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**EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE
(CEPEJ)**

**Mediation Development Toolkit
Ensuring implementation of the CEPEJ Guidelines on mediation**

Training programme for lawyers to assist clients in mediation

Document developed jointly with the Council of Bars and Law Societies of Europe (CCBE)

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

Introduction

Lawyers play an important role in conflict management processes and have the potential to have a major impact on how conflict situations are being dealt with for their clients. It is therefore important that lawyers can demonstrate both a deep awareness and the appropriate technical skill that is necessary in order to support clients effectively in all types of dispute resolution processes, both adjudicative and amicable, including mediation. Taking into account lawyers' duty to act in the best interests of the client, lawyers must always review all options when it comes to advising their clients on the choice of the most appropriate dispute resolution process.

This training programme was developed to support the implementation of the **Guide to Mediation for Lawyers**, developed jointly by the Council of Bars and Law Societies of Europe (CCBE) and the Commission for the Efficiency of Justice of the Council of Europe (CEPEJ). As mentioned in this Guide, awareness and training of lawyers in mediation is important.

The objective of the following training programme is to offer those Bars and Law Societies which provide training services for lawyers¹ a ready to use basic training programme on mediation which they may further and freely develop and use, on a voluntary basis, in their training schemes for lawyers.

The training programme has been developed in order to provide lawyers with the tools and techniques required to successfully assist clients throughout the process of mediation. If lawyers wish to act as mediators themselves, they should undergo the training programme to this end. The "Guidelines on designing and monitoring mediation training schemes" adopted by the CEPEJ in June 2019, constitute an important basis for the elaboration of such training (CEPEJ (2019)8).

The suggested training programme consists of three parts which Bars and Law Societies can freely adjust or adapt according to their own needs and circumstances. Therefore, the duration of the training, as well as the programme itself, can also be variably implemented.

It is important that adequate time is dedicated to experiential learning – practical exercises and discussions. It is recommended that at least 50 percent of the training time should be allocated to such types of exercises.

¹ In some member States of the Council of Europe, Bars and Law Societies are not private associations, but public law entities and, as a matter of principle, do not offer training services to lawyers. Lawyers have (as a deontological duty) to consider, in any case, mediation and other Alternative Dispute Resolution (ADR) processes in the very same way as adjudicative dispute resolution processes.

Chapter 1: Principles, ethics and conflict management

This part of the training is the most theoretical and could possibly be undertaken online (e-learning). However, participants should be aware that taking this course with others is likely to be a more satisfactory experience.

Introduction: Familiarisation with mediation as one of the possible amicable methods of conflict resolution based on the principles of ethical and humane principles; openness to the diversity of non-confrontational practices and approaches; understanding the lawyer's role in mediation; and involvement in a pragmatic personal project requiring an active interest in the development of non-technical skills such as empathy.

Objectives of the day: Participants will acquire the necessary knowledge of national, international and European legislation, the European Code of Conduct for Mediators, the European Code of Conduct for Mediation Providers, and the Guide to Mediation for Lawyers and an overview of the different types and styles of mediation; gain an understanding of the ethical and deontological aspects of mediation and the role of lawyers in it and improve their skills in conflict and crisis prevention and management.

Programme of the day:

➤ **Mediation legislation and ethics:**

- Philosophy, professional ethics and goals of Alternative Dispute Resolution (ADR), including mediation in the current legal and judicial context;
- The national, international and European mediation legal framework, the legislation applicable to mediation and more generally to ADR and its practical implications for lawyers (common rules vs. specific rules differentiating mediation from one State to another);
- The European Code of Conduct for Mediators, the European Code of Conduct for Mediation Providers, and the Guide to Mediation for Lawyers;
- Differences, similarities and complementarities of ADR mechanisms;
- Mediation concept;
- The different types and styles of mediation (conventional and judicial types mediation; facilitative, evaluative and transformative styles of mediation; mandatory, opt-out, and court referred mediation);
- The process and principles of mediation, as well as the duties of the mediator;
- Integration of mediation and alternative dispute resolution methods into legal strategy;
- Role of lawyers in mediation and ADR; and
- The deontological aspects in relation to ADR.

➤ **Conflict management:**

- Definition, main principles and mechanics of conflict processes;
- Escalation and de-escalation of conflicts;
- Traditional and alternative methods and strategies for understanding, preventing and managing conflicts; and
- Benefits, weaknesses and peculiarities of use of litigation and ADR.

Chapter 2: The mediation process and the role of the accompanying lawyer

Introduction: Bringing lawyers to the heart of the mediation process so that they are able to take on their full role and support their clients as best they can.

Learning objectives: Participants will gain an understanding of the different steps of the mediation process and the role of the lawyer in each of them; improve their negotiation and transaction skills; be introduced to listening and participatory communication techniques; and participate in practical exercises to gain practical experience.

Programme of the day:

➤ Preparation for mediation:

- The practice of mediation: mediation contract, venue, ensuring correct participants attend (counsels, lawyers, legal representatives), preliminary issues, third party approvals, plenary, caucuses;
- The lawyer-client relationship: meeting with the client, communicating with the client, informing the client about mediation, risk analysis and client preparation (analysis of the strengths and weaknesses of a case, its costs in relation to probable outcomes, the value of the certainty of a settlement available now in relation to the prospect of obtaining a better settlement later on, etc.);
- Choice of the mediation process and its consequences (instead of filing a claim) including assessment of liability risks;
- Mediator selection and appointment;
- Neutrality and absence of conflict of interest for the mediator;
- Agreement to mediate / rules of engagement;
- Mediation fees; and
- Choosing a strategy: negotiation, mediation, trial.

➤ Providing assistance to the client in mediation:

- Explaining the role of the mediator (assistance and advice to the client);
- Essential role of the lawyer in the different phases of mediation;
- The lawyer's duties in mediation (duty of competence, obligation to provide accurate information, etc.);
- Exchanges with the other mediated party and their lawyer;
- Third parties in mediation; and
- Efficiency and fair techniques of lawyers in mediation.

➤ Importance of communication:

- Technical bases for effective communication in mediation;
- Conflict and communication;
- Non-violent communication mechanisms; and
- Communication and emotion management.

➤ Negotiations:

- General theory of negotiation (preparation and steps);
- Technical basis for negotiation;
- Negotiation strategies; and
- Distributive or collaborative (interest-based) negotiation.

➤ Emotions in negotiation:

- Active listening;
- Emotional recognition; and
- Empathy.

➤ Practical exercises – scenarios:

It is recommended that participants of the training programme undertake practical exercises, such as:

- taking part in role-play mediation, experiencing all roles (parties, assisting lawyers, mediators²) to experience the differences between mediation and other methods of conflict management;

² Mediators' role should be performed first by lawyers having more knowledge and experience in mediations and with a preference that lawyers trained as mediators would be acting as mediators in the first instance. Other

- case studies; and
- observing real-life mediation sessions, where possible and always respecting confidentiality.

Chapter 3: The proper use of mediation

Introduction: Present the professional, strategic, financial benefits of mediation for lawyers and their firms; the importance of lawyers in the crucial phase of the agreement enabling them to help their clients obtain the best possible result from mediation; present the professional, strategic, and financial advantages of mediation for lawyers and their law firms; study the development of mediation through the practices of the courts but also the case law decided at national level.

Learning objectives: Participants will be able to integrate mediation into their professional practice; putting mediation into practice in their daily work; drafting a mediation clause/agreement, agreement with the mediator and a mediated settlement agreement; comprehending and understanding the phases of the agreement and the consequences of the agreement; invoicing mediation support; and understanding the development of national practice and case law on mediation and ADR.

Programme of the day:

➤ **The mediation and settlement agreements: steps, drafting, implementation:**

✓ The agreement:

- The lawyer's creativity as a specialised interlocutor in the defence of the client's rights;
- Formulation of a hypothesis of agreement to mediate, agreement between the parties and the mediator, and mediated settlement agreement;
- Drafting of agreement to mediate, agreement between the parties and the mediator, and mediated settlement agreement;
- Conclusion of agreement to mediate, agreement between the parties and the mediator, and mediated settlement agreement; and
- Analysis of the effectiveness of agreement to mediate, agreement between the parties and the mediator, and mediated settlement agreement.

✓ After the agreement:

- Implementation of the agreement (national, international and EU level);
- Compliance or non-compliance with the agreement; and
- Confidentiality of information and statements made during the mediation.

➤ **Advantages for law firms:**

✓ National case law and court practices in mediation and ADR matters:

- Case law and practices of the courts (put mediation in context as an accepted element of dispute resolution).

✓ Mediation as an opportunity for law firms:

- Benefits of mediation (and ADRs) for law firms: mediation as an additional practice tool;
- Benefits of mediation (and ADRs) in judicial strategy;
- Tariff and financial aspects of mediation (benefits for the client, incentives, tariffs, invoicing);
- Interdisciplinary skills and competences, importance of life skills; and
- Model mandates for mediation assistance, professional mandate, power of attorney.

participants should be presented with short explanations on mediation principles, stages, methods and techniques to be used during each stage before taking on the role of a mediator.

➤ **Practical exercises/situations:**

- Drafting of agreement to mediate, agreement between the parties and the mediator, and mediated settlement agreement exercises;
- Discussions and brainstorming on fair and efficient use of mediation by lawyers for benefit of their clients in respective jurisdiction;
- Observing mediation sessions.

Learning outcomes to be achieved

Once participants have completed this course, they will be able to:

- ✓ Assess the appropriateness of mediation or other alternative dispute resolution methods for specific cases.
- ✓ Explain the role of the lawyer in mediation to clients and other stakeholders.
- ✓ Promote mediation as a dispute resolution process with clients and other stakeholders.
- ✓ Distinguish between useful and unnecessary ways of representing clients in mediation.
- ✓ List the different roles and tasks that a lawyer can have in mediation.
- ✓ Demonstrate appropriate mediation skills such as:
 - Active listening;
 - Planning a negotiation strategy;
 - Managing difficult behaviours;
 - Separate positions from interests;
 - Reality testis and use of BATNA (Best Alternative to a Negotiated Agreement) and WATNA (Worst Alternative to a Negotiated Agreement);
 - Using the mediator appropriately; and
 - Communicating effectively.
- ✓ Manage ethical issues that may arise in mediation.
- ✓ Draft and evaluate mediation documents such as mediation agreements and mediated settlement agreements.
- ✓ Comply with relevant local mediation laws and, where applicable, cross-border mediation laws.
- ✓ Build and implement efficient and fair legal practices which are mediation/ADR-friendly.