GUIDELINES AND PROTOCOL FOR MEDIATION OF RAF PERSONAL INJURY DISPUTES

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SECTION A - GUIDELINES FOR MEDIATION OF RAF PERSONAL INJURY DISPUTES

1. PURPOSE OF THESE GUIDELINES AND PROTOCOL

1.1. These Guidelines and Protocol are intended to be a dynamic instrument, subject to ongoing improvements on the basis of lessons learned and constructive suggestions.

1.2. It is to be published on the SAMLA website (https://medicolegal.org.za/) as a public service.

1.3. In line with the voluntary and flexible nature of mediation, any consensual adaptations may be made by parties to a mediated dispute.

2. STYLES OF MEDIATION

2.1. Different styles of mediation are recognised and practiced internationally. In view of significant inherent differences between these styles, it is important to be clear which style is being referred to in any discussion about mediation. Parties to any dispute may accept one or more styles and reject others, and adverse experience with a particular style should not prevent a party from considering a more suitable style.

2.2. In brief these styles are : -

2.2.1. Adjudicative Mediation. This process is similar to an arbitration, in that the jointly appointed mediator makes a ruling on the issues in dispute, but differs in the sense that the parties are then free to accept or reject the ruling.

2.2.2. Evaluative Mediation. The mediator assists the parties to reach a solution by evaluating their respective cases, by having regard to their legal rights, and by making recommendations. The mediator controls the structure and influences the outcome of the mediation.

2.2.3. Facilitative Mediation. The mediator facilitates a process of communication between the parties, through questioning and active listening, by having primary regard to the interests and needs of the parties, and by assisting the parties to craft their own unique solution based on information and understanding. The mediator controls the structure and the parties determine the outcome of the mediation.

2.2.4. Transformative Mediation. The mediator facilitates a process of empowerment of the parties, seeking recognition by each of the other's needs, interests, values and points of view. This process seeks primarily to transform the long-term relationship between the parties, with or without reaching agreement on the index issue in dispute. The mediator and the parties control the structure of the mediation together, while the parties determine the outcome.

3. LEVELLING THE PLAYING FIELDS

3.1. The Guidelines and Protocol aim to address any power imbalance that may exist between the parties.

4. STATUS OF THE GUIDELINES AND PROTOCOL

4.1. These Guidelines and Protocol have no binding authority. The document is a statement of intent by SAMLA Medical Mediators, that illustrates the general approach that mediators have chosen to adopt in RAF mediations.

5. SAMLA REGISTER OF MEDICAL MEDIATORS

5.1. The SAMLA website contains a register of SAMLA Registered Medical Mediators ("The Register").All mediators whose names appear on The Register subscribe to the Guidelines and Protocol.

5.2. On an ongoing basis, SAMLA updates the names and other details of new and existing Medical Mediators on The Register.

6. QUALIFICATION REQUIREMENTS FOR MEDIATORS IN RAF PERSONAL INJURY DISPUTES

6.1. General Qualifications

6.1.1. This section should be read together with the subsequent sections dealing with co-mediators and sole mediators.

6.1.2. The qualifications for RAF Mediators include:

6.1.3. being a suitable professional person in good standing; who is

6.1.4. an accredited mediator;

6.1.4.1. has certified that he or she abides by the SAMLA Code of Conduct, and

6.1.4.2. commits to contributing his/ her professional services to the mediation of RAF disputes and to the ongoing development of his or her own proficiency as an RAF mediator.

6.1.5. Further information can be found on the Registered Medical Mediators page of the SAMLA website (https://medicolegal.org.za/verified-mediators.php).

6.2. Co-mediators

6.2.1. Save for what is written further below about sole mediators, it is recommended that RAF mediations are to be conducted using the co-mediation model, wherein

6.2.1.1. one of the co-mediators is a Senior Healthcare Practitioner with considerable experience as an Expert Witness in RAF personal injury litigation;

6.2.1.2. the other co-mediator is

6.2.1.2.1. a Senior Legal Practitioner with considerable experience in litigation of RAF personal injury disputes, or

6.2.1.2.2. a Senior Mediator with extensive experience in various types of mediation, and an adequate understanding of the personal injury concepts of outcome, causation, attribution, impact on occupational functioning, quantum of damages and apportionment of damages.

6.3. Sole mediators

6.3.1. The qualifications for this category are as above, plus sufficient experience in medical mediation to have achieved the necessary peer recognition and self-confidence to mediate medical disputes on one's own.

6.3.2. Sole mediators should have an advanced understanding of the personal injury concepts of outcome, causation, attribution, impact on occupational functioning, quantum of damages and apportionment of damages.

6.4. Observer Mediators

6.4.1. RAF Mediators are urged to seek consent from parties to allow the attendance of observer mediators, who are accredited mediators, and are seeking to develop their medical mediation skills.

6.4.2. Observer mediators are not paid for their attendance, do not participate in the mediation process, and are held to the same duty of confidentiality as are the mediator/s.

7. JOINT APPOINTMENT OF MEDIATORS FOR RAF PERSONAL INJURY DISPUTES

7.1. Parties who wish to refer their dispute to mediation should agree on the appointment of two RAF Co-Mediators or one RAF Sole Mediator.

7.2. Such appointments will be guided by the availability of suitably qualified RAF Mediators.

8. INITIATION, DEVELOPMENT AND TRANSFORMATION OF RAF PERSONAL INJURY MEDIATION IN SOUTH AFRICA

8.1. The field of RAF Mediation is a new and developing field at the time of writing this protocol.

8.2. The SAMLA Medical Mediators Group is committed to an ongoing process of mentorship and peer review, whereby more experienced mediators share their knowledge, skills and experience with less experienced mediators, thereby steadily improving the general standard of medical mediation services provided in South Africa.

9. MEDIATORS SHOULD PREPARE FOR THE MEDIATION

9.1. RAF Mediators should prepare thoroughly before and during each mediation by studying all the documents that the parties request them to read, as well as any material documents that the parties present to the mediator in the course of the mediation.

9.2. Mediators should take preparation time into account when considering what their fee will be for the mediation.

9.3. Whereas the mediators do not need to form, and should not express, any opinion as to the substantial issues of the matter, the mediators should understand what the dispute is really about and what each party's case is, so that they can ask meaningful and helpful questions during the mediation process.

9.4. In appropriate circumstances, the mediator may request each party to draw up a confidential, privileged statement of case (to be cc'd to the other party) to assist the mediator/s to grasp the essence of each party's case and to avoid the need to read prolix documents.

10. PRE MEDIATION MEETINGS

10.1. Prior to any agreement between parties to enter into RAF Mediation they should attend a pre-mediation meeting chaired by a Registered Medical Mediator.

10.2. Registered Medical Mediators are encouraged to chair pre-mediation meetings free of charge as a public service. However, in appropriate cases, the mediator can by agreement with the parties debit a fee for chairing a pre-mediation meeting that is more complex or time-consuming than usual.

10.3. At the pre-mediation meeting, the chairperson should ensure that all participants:

10.3.1. understand the nature of the dispute/s required to be resolved and are in agreement as to what issue/s remain in dispute;

10.3.2. understand what mediation is and what the process will be;

10.3.3. receive sufficient information to enable them to give their properly informed consent to the mediation and understand who are to be the participants in the mediation; and

10.3.4. agree to the wording of, and sign, a minute of the pre-mediation meeting (see further below).

11. RAF DECISION MAKER WITH SETTLEMENT AUTHORITY

11.1. Any RAF Mediation requires the presence and participation of an RAF Claims Manager, or other duly authorised representative, with full settlement authority in regard to the likely monetary range of the capital-and-costs settlement figure for the dispute/s to be mediated.

11.2. A mediation cannot proceed if the representative of the RAF needs to obtain a mandate from an RAF officer with sufficient decision-making authority at a later stage.

12. LEGAL REPRESENTATIVES

12.1. Each party should appoint his/her/its own legal representative to attend the mediation process, in the capacity of advisor to his/her client, and to participate in the mediation/negotiation process, on the understanding that the mediator/s, and not the legal representatives, are in charge of the process of mediation.

12.2. It is recommended that legal representatives should be experienced in the specialist field of RAF litigation. Every individual is entitled to choose his or her own representatives. However, the recommendations in the Guidelines and Protocol are aimed at a high standard of mediation, for which suitably qualified and experienced legal representatives, experts and mediators are required.

12.3. Legal representatives are necessary in order to:

12.3.1. advise parties, *inter alia* in relation to the selection of mediators and experts, appropriate reality checks, risk assessments of BATNA (best alternative to a negotiated agreement) and WATNA (worst alternative to a negotiated agreement); and to

12.3.2. write statements of case (where applicable); write detailed letters of instruction to expert witnesses (see below); evaluate expert reports and evidence; question experts; and ultimately reduce any agreements between the parties to writing.

12.4. The reality is that mediation of RAF matters will occur “in the shadow of litigation”. It should always be borne in mind that the parties may perhaps not succeed in settling their dispute and may be left with no choice but to proceed to trial.

13. EXPERTS

13.1. Appointment of experts

13.1.1. Parties, through their legal representatives, should appoint appropriate experts to investigate, analyse and report in an explanatory manner on aspects that are relevant to the issues in dispute.

13.2. Documentation for experts

13.2.1. Both parties should timeously provide the appointed experts with medical records, medico-legal reports and other relevant materials that are already in existence.

13.2.2. Where the parties cannot agree between themselves as to what documentation should be provided to the expert, the parties may request the input of the mediator/s in this regard.

13.3. Jointly appointed experts

13.3.1. Where there is not already a pair of corresponding experts, appointed respectively by the parties, then, in order to limit the number and costs of experts to those strictly necessary to facilitate a properly informed mediation, and more importantly to reduce the risk of subconscious bias by experts, parties are urged to seek agreement on the joint appointment of a single independent expert in each necessary field.

13.4. Letters to jointly appointed experts

13.4.1. In order to ensure the mutually perceived legitimacy of a jointly appointed expert's investigative process and thinking, the mediator should ask each party's legal representative to address a letter to the expert (to be cc'd to the other party's legal representative) setting out what is required of the expert, and stipulating specific aspects to which the expert is being asked to apply his or her mind.

13.4.2. The letter should also contain a list of the collateral witnesses and collateral documentation (if any) to which the expert is requested to have regard.

13.4.3. It will not be necessary for the parties to agree in relation to the specific questions to which the expert is required to apply his or her mind; nor to the identity of the collateral witnesses and collateral documentation (if any) to which the expert is required to have regard.

13.5. Collateral witnesses

13.5.1. In cases of traumatic brain injury, as well as cases of suspected mental impairment for any reason, the necessary experts should interview knowledgeable collateral witnesses in the course of their investigations, and their reports should record what those collateral witnesses said.

13.5.2. Disability assessment experts (e.g. occupational therapists, educational psychologists and industrial psychologists), should interview appropriately knowledgeable collateral witnesses in relation to objective assessment of functioning in the real-world, and their reports should record what those collateral witnesses said.

13.6. Duties of experts

13.6.1. The mediator/s and the parties' legal representatives should impress the following on all the experts:

13.6.1.1. The jointly appointed expert must be at pains to be objective and unbiased;

13.6.1.2. The jointly appointed experts' functions are to investigate, analyse and inform the parties, based on the expertise, experience and knowledge of the expert; to render explanatory reports that explain scientific matters in understandable lay language; and to make no attempt to take sides or to make judgments or decisions on behalf of either party.

13.6.2. A jointly appointed expert is to apply his or her mind to any question as requested by either party and is to interview all such collateral witnesses (if any) and take into account all collateral documentation (if any) as requested by either party.

13.6.3. The expert is not to exclude from consideration any question or collateral witness or collateral documentation merely in the basis that the expert considers such to be irrelevant to the matter.

13.7. Where there are opposing experts

13.7.1. It may not be possible to have one jointly appointed expert, for example in cases where opposing experts have already been appointed; cases in which the parties are unable to agree on the joint appointment of a single independent expert; and cases in which either party later loses confidence in a jointly appointed expert.

13.7.2. In such cases the individual parties will naturally be entitled to appoint counterpart experts of their choosing.

13.7.3. Where there are opposing experts, each party's legal representative should prevail upon his/her/its expert to participate in a meaningful face to face discussion with his or her expert counterpart, and to consider the counterpart's views open-mindedly, enquire as to, and gain insight into the reasoning underlying the counterpart's differing view.

13.7.4. Both counterpart experts should be asked to endeavour to get to the root cause of, identify and record in their detailed joint minute the factual-, historical-, causal-, medical-, psychological- and/ or scientific disagreements that have caused the experts to disagree as they do.

13.7.5. They should then prepare a joint minute, summarising the points of agreement, stating any residual points of disagreement and, most importantly, setting out reasons for such disagreement. Reasons for opinions include relevant facts, scientific knowledge and logical deduction. This joint minute should then be furnished to the mediator and the parties for the purpose of facilitating the assessment of each party's BATNA and WATNA.

13.7.6. The legal representatives of the parties may, before the meeting of counterpart experts takes place, address a letter to both experts (cc'd to the other party) setting out the requirements along the lines of the “Letters to jointly appointed experts” (see above).

13.8. When the experts cannot agree

13.8.1. In situations where the opposing experts, even after genuine open-minded discussion, remain in disagreement about material issues as recorded in their joint minute, the mediators and parties, having read the joint minute, may require both expert witnesses to attend the mediation together and explain to the participants their differing views and elaborate on their underlying reasons.

13.8.2. In such cases, where a material factual dispute constitutes one contributory cause of the experts' differing views, the participants may enquire during the mediation from each of the opposing experts respectively as to:

13.8.2.1. in a scenario where it would be agreed that the material facts are indeed as postulated by Party A, what would each expert's concluding opinion be; and also

13.8.2.2. whether, in a scenario where it would be agreed that the material facts are indeed as postulated by Party B, what would each expert's concluding opinion be.

13.8.3. In order to promote mutual understanding, the parties, legal representatives and mediators may also question the experts, by asking them to explain the reasons for their opinions, as well as any reasons for disagreeing with their colleague.

13.9. Actuary

13.9.1. Once the necessary expert reports are available, and once the parties have satisfied themselves in regard to the substantial issues, they may choose to jointly appoint an actuary, and furnish an agreed set of actuarial- and factual assumptions, on which the actuarial calculations should be done.

14. MEDIATOR TO FACILITATE NEGOTIATION OF SETTLEMENT

14.1. Once the necessary quantum expert reports and actuarial reports (if any) have been obtained, the mediator/s should, if asked, continue to assist the parties and their legal representatives in the process of negotiating a quantum settlement.

15. PROLONGED MEDIATIONS AND DEADLOCK

15.1. Some RAF disputes may not be capable of resolution at a single sitting.

15.2. RAF Mediators faced with protracted disputes should at intervals encourage the participants to revisit the question of whether there is a reasonable prospect that the mediation will lead to a settlement, or at least a formal narrowing of the issues for trial.

15.3. If deadlock has clearly occurred and it would be a waste of time and money to proceed with the mediation, then, in the interests of both parties, the mediator/s should terminate the mediation.

16. COSTS OF THE MEDIATION

16.1. Mediator's fee

16.1.1. The mediator/s' professional fees, and the terms relating thereto, should be agreed between the mediator/s and the legal representatives of the parties.

16.1.2. An undertaking to pay the mediator/s for their professional services must however be signed by the person/s who has/have agreed to make the payments, without disclosure to the mediator of the source or sources of funds.

16.1.3. The mediator/s and the legal representatives of the parties may agree to an hourly fee and/or daily fee for professional mediation services; or may agree on the realistically expected duration of the mediation, and on the actual amount of the mediator's composite fee for the entire mediation (including preparation and reading time), irrespective of the duration thereof, but subject to a pre-agreed upper duration limit to protect the mediator from being held captive in an unduly dragged-out mediation process. Such agreement should be reduced to writing and signed by the mediator/s and legal representatives of the parties.

16.2. Experts’ fees

16.2.1. If necessary the mediator may facilitate the reaching of agreement as to who should pay the experts' fees and other costs incidental to the mediation, both in terms of cash flow and in terms of where the ultimate burden of such costs should fall.

16.2.2. The experts' fees, and the terms relating thereto, should be agreed between each expert and the legal representatives of the parties.

16.2.3. An undertaking to pay the experts for their professional services must be signed by the person/s who has/have agreed to make the payments.

16.2.4. The experts and the legal representatives of the parties may agree to an hourly fee and/or daily fee for professional services; or may agree on composite fee for specified services (such as writing a report, meeting with counterpart and preparation of joint minute, and giving evidence at the mediation). Such agreement should be reduced to writing and signed by the experts and legal representatives of the parties.

16.3. Legal representatives fees and disbursements

16.3.1. It is suggested that, in view of the fact that the vast majority of litigated RAF claims are in any event settled at the doors of Court, and that where there is a valid case, the RAF typically agrees to pay the Plaintiff's legal costs up to and including the first day of trial, the RAF should agree to pay the Plaintiff's reasonable legal costs up to and including the completion of the mediation process.

16.3.2. Professional fees for legal representatives should be agreed between each party and his/her legal representative, who will also agree whether these fee agreements are to remain confidential. This type of agreement should preferably be concluded prior to the pre-mediation meeting. The chairperson of the pre-mediation meeting will not inquire into the nature or details of the fee agreements, but may enquire into the existence of such agreements and whether they are satisfactory to the parties.

16.4. Administrative- and other costs

16.4.1. Costs for the venue, catering, transport, accommodation, translation and/or interpreter's services and any other incidental services or facilities will need to be agreed with the provider/s thereof.

SECTION B - PROTOCOL FOR RAF PERSONAL INJURY PRE-MEDIATION MEETINGS

A. Agenda and minutes

a. It is desirable that, before the pre-mediation meeting is held, the legal representatives of both parties should be provided with a *pro forma* pre-mediation agenda.

b. At the pre-mediation meeting, the following aspects should be canvassed and minuted:

B. Chairperson

a. The identity and qualifications of the mediator who is to chair the pre-mediation meeting.

b. Explanation by the chairperson of each of the items on the agenda for the pre-mediation meeting.

C. Participants' details

a. The identity, contact details, professional qualification and occupation of:

   i. the claimant (the other party is always the RAF);
   ii. each legal representative;
   iii. the RAF decision maker with settlement authority.
   iv. the interpreter (if any).

b. The claimant's home language or chosen language should be noted.

D. RAF decision maker with settlement authority

a. The identity and designation/ title of the RAF decision-maker participating in the mediation, as well as confirmation that the RAF decision-maker has been mandated with the necessary settlement authority to make a sufficient offer in regard to capital and costs, that is likely to cover the range of negotiated outcome amounts.

E. Information provided to allow meaningful informed consent to mediate

a. Confirmation that the chairperson has explained to the participants the nature, aims and procedures of mediation; the potential benefits of mediation over litigation, including the capacity to explore interests in addition to rights; the retention by the parties of their legal rights; that mediation is intended to be a flexible, informal, voluntary, confidential and without prejudice consultative process, that is intended to assist the parties to reach a mutually satisfactory resolution of their dispute in a safe environment.

b. Confirmation that the mediation will be conducted in the styles of Facilitative Mediation and/or Transformative Mediation (see Section A 2.1 to 2.2.4 above).

F. Confidentiality

a. Confirmation that the discussions at the pre-mediation meeting will remain confidential and take place on a without-prejudice basis.

b. Confirmation that the parties agree that under no circumstances will the mediator/s be called to testify in any trial proceedings relating to the Plaintiff's claim.

G. Identification of the issues

a. The mediator/s, assisted by the parties and their legal representatives, should identify relevant issues that have been agreed between the parties; as well as the issues and any sub-issues that are in dispute, that will need to be addressed in the mediation.

H. Selected mediator/s

a. The identity of the jointly selected mediator/s to be approached, taking into consideration the nature, issues and complexity of the matter, as well as the availability of suitably qualified mediators.

I. Documents

a. Confirmation of the exchange between the parties of existing correspondence, statements, pleadings or expert reports (on the advice of their respective legal representatives) and the provision of such documents to the mediator/s.

b. Identification of any further documentation that may be required to mediate the issues that remain in dispute.

J. Fields of expertise required

a. Confirmation as to whether resolution of the matter will require an expert report or reports; the aspects of the matter that require expert investigation, analysis and explanation; and the necessary field or fields of expertise (agreement by parties and legal representatives).

K. Selected experts

a. Confirmation of the identities of :
    i. any opposing experts that have already been appointed;
    ii. any unopposed experts that have been appointed by either party, and whose reports are admitted by the opposing party;
    iii. any expert/s whom the parties agreed to appoint as jointly appointed independent expert/s prior to mediating the dispute, and
    iv. any separately selected opposing experts that either party wishes to appoint prior to mediating the dispute.

b. It may be that the need or otherwise for further experts will only become apparent once the mediation is underway, and this aspect may be revisited if and when necessary during the mediation.

L. Professional fee agreements

a. The agreement/s in relation to the mediator/s' fees should be signed by the legal representatives of the parties and the appointed mediator/s (see section A 16.1 to 16.1.3 above).

b. Agreement/s in relation to expert fees should be signed by the legal representatives of the parties and the appointed experts (see section A 16.2 to 16.2.4 above).

M. Administrative costs

a. The question of who is bear the costs for the venue, catering, transport, accommodation, interpreter and any other required services or facilities should be confirmed.

N. Further aspects to be considered

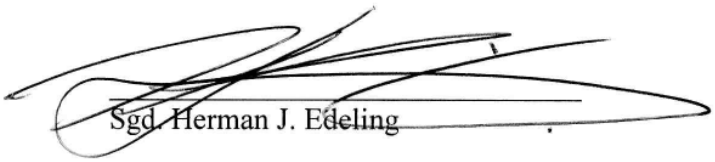
a. Depending on the circumstances of each case, consideration should be given to the possible need for, and preparation that may be required for, the mediation to deal with aspects such as curatorship, protection of funds, accommodation and case management of handicapped individuals.

O. Agreement to mediate

a. At the conclusion of the pre-mediation meeting the parties should sign an agreement to mediate.

b. This agreement should include inter alia provisions for confidentiality, the agreed style/s of mediation to be employed and professional indemnity for the mediators; as well as confirmation that whatever is said during the mediation will be without prejudice, and that any settlement agreement will be binding only once it has been signed by both parties.

c. The minute of the pre-mediation meeting should be attached to the agreement as an annexure forming part of the agreement.



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