

PROPOSALS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA)
TO THE MINISTER'S ADVISORY COMMITTEE ON COURT-ANNEXED MEDIATION

1. INTRODUCTION

The Law Society of South Africa (LSSA) appreciates the opportunity to submit proposals to the Advisory Committee regarding the qualification, standards and levels of mediators who will conduct mediation under the Court-Annexed Mediation Rules. It is well known that the LSSA supports the concept of mediation, to the extent that it may lead to greater and efficient access to justice.

The position of mediator must be developed in such a manner that it ensures quality, but also the opportunity for persons to qualify.

It is also important to ensure that there are a sufficient number of trained mediators available in most parts of the country, able to sustain the project. It appears that many attorneys are interested in qualifying as mediators. This aspiration must be recognized.

2. DATABASE OF MEDIATORS

Attached is a list of practitioners who have to date registered as mediators on the LSSA database. The information includes personal information and contact details, area, information of training and certificate (not compulsory). The database will be updated on a regular basis. The Department is welcome to use the information for its purposes.

We trust that this will assist the Department with the smooth implementation of the programme.

3. TRAINING

The LSSA is of the view that the following should apply with regard to the training of aspirant mediators:

- a. Aspirant mediators must complete an accredited training course in court mediation. We suggest that a 40 hours course is appropriate;
- b. **Alternatively**, they may submit proof of suitable other training and/or experience, that can be regarded as adequate prior learning;
- c. Training should be affordable and accessible;
- d. The course content should include a basic grounding in respect of some of the theory of conflict management, dispute resolution, understanding the negotiation experience, the use and benefits of appropriate dispute resolution, mediation process, mediator skills and an understanding of the legal framework existing (the court-connected mediation rules and judicial activism);
- e. As mediation is a practical skill, the course should include the development of effective skills of the participant as a mediator through role playing demonstrations, coaching and assessment. The coaching and assessments should be conducted by experienced mediators and allow for the personal development of the skills in the individual participant.

4. ASSESSMENT

- 4.1 Participants must be assessed as competent by experienced assessors. (This can also be done by observation of e.g. DVD recordings of the participant to assess the candidate's practical mediation skills).
- 4.2 The assessment will have to include a practical element, such as the candidate being able to draft the documents required in terms of the Rules. These documents must be reviewed by the assessors.

4.3 Criteria for assessment should include a determination as to:

- Whether the participant creates an environment conducive to mediation and whether he/she is able to manage the parties;
- Whether the participant takes control of the process and is an effective process manager;
- Whether the participant has gained an understanding of the issues and is facilitating solutions through a process of managing the problem.

5. CODE OF CONDUCT AND COMPLAINTS PROCESS

It is imperative that mediators must be subject to a code of ethics which is applied by a recognized organization. Attorneys are subject to the supervision and disciplinary jurisdiction of the statutory law societies and as such complaints will be dealt with by them. Serious misconduct can lead to an application to Court by the law society concerned for the attorney to be struck off the roll or suspended from practice. The complaint process is governed by the Attorneys Act, Act 53 of 1979 and the Rules of the individual law societies.

In addition, the attached Code of Conduct adopted by the LSSA Council in 2006 can be adapted by the profession to cover attorney-mediators.

It is essential that the Department provides a guide and code of conduct to mediators who are not subject to the supervision of a recognized organization, which clearly sets out the expectations with regard to the conduct and practice of mediators.

6. QUALIFICATIONS

We suggest two levels of entry for mediators, namely:

- Semi-skilled – Grade 12 or equivalent plus completion of an accredited training course;

- Skilled – 4 years relevant tertiary qualification plus completion of an accredited training course;
- Highly-skilled – 4 years relevant tertiary qualification, plus completion of an accredited training course, plus 5 years mediation experience.

We are of the view that, in complex matters, legal knowledge should be a requirement. The LSSA is prepared to offer substantive law programs as a bridging course to non-lawyers.

7. DISPUTE RESOLUTION OFFICER

This person performs a critical function. He/she needs to have a grasp of the matter in order to refer it to the most appropriate level of mediator.

The possibility can be investigated that attorneys, as part of their compulsory 24 hours per year pro bono services, assist the resolution officer with reviewing and referring matters. The practicalities of this can be worked out.

8. EQUAL DISTRIBUTION (NO BIAS)

We submit that equal distribution of mediation work must be a principle of the process and strictly applied by the Department. Appointments must not depend on the membership or affiliation of a mediator to any institution associated with mediation work.

9. ROLE OF THE LSSA IN RESPECT OF TRAINING OF MEDIATORS

9.1 The LSSA is in a strong position to assist the Department of Justice and Constitutional Development in achieving the ideal of representativity, suitability and availability. The LSSA, acting through its Legal Education and Development department (LEAD) can be a training provider for attorneys. Its education initiatives are subsidised from grants from the Attorneys Fidelity Fund. It is thus able to present skills training to attorneys at a cost

to participants far below prevailing market fees and well within the means of most practitioners.

- 9.2 LEAD, through its various programmes, reaches approximately 12 000 practitioners annually. These programmes include skills transfer, judicial, post-graduate, vocational and continuing professional development initiatives. It has throughout the operation of its training programmes maintained consistently high but nevertheless realistic standards in its training. It provides its services across the broadest spectrum of candidate attorneys and attorneys.
- 9.3 The LSSA has a core of highly motivated and experienced trainers to call on. It also has adequate infrastructural support for national material production, human resources, financial control, information technology, etc. It has various learning material available, including a published handbook on mediation. The quality of provision of training is overseen by the LSSA's Standing Committee on Legal Education.
- 9.4 In 1990 and thereafter, at several centers throughout South Africa, LEAD conducted its first introduction to mediation by attorneys. This was followed in 2010 by training programmes for attorneys interested in training as divorce mediators. The training in divorce mediation for attorneys is based on 40 hours which accords with generally accepted international standards. This course is registered by the SASSETA. Since then, we have rolled out various mediator training programmes, which include divorce mediation, legal aid board mediator training, mediation advocacy and others.
- 9.5 For the purpose of the new Rules, a 40 hours mediation skills training course has been developed and will commence in two weeks from date hereof. There is a high demand for this course among practitioners.

CODE OF ETHICS FOR LEGAL PRACTITIONERS

All legal practitioners shall

1. Honour, respect and promote the values enshrined in the Bill of Rights;
2. Maintain the highest standards of honesty, integrity and independence at all times;
3. Act with care and skill, honour undertakings and maintain the reputation and high standards required in the performance of their duties;
4. Conduct themselves with courtesy and respect towards participants in proceedings especially persons without legal representation, so as to ensure compliance with the rules and procedures for the fair conduct of such proceedings;
5. Maintain the highest standards of professionalism and promptly respond to correspondence and messages from colleagues, clients and members of the public;
6. Comply with all ethical and professional rules of practice;
7. Respect the legal privilege and confidentiality that exists with clients and former clients;
8. Subjects to the laws as regards contingency fees, and the rules and guidelines as regards advertising, not engage in any form of activity that may be construed as touting;
9. Extend to all colleagues, judges, academics, professionals, litigants and students, including persons from foreign jurisdictions, cordially and respect at all times;

(The code of Ethics was adopted by the LSSA Council at its annual general meeting in March 2006)