

## **CLAASSEN/EDELING MEDICAL MEDIATION PILOT PROJECT**

### **1. INTRODUCTION**

- 1.1. The background and need for implementation of mediation for medical disputes in South Africa are set out in the Gauteng Protocol for Medical Mediation, to which this document refers in its entirety.
- 1.2. In furthering the objectives set out in the protocol, the Gauteng MEC for Health, Dr Gwen Ramokgopa, has been approached with an offer to conduct a supervised and recorded pilot project, free of charge, to mediate 15 Technical Medico-Legal Disputes which have been lodged against the Gauteng Department of Health, and which include allegations of clinical negligence.
- 1.3. It is further envisaged that the experiences gained during the pilot project will be incorporated into the protocol for medical mediation, and that this will form a guideline for less experienced professionals to develop and to become able to offer their services to those in dispute. The purpose of this goal is to promote transformation and development of medico-legal practice in South Africa.
- 1.4. Commencement of the pilot project will occur once the Gauteng MEC for Health has studied and accepted the proposed protocol for medical mediation, as well as this plan for the pilot project, whether in their current or amended forms.

## **2. PROPOSED STRUCTURE AND PROCEDURES OF THE PILOT PROJECT**

### **2.1. Appointment of a project leader**

2.1.1. The MEC should appoint a ‘champion’ for the pilot project from within her team. This person will co-ordinate the pilot project as described below.

### **2.2. Pilot Project Co-Mediators**

2.2.1. A small group of committed senior professionals, from the fields of law, medicine and mediation, all of whom are qualified as Technical Medico-Legal Co-Mediators (see protocol), offer their services free of charge to act as co-mediators in the pilot project.

2.2.2. Co-mediators will pair up in groups of two.

2.2.2.1. One of the co-mediators will be a medical specialist who has extensive experience as an expert witness in medical negligence litigation. The medical co-mediator need not belong to the same medical field as the accused medical practitioner, and it may be preferable if the medical co-mediator belongs to a different medical field (see protocol).

2.2.2.2. The other co-mediator will be a legal practitioner with extensive experience in medical negligence litigation, or alternatively a general mediator with extensive experience in mediation.

2.2.2.3. One or both of the co-mediators will have an adequate understanding of the medicolegal concepts of negligence, outcome, causation, attribution, apportionment and quantum.

2.2.2.4. Respecting the professional experience of one another, and in accordance with the spirit of mediation, each co-mediator will be receptive to learning valuable skills from the experience of the other and from the process.

2.2.3. At the time of writing this plan an adequate number of suitably qualified co-mediators have been approached, and have offered their services free of charge to the Gauteng MEC for Health for purposes of the pilot project.

2.2.4. Final commitment to this offer from each individual professional will occur once each has studied and signed the Protocol for Medical Mediation and this Pilot Project Plan, whether in their current or amended forms, and has signed the Code of Professional Conduct, and once the Gauteng MEC for Health has given the go-ahead for the pilot project to commence.

### **2.3. Selection of Cases to be Referred to Mediation in the Pilot Project**

2.3.1. The legal representatives of the MEC will select suitable cases from those that have already been served against the MEC with demands for compensation. Cases that are “trial ready” i.e. where expert reports have already been prepared and pleadings have been closed, would be most suitable.

2.3.2. For purposes of the pilot project suitable cases are defined as Technical Medico-Legal Disputes (see protocol) which include allegations of clinical negligence and damages brought about by the alleged negligence. Bearing and mind that cases that fit this definition occur across a broad spectrum of complexity, it is considered preferable to conduct the pilot project with less complex matters that nonetheless include allegations of clinical negligence and damages brought about by the alleged negligence. If necessary, co-mediators may assist in the selection process.

2.3.3. In this regard it is anticipated that experience gained and lessons learned during the pilot project will provide participating mediators with the necessary skills to tackle the most complex of such cases in future.

2.3.4. The legal representatives of the MEC will invite plaintiffs, through their legal representatives, to consider submitting their dispute to mediation. In these invitations the legal representatives of the MEC will provide clear information outlining the benefits to plaintiffs of mediation rather than litigation. Parties will be assured of the voluntary, confidential and without prejudice nature of the process, which includes free access to advice by their legal representatives and retention of all legal rights.

## **2.4. Pilot Project Pre-Mediation Meetings and Appointment of Co-Mediators**

2.4.1. Plaintiffs who respond favourably to these invitations will be invited to attend a pre-mediation meeting, to be chaired by one of the pilot project co-mediators, and to be conducted in

accordance with the protocol.

2.4.2. At such pre-mediation meetings, the mediation process will be explained and informed consent to mediate will be sought. Properly informed consent to mediate will be confirmed in a signed agreement to mediate.

2.4.3. There should be a standard agreement to mediate provided to the parties by the Chairperson of the pre-mediation meeting, which parties may amend by agreement.

2.4.4. Depending on the particular circumstances and nature of the dispute, the chairperson of the pre-mediation meeting will then refer the dispute for mediation to two appropriately qualified co-mediators, who will be appointed to conduct the mediations by agreement between the parties and their legal representatives.

2.4.5. The chairperson of the pre-mediation meeting may function as one of the co-mediators.

## **2.5. Location, Costs and Practical Arrangements for Pilot Project Mediations**

2.5.1. Pilot project mediators will offer their services free of charge to chair pre-mediation meetings and to act as co-mediators for the purposes of the pilot project.

2.5.2. Practical arrangements, such as location, facilities, translators, observer mediators, dates and times will be agreed between the parties and the co-mediators.

2.5.3. Agreement will be required between the parties and their legal representatives in relation to responsibility for the

payment of any costs for venues, facilities, catering and translation services, as well as any fees to be charged by legal representatives and experts. These cost- and fee agreements will remain confidential between the parties and their legal representatives, and will not be disclosed to the chairperson of the pre-mediation meeting or to the co-mediators.

## **2.6. Conduct of the Pilot Project Mediations**

2.6.1. The pilot project mediations will be conducted in accordance with : -

2.6.1.1. the principles and procedures of mediation, in which all accredited mediators have been trained;

2.6.1.2. the supplementary provisions of the protocol for medical mediation; and

2.6.1.3. the practical- and any other specific agreements accepted in the agreement to mediate.

## **2.7. Monitoring of the Pilot Project Mediations**

2.7.1. It must be respected by all participants that information discussed in a mediation remains confidential, both inside- and outside the mediation, unless and until the party providing any information agrees to its disclosure.

2.7.2. If so desired, the MEC will delegate a representative to observe and monitor the pilot project mediations. As in the case of experts and trainee medical mediators, parties to the mediations must agree to their presence and such

representatives will need to sign confidentiality agreements prior to their attendance at any mediation.

2.7.3. Such monitoring representatives will not be entitled to intervene during any mediation, but will be welcome to communicate their observations and any concerns to the co-mediators in private when the parties are not present.

## **2.8. Outcome of the Pilot Project**

2.8.1. The legal representatives of the plaintiff and the defendant should each be asked to provide a post-mediation report, which may be brief, to the co-mediators. The contents of these post-mediation reports of the parties will be limited to information that each party is willing to disclose publicly. These reports should at least indicate whether the party was satisfied or dissatisfied with the mediation, as well as the reasons for such satisfaction or dissatisfaction.

2.8.2. The co-mediators will be asked to submit a report on the process. The report, which will be signed by both, will outline patterns and learnings from the process, and will incorporate the disclosable reports of the parties, but will not disclose any information subject to confidentiality.

2.8.3. These reports will be provided to the MEC, and copies thereof will be made available for the purpose of updating and improving the medical mediation protocol, as well as in the training and development of medical mediators.

2.8.4. An offer has been extended by a postgraduate student, subject to approval by his university, to write up this pilot project as a Master's Degree Thesis.

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