number of corporate lawyers is so great, gives them an opportunity to contribute to the desired positive changes of the traditional system of dispute settlement.

### WHAT IS IT IN THE EXISTING SYSTEM OF DISPUTE RESOLUTION THAT MAKES ITS PARTICIPANTS UNHAPPY?

Long court procedures<sup>24</sup> create permanent dissatisfaction of all its participants, as well as everyone else who uses the justice system.<sup>25</sup> The dissatisfaction<sup>26</sup>

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<sup>24</sup> 'Under the circumstances of a great number of civil lawsuits and the client's dissatisfaction with the decisions, as well as the duration of the procedures, the traditional lawsuits seem like football matches where the clients are trying to score as many goals as possible. In mediation, however, the clients control both the rules and the conclusion of the dispute. That is why mediation is often referred to as *justice with a human face*', Aleš Zalar, the president of the District Court in Ljubljana, Slovenia, Project: '*Mediation and other experiences of the District Court in Ljubljana, methods of effective solving of the delayed cases, as a part of the project 'Enhancing court efficiency in Monte Negro'*', Education center of Monte Negro, Podgorica, June 2003, pg 65.

<sup>25</sup> 'It is believed that the traditional legal system was very efficient when it came to stopping tyrannies and dictatorships, but it is no longer the best option when it comes to democratic societies. In our time we witness real human dramas, enormous expenses, intentional delays, infinite durations, dishonesty, resistance and bitterness, permanent annihilation of many relationships. All this makes us believe that the system of the dispute settlement as it is today may not be the best option.' Kenneth Cloke, *Mediating Dangerously, The Frontiers of Conflict Resolution*, Jossey-Bass, San Francisco, 2001, pg 164.

<sup>26</sup> This paper, starting from the caption *WHAT IS IT IN THE EXISTING SYSTEM OF DISPUTE SETTLEMENT THAT MAKES ITS PARTICIPANTS UNHAPPY?*(pg 7) to *ELEMENTS OF DISSATISFACTION WITH THE LEGAL SYSTEM* (pg 11), Srđan Šimac, *Mediations and lawyer, why mediation is good for lawyers and their clients?*, Law in Economy, volume 45, no2,1-238, Zagreb, March 2006, pg 195-229.

originated from the feeling of legal insecurity, produced by suspense. Adding to this the significant court expenses, as well as the disturbed mental and emotional balance of the participants, especially the clients, we get all the elements that indicate the crisis of the judicial system.

This crisis is not a feature specific only for Croatia. It has spread to judicial systems of other developing countries, as well as the modern western countries. Looking for a way out most countries, especially the USA, reached for an intensive search for alternative solutions.<sup>27</sup> They have all been searching for methods that would open the way of dispute settlements, avoiding the slow, inefficient and expensive disputes before the judicial authority.<sup>28</sup> These activities have become an imperative because of the citizens who need the guarantee of an appropriate institutional method of solving disputes, but also because of the courts, since an alternative to the court trial can at least lower the pressure felt by the courts. Not only would this disburden the courts, but also hasten and advance their work.

In most European countries legal education and practice are based on a thesis that a court procedure is a standard, regular and sometimes the sole method of dealing with legal disputes. Until recently the settling of legal disputes was observed only from the perspective of the government, which intervenes in social relations by applying abstract norms to individual cases. So, the dispute between clients is seen as a reason to activate the government apparatus which needs to demonstrate how justice is done. The apparatus often ignores the interests of clients, or even work against them.

Today this perspective has changed a great deal. There is a growing pressure on the state to ensure for its citizens, as well as legal officers, the most appropriate mechanisms for the dispute resolution. This pressure comes from below, from the citizens themselves as well as their organizations, which are mostly media and entrepreneurship. The profession's point of view is changing as well; a pragmatic element is becoming more important: how to settle a dispute quickly and efficiently, as opposed to determining an abstract truth at all costs (*fiat iustitia, pereat mundus*). That is why, until recently certain European legal traditions considered each autonomous and nongovernmental mechanism of the dispute resolution to be a disloyal competition to the state judiciary, and as such was frowned upon. The expression *alternative dispute resolution* (ADR) comes from the before mentioned psychology, according to which everything that is not a court procedure is considered an exception or an alternative. Today these alternatives are encouraged by the state, but also judiciary whose job it makes easier.<sup>29</sup>

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<sup>27</sup> 'Humans constantly and repeatedly demonstrate their incapability to settle disputes. Conflict is an immanent feature of the human kind, no matter the geographic position, race, nation, skin color, religion. We simply haven't found a complete explanation of what conflict is, not to mention the proper way to solve it.' Freddie Strasse and Paul Randolph, *Mediation, A Psychological Insight Resolution*, Continuum, London & New York, 2005, pg 3.

<sup>28</sup> 'Ideas initiated in the 1980's in the USA, a new understanding of interests, in a transitional environment could be an alternative to a system which is not functioning. What is more, negotiation and mediation could form a new functional system.' V. Gotovac, *How reach a Yes? Reaching a deal by negotiation, not by surrender*, R. Fisher, W. Patton, Neretva, second edition, Zagreb, 2003, pg8.

<sup>29</sup> 'Mediation was not created as a tool to help the legal system. The help is circumlocutory.' Deborah Arron, *Running from the Law – Why Good Lawyers Are Getting Out of the Legal Profession*, Decision Books, Seattle and Washington, 1989, pg 146.

Encouraging the alternative dispute resolutions, mediation has become a priority in the European Union<sup>30</sup>. The same initiatives are becoming more emphasized in Croatia as well.

### **SOCIAL CLIMATE OF DISPUTING – CRISIS ELEMENT OF THE JUDICIARY SYSTEM**

Croatia was not spared from the crisis of the judiciary system. Today's courts have better working conditions than ever, we have more judges and lawyers than ever before and a great number of judges work diligently to fulfill their quota. Even with all that the problems still exist. As a matter of fact, they are becoming bigger and bigger. One of the reasons for this must be the enormous quantity of court cases which exhausts all the participants of the court procedures.<sup>31</sup> The unquestionable fact is that the clients still almost exclusively turn to state courts<sup>32</sup> as the most attractive forums.

Clients and lawyers almost directly go to state courts<sup>33</sup>. There they anticipate a verdict which will resolve their case according to legal and court orders. Court hearings are often a front for a world of suppressed parties' interests, worries, desires and conflicts, which cannot be legally interpreted. Legal conflict and a conflict behind it do not usually overlap.

Through a judicial proceeding the parties want to attain his rights based on legal regulations. In order to achieve this, the party must legally interpret his dispute, turning his own personal interest into a lawsuit or a defense. The lawsuit is only one specific, inflexible and one-sided conflict resolution, based exclusively on the interests of the complainant. The parties are forced to dig out each other's past during the 'legal battle'<sup>34</sup> to find proofs (arguments) and facts that could be relevant for the verdict. That kind of behavior causes freezing of the opposing attitudes, completely irrelevant for the initial conflict. The initial interests are often forgotten and parties mix their initial interests with loads of legal facts and details. Taking stand in conflicts and judicial procedures entices people to focus only on conflicting and differentiating.

Officially, a legal procedure deals only with legal contents. Disturbances in communication and emotions involved in the procedure are not a part of judge's

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<sup>30</sup> See EU guidelines pronounced in the main mediation document published by the European Commission in April 2002, as the Green Paper: 'ADR is a political priority, repeatedly declared by the institutions of the European Union, whose aim is to promote alternative techniques to ensure simulative conditions for quality and development.' Green Paper on alternative dispute resolution in civil and commercial law, COM (2002)196fin, [Http://www.europa.eu.int/comm/off/green \(index\\_en.htm\)](http://www.europa.eu.int/comm/off/green/index_en.htm); pg 5.

<sup>31</sup> 'Clients produce and bring more cases every day than the judges can handle', A. Zalar, *Legislative and judicial receptive to early (amicable) resolution*, President of the District Court of Ljubljana, Member of the Consultative Council of European Judges (CCJE), *First European Conference Of Judges – Early Settlement Of Disputes And The Role Of Judges*, Strasbourg, 24-25 November 2003, work material, pg 51.

<sup>32</sup> 'Although the states are becoming more powerful each day, the courts are not following the same footsteps. It is getting clearer that the courts have missed their chance and are now demonstrating many inabilities.' Vanja Bilić, *Alternative dispute resolutions and lawsuits*, Doctoral thesis, Faculty of Law, Zagreb, 2008.

<sup>33</sup> 'Most of us still believe court is the only place to find justice. It is a void that needs to be filled.' Deborah Arron, *Running From the Law, Why Good Lawyers Are Getting Out of the Legal Profession?*, Decision Books, Seattle, 2004, pg 147.

<sup>34</sup> 'Court, in other words, replaced war as a more sensible manner of fighting.', W. Ury, *The Third Side, Why we fight, How we can stop*, Penguin books, New York, 2000, pg. 151.

jurisdiction. This of course does not mean that emotions and disturbed communication are not a part of legal procedures, every judge or a attorney knows this is not the case. Besides, it is clear that the legal procedure itself is not the most suitable device for improving relationships and expressing emotions. On the contrary, lawsuits often cause further escalation of the disturbed relationships between the parties.

Even with all these disadvantages of court procedures and the fact that the dissatisfaction with courts is great, parties and their lawyers still turn to them almost exclusively for resolving disputes, neglecting all the aggravating circumstances caused by trials as well as the fact that they themselves are in the center and that they are the ones who could make the resolution of the dispute faster, cheaper and more efficient.<sup>35</sup> The moment the opposing clients terminate all communication; the conditions for resolving their dispute peacefully disappear. Those parties, who often have negative emotions and unrealistic expectation, turn to their lawyers, judges and other judicial experts to resolve the case for them. That way they turn the responsibility to someone else and put their destiny into someone else's hands expecting a verdict from a slow judicial system.<sup>36</sup> The success of the lawsuit usually does not correspond to the expectations of either client and the verdict will not help improve their relationship. What is more, it will even escalate the disturbance of the relationship.

## **PARTIES' BEHAVIOUR PATTERN IN A LAWSUIT**

Parties not capable of resolving a dispute themselves, or the ones who do not want to, turn to attorneys for legal help in order to realize their rights. Doing so, they take on either an active role of the plaintiff or a passive role of the defendant. In both roles, using permissible<sup>37</sup> and unacceptable means<sup>38</sup>, they aim at acquiring the best legal protection available, whether they are right or not.<sup>39</sup> The main goal of the

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<sup>35</sup> 'Lawsuits have been created because many people still cannot solve a problem simply by talking or discussing' S. Petar, *The Art of Negotiation, In a good team everyone knows who is talking and who is listening*, Management, Poslovni tjednik (magazine business weekly) No 35, 2002, pg 54

<sup>36</sup> 'When people are conflicted a social mechanism is activated which helps them solve the conflict by disabling them to solve it themselves. That power is transferred from clients to judges, lawyers, government institutions, social workers, etc.' John W. Cooley, *Mediation Advocacy*, Second Edition, Nita Practical Guide Series, John W. Cooley, National Institute for Trial Advocacy, Notre Dame Law School, Notre Dame, Indiana, 2002.

<sup>37</sup> 'Causing delay and sowing confusion not only are his rights but may be his duty.' W. Rehnquist, Chief Justice of the United States Supreme Court, in *Walters v. National Association of radiation Survivors*, 1985, *The moral compass of the American lawyer, Truth, justice, power and greed*, E. Zitrin and C. M. Langford, Ballantine books, New York, 1997, pg. 53.

<sup>38</sup> 'Why do lawyers think that they can hide documents, lie about it, and get away with it? The reason, in part, is the adversary theorem, run amok to the point where some lawyers believe that anything they do on behalf of the client is justified if it is not clearly illegal and if their chances of being caught are low enough to be worth the risk.' E. Zitrin and C. M. Langford, *IBD*, pg 59.

<sup>39</sup> 'The main thing is taking the matters to court where somebody needs to be convinced that he or his client is right. This is exactly what mediation does not want to do. Mediators have a completely different role from the one of a judge. Mediator needs to know how to listen to clients and their interests. What clients and their representatives need to realize is that this procedure is not done by convincing the mediator that they are right. The mediator must learn about their interests, about the problems that led them to that position and whether they are opened for a compromise or a deal. Mediators are people who should help both sides reach an acceptable solution. The main goal is to reach an acceptable solution, no matter who is right and who is wrong. Why? Firstly because the lawsuit is the worst possible way of resolving the disputes. Lawsuit is long and expensive and it only disables further development of the relationship between clients.' V. Rubčić, a lawyer in Zagreb, *Alternative ways of resolving disputes – mediation*, Notes for the round table of Croatian lawyers in Zagreb, 14-15 March, 2002, magazine *Lawyer*, No 3-4, pg 36-37

lawsuit at court stops being a resolution in favor of clients<sup>40</sup> and becomes a struggle to win at all costs, or to lose with the least consequences. Things like time and expense seem to slip away from the sphere of the parties' primary interest.

Parties often wonder about the strength of their legal position. They want to know what the worth of their lawsuit is. They also wonder about their chances to win the case. Looking for the right answers to all these questions is often additionally complicated by their initial unrealistic expectations and demands. Their attorneys can rarely explain how farfetched those expectations are, since the parties are often prepared to listen to their attorneys only as long as they are telling them what they want to hear.<sup>41</sup> If the lawyers encourage them additionally, chances for a quick and peaceful resolution are very slim.

Parties and their attorneys rarely have the same interests.<sup>42</sup> Not only can attorneys help their clients by explaining them their legal position in a dispute, but they can also manipulate them by not giving them all the information, or simply by expressing strong emotions caused by the dispute. All this creates difficulties. On the other hand, the client can have some unrealistic demands and withhold some important information from the attorney<sup>43</sup>, putting the attorney in an unpleasant situation. There is no such reward for the attorneys that would resolve such a contradiction.

All the mentioned circumstances point to the disadvantages of the existing judicial system. Protection and the independence of the professional status of judges and attorneys contribute a great deal to these circumstances. Such position in the society caused a certain self-sufficiency of judges and lawyers which lessens their capability to adapt to changes. They feel privileged, which is obvious from the way they observe lawsuits from a certain distance, without an emotional involvement. They become craftsmen or even doctors for legal disputes<sup>44</sup>, since the clients go to them just as patients go to doctors.<sup>45</sup>

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<sup>40</sup>Citizens and legal officers, especially state attorneys are almost not aware of the being the best possible resolution of a dispute. The fact that they are so eager to go to a trial points to an insignificant number of deals made at Croatian courts. According to the data of the Croatian Ministry of Justice from 2002, only 2,5% of the cases in municipal courts were resolved by settlement and in 2,6% in commercial courts. (author's remark)

<sup>41</sup> 'It's never easy to say to a professional who needs to earn his own wages to go and mediate. I am an enthusiast and have an office that allows me to mediate, and so I do. With my clients I very often do the one-way mediation - so called 'reality check', when we look at their legal position in the case and their real interests. After such a meeting, the clients almost never return to my office. Since I don't charge them, they get a free legal advice. So, as long as the mediation stays free it is difficult to expect from the lawyers to practice it. Not many of them can afford it. That is why they need to be stimulated differently.' M. Vukmir, lawyer from Zagreb, a part of his speech on the *Round table: Mediation in Croatia, State estimate and how to move on?* Zagreb, June 2005.

<sup>42</sup> 'Fiduciary duty requires the lawyer to place the client's cause above the lawyer's own individual interests, and to always act on the client's behalf in the utmost good faith.' Richard Zitrin and Carol M. Langford, *The Moral Compass of the American Lawyer, Truth, Justice, Power and Greed*, Brillantine Books, New York, 1999., pg 20.

<sup>43</sup> 'It has been proven that not many clients tell the entire truth to their lawyers. The same goes for the French as well as Croatians (...)' S. Strugar, *Philosophy of a profession, Advocacy – immanence and eminence of freedom*, Magazine Lawyer, Magazine Lawyer, 100 years of advocacy in Croatia 1868 – 1968, No 9, year 18, September 1968, Zagreb, pg 366.

<sup>44</sup> 'Lawyers are doctors for legal disputes and the moment they stop using only the legal system and turn to mediation, they will become very powerful doctors.' Mladen Vukmir, *Embracing the Negative to Achieve the Positive*, The European Lawyer, 2004, pg 87.

<sup>45</sup> 'Once we have an intolerable problem, how to resolve it? Here, the decision to turn to an expert reflects the modern belief that there is an expert for every problem. (...) Once we accept that only experts can speak with authority, then, our own voices grow weak and timid. Agents become principals. We see this everywhere: only psychologists can understand our souls, only doctors can treat our bodies, only lawyers can solve our disputes. (...) Once a matter is „turned over to the lawyers“ it is „out of my hands.“ ...false impression that the client can

The moment the legal dispute escalates to such an extent that the parties terminate any kind of communication between themselves; they are no longer capable of settling the dispute on their own. Since they are not familiar with the law, the court procedures, nor their role in the formal process of disputes, they turn to legal experts for help. The parties delegate all their responsibilities to their attorneys and give them full authority over the procedure. As a consequence, the parties become completely passive, expecting from others to deal with their case and so they lose any kind of control. As a final result we get long-lasting lawsuits in which none of the participants are directly included. Those lawsuits usually end with a decision that does not please anyone.

### **ELEMENTS OF DISSATISFACTION WITH THE LEGAL SYSTEM**

According to the nature of the dispute<sup>46</sup> itself, the participants of the court procedures witness real human dramas, significant frustrations, great expenses, deliberate delaying, dishonesty, resistance, bitterness and finally, permanent annihilation of many relationships. All this makes many people believe that the existing dispute resolution system, as well as the traditional lawyer's approach is not the most appropriate solution.<sup>47</sup>

The existing dispute resolution system in all its segments emphasizes political differences and their confrontation. Constant reflecting, even enhancing of the client's confrontation seems to be one of the strongest elements of their dissatisfaction, during the procedure, as well as after it. The dissatisfaction is the consequence of the existing system which encourages the clients to:<sup>48</sup>

- demonize<sup>49</sup> their enemies
- create their own feeling of guilt
- avoid their own responsibilities
- confuse each other with problems
- focus on past instead of present or future
- focus on less important things and neglect the important ones
- persist on pointless assertion of truth
- avoid dialogues, communication, listening and understanding
- bury themselves in legal positions instead of discovering interests
- attack the person instead of the problem
- focus on victory – to defeat the opponent instead of restoring the disrupted relationship

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pursue the conflict while avoiding the messiness of personal involvement.” Benjamin L. Sells, *The Soul of the Law*, Vega, London, 2002, pg 88.

<sup>46</sup> 'But isn't fighting human nature?' W. Ury, *The Third Side, Why we fight, How we can stop*, Penguin books, New York, 2000, pg 27 – 56.

<sup>47</sup> Kenneth Cloke, *Mediating Dangerously, The Frontiers of Conflict Resolution*, Jossey-Bass, San Francisco, 2001, pg 164-189.

<sup>48</sup> Kenneth Cloke, IBD, pg 164.

<sup>49</sup> 'Violence and intolerance are major problems throughout the world, and ability of people to accept differences and resolve conflicts without demonizing each other is a major challenge will shape everyone's future.' Bernard Mayer, *The Dynamics of Conflict Resolution, A Practitioner's Guide*, Jossey-Bass, San Francisco, 2000, pg 242.

- entrenching in confrontation
- go to war using all means possible inside the court arena
- increase the existing dissatisfaction and frustration

### **IMMANENT ELEMENTS OF EVERY LEGAL DISPUTE RESOLUTION SYSTEM, WHICH INITIATE DISSATISFACTION OF ALL THE PARTICIPANTS**

Legal dispute resolution system is:

- long-lasting
- expensive
- formal
- relying on general rules, which are often inappropriate for specific cases
- enables concealing instead of revealing actual situation
- decisions are made based on probability, not certainty
- always producing winners and losers
- permanently proclaiming one side to be right, the other to be in the wrong
- based on someone's mistakes, and never on the relation that caused those mistakes
- permanently damaging the relationship between clients
- makes the outcome uncertain
- excludes dialogue, any kind of communication between clients
- does not prevent, but sanctions
- based on confrontation, which it strengthens
- judicial proceedings are controlled by judges and lawyers, not by clients
- unequal judicial practice can produce unequal justice.

The entire legal system exists on the presumption that the courts are a force superior to people. The force requires unconditional obedience based on power, guilt, fear and shame of every individual as a community member. That is why the legal system as such, although necessary and irreplaceable, cannot help to establish communication between opposing clients, it cannot re-establish the relationship between them, nor can it enable any kind of co-operation in solving the dispute. Also, it never deals with the emotions and interests of the clients.

This kind of system encourages attorneys and corporate lawyers to manipulate; it encourages them not to tell the whole truth, not to take full responsibility as well as to withhold some important evidence and information. All this often forces judges to judge based on inadequate, insufficient, unverified and twisted evidence. This way the winners are made, whose victory is based on technicalities, as opposed to important issues. Also created are the losers whose lives irreversibly change because of the determined guilt. The winners too are not happy. They often get less than they expected. The initial feeling of victory turns into a feeling of bitterness. How can there be pleasure in defeating someone and so ruining a relationship? Is there not a greater pleasure in turning enemies into friends? Can something inside the legal system achieve this?

The law was created to control conflict, not to solve it. It was created to stop disagreement, not to learn from it. It was created to suppress emotions and not to fulfill them, to solve the case, not to reestablish a relationship. A third party is

supposed to make a decision, without the parties' mutual consent. Verdicts are often seen as a special law for a specific relationship. They produce temporary peace between parties based on the presumption of the court's objectivity. There is no better system than this one. And that will remain so until the parties are ready to at least try, alone or with someone's help, to solve the dispute, take responsibility for the resolution of the dispute, but also for their own lives and their own decisions, and not to passively give in to the authorities. Without parties actively taking part in the resolving their own disputes we cannot expect any improvements to take place in the existing judicial system. Such participation by the parties should be enabled by lawyers mainly.

## **IS THERE A BETTER WAY FOR PARTIES TO RESOLVE THEIR DISPUTES THAN THE TRADITIONAL DISPUTE RESOLUTION SYSTEM?**

### **Mediation**

The better way is mediation<sup>50</sup>, in the courts or outside them. Mediation is not an alternative<sup>51</sup>, but simply another way to settle disputes, which does not jeopardize the traditional system.

Mediation gives us all the same possibility of CHOICE, to resolve a dispute in the well-known court environment or in a different special way of resolving it. In mediation, whether voluntary or not, the clients have absolutely nothing to lose because they are the only ones who can make a decision about the dispute. Also, if the mediation does not work they can always go to court. Mediation, as a way of settling the disputes enables<sup>52</sup>:

- volunteerism and informality
- communication, dialog, co-operation
- resolving the dispute together, through an agreement
- free expression of all the details of the dispute
- free expression of emotions
- expressing and revealing one's interests behind the dispute
- separating oneself from the problem
- listening and hearing each other
- not to confront for the sake of confrontation
- focusing on the present and future instead on the past
- being honest, sincere, modest, creative
- forgiveness and co-operation
- direct and complete involvement in the procedure without professional and unintelligible expressions
- not having a third person make a decision

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<sup>50</sup> Srđan Šimac, *'Mediation – Copernican turn in the legal world'*, presentation, 16<sup>th</sup> Days of arbitration and mediation, Croatian Chamber of Commerce, 11-12 December 2008.

<sup>51</sup> 'There have been several attempts to change the expression with one that would express the fact that it is not just an alternative to the judicial procedure, and the one that would include the essence of what the alternative is. On the same track is the attempt to find an expression for dealing the disputes outside the courts, which would not express the alternative, but the efficiency in resolving the disputes. We are talking about Effective Dispute Resolution (EDR) instead of the Alternative Dispute Resolution (ADR).' Vanja Bilić, *Alternative dispute resolutions and lawsuits*, Doctoral thesis, Faculty of Law, Zagreb, 2008, pg 8.

<sup>52</sup> Kenneth Cloke, *IBD.*, pg 169-170.

- complete control of the parties over the procedure and its results
- lack of suspense about the outcome
- victory to both sides
- preserved dignity of both sides
- remaining human with all the flaws and virtues
- understanding the needs and interests of the other side, as well as their reasons for certain behavior<sup>53</sup>
- re-establish the disrupted relationship and preserving it for the future<sup>54</sup>
- taking responsibility for one's decisions, actions and life itself<sup>55</sup>
- voluntary fulfilling of the duties accepted from the settlement, without an enforcement by the court.

Mediation<sup>56</sup> is a procedure in which nobody is trying to compress the vast variety of human relation into a general legal rule. Mediation postulates are just indicators of lawyer's new approaches in dealing with everyday affairs, whether they are a part of mediation procedures or not. Direct involvement in mediation is not a condition for introducing changes into the legal system. Mediation has been created because of the inefficiency of the judicial systems, as a way to contribute to faster, cheaper and more creative dispute resolutions in order to satisfy all the participants as well as the entire community. Mediation has not been created to replace the existing traditional dispute resolution system<sup>57</sup>, which as such is necessary in every social community, but to be used with all its advantages in order to complete the traditional system, to refresh it and make it more human in a way. Finally, mediation can improve the existing judicial system simply by taking over some cases and so disburdening the courts and making them more efficient that way.<sup>58</sup>

Mediation postulates used by parties, their representatives as well as mediators can improve the traditional dispute resolution system<sup>59</sup>. By using them it is possible to regain the lost faith in the system, but also to restore the reputation of the legal profession and bring back the smile on the faces of lawyers.<sup>60</sup>

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<sup>53</sup> 'I'm aware that you're both in a lot of pain. I would suggest that we begin with each of you expressing whatever needs of yours are not being fulfilled in the relationship. Once you've understood each other's needs, I'm confident we can explore some strategies to meet those needs.' Robert K. Greenleaf, *Servant Leadership, A Journey into the Nature of Legitimate Power & Greatness*, Paulist Press, New York/Mahawah, New Jersey, 2002., pg. 5.

<sup>54</sup> Kenneth Cloke, IBD., pg 165..

<sup>55</sup> 'Negotiation and mediation are the primary models of *'private ordering'* that allow parties to retain control over their own lives and avoid imposition of often unexpected and unwanted determinations by formal system of law.' Mnookin, R. and Kornhauser, L. „*Bargaining in the Shadow of the Law: The Case of Divorce*, Yale Law Journal, 1979,88, 950.997. str. 94. "Mediation is an attempt to find the balance between an ordered society and individual freedom." Henry W. Ewalt and Andrew W. Ewalt, *Bringing Peace into the Room, How the Personal Qualities of the Mediator Impact the Process of Conflicts Resolution*, Jossey-Bass, San Francisco, 2003, pg 94.

<sup>56</sup> 'Mediation, an opportunity to make world better place!' Henry W. Ewalt and Andrew W. Ewalt, *Bringing Peace into the Room, How the Personal Qualities of the Mediator Impact the Process of Conflicts Resolution*, Jossey-Bass, San Francisco, 2003, pg. 1.

<sup>57</sup> 'Alternative dispute resolution is different from a lawsuit, but that does not mean it is here to replace it. It is only the matter of introducing choices.' Vanja Bilić, *Alternative dispute resolutions and lawsuits*, Doctoral thesis, Faculty of Law, Zagreb, 2008, pg 9.

<sup>58</sup> 'Mediation was not created as a tool to help the legal system. The help is circumlocutory.' Deborah Arron, *Running from the Law – Why Good Lawyers Are Getting Out of the Legal Profession*, Decision Books, Seattle and Washington, 1989, pg 146.

<sup>59</sup> 'The idea of the alternative dispute resolution has been internationally accepted as one of the political and legal priorities. It is suggested for the Croatian dispute resolution system to create a positive interaction with the traditional judiciary by applying new ideas.' Vanja Bilić, IBD, pg 8.

<sup>60</sup> 'Almost every fifth of all lawyers are unhappy with their employment and nearly half would not gain choose law as career.' Deborah Arron, *Running From the Law, Why Good Lawyers Are Getting Out of the Legal Profession?*, Decision Books, Seattle, 2004, pg 138.

Mediation in Croatia is developing slowly but surely, and it is only a matter of time when it will produce the effects mentioned in this paper.<sup>61</sup> The aim is to draw the attention of the supporters of mediation, but also its rivals, to the fact that mediation is not a magic wand that can answer all our questions or solve all our problems. The great number of cases will never be appropriate for mediation, so our lawyers and judges will still do most of their work inside the courtrooms, no matter how much mediation might spread. Our ambitious goal is clear – to restore the trust of parties and the entire public in judiciary and the traditional dispute resolution system and to erase the negative perception of the legal profession.

## WHAT CAN LAWYERS DO INCREASE THE SATISFACTION WITH THE LEGAL SYSTEM?

Lawyers can put their clients and their interests into the center of attention, the center of their legal activities.<sup>62</sup> Everything the lawyers do, they do for the sake of parties. Only if they apply this approach consistently can they change the negative perception of their profession.

### What can the judges do?

- they can take off the strict and formal mask which separates them from the rest of the world
- they are free to transform their posture inside the courtroom, especially at the beginning of every hearing<sup>63</sup>
- they can explain to every individual his own role in the procedure, as well as the roles of other participants
- they can lower the frustration of the parties and witnesses by explaining that the court procedure does not anticipate statements which are not legally relevant
- they can explain that the court procedure is not about dealing with emotions and interests behind the dispute
- they can choose whether to deal with the emotions and interests of the parties<sup>64</sup>

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<sup>61</sup> 'Meditation is like a small but a shrewd fish that somehow ended up in the hands of a fisherman who wants to restrain it, but the fish is slippery and it keeps getting out of his hands and eventually jumps into the sea...but this one is a gold fish and it will make his three wishes true if he lets it go.' Srđan Šimac, *'Mediation – Copernican turn in the legal world, can Mediation improve the traditional dispute resolution system?'* lecture, 16<sup>th</sup> Days of arbitration and mediation, Croatian Chamber of Commerce, 11-12 December 2008.

<sup>62</sup> 'To mediate means to be in the middle', Benjamin L. Sells, *The Soul of the Law*, Vega, London, 2002, pg 87.

<sup>63</sup> In 2002 a group of 15 Croatian judges, including the author of this paper, went to Canada on an official visit to learn about the Canadian judicial system and possible elements that could be applied in order to improve the Croatian dispute resolution system. That is when we heard about mediation in courts for the first time. We also heard about an item called Conduction in the Courtroom for the first time. The basic idea behind it is that appearing in court is a frustrating and excruciating experience for every average individual. That is why all the judges should be trained how to treat the clients as well as the witnesses in a courteous and open way. For example, a judge should greet the witness, ask him a few general questions to help him relax, introduce him to clients and their representatives or lawyers, explain to him his role in the procedure, show him to his place in the courtroom, ask him if he has any questions, and so on. This way judges eliminate the fear of the court and of the judges felt by many people. They make them feel comfortable, open and free to answer any questions, especially if they are in the courtroom for the very first time. What impressed us the most on our visit to the Canadian courts is the relationship every client has with a judge – they refer to them as 'my judge' and talk about them with utmost respect. This shows us just how the way people talk to judges and other judicial officers is important for the reputation of the judicial profession (Author's comment).

- they can show that they understand the parties and their position
- they can help the clients by informing them about their legal position (*the principle of open judiciary*)<sup>65</sup>
- they have more time to prepare for every hearing
- they can prevent every action that could prolong the procedure and the abuse of it, as well as increase the level of discipline inside the courtrooms
- they can exclude even the smallest bit of unnecessary fellowship from their practice
- they can dedicate more time to their clients and help them reach an agreement
- they can always suggest mediation and point to its advantages, as long as the nature of the case allows it
- they can write their verdicts concisely and intelligibly

In every social community judges are conservative by nature and that is just the way they are supposed to be, since their responsibility is, among other things, to protect the society from too many fast changes. Also, inside the legal profession judges are the most influential people and any improvement in the legislation depends on them. It is their decisions that create the frames of the set social relations and their word, being extremely socially important, is often the last. The judges are also the ones responsible for the situation in judiciary, but also for the situation of the entire legal profession, and so indirectly for the situation of the society itself. So, one might say that it is their right as well as their duty to contribute to the welfare of all social segments. That way they might stop being members of a quiet profession and become active members as well as the creators of positive changes, demanded so vociferously by the spirit of modern times.

The severity of judge's role in every society, but also a new direction that role should take in dealing with everyday legal affairs, as well as all the clients who produce and then try to solve their disputes in one way only - through a lawsuit, is very realistically shown by an anecdote from the courtroom of a judge who was supposed to decide which parent should get the full custody of a minor child: As it often happens, a mother and a father had a verbal argument in the courtroom. They yelled and did their best to belittle and discredit each other concerning the ability to raise a child. They were assisted by their lawyers who were fighting for their client's interests. By doing so they only made the matters worse. The judge was watching them and listening closely until their behavior become unacceptable and so completely useless. He stopped them and calmed everybody down. When everyone was quiet, the judge asked the mother: 'Madam, please allow me to ask you a question, do you love your child?' The mother said: 'Of course I do. What kind of a question is that?', 'OK' said the judge and then turned to the father: 'And you sir, do you love your child?', 'Of course I love my child, I would give my life for him'. The judge paused for a moment and then he said: 'You see, you both love your child, whereas I don't. And so it is not clear to me why would you put your child's destiny in my hands?' The parents peacefully looked at each other and then asked from the

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<sup>64</sup> 'Most parties need to tell their story to someone. Just telling their side of the story can be therapeutic. Some parties may feel ignored because no one had really been listening to them. The mediator does not need to comment on the story as told by the parties. Usually telling the story is enough, but sometimes the parties need to vent their negative feelings and emotions to get them out of their system. Venting allows the parties to finally move forward.' Mary Greenwood, *How to Mediate Like a pro*, Universe, Lincoln, 2008, pg 4.

<sup>65</sup> Triva, *Civil Legal Proceedings*, Narodne novine, Zagreb, 1983, pg 27/3

judge to allow them to leave the courtroom together with their lawyers. They returned after having made the decision about who was going to get the custody over their child. The judge made the decision they both had wanted.<sup>66</sup>

This real-life story best explains the direction the legal profession as well as the parties should go in order for the existing dispute resolution system to become more human, as well as to make all the participants of the system as satisfied as possible.

### What can attorneys do?

- they can help clients to prevent disputes
- they can become their advisors who will help them settle a dispute outside the court<sup>67</sup>
- they can help them to resolve the dispute<sup>68</sup> faster, instead of multiplying their problems
- they can stop convincing them of how certain their victory is
- they can truly get to know their client's legal position and possible negative outcome of the trial<sup>69</sup>
- they can help their clients change the role in which they blame and demonize others and turn themselves into victims<sup>70</sup>
- they can help them end the hostile mood as well as the desire for a legal battle in the courtroom
- they can enable their clients to have a more active role<sup>71</sup>
- they can persuade their clients to communicate with the opposing side
- they can always be available and understanding<sup>72</sup>
- they can inform them about other options for resolving a dispute as well as the reasons why those might be more suitable<sup>73</sup> (negotiation, settlement<sup>74</sup>, mediation settlement)<sup>75</sup>

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<sup>66</sup> Daniel Bowling and David Hoffman, *Bringing Peace Into the Room, How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution*, Jossey Bass, San Francisco, 2003., pg 106-107.

<sup>67</sup> 'Lawyers should see the courtrooms as the last place for resolving disputes' Deborah Arron, *Running From the Law, Why Good Lawyers Are Getting Out of the Legal Profession?*, Decision Books, Seattle, 2004, pg 147.

<sup>68</sup> 'Law firms should quickly jump onto the mediation train, at least on the last carriage. Today's businessmen, as clients, demand from their lawyers to quickly resolve their disputes, without big expenses. It does not matter if they preventing disputes or resolving them or if they are mediators or advisors.' Deborah Arron, *Running From the Law, Why Good Lawyers Are Getting Out of the Legal Profession?*, Decision Books, Seattle, 2004, pg 146-147

<sup>69</sup> 'Lawyers must redefine their roles intended for them by the legal system. They must penetrate into the content of the dispute and contribute to its resolution, with much less time, expenses and stress and with a lot more satisfaction.' Kenneth Cloke *Mediating Dangerously, The Frontiers of Conflict Resolution*, Jossey-Bass, San Francisco, 2001, pg 171

<sup>70</sup> 'I look at all of my cases as a situation for which my client is responsible, one way or another. Instead of solving it, he chooses to blame somebody else for it. Since my client is no longer able to communicate with the other side, he pays me to do it for him.' Deborah Arron, IBD pg 147, 'so we have lost the ability to communicate with our fellow citizen, so we hire lawyers to do our negotiating for us.' Benjamin L. Sells, *The Soul of the Law*, Benjamin L. Sells, Vega, London, 2002.

<sup>71</sup> 'Lawyers should always encourage their clients to actively participate in dispute resolutions.' Deborah Arron, *Running From the Law, Why Good Lawyers Are Getting Out of the Legal Profession?*, Decision Books, Seattle, 2004, pg 147.

<sup>72</sup> 'Many lawyers develop their role as a mediator among clients. In Meddlebury, Vermont their practice is called 'holistic law' (Bill van Zyverden). He questions his clients to discover the roots of the dispute, he tries to promote his own understanding of the situation that brought the clients to his, the lawyer, and he encourages them to use informal methods, arbitrage or mediation, rather than a lawsuit.'; Ted Hobson: 'Holistic law is just a new name for what responsible lawyers do.' pg. 98; Mary Ann Glendon, *A Nation Under Lawyers, How the Crisis in the Legal Profession is Transforming American Society*, Harward University Press, Cambridge, Massachusetts, 1994, pg 97.

- they can prevent every action that could prolong the procedure and the abuse of it, as well as increase the level of discipline inside the courtrooms
- they can choose not to participate in the client's confrontation in the courtroom as well as outside it
- they can choose not to encourage their clients to aspire to defeat their opponents
- they can try to convince them that winning a lawsuit might in a way mean losing a life's battle
- they can explain that a deal could re-establish a ruined relationship and preserve it for the future
- they can accept the fact that contented clients pay the fees and gladly come back.

Attorneys should not be simply technicians and tools used by clients for confrontations. They really should stop being and behaving like mercenaries for their clients. Many attorneys do not realize that they owe their clients the truth about whether they are guilty or not, the truth about their objective legal position. The fact that they do not share that truth with their clients only because the clients don't want to hear it is quite a paradox.

Attorneys should find a way to really help their clients resolve a dispute in the best possible way. They should help them become realistic, especially when it comes to their expectations and demands, as well as the problems they are facing. With their advice attorneys can help them avoid or minimize emotional traumas which are a part of every dispute and divert them from simply trying to prove who is right and who is wrong.<sup>76</sup> Because, that is the way to lead a legal battle in the courtroom, not a way to communicate, understand each other and freely express emotions and interests in order to solve the dispute.

Attorneys should suppress their client's fighting urges, but also their own urges, especially the strongest one – to overpower or defeat the opposing attorney. By behaving this way, attorneys could do a lot to change the negative perception of

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<sup>73</sup> 'Lawyers who have used mediation successfully know how beneficial it can be for their clients. They know that regardless of whether their case is strong, weak, or close, it is a sign of strength and wise advocacy – not a sign of weakness-to suggest mediation.' John W. Cooley, *Mediation Advocacy*, Second Edition, Nita Practical Guide Series, National Institute for Trial Advocacy, Notre dame Law School, Notre dame, Indiana, 2002, pg. 37.

<sup>74</sup> 'Business of litigation.' Law firm discourage settlement. Why settle? Benjamin L. Sells, *The Soul of the Law*, Vega, London, 2002, pg. 83. 'Legal profession as business rather than a profession.' Walter Bennett, *The Lawyer's Myth, Reviving Ideals in the Legal profession*, The University of Chicago Press, Chicago & London, 2001, pg. 89.

<sup>75</sup> 'Lawyers look at the settlement as something that comes along with the dispute, but appears only after the clients have already had an argument and have buried themselves in contradiction, after a severe fight in which they both invested a lot of time, money and energy. They ought to change the perception of the court procedure which should become a procedure not for going into battle, but for reaching a settlement. Mediation became the most popular way to achieve this, since its purpose is to reach an agreement between two sides. Through giving and taking everyone is included in creating a deal that ends the dispute – lawyers, clients and mediators.' Deborah Arron, IBD, pg 146.

<sup>76</sup> 'And instead of both parties expressing their own needs and understanding the needs of other party, **both sides play game of who's right**. That game is more likely to end in various forms of verbal, psychological, or physical violence than in peaceful resolution of differences.' Robert K. Greenleaf, *Servant Leadership, A Journey into the Nature of Legitimate Power & Greatness*, Paulist Press, New York/Mahawah, New Jersey, 2002, pg. 4.

the legal profession<sup>77</sup>, and they could create a new perception of them as being those who do not take their clients into a boxing ring, but to a desk where they try to make peace and settle<sup>78</sup>.

### **What can corporate lawyers do?**

- they can take over a more active role in making decisions inside their own company, especially preventive decisions, when deciding on closing a business deal
- they can use their own example and their own results to confirm their professionalism, their dedication to the companies problems, and so prove their irreplaceability
- they can impose more actively to the boards as reliable and trustworthy
- they can join the activities dealing with settling disputes outside the courts, and promote these activities and commit to them by including stipulations in the contracts made by their company
- they can secure all the necessary documents and other logistics for dealing with a certain case
- they can actively encourage the board members of their companies to finalize all the court procedures by settling or by making deals through mediation, and so improve their business, but also personal reputation<sup>79</sup>

Corporate lawyers also have a choice. They can get organized and united and with their numerosity and new activities aimed at positive changes of everyday legal affairs, they can improve the reputation of the legal profession, as well as their own personal reputation within the entire society. Their numerosity is their biggest advantage which they should definitely use.

### **WHAT CAN LAWYERS DO TOGETHER TO IMPROVE THE TRADITIONAL DISPUTE RESOLUTION SYSTEM AND THEIR REPUTATION IN A COMMUNITY?**

Legal profession is usually described as independent, lonely, autonomous, untouchable, courageous, and so on. All these adjectives strongly contributed to the freedom of accomplishment of this profession without which it would be unimaginable. On the other hand, it is because of those adjectives that lawyers excluded activities such as co-operation, solidarity, mutual respect and sense for a common cause, whether professional or political.

It is certain that this kind of approach from the lawyers, among other things, contributed to their present position in our society, but also their position in the entire legal profession.

Can members of the legal profession, no matter which role they play, accept the challenges of modern times? Can they individually, but also together, contribute

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<sup>77</sup> 'Only by providing a quality service to the client can they earn the reputation and the authority in the society. Only that way will people stop seeing lawyers as a group obsessed with money.' Mladen Vukmir *Embracing the Negative to Achieve the Positive*; The European Lawyer, The Voice of Profession. Issue 42, 2004 pg 87.

<sup>78</sup> Deborah Arron, IBD, pg 148.

<sup>79</sup> Trading companies with the best business results and the highest reputation in the USA are the ones that settle the majority of their disputes through alternative methods, especially through mediation (Author's comment).

to the changes of the existing dispute resolution system<sup>80</sup> as well as their everyday legal practice? Can their own activities change the way<sup>81</sup> parties and the entire public see the legal profession and so improve their reputation as well as their own work satisfaction.

It is up to them to decide whether they will continue to behave the way they have been until now, or will they lose the bad habits and fight for the change of the existing situation.<sup>82</sup>

New social trends impose new roles for the lawyers. These could help them go back to the primal objective, which is to **settle the dispute, not the case**. Until they find themselves in a dispute, all the lawyers deal with the cases and not with the people behind those cases. They are all pressured by deadlines, the number of cases to be solved, pressure from the parties and their wishes and interests, but mostly their own differences and confrontations. Besides, they are pressured by demands for a better quality of work, limitations of the system they work in and the dissatisfaction of all the participants, the entire public, but also their own dissatisfaction, since they very often feel their work is rarely appreciated compared to how much and how hard they work.

The public sees the existing traditional dispute resolution system as aggravating, unclear, bad, slow, and unjust.<sup>83</sup> The system is definitely not party oriented and it is often incapable of satisfying them. Still, the system as such is extremely important, unavoidable, necessary and socially desired. However, many cases that end up in courts could be solved in a much more appropriate way for the parties. This is obvious from the fact that many clients as well as their representatives are showing interest for solving their disputes without direct confrontations.

The legal services market is considerably changing.<sup>84</sup> Today's practice of resolving disputes based on legal positions is replacing their resolving based on parties' interests. The present legal system is centuries old and it requires a certain re-design according to social changes. Legal officers should take responsibility and add a new value to the existing dispute resolution practice.<sup>85</sup>

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<sup>80</sup> In achieving this goal an extremely important role is given to universities of law which should educate new generations of lawyers according to the demands of the modern times and so prepare them for their new legal roles at the very beginning of their career. (Author's comment).

<sup>81</sup> 'The problems in our legal system, our negative attitudes toward lawyers and skyrocketing numbers of lawsuits, are symptomatic signs of illness of our society.' Benjamin L. Sells, *The Soul of the Law*, Vega, London, 2002,

<sup>82</sup> 'We should finally mention the widely spread negative perception of the legal profession and understand how influential the legal system is.' Mladen Vukmir, IBD, pg 86.

<sup>83</sup> 'The plaintiff and the defendant look like two people with their heads inside the buckets full of water, competing who will last longer without air', Samuel Johnson; John W. Cooley, *Mediation Advocacy*, Second Edition, Nita Practical Guide Series, National Institute for Trial Advocacy, Notre Dame Law School, Notre Dame, Indiana, 2002, pg 1.

<sup>84</sup> 'My joining the mediation process is a direct result of me trying to add new values my everyday legal practice with my clients. I decided that simply giving advice and representing the clients is not enough for resolving their real problems. That is why my clients do not only expect legal advice, but they demand a new value for their money. Nobody wants to have endless disputes and they are all grateful for any kind of help they get in resolving them. Everyone prefers a faster resolution to having new problems as a result of resolving the dispute inside the legal arena. That is the reason why clients want to avoid the legal system that will push them into a procedure where others will decide about the final result of their dispute. This does not mean less work for lawyers, it simply means providing extra services that could mend the negative perception of the legal profession.' Mladen Vukmir, IBD, pg 87.

<sup>85</sup> Mladen Vukmir, IBD, pg 86 - 87.

The real purpose of a lawyer is to bring together the separated parties, not to disconnect them permanently.<sup>86</sup> This separation of parties is something every lawyer does, quite often and rather unaware. While doing so they insist only on one-sided interests or position of their parties, neglecting the interests of the opposing side and, most importantly, ignoring mutual interests.

By changing the focus of the dispute resolution system from settling the disputes exclusively based on legal positions to settling based on mutual understanding of interests<sup>87</sup>, even with the assistance of law, lawyers can make big steps<sup>88</sup> inside their everyday legal affairs. This way they can increase the satisfaction of parties<sup>89</sup>, but also their own satisfaction with their work, their achievements and their entire profession. That would be the best way to prove how important as well as useful legal profession is to the entire social community.

How the described mediation postulates can help lawyers and their parties in achieving this goal is the most obvious from the opinion the parties and their lawyers have on mediation procedures done in the High Commercial Court of the Republic of Croatia.<sup>90</sup> Their view of mediation and the mediators is a powerful evidence of validity and social benefit of the path we began to follow, but which still has many obstacles<sup>91</sup>. One of the most prominent evaluations of mediation was given by one of the party, who said the following: **'Mediation in this court regained my trust in judiciary.'** It is hard to imagine a better vocation than this one as well as it is hard to make a firm step forward.<sup>92</sup>

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<sup>86</sup> 'I learned the true practice of law. I learned to find out the better side of human nature and to enter men's hearts. I realized that true function of a lawyer was to unite parties driven asunder.' (Mahatma Gandhi). Kenneth Cloke, *Mediating Dangerously, The Frontiers of Conflict Resolution*, Jossey-Bass, San Francisco, 2001, pg 173.

<sup>87</sup> '...showing how much I believe a literacy of needs helps, how important it is to both express needs, and to hear the other side's needs,...' Robert K. Greenleaf, *Servant Leadership, A Journey into the Nature of Legitimate Power & Greatness*, Paulist Press, New York/Mahawah, New Jersey, 2002, pg. 21.

<sup>88</sup> 'When I don't antagonize the listeners, there is a big number of lawyers who thank me for the opportunity for an open conversation about problems. The incurred changes, as well as those yet to come, are enormous. More and more people are ready to find a solution together. That is why we must find a language that does not scare them, but the one that attracts them, to share the vision with them and change what has to be changed.', Mladen Vukmir, electronic correspondence with the author, 19 September 2008.

<sup>89</sup> 'To settle the case without leaving a bad taste in everyone's mouth.' Mary Ann Glendon, *A Nation Under Lawyers, How the Crisis in the Legal Profession is Transforming American Society*, Harvard University Press, Cambridge, Massachusetts, 1994.

<sup>90</sup> The opinions of the party's representatives and lawyers on mediation in the High Commercial Court of Croatia, Mediation service, Zagreb, 5 October 2008. These opinions are gathered by anonymous questionnaires distributed during mediation process. By 5 October 2008, 152 people expressed their opinion (73 representatives and 79 lawyers) These opinions are an extremely valuable contribution to the development of mediation in Croatia and they are available on [www.vtsrh.hr](http://www.vtsrh.hr)

<sup>91</sup> Are we afraid to mediate? There is collective rejection of mediation by the litigators. (...) '...litigation is our game and we're not going to play, or allow, any others. The litigators' resistance was based on fear. The litigious mind sees the possibility of alternative dispute resolution or mediation as direct threat to the litigation process itself. „Compromise is not Victory“, whispers litigation. 'Mediation is for sissies, adds adversity.' Benjamin L. Sells, *The Soul of the Law*, Vega, London, 2002, pg. 85

<sup>92</sup> 'Finding better ways of solving conflict, involves a commitment to contribute to a better world (to fundamental social change).'' Bernard Mayer, *The Dynamics of Conflict Resolution, A Practitioner's Guide*, Jossey-Bass, San Francisco, 2000, pg. 242.

## CONCLUSION

**‘There is nothing as powerful as an idea whose time has come.’**

Victor Hugo<sup>93</sup>

New ideas can be seen as a threat or a solution. Which one is it going to be?

## SUMMARY

Modern times demand from the legal profession to redefine the roles of all its representatives, as well as to redefine the existing traditional dispute resolution system. The legal arenas were based exclusively on mutual battle and conflict, where the lawyers are gladiators and the parties are audience, a very passive one. Those arenas should be replaced or preferably completed by forums where parties and lawyers<sup>94</sup> will take on new roles whose main aim will be to constructively participate in all phases of the dispute between the parties<sup>95</sup>, not just in its final phase when there is a winner on one side and a loser on the other. This way of settling the disputes only seemingly makes peace between the parties; it actually strengthens their confrontation, builds their dissatisfaction and creates a danger of new conflicts. New approaches to dealing with everyday legal affairs suggested in this paper can relieve every dispute from its negative aspects and turn the dispute resolution into an improvement tool for mending and developing every relationship, which consequently brings satisfaction to all the participants of the dispute resolution, as well as the entire social community.

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<sup>93</sup> Robert K. Greenleaf, IBD, pg 1.

<sup>94</sup> Mediation implies introducing a certain democracy into disputing. This is because mediation, among other things, is the only way to resolve a dispute without the control of the lawyers. Mediators can be members of other professions, depending on the form of the dispute. This paper is focused only on a possible new role of the lawyers in the dispute resolution system.

<sup>95</sup> ‘...we should be framing our work-both for ourselves and certainly for the public-as conflict engagement instead of conflict resolution: If we genuinely liberate ourselves in all that we do from this resolution bias-that, is from the automatic assumption that our role is to bring about resolution-and instead see our role as helping people engage constructively in all phases of the conflict process, then our ability to have constructive impact on conflict will dramatically increase.’- Bernard Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*; Tammy Lensky, *Making Mediation Your Day Job, How to Market Your ADR Business Using Mediation Principles You Already Know*, iUniverse, Inc., Lincoln, 2008, Introduction, pg 13.

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