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Issue 2

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Who can now also be part of SJA?

- Not only mediators
 - Anyone dealing with dispute resolution in any conflict between anyone
- i.e to mention a few:
- Legal practitioners
 - Prosecutors
 - Presiding officers (Judges & Magistrates)
 - Commissioners
 - Social workers
 - Medical practitioners (psychologist & psychiatrists)

Our new name - Social Justice Association of ADR Practitioners (SJA)

We have grown beyond our original focus in the past 18 years and we achieved our purpose to provide a world class infrastructure for mediation.

Our mission to become the leading association for alternative dispute resolution is now on the horizon. We have associated with many accredited and well-known associations, i.e NABFAM, SARJAB (South African Restorative Justice Accreditation Board), DISAC, Africa Centre for Dispute Settlement, South Africa Dialogue, & Co-Parent App, just to mention a few.

We simply must keep up with our expansion, which

is limitless and our EXCO members unanimously voted to change our name from Social Justice Association of Mediators to **Social Justice Association of Appropriate Dispute Resolution Practitioners (SJA)**.

Who can now also be part of SJA? Not only me NOT only mediators but ALSO legal practitioners, presiding officers, prosecutors, commissioners, social workers, psychologists, psychiatrists, consultants and ANYONE dealing with disputes relating to Family law, Domestic Violence, Harassment, Civil and Commercial (i.e arbi-

tration, company disputes, evictions), Labour (disciplinarys, CCMA, DRC), Criminal and Medical Disputes.

Including court appointed mediation; (Uniform Rule 41A and Magistrate's Court Rule 70); - any other law / customary / religious / ethical and moral disputes; and - anyone that believes that alternative / appropriate mediation should be trite, including law that mandates it.



Advantages of joining SJA

By joining SJA Appropriate Dispute Resolution Practitioners:

- ◆ You will receive a SJA membership certificate and you can say with confidence that you are a member of SJA.
- ◆ You will be invited and

reminded of upcoming webinars that you can join for free or attend at a discounted fee to earn your CPD points.

- ◆ You will be listed to our directory as Mediator / Service Provider Database and you will be

publicly visible and searchable.

- ◆ Annual membership fee R650 (excl vat)

Apply and complete form here:

<https://forms.gle/CvzNHjGcN75FiHCy9>

Teaching appropriate dispute resolution (ADR)

- A teacher and mediator's perspective

Introduction

This piece shares my experience as a teacher and mediator of Appropriate Dispute Resolution (ADR) at a university level. After I was a master's student at an international university, I started teaching ADR since 2019. Yet, before pursuing a Master's, my passion for more appropriate ways of resolving conflict was flamed in a course called 'Introduction to Advocacy'. This was when it dawned upon me that there are more suitable and amicable avenues for resolving disputes other than the adversarial method, litigation.

It is my conviction that litigation is so deeply entrenched in our society that people often see no other way. A battle is the order of the day. In society, involving legal authorities like law enforcement officials, judges, or magistrates is acceptable when settling disputes with neighbours, colleagues, business partners and even family. Again, it is as though people know no other way, but the good news is that more appropriate dispute-resolution methods exist. (Christopher W. Moore *'The Mediation Process: Practical Strategies for Resolving Conflict'*). More than ever, it is time to educate and spread awareness about ADR, focusing on mediation to increase its popularity.

My experience of teaching ADR to undergraduate and postgraduates has shown me that law school generally focuses on teaching and developing skills in litigation and mooting. For this reason, when students opt to learn more about ADR, they have to unlearn so many positional, competitive and destructive tendencies. In this brief article, I would like to explore my approach to teaching ADR, what impact ADR has had on my students, and finally, I will delve into why all of this matters.

My approach

I want to use my Mediation postgraduate course as an example. The learning approach for Mediation involves a high degree of participation through various in-person and/or online classroom activities, particularly in discussions on the literature relating to mediation, involvement in the skill-building exercises, and reflective feedback. Consequently, the mediation theory is highly valued and

integrated into practical learning via weekly simulations and discussions. This enhances the course's enjoyment and practicality by ensuring students acquire practical skills upon completing the course.

At the end of the Mediation course, students should be able to understand what mediation is and how it compares with other processes (such as arbitration and litigation), know the theoretical underpinnings of the mediation process, understand what typical mediation looks like and the features thereof, understand what to do at each stage of mediation; have an awareness of the roles and functions of a mediator; have enhanced their mediation skills and techniques, they should know about mediation contained in South African and other foreign legislation and understand the legal and ethical issues of mediation.

The perceived impact

Many of my students have provided me with feedback stating that the course has significantly shaped how they think about conflict and resolve disputes. They view conflict resolution beyond a mere contest of wills.

There is a revelation that interest-based negotiation, collaboration and problem-solving can effectively deal with everyday disputes and disputes that their family, friends, colleagues, and clients experience. Moreover, my students make career choices based on their overall experience in the ADR programme.

Overall, they recognise that they can be solution-bringers and peacemakers in many situations. A true shift and transformation occur after they have completed my Mediation course.

Why does this matter?

As a teacher, I positively impact my students' perceptions of conflict and how it should be resolved without resorting to conventional litigation and I expect that my students will go into their homes, businesses, workplaces and lives knowing how to resolve conflict amicably, whether it is their conflict or someone else's. This makes a difference, if only slightly. It is one less person suing another in court.

Why and how is this relevant to you as an ADR practitioner? As an ADR practitioner, you also hold this influence over your clients, colleagues, family and

friends to name a few. I am reminded of a quote from an academic and ADR practitioner, J Folger in *'Mediation goes mainstream – Taking the conference theme challenge'* where he states, *'Mediation is a process whose core skills and impact can extend beyond the institutional settings in which it is currently practiced'*.

I realised that the teachers who taught me about ADR influenced me as a student. While not mediators themselves, my previous teachers had a solid understanding of ADR principles. They significantly impacted my life by instilling the importance of peacefully and gracefully resolving conflicts. I have also grasped there is so much power in teaching, and as a mediator, you are a teacher, too.

What is the role and function of a mediator? A mediator is meant to demonstrate the mediation process and teach others how to communicate constructively, collaborate, brainstorm, and problem-solve (L Boule & M Nestic *'Mediation: Principles, Process, Practice'*).

In effect, a mediator is also an educator in the mediation room. Have you thought about it? Yes, a mediator is a teacher. A mediator shares knowledge, expertise, and best practices on conflict resolution. In essence, a mediator is a guiding force, a source of optimism sought by conflicting parties for conflict resolution support. As a mediator, one too profoundly impacts others when we meditate.

Appreciate your position as a mediator. It has the potential to positively impact society by transforming lives.

- Monique Carels, Lecturer (UCT) & Mediator



Cross-border Dispute Resolution



- Cross-border dispute resolution refers to the process of resolving legal conflicts that arise between parties from different jurisdictions.

Such disputes can involve individuals, businesses, or governments located in different countries. Resolving cross-border disputes can be complex due to differences in legal systems, cultural nuances, and jurisdictional challenges. Resolving disputes across borders is a complex field but some key aspects of cross-border dispute resolution include jurisdictional issues, choice of law, different options of alternative dispute resolution (ADR) including arbitration and mediation, existence of international treaties and conventions, enforcement of judgments, cross-border litigation, expertise in international law, cultural sensitivity, online dispute resolution (ODR), and customised solutions.

Determining the appropriate jurisdiction for the dispute can be challenging when parties are from different countries. They may have to consider the applicable laws and the forum where the dispute will be resolved. Parties may need to decide which legal system will govern the dispute. This is often addressed in contracts through choice-of-law clauses such as arbitration or mediation agreements when they start doing business before any dispute arises, in the event of future disputes. Such agreements are binding and form the basis of future dispute resolution actions.

ADR methods, such as arbitration and mediation, are commonly used for cross-border disputes. Arbitration allows parties to submit their dispute to a neutral third party for a binding decision and is often more enforceable across borders. The arbitrator's award is final and cannot be appealed. The field of international commercial arbitration is well developed in most parts of the developed world and offers effective dispute resolution to parties. Arbitration is a formal approach to

dispute resolution with established outcomes, as opposed to mediation that is informal by nature and leaves the outcome in the hands of the disputing parties. Mediation involves a neutral third-party facilitating negotiations between the parties to reach a voluntary settlement.

Enforcing judgments across borders can be challenging due to differences in legal systems. In cases where parties resort to litigation in the courts of one jurisdiction can involve complex procedural and substantive issues. Legal professionals involved in cross-border dispute resolution need expertise in international law, conflict of laws, and the intricacies of multiple legal systems. The predictability over the outcome of a dispute increases considerably in favour of arbitration above litigation for various reasons.

Choice of law in cross-border arbitration refers to the process by which parties involved in an international arbitration agree on the governing law that will be applied to their dispute. This is a crucial aspect of international arbitration, as it helps determine the legal framework within which the arbitrators will make their decisions. Parties often specify the governing law of the arbitration agreement itself. This choice is separate from the governing law of the contract or the substantive issues in dispute. In most cases, the parties will identify the governing law of the main contract that is at the centre of the dispute. This is important for determining the rights and obligations of the parties. Some parties may choose a neutral governing law, or even the principles of *Lex Mercatoria* (international commercial principles), especially if the contract involves parties from different legal traditions and jurisdictions. In situations where the contract does not specify a governing law, or the arbitration agreement is silent on the matter, arbitrators may need to apply conflict of laws principles to determine the most appropriate law. Apart from substantive law, parties may also need to agree on the procedural

rules that will govern the arbitration process.

Consideration should also be given to the law governing the enforcement of arbitral awards. Finally, the parties may choose different laws for different aspects of the dispute resolution process, such as the law governing the contract, the law governing damages, or the procedural rules. It's essential for parties engaged in cross-border arbitration to carefully consider these factors and clearly articulate their choice of law in the arbitration agreement. If there's any ambiguity or lack of agreement, arbitrators may need to make determinations based on the rules and principles of the arbitration institution or the applicable law of the seat of arbitration.

Soft skills associated with mediation should be considered in cross-border dispute resolution and they are as important as the laws regulating the processes. Understanding cultural differences is crucial in cross-border disputes, as it can affect negotiation strategies and the overall resolution process. With the rise of digital transactions, online platforms, and e-commerce, ODR mechanisms are becoming more relevant for resolving cross-border disputes. Given the unique challenges of each case, parties often need to tailor their approach to finding solutions that work across borders. Some international treaties and conventions provide a framework for cross-border dispute resolution, offering standardized procedures and recognition of judgments.

Effective cross-border dispute resolution requires careful planning, clear contractual provisions, and an understanding of the legal landscape in the relevant jurisdictions. It often involves a combination of negotiation, ADR, and, if necessary, litigation or arbitration to reach a resolution that is legally binding and enforceable internationally.

- *Laurie Greyvenstien* Chair of SJA
ADR Practitioner & Mediator

Social Justice Association of Appropriate Dispute Resolution Practitioners (SJA) offers :

- ◆ accredited mediation training courses to equip people for their task of rendering crucial alternative dispute resolution services in their communities;
- ◆ a variety of ADR services & training courses in ADR countrywide including Arbitration, Family Law, and Mediation (with NABFAM accreditation), and Restorative Justice (with SARJAB accreditation).

How do family law practitioners view mediation & mediators?

- Interviews with Adv. Johan Venter & Mervyn Vermeulen

As I embarked on a crucial journey of discovery of mediation as a mediator, my burning question was: "How do family law professionals, with their invaluable and unique insights, view mediation and mediators?" I knew the answer to this would shed light on people's views and significantly contribute to an ongoing and vital debate within the family law practice.

For quite valid reasons, this raises more than a few relevant questions about mediators and family law professionals. Mervyn Vermeulen and Adv. Johan Venter open-handedly gave their time to answer my questions and share their thoughts.

Mervyn Vermeulen made a compelling analogy between mediation and litigation, drawing parallels to the medical profession's preference for conservative treatment over more invasive methods. He explained that just as surgery is sometimes the only option, litigation can sometimes be the only option. The key, he emphasised, is understanding when each tool is most appropriate. Mediation, he points out, is just one tool in the legal toolkit, with other forms of Alternative Dispute Resolution (ADR), such as arbitration and negotiation, is also suitable for family matters.

Adv. Johan Venter underscored the necessity of continued training after the 40-hour foundational mediation training, emphasising the dynamic nature of the field. He pointed out that worthwhile courses, such as those on advanced mediation techniques, conflict resolution strategies, and legal updates, should also be perused. There are many of these training sessions (recorded), that you can sign up for through a membership with Social Justice Association of Appropriate Dispute Resolution Practitioners, which highlights the commitment required from

"If we foster a culture of mediators and family law practitioners working together, we can ultimately change the negative perception that many legal practitioners hold"

professionals.

While we attend CPD training regularly to maintain our accreditation and self-development, Adv. Venter also believes we must strive for a uniform standard of best practices within the field of mediation. Mervyn Vermeulen echoed this sentiment.

Adv. Venter also stressed that bad drafting lead to a lack of trust in mediators. He gave examples, such as using vague language or failing to clearly outline the terms of an agreement; lack of understanding of implementing mediation outcomes; not using the correct documentation and drafting, such as not following the required format or omitting key details. If we present poorly written, ambiguous documentation, such as contracts that are difficult to interpret or understand, it reflects badly on everyone.

Adv. Venter further mentions that many family law professionals have been 'bitten' by the mediator's competency and, therefore, also lack trust in the process. Another view by Mervyn Vermeulen is that many family law practitioners don't understand the nature and scope of mediation and, therefore, don't trust the mediation process, no matter who the mediator is.

For us mediators, it is a double-edged sword. As we all know, you need experience to get experience. This catch-22 is what new mediators are faced with. However, while nothing can quite prepare you for a face-to-face mediation session with a real case, Adv. Venter believes that additional role-plays and documentation 'role-plays' can go a long way to helping with confidence and acquiring the right skills when it comes to documentation and the mediation itself.

Mervyn Vermeulen takes the view that there are two fallacies. One is, that no matter is capable of mediation, and the other is that every matter is capable of mediation, saying that the truth lies be-

tween the two extreme thoughts. He emphasizes the importance of professionals 'staying in our lane' when deciding what is and isn't appropriate for mediation, meaning that we should only offer mediation services for cases within our area of expertise. This approach ensures that clients receive the most appropriate and effective services, and that professionals maintain the highest standards of practice.

This is where Mervyn Vermeulen believes that an ecosystem can exist between family law professionals and mediators.

This eco-system starts at the micro level, at first. Still, if we foster a culture of mediators and family law practitioners working together, we can ultimately change the negative perception that many legal practitioners still hold. We can move beyond the notion that family law practitioners see mediation negatively because it takes billable hours out of their hands. Mervyn Vermeulen believes that this is a far more nuanced phenomenon. The key, he believes, is in a collaborative approach between mediators, attorneys and other professionals, a vision that holds promise for the future of family law and mediation.

In conclusion, Mervyn Vermeulen left me with this thought: What the mediation industry needs now in South Africa is an overarching framework that leads to a uniform standard of best practices for mediators.

More cohesion is required between the various mediation bodies for this ecosystem to thrive. Not necessarily regulation but a culture of family law practitioners and other professionals working as and with mediators. This cohesion can exist for the betterment of all our clients.

- Tegwyn Fietze, Mediator



“The ART of mediation

‘Often times in silent meditation

Thoughts turn to the conflicts of litigation

As is my greater passion

My contemplations I fashion

Towards the gentler art of mediation!’

In my youth, I often wrote poetry, some good, some not so. But the more I wrote, the better I got. I also read much, and discovered more about how to express myself through it.

However, over time, as life happened, I started writing less and less, until today I no longer have the same inclination, nor the skill to any degree – see above as an example.

Mediation is mostly seen as a process, with guidelines to be followed and an end goal in mind. Having mediated for a number of years, including working in a number of pro-bono projects, I have come to see mediation more as an art.

The skilled mediator knows the process to be followed.

The skilled mediator will know the hoped-for end goal.

But the skilled mediator will also know there are many ways to get to that end-goal.

There are many different forms of art.

Some are written words, others are physical objects – paintings, sculptures and others. But each is created by an artist, giving of their best to create a work of beauty and an expression of who they are.

No matter what genre an artist works in, they have a number of methods they can use. Most of them also have others whom they can bounce ideas off, and learn new techniques from.

In the same way, the competent and skilled mediator needs to acquire numerous skills and competencies to be able to work with conflicting parties to reach a conclusion that satisfies all involved in the conflict.

All mediators come from a different perspective. Some come from situations where mediation did help, or could have helped, to de-fuse volatility. Others have seen the results that have been achieved, and want to be instrumental in bringing about the same for others. Some of us have a legal perspective, others come from mental health or counselling environments. For myself, I have come from a Christian counselling perspective, and also having been through a painful divorce.

Each of us brings our own world view, and approach how we mediate from that world view. The art of creating a satisfying mediation outcome is based on where we come from.

But that is not enough to create the best outcome. Like an artist, we need to be constantly practicing, looking for where we can do better for our clients. We need to be reviewing where we have been, and what could have been done to improve the outcome.

I am a mediator of reasonable skills, or so I am told. As I look back to where I was,

I can see how far I have come, and how much better the outcomes have become. As I look forward to the future, I see what others have created, and I commit to adding to my techniques and skills, with the aim of creating ever more satisfying outcomes for my clients. I also hope to become a resource for others in our profession, so that we become seen as a community creating outcomes that all involved in conflict will desire, just like any other truly great art.



Like artists, we also need to find others in the field from whom we can learn, who can suggest new (to us) ways of doing things. We need to keep abreast of changes in our industry, and in the fields, we mediate in. We need to remind ourselves that nobody ever knows all there is to know, and that the newest entrant to the profession can give us valuable insights.

We need to become skilled artists, mediating outcomes of peace, harmony, and equity that inspire others to reach for the same.

- Steve Holgate, Counsellor & Mediator

Upcoming Webinars & Training Events

**Dates to remember
Free & CPD Training**

- ◆ **5-6 September 2024 (08h00)** - ADR Conference Mediation goes mainstream– CT
- ◆ **11 September 2024 (18h00)** - Thulani Kunene: Traditional meaning of Lobola vs SA marriage law
- ◆ **8 October 2024 (18h00)** - Arina Smit: Empowering vulnerable children and youth
- ◆ **23 October 2024 (18h00)** - Dr. Elasabe Bosch Brits: Child supervised visitation in the context of contact and care in mediation
- ◆ **Monthly Family Law Round-Up** with Merwyn Vermeulen: 6 September 2024; 4 October 2024; 1 November 2024

Out & About SJA Exco Members



March Natalie Ruiters wrote the article “Bills and bottles: Mediation and the rights of the and the rights of the unborn to maintenance unborn to maintenance” in DeRebus March 2024

June & July Natalie Ruiters hosted The Babute Movement Dialogue joined by the following speakers and participants :

Laurie Greyvenstein

Dereck Beukes

Anneke Greyvenstein



June Geraldine Anderson-Kriel featured in article “A comparative analysis of the rights of children in Thailand and South Africa” in ProBono.org June 2024 newsletter after presenting webinar online in Thailand

July Laurie Greyvenstein featured in article “Egskeiding – maak dit makliker (en minder seer)” in Rooirose July 2024



July Theresa Luyt participated in awareness training with ProBono.org on conflict management and mediation together with :

Karen Malan



Past Webinars & Training Events - Recorded!

Contact us - pay a small fee & receive your recording!

- ◆ 9 April 2024 - Christo Naude: Family Meeting
- ◆ 24 April 2024 - Peter Hugo: Domestic violence Amendment Act & related GBV legislation
- ◆ 8 May 2024 - Dr. Mohanlall: Mental health in family mediation
- ◆ 23 May 2024 - Fathima Dada: How to deal with the trauma of childhood in adulthood
- ◆ 4 June 2024 - Christo Naude: Nurturing self image - The need to nurture
- ◆ 19 June 2024 - Theresa Luyt: Networking 101 for ADR Practitioners



Social Justice



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Network

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Guidelines for articles, contributions, publications in SJ Newsletter

We would love to hear about you and invite you to contact our editor and submit any questions, comments, articles and ideas you wish for us to publish in our next issue!

1. Contributions should be original and not published or submitted for publication elsewhere.
2. Contributions should be useful or of interest to alternative dispute resolution practitioners.
3. Publication decisions is final by SJ Editorial Committee.
4. Authors are required to give word count. Articles should be between 600 -1000 words. Letters should be as short as possible.
5. Authors are required to have copies of sources referred to in their articles for editing process in order to address any queries promptly.
6. The SJ editor reserves the right to edit contributions as to style and language and for clarity and space.
7. Contributions should be submitted in word at e-mail sjnewsletter@anderson-kriel.co.za.
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Editor - *Geraldine Moya Anderson-Kriel*

Social Justice welcomes any submissions from mediators, legal practitioners, social workers, mental health practitioners or general readers. The decision on whether to publish a particular submission is that of the *Social Justice* editorial committee, whose decision is final. In general, contributions should be useful or of interest to practitioners in the field of appropriate dispute resolution & law and must be original and not published elsewhere.

Upcoming deadlines for submissions: 15 November 2024