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**European Commission for the Efficiency of Justice
(CEPEJ)**

Mediation Development Toolkit

Ensuring implementation of the CEPEJ Guidelines on mediation

MEDIATION AWARENESS PROGRAMME FOR JUDGES

ensuring the efficiency of the Judicial Referral to mediation

Document developed with the contribution of the Group of European Magistrates for Mediation (GEMME)



***As adopted at the 33rd Plenary meeting of the CEPEJ
Strasbourg, 5 and 6 December 2019 in view of its adoption***

It has been acknowledged that judges play a crucial role in fostering a culture of amicable dispute resolution. They should be able to give information, arrange information sessions on mediation and, where applicable, invite the parties to use mediation and/or refer cases to mediation. It is essential therefore that they have a full knowledge and understanding of the process and benefits of mediation.

The aim of the present tool is to raise judges' awareness on mediation in civil and family matters, criminal matters (adults and minors) and administrative matters. This tool by analogy can be used by other legal professionals referring to mediation such as prosecutors and other judicial authorities and institutions providing training to them. It is conceived to open access to mediation to litigants by improving the ability of judges to carry out an effective judicial referral to mediation, and not to make judges mediators in the exercise of their judicial function.

It is inspired by the training and awareness programmes carried out in Belgium, France and French-speaking Switzerland, kindly transmitted and commented by the following trainers: Judges Avi SCHNEEBALG, trainer for the Belgian judges at the *Institut de formation judiciaire* of Brussels, Fabrice VERT, trainer for French judges at the *Ecole Nationale de la Magistrature* in Bordeaux, and Jean A. MIRIMANOFF, honorary judge, mediator, trainer for the Foundation for the continuous training of Swiss Judges.

There are a wide range of different mediation teaching and mediation practices within the Council of Europe Member States. However, this tool is made to be easily adaptable to different national situations.

This tool has been developed in reference to point 3. Awareness of the CEPEJ Guidelines on mediation.

1. Context of the tool

- Recommendation Rec(2002)10 on mediation in civil matters, Ch. VII : "States should provide information on mediation in civil matters to professionals involved in the functioning of justice".
- Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters, CEPEJ(2007)14, Nr 50: "Judges play a crucial role in fostering a culture of amicable dispute resolution. It is essential therefore that they have a full knowledge and understanding of the process and benefits of mediation. This may be achieved through information sessions as well as initial and in-service training programmes which include specific elements of mediation useful in day-to-day work of courts in particular jurisdictions".
- Roadmap CEPEJ(2018)8 based on the CEPEJ-GT-MED report on "The Impact of CEPEJ Guidelines on Civil, Family, Penal and Administrative Mediation", adopted June 27th, 2018, Rec. 3, p. 4: "Without a compulsory mediation awareness/training of judges during their education or in the first year of their judiciary practice the number of cases referred to mediation in civil, family, penal (adults and juveniles) and administrative matters will remain unchanged at the actual insignificant number", and its table 2.1 : "Develop and distribute training tools to increase compulsory training and awareness of mediation among lawyers and judges".

2. General aims of the mediation awareness programmes

Any **initial awareness** programme should aim to empower judges to:

- Be knowledgeable of the various ADR methods and know how to discern the appropriate mode for a given situation;
- Understand the conflict and the way to make it positive;
- Open access to mediation through an efficient judicial referral, which involves knowing how to:
 - a) Identify and select cases that are suitable for mediation;
 - b) Understand the characteristics, principles, objectives, approaches and methods of mediation, and the functioning of its process, in order to provide adequate information on mediation to the litigant parties and to their lawyers;
 - c) Suggest, propose or direct the parties³ to attend a mediation information session delivered by a mediation centre or qualified mediators;
 - d) To facilitate the transition of the litigant parties from judiciary proceeding to mediation process.

The content of the training and training methodology shall take into consideration background, initial level of knowledge and practical expertise of the trainees. Quality control and independent monitoring measures should be in place to ensure sufficient contents and provision of the training. It is strongly recommended that

provision of the practical parts of the training should be led by active mediators - judges as well as active non-judge mediators, with experience as trainers.

A **continuous awareness** programme should refresh the knowledge and practice of the judges in matter of judicial referral to mediation, in repeating the programme of the 2nd and 3rd half-days (cf. Appendix 2).

3. Specific objectives related to national and international legislation

- To ensure knowledge of the national legislation of the judges in their fields in civil and family matters, criminal matters (adults and minors) and administrative matters.
- To prepare the judges to participate in a mediation pilot project in their own jurisdiction.
- To improve the conciliatory ability of judges with the use of mediation tools (active communication and principled – interest based – negotiation), where permitted or prescribed by law.

4. Duration of initial and continuous training

The duration over four half-days (two days total) is recommended whenever possible for initial training programmes.

One or two half-day sessions are recommended at a regular frequency for continuous training programmes.

5. Resources required for trainers and assistants

The resources required will depend on the number of participants. For a group of 24 judges, the participation of a qualified trainer (accredited, agreed, sworn mediator) and a team of three assistants ensures a good effectiveness in raising awareness. Ideally, the trainer-trainees ratio should be 1 trainer to 10 trainees/15 trainees maximum.

6. Premises

When the awareness programme takes place in the first year of their judiciary practice, it is recommended that it take place within the judicial buildings or close to them.

7. Recommended Handbooks

The tools adopted by the CEPEJ (CEPEJ(2018)7), in particular:

- The Guide to the Judicial Referral to mediation;
- The management checklist and the pilot monitoring checklist;
- National Handbooks and a short bibliography for judges.

8. Recommendations to the judiciary Authorities of the States Members

For ensuring the efficiency of the awareness/training programmes (i.e. their durability, their frequency and their quality) it would be appropriate to take the following measures:

1. To appoint, in each Appeal Court, a judge responsible for the mediation, for the survey of the awareness of the judges and of pilot projects
2. To appoint, in each jurisdiction, a judge in charge of the organisation of these programmes
3. To ensure that this judge will receive himself a complete mediator's formation, in order to be able to become the main mediation awareness trainer of his/her tribunal and to be able to organise mediation project pilot in his/her jurisdiction

Appendix 1

Basic Curriculum for Judicial Referral

1. Knowledge Development

The training curricula should cover at least these main domains of knowledge development:

1.1 Mediation – definition and concept

1.2 Traditional settlement of disputes and mediation

1.3 Fundamental principles of mediation

1.4. Stages of mediation:

- a. Preparation
- b. Opening
- c. Exploration
- d. Negotiation
- e. Agreement

1.5. Indications and counter-indications of mediation in assessment for suitability of cases

1.6. Qualities required from judges encouraging the parties to mediate

1.7. Roles of the parties, their counsel and other participants in mediation

1.8. Timing of mediation encouragement

1.9 Legal framework of mediation and legislation related to mediation, including review of legal framework for mandatory and opt-out mediation if available

1.10 Interaction between mediators, judges, lawyers, mediation users and other mediation stakeholders

1.11. Elements of a referral interview:

- a. Conflict diagnosis
- b. Intervention plan
- c. Exploring willingness to negotiate an enhancing it
- d. Level of escalation
- e. Information on mediation

1.12. Main characteristics and differences of mediation in civil, family, penal and administrative matters

2. Practical skills training

In terms of skills development, the essential skills topics that should be covered, demonstrated and practiced in any training programme are:

- a. Forms of listening skills and communication strategies especially when vulnerable groups participate (children, victims, and other categories requiring specific attention)
- b. Asking the right questions
- c. Ways of responding to the diverse behaviours of the parties
- d. Motivating and preparing the parties and lawyers
- e. Case analysis skills, including reasonable selection of dispute resolution strategy and methods

Judicial referral training courses should be participatory, interactive and learner focused. To ensure this, a variety of teaching methodologies should be used, including lecturing, videos, interactive exercises, individual work, group discussion, talking in pairs, and role-playing. As a guideline, for the practical part of any course, that is designed to teach the process and skills to be an effective referral judge, a substantial part should be devoted to role-playing, coaching and feedback, as well as discussions and exercises.

Appendix 2

Concrete example of initial and continuous training

1) Concrete example of an initial training programme - organisation and content

Time is divided into lectures followed by round tables, workshops and role-plays in an interactive manner, with a half day devoted to the national specificities. The duration has only an indicative value and may be modified according to the specific needs. See also ch.10. Recommendations to the Judiciary Authorities.

First half-day

- A) Introduction to ADR and place of the mediation vis-à-vis traditional settlement of disputes (lecture 45 min and round table 15 min);
- B) Conflict and legal dispute (lecture 45 min and round table 15 min);
- C) Mediation: principles, advantages and limitations (lecture 45 min) / Round table and debates on confidentiality (15 minutes);
- D) Mediation and conciliation (lecture 30 min) and exercises on practical cases (30 min). For the MS who do not know the conciliation: Mediation approaches and forms (prevention and repair)

Evaluation of the half-day

Second half-day

- A) Active communication (lecture 30 min and practical exercises 30 min)
- B) Principled (interest based) negotiation and its application in collaborative law and in mediation process (lecture 15 min and exercises 45 min)
- C) The mediation process and its stages, the roles of the third party, of the parties and of the counsels / lawyers (lecture 30 min)
Case study: role-play (90 min)
- D) Qualities of judges who refer cases to mediation (round table 30 min)

Evaluation of the half-day

Third half-day

The judicial referral interview and its steps:

- A) Identification and selection of cases (lecture 15 min) and practical cases (45 min)
- B) Information on mediation (lecture 15 min) and role-plays, such as at the hearing (45 min): simulation of the exchanges between the judge, the parties and their lawyers, exploring the willingness to negotiate and enhancing it, arguments *pro and contra*, objections and counter objections
- C) The manner to refer to mediation and the support to the parties during the transition from the judiciary procedure to mediation process: Lecture (15 min) and round table (45 min)

Evaluation of the half-day

Forth half-day

National specificities including legal framework of mediation

Five separate groups, if applicable, for mediation in:

- A) Family
- B) Civil
- C) Criminal (adults)
- E) Criminal (minors) and
- F) Administrative matters

- Judicial referral to mediation;
- The use of mediation tools by the conciliation judge
- Strengthening the mediation settlements: ratification and authentic enforceable acts. National and international aspects.

Evaluation of the half-day and of the training

2) Concrete example of Continuous Training

First half day

- A) Active communication (lecture 30 min) and practical exercises (30 min)
- B) Principled (interest based) negotiation and its application in collaborative law and in mediation process (lecture 15 min and exercises 45 min)
- C) Procedure to the mediation process and its steps, the roles of the third party, of the parties and of the counsels / lawyers (lecture 30 min)
Case study: role-play (90 min)

Evaluation of the half-day

Second half-day

The judicial referral interview and its steps:

- A) Identification and selection of cases (lecture 15 min) and practical cases (30 min)
- B) Information on mediation (lecture 15 min) and role-plays, as at the hearing (30 min): simulation of the exchanges between the judge and her/his litigants and their counsels/lawyers, exploring the willingness to negotiate and enhancing it, arguments *pro et contra*, objections and counter objections
- C) The manner to refer to mediation and the assistance to the parties during the transition from judiciary procedure to mediation process: Lecture (15 min) and round table (30 min)

Evaluation of the half-day and of the training