

PD-ABS-643  
#06829



**DEMOCRACY AND GOVERNANCE:  
RULE OF LAW IQC**

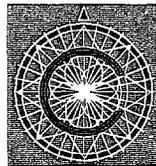
Contract No. AEP-I-807-96-90030-00

**Implementation of Court-Annexed Mediation in Zambia**

**Final Report**

Submitted to:  
U.S. Agency for International Development

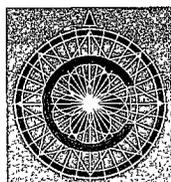
Submitted by:



**CHEMONICS INTERNATIONAL INC.**



October 2000



CHEMONICS INTERNATIONAL INC.

October 31, 2000

Frank Hawes  
Democracy and Governance Advisor  
U.S. Agency for International Development  
Lusaka, Zambia

Re: USAID Contract No. AEP-I-807-96-90030-00  
Rule of Law IQC: Implementation of Court-Annexed Mediation in Zambia

Dear Mr. Hawes,

On behalf of Chemonics International, I am pleased to submit our final report for the Implementation of the Court-Annexed Mediation Project in Zambia.

The project scope of work, originally to be carried out in one year, was reduced by mutual agreement to accommodate a curtailed period of performance of just nine months due to the completion date of the Rule of Law IQC. The final approved workplan had four main objectives:

*Establish a Mediation Model*

The overall goal of the project was to establish the foundation for a sustainable Zambian court-annexed mediation program. Based on a participatory dialogue with key members of the Zambian Judiciary and Law Association, the project established an initial mediation model in February. In April, court-annexed mediation was piloted in Lusaka. Building on lessons learned from the Lusaka experience, in August, a pilot program was held in Ndola. The established model proved successful and is ready to be replicated throughout Zambia. Once fully replicated, the model offers every possibility of institutionalizing court-annexed mediation as a viable complement to adjudication and a sustainable mechanism to reduce case backlog.

*Train 50 Lawyers and Non-Lawyers to Serve as Mediators*

The project offered two intensive one-week training courses that resulted in the certification of 64 mediators (36 in Lusaka and 28 in Ndola). The training participants represented diverse professional occupations, from architects to lawyers to doctors. The training methodology was experiential-based and utilized role-playing, which allowed the participants to practice mediating disputes characteristic of cases filed in the High Court of Zambia.

In addition to training mediators, the Chemonics team held training sessions for 75 advocates practicing in Lusaka and Ndola, and provided awareness training for seven judges in Ndola.

*Co-Mediate Cases with the Newly Trained Mediators*

Of the 64 newly certified mediators, 61 co-mediated cases during one of two settlement weeks held in April (Lusaka) and August (Ndola). Co-mediation of cases provided the mediators with a supervised environment in which to be mentored and practice their newly acquired skills. Co-mediation also helped expedite the disposition of cases already filed in the courts, dating as far back as 1984. During the two settlement weeks, 80 cases were mediated to conclusion, 73 were pending additional mediation or rescheduled, and 46 were removed from the court's docket due to settlement.

*Develop a Plan to Institutionalize the Use of Mediation in the Zambian Justice System*

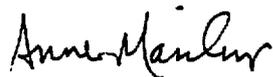
The Chemonics team worked closely with the Zambian Judiciary and Law Association to develop fundamental policies and procedures for the use of mediation in the Zambian civil justice system. The team developed: recommendations for mediation program policy, procedures, forms, and a planning checklist; settlement week policy, procedures, forms, and a planning checklist; a mediation training manual; a mediation advocate's training manual; and a mediation training manual for judges.

Throughout the implementation of the project, the team made specific recommendations to USAID and the Zambian Judiciary with respect to administrative and other actions needed to further enable an administratively efficiently functioning mediation program. Specifically, the team made recommendations with respect to: court system oversight and leadership; the establishment of a national mediation coordinator; day-to-day administrative management of mediation; judicial involvement in the use of mediation; participation of the Attorney General's Office in the mediation program; amendments to mediation rules; quality control and in-country expertise; and, computerization and civil case management.

It was a pleasure to have had the opportunity to work with you on this important and successful initiative. I especially want to thank Sidney Watae, Democracy and Governance Officer, for his valuable insight and practical assistance and, in particular, for his active interest and leadership in the project.

We look forward to the opportunity to work with USAID Zambia again in the future.

Sincerely,



Anne Maschino  
Project Manager, Democracy & Governance

Cc: Robert Buergenthal, Senior Manager, Rule of Law  
Sidney Watae, Democracy and Governance Officer

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PART A

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**Project Stakeholders**

**Chemonics International, Inc.**  
**Rule of Law IQC: Implementation of Court-Annexed Mediation in Zambia**  
**December 15, 1999 – September 30, 2000**

USAID Zambia

Miles Toder  
Democracy and Governance Advisor

Frank Hawes  
Democracy and Governance Advisor

Sidney Watae  
Democracy and Governance Officer

Zambian Judiciary

Judge Peter Chitengi  
Justice, High Court

Phillip Musonda  
Chief Administrator, High Court

Gertrude Chawatama  
Registrar, High Court

Zambian Law Association

Nigel Mutuna  
Secretary

Chemonics Local Coordination

Erasmus Masuwa  
Local Project Coordinator

Chemonics Home Office

Robert Buergenthal  
Senior Manager  
Rule of Law

Anne Maschino  
Project Manager  
Democracy and Governance

Beatrice Zimmermann  
Project Administrator  
Legal Reform and Government Integrity

Catherine Burke  
Assistant Project Administrator  
Legal Reform and Government Integrity

Chemonics Technical Consultants

Melinda Ostermeyer  
Team Leader

Dawn Martin  
Co-Team Leader, Senior Program Implementation Specialist

Judge Nan Shuker  
Senior Judge

Judge Susan Winfield  
Senior Judge

Dr. Cecil Canton  
Senior Judge

Melissa Rhea  
Senior Lawyer

Harlow Case  
Senior Lawyer

Barbara Hulburt  
Senior Program Implementation Specialist

PART B

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**Final Workplan**

**USAID Zambia Assistance to the Judiciary  
Implementation of Court-Annexed Mediation in Zambia**

Activities	Milestones	Timeline												Deliverables
		Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sep				
<p><b>Initial Planning</b> Objective: To propose revised project workplan</p> <p>1) Chemonics team reviews workplan and submits revised workplan for USAID and Judicial Management review</p> <p><b>Phase I.</b> Objective: To establish the foundation of a sustainable Zambian court-annexed Mediation Training Program</p> <p>1) Mediation model</p> <p>1.1 Chemonics submits to Judicial Mediation Development Committee (JMDC) detailed plans for exposure of key JMDC personnel to comparative administration systems for court mediation</p> <p>1.2 JMDC key personnel travel to Washington, DC for site visits to court-annexed mediation programs, briefings with key judges, and meetings with Chemonics team</p> <p>1.3 Assess Zambian mediation model</p> <p>1.4 Propose to JMDC plans and assistance program changes</p> <p>2) Submit Chemonics' proposed trainers and training plan for approval by USAID and Judiciary Management</p> <p>2.1 Select and submit proposed trainers to Judiciary Management (JM)</p> <p>2.2 Submit proposed training plan to JM</p> <p>3) Selection and commitment of training participants</p> <p>3.1 Assist JMDC and JM to select participants</p> <p>3.2 JMDC and JM to inform participants of the program</p> <p>3.3 Confer with JMDC and JM to develop agreements regarding involvement and subsequent obligations</p> <p>4) Case Selection for 1st Settlement Week</p> <p>4.1 Assist Registrar and Mediation Officer to select cases</p> <p>4.2 Registrar and Mediation Officer inform all parties/lawyers of details</p> <p><b>Phase II.</b> Objective: To train the first class of Zambian mediators to successfully co-mediate Settlement Week docket</p> <p>1) Train Mediators</p> <p>1.1 Chemonics provides five mediation trainers for two weeks in Lusaka</p> <p>1.3 Trainers conduct five-day in-depth mediation training for the previously selected group of 25 lawyers/non-lawyers</p> <p>2) Lawyers/non-lawyers co-mediate cases</p> <p>2.1 Lusaka High Court shuts down in order to allow lawyers to participate in Settlement Week</p> <p>2.2 Each mediation trainee mediates throughout the week</p> <p>3) All parties, lawyers, and mediators complete evaluation forms</p> <p><b>Phase III.</b> Objective: To refine mediation and training methodologies and train the second class of Zambian mediators to successfully co-mediate settlement week docket</p> <p>1) Selection of 2nd Mediation Training Class</p> <p>1.1 Chief Justice selects 25 new lawyers/non-lawyers for 2nd Mediation Training Class</p> <p>2) Case Selection for 2nd Settlement Week</p> <p>2.1 Registrar and Mediation Officer select cases and inform all parties and lawyers of details (cases expected to be from Ndola High Court)</p> <p>3) Implementation of 2nd Training Course</p> <p>3.1 Chemonics provides five mediation trainers for two weeks in Ndola</p> <p>3.2 Five-day in-depth training program for lawyers/non-lawyers</p> <p>3.3 2nd Settlement Week takes place</p> <p>4) Evaluation</p> <p>4.1 All parties, lawyers, mediators complete evaluation forms</p> <p><b>Phase IV.</b> Objective: To develop a plan to institutionalize the use of mediation in the Zambian justice system</p> <p>1) Chemonics submits a report summarizing recommended action to institutionalize the use of mediation in the Zambian justice system</p>	<p>1) Mediation Model Reviewed by Chemonics and JMDC</p> <p>2) Trainers and training plan approved by USAID and JM</p> <p>3) JMDC and JM select and inform training participants</p> <p>4) 1st Settlement Week cases selected</p> <p>1) 1st mediation class trained by Chemonics</p> <p>2) 1st Settlement Week co-mediated</p> <p>3) Evaluations completed, recommendations reported by Chemonics</p> <p>1) 2nd mediation class selected by JMDC and JM</p> <p>2) 2nd Settlement Week cases selected</p> <p>3) 2nd mediator class trained and 2nd Settlement Week co-mediated</p> <p>4) Evaluations completed, recommendations reported by Chemonics</p> <p>1) Report with recommended actions submitted to USAID</p>	<p>Workplan Revised and Submitted (First &amp; second week January)</p> <p>JMDC Planning Meeting (Third week February)</p> <p>Trainers and Contractor Plan Approved (First week March)</p> <p>Training and Settlement Week (Third &amp; fourth weeks April)</p> <p>Trip Report (First week June)</p> <p>Training and Settlement Week (First &amp; second week August)</p> <p>Trip Report (Fourth week September)</p>												

PART C

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**Invitational Travel Report**

## Report: Invitational Travel

### Implementation of Court-Annexed Mediation in Zambia (USAID/Zambia Assistance to the Judiciary)

USAID Contract No. AEP-I-807-96-90030-00

**Authors:** Melinda Ostermeyer  
Dawn Martin

**Date:** March 2, 2000

#### *Introduction*

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In order to advance the key goal of the above referenced project—namely to establish the foundation for sustainable Zambian court-annexed mediation and training programs—a Zambian delegation consisting of Judge Peter Chitengi, High Court Judge; Phillip Musonda, Chief Administrator of the Judiciary; and Nigel Mutuna, Secretary of the Law Association of Zambia, were invited to Washington, D.C. and Richmond, Virginia, February 12 through February 19, 2000.

Specifically, the invitational travel was intended to:

1. Expose key Zambians to comparative mediation models and administration systems for court mediation programs;
2. Develop a work plan to be executed by the Zambians for the implementation of Mediator Training and Settlement Week events scheduled for April and August 2000; and,
3. Begin development of policies and procedures for the use of mediation in the Zambian civil justice system.

#### *Activities*

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The detailed itinerary is attached (attachment A). In summary, the delegation and consultants participated in the key activities listed below:

##### **Monday, February 14**

Washington D.C.

- Program Briefing, Chemonics International
- Welcome Meeting with Chief Judge Eugene Hamilton, DC Superior Court
- Civil Judges' Luncheon, DC Superior Court
- Planning Meeting: Chemonics & Delegation, Civil Justice System & ADR in Zambia
- Embassy of Zambia

##### **Tuesday, February 15**

Washington D.C.

- DC Superior Court ADR Programs
- Observe Small Claims Court, Mediation & Administration
- Operations Briefing by Key Personnel

**Wednesday, February 16**

Richmond, Virginia

- The McCammon Group, Private Mediation Provider
- Supreme Court of Virginia, Robert N. Baldwin, Executive Secretary of the Supreme Court of Virginia (State Court Administrator) & Geetha Ravindra, Director, Department of Dispute Resolution Services, Supreme Court of Virginia
- Hunton & Williams, The Honorable Robert Merhige (Ret.)
- Dispute Resolution Center, Beckie Riffe, Executive Director
- Henrico County Juvenile and Domestic Relations Court, Leslie Kahn, Dispute Resolution Program Coordinator, and Chief Judge Catherine Oxenham

**Thursday, February 17**

Washington DC

- DC Superior Court ADR Programs
- Observe Civil Mediation & Administration
- Strategic Planning Session

**Friday, February 18**

Washington DC

- Strategic Planning Session Continued

***Evaluation***

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To evaluate the program, the delegation completed an evaluation questionnaire rating the effectiveness of these activities on a five-point scale of (1) highly ineffective—(3) moderately effective—(5) highly effective. The results are as follows:

Meetings with Judges	4.7
Small Claims Mediation Observation	5
Civil Mediation Observation	3.7
McCammon Group: Private Mediation Services	5
Virginia State Supreme Court ADR Programs	5
Richmond Virginia Community Mediation Program	4.3
Richmond Local Court Domestic Relations Mediation Program	3.7
Planning Meetings with Chemonics	5

The following comments were offered by the delegation on the evaluation form:

- *“The meeting has assisted in highlighting some weaknesses in our legislation and has been educative to both sides.”*
- *“Program was well arranged and executed.”*

### Products

The following were produced by the consultants or provided to the delegation by others. They include:

1. *Implementation of Court-Annexed Mediation in Zambia* (manual including information on ADR program models, Settlement Week administration and forms, and planning documents) (Appendix)
2. Recommendations: Settlement Week Policy, Procedures, and Forms (Attachment B)
3. Recommendations: Mediation Policy, Procedures, Forms and Commercial List Case Processing flow-chart (Attachment C)
4. Brochures and Program Information regarding Virginia ADR Programs including *Mediation: A Consumer Guide*; *Mediation & Parenting*; *BBB Arbitration Rules*; *The Dispute Resolution Center*; *The McCammon Group*; Overview of Mediation in Virginia; and *Resolutions* newsletter. (Appendix)
5. *Guidelines on Mediation and the Unauthorized Practice of Law* (manual funded by the State Justice Institute with information and forms) (Appendix)
6. *Model Parent Education Curriculum and a Study of Related Custody & Visitation Issues* (Report by the Supreme Court of Virginia) (Appendix)
7. *Advocacy in Mediation* (manual for a legal continuing education seminar) (Appendix)

### Immediate Next Steps:

The Delegation will proceed with securing approval of the attached recommendations regarding implementation of Mediator Training, Settlement Week, and the Commercial Case Processing System as outlined in the attached recommendation documents.

Immediate action is required for the following:

1. The attached orders, forms, and documents related to Settlement Week and the Commercial Case Processing System must be reviewed and revised to accurately reflect the terminology, case types, etc. utilized in Zambia;
2. Forms 28 (A) (B) (C) and (D) are requested by Chemonics in order to recommend suggested revisions in accordance with the recommendations;
3. An assessment and necessary action steps must be taken to ensure that the Court has sufficient computerized capability for the scheduling, generation of Orders for Mediation, and data collection for Settlement Week cases (**NOTE:** Orders for Mediation should be issued no later than April 1, 2000);
4. High Court judges must select appropriate cases for referral to mediation during Settlement Week; and,

5. A Mediation Coordinator must be selected and hired to assist in the day-to-day implementation and management of Settlement Week.

### **Attachments:**

1. Attachment A. Itinerary: Invitational Travel Schedule
2. Attachment B. Recommendations: Settlement Week Policy, Procedures, and Forms
3. Attachment C. Recommendations: Mediation Policy, Procedures, Forms and Commercial List Case Processing flow-chart

### **Appendices:**

1. Implementation of Court-Annexed Mediation in Zambia (manual including information on ADR program models, Settlement Week administration and forms, and planning documents)
2. Brochures and Program Information regarding Virginia ADR Programs including *Mediation: A Consumer Guide*; *Mediation & Parenting*; *BBB Arbitration Rules*; *The Dispute Resolution Center*; *The McCammon Group*; Overview of Mediation in Virginia; *Resolutions* newsletter
3. *Guidelines on Mediation and the Unauthorized Practice of Law* (manual with information and forms funded by the State Justice Institute)
4. *Model Parent Education Curriculum and a Study of Related Custody & Visitation Issues* (Report by the Supreme Court of Virginia)
5. *Advocacy in Mediation* (manual for a legal continuing education seminar)

**Attachment A**

**Zambia Judiciary Officials  
Invitational Travel to Observe Court-Annexed Mediation in the United States  
February 14 – 19, 2000**

**Saturday, February 12**

2:30 p.m. Arrive Dulles International Airport on Northwest Flight #37

*Upon arrival in Washington, D.C. you will need to collect your luggage and pass through U.S. immigration and customs. Ms. Jocelyn Wyatt will be waiting for you, holding a sign that says "Chemonics International Zambia Delegation." She will assist you with ground transportation to your hotel.*

Transportation: Prime Transportation  
Contact: Tom Smith  
Tel: 303-296-0000 or 301-839-5000

Lodging: Embassy Suites Hotel  
1250 22<sup>nd</sup> Street N.W.  
Washington, D.C. 20037  
Tel: (202) 857-3388  
Guest Fax: (202) 293-3173

**Sunday, February 13**

10:30 a.m. Meet Ms. Jocelyn Wyatt in the lobby of the Embassy Suites Hotel to participate in a city tour of Washington, D.C.

**Monday, February 14**

8:45 a.m. Meet Ms. Jocelyn Wyatt in the lobby of the Embassy Suites Hotel. She will escort you to Chemonics International.

9:00 a.m. – 10:45 a.m. Program Briefing  
Chemonics International  
1133 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20036  
Tel: 202-955-3300

*Purpose:* Review agenda, discuss goals for the week and provide administrative orientation.

*Co-Participants:*

*Ms. Candace Conrad, Senior Vice President, Chemonics International  
Mr. Robert Buergenthal, Senior Manager, Chemonics International  
Ms. Anne Maschino, Project Manager, Chemonics International*

*Ms. Jocelyn Wyatt, Training Coordinator, Chemonics International*  
*Ms. Melinda Ostermeyer, Consultant, Chemonics International*  
*Ms. Dawn Martin, Consultant, Chemonics International*

10:45 a.m. Depart Chemonics International by taxi for appointment at DC Superior Court

11:30 a.m. Welcome Meeting with Chief Judge Eugene Hamilton  
DC Superior Court  
500 Indiana Ave., NW  
Washington, D.C.  
Chambers 3300

*Co-Participants:*

*Hon. Nan Shuker, DC Superior Court*  
*Melinda Ostermeyer, Consultant, Chemonics International*  
*Dawn Martin, Consultant, Chemonics International*

12:15 p.m. Civil Judges' Luncheon  
DC Superior Court  
JM Level, Judges' Dining Room

*Purpose:* Opportunity to converse with DC Superior Court Judges and gain exposure to judges' perspectives about court-annexed mediation.

1:30 p.m. – 3:00 p.m. Civil Justice System & ADR in Zambia  
DC Superior Court  
Room 3300

*Purpose:* Participants and consultants will engage in an informal dialogue about the current status of ADR in Zambia, including related legislation, policies, procedures, and other judicial and ADR developments to date.

*Co-Participants:*

*Robert Buergenthal, Chemonics*  
*Anne Maschino, Chemonics*  
*Hon. Nan Shuker, DC Superior Court*  
*Hon. Susan Winfield, DC Superior Court*  
*Wallace Meissner, Civil Training Manager, Multi-Door Dispute Resolution, DC Superior Court*

3:00 p.m. Depart DC Superior Court by taxi for appointment at Embassy.

3:30 p.m. – 4:00 p.m.

Embassy of Zambia  
2419 Massachusetts Avenue NW  
Washington, D.C. 20008  
Tel: 202-265-9717

4:00 p.m.

Return by taxi to Embassy Suites Hotel.

6:30 p.m.

Dinner at the home of Harlow Case, Lawyer, Mediator and Mediator Trainer

**Tuesday, February 15**

8:30 a.m.

Meet Ms. Dawn Martin in the lobby of the Embassy Suites Hotel. Depart hotel by taxi to appointment.

9:00 a.m. – 3:00 p.m.

DC Superior Court ADR Programs  
500 Indiana Ave., NW  
Washington, D.C.  
Indiana Avenue Entrance, 1<sup>st</sup> floor lobby

*Purpose:* To compare and contrast court-annexed ADR models in operation at the DC Superior Court. Participants will have the opportunity to learn about administration of court-annexed mediation programs.

(Schedule may be altered as the day progresses depending on the availability and duration of small claims and/or civil mediation observations).

9:15 a.m.

Observe Small Claims Court, Mediation Administration, Small Claims Mediation  
Location: JM Level

11:00 a.m.

Observe Civil Mediation and Civil Mediation Administration  
Location: Building A, 515 Indiana Ave., Room 112

12:00 p.m.

Lunch at own leisure

1:30 p.m.

Operations Briefing by Key Personnel  
Location: JM annex, 3<sup>rd</sup> floor, Moultrie Building, 500 Indiana Ave.

*Co-Participants:*

*Dawn Martin*, Consultant, Chemonics  
*Wallace Meissner*, DC Superior Court  
*Karen Leightnam*, Civil Branch Chief, Multi-Door Dispute Resolution  
Division, DC Superior Court

3:00 p.m. Return by taxi to Embassy Suites Hotel.  
Dinner and evening at own leisure.

**Wednesday, February 16**

7:00 a.m. Meet Ms. Ostermeyer, Ms. Martin, and Ms. Beatrice Zimmerman  
(Chemonics) in the lobby of the Embassy Suites Hotel. Depart hotel by  
bus for Richmond, Virginia.

9:30 a.m. The McCammon Group  
Bank of America Center  
1111 East Main Street, Suite 1700  
Richmond, Virginia 23219  
(804) 343-0922

*Purpose:* Welcome, overview of the day. Brief discussion of history of  
mediation/ADR in Virginia.

*Presenter:*  
*Barbara Hulburt*, Director of Training & Consulting, The McCammon  
Group

10:05 a.m. Supreme Court of Virginia  
Office of the Executive Secretary  
100 North Ninth Street, Third Floor  
Richmond, Virginia 23219  
(804) 786-6455

*Purpose:* Discuss current status of mediation in the court system.

*Discussants:*  
*Robert N. Baldwin*, Executive Secretary of the Supreme Court of  
Virginia (State Court Administrator)  
*Geetha Ravindra*, Director, Department of Dispute Resolution Services,  
Supreme Court of Virginia

12:15 p.m.  
Hunton & Williams  
Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, Virginia 23219

(804) 788-8711

Lunch and discussion with *The Honorable Robert Merhige (Ret.)*

2:00 p.m.

Dispute Resolution Center  
701 East Franklin Street, Suite 712  
Richmond, Virginia 23219  
(804) 648-0030

*Purpose:* Discuss Community Dispute Resolution Programs

*Discussant:*  
*Beckie Riffe, Executive Director*

3:00 p.m.

Henrico County Juvenile and Domestic Relations Court  
4201 East Parham Road  
Richmond, Virginia 23273  
(804) 501-5257

*Purpose:* Discuss Henrico County Juvenile Courts Program

*Discussants:*  
*Leslie Kahn, Dispute Resolution Program Coordinator*  
*Chief Judge Catherine Oxenham*

4:00 p.m.

Bus will depart for Washington, D.C.

6:00 p.m.

Bus will return to Embassy Suites Hotel.  
Dinner and evening at own leisure.

**Thursday, February 17**

8:30 a.m.

Meet Ms. Martin / Ms. Ostermeyer in the lobby of the Embassy Suites Hotel. Depart hotel by taxi to appointment.

{OBSERVED MEDIATION 9:00 a.m. – 10:00 a.m.}

9:00 a.m. – 4:00 p.m.

Strategic Planning Session (Day One)  
DC Superior Court  
500 Indiana Ave., NW  
Washington, D.C.  
Room 2500

*Purpose:* The planning session aims to devise a strategic plan for Mediator Training and Settlement Week program implementation.

(Lunch break scheduled for 12:00 noon.)

*Co-Participants:*

*Melinda Ostermeyer, Consultant, Chemonics*

*Dawn Martin, Consultant, Chemonics*

*Anne Maschino, Chemonics*

*Hon. Nan Shuker, DC Superior Court*

4:00 p.m.

Return to Embassy Suites Hotel by taxi.

6:30 p.m.

Dinner with Robert Buergenthal and Anne Maschino, Chemonics project management team

**Friday, February 18**

8:30 a.m.

Meet Ms. Ostermeyer in the lobby of the Embassy Suites Hotel. Depart hotel by taxi to appointment.

9:00 a.m. – 10:30 a.m.

Initial Scheduling Conference  
{CANCELED – DC SUPERIOR COURT CLOSED DUE TO SNOW}  
DC Superior Court  
500 Indiana Ave., NW  
Washington, D.C.  
Indiana Avenue Entrance, 1<sup>st</sup> Floor Lobby

*Purpose:* Observe DC Superior Court's civil case scheduling and ADR process selection conferences.

*Co-Participants:*

*Melinda Ostermeyer, Consultant, Chemonics*

*Dawn Martin, Consultant, Chemonics*

10:30 a.m. – 3:30 p.m.

Strategic Planning Session (Day 2)  
DC Superior Court  
Room 2500

*Purpose:* Continue Thursday's planning meeting and finalize project planning.

(Lunch break scheduled for 12:00 noon.)

*Co-Participants:*

*Melinda Ostermeyer, Consultant, Chemonics*

*Dawn Martin, Consultant, Chemonics*

*Robert Buergenthal, Chemonics*

*Anne Maschino, Chemonics*

3:30 p.m. – 4:00 p.m.

Evaluation and Program Application

4:00 p.m. Return by taxi to Hotel

7:00 p.m. Dinner with Hon. Nan Shuker

**Saturday, February 19**

12:00 p.m. Checkout time for Embassy Suites Hotel. The hotel will store luggage if late checkout is not possible.

3:30 p.m. Transportation service to pick up delegates at Embassy Suites Hotel and transport to Dulles International Airport (meet Anne Maschino at the airport).

Prime Transportation  
Contact: Tom Smith  
Tel: 303-296-0000 or 301-839-5000

6:05 p.m. Depart Washington Dulles, Northwest Airlines Flight 36  
Arrive Amsterdam, February 20 at 7:45 a.m.

Depart Amsterdam, February 20 at 8:10 p.m.  
KLM Flight 593  
Arrive Johannesburg, February 21 at 7:50 a.m.

Depart Johannesburg, February 21 at 11:05 a.m.  
South African Flight 64  
Arrive Lusaka, February 21 at 1:05 p.m.

## **Mediator Training and Settlement Week Recommended Policy, Procedures and Forms**

The following outlines the policy, procedures, and forms recommended by the Mediation Delegation for the referral and administration of Mediator Training (April 17-21, 2000) and Settlement Week (April 24-28, 2000)<sup>1</sup>. Prior to Settlement Week, it is recommended that the Chief Justice inform the Law Association of Zambia about the event by way of a written practice direction.

### ***Mediator Training***

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The Law Association of Zambia will select thirty (30) mediators for the mediator training scheduled April 17 through April 21, 2000. The training will be held 1 p.m. to 6 p.m. on Monday through Thursday, and 9 a.m. to 4 p.m. on Friday<sup>2</sup>. The Zambia Institute for Advanced Legal Education is the preferred training site. Chemonics and the Judiciary will coordinate to secure one (1) large room accommodating 40 people and four (4) smaller rooms accommodating at least five people each.

Role-play case scenarios, provided by the Chemonics consultants, will be edited by the Zambian Mediation Delegation to ensure that they are culturally, linguistically, monetarily and otherwise appropriate in the Zambian context. Seven Chemonics consultants will serve as the training team and co-mediate with the recently trained mediators during Settlement Week.

Mediators will be expected to mediate cases for one full day during Settlement Week—these services will be offered by mediators *pro bono*.

The Court and the Law Association of Zambia will coordinate opening and closing ceremonies. Participants will include, among others, the Chief Justice, Minister of Legal Affairs, and President of the Law Association of Zambia. During the closing ceremony, mediators will be given certificates recognizing them as court-approved mediators.

### ***General Settlement Week Administration***

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The Chief Administrator of the Judiciary will handle all media-related activities. It was discussed that day-to-day oversight and management responsibilities of the mediator training and Settlement Week be delegated to Gertrude C. Chawatama, Register of the High Court. In addition, Chemonics will hire a part-time coordinator to assist in the administration of the mediator training and Settlement Week. The duties of the coordinator may include case selection, processing of Orders for Mediation and related documents, coordination of case scheduling, data entry and data base management, organization and tracking of case records, and other administrative support functions.<sup>3</sup>

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<sup>1</sup> These recommendations are applicable to the Mediator Training scheduled for July 31-August 4, 2000 and the Settlement Week scheduled for August 7-August 11, 2000.

<sup>2</sup> The Chemonics training team will be available each morning to meet with members of the Judiciary, Law Association, or general public.

<sup>3</sup> See the Settlement Week Planning Worksheet attached.

Settlement Week mediations will be held at the High Court in conference rooms, judges' chambers and other rooms. At least eight mediation rooms<sup>4</sup> are needed each day. In addition, a large area or room is needed as a Settlement Week headquarters. Settlement Week staff is located in the Headquarters and parties and advocates check-in there upon their arrival so that they can be directed to their mediation room.

The Court and the Law Association of Zambia will coordinate the closing ceremony scheduled for 7:00 p.m. on Friday, April 28, 2000. Participants will include, among others, the Chief Justice, Minister of Legal Affairs, and President of the Law Association of Zambia.

### ***Settlement Week Selection and Scheduling***

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High Court Judges will select cases for Settlement Week. Priority will be given to cases in the following categories:

- » Oldest pending cases
- » Mortgages and debt collection
- » Collision
- » Defamation
- » *Pro se* parties
- » Breach of contract

Cases considered ineligible are those in which preliminary applications are pending and labor matters currently not before the High Court.

Eight mediators will be scheduled each day. Approximately 250-300 cases will be scheduled for mediation during Settlement Week at the following times:

- » Monday-Thursday: 9:00, 10:00, 11:00, 12:00, 2:30, and 3:30
- » Friday will be reserved for rescheduled and continued mediation sessions.

After cases are selected and scheduled for a specific date and time, Orders for Mediation will be generated and distributed to advocates in their pigeonholes. *Pro se* litigants will receive Orders for Mediation by way of personal service. So that the Court may impose sanctions for non-compliance, a method for documenting receipt of the Orders for Mediation by advocates and *pro se* parties must be developed. The attached Settlement Week Information form will be included with the Order for Mediation.

### ***Computerization***

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Automated management of the scheduling, case coordination and data retrieval functions is imperative to the successful administration of Settlement Week. It is unclear as to whether the current computerized system is satisfactory, and an immediate assessment must be completed. If the system is not capable of capturing and manipulating the data outlined below, immediate steps must be taken to ensure the system is up and functioning within the next few weeks.<sup>5</sup>

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<sup>4</sup> It was recommended by the Zambian Mediation Delegation that courtrooms not be used as mediation rooms during Settlement Week.

<sup>5</sup>The Chief Administrator of the Judiciary will make this assessment. Computer expertise is available from Chemonics International for the assessment and/or devising the action steps necessary to appropriate programming, if necessary.

### **Data Entry Fields**

The following data must be entered:

1. Case Name
2. Case Number
3. Parties names
4. Attorneys
5. Attorneys phone number if available
6. Judge
7. Mediation Date
8. Mediation Time
9. Mediator Assigned
10. Mediation room/location
11. Outcome
12. Action/Next event

### ***Data Processing Capabilities***

The computerized system must be able to:

1. Print of orders/notices
2. Produce a Case Roster with the data listed above
3. Organize data by:
  - » Date/time of the mediation
  - » Case number
  - » Judge
  - » Mediator
  - » Attorney
  - » Outcome

## SETTLEMENT WEEK PLANNING WORKSHEET

By When	Person Responsible	Task	Comments
2/18		Delegation devises recommendations for approval by the Chief Justice Delegation reviews and revises Settlement Week forms Delegation reviews and comments on role play scenarios	
3/2		Chemonics consultants draft report and recommendations	
		Identify Settlement Week Coordinator Identify support staff for Settlement Week and delineate job duties	
		Select 30 Mediators Decide polices RE: their agreements to provide mediation in exchange for the training Draft invitation letter Send invitations with RSVP	
		Create an automated scheduling program Identify cases for Settlement Week Enter case data into automated program	
		Locate Facilities File storage <ul style="list-style-type: none"> <li>○ Training</li> <li>○ Opening &amp; closing ceremonies</li> <li>○ Settlement Week</li> </ul>	<i>Training:</i> one large room and 4 small rooms. <i>Settlement Week:</i> waiting area near check-in, 8 rooms, general waiting areas
		Schedule cases for date/time Create a Settlement Week cause list Print Notice/Order & Information Sheet Mail Notice/Order & Information Sheet	Check attorney scheduling conflicts. Mail notices at least six weeks prior to Settlement Week.
		Identify guest list for opening and closing ceremonies Invite speakers for opening ceremony Invite speakers for closing ceremony	Contact court, embassy, USAID, etc.
		Submit comment about the role play cases to Melinda Ostermeyer, Consultant, Chemonics	

		Draft press releases get Court approval Draft press releases get Embassy/USAID approval	
		Confirm and finalize Mediator Trainee List Print and mail invitations to the opening and closing ceremonies	
		File <i>returns of service</i> in court files Annotate SW cause list	Continually update cause list due to requests for reschedule, no service, settled cases, etc.
		Submit trainees names for Chemonics to create certificates	
		Duplicate forms: <ul style="list-style-type: none"> <li>» Statement of understanding</li> <li>» Information sheet</li> <li>» Attorney survey</li> <li>» Litigant survey</li> <li>» Consent judgment form</li> <li>» Mediator reporting form</li> </ul>	
		Duplicate training materials	
		Secure equipment for training Secure refreshments for training	Slide projector or PowerPoint equipment or overhead projector, projector screen, VCR, easel and flip-chart paper, writing pads, pens, name tags/tents, coffee/tea, snacks
4/17-21	Chemonics Consultants	Mediator Training Week Meet with settlement week staff Meet with the bar and with the judges Train mediators End of training ceremony	
4/21		Produce final cause list Sort court files chronologically by mediation date and time	
4/24-		Settlement Week	

28		<p>Support Staff will: Check-in parties and attorneys Escort parties to mediator Reassign cases and transfer files between mediators Maintain documentation of the status of each case Obtain evaluation forms from the parties/attorneys Coordinate approval of consent judgments with judge and file it in case files Compile and post daily statistics Collect and review court files and return to the Registrar's office</p> <p>Closing ceremonies</p>	
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**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY AT LUSAKA**

\_\_\_\_\_

**PLAINTIFF**

**vs.**

\_\_\_\_\_

**DEFENDANT**

**Case No.**

**ORDER FOR MEDIATION**

This case has been scheduled for mediation on the \_\_\_\_\_ day of \_\_\_\_\_, promptly at \_\_\_\_\_ AM/PM and shall take place at \_\_\_\_\_. ALL PARTIES and their advocates are hereby **ORDERED** to appear. Unless an agreement disposing of this case is filed with the Court in advance of this date, the mediation will occur as scheduled.

The Court **ORDERS** full compliance with the following:

1. All parties who must approve a settlement and at least one advocate for each party, if represented by an advocate, must appear at the mediation. If someone other than a party to the suit must approve the settlement, that person should be present during the scheduled mediation. Institutional parties must have an individual with the authority to settle the case present at the mediation.
2. Each party or advocate must bring to the mediation:
  - a) If damages are requested, an outline of how they have been or should be calculated (including, if appropriate, the time period and rates of interest); and,
  - b) Relevant documentation, such as appraisals, receipts and records;
3. All proceedings at the mediation, including any statement made or document prepared by any party, advocate, or other participants, are confidential and will not be disclosed to the trial judge or affect the case if it is not settled at this time. No party shall be bound by anything said or done at the mediation unless a settlement is reached. If a settlement is reached, the agreement will be put in writing and will be binding upon all parties to the agreement.

In the event that a plaintiff and, if represented, the plaintiff's advocate does not appear at the mediation, the Court may dismiss the case. In the event that a defendant and, if represented, the defendant's advocate does not appear at the mediation the Court may enter a default judgment against the defendant.

This **ORDER** is entered, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

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JUDGE

## SETTLEMENT WEEK INFORMATION SHEET

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### *What is Settlement Week?*

During Settlement Week hundreds of cases pending in the High Court will be mediated. Mediators appointed by the Court will help parties and their lawyers to reach an amicable settlement to their dispute.

### *How does mediation work?*

Mediation is very successful in assisting parties to resolve their disputes. Because the mediation sessions are confidential and informal, parties can feel comfortable to discuss their case with candor, state grievances, and reveal confidential settlement offers.

The mediator will first meet with the parties and their attorneys, if represented, and hear from all parties in the case. Most likely the mediator will spend some time alone with the plaintiff and with the defendant—what the parties say to the mediator in these private meetings will not be shared with the other party, unless the party gives the mediator permission to do so. The mediator will help the parties to keep the discussions focused, to talk about possible ways the dispute might be resolved, and to assist in drafting an agreement that is acceptable to all parties. If an agreement is reached and signed, the case will be concluded that day.

### *Will a party be penalized in any way for failing to settle a case?*

No. The Court recognizes that every case cannot be settled and that the parties have a right to a trial. However, the Court does require everyone involved to appear at the mediation and to make a serious effort to reach a settlement. If parties do not *appear* at the mediation, sanctions may be imposed.

### *What must be done to prepare for the mediation?*

Each party or attorney must bring to the mediation 1) an outline of how the requested damages have been or should be calculated, including, if appropriate, the time period and rates of interest, 2) relevant documentation such as appraisals, receipts, or records, and 3) a list of potential settlement possibilities.

### *How long will the mediation last?*

Typically a mediation session will last about two hours. However, it may be necessary for the mediation to continue for a longer period of time, or to be continued to another day.

## MEDIATOR SETTLEMENT WEEK INFORMATION & PROCEDURES

- 1) Please check-in at the Settlement Week desk located at the entrance of the court every morning by 8:30 a.m. for the assignment of your co-mediator, case up-dates, and other information. Between sessions, wait in your assigned mediation room to receive the parties for mediation.
- 2) Parties and advocates will be given a check-in notice by the Settlement Week staff and sent to the assigned mediation room when all parties and advocates arrive for the mediation.
- 3) Parties who appear in the assigned mediation room without a check-in notice should be directed to the Settlement Week desk.
- 4) During the mediation, the parties should complete the following documents:
  - Statement of Understanding (filed in the case jacket)
  - Advocate Survey (direct advocates to the Survey Box at the Settlement Week desk)
  - Litigant Survey (direct parties to the Survey Box at the Settlement Week desk)
- 5) If reached, the consent order can be duplicated with carbon paper (give carbon copies to the parties and place the original in the case jacket), and the official entry of the consent agreement can be recorded in the case jacket at a later time.
- 6) *Immediately after the mediation*, the mediator should complete the Case Reporting Form and return it and the court jacket to the Settlement Week desk. The reporting form will be used to keep track of case statistics and to indicate to the Settlement Week staff that you are ready to receive your next mediation case.
- 7) Please try to keep your mediation sessions to one and a half hours. If you wish to mediate more than one and a half hours, please check-in with the Settlement Week staff to determine the status of your next mediation case. Many advocates are scheduled for consecutive mediation sessions. Please determine whether an extended mediation session will interfere with another mediators scheduled mediation.
- 8) If one or more parties *and* advocates do not appear, the Settlement Week staff will inform you if your next case has been canceled.
- 9) If an advocate appears without his or her client, the mediator will determine whether the advocate has settlement authority sufficient enough to continue the mediation or whether other action is appropriate.
- 10) If the assigned mediator is unavailable, cases may be reassigned to another mediator for mediation at the originally scheduled date and time.
- 11) Case reporting forms must be completed before the end of each day for all cases, including cases in which one or more parties do not appear for the mediation.

# SETTLEMENT WEEK MEDIATOR CASE REPORTING FORM

Date: \_\_\_\_\_

Primary Mediator: \_\_\_\_\_

Case Name: \_\_\_\_\_ Case No: \_\_\_\_\_

### Case Type (check all issues in the case)

Employment	<input type="checkbox"/>	Worker's Comp	<input type="checkbox"/>
Collision	<input type="checkbox"/>	Bank/Loan	<input type="checkbox"/>
Defamation	<input type="checkbox"/>	Contract	<input type="checkbox"/>
Other:	_____		

### Case Disposition (check one)

Settled before mediation

Mediated & **fully** settled  or Mediated & **partially** settled

Mediated & scheduled 2nd mediation  on \_\_\_\_\_

Mediated & not settled

Not mediated

#### Check reasons why the case was not mediated (check all that apply):

Non-appearance of one or more parties

Non-appearance of one or more advocates

Advocate without settlement authority

Other: \_\_\_\_\_

#### Check action taken when case was not mediated (check all that apply):

Mediation rescheduled on \_\_\_\_\_

Assigned to another mediator

Referred to trial

Dismissal/Default entered for non-appearance

Dismissal/Default entered for lack of settlement authority

Other action taken due to lack of settlement authority

Indicate action:

\_\_\_\_\_

Other action: \_\_\_\_\_

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY AT LUSAKA**

\_\_\_\_\_

**PLAINTIFF**

**vs.**

\_\_\_\_\_

**DEFENDANT**

**Case No.**

**CONSENT SETTLEMENT ORDER**

The parties agree as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Plaintiff

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Address

\_\_\_\_\_  
Address

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

\_\_\_\_\_  
Mediator

## SETTLEMENT WEEK ADVOCATE SURVEY

Your opinions are important to assess the use of mediation in the courts.  
Please complete this form and place it in the Survey Box located beside the Settlement Week desk.  
Thank you.

1. Name of primary mediator: \_\_\_\_\_

2. You represent the:                     plaintiff     defendant

3. Case Type (check all issues in the case)

Employment                        Worker's Comp                   

Collision                        Bank/Loan                   

Defamation                        Contract                   

Other: \_\_\_\_\_

4. Case Disposition (check one)

Settled before mediation                   

Mediated & *fully* settled                                        or                    Mediated & *partially* settled                   

Mediated & 2nd mediation scheduled

Mediated & not settled                   

Not mediated                   

If not, why not? (check all that apply):

Non-appearance of a party

An advocate did not have settlement authority

Parties could not agree

Preliminary matters pending (motions, discovery)

Other \_\_\_\_\_

5. How many mediation sessions have you participated in before this week?

0

1-3

4-5

6. Did you learn more about mediation as a result of Settlement Week?

Yes

No

If so, how?

7. Is mediation through the courts a good idea for Zambia?  Yes  No  
 Why or why not?

8. Mediator(s) level of participation: *None* *Low* *Medium* *High*

*Please rate the following:*

9. How effective was the mediator(s) in helping you and the parties to consider settlement of this case?  
*Poor* *Fair* *Good* *Excellent*

*Strongly Disagree* *Disagree* *Agree* *Strongly Agree*

10. The mediator(s) explained the mediation process clearly so that I knew what to expect during the mediation session

11. The mediator(s) allowed me/my advocate to fully present my case.

12. The mediator(s) carefully listened to my side of the case

13. The mediator(s) asked proper questions to determine the facts in the case.

14. The mediator(s) helped me/my advocate discuss different methods for resolving the case.

15. The mediator(s) treated all parties equally.

16. Overall, I was satisfied with the mediation itself.

17. I was satisfied with the outcome of the mediation.

18. Overall, I was satisfied with the mediator(s).

19. Please comment on the use of mediation in the courts (use the back of this form). Thank you.

## SETTLEMENT WEEK PARTICIPANT SURVEY

Your opinions are important to assess the use of mediation in the courts.  
Please complete this form and place it in the Survey Box located beside the Settlement Week desk.  
Thank you.

1. Name of primary mediator: \_\_\_\_\_

2. You are the:                     plaintiff                     defendant

3. Did you have an advocate represent you in this case?                     yes                     no

If not, did you have any difficulty representing yourself?                     yes                     no

4. Did you reach an agreement today with the other party?                     yes                     no

	<i>Poor</i>	<i>Fair</i>	<i>Good</i>	<i>Excellent</i>
5. How effective was the mediator(s) in helping you and your advocate to consider settlement of this case	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

	<i>Strongly Disagree</i>	<i>Disagree</i>	<i>Agree</i>	<i>Strongly Agree</i>
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6. The mediator(s) explained the mediation process clearly so that I knew what to expect during the mediation session	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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7. The mediator(s) allowed me/my advocate to fully present my case.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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8. The mediator(s) carefully listened to my side of the case	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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9. The mediator(s) asked proper questions to determine the facts in the case.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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10. The mediator(s) helped me/my advocate discuss different methods for resolving the case.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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11. The mediator(s) treated all parties equally.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--	--------------------------	--------------------------	--------------------------	--------------------------

12. Overall, I was satisfied with the mediation itself.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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13. I was satisfied with the outcome of the mediation.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--	--------------------------	--------------------------	--------------------------	--------------------------

14. Overall, I was satisfied with the mediator(s).	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--	--------------------------	--------------------------	--------------------------	--------------------------

*Please provide any comments you wish regarding the mediator(s) or the mediation process (use the back of this form). Thank you.*

## Commercial List Case Processing System Recommended Policy, Procedures and Forms

The following outlines the policy, procedures, forms, and rule amendments recommended by the Zambian Mediation Delegation for the referral and administration of mediation of commercial list cases. Prior to the initiation of this system, it is recommended that the Chief Justice inform the Law Association of Zambia about the new system by way of a written practice direction.

### *Referral to Mediation*<sup>6</sup>

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Judges select appropriate cases for referral to mediation and indicate such by modifying the Orders for Direction (if necessary, revising or adding language provided by the attorneys in their proposed Orders). Furthermore, the judge will issue the attached Order for Mediation (form 28A)<sup>7</sup> and a roster of five potential mediators.<sup>8</sup> The parties will select a mediator listed on the roster by consensus, or they will engage in a striking process—the mediator remaining on the list after the striking process will be the assigned mediator. The parties will inform the mediator and the court of their selection within seven (7) days of the date of the Orders for Direction.

### *Mediation Practices*

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Mediators will ensure that the mediation is concluded within sixty (60) days of the date of the Orders for Direction<sup>9</sup>. Immediately upon being informed of his or her selection, the mediator will collect the court record; contact the parties; and inform them of the mediation date, time, and location. Due to limited facilities at the Court, mediators will be encouraged to conduct mediation sessions in their offices, whenever possible.

The mediator will record the attendance of the parties on Mediator Reporting Form (form 28C) to serve as a basis for possible sanctions by the Court in the event of non-appearance of a party at the mediation as directed in the Order for Mediation. The mediator will commence the mediation session by securing the parties signature on the Statement of Understanding: Role of the Mediator (form 28B). As dictated by the Rules, statements made during the mediation are confidential and privileged. As many mediation sessions as deemed necessary by the mediator and the parties may be scheduled within the time period outlined above.

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<sup>6</sup> As a point of clarification regarding Statutory Instrument No. 71 of 1997, the phrases “Judge *may* refer” cases to mediation (4. Reference to Mediation) and “parties *shall* appear” (8. Appearance before mediator) are interpreted to mean that judges have discretion to refer cases to mediation, in the first instance, and party appearance at mediation is mandatory, in the second.

<sup>7</sup> Form 28A will need to be amended. See the attached Order for Mediation, which provides for sanctions of dismissal or default by the Court in the event parties do not appear at the mediation, as directed.

<sup>8</sup> Five mediators will be listed on a roster (assigned to rosters at random) for use by the judges. Mediators will be rotated on and off rosters depending on their availability to accept mediation cases.

<sup>9</sup> It is suggested that the Court Rules related to mediation indicated that the “court shall not grant extension of time except for compelling reasons.”

In the event of an agreement, the mediator shall hand-write (or type if convenient) the mediation settlement (form 28D), secure the signature of all parties and lawyers, and sign the mediation agreement.<sup>10</sup>

Within ten (10) days of the final mediation session, the mediator will submit to the court the following:

1. Court record;
2. Signed Statement of Understanding (form 28B);
3. Mediator case reporting form (form 28C)<sup>11</sup>; and,
4. Signed mediation settlement, if reached (form 28D).

### ***Post Mediation***

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In the event of an agreement, the Court Registry will affix the Court seal on the mediation agreements. The parties will pay the mediation fee at the time they uplift the agreement from the Court Registry. The Court will then forward payment to the mediator.

In the event the parties do not reach an agreement, within seven (7) days of receipt of the mediator's reporting form, the Mediation Office will advise the judge that the case has not been settled. Within fourteen (14) days of notification by the Mediation Office, the judge will summons the parties to appear before him or her for the purposes of scheduling a trial date. At that time, the parties will pay the mediation fee to the Court, and the Court will then forward payment to the mediator.

### ***Mediation Fees***

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Mediators will serve *pro bono* during Settlement Week as a continuation of their training as mediators. Thereafter, Statutory Instrument No. 69 of 1998 (rule 13) states: "There shall be paid to the mediator in equal proportion by the parties to a suit, a mediation fee in accordance with the scale that may be prescribed by the Chief Justice." Accordingly, a policy statement will be made to the Law Association of Zambia at its Annual General Meeting scheduled for the first week of April 2000.

It is recommended that mediation fees be assessed per case (rather than per hour or some other increment of time). It is further recommended, that the parties pay the mediation fee to the Court, which will, in turn, forward the fee to the mediator. In addition, a method for providing mediation services to indigent parties will be devised.

### ***Rule Amendments***

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In order to implement these recommendations, the following Rule amendments to Statutory Instruments No. 71 of 1997 are required:

1. **Rule 4. Reference to Mediation:** Form 28A (referral order) amended as necessary based on the attached Order for Mediation. Also, add reference that mediation should be concluded within 60 days of the date of the Orders for Direction and that the court shall not grant extension of time

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<sup>10</sup> Form 28D will need to be revised to include the signature of the mediator. It is recommended that judges not sign mediation agreements.

<sup>11</sup> Form 28C will need to be revised to include documentation regarding the attendance of the parties at mediation and other statistical information deemed important for determining the success of the mediation project.

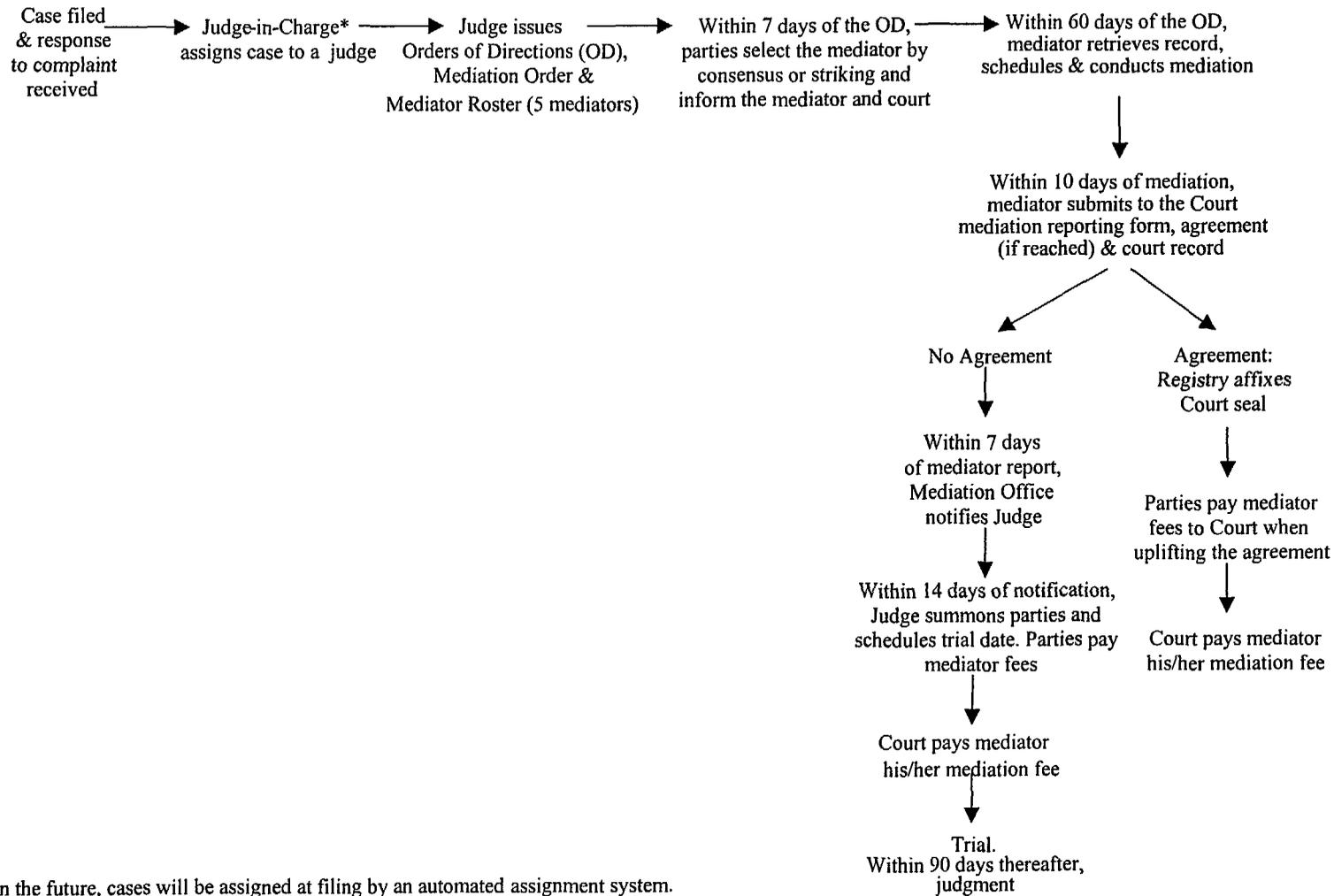
except for compelling reasons. In addition, add sanction provisions, (i.e.) “in the event that a plaintiff and, if represented, the plaintiff’s advocate does not appear at the mediation, the Court may dismiss the case. In the event that a defendant and, if represented, the defendant’s advocate does not appear at the mediation the Court may enter a default judgment against the defendant.”

2. **Rule 5: List of Mediators:** Add *Selection of a Mediator*: Outline the procedures for selecting a mediator from a Mediator Roster (approximately 5 mediators per roster) by consent or striking process. And, add provision that parties must notify the Court and the Mediator of their selection within seven (7) days of the date of the Orders of Direction.
3. **Rule 7. Conduct of Mediator:** Amend rule to reflect that the mediation is to be concluded within sixty (60) days from the date of the Orders for Direction, rather than 60 days from the date of the mediator collecting the record.
4. **Rule 11 (1). Return of Records to Mediation Office or Proper Officer:** Amend rule to indicate that the mediator must return the following documents within 10 days of the conclusion of mediation (in instances of agreement *and* no agreement):
  - » Signed Statement of Understanding (form 28B);
  - » Mediator case reporting form (form 28C—To be Revised)
  - » Signed mediation settlement, if reached (form 28D—To be Revised: include mediator’s signature, exclude judge’s signature).
5. **Rule 11 (2). Return of Records to Mediation Office or Proper Officer:** Amend to reflect, “*if the mediation fails, the mediation officer....*”
6. **Rule 11 (2). Return of Records to Mediation Office or Proper Officer:** Amend to reflect, “*The judge shall summons parties to appear before him or her within 14 days of receipt of the record.*”
7. **Rule 13: Mediator fees.** Amend rules to reflect Chief Justice’s decision regarding mediation fee scale. Also, add payment of the fees by the parties to the Court, and the Court’s payment of fees to the mediator.

#### Commercial Case Processing Flow Chart

The flow chart below reflects the proposed case processing system.

## Zambian Commercial List Case Processing System beginning April 1, 2000



**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY AT LUSAKA**

\_\_\_\_\_

**PLAINTIFF**

**vs.**

\_\_\_\_\_

**DEFENDANT**

**Case No.**

**ORDER FOR MEDIATION**

This case has been referred for mediation. ALL parties and their advocates are hereby **ORDERED** to appear at the date, time and location designated by the mediator. The parties should select a mediator listed on the attached Mediator Roster by consensus or the plaintiff and defendant may strike two mediators each and the mediator remaining on the list will be selected. The parties shall inform the Court and the mediator of his or her selection within seven days of the date of this Order. Unless an agreement disposing of this case is filed with the Court in advance of this date, the mediation will occur as scheduled.

The Court **ORDERS** full compliance with the following:

1. All parties who must approve a settlement and at least one advocate for each party, if represented by an advocate, must appear at the mediation. If someone other than a party to the suit must approve the settlement, that person should be present during the scheduled mediation. Institutional parties must have an individual with the authority to settle the case present at the mediation.
2. Each party or advocate must bring to the mediation:
  - a) *If damages are requested, an outline of how they have been or should be calculated (including, if appropriate, the time period and rates of interest); and,*

b) Relevant documentation, such as appraisals, receipts and records;

3. All proceedings at the mediation, including any statement made or document prepared by any party, advocate, or other participants, are confidential and will not be disclosed to the trial judge or affect the case if it is not settled at this time. No party shall be bound by anything said or done at the mediation unless a settlement is reached. If a settlement is reached, the agreement will be put in writing and will be binding upon all parties to the agreement.

In the event that a plaintiff and, if represented, the plaintiff's advocate does not appear at the mediation, the Court may dismiss the case. In the event that a defendant and, if represented, the defendant's advocate does not appear at the mediation the Court may enter a default judgment against the defendant.

This **ORDER** is entered, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE

PART D

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**First Mediator Training and Settlement Week Trip Report**



**DEMOCRACY AND GOVERNANCE:  
RULE OF LAW IQC**

Contract No. AEP-I-807-96-90030-00

**Implementation of Court-Annexed Mediation in Zambia**

**Trip Report**  
Mediator Training and Settlement Week #1  
April 17, 2000 – April 28, 2000

Submitted to:  
U.S. Agency for International Development

Submitted by:



CHEMONICS INTERNATIONAL INC.

June 6, 2000

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# Implementation of Court-Annexed Mediation in Zambia

## A. Introduction

Seven U.S. mediators and trainers traveled to Lusaka, Zambia, to conduct mediator training from April 17 to 21, 2000, and to mentor Zambian mediators during Settlement Week, April 24 to 28, 2000. The consultants helped administer Settlement Week and met with members of the judiciary and other USAID and Zambian leaders to advance understanding of mediation. These activities achieved the project's Phase II objective: to train the first class of Zambian mediators to successfully co-mediate Settlement Week cases.

In summary:

- Thirty-six Zambian professionals were trained as mediators.
- Thirty-three mediators were mentored during Settlement Week.
- Settlement Week procedures were established and implemented.
- Two hundred and seven cases were scheduled for mediation during Settlement Week.
- Formal and informal discussions were held with the Chief Justice of Zambia, High Court judges, the Minister of Justice, the Secretary of the Law Association of Zambia, and representatives from USAID and the U.S. Embassy.

## B. Mediation Training

The five-day training program included substantive discussion of mediation theory and practice with both individuals and groups, mediation demonstrations, and exercises to strengthen communication, negotiation, and facilitation skills. Much of the training was devoted to role-play sessions in which the participants practiced mediating disputes characteristic of cases filed in the High Court of Zambia. The trainers evaluated each participant's performance in these practice sessions, as well as the progress of the group as a whole. Throughout the week, the training program and role-play assignments were adjusted to ensure maximum learning opportunities.

Among those trained were architects, lawyers, engineers, surveyors, and other professionals. In their daily and final evaluations (attached), the participants endorsed experiential training as an effective method for teaching mediation skills.

After the training, participants reinforced their newly acquired skills through practical mediation experience during Settlement Week. With every case they mediated, the mediators became more confident and enthusiastic about mediation. With very few exceptions, the participants proved to be extremely talented and dedicated mediators.

At the end of each day, participants were asked to rate the effectiveness of the training, ranking each item from (1) very ineffective to (3) moderately effective to (5) very effective. They rated all elements of the training program as being effective or highly effective, as indicated in the tables on the next page.

**Table I. Participants' Evaluation of Overall Training**

<b>Overall Rating (25 responses)</b>	<b>Average</b>
Role Plays	4.8
Group Discussions	4.6
Training Materials	4.0
Trainers	4.8
Overall Training	4.6

**Table 2. Daily Evaluations of Key Elements of the Training**

<b>Monday, April 17, 2000 (29 responses)</b>	<b>Average</b>
Conflict Discussion	3.5
Negotiation Discussion	3.3
Mediation-Arbitration Exercise	4.2
Mediation Demonstration	4.8

<b>Tuesday, April 18, 2000 (35 responses)</b>	<b>Average</b>
Mediators' Introductory Statements	4.3
Identifying Interests Discussion	4.1
Summarizing Interests Practice	3.9
Questioning Practice	4.0
Role Play	4.6

<b>Wednesday, April 19, 2000 (34 responses)</b>	<b>Average</b>
Information Gathering Discussion	4.3
Individual Sessions Discussion	4.5
Communication Skills Practice	4.0
Role Play	4.8

<b>Thursday, April 20, 2000 (30 responses)</b>	<b>Average</b>
Facilitative Mediation Demonstration	4.5
Role Play	4.7

<b>Friday, April 21, 2000 (25 responses)</b>	<b>Average</b>
Practical Problems Discussion	4.6
Settlement Week Administration & Logistics	4.3
Role Play	4.9

### C. Settlement Week

Settlement Week in Lusaka achieved many of its intended goals:

- The Chief Justice, the Minister of Justice, and other chief officials of the Zambian judicial system publicly endorsed mediation.
- A large number of people (lawyers, clients, court personnel, and judicial officers) were educated about mediation. Participating in a single mediation session is far more effective in spurring endorsement of the process than is attendance at seminars, reading about mediation, or engaging in theoretical discussions about it.<sup>1</sup>
- The professionals trained as mediators, and many of the lawyers participating in mediation, have become vocal advocates of process. They will substantially influence the acceptance of mediation by the legal community.
- Lawyers and litigants through user-surveys confirmed that participants were highly satisfied with mediation and consider it a welcome enhancement of the Zambian judicial system.
- The successful partnership between the bench and the bar in resolving cases created a synergy that will have lasting positive effects.
- Administrative procedures, automated capabilities, and policy decisions were tested and short- and long-term changes were recommended.

The week before Settlement Week the trainers, in consultation with key Zambian representatives, also completed the following administrative tasks:

- Settlement Week policies, procedures, and forms were established and produced.
- The case cause list was produced using new automated capabilities.
- Advocates were notified of the mediation date and time.
- The U.S. consultants assigned Settlement Week cases to the Zambian mediators on the basis of their expertise, skills, and availability.
- Case files were organized by date/time.
- Zambian mediators reviewed their case files and cases were reassigned where conflict of interest or other issues arose.

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<sup>1</sup> A senior lawyer who had just participated in mediation was overheard commenting that he had accomplished more for his client in a two-hour mediation than he had in three years of litigation.

- In the courthouse 18 mediation rooms were set up with tables, chairs, and forms.
- Mediation case rosters and hearing room signs were posted in the courthouse.
- A Settlement Week Headquarters area was established for party, attorney and mediator check-in and case file management.

About 50 cases were scheduled each day of the four-day Settlement Week, for a total of 207 cases. Where all parties and advocates in a case had settlement authority, the resolution rate was high. At week's end, 64 percent of the cases mediated to conclusion were fully or partially settled.

The total number of cases mediated to conclusion was lower than expected for a number of reasons. Many of these were addressed during Settlement Week and others by the court immediately thereafter. These include timely notification of the dates and times of mediation sessions; cross-checking advocates' mediation schedules to prevent duplicate scheduling; and implementing sanctions (i.e., case dismissal and default) for failure to appear as scheduled.

Advocate education and involvement in mediation programs is a key element of success. For that reason, the U.S. consultants had intended to meet with members of the Law Association of Zambia before Settlement Week. However, the meeting could not be scheduled. Fortunately, many advocates were educated about the mediation process through their practical experiences during Settlement Week. With no exceptions, all advocates who returned the post-mediation survey their support for further mediation programs in Zambia. Future meetings with the bar are being planned to educate lawyers and address their questions and concerns. This will ensure that a greater percentage of advocates will attend future mediation sessions prepared to engage in settlement discussions.

During Settlement Week, mediators diligently worked with advocates and parties to reschedule mediation hearings as needed. Often, second and third mediation sessions were scheduled to continue settlement discussions. In fact, efforts to mediate about 60 cases continued after Settlement Week.

With the High Court's administrative support and leadership in implementing policies and procedures, the successes of Settlement Week will expand to the effective use of mediation to resolve pending cases in the High Court, with continued high satisfaction rates among both litigants and advocates.

#### **D. Key Findings**

Based on case statistics and responses from advocate and litigant surveys, we found that:

- Of the 207 cases scheduled for mediation, all parties and advocates appeared in 30 percent (62 cases).

- Of the cases scheduled for mediation, 60 percent of the cases had been filed between 1998 and 2000, 30 percent in 1996 or 1997, and most of the remaining 10 percent between 1987 and 1995.
- Of the cases in which the type of dispute was reported, 46 percent were contract disputes other than bank loans or mortgages, 21 percent were employment cases, 18 percent were bank loans, 2 percent were tort actions, and 6 percent were mortgages.
- During Settlement Week, 14 cases (64 percent) were fully or partially settled; 60 cases were rescheduled for mediation or the mediator planned to continue working with the parties after Settlement Week.<sup>2</sup>
- Comparable numbers of plaintiff and defendant advocates completed survey forms: 85 percent indicated that they had learned more about mediation during Settlement Week. Except for two who did not respond to the question, advocates agreed unanimously that mediation through the courts is a good idea for Zambia.
- Advocates were very satisfied with the mediators' performance: Asked how effective the mediator was in helping the parties to work toward settlement, 85 percent indicated the mediator was good or excellent (twice as many respondents chose "excellent"). And 100 percent strongly agreed or agreed with the statement, "Overall, I was satisfied with the mediator."
- Advocates were equally positive about the mediation process: 98 percent strongly agreed with being satisfied with the mediation itself and 93 percent agreed with the outcome of the mediation.
- Litigants were just as satisfied: 79 percent indicated that the mediator was good or excellent in helping them to consider settlement and 100 percent strongly agreed or agreed with the statement, "Overall, I was satisfied with the mediator." Furthermore, one hundred percent and eighty-six percent respectively indicated that they agreed or strongly agreed with being satisfied with the mediation itself and with the outcome of the mediation.

### **E. Conclusions, Recommendations, and Next Steps**

The Lusaka training and Settlement Week experiences sometimes highlighted strengths and sometimes areas for improvement. The following recommendations based on various assessments of the Lusaka program are intended to set the stage for a successful training and Settlement Week in Ndola and for the ultimate success of court-annexed mediation programs in Zambia.

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<sup>2</sup> The High Court is currently collecting case disposition data for cases continuing mediation after Settlement Week.

## **E1. Before Mediation Training and Settlement Week in Ndola**

*Planning trip.* It is recommended that a U.S. consultant travel to Lusaka and Ndola the week of July 3rd for three to four days of meetings with judges, key administrators, prospective mediators, and members of the Law Association of Zambia. The consultant can then assess the status of the planning for Settlement Week, including selection of cases and notification processes.

*Computerization of case scheduling.* The computer program devised for scheduling Settlement Week cases in Lusaka was able to organize the cause list by date/time and cause number, but not by individual advocates. As a result, some mediators were scheduled for two or three concurrent sessions, so they could not appear at all of them. Resources for computerization have an urgent priority: the computer system must be functioning well in advance of the Lusaka Settlement Week. This will be particularly important because computer capability in general is reportedly less developed in the Ndola Court than in the Lusaka Court.

We recommend that the Ndola computer system be operational by June 15, 2000. This will allow time for the case data to be entered before scheduling cases and sending mediation orders/notices. Case data should include: 1) case name; 2) case number; 3) names of individual advocates (including law firm affiliation); and 4) names of parties. Hearing notices should be sent 30 to 45 days before Settlement Week (i.e., by early July 2000).

*Case selection and notification.* In addition to the criteria used to select cases for the Lusaka Settlement Week, the oldest cases on the dockets should be prioritized for the Ndola Settlement Week. Furthermore, a judicial Order (rather than the cause list notification system used in Lusaka) should be sent to advocates and pro se parties no less than 30 days, but preferably 45 days, before Settlement Week. The order should contain the following data:

- Names of the case and all parties and lawyers, by individual (with company or law firm affiliations).
- Date, time, and place of mediation with a note that participants are expected to arrive on time. The last day of Settlement Week (Friday) has been reserved for continued or rescheduled mediation cases. The notice should advise parties that appearance at any Friday sessions that will be scheduled is also mandatory.
- Notice that sanctions, including default or dismissal, may be imposed where parties either fail to appear or appear without full settlement authority.
- Notice that a party or a lawyer who has two or more mediation sessions scheduled at the same time must notify the Deputy Registrar, in writing, of the conflict within seven days of the date the Order was sent (not the date it was received).

*Advocate education.* It is critical that advocates be well informed about mediation and Settlement Week. In any jurisdiction, when members of the bar do not understand mediation, there are low

appearance rates, lack of preparation for mediation, and failure to negotiate constructively. To this end, it is recommended that, before Settlement Week in Ndola:

- The Chief Justice and the Minister of Justice publicly endorse mediation before the Ndola bar on at least once, but preferably on several occasions.
- Written materials explaining the general principles of mediation and especially Settlement Week policies and procedures are distributed to all members of the Ndola bar.
- Meetings are held with members of the Zambian Law Association to describe mediation and discuss Settlement Week logistics and expectations. At a minimum, while in Ndola on the planning trip, the consultant should meet with Ndola advocates, accompanied by judicial and Law Association officials, to emphasize important points, including attendance by lawyers and parties, required settlement authority, and the advocates' role in mediation.

*Attorney general.* The Minister of Justice has given the mediation program strong support. However, further coordination with the Attorney General's Office would enhance the success of Settlement Week in Ndola. Specifically, legal counsel from the Attorney General's office should be reminded that their appearances at mediation are mandatory; they should be given an orientation about the role of government counsel in the mediation process. While all advocates should receive this sort of orientation before Settlement Week, a special effort should be made to train lawyers of the Attorney General's Office, given the facts that the Attorney General's Office is involved in an unusually large number of cases and is further influential in the court and the bar.

*Mediator policies and procedures.* To clarify the court's policy on awarding certificates to mediators, it is recommended that by the training participants and a representative of the court sign a letter of understanding, including the following elements:

- Mediator trainees agree to contribute one full week, Monday through Friday, from 9:00 to 17:00 hrs., for mediator training.
- During Settlement Week, mediators agree to mediate two full days, as well as being available all day on Friday for follow-up sessions between 9:00 and 12:00 hrs. and an afternoon mediator debriefing to discuss training and administrative improvements. This day would conclude with a closing ceremony and reception at 18:00 hrs. (We recommend that lunch be provided to mediators on Friday, the last day of Settlement Week.)
- Mediator trainees understand that they will receive Mediator Certificates only if they complete all the training and Settlement Week requirements. The Court reserves the right to withhold certification if there are any concerns about a mediator's performance during training or Settlement Week.

## **E2. Ndola Mediation Training and Settlement Week**

*Mediator training.* The training program will be nearly identical to the Lusaka training, but modified to enhance the opportunity for trainees to practice mediating cases to conclusion and to emphasize negotiating and writing agreements.

*Case selection and scheduling.* The oldest cases should have the highest priority. If this recommendation is followed, cases should be overscheduled by 25 percent and assigned for 9, 10:30, 12:00, and 14:30 hrs, Monday through Thursday. Friday is reserved for continued and rescheduled mediation sessions. This schedule will increase the time for each mediation session and still provide an additional half-day to continue sessions started earlier in the week. With 30 mediators contributing two days each, approximately 240 of the oldest, non-land, non-injunction cases could be scheduled.

*Settlement week administration.* For Settlement Week, Court personnel must assign cases to mediators, create daily dockets, monitoring the status of cases and tally the statistics, and manage staff assistants, duplication of materials, and facilities. It is recommended that during Settlement Week a Court representative be present who is authorized to schedule cases, if necessary, for subsequent court appearances or monitoring. It is also recommended that a Deputy Registrar be present and authorized to: 1) enter defaults, 2) enter dismissals and 3) schedule ex parte proof hearings if failed to appear for mediation.

## **E3. On-Going Mediation Program**

The Lusaka mediators have expressed keen interest in continuing the mediation program and a willingness to support the program by mediating regularly, either weekly or monthly. To bolster mediator confidence in the viability of the program, it is recommended that the Chief Justice make a public statement of support for mediation. It is also recommended that the Chief Justice keep mediators apprised of developments by periodically giving them formal notice of decisions and actions taken to continue mediation.

In addition to the policies and procedures the Court<sup>3</sup> is currently being contemplated, the following are recommended:

- A system should be established allowing parties whose cases are not sent to mediation by court order, to request a mediation hearing.
- Mediators have been advised that they will be compensated for their services. Therefore, it is necessary to implement a payment system as quickly as possible. Significant delays could cause mediators to lose interest and trust in the program.
- The Chief Justice should issue a public statement expressing strong support for the mediation process and mention sanctions for non-appearance at mediation hearings. If

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<sup>3</sup> See the recommended policies, forms and procedures contained in the annexes to this report. These procedures were devised by the Zambian Mediation Delegation consisting of Judge Peter Chitengi, High Court Judge: Phillip Musonda, Chief Administrator of the Judiciary: and Nigel Mutuna, then-Secretary of the Law Association of Zambia during a planning meeting held in Washington, D.C. February 12 through February 19, 2000.

sanctions have not been legally authorized at the time. It is recommended that the Chief Justice describe the status of the proposed rule amendment and ask the bar to participate fully in mediation, even before sanctions are formally applied. Any necessary revisions to the Rules should be implemented as soon as possible.

- Within the Court building a room should be identified where mediation sessions can be regularly scheduled. Ideally there should be a computer, printer, and copier nearby for documenting and copying agreements.
- One Court staff person should be assigned to coordinate each of the two current mediation programs. Each coordinator would be responsible for: 1) receiving court-referred cases, 2) assigning cases to mediators, 3) scheduling mediations, 4) distributing and collecting participant and advocate surveys, 5) compiling survey results, and 6) solving problems as they arise.
- In addition to all these specifics, long-term plans are needed for:
  - Training mediator trainers.
  - Putting in place performance-monitoring systems for mediators.
  - Training court administrators to coordinate mediation in the broader context of the judicial system.
  - Training judges in how to select cases for mediation and in the potential benefits of mediation.
  - Training advocates in how to optimize the mediation process for their clients.
  - Selection, training, and certification of mediators.
  - Computerizing a system for scheduling cases, notifying lawyers and parties, and monitoring mediation cases.
  - Once mediation is shown to be successful, expanding it to all courts, including the subordinate courts and Industrial Relations Court.

#### **E4. Conclusion**

Mediation successes in Zambia will further the country's broader goals of increasing access to justice and enhancing both the efficiency and the effectiveness of judicial processes. The long-term success of mediation in Zambia will hinge on many factors, among them support from the Ministry of Justice and the court system, the availability of skilled mediators, and party and advocate understanding of the mediation process.

An assessment of the pilot program in Lusaka gives strong indications for success in the future:

- The Ministry of Justice has provided strong and public support for mediation programs and has endorsed the imposition of sanctions for failure to appear at mediation hearings.

- The High Court has lent its support to the initiative by providing administrative, computer, and copying services; space in which to conduct mediation sessions; and other resources needed, before, during, and after Settlement Week.
- The first group of trained mediators exhibited talent, professionalism, and commitment to continuing support for the mediation program.
- Finally, parties and advocates who participated in mediation sessions were quick to appreciate the process as an effective alternative dispute resolution tool.

These successes, the invaluable lessons learned through practical experience, and effective planning, hold promise for even greater achievements in the future.

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ANNEX A

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**Recommended Form for Announcement of Case Scheduled  
for Mediation**

ANNEX A

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**Recommended Form for Announcement of Case Scheduled for Mediation**

IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY AT LUSAKA

\_\_\_\_\_ PLAINTIFF

vs.

\_\_\_\_\_ DEFENDANT

Case No. \_\_\_\_\_

**ORDER FOR MEDIATION**

This case has been scheduled for mediation on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ promptly at \_\_\_\_\_ hrs. and shall take place at \_\_\_\_\_. ALL PARTIES and their advocates are hereby **ORDERED** to appear. Unless an agreement disposing of this case is filed with the Court in advance of this date, the mediation will occur as scheduled.

The Court **ORDERS** full compliance with the following:

1. All parties who must approve a settlement and at least one advocate for each party, if represented by an advocate, must appear at the mediation. If someone other than a party to the suit must approve the settlement, that person should be present during the scheduled mediation. Institutional parties must have an individual with the authority to settle the case present at the mediation.
2. Each party or advocate must bring to the mediation:
  - a) Where damages are being requested, an outline of how they have been or should be calculated (including, if appropriate, the time period and rates of interest); and,
  - b) Relevant documentation, such as appraisals, receipts and records;
3. All proceedings at the mediation, including any statement made or document prepared by any party, advocate, or other participants, are confidential and will not be disclosed to the trial judge or affect the case if it is not settled at this time. No party shall be bound by anything

said or done at the mediation unless a settlement is reached. If a settlement is reached, the agreement will be put in writing and will be binding upon all parties to the agreement.

In the event that a plaintiff and, if represented, the plaintiff's advocate does not appear at the mediation, the Court may dismiss the case. In the event that a defendant and, if represented, the defendant's advocate does not appear at the mediation the Court may enter a default judgment against the defendant.

This **ORDER** is entered, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE

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ANNEX B

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**Settlement Week Information Sheet**

## Settlement Week Information Sheet

### What Is Settlement Week?

During Settlement Week hundreds of cases pending in the High Court will be mediated. Mediators appointed by the Court will help parties and their lawyers to reach an amicable settlement to their dispute.

#### *How does mediation work?*

Mediation is very successful in assisting parties to resolve their disputes. Because the mediation sessions are confidential and informal, parties can feel comfortable to discuss their case with candor, state grievances, and reveal confidential settlement offers.

The mediator will first meet with the parties and their attorneys, if represented, and hear from all parties in the case. Most likely the mediator will spend some time alone with the plaintiff and with the defendant—what the parties say to the mediator in these private meetings will not be shared with the other party, unless the party gives the mediator permission to do so. The mediator will help the parties to keep the discussions focused, to talk about possible ways the dispute might be resolved, and to assist in drafting an agreement that is acceptable to all parties. If an agreement is reached and signed, the case will be concluded that day.

#### *Will a party be penalized in any way for failing to settle a case?*

No. The Court recognizes that every case cannot be settled and that the parties have a right to a trial. However, the Court does require everyone involved to appear at the mediation and to make a serious effort to reach a settlement. If parties do not appear at the mediation, sanctions may be imposed.

#### *What must be done to prepare for the mediation?*

Each party or attorney must bring to the mediation: 1) an outline of how the requested damages have been or should be calculated, including, if appropriate, the time period and rates of interest; 2) relevant documentation such as appraisals, receipts, or records; and 3) a list of potential settlement possibilities.

#### *How long will the mediation last?*

Typically a mediation session will last about two hours. However, it may be necessary for the mediation to continue for a longer period of time, or to be continued to another day.

ANNEX C

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**Recommended Commercial List Case Processing System**

## Recommended Commercial List Case Processing System

The following outlines the policy, procedures, forms, and rule amendments devised by the Zambian Mediation Delegation consisting of Judge Peter Chitengi, High Court Judge; Phillip Musonda, Chief Administrator of the Judiciary; and Nigel Mutuna, then-Secretary of the Law Association of Zambia during a planning meeting held in Washington, D.C. February 12 through February 19, 2000. Prior to the initiation of this system, it is recommended that the Chief Justice inform the Law Association of Zambia about the new system by way of a written practice direction.

### A. Referral to Mediation<sup>1</sup>

Judges select appropriate cases for referral to mediation and indicate such by modifying the Orders for Direction (if necessary, revising or adding language provided by the attorneys in their proposed Orders). Furthermore, the judge will issue the attached Order for Mediation (form 28A)<sup>2</sup> and a roster of five potential mediators.<sup>3</sup> The parties will select a mediator listed on the roster by consensus, or they will engage in a striking process—the mediator remaining on the list after the striking process will be the assigned mediator. The parties will inform the mediator and the court of their selection within seven (7) days of the date of the Orders for Direction.

### B. Mediation Practices

Mediators will ensure that the mediation is concluded within sixty (60) days of the date of the Orders for Direction.<sup>4</sup> Immediately upon being informed of his or her selection, the mediator will collect the court record; contact the parties; and inform them of the mediation date, time, and location. Due to limited facilities at the Court, mediators will be encouraged to conduct mediation sessions in their offices, whenever possible.

The mediator will record the attendance of the parties on Mediator Reporting Form (form 28C) to serve as a basis for possible sanctions by the Court in the event of non-appearance of a party at the mediation as directed in the Order for Mediation. The mediator will commence the mediation session by securing the parties signature on the Statement of Understanding: Role of the Mediator (form 28B). As dictated by the Rules, statements made during the mediation are confidential and privileged. As many mediation sessions as deemed necessary by the mediator and the parties may be scheduled within the time period outlined above.

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<sup>1</sup> As a point of clarification regarding Statutory Instrument No. 71 of 1997, the phrases "Judge *may* refer" cases to mediation (4. Reference to Mediation) and "parties *shall* appear" (8. Appearance before mediator) are interpreted to mean that judges have discretion to refer cases to mediation, in the first instance, and party appearance at mediation is mandatory, in the second.

<sup>2</sup> Form 28A will need to be amended. See the attached Order for Mediation, which provides for sanctions of dismissal or default by the Court in the event parties do not appear at the mediation, as directed.

<sup>3</sup> Five mediators will be listed on a roster (assigned to rosters at random) for use by the judges. Mediators will be rotated on and off rosters depending on their availability to accept mediation cases.

<sup>4</sup> It is suggested that the Court Rules related to mediation indicated that the "court shall not grant extension of time except for compelling reasons."

In the event of an agreement, the mediator shall hand-write (or type if convenient) the mediation settlement (form 28D), secure the signature of all parties and lawyers, and sign the mediation agreement.<sup>5</sup>

Within ten (10) days of the final mediation session, the mediator will submit to the court the following:

1. Court record.
2. Signed Statement of Understanding (form 28B).
3. Mediator case reporting form (form 28C).<sup>6</sup>
4. Signed mediation settlement, if reached (form 28D).

### **C. Post Mediation**

In the event of an agreement, the Court Registry will affix the Court seal on the mediation agreements. The parties will pay the mediation fee at the time they uplift the agreement from the Court Registry. The Court will then forward payment to the mediator.

In the event the parties do not reach an agreement, within seven (7) days of receipt of the mediator's reporting form, the Mediation Office will advise the judge that the case has not been settled. Within fourteen (14) days of notification by the Mediation Office, the judge will summons the parties to appear before him or her for the purposes of scheduling a trial date. At that time, the parties will pay the mediation fee to the Court, and the Court will then forward payment to the mediator.

### **D. Mediation Fees**

Mediators will serve pro bono during Settlement Week as a continuation of their training as mediators. Thereafter, Statutory Instrument No. 69 of 1998 (rule 13) states: "There shall be paid to the mediator in equal proportion by the parties to a suit, a mediation fee in accordance with the scale that may be prescribed by the Chief Justice." Accordingly, a policy statement will be made to the Law Association of Zambia at its Annual General Meeting scheduled for the first week of April 2000.

It is recommended that mediation fees be assessed per case (rather than per hour or some other increment of time). It is further recommended, that the parties pay the mediation fee to the Court, which will, in turn, forward the fee to the mediator. In addition, a method for providing mediation services to indigent parties will be devised.

### **E. Rule Amendments**

In order to implement these recommendations, the following Rule amendments to Statutory Instruments No. 71 of 1997 are required:

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<sup>5</sup> Form 28D will need to be revised to include the signature of the mediator. It is recommended that judges not sign mediation agreements.

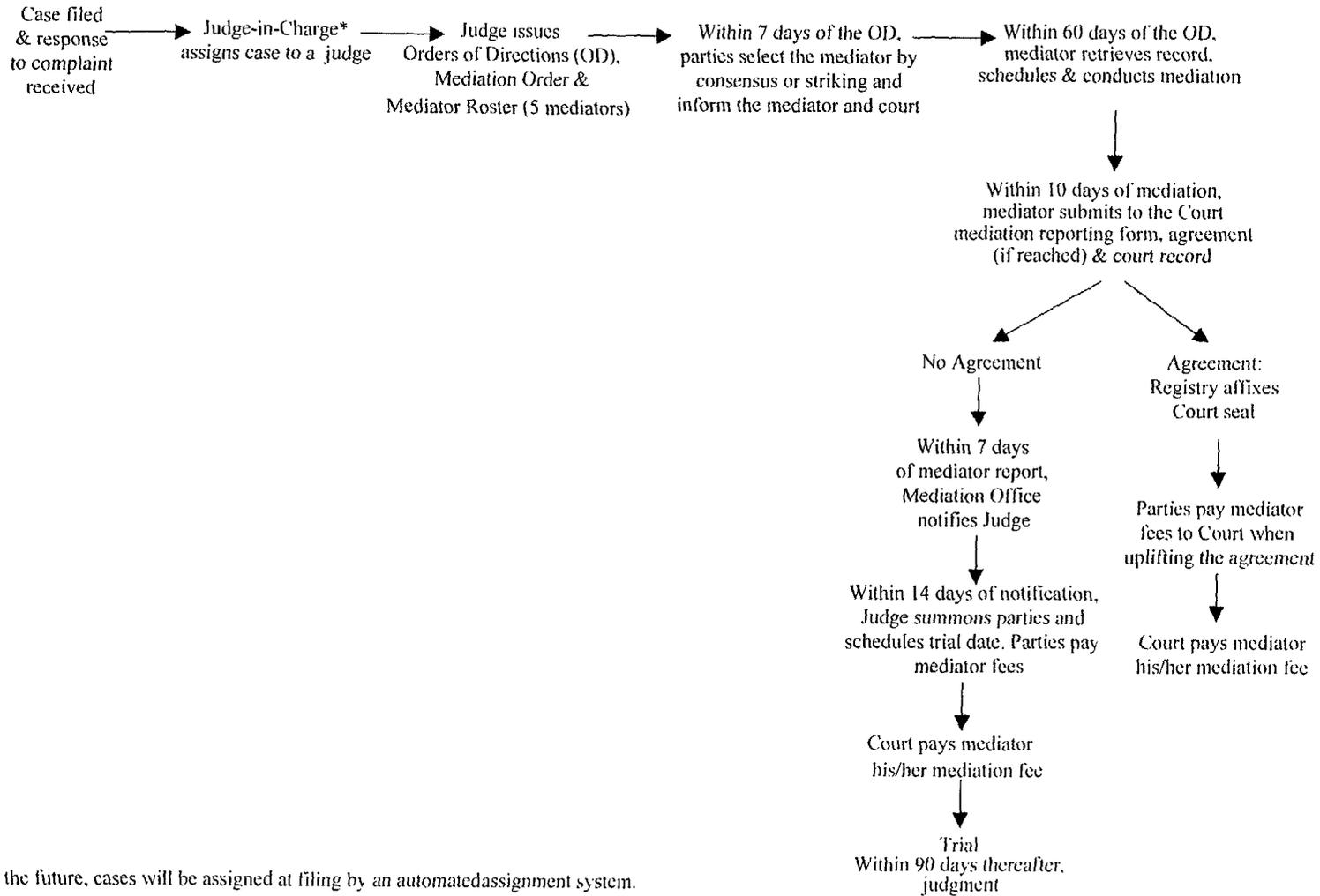
<sup>6</sup> Form 28C will need to be revised to include documentation regarding the attendance of the parties at mediation and other statistical information deemed important for determining the success of the mediation project.

1. **Rule 4. Reference to Mediation:** Form 28A (referral order) amended as necessary based on the attached Order for Mediation. Also, add reference that mediation should be concluded within 60 days of the date of the Orders for Direction and that the court shall not grant extension of time except for compelling reasons. In addition, add sanction provisions, (i.e.)”in the event that a plaintiff and, if represented, the plaintiff’s advocate does not appear at the mediation, the Court may dismiss the case. In the event that a defendant and, if represented, the defendant’s advocate does not appear at the mediation the Court may enter a default judgment against the defendant.”
2. **Rule 5: List of Mediators:** Add **Selection of a Mediator:** Outline the procedures for selecting a mediator from a Mediator Roster (approximately 5 mediators per roster) by consent or striking process. And, add provision that parties must notify the Court and the Mediator of their selection within seven (7) days of the date of the Orders of Direction.
3. **Rule 7. Conduct of Mediator:** Amend rule to reflect that the mediation is to be concluded within sixty (60) days from the date of the Orders for Direction, rather than 60 days from the date of the mediator collecting the record.
4. **Rule 11 (1). Return of Records to Mediation Office or Proper Officer:** Amend rule to indicate that the mediator must return the following documents within 10 days of the conclusion of mediation (in instances of agreement *and* no agreement):
  - ❑ Signed Statement of Understanding (form 28B).
  - ❑ Mediator case reporting form (form 28C—To be Revised).
  - ❑ Signed mediation settlement, if reached (form 28D—To be Revised: include mediator’s signature, exclude judge’s signature).
5. **Rule 11 (2). Return of Records to Mediation Office or Proper Officer:** Amend to reflect, “*if the mediation fails, the mediation officer....*”
6. **Rule 11 (2). Return of Records to Mediation Office or Proper Officer:** Amend to reflect, “*The judge shall summons parties to appear before him or her within 14 days of receipt of the record.*”
7. **Rule 13: Mediator fees.** Amend rules to reflect Chief Justice’s decision regarding mediation fee scale. Also, add payment of the fees by the parties to the Court, and the Court’s payment of fees to the mediator.

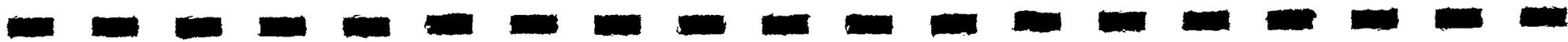
#### F. Commercial Case Processing Flow Chart

The flow chart on the next page reflects the proposed case processing system.

### Zambian Commercial List Case Processing System beginning April 1, 2000



6/5/00



ANNEX D

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**Recommended Form for Announcement of Case Ordered for  
Mediation**

ANNEX D

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**Recommended Form for Announcement of Case Ordered for Mediation**

IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY AT LUSAKA

\_\_\_\_\_ PLAINTIFF

vs.

\_\_\_\_\_ DEFENDANT

Case No. \_\_\_\_\_

**ORDER FOR MEDIATION**

This case has been referred for mediation. ALL parties and their advocates are hereby **ORDERED** to appear at the date, time and location designated by the mediator. The parties should select a mediator listed on the attached Mediator Roster by consensus or the plaintiff and defendant may strike two mediators each and the mediator remaining on the list will be selected. The parties shall inform the Court and the mediator of his or her selection within seven days of the date of this Order. Unless an agreement disposing of this case is filed with the Court in advance of this date, the mediation will occur as scheduled.

The Court **ORDERS** full compliance with the following:

1. All parties who must approve a settlement and at least one advocate for each party, if represented by an advocate, must appear at the mediation. If someone other than a party to the suit must approve the settlement, that person should be present during the scheduled mediation. Institutional parties must have an individual with the authority to settle the case present at the mediation.
2. Each party or advocate must bring to the mediation:
  - a) If damages are requested, an outline of how they have been or should be calculated (including, if appropriate, the time period and rates of interest).
  - b) Relevant documentation, such as appraisals, receipts and records.

3. All proceedings at the mediation, including any statement made or document prepared by any party, advocate, or other participants, are confidential and will not be disclosed to the trial judge or affect the case if it is not settled at this time. No party shall be bound by anything said or done at the mediation unless a settlement is reached. If a settlement is reached, the agreement will be put in writing and will be binding upon all parties to the agreement.

In the event that a plaintiff and, if represented, the plaintiff's advocate does not appear at the mediation, the Court may dismiss the case. In the event that a defendant and, if represented, the defendant's advocate does not appear at the mediation the Court may enter a default judgment against the defendant.

This **ORDER** is entered, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE

ANNEX E

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**Advocate and Litigant Survey Results**

## ANNEX E

### Advocate and Litigant Survey Results<sup>1</sup> for Settlement Week in the High Court, April 24-28, 2000

#### Summary of User Surveys by Advocates<sup>2</sup>

Name of primary mediator	
Bradford Machila	2
Lemba Nyirenda	2
N.K. Mubonda	4
Victor Wells	4
Sue Mwanza	4
W.A. Mubanga	2
Edward Mumbi	2
Sibanze Simuchoba	1
Burton Brian Chirwa	3
Jitesh Naik	11
Nicole Sharpe Phiri	3
Henry Mwenda	1
Marjorie Mwenda	1
Frywell Chirwa	6
Don Zyambo	1
Mumba Malila	2
Ricky Mwanza	2
Yusuf Dodia	2
Nellie Mutti	1
Mwila Chitabo	1

#### Party represented by the advocate

47% Plaintiff	51% Defendant	2% No Answer
---------------	---------------	--------------

#### Case type<sup>3</sup>

Contract (other)	34%
Tort	23%
Employment	14%
Bank loan (non-mortgage)	14%
Mortgages	4%
Other	5%
No Answer	5%

<sup>1</sup> The percentages previously documented earlier in this report differ slightly from those indicated in this addendum—"no answer" responses are included in these calculations.

<sup>2</sup> Based on 55 advocate survey forms.

<sup>3</sup> Case type categories are reflected only for those cases in which advocates completed survey forms—the total includes cases with multiple issues.

**Case disposition**

Settled before mediation	0%
Mediated & fully settled	15%
Mediated and partially settled	11%
Mediated & 2 <sup>nd</sup> mediation scheduled	36%
Mediated & not settled	27%
Not mediated	7%
No Answer	4%

*How many mediation sessions have you participated in before this week?*

0	1-3	4-5
42%	51%	7%

*Did you learn more about mediation as a result of Settlement Week?*

Yes	No	No Answer
85%	11%	4%

*Is mediation through the courts a good idea for Zambia?*

Yes	No	No Answer
96%	0%	4%

*Mediator's level of participation*

None	Low	Medium	High	No Answer
	2%	16%	76%	5%

<b>Mediator Effectiveness</b>	Poor 1	Fair 2	Good 3	Excellent 4	No Answer	Average
How effective was the mediator in helping you and the parties to consider settlement of this case?		11%	29%	56%	4%	<b>3.5</b>

<b>Mediator Performance</b>	Strongly Disagree 1	Disagree 2	Agree 3	Strongly Agree 4	No Answer	Average
The mediator(s) explained the mediation process clearly so that I knew what to expect during the mediation session.			25%	71%	4%	<b>3.7</b>
The mediator(s) allowed me/my advocate to fully present my case.			24%	65%	11%	<b>3.7</b>
The mediator(s) carefully listened to my side of the case.		2%	29%	62%	7%	<b>3.6</b>
The mediator(s) asked proper questions to determine the facts in the case.		4%	25%	64%	7%	<b>3.6</b>
The mediator(s) helped me/my advocate discuss different methods for resolving the case.	4%	2%	35%	47%	13%	<b>3.4</b>

The mediator(s) treated all parties equally.			27%	65%	7%	3.7
Overall, I was satisfied with the mediation itself.		2%	27%	58%	13%	3.6
I was satisfied with the outcome of the mediation.	2%	4%	36%	40%	18%	3.4
Overall, I was satisfied with the mediator(s).			24%	70%	7%	3.7

**Did you learn more about mediation as a result of Settlement Week? If so, how? <sup>4</sup>**

Yes. By the briefing given by the mediator.

Yes. Procedure was very informal allowing the parties to communicate effectively. Parties were able to focus accurately on their interests.

Yes. The fact that parties can freely state facts and positions which otherwise they cannot so if they are preparing for trial.

Yes. To patiently mediate a settlement and fail to reach a solution.

Yes. I participated fully.

No, prior seminar.

Yes. Mediation teaches to deal with issues.

Yes. That is when the mediation process was discussed.

Yes. Well some matters are not meant for mediation as the law cannot be explained or enforced by the mediator, i.e., matters requiring agreement on a question of law.

Yes.

1. Dealing with the weak points of your case in reaching a settlement.
2. Having settlement authority before the proceedings take off.

Yes. I saw how mediation is a true alternative dispute settlement.

Yes. Presentation of materials to help determine issues.

Yes. We were able to discuss issues freely, issues which could not have been discussed (?) between counsel and the parties. We were able to identify and limit the issues.

Yes. By actually experiencing it. Have yet to attend a further session.

Yes. I have understood the process and its objectives which I fully endorse.

Yes. Less stringent procedure than court.

<sup>4</sup> Comments appear exactly as written by the respondent.

Yes. Parties reaching a settlement on their own without pressure or undue influence.  
Speedy disposition of the matter.

Yes. I have learned how to go about settling or determining issues between parties.

Yes. It's purpose.

No. Other training programs.

Yes. Reduces on the backlog in the courts.

Yes. Parties are really anxious to resolve their disputes—formal courts take too long.

Yes. By the brief presentation done by the mediator before the actual session and thereafter by actually participating in the mediation process.

Yes. I have come to understand the importance of mediation in that it saves time.

The informal procedures were more useful than the strict procedures ordinarily used in other hearings.

*One comment illegible.*

**Is mediation through the courts a good idea for Zambia?**

Saves time and parties end up with agreement acceptable to both parties.

It is controlled and court driven.

It is cheaper and saves time.

It is cheaper and saves time.

It (?) the parties together to discuss the issues at hand and in a (?) atmosphere leaving out legal intricacies.

Yes, but the timing needs to be worked on. More notice is required.

We need to sort out the time frame and notice of hearing to allow parties to prepare.

It is cheaper and not time wasting.

It helps to discover (?) and parties decide whether to agree.

Both plaintiff and defendant can be cross-examined.

It is a fast way of disposing of issues.

It is a good idea because at the back of your mind there is a feeling that the process has the full backing of the court.

It appears to be good particularly what will be agreed upon will have a force of a court judgment.

It appears to be a quicker process of dispute resolution and it is not provide an intimidating atmosphere for parties.

This is because in the event of a disagreement we could revert to court.

Because it minimizes costs and avoids long delays.

As an alternative means of dispute resolutions, it complements the courts' efforts.

Affords the parties a chance to settle disputes even at the 11<sup>th</sup> hour.

It appears to be a speedy method of dispute resolution.

expedience

It will decongest court cases.

Short circuit.

It brings the parties together and affords them an opportunity to agree on issues and discuss the matter in a free atmosphere.

It's faster and friendlier.

Because cases are disposed of much quicker than in a usual trial.

It helps resolve matters with little confrontation between parties.

It is informal and speedy if issues are not complex.

### **General Comments**

It is an excellent process.

The process should be encouraged.

Mediation is a good way of resolving cases that can be settled other than going through the lengthy court case.

Very appropriate and useful.  
Good alternative to litigation.

It is a procedure which should strongly be encouraged. It is a new method and we will develop and refine it as we go along.

The idea is good but provision must be made for adjournment to allow parties to consider propositions.

It is cheaper.  
It saves time.  
No rigid rules of evidence.

It is cheaper.  
It saves time.  
No rigid rules of evidence.

It should strongly be encouraged but I recommend that it should be brought up much earlier in the statement of claim and "sequence" (?).

Appears to be a good system but the lawyers also need some sort of negotiation seminar to fully realize the mediation process.

The use of mediation encourages amicable settlements and will hopefully decongest the courts. Confident that in time it will be expanded and the 1<sup>st</sup> option for settling matters.

It should be encouraged as it is cheaper and not time wasting.

It is a good method of dispute resolution and should be encouraged to take root in the Zambian Judicial system.

It is a good and cost-saving measure, which is also faster and promotes reconciliation of the parties.

The introduction of mediation is a very good thing. It has made a number of cases be finalized speedily and it should be encouraged.

It is a new concept requires time to be absorbed or accepted.  
It is quick but has a disadvantage of time wasting when matter drags and remains unresolved.

It's good but not for all matters.

Mediation should be encouraged in courts at a very early stage of the dispute.  
Mediators also should address themselves with basic legal principles not necessary to insist on settling.

I think that mediation in the courts must be encouraged.

I feel mediation will highly decongest the courts.

It is an excellent way of resolving disputes.

Mediation should be the 1<sup>st</sup> step before the matter is set down for trial.

I am satisfied with the mediation process.

I am of the view that mediation is most useful in reducing the caseload of an already overburdened judiciary, such as ours. It is also useful in that it can facilitate the speedy resolution of matters before the courts.

I believe before the parties even come to court there is a process where parties discuss their positions, sometimes with the help of mediators. Disputes however remain unresolved. What is not certain is

whether even after matters go into court they can be resolved by mediation which failed before the legal action was taken. The onus is really on the plaintiff to really consider his position and ask for reasonable demands. The idea of mediation is however welcome. An effort made is better than none.

Reserved my comments until a later date.

This is a very good tool which will decongest our courts. The procedure is user friendly and not complex to the average man. It fits in perfectly with our traditional Zambian way of dispute resolution.

For expediency basically.

A great idea. The more it takes pace the more we'll learn and appreciate it.

It is an excellent way of dispute resolution but most often the advocates misguide their clients by informing them that they need not attend the session or that they'd be better off having it tried in court. All advocates must be trained and informed about the advantages of mediation.

Useful.

Mediation is most welcome and it should be restricted to cases where facts are not violently in dispute.

### Summary of User Surveys by Litigants<sup>5</sup>

Name of primary mediator	
Brian Chirwa	4
Frywell Chirwa	4
Miuela Chitabo	3
Hapenga Kabeta	1
W.A. Mubanga	3
N.K. Mubonda	6
Edward Mumbi	2
Ricky Mwanza	2
Sue Mwanza	2
Marjorie Mwenda	1
Jitish Naik	4
Sunday Nkonde	1
Lemba Nyirenda	2
Nicole Sharpe-Phiri	2
Sibanze Simuchoba	3
Victor Wells	2
Not named	3

<sup>5</sup> Based on forty-three litigant survey forms.

**Party completing survey**

53% Plaintiff	47% Defendant
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*Did you have an advocate represent you in this case?*

97% Yes	2% No	2% No Answer
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*Did you reach an agreement today with the other party?*

Yes	38%
Partial Settlement (or almost settled)	8%
No	55%

*How effective was the mediator(s) in helping you and your advocate to consider settlement of this case?*

<b>Mediator Effectiveness</b>	Poor 1	Fair 2	Good 3	Excellent 4	No Answer	Average
		17%	21%	53%	7%	3.4

<b>Mediator Performance</b>	Strongly Disagree 1	Disagree 2	Agree 3	Strongly Agree 4	No Answer	Average
The mediator(s) explained the mediation process clearly so that I knew what to expect during the mediation session.			30%	67%	2%	3.7
The mediator(s) allowed me/my advocate to fully present my case.			26%	65%	9%	3.7
The mediator(s) carefully listened to my side of the case.			28%	65%	6%	3.7
The mediator(s) asked proper questions to determine the facts in the case.		4%	30%	58%	6%	3.6
The mediator(s) helped me/my advocate discuss different methods for resolving the case.			42%	40%	17%	3.5
The mediator(s) treated all parties equally.			30%	65%	4%	3.6
Overall, I was satisfied with the mediation itself.			42%	49%	9%	3.5
I was satisfied with the outcome of the mediation.	2%	9%	32%	37%	21%	3.3
Overall, I was satisfied with the mediator(s)			35%	56%	9%	3.6

## General Comments<sup>6</sup>

The process is clear and transparent. Hopefully, the next hearing will be conclusive!

It's a good one and let it continue for in future.

I would encourage the mediators to study case file before meeting with the parties.

Punctuality was not maintained.

Mediators could have given a day or two for the two parties to come up with any alternative proposals.

The mediation started at 11:45, not 9:00 a.m. as expected.

It is a very good beginning, should be encouraged.

The mediation process has to be encouraged in Zambia due to that its one way of solving parties concerns as early as possible. Thanks.

1. It is very efficient way of resolving civic disagreements.
2. It is not too costly and can be afforded by all.
3. It will assist in decongesting the courts.

Good advocates take the process as serious and advise their clients accordingly to enable mediation to start on time.

The mediation process should also allow the production of documents that may have been left out in the early stages of the matter.

He (i.e., the mediator) is very very good. Keep up the good work. I love. Bishop John H. Mambo. See Cor. 13:13.

I feel that this mediation process should be extended to government debt. Most chronically difficult cases of debt resolutions have to do with government capital projects. These cases also contribute hugely to the collapse of many would be sound business activities in the country.

The process of mediation is long overdue—court processes in Zambia are very very slow. Train more mediators and let the system be exploited to overcome court backlogs.

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<sup>6</sup> Comments appear exactly as written by the respondent.

PART E

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**First Mediation Meeting Minutes**

**MINUTES OF THE FIRST MEDIATION MEETING HELD ON 1<sup>ST</sup> JUNE 2000 AT  
14:00HRS IN THE CLUB LOUNGE AT THE PAMODZI HOTEL**

**Present**

**Chairperson:** Hon. Madam Justice I M C Mambilima, the Judge in Charge – High Court

Hon. Mr. Justice Peter Chitengi – High Court

Hon. Mr. Deputy Registrar Evans Hamaundu – High Court

Mr. Sidney Watae – USAID

Mr. Henry B. Chalwa – Mediator

Mr. Fraywell S. Chirwa – Mediator

Mr. Burton B. Chirwa – Mediator

Dr. Paul C. Chisale – Mediator

Mr. Patrick A T Chilaizya – Mediator

Mr. Yusuf M. Dodia – Mediator

Mr. Hapenga M. Kabeta – Mediator

Mr. Jowitt L. Kaluwa – Mediator

Dr. Mwangala B. Kamumawanga – Mediator

Mr. Mutale I. Kanyanta – Mediator

Mr. Mumba Malila – Mediator

Dr. Muzibairi S. Mashamba – Mediator

Mr. Newton K. Mubonda – Mediator

Mr. Edward K. Mumbi – Mediator

Mr. Zacks C. Musonda – Mediator

Ms. Nellie B. K. Mutti – Mediator

Mr. Nigel K. Mutuna – Mediator

Ms. Sue M. S. Mwaanza – Mediator

Mr. Ricky L. Mwanza – Mediator

Dr. Henry M. Mwenda – Mediator

Ms. Majorie G. J. Mwenda – Mediator

Mr. Jitesh Naik – Mediator

Mr. Sunday Nkonde – Mediator

Mr. Walubita J. Nyirongo – Mediator

Ms. Nicola A. S. Phiri – Mediator

Mr. Sibanza Simuchoba – Mediator

Mr. Geoffrey W. Simukoko – Mediator

Mr. Don W. Zyambo – Mediator

**Secretary:** Mr. Erasmus Masuwa – High Court

**Apologies for Absence**

Mr. Mwila Chitabo – Mediator

Mr. Bradford Machila – Mediator

Mr. Willy Aubbie Mubanga – Mediator

## **1. Opening Remarks**

The Chairperson Hon. Madam Justice I. M. C. Mambilima opened the meeting at 14:00hrs and warmly welcomed everyone present. She stated that she was actually standing in for His Lordship the Hon. Chief Justice who could not be present due to other commitments. She, however, mentioned that her presence and that of the Hon. Justice Peter Chitengi was testimony that the programme of Mediation is firmly rooted in the High Court. The Chairperson went on to say that the aim of the meeting was not only to award certificates to Mediators but also discuss other matters that will ensure success of the Mediation Programme in Zambia.

The Chairperson informed the gathering that the Judiciary in its continued reform programme is determined to see Mediation succeed in Zambia. She then said that liaison between the Judiciary and the Mediators will be cardinal and the Judiciary has set up an office where Mediators will meet Judiciary Staff and track cases to record at every other stage whether a case has been settled fully, settled partially, adjourned, or failed. The Chairperson then said that Judges will ensure that sanctions are imposed on parties who will either not appear for mediation or default on the agreement at mediation. To this end, she said that Judges will not entertain any cases sent for mediation until a report is obtained from a Mediator indicating that parties attended but mediation failed.

The Chairperson requested the Secretary to obtain particulars of Mediators relating to their professions and physical and postal addresses for networking purposes. She indicated that the Judiciary already had phone numbers for Mediators. She then told the meeting that the Secretary would henceforth be the contact person for all mediation issues and requested him to give the Mediators his contact telephone numbers.

In her concluding remarks, the Chairperson implored everyone in the meeting to take ownership of the programme to ensure its success. She said that the failure or success of the programme will be national which is why all present should apply themselves.

The Chairperson then opened the meeting for discussion.

## **2. Suggestions**

It was suggested that:

- 2.01 the Judiciary should quickly announce how much a Mediator will get per case mediated;
- 2.02 a sum of US \$100 net of VAT per case should be charged and shared equally between or among the parties before the first sitting;
- 2.03 the parties to a matter will be expected to file sufficient copies of the Statement of Claim and Defense so that Mediators are availed same;

- 2.04 since the Attorney General's office is the major culprit in absconding or attending without settlement authority, the Judiciary should urgently find means and ways of compelling this office to comply;
- 2.05 amendments be made to the **ORDER FOR MEDIATION form** so that there be an instruction for holding mediation within 14 days instead of imposing a date and further that the ambiguity in item (2) of the form be clarified;
- 2.06 the **STATEMENT OF UNDERSTANDING** be amended so that the signature of the Mediator does not come under the plaintiff's but somewhere in the middle to emphasize neutrality and that the date moves to the top of the page;
- 2.07 the **MEDIATION CASE REPORTING form** be amended to clarify which party has not appeared or if it is both parties who have not appeared;
- 2.08 the **CONSENT SETTLEMENT ORDER** be amended so that more space is given for the settlement of details; and
- 2.09 a provision be made in the rules for a mediator to ask for more time depending on the proceedings of the mediation.

### 3. Conclusion

The Chairperson noted the suggestions of the Mediators and assured them that she would be meeting with the Chief Justice soon where decisions would be made and communicated to the Mediators. She advised the Secretary to quickly make the adjustments to the forms as suggested and submit them for her scrutiny. She then thanked everybody for a lively debut meeting and urged everyone to keep up the morale and enthusiasm she had observed. She reiterated the need for close liaison so that progress is monitored and again urged the Mediators to work closely with the Judiciary.

### 4. Certification

Certificates were then presented by the Chairperson to the Mediators present and the meeting was closed at 16:00hrs.

MINUTES OF THE FIRST MEDIATION MEETING HELD ON 1<sup>ST</sup> JUNE 2000  
AT 14:00HRS IN THE CLUB LOUNGE AT THE PAMODZI HOTEL

PRESENT

<b>Chairperson:</b> Hon. Madam Justice I M C Mambilima, the Judge In Charge	- High Court
Hon. Mr Justice Peter Chitengi	- High Court
Hon. Mr Deputy Registrar Evans Hamaundu	- High Court
Mr Sidney Watae	USAID
Mr Henry B Chalwa	Mediator
Mr Fraywell S Chirwa	"
<del>Mr Burton B Chirwa</del>	"
Dr Paul C Chisale	"
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Mr Edward K Mumbi	"
Mr Zacks C Musonda	"
Ms Nellie B K Mutti	"
Mr Nigel K Mutuna	"
Ms Sue M S Mwaanza	"
Mr Ricky L Mwanza	"
Dr Henry M Mwenda	"
Ms Majorie G J Mwenda	"
<del>Mr Jitesh Naik</del>	"
Mr Sunday Nkonde	"
Ms Walubita J Nyirongo	"

Ms Nicola A S Phiri  
Mr Sibanza Simuchoba  
Mr Geoffrey W Simukoko

Mediator  
"  
"  
"  
High Court

*Mr Don W Zyambo*

Secretary: Mr Erasmus Masuwa

APOLOGIES FOR ABSENCE

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Mr Bradford Machila  
Mr Willy Aubbie Mubanga

Mediator  
"  
"

1. OPENING REMARKS

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The Chairperson informed the gathering that the Judiciary in its continued reform programme is determined to see Mediation succeed in Zambia. She then said that liaison between the Judiciary and the Mediators will be cardinal and the Judiciary has set up an office where Mediators will meet Judiciary Staff and track cases to record at every other stage whether a case has been settled fully, settled partially, adjourned, or failed. The Chairperson then said that Judges will ensure that sanctions are imposed on parties who will either not appear for mediation or

*84*

default on the agreement at mediation. To this end, she said that Judges will not entertain any cases sent for mediation until a report is obtained from a Mediator indicating that parties attended but mediation failed.

The Chairperson requested the Secretary to obtain particulars of Mediators relating to their professions and physical and postal addresses for networking purposes. She indicated that the Judiciary already had phone numbers of Mediators. She then told the meeting that the Secretary would hence forth be the contact person for all mediation issues and requested him to give the Mediators his contact telephone numbers.

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- the Judiciary should urgently find means and ways of compelling this office to comply;
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2. 08 the **CONSENT SETTLEMENT ORDER** be amended so that more space is given for the settlement details; and
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### CONCLUSION

The Chairperson noted the suggestions of the Mediators and assured them that she would be meeting with the Chief Justice soon where decisions would be made and communicated to the Mediators. She advised the Secretary to quickly make the adjustments to the forms as suggested and submit them for her scrutiny. She then thanked everybody present for a lively debut meeting and urged everyone to keep

up the morale and enthusiasm she had observed. She reiterated the need for close liaison so that progress is monitored and again urged the Mediators to work closely with the Judiciary.

**CERTIFICATION**

Certificates were then presented by the Chairperson to the Mediators present and the meeting was closed at 16:00hrs.

**Chairperson**

**Secretary**

PART F

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**Second Mediator Training and Settlement Week Trip Report**

**DEMOCRACY AND GOVERNANCE IQC:  
RULE OF LAW**



Contract No. AEP-I-807-96-90030-00

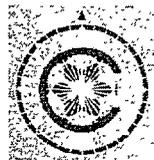
**Trip Report:  
Mediator, Judicial, and Advocate Training and Settlement Week  
Ndola, Zambia**

Submitted: September 25, 2000

Sponsored by:



Organized by:



CHEMONICS INTERNATIONAL INC.

2000

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**Trip Report**

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**Trip Report**  
**Mediator, Judicial, and Advocate Training and Settlement Week**  
**Ndola, Zambia, July 26-August 12, 2000**

**Implementation of Court-Annexed Mediation in Zambia**  
**USAID/Zambia Assistance to the Judiciary**

**Contract No. OUT-AEP-1-807-96-00030-00**  
**(AEP-5488-1-00-8030-00)**

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**Introduction**

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As occurred in Lusaka in April 2000, U.S. mediators/trainers traveled to Ndola to conduct mediator training for a multi-disciplinary group of professionals<sup>2</sup> and to present orientation programs for advocates and judges. In addition, the consultants were instrumental in the administration of Settlement Week—a weeklong event during which seventy-nine<sup>3</sup> cases were scheduled for mediation—and mentored Zambian mediators during Settlement Week. Furthermore, the consultants met with members of the Judiciary and other key USAID and Zambian leaders to advance an understanding about mediation. These activities<sup>4</sup> resulted in the achievement of the project's Phase II objective: *To train the second class of Zambian mediators to successfully co-mediate Settlement Week cases.*

In summary:

1. Twenty-eight Zambian professionals from the Copperbelt were trained as mediators and mentored during Settlement Week;
2. Seventy-nine cases were mediated during Settlement Week;
3. Settlement Week procedures were revised and implemented in the Ndola High Court;
4. Seven judges from the Copperbelt and the Deputy Registrar of the Ndola High Court met to discuss mediation and case selection; and,
5. Approximately 75 advocates received information about advocacy techniques in mediation during workshops held in Ndola and in Lusaka.

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<sup>1</sup> Judge Nan R. Shuker and Dawn Martin contributed to this report.

<sup>2</sup> Training participants included architects, lawyers, engineers, land surveyors and other professionals.

<sup>3</sup> Initially, 124 cases were referred to mediation. However, 45 cases originating in the Industrial Relations Court were removed from the Settlement Week docket due to lack of statutory authorization for referral to mediation.

<sup>4</sup> See the Addendum for the consultants' itinerary while in Zambia.

This report includes an assessment of the way in which this phase of the project was carried-out and the impact of previous recommendations on the success of the overall effort. It is divided into four sections, including:

- ◆ *Training Overview*: A summary of (1) the various training programs offered to mediators, advocates and judges; and (2) evaluations completed by training participants.
- ◆ *Settlement Week Executive Summary*: A summary of key findings based on an analysis of the Settlement Week case statistics, and surveys completed by advocates and parties participating in mediation.
- ◆ *Conclusions and Recommendations*: An assessment based on the project's development thus far and the desire of the leadership of the Zambian Courts to implement mediation throughout the civil judicial system.
- ◆ *Addendum*: Detailed descriptions of the mediator-training program, data analysis of mediation participant surveys, training manuals, and other miscellaneous information related to this project and not provided in previously submitted planning documents or reports.

## **Training Overview**

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The purpose of the various training programs was threefold:

1. To build a discrete set of skills related to mediation—whether the individual was a professional learning how to be a mediator; a judge learning how to select cases for mediation and how to talk to litigants about the mediation process; or an advocate learning how to represent clients in a new and different forum;
2. To create the philosophical underpinning and procedural mechanisms consistent with Zambian culture as well as in line with “best practices” we know to be true for court-annexed mediation; and,
3. To generate respected and vocal advocates for mediation within the legal system and throughout the community at-large.

### ***Mediator Training***

Key documents related to the weeklong mediation training were developed, including a *Mediator Training Manual*, training agenda, role-play scenarios, and evaluation forms<sup>5</sup>. The five-day training program included information about mediation theory and practice, group discussions, mediation demonstrations, and experiential exercises to develop communication, negotiation, and facilitation skills. A substantial portion of the training was devoted to role-play sessions, during which the participants practiced mediating disputes characteristic of cases filed in the High Court of Zambia.

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<sup>5</sup> Please see the *Trip Report dated June 2000 for Mediator Training and Settlement Week #1* for copies of the role-play scenarios and evaluation forms. The mediation training agenda used in the Copperbelt is included as an addendum to this report.



The trainers evaluated each participant's performance during these practice sessions. Throughout the week, the training agenda and mediator role-play assignments were adjusted to ensure maximum learning opportunities for the participants. Evaluation results confirm that participants considered the interactive and experiential training format an effective method for teaching mediation skills and techniques.

At the conclusion of each day, participants were asked to rate the effectiveness of the training at teaching them mediation skills and techniques. Participants were asked to rank each item from (1) very ineffective to (3) moderately effective to (5) very effective. As seen from the evaluation results below as well as the general comments provided by participants throughout the training (see Addendum), participants positively rated all elements of the training program as being effective or highly effective.

*Evaluation of Overall Training*

	Average <sup>6</sup>
Role Plays	4.6
Group Discussions	4.6
Training Materials	4.5
Trainers	4.8
Overall Training	4.7

Following the training, the participants' newly acquired skills were reinforced through practical mediation experience during Settlement Week. With every case they mediated, the newly trained mediators became more confident and enthusiastic about the effectiveness of mediation. With very few exceptions, the participants proved to be an extremely talented and dedicated group of mediators. They also are a group of highly regarded professionals in Ndola and the Copperbelt. It is the consultants' view that they will be articulate spokespeople on behalf of the mediation program and will deliver a high standard of service.

***Advocate Trainings***

The attached *Advocate Training Manual* was developed, distributed, and reviewed with approximately 75 advocates practicing in Lusaka, Ndola, and the Copperbelt. Judge Nan Shuker and Dr. Cecil Canton conducted the training in Lusaka. Dr. Canton and attorney Melissa Rhea conducted the advocates' session in Ndola, assisted by the Deputy Registrar of the High Court in Ndola. The trainings focused on the following points:

- ◆ Process distinctions between mediation and adjudication
- ◆ The stages of the mediation process and the role of the mediator
- ◆ Settlement Week policies and procedures
- ◆ Advocacy skills and techniques during mediation
- ◆ Preparing and advising clients during mediation
- ◆ Mediation Rules for the High Court of Zambia

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<sup>6</sup> The average is based on the total number of responses for each category.

The advocate training sessions were well received and proved to be an effective way to educate the legal community about mediation. It is believed that these training sessions<sup>7</sup>, in conjunction with the issuance of judicial orders and sanctions (discussed later in this report) increased the participation of advocates and their clients in Settlement Week.

### **Judicial Trainings**

The attached *Judicial Training Manual* was developed, distributed, and reviewed with approximately seven judges. The training was conducted by Judge Nan Shuker and Judge Susan Winfield, and provided an opportunity for the judges to express concerns with their colleagues, out of the presence of advocates or other court officials. The training focused on the following points:

- ◆ Process distinctions between mediation and adjudication
- ◆ The stages of the mediation process and the role of the mediator
- ◆ Settlement Week policies and procedures
- ◆ Selection of cases for mediation and future referral procedures
- ◆ Mediation Rules for the High Court of Zambia

Enthusiasm for mediation was high. However, judicial participants expressed the need for more “hands-on” training/coaching about the benefits of mediation and the role of the judge in the referral and management of mediation cases.

### **Settlement Week Executive Summary**

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The fact that Settlement Week in Ndola achieved its intended impact is supported by the key findings found below. These findings are based on the case disposition figures and the advocate and party participant surveys. The results achieved through Settlement Week include:

1. The Chief Justice of Zambia and other chief officials of the Zambian judicial system publicly endorsed mediation.
2. A large number of people (litigants, lawyers, judicial officers, and court personnel) were educated about mediation.<sup>8</sup>
3. A large number of cases were resolved or otherwise removed from the court’s docket during a one-week period of time.
4. The professionals trained as mediators, and many of the lawyers and litigants participating in mediation, have become vocal advocates of the process. They, in

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<sup>7</sup> A recommendation for advocacy training resulted following Settlement Week in Lusaka, where a similar session for advocates was contemplated, but did not occur due to scheduling difficulties with the *Zambian Law Association*.

<sup>8</sup> General comments on user surveys support the contention that participating in a mediation session is far more effective in spurring endorsement of the process than is attendance at numerous seminars, reading about mediation, and/or engaging in theoretical discussions about the topic.

turn, will substantially influence the acceptance of mediation throughout the community.

5. Data collected from lawyers and litigants through user surveys confirmed that participants were highly satisfied with the mediation process and consider it a welcome enhancement of the Zambian judicial system.
6. The successful partnership between the bench and the bar in resolving cases creates a synergy that will have lasting positive effects.
7. Administrative procedures, automated capabilities, and policy decisions were tested, resulting in further recommendations for short- and long-term enhancement of the system.

*Settlement Week Key Findings as of August 11, 2000: Case Statistics and Responses from Advocate and Litigant Surveys<sup>9</sup>*

- ◆ Almost without exception, parties and advocates completing survey forms indicated that they learned a great deal about mediation as a result of Settlement Week. And, they endorse the continuation of the process in the High Court in Zambia. One comment by a party: “*excellently done—good beginning*” reflects the general sentiment expressed by mediation participants.
- ◆ Seventy-nine cases were scheduled for mediation. In 56 cases (70 percent), all parties and advocates appeared with settlement authority. This reflects a dramatic contrast, when compared to the appearance/authority rate of 30 percent during the Lusaka Settlement Week.
- ◆ Of the 79 cases scheduled for mediation, 66 (84 percent) were concluded during Settlement Week and 13 (16 percent) were pending additional mediation at the conclusion of Settlement Week<sup>10</sup>. Of the cases concluded, 46 cases (70 percent) were removed from the court’s docket due to settlement. In addition to settlement, cases were removed by the Deputy Registrar for plaintiff’s failure to appear (i.e., case struck-out) or defendant’s failure to appear (i.e., default judgment entered) at scheduled mediation sessions.
- ◆ In 43 cases, the mediation process was completed during Settlement Week. Of those cases, the parties reached agreement in 29 cases (68 percent). Most of the mediators successfully resolved at least one case. The few exceptions have cases pending further mediation.
- ◆ Of the cases scheduled for mediation, 32 percent of the cases were filed in the court between the years 2000 and 1998; 20 percent were filed in 1997 or 1996; 13 percent were filed in 1995 or 1994; and one case was filed in 1984. Only two cases with a filing date prior to 1996 were not settled or otherwise removed from the court’s docket. On average, the Ndola cases had been pending much longer than the cases

<sup>9</sup> See the Addendum for a detailed reporting of the data and comments by respondents.

<sup>10</sup> Case disposition data for cases continuing mediation after Settlement Week is currently being collected by the High Court.

selected in Lusaka. In Lusaka, 60 percent of the cases had been pending for only 2-to-3 years.

- ◆ Fifty-nine percent of the cases scheduled for mediation were contract disputes; 19 percent were for damages; nine percent were miscellaneous case types; and six percent were employment or possession cases, respectively. No discernable trends were apparent when comparing the rate of settlement and case type.
- ◆ Comparable numbers of plaintiff and defendant advocates (49 percent and 51 percent respectively) completed survey forms. Ninety-six percent of those advocates indicated that they learned more about mediation as a result of Settlement Week. With the exception of two attorneys<sup>11</sup>, advocates unanimously agreed that mediation through the courts is a good idea for Zambia.
- ◆ Advocates were positive about the mediation process. Ninety-six percent indicated that they were satisfied with the mediation itself, and 91 percent were satisfied with the outcome of the mediation. Advocates, regardless of whether or not an agreement was reached in mediation, reported the same level of satisfaction with the mediation process.
- ◆ Likewise, advocate satisfaction with the mediators' performance was equally high. When asked how effective the mediator was in helping the parties to consider settlement of the case, 91 percent of the advocates indicated that the mediator was good or excellent. Furthermore, 97 percent agreed with the statement: "overall, I was satisfied with the mediator."
- ◆ One hundred percent of the litigants indicated that they were satisfied with the mediation itself, and 90 percent were satisfied with the outcome of the mediation. Parties, regardless of whether or not an agreement was reached in mediation, reported the same level of satisfaction with the mediation process.
- ◆ Litigants were as satisfied with the mediators and the mediation process as their advocates. Ninety percent of the litigants indicated that the mediator was good or excellent in helping them to consider settlement and 100% agreed with the statement: "overall, I was satisfied with the mediator."

#### ***Settlement Week Administration***

The advance preparation for this Settlement Week, together with the implementation of key recommendations resulting from the experiences in Lusaka, resulted in improved administration of Settlement Week. For example, the total number of cases mediated was dramatically improved, due at least in part to (1) sending notices about the dates and times of mediation sessions several weeks prior to Settlement Week and providing personal service to advocates; (2) cross-checking advocates' mediation schedules to guard against duplicate scheduling; and (3) issuing court orders which allowed the Deputy Registrar to assess sanctions (i.e., striking-out

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<sup>11</sup> One advocate responded that it was "too early to tell" and the other indicated mediation was not a good idea for Zambia.

cases or entering default judgment) for failure to appear at a scheduled mediation and for failure to appear with full settlement instructions.

Imposing sanctions for non-appearance also resulted in the further reduction of the court's docket, and it sent a strong message to advocates and litigants that the Court takes the mediation process—and their participation in it—very seriously. In some cases, litigants who were previously unavailable did appear within minutes when they were telephoned by their advocates and informed that the Deputy Registrar would in fact take punitive action due to their non-compliance with the mediation court order.

Furthermore, advocate education was also a key element of the Ndola success. Advocates were comfortable with their role in the mediation process, and therefore worked to advance, rather than hinder, the process. While the training sessions provided in Lusaka and Ndola were a beginning, future meetings with the Law Association of Zambia should be held to educate advocates about the potential benefits of mediation, and to address questions/concerns that might arise. This will ensure that a greater percentage of advocates attend future mediation sessions prepared to engage in settlement discussions.

The greater number of cases being settled in Ndola, as compared to Lusaka, may be attributed to the increased number of cases in which all parties were present and ready to negotiate. Another factor may be that the cases tended to be older—or pending longer. Furthermore, advocates and litigants were better informed about mediation prior to mediation. And, cases were scheduled such that more time was allowed for each mediation session to be conducted.

Finally, the Court's expectations related to the training and certification of mediators were clear and well articulated. Mediators understood the requirements they had to fulfill to receive their certification, and all mediators complied with the court's request to be available every day for a two-week period. The tremendous commitment of the mediators was readily apparent—a large number of mediators appeared at court everyday, even if they had not been scheduled to conduct mediation on that day. All the mediators were eager to observe mediation, co-mediate with their colleagues, handle reassigned cases, or otherwise help-out in any way possible. The camaraderie of the group during the closing ceremony was heartwarming and sets a tone for continued mentorship, peer coaching, and professional development within the group.

All in all, the lessons learned in Lusaka were very beneficial to the Ndola Pilot Program.

### **Conclusions and Recommendations**

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Recommendations are based on the state of mediation in Zambia to date. They are intended to advance and ensure continued operation of a successful court-annexed mediation throughout the country. First, an overview of system issues is provided, followed by a recommended approach for addressing these issues.

#### ***System Issues***

As with all mediation systems—particularly those that are intended to serve courts throughout a country—a strong infrastructure must exist to move the program forward and to keep it a priority

as decisions about the allocation of time, effort and scarce resources are made. In addition to this macro-level concern, on the micro-level, day-to-day administration of the mediation program, court-by-court, must be managed efficiently and effectively, while also keeping an eye to issues of quality control, continued training, and professional development.

The macro-and micro- level support systems for mediation have been strengthened over the past year. The success of the Lusaka and Ndola mediator training and Settlement Week events attest to that fact. Yet to truly institutionalize mediation in the High Court of Zambia, and possibly other courts in Zambia, it is recommended that attention be given to the following areas:

- ◆ National leadership, oversight, and advocacy
- ◆ Local day-to-day program management
- ◆ Judicial involvement
- ◆ Participation of the Attorney General's Office
- ◆ Amendments: Mediation Rules
- ◆ Quality control and development of in-country expertise
- ◆ Computerization and Civil Case Management

#### **National leadership, oversight, and advocacy**

##### *Court System Oversight and Leadership*

Representatives of the highest echelons of the Zambian judiciary are in favor of mediation. For example, the Chief Justice of Zambia, the Chief Administrator of the Courts, and the Registrar/Chief Policy Advisor of the Courts have been keen and vocal advocates for the use of mediation and Alternative Dispute Resolution (ADR) in the Courts. While managing the demands of their senior, high profile positions, these individuals, and others, have made laudable efforts to keep mediation at the forefront of the Court's agenda.

However, it is imperative that a respected, influential and savvy political "cheerleader" be delegated as the person *solely responsible* for the program's success. Preferably, this individual would be a high-ranking Court administrator—who would work in concert with the Judge assigned to oversee ADR—and would be responsible for: 1) overseeing the national program, including supervision of the National Mediation Coordinator (see comments below); 2) parleying significant judicial system changes, such as ushering rule amendments through the appropriate channels or initiating key policies; 3) serving as liaison with key Court officials, such as the Chief Justice, Judges in Charge, and Chief Executive of the Courts; 4) collaborating with other justice-related officials, such as the Minister of Justice; 5) interfacing with judges and Law Association leaders about their concerns about the system; and so forth.

The Zambian court system is in a pivotal position with respect to the development of mediation as an ADR tool. Careful planning by the Courts is needed to harness the momentum gained, to date, through training, education, and Settlement Week initiatives, for purposes of successfully institutionalizing court-annexed mediation programs in the

country. That is why it is imperative that, from the Court system's perspective, this program be considered a priority management responsibility for this individual; possibly requiring a reprioritizing of their current duties.

### *National Mediation Coordinator*

We understand that Zambia is contemplating the appointment of a National Mediation Coordinator. We recommend that this person report to the court administrator referred to above on all policy and program issues. The National Coordinator<sup>12</sup> would organize general program initiatives, such as arranging for mediator and judicial training, standardizing local procedures, and gathering case statistics. In addition, the Coordinator would monitor local programs and report trends, issues, or resource needs.

It is anticipated that the National Mediation Coordinator would be a mid-level manager and, therefore, would not necessarily have the political status or influence needed to significantly advance the program and further supports our recommendation regarding high-level court oversight and leadership. That being said, the consultants applaud the establishment of this position, and consider the selection of the Coordinator one of the most important decisions the Court will make relative to this program. The creation of a strong leadership and administrative team is absolutely paramount to the success of the program.

### **Local day-to-day program management**

Equally important to the leadership on a macro-level described above, is the administration on a local level, in each court, to ensure that individual cases are processed efficiently through mediation. Administrative case management responsibilities include ensuring that (1) judicial orders are issued, (2) affidavits of service are secured and accurate, (3) case files are available to mediators, (4) mediation rooms are secured, (5) the appropriate forms are completed, and (6) the appropriate action is taken following the mediation—continued mediation, execution of a mediation agreement, issuing sanctions for non-appearance, and so forth. These responsibilities also involve mediator management duties, such as selecting an appropriate mediator for the case, ensuring that no conflicts of interest exist, coaching the mediator if necessary, monitoring the quality of service being provided by the mediator, and initiating remedial assistance to the mediator if necessary. Furthermore, the individual responsible for all of the tasks outlined above also serves as a key public information officer, educating advocates and litigants about mediation on a case-by-case basis.

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<sup>12</sup> During the pilot phase of the mediation program, one person has assumed the duties related to local project coordination on behalf of the USAID Technical Assistance Contractor and to mediation program management on behalf of the judiciary. It is difficult for one person to manage the divergent tasks required by both parties. This arrangement has been problematic in terms of prioritizing responsibilities and ensuring accountability. To increase efficiency and to minimize opportunity for conflict of interest, we recommend that whomever assumes the role of National Mediation Coordinator focus solely on programmatic concerns related to mediation. The local Project Coordinator for the USAID Contractor should be a separate and distinct position held by a person not intimately affiliated with the Judiciary.

Theoretically, these duties could be assumed by the National Mediation Coordinator and administered through a centralized system. In the alternative, we recommend that support, oversight, coordination, and policy/procedural development be maintained on a national level by the Registrar and National Mediation Coordinator, and that the Deputy Registrar in each court, or another designee, be responsible for day-to-day management of the mediators and cases assigned to mediation in each individual court. We have been impressed with the dedication and talent of the Deputy Registrars we have encountered. They are known locally as the person to go to with questions or problems; they maintain quasi-judicial authority to issue sanctions, authorize agreements, etc; and their stature gives the mediation program an importance it might otherwise lack. In addition, the Deputy Registrars report to the Registrar of the Court, which enhances coordination and accountability. In any event, it is important that a local mediation representative be visible and accessible in each court on a daily basis.

### **Judicial involvement**

Zambia enjoys the vocal support of its judges for the use of mediation. However, it appears that judges have a somewhat *hands-off* approach to the process. For example, judges in Ndola and Lusaka were only minimally involved in the selection of cases for Settlement Week.

It is imperative that judges understand the mediation process; that they aggressively and consistently review their cases to determine what types of cases to refer to mediation and the timing of when these cases are best referred to mediation; and that they explain the benefits of mediation and encourage litigants to participate in the process.

Furthermore, judges will be crucial in providing credibility to the sanctioning process for non-appearance. There is a danger that routine judicial reversals of the Deputy Registrar's decisions to strike-out cases or to enter default judgments will foster a counter-productive environment where litigants can avoid the consequences of their non-appearance simply by requesting a review by the judge. Currently, not unlike other countries, a legal culture exists where advocates and litigants routinely fail to appear for court-ordered events. Changing this behavior can begin with enforcing the rules governing appearance of all parties and advocates at mediation—however, this will take great diligence and consistency by all judges.

### **Participation of the Attorney General's Office**

The mediation program has received strong support from the Minister of Justice, who has himself received mediation training. Further coordination with the Attorney General's Office would contribute to the success of mediation in Zambia. Specifically, internal procedures should be developed within the Attorney General's Office to facilitate the mediation process. Legal counsel from that office should be apprised that appearances at mediation are mandatory and have institutional guidelines or other methods of securing settlement instructions prior to mediation. A special training program regarding the role of government counsel in the mediation process, as well as an outline of the institutional mandate described above, is vital. The Attorney General's

Office is involved in a large number of cases; therefore, it can help or hinder the success of this initiative.

#### **Amendments: Mediation Rules**

The Rule amendments<sup>13</sup> to Statutory Instruments No. 71 of 1997 outlined below were recommended previously and continue to be applicable. It is also likely that additional amendments will be necessary after the on-going mediation program is operational for a period of time, and ideas about improvements are gleaned from judges, program administrators, mediators, advocates and litigants. It is recommended that mechanisms for continuous feedback from these audiences be put in place, such as focus group meetings, questionnaires, and actively discussing the mediation program's strengths and areas for improvement during regular meetings of the Law Association.

In addition, it is recommended that the necessary statutory provisions be initiated to allow for the mediation of cases outside of the High Court—specifically Industrial Relations cases. It is our view that these cases are particularly well suited for mediation, and the Industrial Relations Court would greatly benefit from the services of the mediators. However, some consideration may need to be given as to whether the \$100 mediator fee would restrict access by the litigants with limited financial means.

Additional rules amendments recommended include:

- ◆ Rule 4. *Reference to Mediation*: Form 28A (referral order) amended as necessary based on the Order for Mediation. Also, add reference that mediation should be concluded within 60 days of the date of the Orders for Direction and that the court shall not grant extension of time except for extraordinary circumstances.

In addition, add sanction provisions, (i.e. “in the event that a plaintiff and, if represented, the plaintiff’s advocate, do not appear at the mediation, the Court may strike the case. In the event that a defendant and, if represented, the defendant’s advocate does not appear at the mediation the Court may enter a default judgment against the defendant.”)

- ◆ Rule 5: *List of Mediators*: Add *Selection of a Mediator*: Outline the procedures for selecting a mediator from a Mediator Roster (approximately 5 mediators per roster) by consent or striking process. And, add provision that parties must notify the Court and the Mediator of their selection within seven (7) days of the date of the Orders for Direction.
- ◆ Rule 7. *Conduct of Mediator*: Amend rule to reflect that the mediation is to be concluded within sixty (60) days from the date of the Orders for Direction, rather than 60 days from the date of the mediator collecting the record.
- ◆ Rule 11 (1). *Return of Records to Mediation Office or Proper Officer*: Amend rule to indicate that the mediator must return the following documents within 10 days of the conclusion of mediation (in instances of agreement *and* no agreement):

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<sup>13</sup> An initial planning group consisted of Judge Peter Chitengi, High Court Judge; Phillip Musonda, Chief Administrator of the Judiciary; and Nigel Mutuna, then-Secretary of the Law Association of Zambia. The delegation recommended amendments to the Rules, as well as recommendations for the on-going use of mediation in commercial cases. See project reports dated March 2000 and June 2000.

1. Signed Statement of Understanding (form 28B);
  2. Mediator case reporting form (form 28C—To be Revised)
  3. Signed mediation settlement, if reached (form 28D—To be Revised: include mediator's signature, exclude judge's signature<sup>14</sup>).
- ◆ Rule 11 (2). *Return of Records to Mediation Office or Proper Officer*: Amend to reflect, "if the mediation fails, the mediation officer shall...."
  - ◆ Rule 11 (2). *Return of Records to Mediation Office or Proper Officer*: Amend to reflect, "The judge shall summons parties to appear before him or her within 14 days of receipt of the record."
  - ◆ Rule 13: *Mediator fees*. Amend to reflect the Chief Justice's practice direction indicating mediators will receive \$100 per case paid by the parties; the total is divided equally between the parties. Also, the initial planning group recommended that the payment of the fees by the parties be made to the Court, and that the Court transmit the fees to mediators.

#### **Quality control and in-country expertise**

Quality relates to two aspects—(1) efficient case processing and (2) skilled and effective mediators. Issues related to quality case processing have been addressed in many of the sections above. Issues related to quality service being provided by individual mediators includes, but is not limited to:

- ◆ Matching cases to mediators
- ◆ Ensuring that all mediators, not only a select few, are given opportunities to mediate regularly so they can maintain their skills
- ◆ Monitoring the performance of mediators through participant surveys, conversations with participants, and periodic observation of mediators
- ◆ Peer mentorship and support
- ◆ Periodic performance evaluation of mediators
- ◆ Remedial assistance and performance improvement plans, if needed
- ◆ Professional development opportunities through advanced training, professional ADR associations/groups, and national mediation conferences

In-country expertise must be developed in order to ensure that these quality control mechanisms are in place and functioning. The most talented mediators should serve as mediator trainers and performance evaluators and should also spearhead the other educational and peer support initiatives mentioned above. Mediation can only be provided on a long-term basis when the country can ably (1) monitor the performance of its mediators, (2) enhance the skills of veteran mediators, and (3) train new mediators.

The consultants are pleased to hear that the national arbitration association will be expanded to include mediators as well. This will help to foster camaraderie among Alternative Dispute Resolution (ADR) professionals in Zambia and create an organized synergy to advance the

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<sup>14</sup> In practice in Lusaka and Ndola during Settlement Week, the Deputy Registrar or Registrar signed the mediation agreements, rather than the judge.

use of ADR throughout the country. This group should also be instrumental in providing feedback and recommendations to the Court regarding the policies and procedures governing the mediation program.

### **Computerization and civil case management**

It has always been the view of the consultants that mediation should be incorporated with an integrated civil case management/civil delay reduction program. We understand that this broader initiative is outside the scope of this mediation project. Nevertheless, we recommend its serious consideration.

In brief, a case management/civil delay reduction initiative would help the court to manage its cases from filing to final disposition as efficiently as possible. The time periods between court events are expedited for less complex cases. A *next event* before the court is always scheduled—applying pressure on advocates and parties to proceed with the litigation. Sanctions are imposed for missing deadlines or court appearances. This type of case management system is automated so that judges and court officials readily monitor the status of individual cases, as well as their case docket as a whole.

It was our understanding that such a computerized system had been developed and was operational. However, we discovered that the functional capabilities of the system are unclear, as is whether or not the Court is actually utilizing the system in any way. Regardless, a system that is functional and user friendly should be developed so that:

- ◆ Cases can be scheduled for all court events, including mediation, and notices can be generated automatically;
- ◆ Case dockets can be organized in a variety of ways, including by judge, by case number, by day, etc.;
- ◆ The progress of cases can be monitored and tracked so that cases are not left languishing in the system; and
- ◆ Information related to the timely processing of cases can be maintained, including the average time period between case filing and disposition, the period of time cases are pending in mediation, and so forth.

If such a system were in place, no special computer programming would be required to manage Settlement Week events or the on-going mediation program.

The Access software program developed for Ndola did help expedite administrative functions and statistical/record keeping. However, it has limitations, and further improvements or use of another off-the-shelf software program may more fully maximize the potential capabilities of automation. For example:

- ◆ *Easy manipulation of the database:* Given the inability to manipulate the primary database, data entry and statistical analysis are limited. The various problems this causes are intricate and numerous. In the final analysis, the Access program is better than a manual accounting of Settlement Week cases, but it lacks the flexibility and complexity to manage future Settlement

Week-type events or the on-going case-by-case referral to mediation *ad infinitum*.

- ◆ *Develop a data entry protocol:* Data entry clerks should be advised regarding entry protocols. As one example: advocate *A. Patel* was entered such that it appeared in alphabetical listings under *A* rather than *P*. Inconsistencies in data entry, typographical errors, and the lack of standardized entries limit functioning.
- ◆ *Automatic identification of scheduling conflicts:* An automated system is needed for checking duplicate scheduling of advocates and mediators who also appear in mediation cases as advocates. The current program requires that after organizing the advocate list in alphabetical order, one visually checks for overlap. This process is cumbersome and less than error-free. Advocates for plaintiffs and defendants must be viewed separately—a list of all cases in which an advocate is scheduled, regardless of the party they represent is not available. Furthermore, mediators who were also advocates cannot be checked for duplicate scheduling.

### ***Conclusion***

It is anticipated that mediation successes in Zambia will, in turn, further the country's broader judicial reform goals of increasing access to justice and enhancing both the efficiency and effectiveness of judicial processes. The long-term success of mediation in Zambia will hinge on many factors including, among others, aggressive national leadership and oversight by the Court; support from the Ministry of Justice and other governmental and business leaders; efficient processing of mediation cases; the availability of skilled mediators and the ability to train and evaluate the mediator corps; and party and advocate understanding of the mediation process. To reiterate a participant survey comment from Ndola, "*excellently done—good beginning,*" the High Court of Zambia is definitely off to a "good beginning." All indications are that if the Court can maintain the momentum and enthusiasm generated for mediation thus far, it is well on its way to implementing a viable national initiative.

**Addendum: Consultants' Itinerary**

7/26/2000	Melinda Ostermeyer, Team Leader, arrives in Ndola
7/28-29/2000	Meetings with administrative staff, USAID representatives, judges and others
7/30/2000	Consultants arrive in Lusaka and/or Ndola
7/31/2000	Judge Shuker and Dr. Canton meet with the members of the Zambia Law Association and Government advocates in Lusaka <sup>15</sup>
7/31/2000-8/4/2000	Mediator Training
8/5/2000	Training for members of the Zambia Law Association and Government advocates in Ndola
8/5/2000	Training for members of the Judiciary in the Copperbelt
8/8/2000-8/11/2000	Settlement Week
8/12/2000	Consultants leave Lusaka

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<sup>15</sup> Judge Shuker and Dr. Canton joined the trainer/mediator team in Ndola the next day.

**Addendum: Trainers' Agenda: Mediation Training Ndola, Zambia<sup>16</sup>:**

**Monday**

		<i>Trainer</i>	<i>Topics/Activities</i>	<i>Trainers' Notes</i>
11:00	45	Ostermeyer	Participant/trainer introductions	Drawings: Personal responses to conflict. Explain drawing, name, profession, training expectations.
11:45	5	Ostermeyer	Agenda, Rules, Evaluations	
11:50	40	Martin	"The Burning Sailboat" Compare legal/mediation process	Exercise: Compares a decision-making process and outcomes.
12:30	30	Ostermeyer	"Getting Clear" Listener behaviors	Exercise: In pairs, talk about a personal situation in which you are unclear about what to do.
1:00	75		<i>Lunch</i>	
2:15	20	Ostermeyer	Mediation Overview: Process & Principles, Procedural Justice Theory	
2:35	135	All	Demonstration/Debrief (take a <i>break</i> as appropriate) Facilitative/Evaluative Styles	Contractor, roof repair dispute Melissa: Mediator, Susan/Dawn: attorneys
4:45	15	Ostermeyer	Wrap-up, Evaluations, Close	
TBD			Trainers' Meeting <sup>17</sup>	

**Tuesday**

		<i>Trainer</i>	<i>Topics/Activities</i>	<i>Trainers' Notes</i>
9:00	10	Ostermeyer	Q&A, Agenda	
9:10	15	Martin	Responses to Conflict	Build on introductory drawings
9:25	25	Ostermeyer	Negotiation Best Practices Benefits of Adding a Mediator	DM charts best practices
9:50	50	Martin	Mediator Introductory Statements Practice Statements Seating Exercise Initial Statements, Types of Q's	In triads, trainees practice their statements. Trainees write their own introductions. Complete seating exercise.
10:40	20		<i>Break</i>	

<sup>16</sup> The Agenda was revised as needed as the training progressed.

<sup>17</sup> At the end of each day, the training team met to review each trainee's progress and adjust the next day's schedule and trainee/trainer group assignments as needed.

11:00	30	Melinda	"The Vacation" Identifying Interests	Exercise: Brainstorm interests, compare & contrast.
11:30	90	All	Role Playing "tips" & co-mediation Role Play #1 <sup>18</sup>	Co-Mediators Mercedes Contract
<b>1:00</b>	<b>75</b>		<b>Lunch</b>	
2:15	40	Ostermeyer	Case Study: Hanna & Emma Summarizing Interests	Case Study: brainstorm interests, practice summarizing in dyads/triads.
2:55	130	All	Role Play #2  Break at 4 prior to small group debrief	Co-Mediators Water Contract
4:45	15	Ostermeyer	Wrap-up, Evaluations Close	
TBD			Trainers' Meeting	

**Wednesday**

	<i>Est. Time</i>	<i>Trainer</i>	<i>Topics/Activities</i>	<i>Trainers' Notes</i>
9:00	15	Ostermeyer	Q&A, Agenda	
9:15	45	Martin	Questions/Information Gathering Case Study: Hanna & Emma	Ordering, timing, interest-based. Brainstorm and practice related to case study.
10:00	40	Ostermeyer	Individual Sessions. Generating Options, Transmitting Offers. Getting to Closure Case Study: Hanna & Emma	Brainstorm and practice related to case study.
<b>10:40</b>	<b>20</b>		<b>Break</b>	
11:00	120	All	Role Play #3	Retirement Dispute
<b>1:00</b>	<b>75</b>		<b>Lunch</b>	
2:15	30	Martin	Reframing Negatives	
2:45	120	All	Role Play #4	Land Sale Dispute

<sup>18</sup>The time allocated for each role-play includes trainer set-up, trainees' reading their roles, conducting the actual role-play, and small group debrief. As the training progresses, the trainers decide whether the mediators function alone, as co-mediators, or back-to-back—one mediator starts, another finishes the session.

4:45	15	Ostermeyer	Wrap-up, Evaluations, Close	
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**Thursday**

	<i>Est. Time</i>	<i>Trainer</i>	<i>Topics/Activities</i>	<i>Trainers' Notes</i>
9:00	15	Ostermeyer	Q&A, Agenda	
9:15	35	Canton Rhea	Working with advocates Dealing with <i>pro se</i> parties	
9:50	40	Shuker Winfield	Agreements: Writing and Psychological Satisfaction	
<b>10:30</b>	<b>20</b>		<b>Break</b>	
10:50	140	All	Role Play #5	Repatriation Dispute
<b>1:00</b>	<b>75</b>		<b>Lunch</b>	
2:15	30	Rhea	Practical Problems Ethics Exercise	
2:45	120	All	Role Play #6	Fruit Trees Dispute
4:45	15	Ostermeyer	Wrap-up, Evaluations, Close	

**Friday**

	<i>Est. Time</i>	<i>Trainer</i>	<i>Topics/Activities</i>	<i>Trainers' Notes</i>
9:00	15	Ostermeyer	Q&A, Agenda	
9:15	60	All	Review: Ethics Agreements Key process and communication skills	
10:15	120	All	Role Play #7	
<b>12:15</b>	<b>75</b>		<b>Lunch</b>	
1:30		Ostermeyer	Settlement Week Logistical Review Case Assignment Case Review	

## Addendum: Training Participants' Daily Evaluations

*Rating Scale: (1) Very Ineffective—(3) moderately effective—(5) very effective.*

### Monday, July 31

	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>Average</i> <sup>19</sup>
Burning Sailboat	1		3	13	10	4.1
Mediation Demonstration	1		1	4	20	4.6

#### General comments<sup>20</sup>:

- ◆ The mode of presentation and the exercises keep the participants actively involved. Today's activities relate to real practical situations. Very interesting!
- ◆ So far so good.
- ◆ Very helpful thus far.

### Tuesday, August 1

	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>Average</i>
Mediator Introduction			1	9	13	4.5
Hannah & Emma: Case Study		1	1	13	8	4.2
Role Plays			2	7	15	4.5

#### General comments

- ◆ The exercises assist in "Mediator confidence building!!"
- ◆ Yesterday's paper was wrongly marked as "1" instead of "5" (adjusted Monday data accordingly).

### Wednesday, August 2

	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>Average</i>
Information Gathering			3	10	12	4.4
Individual Sessions			2	8	13	4.5
Reframing Negatives		1	7	11	7	3.8
Role Play			1	10	15	4.5

#### General comments

- ◆ Reframing needs to be readdressed more detailed and patiently.
- ◆ Would the trainers mind to form another panel composed of themselves and sketch for us a mediation? Again?
- ◆ The morning session was rather too long without a break.
- ◆ Reframing negative comments was not covered well. Going over may help.
- ◆ There is no need to over-emphasize cultural and individual differences in the mediation process.
- ◆ My confidence was increased and this is also evident from other participants. I'm enjoying myself.

<sup>19</sup> The average is based on the total number of responses for each category/training segment.

<sup>20</sup> Comments appear exactly as written by the respondents. Illegible writing is indicated by a "?".

**Thursday, August 3**

	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>Average</i>
Advocates	1	2	5	9	9	<b>3.9</b>
Agreement Writing		1	1	12	11	<b>4.3</b>
Role Play	1		1	11	13	<b>4.3</b>
Practical Problems		1	4	13	8	<b>4.1</b>

**General comments**

- ◆ Mediation is not so simple after all. The need for all the parties to have a flexible approach and tone down on their interests involves hard work.

**Friday, August 4**

	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>Average</i>
General Discussion				7	14	<b>4.7</b>
Role Play				7	14	<b>4.7</b>

**Overall Training**

	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>Average</i>
Role Plays				8	14	<b>4.6</b>
Group Discussions			1	6	15	<b>4.6</b>
Training Materials			2	8	12	<b>4.5</b>
Trainers				4	18	<b>4.8</b>
Overall Training				7	15	<b>4.7</b>

**General comments**

- ◆ Considering that this is an introduction of a new concept of dispute resolution, the theory and practical sessions were presented in a manner which kept my interest and quest to know more. The challenges posed in this new field to me are very exciting and a new dimension to enrich my career has opened!!
- ◆ Would be interested in further training.
- ◆ Language speed at start was hard—but became good as we went along. Otherwise, this [was] very very good style, training. I had fun and learned.
- ◆ Good luck to all of you and hope to meet again.
- ◆ It may assist if the training materials in the provided manual were chronologically arranged from Day 1 through Day 4 agendas.
- ◆ I am glad I came.
- ◆ Wonderful training week.
- ◆ I personally I am a book person in that I get more from the books than in class. Thus, if materials were a bit expanded especially where techniques were being explained.
- ◆ This week has gone by so fast. I have enjoyed myself very very much. I enjoy working in court but I think I'll enjoy mediation more.
- ◆ Excellent and well done.

**Addendum: Advocate and Litigant Survey Results**  
 Settlement Week in the High Court in Lusaka  
 April 24 - 28, 2000

**Summary of user surveys by advocates<sup>21</sup>**

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*Party Represented by the Advocate*

49% Plaintiff	51% Defendant
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*Case Type<sup>22</sup>*

Contract (other)	45%
Tort	14%
Employment	18%
Bank Loan (non-mortgage)	7%
Other	16%

*Case Disposition<sup>23</sup>*

Settled before mediation	0%
Mediated & fully settled	40%
Mediated and partially settled	11%
Mediated & 2 <sup>nd</sup> mediation scheduled	16%
Mediated & not settled	33%

*How many mediation sessions have you participated in before this week?*

0	1-3	4-5
45%	46%	9%

*Did you learn more about mediation as a result of Settlement week*

Yes	No
96%	4%

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<sup>21</sup>Fifty-seven advocate survey forms were received. The calculations are based on the total number of responses for each category/question. Percentages may not total 100% due to rounding.

<sup>22</sup> Case type categories are reflected only for those cases in which advocates completed survey forms, and therefore differ from the case-type figures indicated previously in this Report for cases mediated during Settlement Week based on court records. In addition, the totals reflected in this chart include cases with multiple issues.

<sup>23</sup> Case disposition figures are reflected only for those cases in which advocates completed survey forms, and therefore differ from the disposition figures indicated previously in this Report for all cases scheduled for mediation during Settlement Week.

*Is mediation through the courts a good idea for Zambia?*

Yes	No	Too early to say
96%	2%	2%

*Mediator's level of participation*

None	Low	Medium	High
2%	4%	23%	72%

<i>Mediator Effectiveness</i>	Poor 1	Fair 2	Good 3	Excellent 4	Average
How effective was the mediator in helping you and the parties to consider settlement of this case?	2%	7%	50%	41%	<b>3.3</b>

<i>Mediator Performance</i>	Strongly Disagree 1	Disagree 2	Agree 3	Strongly Agree 4	Average
The mediator(s) explained the mediation process clearly so that I knew what to expect during the mediation session.		2%	49%	49%	<b>3.5</b>
The mediator(s) allowed me/my advocate to fully present my case.		3%	42%	55%	<b>3.5</b>
The mediator(s) carefully listened to my side of the case.		2%	46%	52%	<b>3.5</b>
The mediator(s) asked proper questions to determine the facts in the case.	2%	2%	43%	54%	<b>3.5</b>
The mediator(s) helped me/my advocate discuss different methods for resolving the case.	2%	6%	54%	38%	<b>3.3</b>
The mediator(s) treated all parties equally.		4%	40%	57%	<b>3.6</b>
Overall, I was satisfied with the mediation itself.		4%	31%	65%	<b>3.6</b>
I was satisfied with the outcome of the mediation.	2%	8%	33%	58%	<b>3.5</b>
Overall, I was satisfied with the mediator(s).	2%	2%	30%	67%	<b>3.6</b>

**Did you learn more about mediation as a result of Settlement Week? If so, how?<sup>24</sup>**

- ◆ It has exposed me both as advocate and mediator to a number of situations which has helped me appreciate mediation fully.
- ◆ As mediator and counsel, I have discovered a confidence to perform both roles as a result of this exposure.

<sup>24</sup> Comments appear exactly as written by the respondent. Illegible writing is indicated by a "?".

- ◆ I have been exposed to a new form of conflict settlement.
- ◆ The weaknesses of the case were brought out.
- ◆ By participating.
- ◆ Quick method of resolving disputes.
- ◆ That issues can be simple and (?).
- ◆ The exposure to mediation taught me how effective and efficient it is to resolve matters through mediation, in relation to litigation.
- ◆ It brings finality to disputes amicably.
- ◆ Participation by all concerned parties.
- ◆ Definitely a useful process of resolution of court matters.
- ◆ From the procedures, questions, negotiations and debate.
- ◆ Real situation.
- ◆ It is a much quicker way of settling small matters.
- ◆ By learning that matters are settleable even during the course of trial.
- ◆ I knew practically nothing before this week.
- ◆ From the mediation process, introductions and meetings.
- ◆ That it is easier to bring parties to a settlement rather than through confrontation in open court.
- ◆ It is advisable to ensure that your clients attend before a mediator – as adjournments can easily be secured and Default Judgment if you are acting for the defendant will be granted.
- ◆ Various mediators fully guided and explained the advantage and(?).
- ◆ I must compliment the mediator. Mr. Musonda and the consultant judge for their understanding and efforts.
- ◆ It is much cheaper and takes less time.
- ◆ Learned about the informal nature of the settlement. Though it would be more technical.
- ◆ That there is need for parties to discuss issue fact to face to facilitate settlement.
- ◆ Initially my opponent had taken a firm view that since his client was denying liability, there was no need or basis for mediation. But after (?) by mediators, the process began: lesson: mediation should not easily succumb to an apparently uncooperative party or advocate. Skills must be used to enable process to take off.
- ◆ Could result in early settlement of disputes.
- ◆ A quick way to dispose of matters that would otherwise unnecessarily drag.
- ◆ It is a speedy and (?) mode of settlement of disputes.
- ◆ By being involved practically.
- ◆ I have known of a better, quicker and cheaper way of conflict resolution.
- ◆ I have learned a new dimension available in conflict resolution which is cheap and fast.
- ◆ I have had a chance to experience a mediation and clarified issues with the mediators present.
- ◆ The rules are too (?).
- ◆ That in fact disputes are capable of settlement without necessarily going to trial.
- ◆ It was very helpful.
- ◆ The whole nature of mediation.
- ◆ Actual participation in the decision-making process made it easier to understand.
- ◆ The parties learn to dialogue. It's more about give and take.
- ◆ Much quicker to settle disputes and no bitterness on either side.

## Is mediation through the courts a good idea for Zambia?

- ◆ It cuts costs and time.
- ◆ It is helping resolve matters amicably as opposed to lengthy court matters.
- ◆ It gives an opportunity.
- ◆ Saves time.
- ◆ It speeds up the settlement of disputes.
- ◆ Matters will be settled more quickly.
- ◆ Environment during mediation is convenient for settlement as the central parties feel part of the process.
- ◆ Mediation is cheaper than litigation.
- ◆ It will decongest the courts which are not, at this moment, coping with rising litigation.
- ◆ It helps reconcile parties who may be left bitter by ordinary court judgments.
- ◆ To lessen on the backlog of the court cases.
- ◆ Speed up settlement of case.
- ◆ Informal and quick resolution of dispute.
- ◆ It gives an opportunity to parties to re-examine their positions and interests, before proceeding further with their cases.
- ◆ It is good for Zambia, because the courts are congested and it eases the Court's work if small claims can be disposed of as quickly as possible.
- ◆ It helps decongest the court.
- ◆ It is too early in the day.
- ◆ It is a better way of resolving disputes in an amicable manner.
- ◆ Time economy.
- ◆ It tends to bring "morality" in the legal profession (i.e. Advocate to be looked at as problem solving ally other than a "money making" shark) in turn better community confidence in advocates.
- ◆ Mediators made short work of case disposal as compared to the time it takes to complete trial in courts.
- ◆ This is so because it takes away the bitterness one experiences when a judgment is against him in circumstances one felt the law was on his side.
- ◆ Good idea because it allows for speedy settlement and most important, allows client participation.
- ◆ Speeds up justice.
- ◆ Time economy
- ◆ Seal settlement; disputes amicably.
- ◆ Quick dispensation of justice.
- ◆ Early settlement of cases and less costs.
- ◆ The courts will be decongested in that they will only be left to settle more serious and contentious matters. Mediation will in fact help advocates to always have a go at out of court settlements before (??) to Court.
- ◆ It disposes cases expeditiously and involving the parties in decision making.
- ◆ Saves on time and costs.
- ◆ It is a speedy way of resolving disputes.
- ◆ It's cheaper and faster.
- ◆ But initially may be difficult to implement unless parties will be in a position to pay mediator's fees. More free settlement weeks should be considered to allow both advocates and litigants appreciate the benefits.

- ◆ It will be more beneficial after all the interest groups appreciate the type of cases most suitable for mediation.
- ◆ The Courts choose which matters are suited for mediation and it leaves the parties with little option but to attend mediation with a view to settle the matter.
- ◆ The parties participate in the final decision made and therefore no bitterness as there is no loser.

### **General Comments.**

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- ◆ It is long overdue.
- ◆ It should be encouraged in most cases and should be introduced to matters of the industrial relations court.
- ◆ It is a good idea.
- ◆ It is a useful process.
- ◆ Well prepared.
- ◆ I am of the view that before any matter is set for trial, it should be a condition that the same be heard by mediators and only go to trial if mediation fails.
- ◆ This should be encouraged for justice to be dispensed quickly.
- ◆ Long overdue.
- ◆ Mediation will assist in resolving disputes as parties will be given an early opportunity to consider settling.
- ◆ Acceptable
- ◆ It is a good idea as it eases the congestion in the courts.
- ◆ It is a good idea and it ought to be allowed to filter to the IRC as well as subordinate Courts.
- ◆ It is a very useful process.
- ◆ It is a good idea.
- ◆ Courts or court rooms—mediation courts okay, it gives respectability.
- ◆ Makes settlement of disputes easy and cuts down on time by more than 90%.
- ◆ A very good effort for our developing country. We must give it a try.
- ◆ I strongly feel simple cases should be resolved by mediation. This avoids expensive, protracted and costly litigation and neither side feels bitter. There is also pleasure in participating in decision-making.
- ◆ Mediation should be optional. Default judgment should not be entered if parties refuse to mediate and opt to litigate. So far, it seems to have been imposed on the parties. Good idea, if parties are allowed to consult or given more time to consult.
- ◆ If it can achieve the results it is a good thing.
- ◆ Mediation should be used in courts provided it is facilitated immediately after the (?) of pleadings as this will save a lot of time and expense for the parties. It will help the parties and advocates to develop the speed of give and take with a move to settling matters speedily.
- ◆ It is a good concept as most court matters are bogged down on legal (?) rather than (?) matters of give and take and thereby dispose of matters.
- ◆ For all matters not touching on legal points, mediation is ideal for our court system.
- ◆ It is a good idea, save that certain cases may not be resolved by way of mediation because of the fees parties are expected to pay. For example, pro bono cases.
- ◆ It should be encouraged and fully supported by all concerned.
- ◆ The parties ought to be consulted before being drawn into the process of mediation as they have a constitutional right to proceed with litigation. The idea of mediation is similar to amicable settlements which cannot be imposed on the parties.
- ◆ This should be encouraged because it lessens backlog of court cases.

- ◆ Cases should be referred as early as reasonably possible if the benefits of mediation are to be appreciated.
- ◆ It helps settle matters quickly and amicably and of course helps reduce the backload of the Court cases.
- ◆ It's an excellent idea which should and must be encouraged. It provides a speedy process of settlement.
- ◆ Mediation process in courts can help resolve pending issues within a very short time and in a very free atmosphere.

**Summary of user surveys by litigants<sup>25</sup>**

*Did you have an advocate represent you in this case?*

94% Yes	6% No
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*Did you reach an agreement today with the other party?<sup>26</sup>*

Yes	65%
No	35%

*How effective was the mediator(s) in helping you and your advocate to consider settlement of this case?*

<i>Mediator Effectiveness</i>	Poor 1	Fair 2	Good 3	Excellent 4	Average
		1%	34%	56%	<b>3.5</b>

<i>Mediator Performance</i>	Strongly Disagree 1	Disagree 2	Agree 3	Strongly Agree 4	Average
The mediator(s) explained the mediation process clearly so that I knew what to expect during the mediation session.		2%	35%	64%	<b>3.6</b>
The mediator(s) allowed me/my advocate to fully present my case.			37%	63%	<b>3.6</b>
The mediator(s) carefully listened to my side of the case.			42%	58%	<b>3.6</b>
The mediator(s) asked proper questions to determine the facts in the case.			46%	54%	<b>3.5</b>
The mediator(s) helped me/my advocate discuss different		4%	55%	42%	<b>3.4</b>

<sup>25</sup> Fifty-two client/party survey forms were received. The calculations are based on the total number of responses for each category/question. Percentages may not total 100% due to rounding.

<sup>26</sup> Settlement figures are reflected only for those cases in which parties completed survey forms, and therefore differ from the disposition figures indicated previously in this Report for all cases scheduled for mediation during Settlement Week.

methods for resolving the case.					
The mediator(s) treated all parties equally.			37%	63%	3.6
Overall, I was satisfied with the mediation itself.			40%	60%	3.6
I was satisfied with the outcome of the mediation.		9%	53%	37%	3.3
Overall, I was satisfied with the mediator(s)			33%	67%	3.7

### General Comments<sup>27</sup>

- ◆ I would wish Mr. Isaac Chali and Her Honorable Judge Justice Mrs. Susan well and God bless.
- ◆ Due consideration should be given to allocating morning programmes for travellers outside Kabwe.
- ◆ The process has been very good and fast. Thank you sirs.
- ◆ Mediation should be given more powers to make one understand where they feel there is no justice.
- ◆ The mediation process was good because it gave room for questions and suggestions on how the case could be resolved. The mediators were helpful for both sides.
- ◆ The mediator helped us as defendants to reach an amicable agreement to settle the matter and as defendants we were very free to express ourselves during the session.
- ◆ The whole issue was handled properly by the mediators without being biased.
- ◆ This kind of system to be encouraged as it will assist the courts decongesting the already too many pending cases.
- ◆ Excellently done—good beginning.
- ◆ I appreciate the mediator's conclusion in our case. May God bless the mediator.
- ◆ This will help greatly to companies and the country settling cases of this nature.
- ◆ I left the room with the feeling that had Judge Susan Winfield not been present at the mediation process, things may not have gone quite so smoothly. Patrick did not seem to have quite grasped the concept of the process.
- ◆ Regina was very helpful and we look forward to seeing her again.
- ◆ Thanks.
- ◆ It was very much (?) on all the parties.
- ◆ The mediators should avoid prejudging cases otherwise one party may feel unfairly treated. As for this case, it's fairly handled.

<sup>27</sup> Comments appear exactly as written by the respondents. Illegible writing is indicated by a "?".

ANNEX A

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**Advocate Training Manual**



# ADVOCACY IN MEDIATION

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## Introduction to Mediation

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Mediation is a process for resolving existing disputes, helping prevent disputes in the future, and mitigating the negative effects of disputes. Mediators facilitate negotiations between parties through a series of joint meetings and confidential private caucuses (meetings between one party and the mediator). They help parties assess their positions, identify their interests, generate possible solutions, and consider alternatives to a negotiated agreement. When asked, parties indicate the following reasons for their participation in the mediation process:

- » Satisfaction with the process has been shown to be high.
- » Procedures are informal and flexible, giving the parties the best chance to “speak their piece.”
- » Outcome remains in the parties’ hands. No outside decision-maker pronounces a “winner” and a “loser.”
- » Less time is often required than other means of resolving disputes.
- » Relationships between the parties may be preserved, which is especially important if there is ongoing contact of any type between them.
- » Creative options for resolution are often identified.
- » Privacy of the matter remains intact.
- » Emotional and financial costs are usually reduced.

## Process Distinctions

*A comparison of legal and mediation processes:*

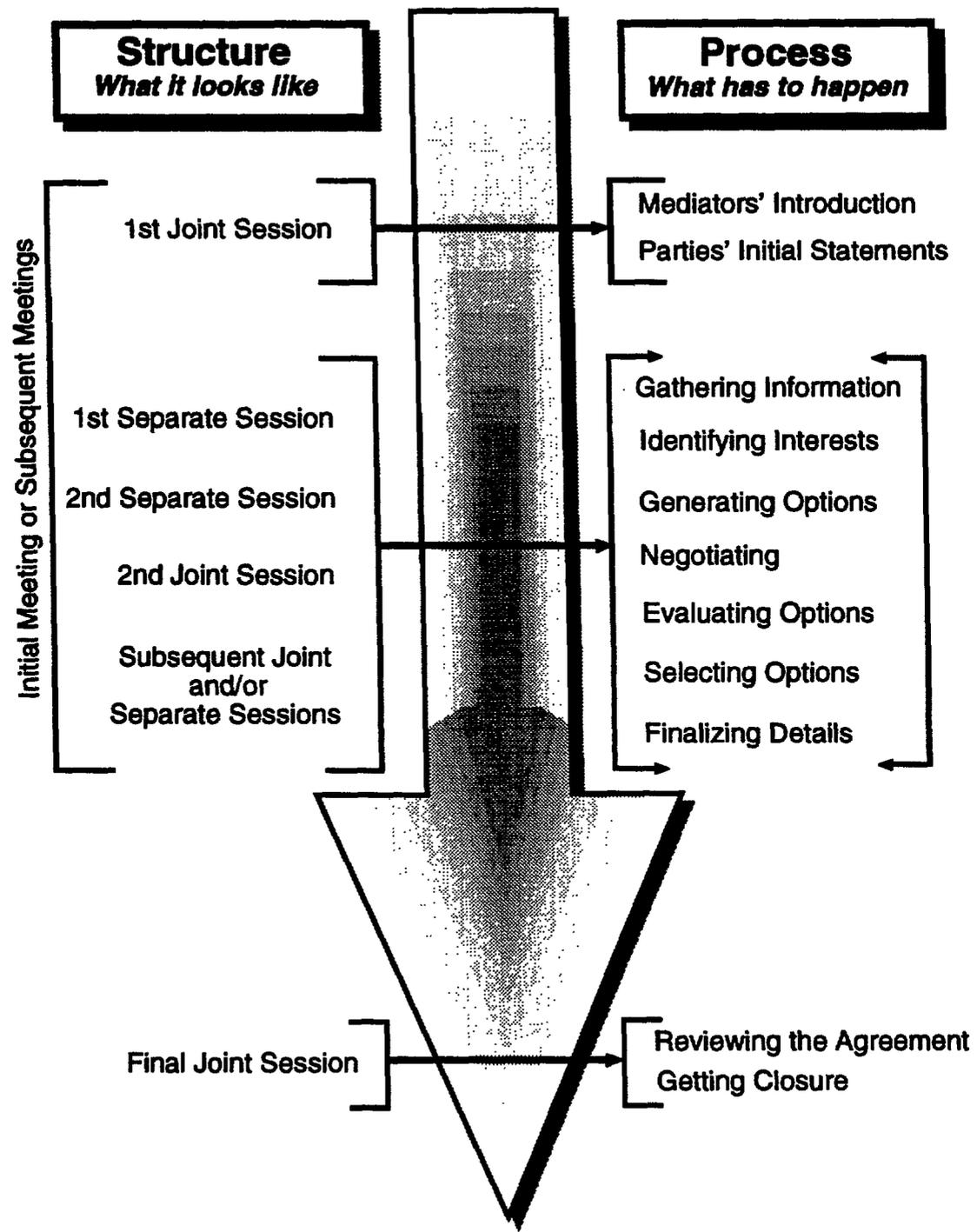
<b>Parameters of the Decision Process</b>	<b>Legal Perspective</b>	<b>Mediation Perspective</b>
» <i>Role of the professional</i>	Advocate acts as an “expert representative” for the client. Represents and advocates for a client by engaging in fact-finding and by developing legal strategies on the client’s behalf.	Mediator acts as a neutral. Convenes the parties, facilitates discussion, uses shuttle diplomacy, and moves the parties’ toward agreement and resolution of the issues.
» <i>Nature of the process</i>	Issues are argued and facts are established through an adversarial process controlled according to rules of judicial/legal system.	Mediator facilitates the sharing of perspectives between parties for use in collectively reaching a solution.
» <i>Solution/disposition and follow-up</i>	Having considered relevant law, evidence, and credibility of witnesses, a third party imposes a solution that has the force of law.	Parties control the outcome. They usually develop a written agreement that specifies each party’s role and procedures to be followed in instances of non-compliance.
» <i>Information sharing and disclosure</i>	Information is elicited by advocates and governed by rules of evidence. Information becomes “testimony” and is used to increase the likelihood that one side will prevail over the other.	All information needed to understand the situation is fully disclosed among the parties. Parties themselves control disclosure and use of information.
» <i>Professional influence and power</i>	Legal/judicial process creates the venue in which advocate and client hold power to influence the ultimate decision, which is made by a third party.	Mediator holds no power beyond assisting parties to arrive at mutual understandings and solutions.

## Benefits of Adding a Mediator

Mediation is increasingly the preferred ADR process chosen by parties. Why? Because it provides the greatest degree of party control over the process and over the outcome, while at the same time providing the greatest opportunity for collaborative and creative problem solving. It is true that the same can be said for negotiation. But as we all know, negotiation has several inherent limitations. Once impasse is reached, it is difficult, and sometimes impossible, to overcome. Simply put, mediation is *assisted* negotiation. Adding a mediator to negotiations can assist in overcoming specific pitfalls associated with traditional negotiation. For example:

<b>Limitations: Negotiation</b>	<b>Benefits: Mediation</b>
» Feelings of distrust, hatred or lack of respect exist between the parties and/or opposing counsel.	» A mediator improves communication, focuses discussions on the issues, not the people, and, if necessary, limits the direct contact of the parties through caucusing techniques.
» The parties have vastly different perceptions of the strengths and weaknesses of the case.	» A mediator provides an unbiased view, often reducing expectations associated with continued litigation.
» There are multiple parties with many, varying issues and interests.	» A mediator can organize multi-party, multi-issue settlement talks into subgroups or issue specific caucuses.
» The interests of individuals on the same side are at odds.	» A mediator can facilitate intra-group, as well as, inter-group negotiations.
» Parties are hesitant to be open and candid with information or options that might lead to settlement.	» A mediator can succeed in getting information in a private caucus that may not be readily shared with the other side.
» The parties are "risk" or "loss" adverse.	» A mediator can help the parties conduct a cost/benefit analysis of various settlement options and of going forward with litigation.
» Offers are rejected because they have come too early and are therefore given little value, or they come too late, once the parties are entrenched in their positions.	» A mediator can help control the dynamics of the talks and transmit an offer when it has the greatest likelihood of being favorably received by the other party.
» A deadlock is reached.	» A mediator can foster problem solving, discourage the parties from accepting impasse, and jump-start the negotiations.

# Mediation Model



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# **Stages of the Mediation**

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The mediation process involves various “stages” during which specific tasks or objectives are completed. A brief outline follows:

## ***Introduction Stage:***

### **Mediator’s Introductory Comments**

- The parties are informed about the mediation process.
- The mediator secures the parties’ signature on forms as necessary (i.e. “the statement of understanding”).

### **Parties Initial Comments**

- The parties share their perspectives about the situation.

## ***Engagement Stage:***

### **Information Gathering**

- The mediator asks questions to help the parties better understand each other and their situation.

### **Identifying Issues and Interests**

- The parties clarify the topics for discussion during the mediation.
- The mediator helps the parties understand the importance of their respective concerns.

### **Generating Options**

- The parties identify as many solutions as possible.

### **Assessing Options**

- The parties consider the feasibility of the various options.
- The mediator assists the parties to negotiate.

## ***Closure Stage:***

### **Selecting Options**

- The parties finalize their agreement or reach impasse.

### **Agreement Writing/Next Steps**

- The details of the parties’ agreement are reduced to writing.
- The parties confirm their next steps regarding further negotiation or litigation.

# Settlement Week

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## ***What is Settlement Week?***

Settlement Week is a period set aside from the regular court calendar. During Settlement Week hundreds of cases pending in the High Court will be scheduled for mediation. Mediators appointed by the Court will help parties and their advocates to reach an amicable settlement to their dispute.

## ***Will a party be penalized in any way for failing to settle a case?***

No. The Court recognizes that every case cannot be settled and that the parties have a right to a trial. However, the Court does require everyone involved to appear at the mediation and to make a serious effort to reach a settlement. If parties do not *appear* at the mediation, sanctions may be imposed.

## ***How long will the mediation last during Settlement Week?***

Typically a mediation session will last about two hours. However, it may be necessary for the mediation to continue for a longer period of time, or to be continued to another day.

## ***Why is the Court conducting Settlement Week?***

It has been the experience of many courts that Settlement Week is an excellent way to accomplish several goals:

- » A large number of cases are "audited" and the audit itself generally disposes of a large number of cases prior to the Settlement Week.
- » A large number of people (advocates, litigants, court personnel, and judicial officers) are educated about mediation—participating in one mediation session is far more effective in spurring advocates for the mediation process, than numerous seminars, written materials, and discussions about the topic.
- » The successful partnership between the bench and the bar in resolving cases creates a synergy that will have positive ramifications for a long time.
- » Judges receive additional training and hands-on experience that is needed to develop their skill and expertise regarding the process of mediation and referral of appropriate cases to mediators.
- » A substantial number of cases are settled during a one-week period.
- » Data from advocates and litigants can be gathered during a short period of time (typically each advocate and litigant completes a survey form at the conclusion of the mediation). This data can be used to make necessary changes in program administration, verify the views of participants about their satisfaction with the process, and allow a forum for the users of mediation to be heard.

## Advocacy Skills and Techniques<sup>1</sup>

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Mediation differs from other forums in which advocates represent clients, by virtue of:

- ✓ Substantial client involvement
- ✓ No decision-making power vested in the neutral
- ✓ Ex-parte sessions (caucuses or individual private sessions) with the neutral

### **Preparation for the mediation:**

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- Obtain agreement with your client and the other party on ground rules, including selection and payment of the mediator, the issues to be discussed, confidentiality provisions, necessary discovery, the status of litigation while the mediation is ongoing, and a time-line for the process.
- Ensure that all the key decision-makers will be available during the mediation and that opposing counsel has the authority to negotiate settlement, if not the authority to settle.
- Develop a “position paper” for your own use during the mediation that outlines the issues and interests, supporting factual and legal arguments, and possible settlement options and alternatives to a negotiated agreement.
- Prepare an opening statement for the joint session that conveys reasonableness and outlines your perspectives on the facts and law, as well as, your clients’ interests and priorities. Remember, in order to be successful, you need to persuade the other side, not the mediator.
- Consider whether the use of exhibits, experts and other key documents would be helpful.
- Educate your client about the mediation process, the role of the mediator, and your role as advocate during the mediation. Advise your client about their participation in the mediation, rehearse with them key factual statements, coach them on effective communication and presentation styles, and establish guidelines about how they should respond to questions and react (or not react) to settlement offers. Finally, discuss the strengths and weaknesses of your case and your opponent’s case; and the possible range of settlement options and the ramifications of not reaching a settlement.

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<sup>1</sup> Adapted from materials prepared by the Department of Justice/ADR, 1995. Contributing authors include Peter R Steenland, Jr., Stephen Altman, Catherine M. Sheafor, Deborah R. Kant, John Bickerman, and Nancy Stanley.

### **During the mediation:**

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- Educate the mediator and the other party through a well-prepared, concise opening statement. Throughout the mediation, provide written materials and other information that makes it easier to understand your case.
- Convince the other side, not the mediator. In negotiation, you use your persuasive powers to convince the other side. In court, you work your magic on judges. But the mediator is facilitating your discussion, not making a decision, and needs to understand your point of view, not agree with it. The parties are the decision-makers, and therefore they are the ones who must be persuaded. This fact impacts the way in which you present your client's case during the mediation and the way in which your client communicates with others during the mediation. Generally, the more communication that occurs directly between the parties—rather than through the mediator or through the parties' advocates—the greater the likelihood that mutual understanding and resolution will be achieved.
- Work with the mediator during private caucuses to devise a settlement strategy. Use the mediator to reality test with the other side and with your client, the strengths and weaknesses of their respective cases and the feasibility of their expectations. For example, your client may believe that his case is a sure winner and scoff at a settlement offer that you think is better than is obtainable in court. You may have had no luck getting him to appreciate your point of view. Encourage the mediator to point out the positive aspects of settlement to your client; often a resistant client will be more receptive to ideas when they come from a mediator.

Suggest that the mediator float options for “hypothetical consideration” by the other side. Finally, confer with the mediator about the appropriate timing of “bottom-line” offers and/or whether impasse has been reached and the other party is intractable.

- Work with your client when the mediator is holding a private caucus with the other side. Assess what has occurred, re-examine possible settlement options, and decide on your next steps.

### **After the mediation:**

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- Finalize the settlement agreement or decide next steps toward re-establishing negotiations or pursuing litigation.
- Assess the performance of the mediator. Was the mediator effective, efficient, and behave in accordance with mediators' ethical codes of conduct?
- Assess your performance and that of your client during the mediation. What techniques were effective and what aspects should be refined for a subsequent mediation in this case or others?

## **Checklist for Advocates Participating in Mediation <sup>2</sup>**

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***Decide whether to recommend mediation to your client and the Court.  
Check all that apply:***

- Opposing party has expressed an interest in ADR.
- Client has expressed an interest in ADR.
- Your client or opposing counsel/client does not have a realistic view of the case.
- The matter arose or is being prolonged because of emotional rather than legal issues.
- A continued relationship between the parties is necessary or worth preserving.
- Speedy resolution is important to your client.
- Other matters involving the same party are pending and could be incorporated into a universal settlement.
- The parties on one side of the case are unable to agree among themselves on a settlement position.
- The parties might benefit from hearing the other side, or they might be interested in relief that could best be worked out through face-to-face discussions, such as an apology or an agreement regarding future interaction.

### ***Prepare Your Client for Mediation***

- Explain the mediation process.
  - » Mediation is not a trial. Rather, it is a facilitated negotiation with the purpose of helping parties to consider settlement possibilities.
  - » Mediation is voluntary in that the parties are not required to settle their case. The Court does expect the parties to engage in a good faith effort to discuss possible resolution of the case.
  - » Mediation is informal. No witnesses attend. Testimony is not taken. Discussion is not limited to legal claims. Parties can explore creative solutions.
  - » The mediator will meet all together with the parties, as well as with each party and their advocate individually.
  - » The time required to complete mediation varies. Remind your client that the Court requires his or her participation in the mediation. Confirm the time allocated for the mediation and the location.

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<sup>2</sup> Adapted from an *ADR Checklist* developed by the United States Postal Service, 2000.

- Explain the role of the mediator.
  - » The mediator has received mediation training and is certified by the Court to serve in this capacity.
  - » The mediator is impartial, gives no legal advice, and does not determine right or wrong.
  - » The mediator facilitates the negotiation process.
  - » The mediator helps parties to focus their discussion and to assess their claims, defenses, and proposed solutions.
  
- Explain your client's role.
  - » Urge your client to be cooperative and to keep his or her goals in mind.
  - » Advise your client to ask questions privately, when in doubt, and suggest that he or she request a break if the need arises to talk in confidence.
  - » Be clear about information, if any, that you think your client should not divulge during the mediation.
  - » Suggest that the client listen closely to the other parties and the mediator, taking notes if necessary to avoid interruptions.
  - » Remind your client that he or she makes the final decision regarding settlement.
  
- Review your client's case and your objectives for the mediation.
  - » Consider what is most important to your client—what are his or her interests—what does he or she need to have from a possible settlement? Prioritize your client's interests.
  - » Discuss with your client all the various monetary and non-monetary settlement options. And, discuss what happens if the case does not settle—(i.e.) costs, time, and effort.
  - » Ensure that you and your client have authority to settle the case.
  - » Prepare and bring to the mediation 1) an outline of how the requested damages have been or should be calculated, including, if appropriate, the time period and rates of interest, 2) relevant documentation such as appraisals, receipts, or records, and 3) a list of potential settlement possibilities.

### ***Advise Your Client During Mediation***

- Use effective negotiation skills and counsel your client to do the same.
  - » Provide information to the other side, unless revealing it damages your legal case significantly. This will encourage settlement.
  - » Build trust by asking questions, listening to the other side, behaving credibly, and empathizing—that is by expressing an understanding of how the other party feels without agreeing with them.

- Expedite the signing by your client of the *Statement of Understanding: The Role of the Mediator*.
  - » Be sure to explain the document and its purpose.
  - » Understand the provisions for confidentiality—the mediator will not testify in a subsequent court proceeding.
  
- Make an opening statement.
  - » Prepare your client to present a short opening statement, which avoids blaming the other party and excludes inflammatory comments. Highlight your client's interest and needs.
  - » Add additional information you deem relevant to helping the mediator and the other parties understand your case.
  
- Listen to the mediator's summaries.
  - » Listen carefully. Summaries and feedback should reflect what you have said.
  - » Correct any misstatements or misunderstandings. Amplify on points if necessary so that the mediator and the other side understand your client's interests.
  
- Manage your client.
  - » Tell your client to talk to you privately before revealing information he or she is hesitant to reveal.
  - » Encourage your client to listen sincerely to the other side.
  - » Allow your client to express his or her feelings.
  
- Present your client's desired outcomes.
  - » State what you would like to have, including the principles and calculations upon which you base your statement.
  - » Include intangible outcomes if possible (e.g., respect, better relationship). Seek to maximize the outcome for both sides.
  
- Work with the mediator during the private sessions with you, your client and the mediator to:
  - Reveal Interests**
    - » Reveal interests, so as to help the mediator understand the case and help you and your client identify options for satisfying these interests.

### **Use The Mediation To Understand Interests Of Other Side:**

- » Make sure the mediator is not just conveying successive offers. If you are not learning more about the other side's needs and interests, ask to meet together again.
- » Ask the mediator to help you understand the other side's rationale for any offers. Understanding what motivates the offer will lead to a better understanding of your opponent's interests and may hold the key to more creative solutions.

### **Develop Options**

- » The mediator can assist parties in identifying options for resolution.
- » Do not hesitate to suggest any and all creative options that you and your client can develop.

### **Manage Confidentiality**

- » Make sure the mediator knows which information, if any, you have decided to keep confidential, if revealed in private session.

### **Request Joint Sessions**

- » It is appropriate to ask the mediator for joint sessions with the other party if you feel joint sessions would help.
- » Certain types of disputes can be handled more expediently and productively by meeting together. For example, if the parties understand a technical dispute better than the mediator, it would be a waste of time for them to educate the mediator before she or he can effectively carry information between the parties.

- Work with your client while the mediator is meeting with the other side in a private session.
  - » Use the time while the mediator is meeting privately with the other side to process new information and reevaluate your case.
  - » Reassess your client's interests and options for resolution. Discuss the other side's positions, interests and case.

- Conclude the mediation and confirm next steps.

#### **No Final Agreement**

- » Ask the mediator to summarize what has transpired so far, the specific areas of continuing disagreement, and the reasons presented by each side for their positions.
- » Make sure some structure is in place for continued discussions—possibly another meeting with the mediator in a specific period of time.
- » Confirm “tasks” that need to be completed in order to advance further negotiations, i.e., the transfer of documents or information, etc.
- » Write down areas of agreement, if some exist, in clear language. Both sides should receive a copy of this document.

#### **Agreement**

- » You, opposing counsel, or the mediator may draft an agreement. Typically, the mediator will draft the agreement, but you, your client, and the other party must ensure that the agreement says what it is supposed to say.

## Selecting a Mediator External to the Court

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Advocates utilizing mediation outside of the Court program—that is, the Court is not ordering the parties to participate in mediation and the Court is not assigning the mediator—should contemplate the following factors when selecting an external mediator:

### *Is a facilitative or evaluative mediator best for this case?*

The *facilitative* mediator assumes that his principal mission is to enhance and clarify communications between the parties in order to help them decide what to do. Therefore, this type of mediator believes it is inappropriate to give his or her opinion about the strengths and weakness of the case. Although, the facilitative mediator would request the parties to share their opinions about the case, and he or she would ask probing questions to explore the cases' strengths and weaknesses.

The *evaluative* mediator assumes that the participants want and need the mediator to provide some direction as to the appropriate grounds for settlement—based on law, industry practice or technology. This type of mediator also assumes that he or she is qualified to give such direction by virtue of experience, training and objectivity.

### *Is any special knowledge or expertise crucial to resolving this case?*

For example, if the case involves multiple parties, it is best that the mediator have experience in complex, multi-issue cases. Or, if the case hinges on highly technical issues or points of law, the mediator may be better able to help the parties understand these issues if he has knowledge of that field.

### *What credentials, skills, or experiences are necessary for the mediator to be accepted and respected by both sides?*

It is unlikely that a novice mediator with little understanding of the legal aspects of the case would immediately engender the respect of a seasoned advocate with substantial negotiation and mediation experience. Yet, a skilled mediator who can get the parties talking with each other is preferable to an unskilled mediator who is an expert in a particular area.

Mediation Rules for the High Court of Zambia

**GOVERNMENT OF ZAMBIA**

**STATUTORY INSTRUMENT NO. 71 OF 1997**

**The High Court Act  
(Laws, Volume 3, Cap. 27)**

**The High Court (Amendment) Rules, 1997**

IN EXERCISE of the powers contained in sections *forty-four* and *forty-five* of the High Court Act, the following Rules are hereby made:

- |  |  |
|--|--|
| 1. (1) These Rules may be cited as the High Court (Amendment) Rules, 1997, and shall be read as one with the High Court Rules, in these Rules referred to as the principal Rules.  | Title and commencement<br>Cap. 27                  |
| (2) These Rules shall come into operation on the expiry of six months after the publication of these Rules.  |  |
| 2. The principal Rules are amended in rule 2 by the deletion of the definition of " solicitor ".   | Amendment<br>of rule 2                             |
| 3. Order I of the principal Rules is amended by the deletion of rules 5, 6, 7, 8, 9 and 10 and the substitution thereof of the following:  | Amendment<br>of Order I                            |
| <del>5.</del> The fees payable on filing any document shall be in cash and the proper officer receiving the fees shall issue a receipt and endorse the document in accordance with sub-rule (1) of rule 7 in Order III.  | Payment of<br>fees                                 |
| 6. The document on which a fee is to be paid shall be the document indicated in the Third Column of the Second Schedule, Parts 1 to 5. The fees shall be paid before the document is presented at the Registry or District Registry concerned, and unless so paid, the document shall not be accepted. | Acceptance<br>of document<br>on payment<br>of fees |
| 7. The proper officer of the court whose duty it is to receive any document shall ensure that a proper fee is paid on any document before accepting the same.  | Duty of<br>officers                                |
| 8. (1) When any document not requiring to be paid for is inadvertently paid for or when the fees paid exceed those laid down in the Second Schedule, Parts 1 to 5 inclusive, or the document is not presented to or is not accepted for filing by the  | Refund of<br>fees paid in<br>certain cases         |

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*Copies of this Statutory Instrument can be obtained from the Government Printer,  
P.O. Box 30136, 10100 Lusaka. Price K7,000.00 each.*

setting down the action for the new trial shall be that specified in sub-rule (1), (2) and (3) except that—

- (a) the bundle referred to in sub-rule (1) (which is to serve as the record) shall be bespoken from the person in whose custody it is and sent to the proper officer; and
- (b) there shall be delivered, along with the request that the action be set down, a backsheet with the title of action thereon, and the names, addresses and telephone numbers of the advocates for the parties, or, in the case of a party who has no advocate, of the party himself, duly endorsed with the amount of the fee payable on setting down the action for the new trial.

(5) In this rule, "proper officer" means—

- (a) in relation to an action to be set down at the Principal Registry for trial, the Registrar, Deputy Registrar, or the Assistant Registrar in charge of civil actions;
- (b) in relation to an action to be set down at a District Registry for trial, the District Registrar or the Assistant Registrar in charge of civil actions.

4. Except for cases involving constitutional issues or the liberty of an individual or an injunction or where the trial Judge considers the case to be unsuitable for referral, every action may, upon being set down for trial, be referred by the trial Judge for mediation and where the mediation fails the trial Judge shall summon the parties to fix a hearing date. The referral order shall be in form 28A in the First Schedule, set out in the Appendix to these Rules.

Reference to mediation

5. There shall be kept by the mediation office or proper officer a list of mediators who have been trained and certified by the court to act in this capacity with the field or fields of bias or experience indicated against each of their names. The mediators shall be of not less than seven years working experience in their respective fields.

List of mediators

6. The mediator shall sign for and collect from the mediation office or proper officer the record referred to under sub-rule (3) of rule 3 of this Order.

Collection of records by mediator

Conduct of mediator	7. The mediator shall, soon after collecting the record, contact the parties and give them the date, time and venue of the mediation and shall, not more than sixty days from the date of collecting the record, complete the mediation process.
Appearance before mediator	8. The parties shall appear in person at the mediation. If they are represented, their advocates shall accompany them. If a party is a corporation, partnership, governmental agency, or entity other than an individual, an officer or director of sufficient rank to settle the matter shall attend.
Statement of understanding on role of mediator	9. At the commencement of the mediation, the mediator shall read and explain to the parties the statement of understanding on the role of the mediator in form 28B in the First Schedule set out in the Appendix to these Rules, and shall require the parties to sign the form.
Record of mediation	10. The mediator shall not be required to keep a record of the mediation proceedings and any document prepared by the mediator during the proceedings shall, where the mediation fails, be destroyed at the end of the mediation process in the presence of the parties. Statements made during mediation are confidential and privileged, and shall not be used as evidence in any matter. The mediator shall not communicate with any trial Judge about the mediation.
Return of records to mediation office or proper officer	11. (1) If the mediation fails, the mediator shall not more than ten days after the close of the mediation proceedings, return the record to the mediation office or proper officer with a report in form 28C in the First Schedule set out in the Appendix to these Rules, stating that the mediation has failed.  (2) The mediation officer or proper officer shall, not more than seven days after receipt of the report referred to in sub-rule (1), submit the record to the trial Judge who shall, not more than fourteen days after receipt of the record from the mediation officer or proper officer summon the parties in terms of rule 5.
Registration of Mediation Settlement	12. A mediation settlement in form 28D in the First Schedule set out in the Appendix to these Rules shall be signed by the parties and the mediator and registered under Order XXXVII, rule 1, and shall have the same force and effect for all purposes as a judgement, order or decision and be enforced in the like manner.
Mediator fee	13. There shall be paid to the mediator a mediation fee as agreed between the parties and the mediator which shall be..

paid by the parties in equal proportions at the time of lodging documents for trial:

Provided that where the parties and the trial judge fail to agree on the fee, the fee shall be referred to the trial judge for determination.

14. No appeal shall lie against a registered mediated settlement. No appeal against settlement
21. Order XXXII of the principal Rules is amended— Amendment of Order XXXII
- (a) in rule 1 by the deletion of the words "Judicial Department" and the substitution therefor of "Judicature";
- (b) in sub-rule (1) of rule 4 in sub-rule (2) of rule 5 by the deletion of the words "Court of Appeal" and the substitution therefor of the words "Supreme Court of Zambia".
22. Order XXXVI of the principal Rules is amended— Amendment of Order XXXVI
- (a) by the deletion of rules 8 and 9 and the substitution therefor of the following:
8. Where a judgement or order is for a sum of money, interest shall be paid thereon at the average of the short-term deposit-rate per annum prevailing from the date of the cause of action or writ as the court or judge may direct to the date of judgement. Rate of interest
9. Where any judgement or order directs the payment of money, the Court or a judge may, for any sufficient reason, order that the amount shall be paid by installments, with or without interest. The order may be made at the time of giving judgement, or at any time afterwards, and may be rescinded or varied upon sufficient cause, at any time. The order shall state that, upon the failure of any installment, the whole amount remaining unpaid shall forthwith become due. Payment by installments and stay of execution
- Provided that where there is default in paying any one installment, there shall be no order for stay of execution on the balance.;
- (b) by the insertion after rule 9 of the following new rule:
10. Except as provided for under rule 9, the court or Judge may, on sufficient grounds, order stay of execution of a judgement. Register of execution

FORM 28D	
Cause No. / /	
IN THE HIGH COURT FOR ZAMBIA	
Holden at.....	
BETWEEN:	
PLAINTIFF(S)	
DEFENDANT(S)	
<b>MEDIATION SETTLEMENT-0.XXX1 r12</b>	
We, the undersigned parties to this action have agreed to settle our disputes/ differences as follows:	
Dated the	day of
.....	.....
..... <i>Plaintiff (s)</i>	..... <i>Defendant (s)</i>
..... <i>Plaintiff's Advocate</i>	..... <i>Defendant's Advocate</i>
..... <i>Mediator</i>	..... <i>Mediator's Full Name</i>

M. M. S. W. NGULUBE,  
*Chief Justice*

M. M. MUNDASHI

L. NYEMBERE

L. P. CHIBESAKUNDA

I. MAMBILIMA (J)

LUSAKA  
28th May, 1997  
[CJ.6/1]

FORM 28C	
Cause No. / /	
<b>IN THE HIGH COURT FOR ZAMBIA</b>	
Holds at.....	
BETWEEN:	
	PLAINTIFF (S)
	DEFENDANT (S)
<b>MEDIATOR'S REPORT -0.XXX1 r11</b>	
TO: THE MEDIATION OFFICER	
<p>I .....having been designated as mediator in this action and having conducted mediation between the parties do hereby report that the parties have failed to reach a settlement. In terms of the above rule you are required within 7 days of your receiving this report to remit the record herewith to the trial judge.</p>	
Dated the	day of .....
<p>..... <i>Mediator's Signature</i></p>	

FORM 28B													
Cause No./ / /													
<b>IN THE HIGH COURT FOR ZAMBIA</b>													
Holds at.....													
<b>BETWEEN:</b>													
PLAINTIFF(S)													
DEFENDANT(S)													
<b>STATEMENT OF UNDERSTANDING: THE ROLE OF THE MEDIATOR- 0.XXX1 r 9</b>													
<p>My name is..... I have been assigned to mediate your case. I will serve as a neutral party to help you resolve your dispute. I will not act as an advocate for any party.</p> <p>This mediation is strictly confidential. No party shall be bound by anything said or done in mediation unless a settlement is reached. If a settlement is reached, the agreement shall be reduced to writing and, when signed, shall be binding upon all parties to the agreement. Each party agrees not to request that, I, the mediator testify against the other party, nor ask me or the other party to testify regarding statements made in mediation.</p> <p>Please sign below to acknowledge that you have read and/or understand this statement.</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; border: none;">.....</td> <td style="width: 50%; border: none;">.....</td> </tr> <tr> <td style="text-align: center; border: none;"><i>Plaintiff (s)</i></td> <td style="text-align: center; border: none;"><i>Defendant (s)</i></td> </tr> <tr> <td style="border: none;">.....</td> <td style="border: none;">.....</td> </tr> <tr> <td style="text-align: center; border: none;"><i>Plaintiff's Advocate</i></td> <td style="text-align: center; border: none;"><i>Defendant's Advocate</i></td> </tr> <tr> <td style="border: none;">.....</td> <td style="border: none;">.....</td> </tr> <tr> <td style="text-align: center; border: none;"><i>Mediator</i></td> <td style="text-align: center; border: none;"><i>Date</i></td> </tr> </table>		.....	.....	<i>Plaintiff (s)</i>	<i>Defendant (s)</i>	.....	.....	<i>Plaintiff's Advocate</i>	<i>Defendant's Advocate</i>	.....	.....	<i>Mediator</i>	<i>Date</i>
.....	.....												
<i>Plaintiff (s)</i>	<i>Defendant (s)</i>												
.....	.....												
<i>Plaintiff's Advocate</i>	<i>Defendant's Advocate</i>												
.....	.....												
<i>Mediator</i>	<i>Date</i>												

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14. The forms contained in the First Schedule shall, as far as they are applicable, be used in or for the purpose of the District Registries, with such variations as circumstances require. Forms to be used

29. Order LI of the principal Rules is amended in rule 1 by the deletion of the words " three miles " wherever they appear and the substitution therefor of the words " ten kilometres ". Amendment of Order LI

30. The principal Rules are amended by the deletion of " solicitor " wherever it appears and the substitution therefor of " advocate ". General amendment

APPENDIX  
(Rule 20)

FIRST SCHEDULE  
(Order XXX1 Rule 4)

<b>FORM 28A</b>	
	Cause No. / /
<b>IN THE HIGH COURT FOR ZAMBIA</b>	
Holden at.....	
<b>BETWEEN:</b>	
	PLAINTIFF (s)
	DEPENDANT (s)
<b>REFERRAL ORDER - 0.XXX1 r4</b>	
<i>To: THE MEDIATION OFFICER</i>	
Having satisfied my self that this action is ready for trial I hereby refer it for mediation.	
Please assign a mediator to mediate and ensure that the mediator collects the record from your office immediately. Failure to do so will amount to contempt of Court.	
Dated the	day of .....
..... <i>Trial Judge</i>	

ANNEX B

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**Mediator Training Manual**

**DEMOCRACY AND GOVERNANCE IQC:  
RULE OF LAW**



Contract No. AEP-I-807-96-90030-00

**COURT-ANNEXED MEDIATION  
IN THE HIGH COURT OF ZAMBIA**

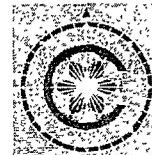
**MEDIATOR TRAINING MANUAL**

July 31-August 4, 2000

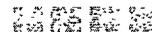
Sponsored by:



Organized by:



CHEMONICS INTERNATIONAL INC.



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## Faculty

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**CECIL E. CANTON** is a senior professor with over twenty years of experience in criminal justice and mediation, conflict management and dispute program initiatives. As former Assistant Commissioner for Program Services of the New York Department of Correctional Services, he was responsible for policy formulation and long-range planning, development and implementation of ADR programs.

**DAWN MARTIN** is an attorney and senior dispute resolution trainer, mediator, and facilitator with 15 years of experience in ADR activities worldwide. As founding partner in a Washington-based law firm and mediator with private ADR centers, Ms. Martin has extensive experience developing court annexed mediation programs, and executing mediator training and train-the-trainer activities. In addition to her extensive experience in Latin America, Ms. Martin was a lead consultant who designed the mediator train-the-trainer trainings for the Tanzanian judiciary.

**MELINDA OSTERMEYER** is a dispute resolution trainer, negotiator and facilitator with fifteen years of experience designing and directing comprehensive ADR activities worldwide. As former director of the Washington D.C. Multi-Door Dispute Resolution Division of the Superior Court of the District of Columbia, Ms Ostermeyer designed and administered court dispute resolution services for civil, family, probate, tax and employee disputes. In addition to her experience in Latin American, she designed the Tanzanian mediator training and the train-the-trainer courses.

**MELISSA RHEA** is an associate with Jack H. Olender & Associates, a civil trial attorney, and an experienced mediator and arbitrator for the local state and federal courts. Ms. Rhea has traveled to Tanzania twice to assist with mediation training and the Settlement Weeks held in the Kisutu Court and the High Court in Dar es Salaam.

**JUDGE NAN SHUKER** is an associate judge for the Superior Court of the District of Columbia and a member of the DC Courts' Joint Committee on Judicial Administration, and formerly was the presiding judge of the court's civil division. Judge Shuker has 30 years of experience in judicial reform, justice administration, program development, policy formulation and alternative dispute resolution. She has worked extensively in Tanzania and Zambia on reforming court structure and management and ADR programs. Judge Shuker also was a founding member of a U.S./Africa judicial exchange program

**JUDGE SUSAN WINFIELD** is an associate judge of the Superior Court of the District of Columbia, and former presiding judge of the court's family division. Judge Winfield has 20 years of experience in civil, criminal, and family law. She has extensive experience working to improve justice systems and has been involved in various dispute resolution, case flow management, civil delay reduction, and legal and judicial exchange efforts with several countries in Africa

## **Settlement Week**

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Settlement Week is a period set aside from the regular court calendar. During Settlement Week, a large number of the court's pending cases are referred to mediation. Members of the Law Association of Zambia and other professionals are trained to mediate these cases during an intensive one-week period. It has been the experience of many courts that Settlement Week is an excellent way to accomplish several goals:

- » A large number of cases are "audited" and the audit itself generally disposes of a large number of cases prior to the Settlement Week.
- » A large number of people (advocates, litigants, court personnel, and judicial officers) are educated about mediation—participating in one mediation session is far more effective in spurring advocates for the mediation process, than numerous seminars, written materials, and discussions about the topic.
- » Those who are trained as mediators tend to become vocal advocates of mediation, and they have substantial influence over the acceptance of mediation throughout the community.
- » Through exposure to mediation, judges develop an understanding of the mediation process and of case selection criteria.
- » A substantial number of cases are disposed of during a one-week period. This demonstrates that mediation can successfully resolve cases.
- » Data from advocates and litigants is gathered during a short period of time (typically each advocate and litigant completes a survey form at the conclusion of the mediation). This data can be used to verify the views of participants about their satisfaction with the process and make necessary changes in program administration.
- » The successful partnership between the bench, bar and community in resolving cases creates a synergy that will have enduring positive effects.

# Settlement Week Information Sheet<sup>1</sup>

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## ***What is Settlement Week?***

During Settlement Week, over one hundred cases pending in the High Court will be scheduled for mediation. Mediators appointed by the Court will help parties and their advocates to reach amicable settlements to their disputes.

## ***How does mediation work?***

Mediation is very successful in assisting parties to resolve their disputes. Because the mediation sessions are confidential and informal, parties can feel comfortable to discuss their case with candor, state grievances, and reveal confidential settlement offers.

The mediator will first meet with the parties and their advocates, if represented, and hear from all parties in the case. Most likely the mediator will also spend some time alone with the plaintiff and with the defendant—what the parties say to the mediator in these private meetings will not be shared with the other party, unless the party gives the mediator permission to do so. The mediator will help the parties to keep the discussions focused, to talk about possible ways the dispute might be resolved, and to assist in drafting an agreement that is acceptable to all parties. If an agreement is reached and signed, the case will be concluded that day.

## ***Will a party be penalized in any way for failing to settle a case?***

No. The Court recognizes that every case cannot be settled and that the parties have a right to a trial. However, the Court does require everyone involved to appear at the mediation and to make a serious effort to reach a settlement. If parties do not *appear* at the mediation, sanctions may be imposed.

## ***What must be done to prepare for the mediation?***

Each party or advocate must bring to the mediation relevant documentation such as appraisals, receipts, or records, and a list of potential settlement possibilities. When damages are requested, it is also necessary to bring an outline of how damages have been or should be calculated, including, if appropriate, the time period and rates of interest.

## ***How long will the mediation last?***

Typically a mediation session will last about two hours. However, it may be necessary for the mediation to continue for a longer period of time, or to be continued to another day.

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<sup>1</sup> An adapted version of the information sheet used in Zambia.

## Introduction to Mediation

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Mediation is a process for resolving existing disputes, helping prevent disputes in the future, and mitigating the negative effects of disputes. Mediators facilitate negotiations between parties through a series of joint meetings and confidential private caucuses (meetings between one party and the mediator). They help parties assess their positions, identify their interests, generate possible solutions, and consider alternatives to a negotiated agreement. When asked, parties indicate the following reasons for their participation in the mediation process:

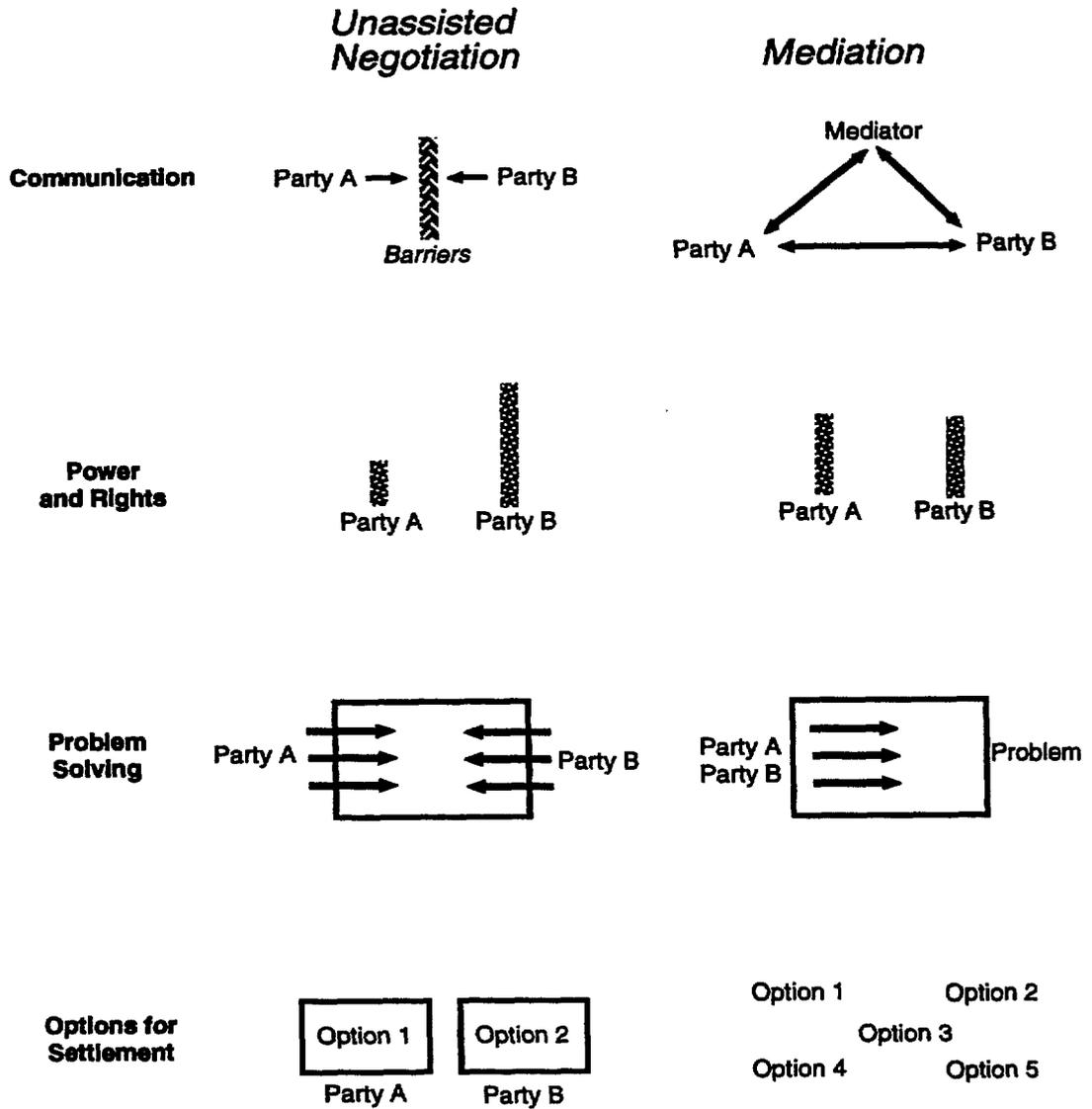
- » Satisfaction with the process has been shown to be high.
- » Relationships between the parties may be preserved, which is especially important if there is ongoing contact of any type between them.
- » Procedures are informal and flexible, giving the parties the best chance to “speak their piece.”
- » Creative options for resolution are often identified.
- » Outcome remains in the parties’ hands. No outside decision-maker pronounces a “winner” and a “loser.”
- » Privacy of the matter remains intact.
- » Less time is often required than other means of resolving disputes.
- » Emotional and financial costs are usually reduced.

## Process Distinctions

*A comparison of legal and mediation processes:*

<b>Parameters of the Decision Process</b>	<b>Legal Perspective</b>	<b>Mediation Perspective</b>
» <i>Role of the professional</i>	Advocate acts as an “expert representative” for the client. Represents and advocates for a client by engaging in fact-finding and by developing legal strategies on the client’s behalf.	Mediator acts as a neutral. Convenes the parties, facilitates discussion, uses shuttle diplomacy, and moves the parties’ toward agreement and resolution of the issues.
» <i>Nature of the process</i>	Issues are argued and facts are established through an adversarial process controlled according to rules of judicial/legal system.	Mediator facilitates the sharing of perspectives between parties for use in collectively reaching a solution.
» <i>Solution/disposition and follow-up</i>	Having considered relevant law, evidence, and credibility of witnesses, a third party imposes a solution that has the force of law.	Parties control the outcome. They usually develop a written agreement that specifies each party’s role and procedures to be followed in instances of non-compliance.
» <i>Information sharing and disclosure</i>	Information is elicited by advocates and governed by rules of evidence. Information becomes “testimony” and is used to increase the likelihood that one side will prevail over the other.	All information needed to understand the situation is fully disclosed among the parties. Parties themselves control disclosure and use of information.
» <i>Professional influence and power</i>	Legal/judicial process creates the venue in which advocate and client hold power to influence the ultimate decision, which is made by a third party.	Mediator holds no power beyond assisting parties to arrive at mutual understandings and solutions.

# A Comparison of Unassisted Negotiation & Mediation Processes



## Benefits of Adding a Mediator

Mediation is increasingly the preferred ADR process chosen by parties. Why? Because it provides the greatest degree of party control over the process and over the outcome, while at the same time providing the greatest opportunity for collaborative and creative problem solving. It is true that the same can be said for negotiation. But as we all know, negotiation has several inherent limitations. Once impasse is reached, it is difficult, and sometimes impossible, to overcome. Simply put, mediation is *assisted* negotiation. Adding a mediator to negotiations can assist in overcoming specific pitfalls associated with traditional negotiation. For example:

<b>Limitations: Negotiation</b>	<b>Benefits: Mediation</b>
» Feelings of distrust, hatred or lack of respect exist between the parties and/or opposing counsel.	» A mediator improves communication, focuses discussions on the issues, not the people, and, if necessary, limits the direct contact of the parties through caucusing techniques.
» The parties have vastly different perceptions of the strengths and weaknesses of the case.	» A mediator provides an unbiased view, often reducing expectations associated with continued litigation.
» There are multiple parties with many varying issues and interests.	» A mediator can organize multi-party, multi-issue settlement talks into subgroups or issue specific caucuses.
» The interests of individuals on the same side are at odds.	» A mediator can facilitate intra-group, as well as, inter-group negotiations.
» Parties are hesitant to be open and candid with information or options that might lead to settlement.	» A mediator can succeed in getting information in a private caucus that may not be readily shared with the other side.
» The parties are "risk" or "loss" adverse.	» A mediator can help the parties conduct a cost/benefit analysis of various settlement options and of going forward with litigation.
» Offers are rejected because they have come too early and are therefore given little value, or they come too late, once the parties are entrenched in their positions.	» A mediator can help control the dynamics of the talks and transmit an offer when it has the greatest likelihood of being favorably received by the other party.
» A deadlock is reached.	» A mediator can foster problem solving, discourage the parties from accepting impasse, and jump-start the negotiations.

## **The Mediator's Job**

---

There is no one "right" way to mediate. In fact, different disputes and different parties require mediators to assume distinct roles at various stages of the mediation process. Mediators will excel in some roles more than in others as a result of personal style, experience and other factors. However, every mediator develops competence in each of the roles described below and develops an ability to use techniques that best meet the needs of particular parties and situations.

### ***Facilitate the Process***

Mediators help the parties move through the various stages of the mediation process by reframing conflict to create positive movement and by refocusing attention on areas of possible agreement. Mediators encourage parties to view problems as shared, which, in turn, enables them to shift from blaming to effective problem solving. Mediators also encourage the use of active listening skills during the mediation process through modeling and coaching.

### ***Improve Communication***

There are many barriers to communication including anger, poor language skills, cultural differences, pre-existing biases, ignorance, fear, anxiety and exhaustion. Improving the parties' ability to express themselves and understand one another is of paramount importance. When parties are not talking to one another, or talking but not "hearing" one another, mediators intervene to reestablish communication. Mediators may coach the parties on their choice of words, communication style, or the importance of demonstrating that they understand what others are saying during mediation.

Communication can also break down when parties are unaware of certain facts, or have different perceptions of the *meaning* of facts. In these instances, mediators can transmit new information or translate the meaning of information into new terms to help the parties engage in constructive dialogue.

### ***Manage Emotions***

The issues discussed by parties in mediation can be highly charged and emotional. When parties reveal more of their hidden thoughts and feelings during mediation, they are often freer to become actively engaged in the process and to make movement toward resolution. For this reason, mediators encourage the parties to express, not squelch, their emotions. At the same time, repetitive, inflammatory outbursts benefit

no one. To prevent feelings from being expressed in these ways, mediators encourage the parties to use language that is clear, descriptive, and non-judgmental.

### ***Distinguish Wants from Needs***

Usually parties will need to modify their original demands in order to resolve a dispute. Mediators help them distinguish their true underlying *needs*—those things that must take place for the dispute to be resolved—from their original desires or *wants*.

### ***Generate Options***

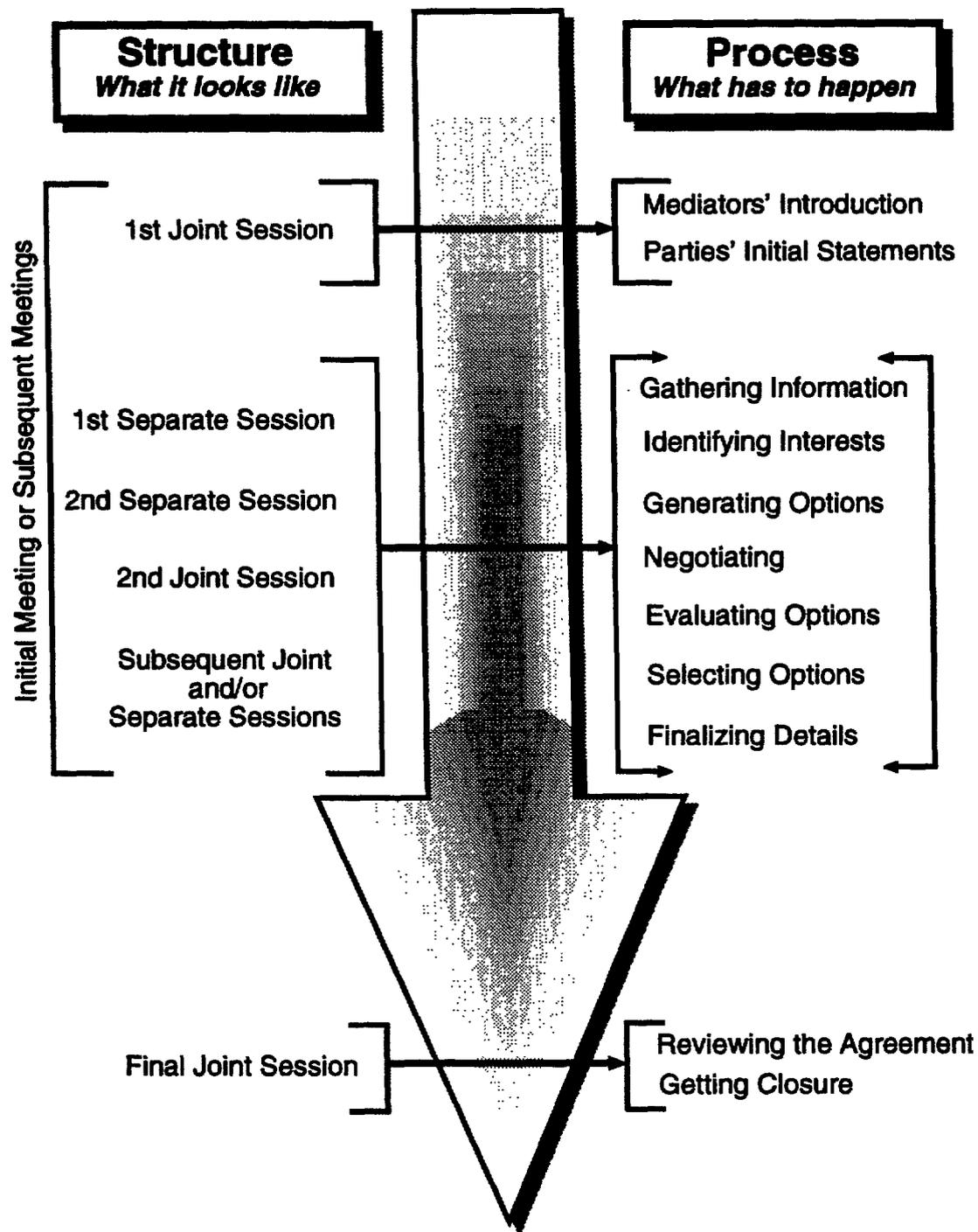
Although it is not necessarily the mediators' job to create solutions, they should be prepared to help parties generate and articulate as many realistic options for resolution as possible. Mediators also assist the parties in considering which options are the most appropriate, as well as what will happen if they do not resolve their disputes in mediation.

### ***Recognize Human Behavior Related to Negotiating***

While all individuals are different, certain principles of human behavior can operate when people engage in negotiation. Understanding the following principles helps the mediator guide the parties through a process that respects their participation and empowers them to take control of their destiny.

- » Parties sometimes would rather avoid making a decision.
- » Parties might “give in” prematurely but they will not truly resolve a dispute until they are psychologically ready to do so.
- » Parties rarely like to apologize, may not know how to do it, and often minimize the importance of an apology to others involved in the conflict.
- » Parties usually act out of self-interest, even if they don't understand what that “interest” is.
- » Parties can compromise much more easily if they believe that they won't be seen as weak for doing it.
- » Parties more readily follow through on decisions they help to formulate.

# Mediation Model



## **Stages of the Mediation**

---

The mediation process involves various “stages” during which specific tasks or objectives are completed. A brief outline follows:

### ***Introduction Stage:***

#### Mediator’s Introductory Comments

- The parties are informed about the mediation process.
- The mediator secures the parties’ signature on forms as necessary (i.e. “the statement of understanding”).

#### Parties Initial Comments

- The parties share their perspectives about the situation.

### ***Engagement Stage:***

#### Information Gathering

- The mediator asks questions to help the parties better understand each other and their situation.

#### Identifying Issues and Interests

- The parties clarify the topics for discussion during the mediation.
- The mediator helps the parties understand the importance of their respective concerns.

#### Generating Options

- The parties identify as many solutions as possible.

#### Assessing Options

- The parties consider the feasibility of the various options.
- The mediator assists the parties to negotiate.

### ***Closure Stage:***

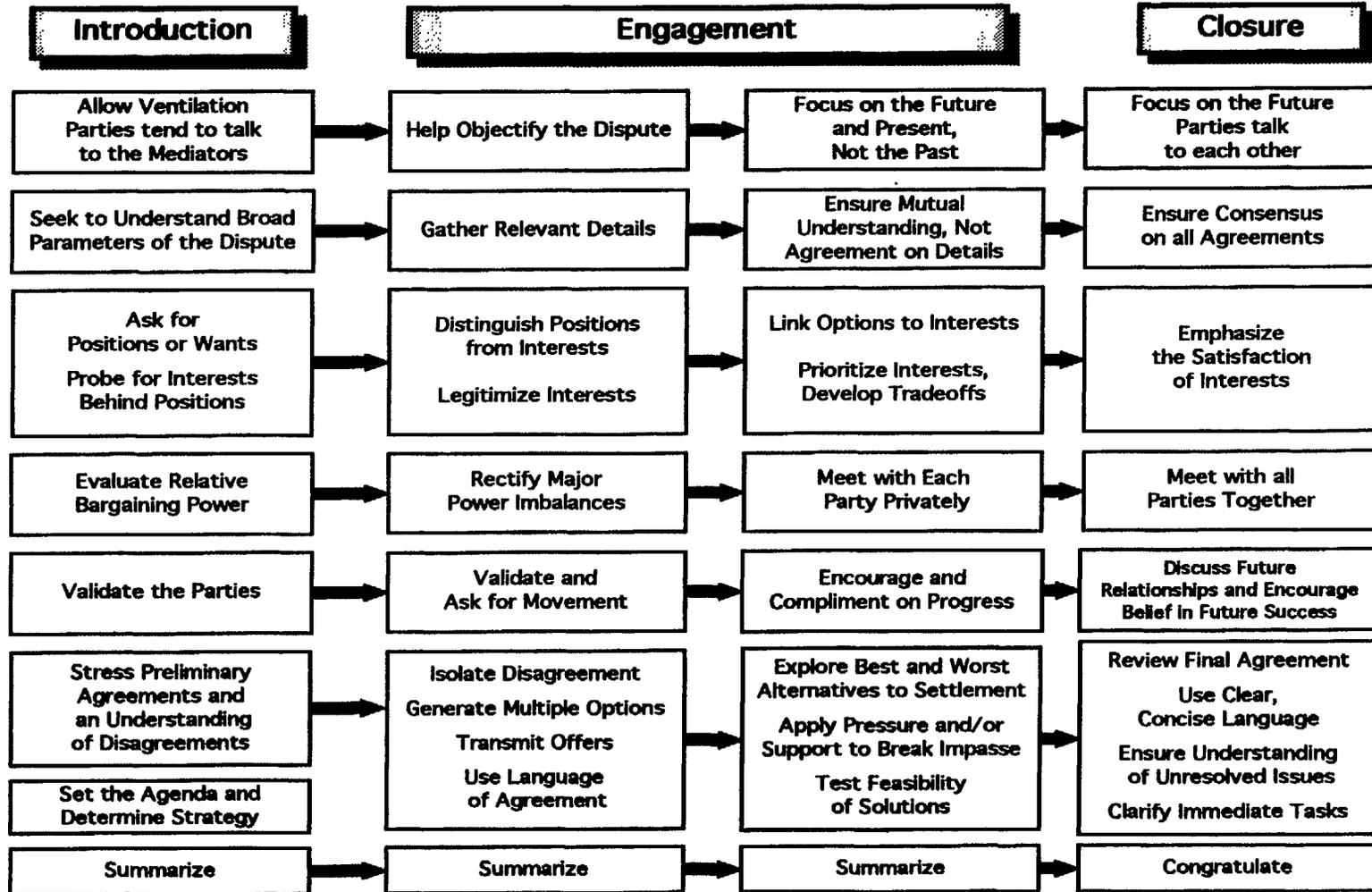
#### Selecting Options

- The parties finalize their agreement or reach impasse.

#### Agreement Writing/Next Steps

- The details of the parties’ agreement are reduced to writing.
- The parties confirm their next steps regarding further negotiation or litigation.

# Developmental Stages of the Mediation Process



***Joint Session***

- Introduction
- Party A's narrative
- Party B's narrative
- Summarize
- Gather preliminary information
- Set the agenda
- *Interest based summary*

***Individual Sessions***

- Begin with that party's concerns
- Find out what wasn't said in the joint session
- Ask what is important to them and the other party
- Clarify interests
- Generate options
- Explore what that party anticipates the other party's reaction to be to proposals
- Explain rationale and transmit offers
- Develop trade-offs, "package deals"
- Reality test, push limits, understand resistance
- Confirm confidential information
- Summarize

***Subsequent Joint or Individual Sessions***

- Narrow options
- Reach provisional agreements
- Test consequences of agreements
- Draft the written agreement
- Clarify post mediation tasks
- Reach closure, plan follow-up if appropriate

## Mediator Approaches<sup>2</sup>

---

Leonard L. Riskin, a professor at the University of Missouri-Columbia School of Law, has developed a classification system that reflects whether a mediator tends to define problems *narrowly* or *broadly*, and whether a mediator thinks he/she should *evaluate*—make assessments, predictions or proposals for agreements—or *facilitate* the parties' negotiation without evaluating.

### **The Mediator's Role**

The *facilitative* mediator assumes that his principal mission is to enhance and clarify communications between the parties in order to help them decide what to do.

Therefore, this type of mediator believes it is inappropriate to give his or her opinion about the strengths and weakness of the case. Although, the facilitative mediator would request the parties to share their opinions about the case, and he or she would ask probing questions to explore the cases' strengths and weaknesses.

The *evaluative* mediator assumes that the participants want and need the mediator to provide some direction as to the appropriate grounds for settlement—based on law, industry practice or technology. This type of mediator also assumes that he or she is qualified to give such direction by virtue of experience, training and objectivity.

### **Problem Definition**

Mediators with a *narrow* focus assume that the parties have come to them for help in solving a technical problem. Often it involves a question such as, "Who pays how much to whom?" or "Who can use such-and-such property?" As framed, these questions rest on "win-lose" (or "distributive") assumptions. In other words, the participants must divide a limited resource; whatever one gains, the other must lose.

A mediator who starts with a *broad* orientation, on the other hand, assumes that the parties can benefit if the mediation goes beyond the narrow issues that normally define legal disputes. Important interests often lie beneath the positions that the participants assert. Accordingly, the mediator should help the participants understand and fulfill those interests—at least if they wish to do so.

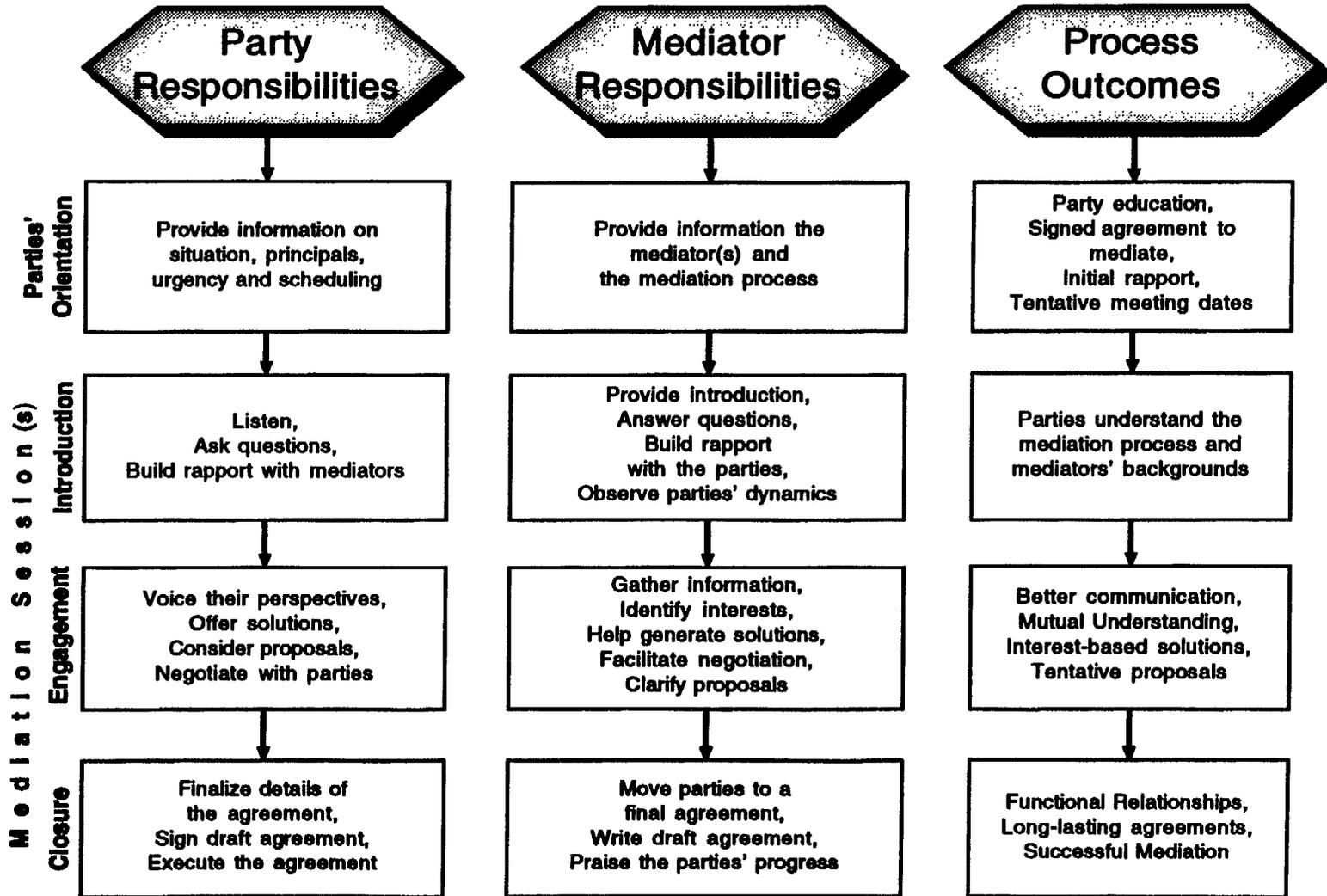
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<sup>2</sup> See the *Mediator Classification Index* located in the *Practice Sessions, Exercises and Worksheets* section of this manual to determine your mediator approach.

## Mediator Orientation Matrix

EVALUATIVE						
<ul style="list-style-type: none"> <li>Assesses strengths and weaknesses of legal claims</li> <li>Develops and proposes narrow (position-based) settlement</li> <li>Urges/pushes parties to accept narrow (position-based) settlement</li> </ul>			<ul style="list-style-type: none"> <li>Probes parties interests</li> <li>Develops and proposes broad (interest-based) settlement</li> <li>Urges/pushes parties to accept broad (interest-based) settlement</li> <li>Predicts impact (on interests) of not settling</li> </ul>			
<i>Narrow Problem Definition</i>	<b>Litigation Issues</b>	<b>Distributive Issues</b>	<b>Business Interests</b>	<b>Personal Interests</b>	<b>Societal Interests</b>	<i>Broad Problem Definition</i>
<ul style="list-style-type: none"> <li>Asks about strengths and weaknesses of legal claims</li> <li>Helps parties develop narrow (position-based) proposals</li> <li>Helps parties evaluate proposals</li> <li>Asks parties about consequences of not settling</li> </ul>			<ul style="list-style-type: none"> <li>Focuses discussion on underlying interests (business, personal, societal)</li> <li>Helps parties understand issues and interests</li> <li>Helps parties develop broad (interest-based) proposals</li> <li>Helps parties evaluate proposals</li> </ul>			
FACILITATIVE						

## Responsibilities and Process Outcomes



## **The Mediation Process: Step-by-Step**

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Mediators meet with the all parties together (known as joint session) and with the parties privately (known as individual sessions). Typically, all the parties and the mediator meet together briefly for a joint session during which the parties' names are confirmed, the mediation process is explained and the parties make their initial comments. Thereafter, the mediator meets with the parties in a series of individual and/or joint sessions, helping them to reach consensus, and if appropriate, to draft a mutually satisfactory agreement.

### **Step 1: The mediator makes introductory comments.<sup>3</sup>**

The introductory statement by the mediator is given in a joint session with all parties. The mediator's comments establish a relaxed atmosphere for the session. The mediator's role is explained, as are the purpose and procedures of the mediation process. It is important that there is a clear understanding of what will be expected of the parties, and what they can expect from the mediator and the mediation process. The mediator's opening remarks may be brief, but they are vital to developing a rapport with the parties and for setting the stage for collaboration and problem solving.

The mediator's objectives are to:

- » Educate parties about mediation process
- » Establish trust
- » Answer initial questions

The following points should be included in the mediator's introductory comments:

1. Greet and welcome the parties.
2. Introduce self and clarify the parties' names.
3. Describe the purpose of mediation.
4. Describe the mediation process:
  - » Proceedings are confidential;
  - » Separate and joint meetings will be held with the parties;
  - » If an agreement is reached, the mediator will draft a document for the parties' review and signatures.
5. Describe role as mediator
  - » Neutral
  - » Facilitator
    - Guides discussions
    - Helps parties communicate effectively
    - Helps parties consider options for resolution

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<sup>3</sup> See the *Practice Sessions, Exercises and Worksheets* section of this manual for an example mediator introductory statement by Tanzanian Principal Resident Magistrate R. L. Nditu.

*"I'll help you to talk and think about ways of working things out"*

6. Give opportunity for questions

## **Step 2: The mediator asks the parties for their initial comments.**

The mediator begins the dialogue between the parties by asking them to briefly share their perspectives of the situation. At this point in the process it is best for the mediator to ask as few questions as possible—extensive questioning may entrench the parties in their positions or cause alienation. And, the objective of this stage of the process is for the parties to have a brief period of uninterrupted time. Transitions are made from one party to the other party with an open-ended statement, such as, *"Now, if we could hear from Mr. Jones."*

### **Mediator Techniques: Parties' Initial Comments**

1. Ask for a brief summary of the parties' perceptions of the situation. For example, *"Mr. Meissner, please tell us why you are here today and what you would like to see happen in this mediation."*
2. Provide the parties with an opportunity for expressing their emotions.
3. Ask parties who talk non-stop to summarize.
4. Allow some exchange of dialogue between the parties.
5. Ask very few questions, and make them broad, clarifying questions, such as, *"What do you mean by..."*
6. Resist the urge to confirm all of the details at this stage of the process. Understand that the story may still be unclear.
7. Make a mental and written list of the key issues.
8. Summarize what has been said in neutral, non-negative terms, highlighting areas of agreement and the issues or concerns that will need to be discussed during the mediation.

## **Step 3: The mediator asks questions and the parties share information with each other.**

Whether in a joint or individual session, the mediator begins gathering information and building on what was said by the parties in their initial comments. The use of open, focused, and closed questions is of paramount importance; the mediator controls the flow of information through these questioning techniques. It is best to employ open-ended questions early in the mediation, unless the parties' comments are disjointed. Mediators must continually clarify information as the story unfolds.

Be cautious about eliciting information that would be damaging to the negotiations. Particularly sensitive questions may be better asked during an individual session with a party. Do not interrupt the parties needlessly; issues are often clarified by allowing the parties to engage in free flowing dialogue. At this stage in the process, the mediator helps the parties to clarify the issues, uncover their interests, and create a better understanding of the situation and its ramifications on the parties.

### **General Topics to Explore:**

1. The parties' perceptions of the situation.
2. The impact the situation has had on the parties' lives—the practical aspect as well as the parties' feelings and emotions.
3. The rationale behind what a party is requesting. For example, their specific financial losses or cost estimates.
4. Whether other people may have been involved in the situation.
5. The real or perceived motives of the parties—uncover the parties' interests by asking *why* something is important.
6. The history of, or desire for, an ongoing relationship between the parties.
7. The financial and emotional ramifications of the dispute.
8. The parties' financial and support resources (jobs, family, friends).
9. Previous settlement discussions or other interactions.
10. The impact on the parties of not resolving the dispute through mediation.

### **Mediator Techniques: Information Gathering**

1. Actively listen to the parties; provide non-verbal responses.
2. Ask questions in a neutral fashion; use more open-ended questions than closed.
3. Gather information that helps the parties to better understand each other and to identify their interests.
4. Determine whether questions should be asked in individual or joint meetings.
5. Restate information and feelings that are important.
6. Pay attention to the behavior and body language of all of the parties.
7. Take notes while maintaining eye contact. The parties should know that the mediator is focused on them, not on the notes.
8. Focus on the future, to the degree possible, even while collecting information on the past.
9. Stay calm in the face of intense emotions. When the parties exhibit strong emotions, mediators may reassure them that it's okay to get things out and that everyone will get a chance to say what's important to them.

#### **Step 4: The mediator helps the parties identify their issues, concerns and interests.**

At this stage of the process, the mediator helps the parties identify and understand their concerns and the topics that will need to be discussed during the mediation. Mediators summarize the issues and check for accuracy and completeness of the issue list. For example, the mediator might say, "*The issues as I understand them are 1)....., 2)....., and 3).... Is there anything else?*" The parties and the mediator decide which issues to work on first. The mediator may ask the parties where they would like to begin or may choose to start with an issue that the parties will be able to resolve easily.

##### **Mediator Techniques: Issues & Interests**

1. Begin to foster a spirit of teamwork and cooperation.
2. Ask each party to identify the prevailing issues.
3. Restate the issues in an organized and succinct manner.
4. Inquire and probe into underlying or "hidden" issues.
5. Begin to understand the parties' interests—ask, "*Why is it (the position) important?*"
6. Assist the parties in prioritizing issues and interests.
7. Think and talk about the problem as a shared or joint problem.
8. Shift the focus from positions (what they want) to interests (what they need).
9. Summarize areas of agreement and disagreement.

#### **Step 7: The mediator helps the parties to generate options and devise a workable plan.**

At this stage of the process, whether in joint and/or individual sessions, the mediator helps the parties to think of as many ways as possible that the dispute may be resolved. It is important that several ideas be considered and that the parties do not attempt to evaluate each idea as it is suggested.

##### **Mediator Techniques: Generating Options**

1. Brainstorm options. Throw out several options simultaneously to get the parties thinking in a brainstorming frame of mind.
2. Ask the parties "*What if you tried this or that....*" or "*Others have resolved similar concerns by....*", or "*Have you considered....*"
3. Suggest possible options. By offering more than one option, mediators guard against unwittingly compelling parties to view their single suggestion as the "right" choice.
4. Develop agreements on general principles, and then work out the details.

5. Break issues into smaller problems and discuss solutions to sub-issues.
6. Do not allow the parties to accept or reject options one at a time.
7. If a party is consistently negative toward suggested options, ask them to replace a rejected option with one of their own.
8. Switch to another issue when the parties seem to be reaching an impasse on one issue.
9. Select a possible option that is neither perfect nor totally acceptable to the parties, but provides a framework for joint modification.
10. If necessary, suggest the use of outside experts or standards, such as estimates by professionals.
11. Encourage the parties to move forward by noting specific areas of agreement.
12. Use individual sessions to help parties consider their options.

At this stage in the process, the mediator helps the parties consider the different options and begin to develop the framework for a possible agreement. The mediator rephrases various options to increase the parties understanding about what one party is offering or what the other party is requesting. The mediator helps the parties to assess the workability of the different options, and encourages the selection of options that meet both parties' interests. The mediator attempts to build a positive momentum and highlights the progress that the parties have made. In some instances, the parties may be asked to "try-out" an interim or temporary agreement.

### **Mediator Techniques: Bargaining and Negotiation**

1. Develop movement by starting to discuss options that might be agreeable to both parties.
2. Don't underestimate the value of symbolic psychological offers or apologies.
3. Review points of agreement and clarify specific language.
4. Develop "package" proposals that are comprehensive and satisfy most interests.
5. Be alert for options that "enlarge the pie." Variables such as time, ancillary resources of the parties, or actions that are "worth" something to one party can sometimes be used to produce the classic win-win solution.
6. Use individual sessions if necessary to:
  - » Help parties think realistically about their situation.
  - » Consider options on their merits.
  - » Test out particular offers.
  - » Help each party present offers in terms that will be more acceptable to the other party.

- » Indicate the likelihood, in your opinion, of the other party accepting an offer.
- » Suggest an idea as your own, so as to not have it rejected simply because it is thought to have come from the other side.
- » Present a worse case settlement offer first, and then present a more favorable offer.
- » Assist the parties to develop a rational and logical argument behind the settlement offer, i.e., assist them to save face in offering or accepting a settlement.
- » Role-play with each party possible proposals from the other side or reactions to the options being discussed: *“How would you react if Mrs. Rodriquez suggested the following option...?”* Or, *“How would you respond if Mrs. Rodriquez’s reacts to your proposal by saying...?”*
- » Phrase offers on a contingent basis, *“If you give him this, then he is likely to consider giving you that.”* Or make the offer contingent upon the receipt of a reciprocal concession on future issues.

**Step 6: The parties finalize their agreement and/or the mediation process is concluded.**

As the mediation process progresses, the parties may appear to be in agreement on the major issues. At this point, it is tempting for mediators to think an agreement is imminent before working out all the details with the parties. Many agreements fail because crucial details were not agreed upon before the mediation was concluded. Be sure to test out the details with each party before assuming that an agreement has been reached.

The agreement is:

- » A reminder of the specific tasks they have agreed to perform.
- » A reminder and documentation of their cooperation.
- » Sometimes an official document maintained as court or administrative records.

A good agreement must do the following:

1. Resolve the immediate dispute.
2. Cover all the issues raised by the parties for which an agreement was reached.
3. Deal with all parties present and any that are absent.
4. Prevent similar disputes from arising in the future.
5. Make sure that the agreement is realistic and satisfactory to all parties.

6. State clearly and succinctly *what* each party must do, and *when* and *how* they must do it—specify amounts, dates, and actions.
7. Avoid non-quantifiable terms such as: “reasonable, adequate, frequent”.
8. Include contingency plans if the agreement does not work out or otherwise needs to be revisited/altered.

**Agreement Format:**

» **Statements of principle(s)**

Identify underlying principles that guide the parties, help clarify intent, and reinforce their shared interests of the parties. For example: *“Mr. White and Mrs. Williamson agree that all staff in the division should be notified of their job expectations and behavior.”* Or, *“Mr. White and Mrs. Williamson agree that this case is settled and should be removed from the court’s docket.”*

» **Specific performance**

Clarify the responsibilities of both parties. Be as detailed and specific as possible, including the time frames associated with each specific performance. For example: *“ Mr. White agrees to meet with Mrs. Williamson a minimum of twice per week” (vs. often). He will arrive in Mrs. Williamson’s office at 9:00 a.m. (vs. early) on Mondays and Thursdays to discuss the tasks that must be completed prior to their next scheduled meeting.”* Or, *“Mr. White agrees to pay Mrs. Williams (exact amount), by (method of payment), no later than (date and time).*

» **Non-compliance**

Identify what happens if either party is unable to comply with the terms of the agreement. For example: *“If payment is not executed, Mrs. Williamson will.....”*

# Improving Communication

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## ***Mediator Techniques***

1. Actively listen to the parties.
2. Demonstrate interest, verbally and non-verbally.
3. Use the appropriate degree of eye contact.
4. Use the appropriate types of questions.
5. Learn to be comfortable with silence.
6. Take notes, including the actual words of the parties.
7. Eliminate as many distractions as possible (e.g., loud noises).
8. Ask people to share their reaction to what is being said by the other party.
9. Resist the urge to “figure out” the situation or solution too early.
10. Empathize (don’t sympathize)—a good expression of empathy for one party usually will *not* be taken as a sign of bias toward that party.
11. Coach the parties to express thoughts and feelings in ways that will have the greatest chance of being understood and accepted by the other party.
12. Reframe and redirect negative communication behaviors, such as insults and verbal attacks, using “I messages” and other techniques.
13. Tolerate a certain level of arguing as long as it is helping you or the parties learn or understand something.

## ***Questions***

Different types of questions are more effectively used at different times, depending on the stage of the mediation process, the level of emotion being expressed by the parties, and the goals of the mediator and the parties. In all of their questioning, mediators are careful to use wording that is neither explicitly nor implicitly judgmental.

### **Types of Questions**

#### **» Open-ended Questions**

Open-ended questions encourage the parties to expand and explain things more completely than a series of pointed questions. These types of questions are used to gain a lot of information, to begin communication between the parties, and to address sensitive topics. They call for narrative answers and cannot be answered by a simple “yes or no.” Mediators use open-ended questions more than any other type of question.

For example: *“Would you tell us what has happened between you and your boss?”*

» **Closed Questions**

These are specific questions and require "yes or no" type answers. They are used to direct the focus of the conversation to a specific topic and to manage the mediation process or parties.

For example: *"Do you want to continue with our discussions?"*  
*"Were you present at the time?"*

Closed questions are also typically used when finalizing agreements.

For example: *"Will rotating on Thursdays and every other weekend work for you?"*

» **Focused Questions**

A focused question is like an open question but it seeks a more narrow scope of information.

For example: *"What happened that afternoon, after he left?"*

Focused questions are also used to determine what is most important to each party, i.e., their real interests and concerns.

For example: *"What is it about this situation that bothers you the most?"*

Like closed questions, focused questions are particularly useful when generating and evaluating options for settlement and thinking about the possibility of not reaching agreement through the mediation process.

For example: *"What do you think about working things out this way?"* *"Does this seem fair to you?"*

» **Clarifying Questions**

Clarifying questions are used to help the parties and the mediator thoroughly understand what is being said.

For example: *"You said a few minutes ago that you didn't care anymore. Will you tell us what you meant?"*

When one party makes inconsistent remarks, or when a party's body language does not match his or her words, the mediator can clear up incongruities by asking clarifying

questions. In these instances, it is important that questions be free from even a trace of judgment since parties can quickly become defensive when they feel trapped by their own inconsistencies.

For example, instead of *"You said (x). Now you are saying (y). Which is it?"* ask, *"Earlier, I thought I heard you mention that Thursdays won't work for you but now it sounds like they might. I want to make sure I understand your thoughts on that. Could you explain?"*

#### » **Leading Questions**

Leading questions are used to gain a desired response and carry a subtle prejudice. They should never be used during the mediation process.

For example: *"Don't you think you owe him something?"*

#### **Mediator Techniques: Questioning**

1. Early in the mediation, and at the beginning of the first individual session with each party, ask only general, open-ended questions.
2. Do not interrupt a constructive narrative to ask a question that can wait.
3. Gather information in a conversational style. Use what the party has just said as a prompt for a natural follow-up question.

For example: *"You said that you stopped going to the meetings in January. What led you to decide that?"*

4. Ask one question at a time and wait for an answer. A quick series of questions will appear as an interrogation or like a cross-examination.
5. Ask "why" questions that help to uncover interests behind the positions.

For example: *"Why is that important to you?"*

6. Avoid "why" questions that sound accusatory.

For example: *"Why did you make that decision without consulting the others first?"*

7. Be cautious about eliciting information that would be damaging to the negotiations.

For example: *"Did you think she was trying to cheat you?"*

8. Do not ask questions that prompt a party to give an answer you have already formulated for yourself.

For example: *"Don't you think it would be wise for each party to share in the responsibility?"*

## **Sample Questions**

The following list of sample questions illustrates the use of different questions in each stage of the process.

### **Mediator's and Parties Initial Comments**

- » *"What questions can I answer for you about the mediation process?"*
- » *"Where would you like to start the discussion?"*
- » *"Would you please describe it in your own words?"*
- » *"What is your understanding of how it happened?"*

### **Identifying Issues and Interests**

- » *"What are your biggest concerns?"*
- » *"What worries you the most about the situation?"*
- » *"Why do you suppose you feel this way? Why is it important?"*
- » *"What would it take to assure you in the future?"*

### **Generating & Selecting Options**

- » *"To get this done, what will you need to do?"*
- » *"What is the best situation and the worst situation that could happen to you right now?"*
- » *"How much of a hardship will that be for you?"*
- » *"Can you explain how you arrived at the amount you are requesting?"*

### **Agreement Writing & Closure**

- » *"What questions do you have?"*
- » *"How comfortable do you feel with what you have decided?"*

## **Active Listening Techniques**

### » **Encouraging**

Shows interest in a neutral way and keeps the parties talking. For example: *"I see. Please tell me more."*

### » **Restating**

Confirms what was said by saying it in a slightly different way, taking out the blame and focusing on interests rather than positions. For example: *"In other words, you're concerned about being treated with respect and..."*

» **Reflecting**

Lets a party know you understand his or her point of view. For example: *“I hear that you are very troubled about not knowing what to expect....”*

» **Summarizing**

Pulls the story together and promotes further discussion. For example: *“These seem to be the main points you have covered so far....”*

» **Coaching**

Gets one party to practice expressing thoughts and feelings in a private session with the mediator--before confronting the other party directly. In many instances, mediators help parties reframe their comments from blaming (or “You messages”) to focusing on their own concerns and needs (or “I messages”).

Coaching is also used to help the parties practice active listening with each other and can be used in joint and individual sessions. For example, in a joint session, the mediator might say: *“Mrs. Ramirez, would you tell us your understanding of what Mr. Randolph is talking about?”* This technique should be used simply to clarify, never to force one party to accept the validity of the other’s views. Doing the latter can quickly undermine the party’s trust in the neutrality of the mediator and can put him or her on the defensive.

» **Reframing Negative Communication**

It is common for parties to blame and even insult others during mediation sessions. Mediators are skilled at helping the parties shift the focus from what went wrong in the past and who’s to blame, to what needs to change in the future and how they can make such change possible. For example, in response to *“He treats me like dirt every time he comes to pick up the reports”* the mediator might say *“It sounds like you are concerned that there be respect between you and colleague. What would a respectful interaction look like?”*

***I-Messages***

Mediators help the parties to reframe comments that cast blame or are otherwise negative—often referred to as “you messages”—into “I messages”. I-messages enable a party to express the impact another party’s behavior has on him/her without making the other party feel defensive.

### Examples of you-messages are:

- » Orders or commands.  
For example: *"Don't eat in here."* *"Get into the car."*  
*"Stop tapping that pencil."*
- » Blaming or name-calling statements.  
For example: *"You are acting like a baby."* *"You are driving me crazy."*
- » Solution-giving statements.  
For example: *"You should forget that idea."* *"You'd better stop fooling around."*
- » "If-then" threats.  
For example: *"If you don't do what I ask, then I will make things very difficult for you."*

### I-messages consist of a three-part message:

1. The feeling the party experienced as a result of the specific behavior.
2. The specific behavior.
3. The tangible effect on the party.

For example: *"I get frustrated (feeling) when you keep looking at your papers while we're talking (specific behavior) because I lose my train of thought (tangible effect)."*

### Mediators coach parties to:

1. Describe their feelings as accurately as possible. The mediator helps to "normalize" a party's feelings. For example, a mediator might help the parties to understand that experiencing anger after initial feelings of hurt, embarrassment, guilt, fear, etc. is a common reaction.
2. Describe the behavior in specific, rather than general terms.  
Mediators help the parties to:
  - » Clarify statements that are non-specific (*"You don't do your part around the house."*)
  - » Refrain from using negative inferences about the other person's behavior (*"You were so rude."*)
  - » Stay away from terms that are absolutes (*"You always do it this way."*)

- » Avoid casting judgment (*"You waste money."*)
3. Describe the effect in concrete or tangible terms. Mediators may inquire, "Does this:
    - » cost you money"?
    - » harm your possessions or peace of mind"?
    - » consume your time"?
    - » interfere with your effectiveness"?
    - » cause you extra work"?

### **Responses to Feeling Attacked**

Mediators help to improve communication by redirecting the mediation when one of the parties feels attacked by the other party. Parties may respond in one of several different ways when feeling attacked. The mediator uses the following techniques to minimize the damaging effects of attacks.

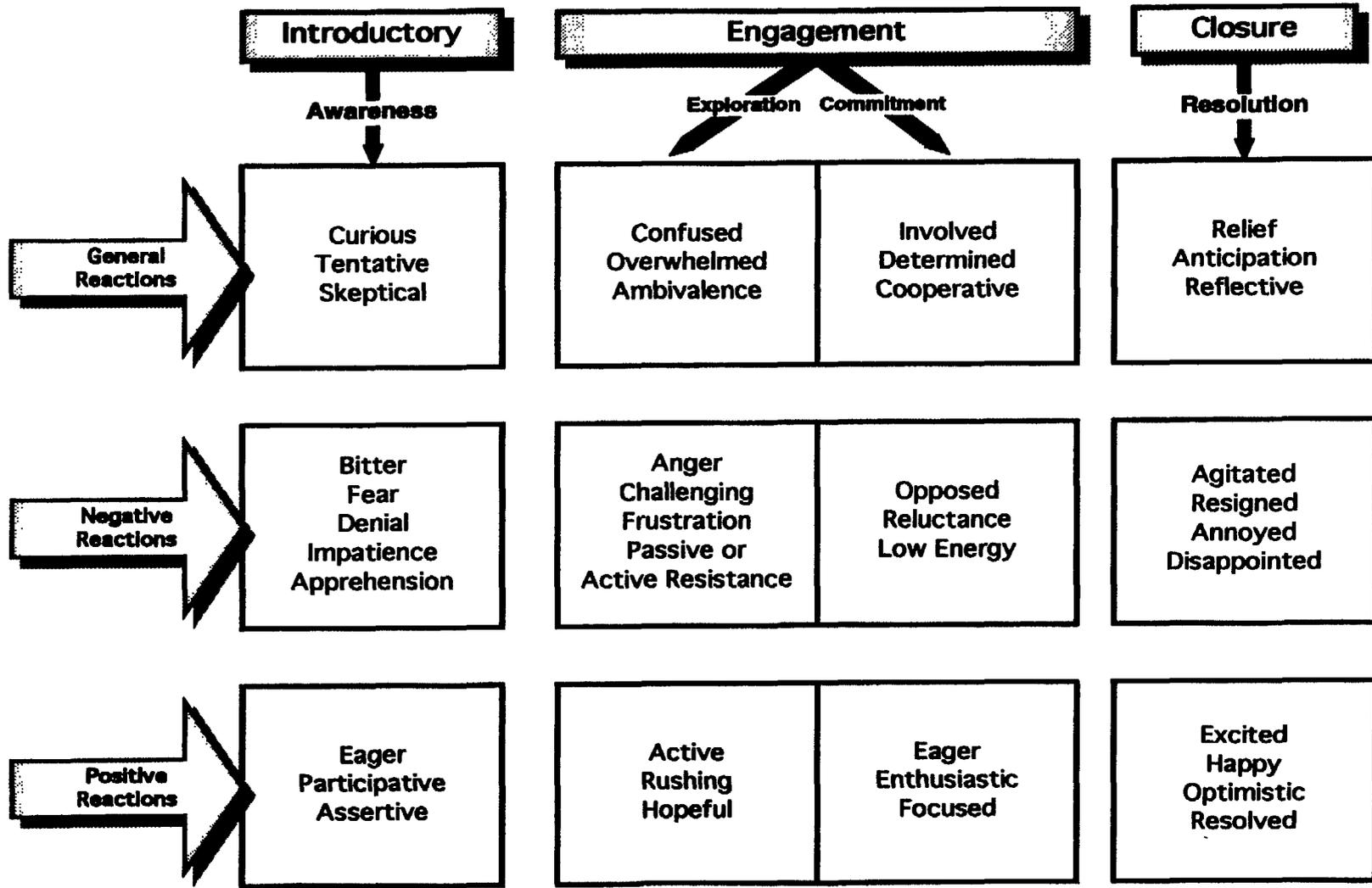
#### **Mediator Techniques: Verbal Attacks**

1. Ask the parties whether this is a common reaction/pattern with this person and with others.
  - » For example, *"Is this a typical reaction for you?"* Or, to the other person, *"Is this how you would expect him to react?"*
2. Help the party understand that he has a choice about how he receives the insult.
  - » For example, *"Is it possible that the comment meant more about him, than it did about you?"*
3. Rephrase the statement using neutral or positive language, or ask the person to rephrase the statement using neutral language.
  - » For example, *"Could you rephrase what you just said by highlighting the good things that could come of it?"*
4. Suggest a positive or neutral way for the person to make the statement.
  - » For example, *"When you talk to him about your feelings, it would be best to focus on what concerns you when he is with the children, rather than to say he is 'no good' around them."*
5. Identify the statement as "attacking" behavior.
  - » For example, to the receiver: *"How do you hear what he just said."* Or, to the sender: *"If someone said that to you, how would you take it?"*
7. Use the following techniques offered for specific situations.
  - If the party responds to the attack by:
    - » Reacting back, the mediator can:
      - Ask direct and focused questions.
      - Ask the person what he heard or what he is reacting to.

Interrupt the person and focus the discussion in a more productive direction.

- » Becoming silent, the mediator can:
  - Involve the party by asking specific questions.
  - Give the party more time and attention; possibly meet with the party in an individual session.
  - Coach the party on how to express his feelings directly to the other person.
- » Wanting to leave the mediation, the mediator can:
  - Conduct an individual session with the party.
- » Blaming themselves, the mediator can:
  - Ask the party if he really believes he is at fault.
  - Ask the party if he can learn something positive from the experience.
- » Giving into the other party's demands, the mediator can:
  - Explore the consequences of an agreement.
- » Blaming a third party, the mediator can:
  - Involve the third party in the mediation.
  - Limit discussions about the third party during the mediation.

# Parties' Common Reactions During the Stages of Mediation



## Individual Sessions

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### *Why Use Individual Sessions*

» **Promote Negotiating Equality**

If there are any indications that pressures, threats or other forms of intimidation are affecting the negotiating process, mediators can use individual sessions to elicit concerns from the parties. While some parties express such concerns openly, those who feel very afraid or intimidated are likely to do so only in private. In addition, individual sessions also can be used to clarify or share information in a non-threatening way where one party has a mistaken view of the facts or is missing information.

» **Promote Positive Negotiating Strategies**

In separate sessions, mediators can talk openly with each party about his/her motivation for using particular negotiating strategies. With a better understanding of what motivates the parties, the mediator can work with them to bolster effective negotiating strategies and change those that are ineffective.

» **Resolve Impasses**

In some instances, one party has difficulty making a final decision to accept an agreement. The party may be afraid of the uncertainties of the future, or of the negative aspects of the agreement, or may be unrealistically hoping for circumstances to change. Whatever the reasons, some parties have difficulty taking the last step to settlement, and the mediator may need to help them to reach a decision. In these circumstances, mediators use private sessions to guide the parties in considering their likely options if no agreement is reached.

Not surprisingly, individual sessions can also be extremely useful in resolving impasses over specific issues, especially if one party is more uncompromising or “stuck” in place. Private discussions increase the likelihood that each party will consider proposals on their merits since proposals accepted or rejected in private do not affect their bargaining positions.

### *How to Use Individual Sessions*

Individual sessions are a routine part of the mediation process and, during the mediator’s introductory comments, parties should be told to expect them. Individual sessions should not, however, be used as a crutch to avoid all conflict. In each case,

mediators should determine when and why an individual session might be helpful in advancing the parties' negotiation.

Prior to meeting with the parties individually and before closing a joint session with the parties, mediators should summarize relevant points, acknowledge that waiting outside may seem lengthy, and assure the party who will wait initially that they will be with him/her as soon as possible.

### **Mediator Techniques: Individual Sessions**

1. Ask the parties to wait outside to review notes and decide:
  - » Who to speak with first
  - » Questions to be asked
  - » Areas of agreement/impasse
  - » Individual interests and positions
  - » Tentative agreement possibilities
2. Remain mindful of the length of time spent with one party.
3. Begin each individual session with the agenda of the party who is present, not the other party's or the mediator's. Reconfirm each party's primary interest to determine if it has changed in the absence of the other party.
4. Assign "homework", if appropriate, for parties while they are waiting to meet with the mediator. For example, ask parties to think about choices they will need to make in a later session.
5. Ask specific questions, test the feasibility of the parties' decisions, and assist them in separating the issues, interests, and positions.
6. Facilitate an understanding of any "hidden" issues between the parties.
7. Clarify and prioritize the parties' requests:
  - » Ask for the parties' rationale for their requests. For example: "*How did you arrive at that figure?*"
  - » Rephrase statements in order to help the parties broaden a specific request. For example: "*So you would like an increase in salary....*" or, "*You're interested in changing the rotation schedule.*"
  - » Clarify the specifics in order to help the parties define general terms. For example, where one party is hesitant to mention a particular amount of child support, the mediator would say: "*We need to understand a range that you feel is fair.*"
8. Do not divulge entire settlement offers at once. Build upon points of agreement.
9. Do not give advice, even if asked.
10. Keep parties' confidences. At the end of each individual session, ask if the party has said anything that he or she *does not* wish to be shared with the other party.

11. Review notes from each session to determine a strategy for the next individual or joint session.

### **Mediator Techniques: Negotiating through Individual Sessions**

1. Focus on each party's needs, feelings or positions, at the beginning of an individual session with him/her. Mediators encourage the parties to elaborate about their concerns. For example:

*"Mrs. Shorts, It's clear that you're upset about what has happened. Is there anything else you'd like to tell me about all this?"*

2. Use summarizing techniques to clarify a party's bargaining strategy and underlying goals. Sometimes this is the first opportunity a party has had to reflect on his/her own negotiating posture and style. For example:

*"If I hear you correctly, Mrs. Shorts, you're saying that your primary goal is to ensure that your staff feel secure while your department is merging with Mrs. Ray's department. Is that right?" "Have you thought about how you might present this concern to Mrs. Ray?"*

3. Transmit information gained in a prior individual session with the other party, when appropriate. You can correct misimpressions, clarify the feelings, goals and needs of the absent party, and portray the bargaining position of the other party in the best possible light. For example:

*Mrs. Ray: "Mrs. Shorts blames me for all her staff problems. She refuses to acknowledge that she has been treating them terribly ever since the staff survey came back indicating they wanted to merge with my department."*

*Mediator: "Well, Mrs. Shorts told me in our conversation that she has regrets about her own managing style lately. She also said that she wants to do whatever she can to improve things and would like to work with you to make the transition as smooth as possible."*

*Mr. Shorts: "She did?"*

4. Use "what-if" questions to formulate options and narrow bargaining positions without risk. For example:

*"This is my idea, not hers. But, hypothetically speaking, what if Mrs. Shorts were to come up with a list of things she would be willing to do to make this possible?"*

5. Role-play with one party the possible responses by the other party. For example:

*"Supposing I'm Mrs. Shorts and I responded to your proposal by pointing out that you have a history of frequently reassigning her work to other employees. How would you respond?"*

6. Get the parties to take responsibility for resolving the conflict, rather than continuing to dwell on who did what to whom in the past. For example:

*"Mrs. Shorts, I know that you feel Mrs. Ray was wrong to insist on meeting with your staff on a day that wasn't previously arranged for such a lengthy meeting. Knowing what we do now, that she wanted to meet with them before the CEO announced the reorganization, how might the two of you handle a similar situation in the future?"*

7. Help the parties to consider the other party's perspective and to respond accordingly. For example:

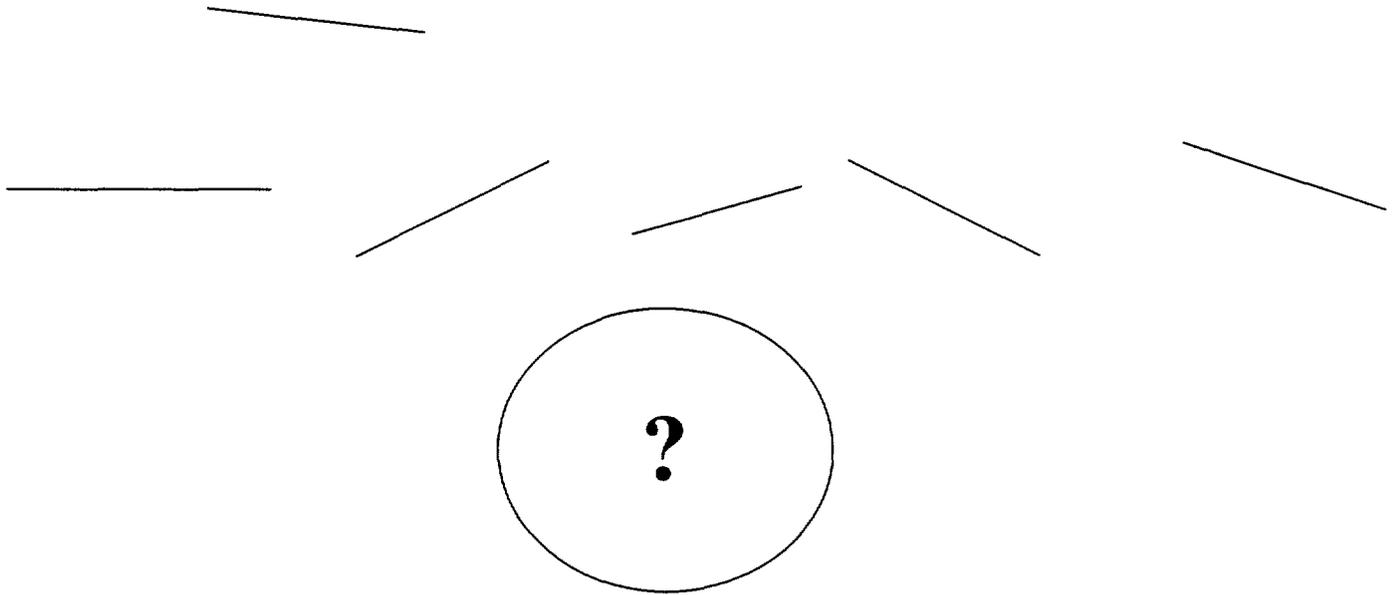
*"Mrs. Shorts, I think you know as well as I do that, if I present this proposal to Mrs. Ray, she's going to discount it, using the same argument we heard before. What would make her respond more positively?"*

8. Help the parties consider their best and worst alternatives to an agreement. For example:

*"Mrs. Shorts, what is going to happen if this matter is not resolved here? Let's discuss the worst and best scenarios so you can weigh all your possible options."*

# Practice Sessions, Exercises and Worksheets

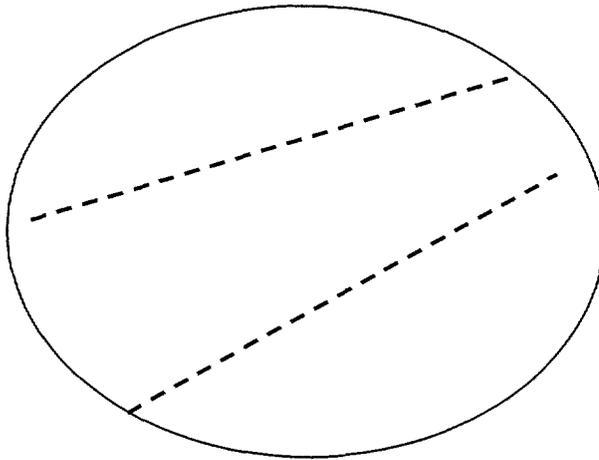
**“Conflict”**



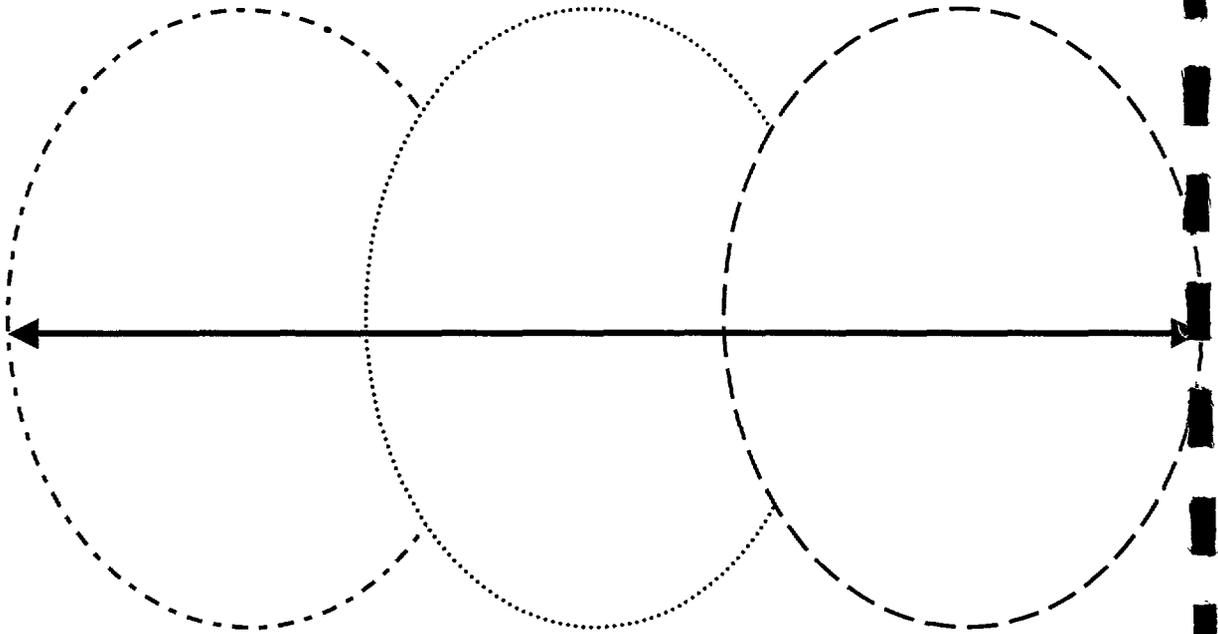
**Responses to Conflict**



**What is Resolved???**



# Language Responses to Conflict



+ / -

**Time**

**Cost**

**Control:**

*Process*

*Outcome*

**Future  
Relationship**

**Certainty of  
Resolution**

**Others:**

# The Burning Sailboat

## *Background Information*

Sammy and Leslie have been neighbors for ten years. Leslie bought a sailboat and stored it for a few months in his driveway. Then Sammy offered to keep the boat in his garage. Leslie accepted Sammy's offer and everything was fine until the garage caught fire one day.

## *Other Facts:*

1. Losses due to fire
  - Garage     \$5,000
  - Boat        \$1,500
2. Sammy's Insurance covers
  - \$5,000
3. Fire marshal's finding: "Undetermined Cause"
4. The law:
  - A "gratuitous bailee" is liable only if s/he is negligent

## *Notes:*

## Leslie

---

*(Confidential Instructions—do not read unless instructed to do so.)*

You are having serious financial problems. You had been planning to sell the boat to pay off some of your debts. You don't have enough to fix it up for sale and no one will buy it in its present condition. You are very embarrassed by your financial problems and haven't even told your family how bad the situation is.

Notes:

## Sammy

---

*(Confidential Instructions—do not read unless instructed to do so.)*

You are afraid that the fire started in a pile of rags that you had been using to refinish furniture. Your spouse had been telling you for weeks to clean up the garage. You told your spouse that the rags were cleaned up before the fire began. The fire marshal ruled that the origin of the fire is unknown, but you never told him about the pile of rags. You feel guilty but you don't want your spouse to learn how the fire might have started. Your spouse doesn't want to pay for the damage to Leslie's boat.

Notes:

# Mediation Observation Form

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## *Mediator Principles:*

*Note behaviors that exhibited adherence to or violated the following principles:*

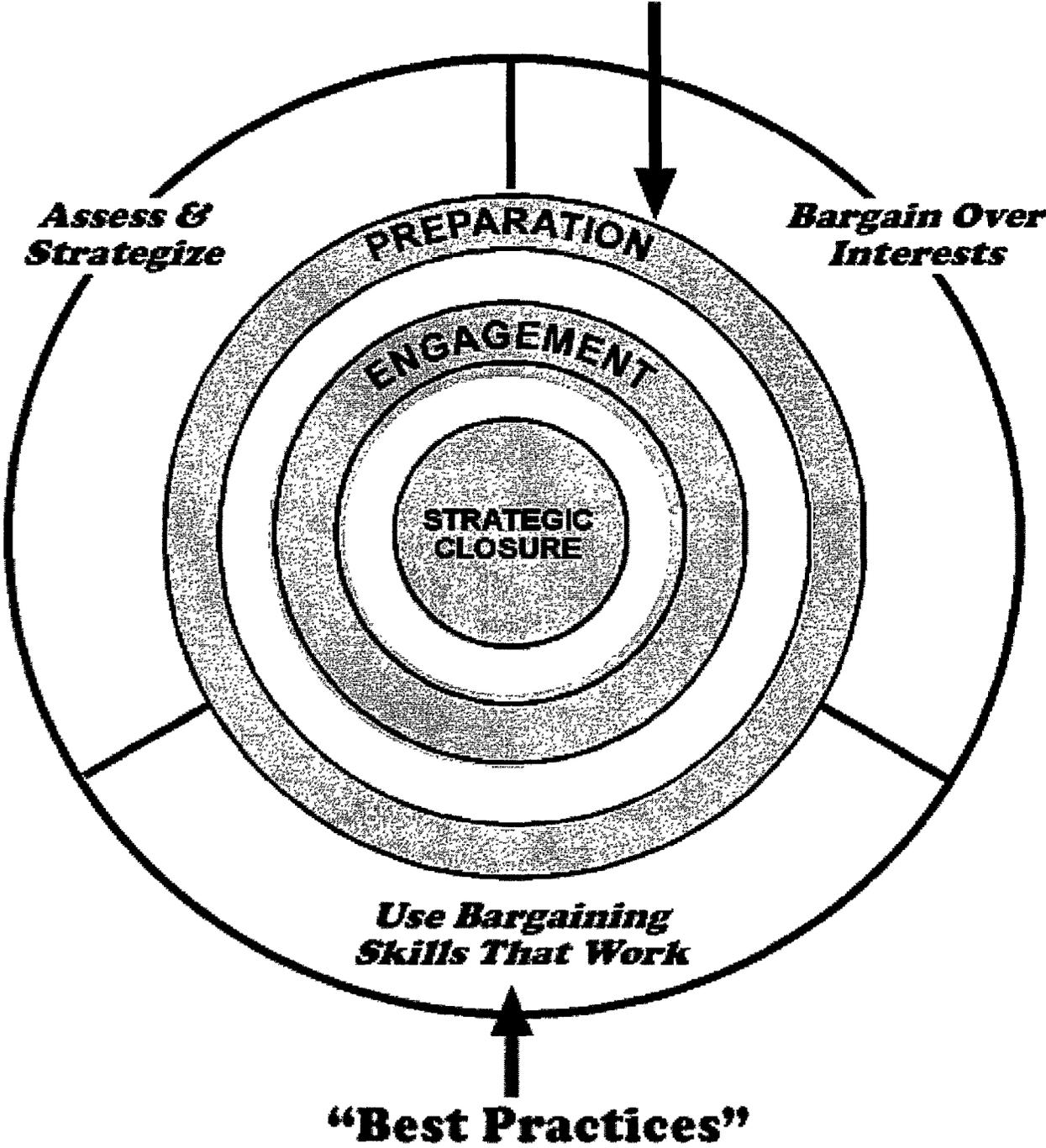
1. Let the parties be heard
2. Micro focus
3. Be inviting
4. Follow the parties
5. Be Transparent
6. Use a problem solving approach
7. Be neutral
8. Be patient

## *Mediator Skills and Techniques:*

*Note behaviors (such as the actual words used by the mediator) as examples of the following skills and techniques:*

1. Identifying and working with interests:
2. Use of open-ended questions:
3. Restating information:
4. Reframing negative comments:
5. Keeping the parties focused and moving:
6. Effective use of individual sessions with each party:
7. Helping the parties generate options:
8. Moving the parties toward closure.

# Negotiation Framework



195

A SAMPLE OF AN INTRODUCTORY STATEMENT OF A  
MEDIATION SESSION

(PREPARED BY R. L. NDITI, PRINCIPAL RESIDENT  
MAGISTRATE AND APPROVED BY THE  
CHIEF JUSTICE, TANZANIA)

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1. When parties to a case and their advocates if any, enter the Mediation room, they and the mediator will greet each other and then make self introduction.

The mediator will commence to state thus:

"My name is X. You might know me. I am a Principal Resident Magistrate in this Court of Mwanza. But to day I have been assigned to mediate your case. Though I have just told you that I am a Principal Resident Magistrate in this mediation session I won't pose or act as such. I will not make any decision of your case. And further, I will not advocate for any one of you. I want to assure you that I have no relationship either of blood or of friendship with any one of you. The success of today's discussion will mainly depend on your full participation in the exercise. In order to reach an amicable settlement, each party has to be open minded and reveal honestly, whatever reason of bringing the case to Court".

2. The Mediator will state to the parties the disadvantages of a trial and advantages of mediation in the following words.

"Mr. Plaintiff. You have filed your case in Court and you are here, today because you believe that you are going to win it. Isn't it? (probable answer - Yes). And you Mr defendant you are here today resisting the plaintiff's claim because you believe you are going to win your case. Is it not? (probable answer - Yes). I am afraid, one of you is wrong. In any trial there must be a winner and a loser. In no way will both parties win a case. Likewise in the present case one of you is going to win and the other, lose the case. The crucial question is, who is going to win the case?"

Usually the end results of most cases are unpredictable. You can win or lose the case. Suppose you win the case, what have you won. You have won a judgement. And you will be awarded a copy of judgement to that effect. But is it what you came to court to seek for? Surely not. You came to seek for a decree or order of payment of money or something to be done for you. Now, how long will it take to realize your claim, is what you have to put into consideration. It might take a year, two or more years to get what you want from the court.

And don't forget, though you have won the case, the right of appeal is always there. The loser of the case might decide to appeal to the higher courts with the usual application for stay of execution. The chances of winning the appeal are again fifty fifty. One might win or lose the appeal, thereby putting the parties in still capricious situation all along to the highest court of Appeal. It is common knowledge that our courts of appeal are always congested with cases. Your appeal will therefore inevitably be fixed last in the cause list. Because of the heavy case load the court of appeals are confronted with, your appeal case might take many years to reach the unpredictable decision.

Your belief of winning this case might be based on your ignorance of law or mistake of facts of the case. It might have as well been based on the wrong advice by your relatives, friends or street\bus lawyers. Who knows! You might also have budgeted for the anticipated claim.

May I take this opportunity, to earnestly caution you on whatever, the basis of your winning belief, to be flexible and positive in today's discussion, lest you should be disappointed by the end result of the case should it go to full trial.

Although you are expecting to win this case on full trial believe it or not you can as well lose it. Should that happen, you will be ordered to pay costs to the successful party.

If you take all these things into serious consideration, you will bear with me that mediation is better than trial. Should you decide to settle your case amicably in today's mediation session you will have every reason of being proud by reaching such a decision. No one will be an absolute winner or a loser, rather that would be a draw match. You had entered the mediation room as enemies

but after the successful session you will leave the room as friends reviving and strengthening your former good relationship. Having done that you will realize that you have saved your time and court's time and avoided costs of the parties and the court.

3. The mediator will then tell the parties how the mediation discussion will be conducted:

"As I told you in the beginning of this statement my duty today is just to supervise the discussion between yourselves as plaintiff and defendant. You will therefore talk to each other through me. Do not throw harsh words to each other. Each one of you will be given equal opportunity to talk. No one will be favoured to talk more than the other. During the discussion I shall be taking some notes to keep myself in touch with the issues to the problem. And I advise you to do the same for your own benefit. At the end of the discussion these notes will be destroyed. What you have to bear in mind is that mediation sessions are guided by the principle of confidentiality. Whatever is discussed during the session is to be treated strictly confidential. No one is allowed to disclose what has been discussed in the mediation room. Nothing which had transpired in the mediation room during discussion will be admissible in evidence in court during trial!

"Usually the mediation discussion is held in a joint session, in the presence of all parties. But at times there may be need to hold separate sessions. Should such need arise then I shall ask one party to go out of the mediation room and leave the other to talk with me; Usually on matters which the party would not want to be revealed in the presence of the other.

Such a separate session would also be accorded to the other party which had been waiting outside. Whenever, I shall hold separate sessions with you I shall ask if you would like me to hold in confidence some of the information revealed during separate session. Your wishes on this point will be honoured by me.

If the mediation session succeeds and you reach an amicable settlement the same shall be reduced into a written consent settlement order of the court to be signed by you parties and me, the mediator magistrate. This court's consent order will have to be complied with fully, otherwise execution proceedings will be instituted against the defaulter.

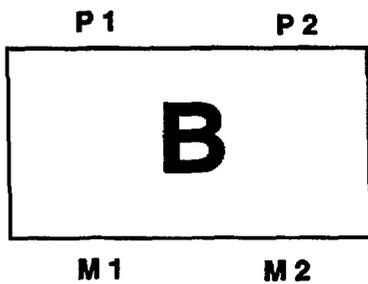
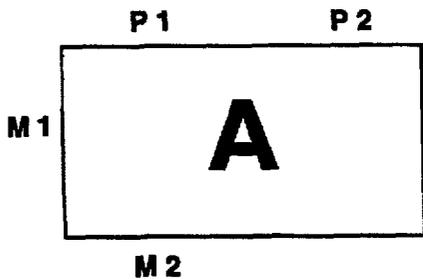
In case the mediation fails and no settlement is reached, all the notes and records of the mediation session will be destroyed. The case will be returned to the assigned magistrate for a full trial.

Do you have any question? Or is there any point you would like me to clarify before the discussion commences?".

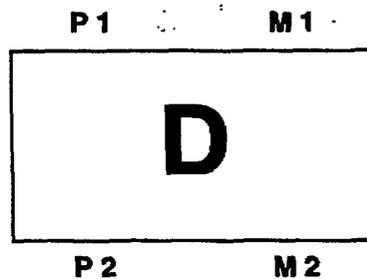
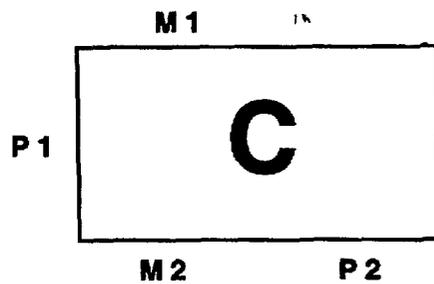
By: (R. L. Nditi)  
PRINCIPAL RESIDENT MAGISTRATE

# Which one would you choose?

Select the best mediation seating arrangement.  
Indicate the reasons for your choice.



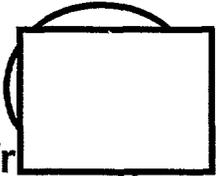
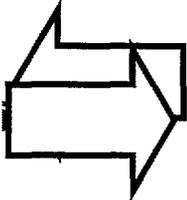
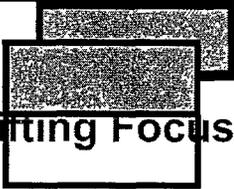
**P = Party**  
**M = Mediator**



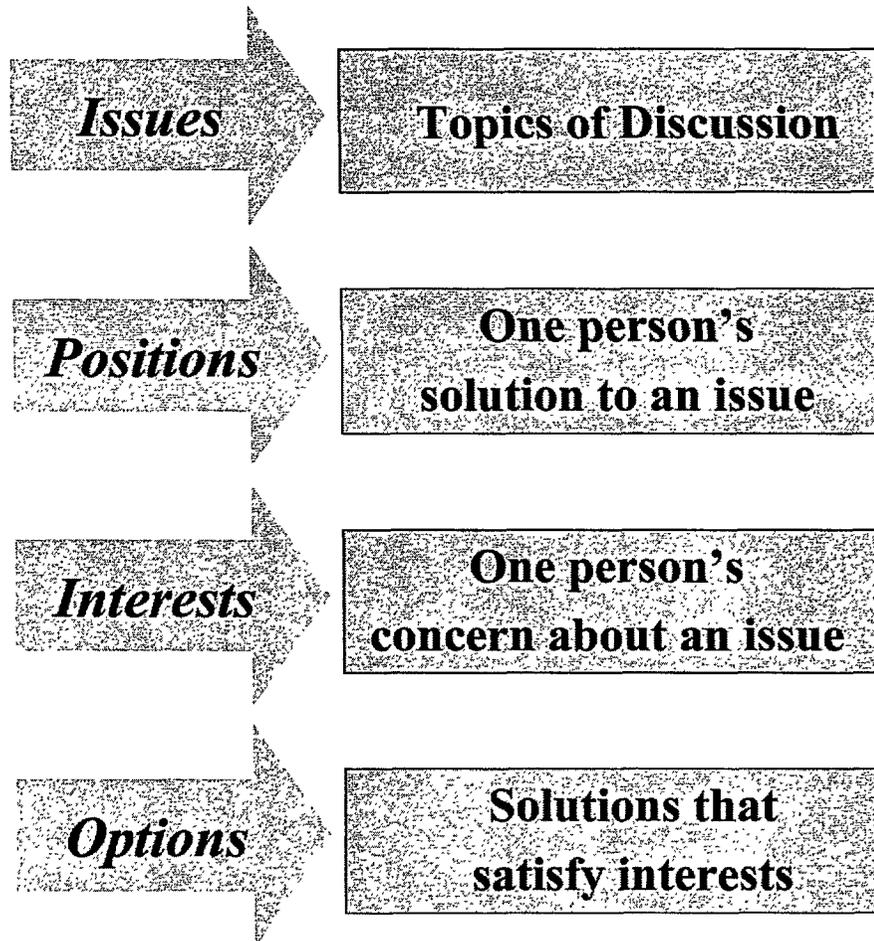
Reasons for your choice:

# Communication

*How a third-party neutral can assist party-communication during negotiations.*

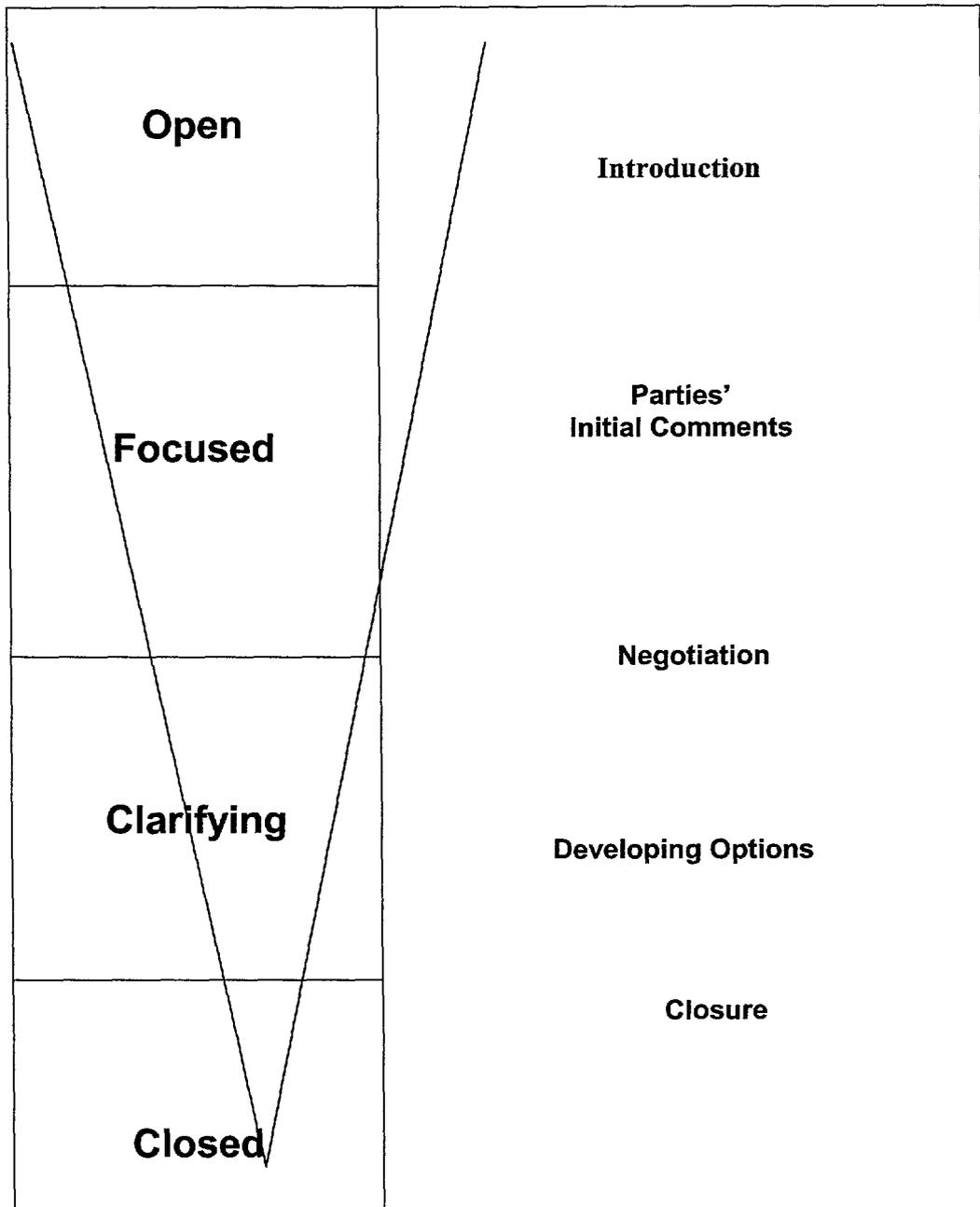
	Unassisted	Assisted
 <b>Listening</b>		
 <b>Refr</b>		
 <b>Clari</b>		
 <b>Shifting Focus</b>		

# Interests *versus* Positions



# Questioning

---



## Open Ended Question Exercise

---

*You are asking the question. Keep the subject of each question but re-word it to be more open-ended and phrased with a less confrontational tone.*

1. Why haven't you been able to understand that the case law doesn't support your position?
2. Is it a really a good idea to jeopardize your future contracting relationship with this business?
3. Isn't it true that calculating damages by accepting all your premises still doesn't add up to your demand?
4. Isn't getting a swift resolution to this case more important than the dollar amount?
5. Is it because you fear a loss of face that you can't be more flexible here?

## Case Study: Hannah & Emma

---

### *Emma's Initial Statement:*

Hannah and I are sisters. For 15 years, we've owned a successful printing business. Basically, I want out of the partnership. I'm tired. It has been a long couple of years, and I need a rest. Plus, my husband Ron wants to start a new business and he needs the capital from our business, and my help to get it going. In addition, I want to spend more time with my children, and I need a work situation where I can do that. Because of Hannah's health problems, almost 100 percent of my time has been spent on Hannah or keeping the business going. I feel like I never see my children.

I want Hannah to buy me out at least 65 percent of the business. Up until now we have always split the profits 50/50. Even though I always felt like I deserved more, I never said anything because we're family. But now I have to stand up for what I feel is rightfully mine. After all, the business was my idea in the first place, and I think I'm the one who has kept it going all these years.

Ron and I put up most of the money to get things started, until I secured investors after the first few years. Hannah and I disagree about how much money that really turned out to be over the years. Plus, Hannah's health problems have caused her to virtually drop out of the business for several months at a time.

We have to get this worked out for the sake of our relationship—this has just been too much for me to cope with.

### *Hannah's Initial Statement*

I can't afford to buy Emma out at 65 percent of the business, and I wouldn't want to if I could. I want the partnership to continue as it has in the past.

I owe Emma a lot. I have a problem with depression, and at times I have been really sick. Emma takes care of me and runs the business when I'm in a really bad way. When I'm feeling good, I work 12 hours a day, and I sometimes go off my medication, and before you know it, I get depressed and can't work. When I'm not sick, I work more hours than Emma, and so it pretty much balances out in the end.

Even though Emma got the initial investors—I'm responsible for the entire client. I'm the one who recruits and keeps our clients coming back. About the initial start-up money, I'm younger than Emma and didn't have any money to contribute to the business early on. I don't think their financial contribution was all that great. And, I worked full time while Emma only worked part-time for the first several years.

Emma knows I can't afford to buy her out and I can't run the business by myself right now—I'm still not healthy enough. I need to work with people who understand my health situation. I agree that no matter what, Emma and I need to work this out—we built a successful business—we can't throw it all away now. Plus, she's my sister, and I can't stand for us to have all this tension between us.

***Emma's Interests:***

---

1. Having a work situation conducive to her child-care needs
2. Getting rest
3. Getting capital for Ron's business
4. Getting a fair "buy-out" for her investment
5. Getting this resolved for the sake of the family

***Hannah's Interests:***

---

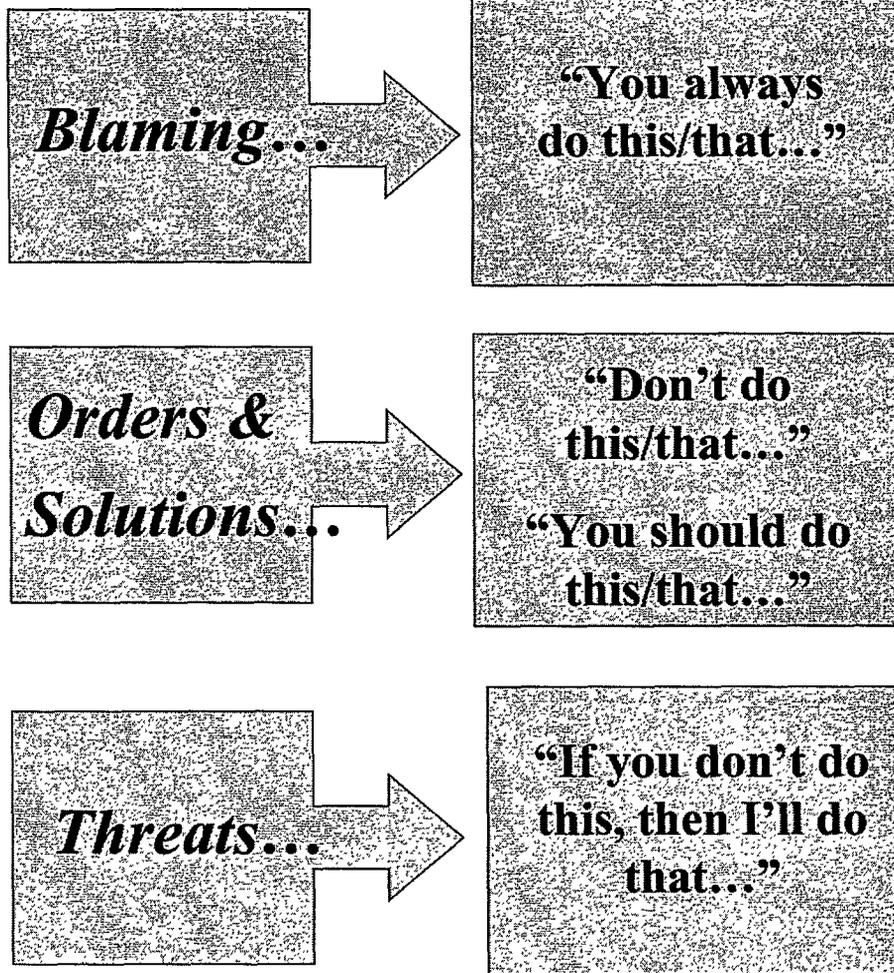
1. Financially supporting herself
2. Having a work situation conducive to her health needs
3. Continuing a successful business
4. Getting this resolved for the sake of the family

***Example: Interest-Based Summary***

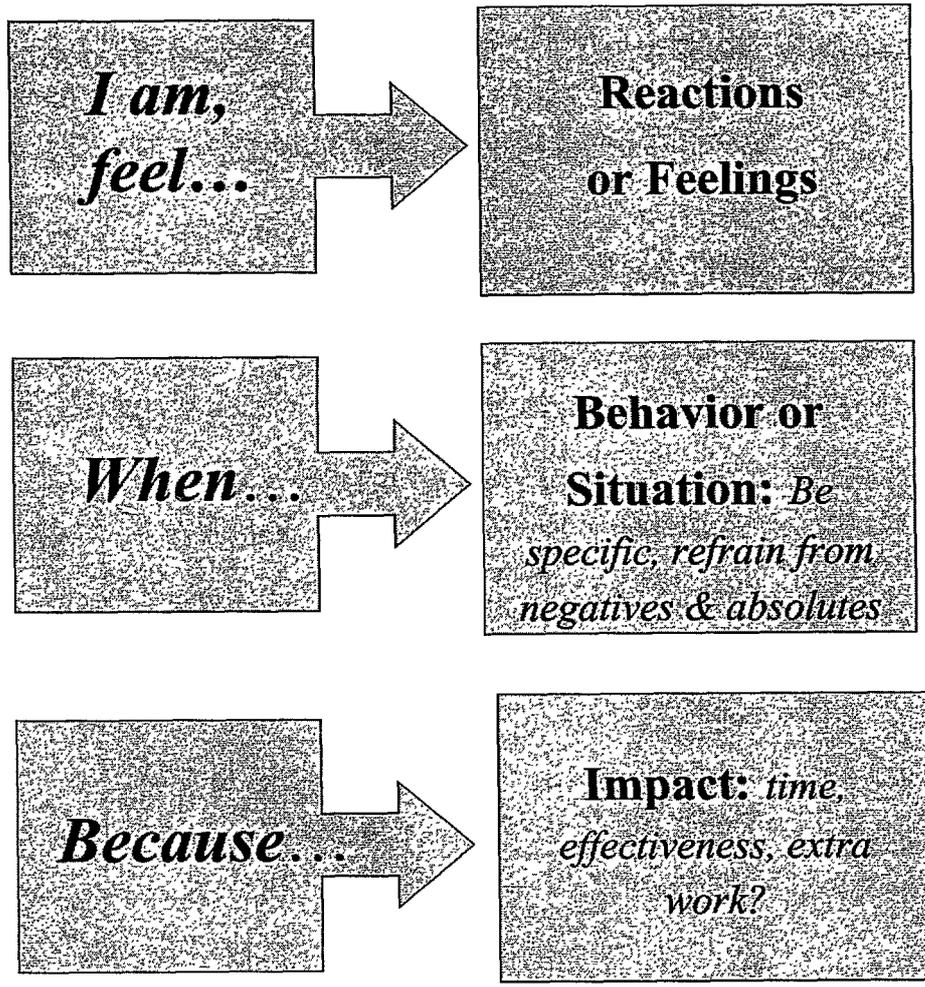
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You both have worked hard to build a very successful business over the past 15 years, and it sounds as if you have a strong relationship as sisters—helping each other out when it was needed. Due to recent circumstances, one—you need to figure out some things about the business—keep it as it is, a buy-out, or other possible alternatives. You also need to consider how your individual financial and time contributions play into those decisions. How do you achieve work situations that are more conducive to your health, Hannah, and to your family needs, Emma, as well as, how to support Ron in his new business, are issues that need to be discussed. Your obvious desire to improve the situation for the sake of your relationship, I'm sure, will help you both to figure things out.

# You Messages

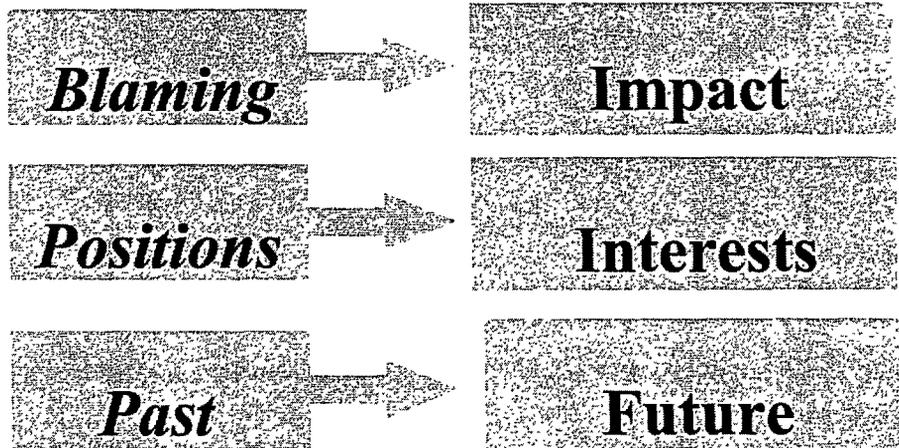


# / Messages

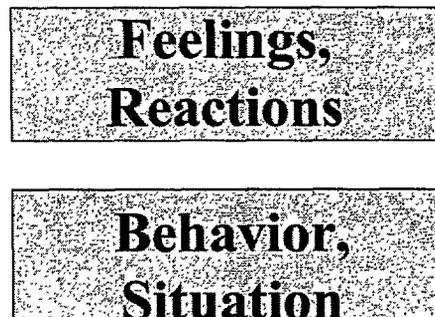


# Reframing Negatives

**Switch:**



**Highlight,  
Clarify:**



## **Reframing Negative “You Statements” Exercise**

---

*One of the parties makes the following statements to the other party. Reframe the statements to “defuse” them and make them more helpful. Reframe them as a **statement**, not a question.*

### **1. Co-workers**

*“He’s lazy. We’re supposed to share this job 50/50. But I do 90% of the work. He should be fired.”*

- You would say (write a reframed statement):

### **2. Secretary/Boss**

*“She is completely unreasonable. Try as I might, she never likes the documents I produce for her. And she never tells me what she wants. I don’t need to put up with this. I don’t see any option but to quit.”*

- You would say (write a reframed statement):

### **3. Contractor/Client**

*“They never completed the construction on my house. They claim they did but they didn’t. They’re not only unprofessional—they’re liars. I’ll destroy their reputation in the whole community unless they finish the job this week.”*

- You would say (write a reframed statement):

### **4. Contractor/Client**

*“We’re not going to negotiate against ourselves. So don’t keep hiding behind your ridiculous first offer.”*

- You would say (write a reframed statement):

### **5. Party/Attorney**

*“Your client exacerbated everything from the beginning with his ‘you can tell it in court’ attitude.”*

- You would say (write a reframed statement):

### **6. Husband/Wife**

*“You *never* listen to me and, as usual, you haven’t heard a word I’ve said during this discussion. We might as well end it now—it isn’t going to accomplish a thing.”*

- You would say (write a reframed statement):

## **Mediation Fact Patterns: Ethics and Impartiality**

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### **■ Fact Pattern One**

You are the mediator in a contract case. The plaintiff is *pro se* and an advocate represents the defendant. The defense advocate is playing hardball, and is critical of everything the plaintiff says or shows to support his case. The plaintiff is getting flustered and the session is falling apart. What do you do?

### **■ Fact Pattern Two**

You are the mediator in a commercial case. The defense advocate is a friend of yours. You don't know the plaintiff's advocate. During your preliminary telephone conference call with counsel, you advise plaintiff's advocate of your friendship, and he agrees that you should mediate the case. It is the day of mediation, and the defense advocate is acting very friendly and informally with you. You can see that the *plaintiff* is very upset by this. What do you do?

### **■ Fact Pattern Three**

You are co-mediating with an advocate in a case in which the parties in a contract dispute are represented by counsel. It appears clear that they are going to settle the case that day. During the session, your co-mediator realizes that the statute of limitations has run in this matter. It appears the defense advocate is unaware of this fact, and instead of moving to dismiss the case, is about to settle it by paying the plaintiff a substantial sum of money. What do you do?

### **■ Fact Pattern Four**

You are the mediator in a commercial dispute. After several sessions, the parties decided a particular issue should be arbitrated. They agree that they will require your services again, and that they will contact you to schedule the subsequent mediation sessions after the arbitration is completed. Shortly after that, one of parties calls you. He tells you that he is so impressed with your competence and neutrality, he would like you to mediate another dispute in which he is involved, and that he would like to begin the mediation within the week. What do you do?

# Mediator Classification Index<sup>4</sup>

## Instructions:

Read each statement and indicate the extent to which you agree or disagree with the statement by checking the appropriate box. Then fill in the "score" to the right of each question. When you are finished, follow the attached **Self-Scoring Instructions** at the end.

### Example

	1	2	3	4	5	6	7	8	9	10	
	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____						
Strongly agree										Strongly disagree	8

### Score

1. As a mediator, I encourage the parties to focus on resolving the specific, legal problems.

	<input type="checkbox"/>	_____									
Strongly agree										Strongly disagree	

2. As a mediator, I prefer to look beyond the legal issues in defining the problem to be resolved.

	<input type="checkbox"/>	_____									
Strongly agree										Strongly disagree	

3. As a mediator, I am inclined to consider the parties interests more important than the legal issues in defining the problems to be resolved at the mediation.

	<input type="checkbox"/>	_____									
Strongly agree										Strongly disagree	

<sup>4</sup> copyright 1996 Riskin, Krivis & McAdoo

4. As a mediator, I focus the mediation session on the legally relevant issues.

1	2	3	4	5	6	7	8	9	10	_____
<input type="checkbox"/>										
Strongly agree									Strongly disagree	

5. My goal in mediation is to insure that the underlying interests of the parties are addressed.

1	2	3	4	5	6	7	8	9	10	_____
<input type="checkbox"/>										
Strongly agree									Strongly disagree	

6. In learning about the issues of the case, it is important to understand the legal posture of the case.

1	2	3	4	5	6	7	8	9	10	_____
<input type="checkbox"/>										
Strongly agree									Strongly disagree	

7. As a mediator, I tend to urge the parties to compromise on narrow issues.

1	2	3	4	5	6	7	8	9	10	_____
<input type="checkbox"/>										
Strongly agree									Strongly disagree	

8. I view legal positions as more important than the interests of the parties in mediation.

1	2	3	4	5	6	7	8	9	10	_____
<input type="checkbox"/>										
Strongly agree									Strongly disagree	

213

9. I tend to decide how I will approach a case as a mediator based on the litigation documents, technical reports or legal briefs.

1	2	3	4	5	6	7	8	9	10	_____
<input type="checkbox"/>										
Strongly agree									Strongly disagree	

10 Even when an advocate is present at the mediation, I tend to ask the client to discuss the impact of the case on him or her.

1	2	3	4	5	6	7	8	9	10	_____
<input type="checkbox"/>										
Strongly agree									Strongly disagree	

11 As a mediator, the interests of the parties are more important to me than settling the case.

1	2	3	4	5	6	7	8	9	10	_____
<input type="checkbox"/>										
Strongly agree									Strongly disagree	

12 As a mediator, the perception of the parties is not as important to me as the actual evidence of the case.

1	2	3	4	5	6	7	8	9	10	_____
<input type="checkbox"/>										
Strongly agree									Strongly disagree	

13 As a mediator, I strive to empower the parties to define issues and decide settlement terms for themselves.

1	2	3	4	5	6	7	8	9	10	_____
<input type="checkbox"/>										
Strongly agree									Strongly disagree	

14 As a mediator, I view the mediation as an opportunity to help the parties understand each other's perception of the dispute.

1	2	3	4	5	6	7	8	9	10	_____
<input type="checkbox"/>										
Strongly agree									Strongly disagree	

15 My function as a mediator is to help parties understand and reach settlement on the issues set forth in the legal briefs.

1	2	3	4	5	6	7	8	9	10	_____
<input type="checkbox"/>										
Strongly agree									Strongly disagree	

16 The parties in mediation are generally more capable of understanding their situations better than either advocates or myself as the mediator.

1	2	3	4	5	6	7	8	9	10	_____
<input type="checkbox"/>										
Strongly agree									Strongly disagree	

**Add scores 1-16 for the Total Problem Definition Score** \_\_\_\_\_

17 As a mediator, I provide direction as to the appropriate grounds for settlement e.g., law, industry practice or technology.

1	2	3	4	5	6	7	8	9	10	_____
<input type="checkbox"/>										
Strongly agree									Strongly disagree	

215

18 As a mediator, I counsel the parties in making decisions.

1 2 3 4 5 6 7 8 9 10

Strongly  
agree

Strongly  
disagree

---

19 To help parties negotiate realistically, I find it helpful to give an advisory opinion about the likely outcome of a case.

1 2 3 4 5 6 7 8 9 10

Strongly  
agree

Strongly  
disagree

---

20 As a mediator, I need not have expertise in the subject matter of the dispute.

1 2 3 4 5 6 7 8 9 10

Strongly  
agree

Strongly  
disagree

---

21 My principal strategy as a mediator is to help the parties understand the strengths and weaknesses of their legal positions.

1 2 3 4 5 6 7 8 9 10

Strongly  
agree

Strongly  
disagree

---

22 I use the parties' relevant documents, pleadings, reports and legal briefs to help them look realistically at their case.

1 2 3 4 5 6 7 8 9 10

Strongly  
agree

Strongly  
disagree

---

23 In order to appear impartial, I do not give opinions regarding the outcome of

a case.

1	2	3	4	5	6	7	8	9	10	
<input type="checkbox"/>	_____									
Strongly agree									Strongly disagree	

24 The principal technique I use as a mediator is to urge the parties to explore the likely outcome at trial.

1	2	3	4	5	6	7	8	9	10	
<input type="checkbox"/>	_____									
Strongly agree									Strongly disagree	

25 A principal strategy I use as a mediator is to suggest a particular settlement proposal or range.

1	2	3	4	5	6	7	8	9	10	
<input type="checkbox"/>	_____									
Strongly agree									Strongly disagree	

26 Evaluating the legal merits of a case is one of the most important mediator techniques.

1	2	3	4	5	6	7	8	9	10	
<input type="checkbox"/>	_____									
Strongly agree									Strongly disagree	

27 I use private caucuses early in the session to help the parties understand the weaknesses of their case.

1	2	3	4	5	6	7	8	9	10	
<input type="checkbox"/>	_____									
Strongly agree									Strongly disagree	

28 As a mediator, I propose solutions that emphasize my own understanding of the circumstances of the parties.



\_\_\_\_\_  
Strongly agree Strongly disagree

34 As a mediator, I encourage the parties to explore solutions collaboratively.  
1 2 3 4 5 6 7 8 9 10 \_\_\_\_\_  
           
Strongly agree Strongly disagree

35 As a mediator, I must always have subject matter expertise.  
1 2 3 4 5 6 7 8 9 10 \_\_\_\_\_  
           
Strongly agree Strongly disagree

36 Protecting legal rights and responsibilities of the parties is something I consider as a mediator.  
1 2 3 4 5 6 7 8 9 10 \_\_\_\_\_  
           
Strongly agree Strongly disagree

**Add scores 17-36 for the Total Role of Mediator Score** \_\_\_\_\_

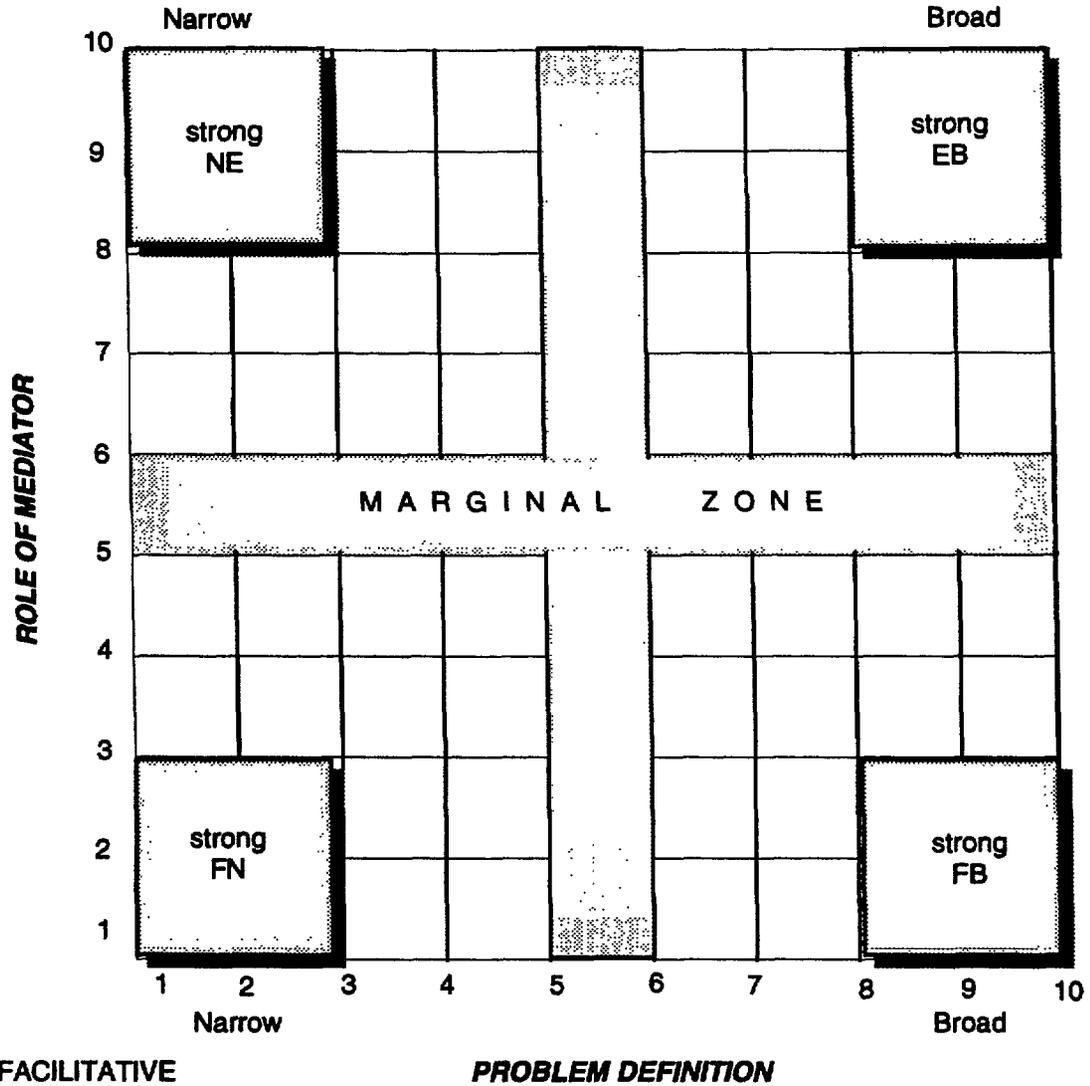
## Self-Scoring Instruction

How to determine your personal mediator classification:

1. Add together all of your Problem Definition scores (questions 1-16).
2. Divide that total number by 16. This is your MEAN Problem Definition score.
3. Add together all of your Role of Mediator scores (questions 17-36).
4. Divide that total number by 20. This is your MEAN Role of Mediator score.
5. Go to the Mediator Classification Index (MCI).
6. On the Problem Definition axis (the bottom horizontal axis) locate the point that corresponds to your MEAN Problem Definition score. Draw a vertical line from that point all the way to the top of the Index.
7. On the Role of Mediator axis (the left vertical axis) locate the point that corresponds to your MEAN Role of the Mediator score. Draw a horizontal line from that point all the way across the index.
8. The point at which the two lines intersect will indicate your personal Mediator Classification Index (MCI).

# MEDIATOR CLASSIFICATION INDEX (MCI)

EVALUATIVE



221

Appendix

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IN THE HIGH COURT OF ZAMBIA

\_\_\_\_\_

PLAINTIFF

vs.

\_\_\_\_\_

DEFENDANT

Case No.

**Order for Mediation<sup>5</sup>**

This case has been scheduled for mediation on the \_\_\_\_ day of \_\_\_\_\_, promptly at \_\_\_\_\_ AM\PM and shall take place at \_\_\_\_\_. ALL PARTIES and their advocates are hereby **ORDERED** to appear. Unless an agreement disposing of this case is filed with the Court in advance of this date, the mediation will occur as scheduled.

The Court **ORDERS** full compliance with the following:

1. All parties who must approve a settlement and at least one advocate for each party, if represented by an advocate, must appear at the mediation. If someone other than a party to the suit must approve the settlement, that person should be present during the scheduled mediation. Institutional parties must have an individual with the authority to settle the case present at the mediation.
2. Each party or advocate must bring to the mediation:
  - a) If damages are requested, an outline of how they have been or should be calculated (including, if appropriate, the time period and rates of interest); and,
  - b) Relevant documentation, such as appraisals, receipts and records;
3. All proceedings at the mediation, including any statement made or document prepared by any party, advocate, or other participants, are

<sup>5</sup> Example: The actual order may differ.

confidential and will not be disclosed to the trial judge or affect the case if it is not settled at this time. No party shall be bound by anything said or done at the mediation unless a settlement is reached. If a settlement is reached, the agreement will be put in writing and will be binding upon all parties to the agreement.

In the event that a plaintiff and, if represented, the plaintiff's advocate does not appear at the mediation, the Court may dismiss the case. In the event that a defendant and, if represented, the defendant's advocate does not appear at the mediation the Court may enter a default judgment against the defendant.

This **ORDER** is entered, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

---

JUDGE

# Settlement Week Mediator Case Reporting Form<sup>6</sup>

Date: \_\_\_\_\_

Mediator: \_\_\_\_\_

Case Name: \_\_\_\_\_ Case No: \_\_\_\_\_

## ***Case Type (check all issues in the case)***

- |                                       |   |
|---------------------------------------|---|
| <input type="checkbox"/> Employment   | <input type="checkbox"/> Mortgages                |
| <input type="checkbox"/> Tort         | <input type="checkbox"/> Bank/Loan (non-mortgage) |
| <input type="checkbox"/> Other: _____ | <input type="checkbox"/> Contract (other)         |

## ***Case Disposition (check one)***

- Mediated & **fully** settled                      or                       Mediated & **partially** settled
- Mediated & scheduled 2nd mediation on \_\_\_\_\_
- Mediated & not settled
- Not mediated

***Check reasons why the case was not mediated (circle all that apply):***

- |  |           |           |
|--|-----------|-----------|
| <input type="checkbox"/> Non-appearance of one or more parties   | Plaintiff | Defendant |
| <input type="checkbox"/> Non-appearance of one or more advocates | Plaintiff | Defendant |
| <input type="checkbox"/> Advocate without settlement authority   | Plaintiff | Defendant |
| <input type="checkbox"/> Other: _____                            |           |           |

---

## ***The section below is completed by the Court: Check action taken when case was not mediated (check all that apply)***

- Mediation rescheduled on \_\_\_\_\_
- Dismissal/Default entered for non-appearance
- Dismissal/Default entered for lack of settlement authority
- Other action taken \_\_\_\_\_

<sup>6</sup> Example: The actual form may differ.

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## Settlement Week Advocate Survey<sup>7</sup>

*Your opinions are important to assess the use of mediation in the courts. Please complete this form and place it in the Survey Box located beside the Settlement Week desk. Thank you.*

1. Name of primary mediator: \_\_\_\_\_

2. You represent the:  plaintiff  defendant

3. Case Type (check all issues in the case)

Employment

Mortgages

Tort

Bank/Loan (non-mortgage)

Contract (other)

Other: \_\_\_\_\_

4. Case Disposition (check one)

Settled before mediation

Mediated & *fully* settled

Mediated & *partially* settled

Mediated & 2nd mediation scheduled

Mediated & not settled

5. How many mediation sessions have you participated in before this week?

0

1-3

4-5

6. Did you learn more about mediation as a result of Settlement Week?

Yes

No

If so, how?

7. Is mediation through the courts a good idea for Zambia?  Yes  No

Why or why not?

<sup>7</sup> Example: The actual form may differ.

- |   |                          |                          |                          |                          |                          |
|---|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| 8. Mediator(s) level of participation:  | <i>None</i>              | <i>Low</i>               | <i>Medium</i>            | <i>High</i>              |                          |
|   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |                          |
| 9. How effective was the mediator(s) in helping you and the parties to consider settlement of this case?                |                          | <i>Poor</i>              | <i>Fair</i>              | <i>Good</i>              | <i>Excellent</i>         |
|   |                          | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 10. The mediator(s) explained the mediation process clearly so that I knew what to expect during the mediation session. |                          | <i>Strongly Disagree</i> | <i>Disagree</i>          | <i>Agree</i>             | <i>Strongly Agree</i>    |
|   |                          | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 11. The mediator(s) allowed me/my advocate to fully present my case.  |                          | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 12. The mediator(s) carefully listened to my side of the case.  |                          | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 13. The mediator(s) asked proper questions to determine the facts in the case.  |                          | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 14. The mediator(s) helped me/my advocate discuss different methods for resolving the case.                             |                          | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 15. The mediator(s) treated all parties equally.  |                          | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 16. Overall, I was satisfied with the mediation itself.   |                          | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 17. I was satisfied with the outcome of the mediation.  |                          | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 18. Overall, I was satisfied with the mediator(s).  |                          | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

19. Please comment on the use of mediation in the courts. Thank you.

## Settlement Week Participant Survey<sup>8</sup>

*Your opinions are important to assess the use of mediation in the courts. Please complete this form and place it in the Survey Box located beside the Settlement Week desk. Thank you.*

1. Name of primary mediator: \_\_\_\_\_
2. You are the:                       plaintiff                       defendant
3. Did you have an advocate represent you in this case?                       yes                       no
- If not, did you have any difficulty representing yourself?                       yes                       no
4. Did you reach an agreement today with the other party?                       yes                       no
5. How effective was the mediator(s) in helping you and your advocate to consider settlement of this case                      *Poor*                      *Fair*                      *Good*                      *Excellent*
6. The mediator(s) explained the mediation process clearly so that I knew what to expect during the mediation session.                      *Strongly Disagree*                      *Disagree*                      *Agree*                      *Strongly Agree*
7. The mediator(s) allowed me/my advocate to fully present my case.
8. The mediator(s) carefully listened to my side of the case.
- The mediator(s) asked proper questions to determine the facts in the case.
10. The mediator(s) helped me/my advocate discuss different methods for resolving the case.
11. The mediator(s) treated all parties equally.
12. Overall, I was satisfied with the mediation itself.
13. I was satisfied with the outcome of the mediation.
14. Overall, I was satisfied with the mediator(s).

*Please provide any comments you wish regarding the mediator(s) or the mediation process (use the back of this form). Thank you.*

<sup>8</sup> Example: The actual form may differ.

Mediation Rules for the High Court of Zambia

GOVERNMENT OF ZAMBIA

STATUTORY INSTRUMENT NO. 71 OF 1997

The High Court Act  
(Laws, Volume 3, Cap. 27)

The High Court (Amendment) Rules, 1997

IN EXERCISE of the powers contained in sections *forty-four* and *forty-five* of the High Court Act, the following Rules are hereby made:

1. (1) These Rules may be cited as the High Court (Amendment) Rules, 1997, and shall be read as one with the High Court Rules, in these Rules referred to as the principal Rules. Title and Commencement  
Cap. 27  
(2) These Rules shall come into operation on the expiry of six months after the publication of these Rules.
2. The principal Rules are amended in rule 2 by the deletion of the definition of "solicitor". Amendment  
of rule 2
3. Order I of the principal Rules is amended by the deletion of rules 5, 6, 7, 8, 9 and 10 and the substitution therefor of the following: Amendment  
of Order I
5. The fees payable on filing any document shall be in cash and the proper officer receiving the fees shall issue a receipt and endorse the document in accordance with sub-rule (1) of rule 7 in Order III. Payment of  
fees
6. The document on which a fee is to be paid shall be the document indicated in the Third Column of the Second Schedule, Parts 1 to 5. The fees shall be paid before the document is presented at the Registry or District Registry concerned, and unless so paid, the document shall not be accepted. Acceptance  
of document  
on payment  
of fees
7. The proper officer of the court whose duty it is to receive any document shall ensure that a proper fee is paid on any document before accepting the same. Duty of  
officers
8. (1) When any document not requiring to be paid for is inadvertently paid for or when the fees paid exceed those laid down in the Second Schedule, Parts 1 to 5 inclusive, or the document is not presented to or is not accepted for filing by the Refund of  
fees paid in  
certain cases

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*Copies of this Statutory Instrument can be obtained from the Government Printer,  
P.O. Box 30136, 10100 Lusaka. Price K7,000.00 each.*

setting down the action for the new trial shall be that specified in sub-rule (1), (2) and (3) except that—

- (a) the bundle referred to in sub-rule (1) (which is to serve as the record) shall be bespoken from the person in whose custody it is and sent to the proper officer; and
- (b) there shall be delivered, along with the request that the action be set down, a backsheet with the title of action thereon, and the names, addresses and telephone numbers of the advocates for the parties, or, in the case of a party who has no advocate, of the party himself, duly endorsed with the amount of the fee payable on setting down the action for the new trial.

(5) In this rule, "proper officer" means—

- (a) in relation to an action to be set down at the Principal Registry for trial, the Registrar, Deputy Registrar, or the Assistant Registrar in charge of civil actions;
- (b) in relation to an action to be set down at a District Registry for trial, the District Registrar or the Assistant Registrar in charge of civil actions.

4. Except for cases involving constitutional issues or the liberty of an individual or an injunction or where the trial Judge considers the case to be unsuitable for referral, every action may, upon being set down for trial, be referred by the trial Judge for mediation and where the mediation fails the trial Judge shall summon the parties to fix a hearing date. The referral order shall be in form 28A in the First Schedule, set out in the Appendix to these Rules. Reference to mediation

5. There shall be kept by the mediation office or proper officer a list of mediators who have been trained and certified by the court to act in this capacity with the field or fields of bias or experience indicated against each of their names. The mediators shall be of not less than seven years working experience in their respective fields. List of mediators

6. The mediator shall sign for and collect from the mediation office or proper officer the record referred to under sub-rule (3) of rule 3 of this Order. Collection of records by mediator

Conduct of mediator	7. The mediator shall, soon after collecting the record, contact the parties and give them the date, time and venue of the mediation and shall, not more than sixty days from the date of collecting the record, complete the mediation process.
Appearance before mediator	8. The parties shall appear in person at the mediation. If they are represented, their advocates shall accompany them. If a party is a corporation, partnership, governmental agency, or entity other than an individual, an officer or director of sufficient rank to settle the matter shall attend.
Statement of understanding on role of mediator	9. At the commencement of the mediation, the mediator shall read and explain to the parties the statement of understanding on the role of the mediator in form 28B in the First Schedule set out in the Appendix to these Rules, and shall require the parties to sign the form.
Record of mediation	10. The mediator shall not be required to keep a record of the mediation proceedings and any document prepared by the mediator during the proceedings shall, where the mediation fails, be destroyed at the end of the mediation process in the presence of the parties. Statements made during mediation are confidential and privileged, and shall not be used as evidence in any matter. The mediator shall not communicate with any trial Judge about the mediation.
Return of records to mediation office or proper officer	11. (1) If the mediation fails, the mediator shall not more than ten days after the close of the mediation proceedings, return the record to the mediation office or proper officer with a report in form 28C in the First Schedule set out in the Appendix to these Rules, stating that the mediation has failed.  (2) The mediation officer or proper officer shall, not more than seven days after receipt of the report referred to in sub-rule (1), submit the record to the trial Judge who shall, not more than fourteen days after receipt of the record from the mediation officer or proper officer summon the parties in terms of rule 5.
Registration of Mediation Settlement	12. A mediation settlement in form 28D in the First Schedule set out in the Appendix to these Rules shall be signed by the parties and the mediator and registered under Order XXXVII, rule 1, and shall have the same force and effect for all purposes as a judgement, order or decision and be enforced in the like manner.
Mediator fee	13. There shall be paid to the mediator a mediation fee as agreed between the parties and the mediator which shall be .

paid by the parties in equal proportions at the time of lodging documents for trial:

Provided that where the parties and the trial judge fail to agree on the fee, the fee shall be referred to the trial judge for determination.

14. No appeal shall lie against a registered mediated settlement. No appeal against settlement
21. Order XXXII of the principal Rules is amended— Amendment of Order XXXII
- (a) in rule 1 by the deletion of the words "Judicial Department" and the substitution therefor of "Judicature";
- (b) in sub-rule (1) of rule 4 in sub-rule (2) of rule 5 by the deletion of the words "Court of Appeal" and the substitution therefor of the words "Supreme Court of Zambia".
22. Order XXXVI of the principal Rules is amended— Amendment of Order XXXVI
- (a) by the deletion of rules 8 and 9 and the substitution therefor of the following:
8. Where a judgement or order is for a sum of money, interest shall be paid thereon at the average of the short-term deposit-rate per annum prevailing from the date of the cause of action or writ as the court or judge may direct to the date of judgement. Rate of interest
9. Where any judgement or order directs the payment of money, the Court or a judge may, for any sufficient reason, order that the amount shall be paid by installments, with or without interest. The order may be made at the time of giving judgement, or at any time afterwards, and may be rescinded or varied upon sufficient cause, at any time. The order shall state that, upon the failure of any installment, the whole amount remaining unpaid shall forthwith become due. Payment by installments and stay of execution
- Provided that where there is default in paying any one installment, there shall be no order for stay of execution on the balance.;
- (b) by the insertion after rule 9 of the following new rule:
10. Except as provided for under rule 9, the court or Judge may, on sufficient grounds, order stay of execution of a judgement. Register of execution

FORM 28D	
Cause No. / /	
IN THE HIGH COURT FOR ZAMBIA	
Holden at.....	
BETWEEN:	
	PLAINTIFF(S)
	DEFENDANT(S)
MEDIATION SETTLEMENT-0.XXX1 r12	
We, the undersigned parties to this action have agreed to settle our disputes/ differences as follows:	
Dated the                      day of .....	
..... <i>Plaintiff (s)</i>	..... <i>Defendant (s)</i>
..... <i>Plaintiff's Advocate</i>	..... <i>Defendant's Advocate</i>
..... <i>Mediator</i>	..... <i>Mediator's Full Name</i>

M. M. S. W. NGULUBE,  
*Chief Justice*

M. M. MUNDASHI

L. NYEMBERE

L. P. CHIBESAKUNDA

I. MAMBILIMA (J)

LUSAKA  
28th May, 1997  
[CJ.6/1]



FORM 28B		Cause No. / /
<b>IN THE HIGH COURT FOR ZAMBIA</b>		
Holdsen at.....		
<b>BETWEEN:</b>		
		PLAINTIFF(S)
		DEFENDANT(S)
<b>STATEMENT OF UNDERSTANDING: THE ROLE OF THE MEDIATOR- 0.XXX1 r 9</b>		
<p>My name is..... I have been assigned to mediate your case. I will serve as a neutral party to help you resolve your dispute. I will not act as an advocate for any party.</p> <p>This mediation is strictly confidential. No party shall be bound by anything said or done in mediation unless a settlement is reached. If a settlement is reached, the agreement shall be reduced to writing and, when signed, shall be binding upon all parties to the agreement. Each party agrees not to request that, I, the mediator testify against the other party, nor ask me or the other party to testify regarding statements made in mediation.</p> <p>Please sign below to acknowledge that you have read and/or understand this statement.</p>		
..... <i>Plaintiff (s)</i>	..... <i>Defendant (s)</i>	
..... <i>Plaintiff's Advocate</i>	..... <i>Defendant's Advocate</i>	
..... <i>Mediator</i>	..... <i>Date</i>	



## **Checklist for Advocates Participating in Mediation <sup>9</sup>**

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***Decide whether to recommend mediation to your client and the Court.  
Check all that apply:***

- Opposing party has expressed an interest in ADR.
- Client has expressed an interest in ADR.
- Your client or opposing counsel/client, does not have a realistic view of the case.
- The matter arose or is being prolonged because of emotional rather than legal issues.
- A continued relationship between the parties is necessary or worth preserving.
- Speedy resolution is important to your client.
- Other matters involving the same party are pending and could be incorporated into a universal settlement.
- The parties on one side of the case are unable to agree among themselves on a settlement position.
- The parties might benefit from hearing the other side, or they might be interested in relief that could best be worked out through face-to-face discussions, such as an apology or an agreement regarding future interaction.

### ***Prepare Your Client for Mediation***

- Explain the mediation process.
  - » Mediation is not a trial. Rather, it is a facilitated negotiation with the purpose of helping parties to consider settlement possibilities.
  - » Mediation is voluntary in that the parties are not required to settle their case. The Court does expect the parties to engage in a good faith effort to discuss possible resolution of the case.
  - » Mediation is informal. No witnesses attend. Testimony is not taken. Discussion is not limited to legal claims. Parties can explore creative solutions.
  - » The mediator will meet all together with the parties, as well as with each party and their advocate individually.
  - » The time required to complete mediation varies. Remind your client that the Court requires his or her participation in the mediation. Confirm the time allocated for the mediation and the location.
  
- Explain the role of the mediator.

---

<sup>9</sup> This *Checklist* was used in training Advocates in Zambia. Adapted from an *ADR Checklist* developed by the United States Postal Service, 2000.

- » The mediator has received mediation training and is certified by the Court to serve in this capacity.
  - » The mediator is impartial, gives no legal advice, and does not determine right or wrong.
  - » The mediator facilitates the negotiation process.
  - » The mediator helps parties to focus their discussion and to assess their claims, defenses, and proposed solutions.
- Explain your client's role.
- » Urge your client to be cooperative and to keep his or her goals in mind.
  - » Advise your client to ask questions privately, when in doubt, and suggest that he or she request a break if the need arises to talk in confidence.
  - » Be clear about information, if any, that you think your client should not divulge during the mediation.
  - » Suggest that the client listen closely to the other parties and the mediator, taking notes if necessary to avoid interruptions.
  - » Remind your client that he or she makes the final decision regarding settlement.
- Review your client's case and your objectives for the mediation.
- » Consider what is most important to your client—what are his or her interests—what does he or she need to have from a possible settlement? Prioritize your client's interests.
  - » Discuss with your client all the various monetary and non-monetary settlement options. And, discuss what happens if the case does not settle—(i.e.) costs, time, and effort.
  - » Ensure that you and your client have authority to settle the case.
  - » Prepare and bring to the mediation 1) an outline of how the requested damages have been or should be calculated, including, if appropriate, the time period and rates of interest, 2) relevant documentation such as appraisals, receipts, or records, and 3) a list of potential settlement possibilities.

## **Advise Your Client During Mediation**

- Use effective negotiation skills and counsel your client to do the same.
  - » Provide information to the other side, unless revealing it damages your legal case significantly. This will encourage settlement.
  - » Build trust by asking questions, listening to the other side, behaving credibly, and empathizing—that is by expressing an understanding of how the other party feels without agreeing with them.
  
- Expedite the signing by your client of the *Statement of Understanding: The Role of the Mediator*.
  - » Be sure to explain the document and its purpose.
  - » Understand the provisions for confidentiality—the mediator will not testify in a subsequent court proceeding.
  
- Make an opening statement.
  - » Prepare your client to present a short opening statement, which avoids blaming the other party and excludes inflammatory comments. Highlight your client's interest and needs.
  - » Add additional information you deem relevant to helping the mediator and the other parties understand your case.
  
- Listen to the mediator's summaries.
  - » Listen carefully. Summaries and feedback should reflect what you have said.
  - » Correct any misstatements or misunderstandings. Amplify on points if necessary so that the mediator and the other side understand your client's interests.
  
- Manage your client.
  - » Tell your client to talk to you privately before revealing information he or she is hesitant to reveal.
  - » Encourage your client to listen sincerely to the other side.
  - » Allow your client to express his or her feelings.
  
- Present your client's desired outcomes.
  - » State what you would like to have, including the principles and calculations upon which you base your statement.
  - » Include intangible outcomes if possible (e.g., respect, better relationship). Seek to maximize the outcome for both sides.
  
- Work with the mediator during the private sessions with you, your client and the mediator to:
  - Reveal Interests**

- » Reveal interests, so as to help the mediator understand the case and help you and your client identify options for satisfying these interests.

#### **Use The Mediation To Understand Interests Of Other Side:**

- » Make sure the mediator is not just conveying successive offers. If you are not learning more about the other side's needs and interests, ask to meet together again.
- » Ask the mediator to help you understand the other side's rationale for any offers. Understanding what motivates the offer will lead to a better understanding of your opponent's interests and may hold the key to more creative solutions.

#### **Develop Options**

- » The mediator can assist parties in identifying options for resolution.
- » Do not hesitate to suggest any and all creative options that you and your client can develop.

#### **Manage Confidentiality**

- » Make sure the mediator knows which information, if any, you have decided to keep confidential, if revealed in private session.

#### **Request Joint Sessions**

- » It is appropriate to ask the mediator for joint sessions with the other party if you feel joint sessions would help.
- » Certain types of disputes can be handled more expediently and productively by meeting together. For example, if the parties understand a technical dispute better than the mediator, it would be a waste of time for them to educate the mediator before she or he can effectively carry information between the parties.

- Work with your client while the mediator is meeting with the other side in a private session.
  - » Use the time while the mediator is meeting privately with the other side to process new information and reevaluate your case.
  - » Reassess your client's interests and options for resolution. Discuss the other side's positions, interests and case.
- Conclude the mediation and confirm next steps.

24:

**No Final Agreement**

- » Ask the mediator to summarize what has transpired so far, the specific areas of continuing disagreement, and the reasons presented by each side for their positions.
- » Make sure some structure is in place for continued discussions—possibly another meeting with the mediator in a specific period of time.
- » Confirm “tasks” that need to be completed in order to advance further negotiations, i.e., the transfer of documents or information, etc.
- » Write down areas of agreement, if some exist, in clear language. Both sides should receive a copy of this document.

**Agreement**

- » You, opposing counsel, or the mediator may draft an agreement. Typically, the mediator will draft the agreement, but you, your client, and the other party must ensure that the agreement says what it is supposed to say.

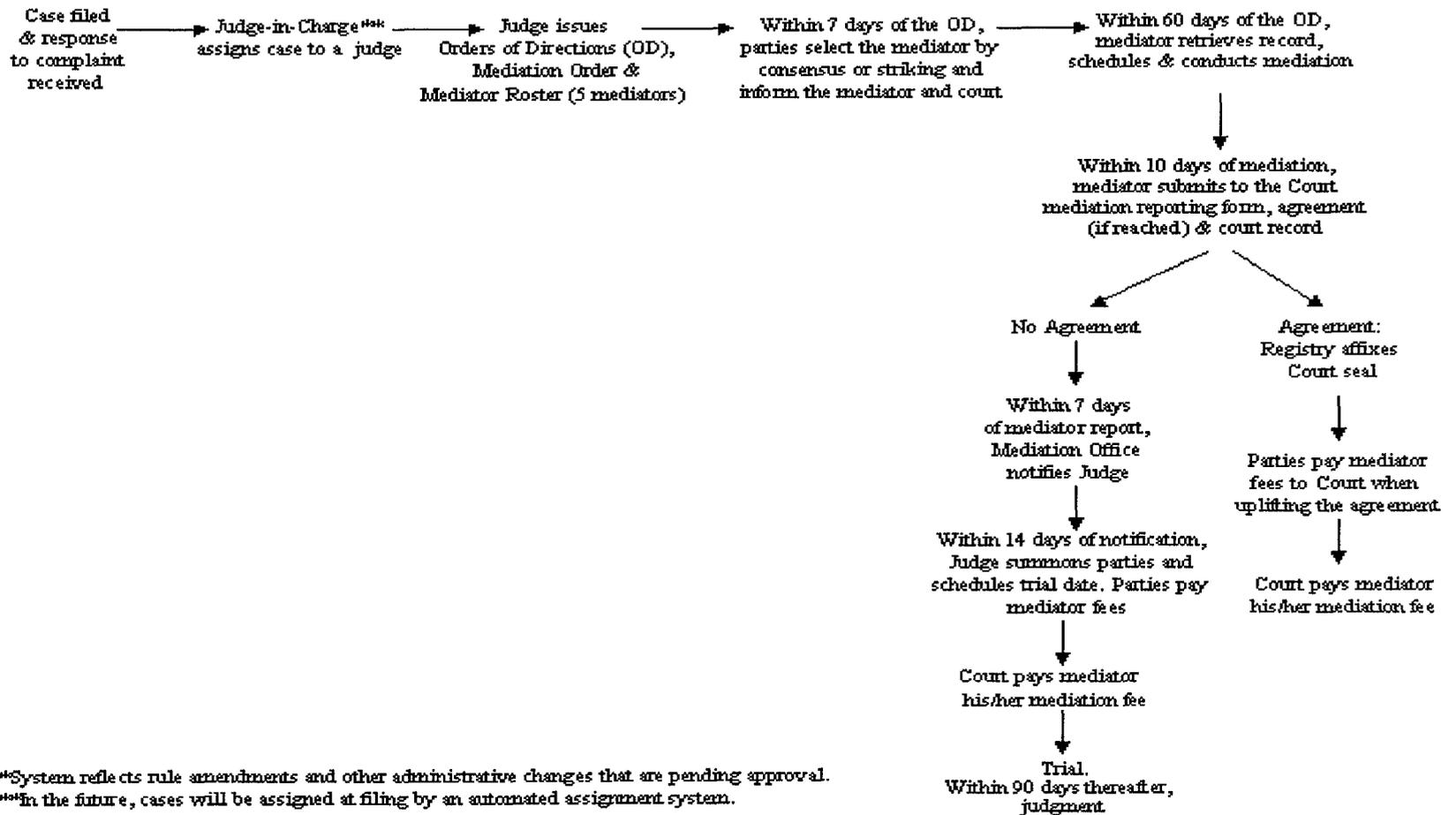
# Zambian Commercial Case Processing

## A System for Mediation

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*The attached procedures are pending Rule Amendments and other necessary action*

## Zambian Commercial List Case Processing System\*



\*System reflects rule amendments and other administrative changes that are pending approval.

\*\*\*In the future, cases will be assigned at filing by an automated assignment system.

2011

ANNEX C

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**Judicial Training Manual**

**DEMOCRACY AND GOVERNANCE IQC:  
RULE OF LAW**



Contract No. AEP-I-807-96-90030-00

**COURT-ANNEXED MEDIATION  
IN THE HIGH COURT OF ZAMBIA**

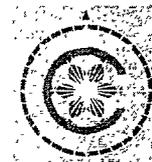
**JUDICIAL TRAINING MANUAL**

August 5, 2000

Sponsored by:



Organized by:



CHEMONICS INTERNATIONAL INC.

1000 PINE  
AVENUE  
SUITE 100  
BOSTON, MA 02114

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## Settlement Week

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Settlement Week is a period set aside from the regular court calendar. During Settlement Week, a large number of the court's pending cases are referred to mediation. Members of the Law Association of Zambia and other professionals are trained to mediate these cases during an intensive one-week period. It has been the experience of many courts that Settlement Week is an excellent way to accomplish several goals:

- » A large number of cases are "audited" and the audit itself generally disposes of a large number of cases prior to the Settlement Week.
- » A large number of people (advocates, litigants, court personnel, and judicial officers) are educated about mediation—participating in one mediation session is far more effective in spurring advocates for the mediation process, than numerous seminars, written materials, and discussions about the topic.
- » Those who are trained as mediators tend to become vocal advocates of mediation, and they have substantial influence over the acceptance of mediation throughout the community.
- » Through exposure to mediation, judges develop an understanding of the mediation process and of case selection criteria.
- » A substantial number of cases are disposed of during a one-week period. This demonstrates that mediation can successfully resolve cases.
- » Data from advocates and litigants is gathered during a short period of time (typically each advocate and litigant completes a survey form at the conclusion of the mediation). This data can be used to verify the views of participants about their satisfaction with the process and make necessary changes in program administration.
- » The successful partnership between the bench, bar and community in resolving cases creates a synergy that will have enduring positive effects.

IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY AT NDOLA

\_\_\_\_\_

PLAINTIFF

vs.

\_\_\_\_\_

DEFENDANT

Case No.

**Order for Mediation**

This case has been scheduled for mediation on \_\_\_\_\_, \_\_\_\_\_ at AM\PM. The Mediator will be \_\_\_\_\_. ALL PARTIES and their advocates are hereby **ORDERED** to appear. Unless an agreement disposing of this case is filed with the Court in advance of this date, the mediation will occur as scheduled.

The Court **ORDERS** full compliance with the following:

1. All parties who must approve a settlement and at least one advocate for each party, if represented by an advocate, must appear at the mediation. If someone other than a party to the suit must approve the settlement, that person should be present during the scheduled mediation. Institutional parties must have an individual with the authority to settle the case pursuant to High Court (Amendment) Rules, 1997, Order 31r8;
2. Each party or advocate must bring to the mediation:
  - a) If damages are requested, an outline of how they have been or should be calculated (including, if appropriate, the time period and rates of interest); and,
  - b) Relevant documentation, such as appraisals, receipts and records;
3. All proceedings at the mediation, including any statement made or document prepared by any party, advocate, or other participants, are confidential and will not be disclosed to the trial judge or affect the case if it

is not settled at this time. No party shall be bound by anything said or done at the mediation unless a settlement is reached. If a settlement is reached, the agreement will be put in writing and will be binding upon all parties to the agreement.

**In the event that a plaintiff and, if represented, the plaintiff's advocate does not appear at the mediation, the Court may dismiss the case. In the event that a defendant and, if represented, the defendant's advocate does not appear at the mediation the Court may enter a default judgment against the defendant.**

This **ORDER** is entered, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE

# Settlement Week Information Sheet<sup>1</sup>

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## ***What is Settlement Week?***

During Settlement Week, over one hundred cases pending in the High Court will be scheduled for mediation. Mediators appointed by the Court will help parties and their advocates to reach amicable settlements to their disputes.

## ***How does mediation work?***

Mediation is very successful in assisting parties to resolve their disputes. Because the mediation sessions are confidential and informal, parties can feel comfortable to discuss their case with candor, state grievances, and reveal confidential settlement offers.

The mediator will first meet with the parties and their advocates, if represented, and hear from all parties in the case. Most likely the mediator will also spend some time alone with the plaintiff and with the defendant—what the parties say to the mediator in these private meetings will not be shared with the other party, unless the party gives the mediator permission to do so. The mediator will help the parties to keep the discussions focused, to talk about possible ways the dispute might be resolved, and to assist in drafting an agreement that is acceptable to all parties. If an agreement is reached and signed, the case will be concluded that day.

## ***Will a party be penalized in any way for failing to settle a case?***

No. The Court recognizes that every case cannot be settled and that the parties have a right to a trial. However, the Court does require everyone involved to appear at the mediation and to make a serious effort to reach a settlement. If parties do not *appear* at the mediation, sanctions may be imposed.

## ***What must be done to prepare for the mediation?***

Each party or advocate must bring to the mediation relevant documentation such as appraisals, receipts, or records, and a list of potential settlement possibilities. When damages are requested, it is also necessary to bring an outline of how damages have been or should be calculated, including, if appropriate, the time period and rates of interest.

## ***How long will the mediation last?***

Typically a mediation session will last about two hours. However, it may be necessary for the mediation to continue for a longer period of time, or to be continued to another day.

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<sup>1</sup> Distributed to the parties and advocates prior to and during Settlement Week.

## Introduction to Mediation

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Mediation is a process for resolving existing disputes, helping prevent disputes in the future, and mitigating the negative effects of disputes. Mediators facilitate negotiations between parties through a series of joint meetings and confidential private caucuses (meetings between one party and the mediator). They help parties assess their positions, identify their interests, generate possible solutions, and consider alternatives to a negotiated agreement. When asked, parties indicate the following reasons for their participation in the mediation process:

- » Satisfaction with the process has been shown to be high.
- » Relationships between the parties may be preserved, which is especially important if there is ongoing contact of any type between them.
- » Procedures are informal and flexible, giving the parties the best chance to “speak their piece.”
- » Creative options for resolution are often identified.
- » Outcome remains in the parties’ hands. No outside decision-maker pronounces a “winner” and a “loser.”
- » Privacy of the matter remains intact.
- » Less time is often required than other means of resolving disputes.
- » Emotional and financial costs are usually reduced.

## Process Distinctions

*A comparison of legal and mediation processes:*

<b>Parameters of the Decision Process</b>	<b>Legal Perspective</b>	<b>Mediation Perspective</b>
» <i>Role of the professional</i>	Advocate acts as an "expert representative" for the client. Represents and advocates for a client by engaging in fact-finding and by developing legal strategies on the client's behalf.	Mediator acts as a neutral. Convenes the parties, facilitates discussion, uses shuttle diplomacy, and moves the parties' toward agreement and resolution of the issues.
» <i>Nature of the process</i>	Issues are argued and facts are established through an adversarial process controlled according to rules of judicial/legal system.	Mediator facilitates the sharing of perspectives between parties for use in collectively reaching a solution.
» <i>Solution/disposition and follow-up</i>	Having considered relevant law, evidence, and credibility of witnesses, a third party imposes a solution that has the force of law.	Parties control the outcome. They usually develop a written agreement that specifies each party's role and procedures to be followed in instances of non-compliance.
» <i>Information sharing and disclosure</i>	Information is elicited by advocates and governed by rules of evidence. Information becomes "testimony" and is used to increase the likelihood that one side will prevail over the other.	All information needed to understand the situation is fully disclosed among the parties. Parties themselves control disclosure and use of information.
» <i>Professional influence and power</i>	Legal/judicial process creates the venue in which advocate and client hold power to influence the ultimate decision, which is made by a third party.	Mediator holds no power beyond assisting parties to arrive at mutual understandings and solutions.

## **The Mediator's Job**

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There is no one "right" way to mediate. In fact, different disputes and different parties require mediators to assume distinct roles at various stages of the mediation process. Mediators will excel in some roles more than in others as a result of personal style, experience and other factors. However, every mediator develops competence in each of the roles described below and develops an ability to use techniques that best meet the needs of particular parties and situations.

### ***Facilitate the Process***

Mediators help the parties move through the various stages of the mediation process by reframing conflict to create positive movement and by refocusing attention on areas of possible agreement. Mediators encourage parties to view problems as shared, which, in turn, enables them to shift from blaming to effective problem solving. Mediators also encourage the use of active listening skills during the mediation process through modeling and coaching.

### ***Improve Communication***

There are many barriers to communication including anger, poor language skills, cultural differences, pre-existing biases, ignorance, fear, anxiety and exhaustion. Improving the parties' ability to express themselves and understand one another is of paramount importance. When parties are not talking to one another, or talking but not "hearing" one another, mediators intervene to reestablish communication. Mediators may coach the parties on their choice of words, communication style, or the importance of demonstrating that they understand what others are saying during mediation.

Communication can also break down when parties are unaware of certain facts, or have different perceptions of the *meaning* of facts. In these instances, mediators can transmit new information or translate the meaning of information into new terms to help the parties engage in constructive dialogue.

### ***Manage Emotions***

The issues discussed by parties in mediation can be highly charged and emotional. When parties reveal more of their hidden thoughts and feelings during mediation, they are often freer to become actively engaged in the process and to make movement toward resolution. For this reason, mediators encourage the parties to express, not squelch, their emotions. At the same time, repetitive, inflammatory outbursts benefit

no one. To prevent feelings from being expressed in these ways, mediators encourage the parties to use language that is clear, descriptive, and non-judgmental.

### ***Distinguish Wants from Needs***

Usually parties will need to modify their original demands in order to resolve a dispute. Mediators help them distinguish their true underlying *needs*—those things that must take place for the dispute to be resolved—from their original desires or *wants*.

### ***Generate Options***

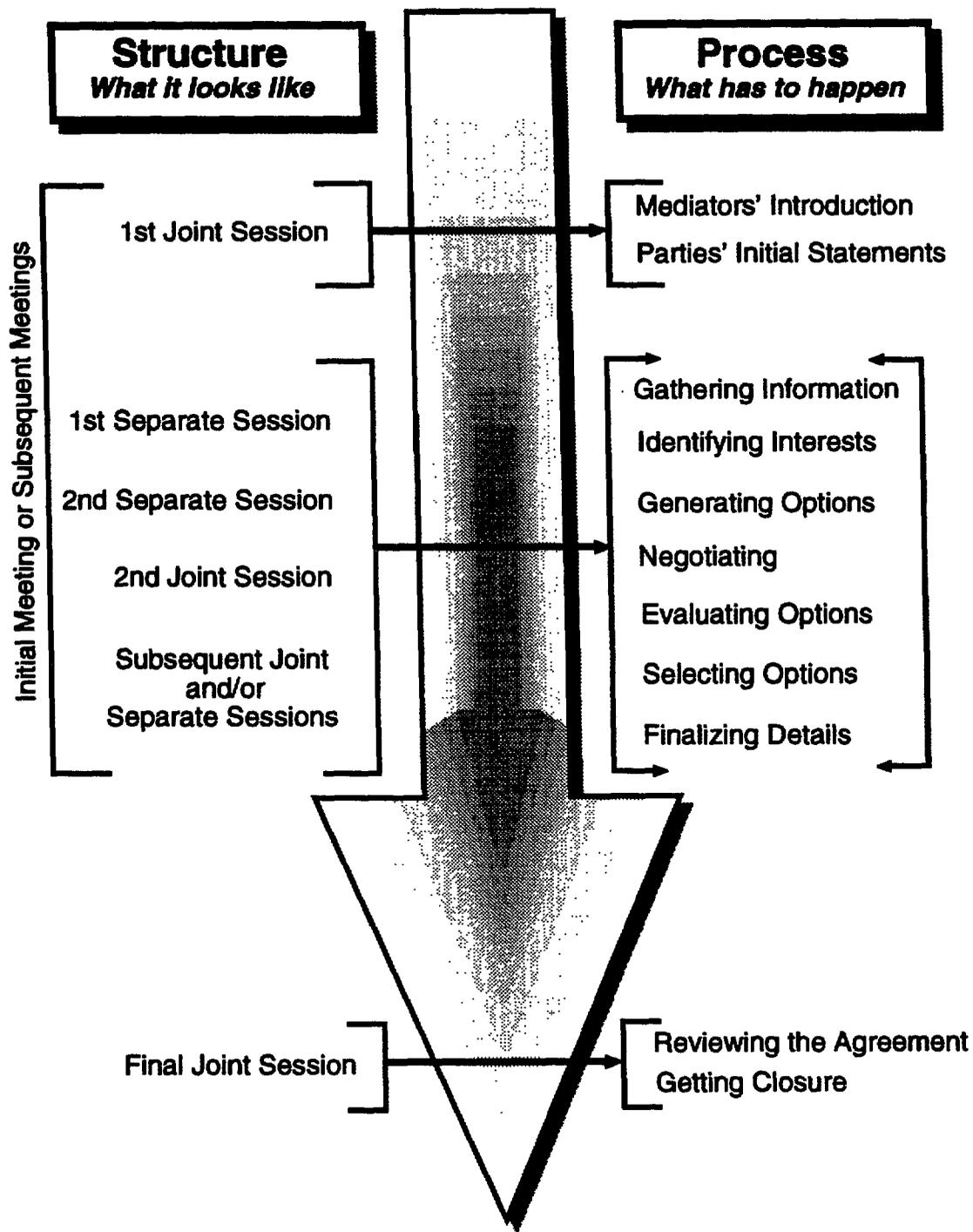
Although it is not necessarily the mediators' job to create solutions, they should be prepared to help parties generate and articulate as many realistic options for resolution as possible. Mediators also assist the parties in considering which options are the most appropriate, as well as what will happen if they do not resolve their disputes in mediation.

### ***Recognize Human Behavior Related to Negotiating***

While all individuals are different, certain principles of human behavior can operate when people engage in negotiation. Understanding the following principles helps the mediator guide the parties through a process that respects their participation and empowers them to take control of their destiny.

- » Parties sometimes would rather avoid making a decision.
- » Parties might “give in” prematurely but they will not truly resolve a dispute until they are psychologically ready to do so.
- » Parties rarely like to apologize, may not know how to do it, and often minimize the importance of an apology to others involved in the conflict.
- » Parties usually act out of self-interest, even if they don't understand what that “interest” is.
- » Parties can compromise much more easily if they believe that they won't be seen as weak for doing it.
- » Parties more readily follow through on decisions they help to formulate.

# Mediation Model



## **Stages of the Mediation**

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The mediation process involves various “stages” during which specific tasks or objectives are completed. A brief outline follows:

### ***Introduction Stage:***

#### Mediator’s Introductory Comments

- The parties are informed about the mediation process.
- The mediator secures the parties’ signature on forms as necessary (i.e. “the statement of understanding”).

#### Parties Initial Comments

- The parties share their perspectives about the situation.

### ***Engagement Stage:***

#### Information Gathering

- The mediator asks questions to help the parties better understand each other and their situation.

#### Identifying Issues and Interests

- The parties clarify the topics for discussion during the mediation.
- The mediator helps the parties understand the importance of their respective concerns.

#### Generating Options

- The parties identify as many solutions as possible.

#### Assessing Options

- The parties consider the feasibility of the various options.
- The mediator assists the parties to negotiate.

### ***Closure Stage:***

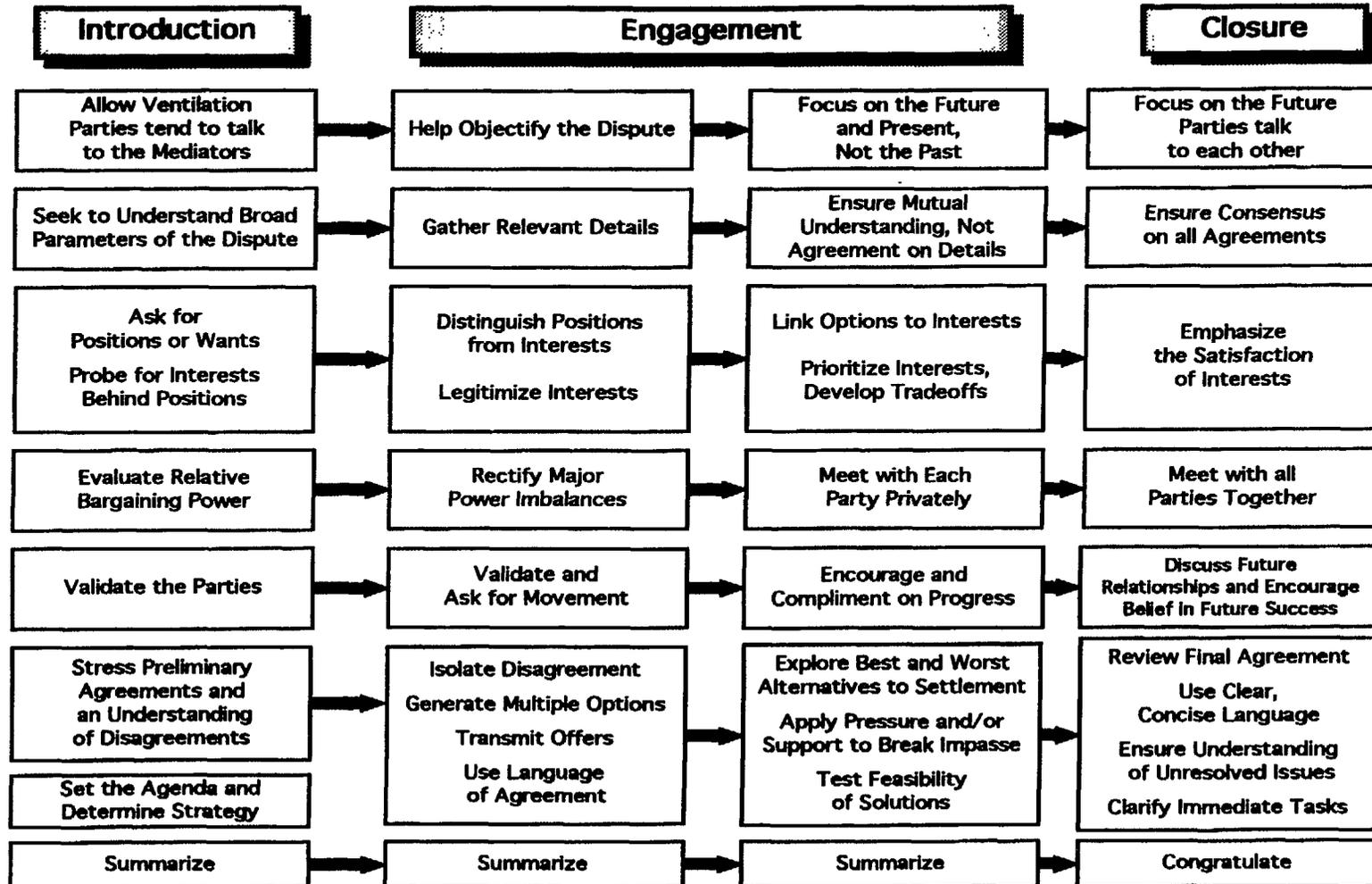
#### Selecting Options

- The parties finalize their agreement or reach impasse.

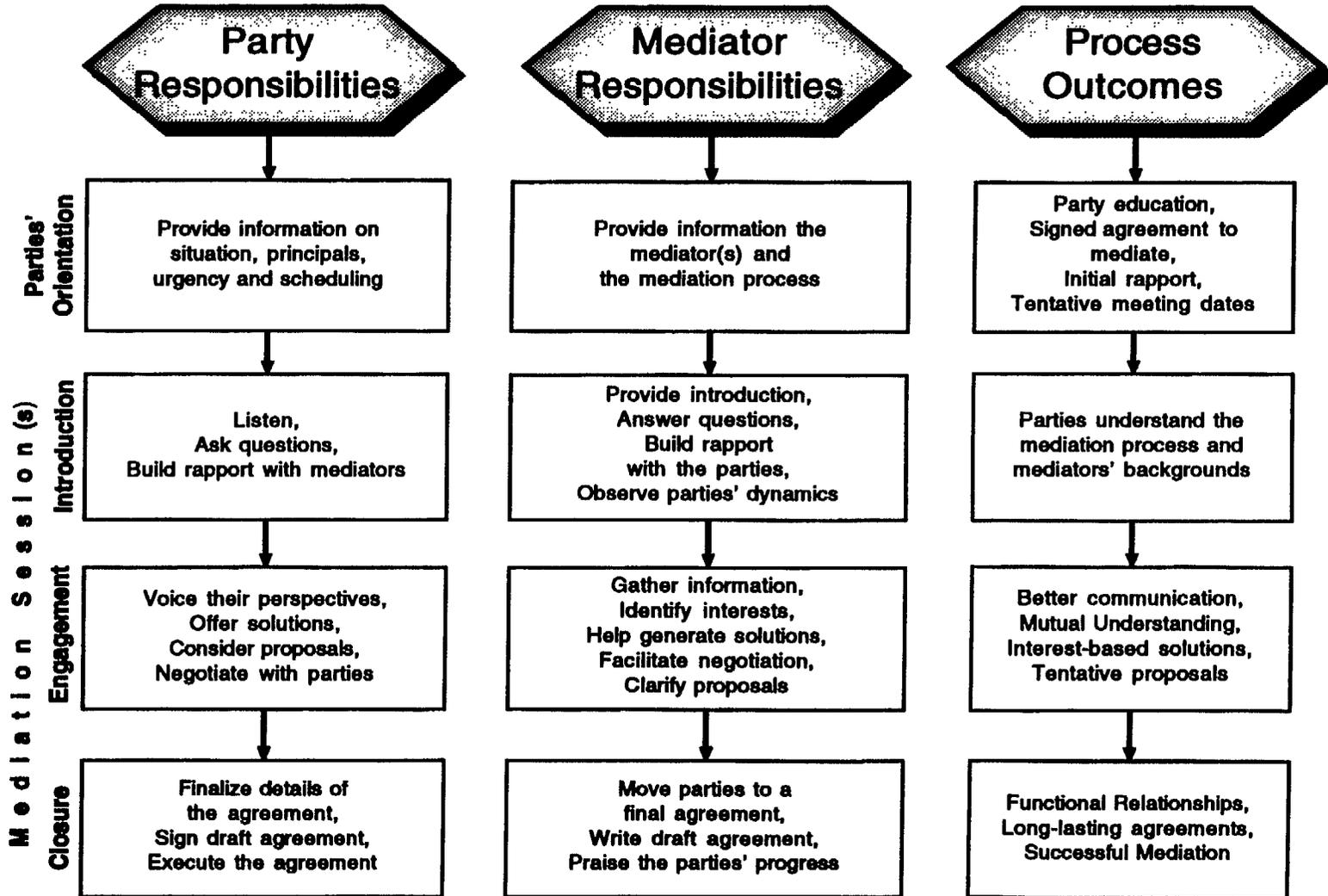
#### Agreement Writing/Next Steps

- The details of the parties’ agreement are reduced to writing.
- The parties confirm their next steps regarding further negotiation or litigation.

# Developmental Stages of the Mediation Process



## Responsibilities and Process Outcomes



## **The Mediation Process: Step-by-Step**

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Mediators meet with the all parties together (known as joint session) and with the parties privately (known as individual sessions). Typically, all the parties and the mediator meet together briefly for a joint session during which the parties' names are confirmed, the mediation process is explained and the parties make their initial comments. Thereafter, the mediator meets with the parties in a series of individual and/or joint sessions, helping them to reach consensus, and if appropriate, to draft a mutually satisfactory agreement.

### ***Step 1: The mediator makes introductory comments.***

The introductory statement by the mediator is given in a joint session with all parties. The mediator's comments establish a relaxed atmosphere for the session. The mediator's role is explained, as are the purpose and procedures of the mediation process. It is important that there is a clear understanding of what will be expected of the parties, and what they can expect from the mediator and the mediation process. The mediator's opening remarks may be brief, but they are vital to developing a rapport with the parties and for setting the stage for collaboration and problem solving.

The mediator's objectives are to:

- » Educate parties about mediation process
- » Establish trust
- » Answer initial questions

The following points should be included in the mediator's introductory comments:

1. Greet and welcome the parties.
2. Introduce self and clarify the parties' names.
3. Describe the purpose of mediation.
4. Describe the mediation process:
  - » Proceedings are confidential;
  - » Separate and joint meetings will be held with the parties;
  - » If an agreement is reached, the mediator will draft a document for the parties' review and signatures.
5. Describe role as mediator
  - » Neutral
  - » Facilitator

Guides discussions

Helps parties communicate effectively

Helps parties consider options for resolution

*"I'll help you to talk and think about ways of working things out"*

6. Give opportunity for questions

### ***Step 2: The mediator asks the parties for their initial comments.***

The mediator begins the dialogue between the parties by asking them to briefly share their perspectives of the situation. At this point in the process it is best for the mediator to ask as few questions as possible—extensive questioning may entrench the parties in their positions or cause alienation. And, the objective of this stage of the process is for the parties to have a brief period of uninterrupted time. Transitions are made from one party to the other party with an open-ended statement, such as, “*Now, if we could hear from Mr. Jones.*”

#### **Mediator Techniques: Parties’ Initial Comments**

1. Ask for a brief summary of the parties’ perceptions of the situation. For example, “*Mr. Meissner, please tell us why you are here today and what you would like to see happen in this mediation.*”
2. Provide the parties with an opportunity for expressing their emotions.
3. Ask parties who talk non-stop to summarize.
4. Allow some exchange of dialogue between the parties.
5. Ask very few questions, and make them broad, clarifying questions, such as, “*What do you mean by...*”
6. Resist the urge to confirm all of the details at this stage of the process. Understand that the story may still be unclear.
7. Make a mental and written list of the key issues.
8. Summarize what has been said in neutral, non-negative terms, highlighting areas of agreement and the issues or concerns that will need to be discussed during the mediation.

### ***Step 3: The mediator asks questions and the parties share information with each other.***

Whether in a joint or individual session, the mediator begins gathering information and building on what was said by the parties in their initial comments. The use of open, focused, and closed questions is of paramount importance; the mediator controls the flow of information through these questioning techniques. It is best to employ open-ended questions early in the mediation, unless the parties' comments are disjointed. Mediators must continually clarify information as the story unfolds.

Be cautious about eliciting information that would be damaging to the negotiations. Particularly sensitive questions may be better asked during an individual session with a

party. Do not interrupt the parties needlessly; issues are often clarified by allowing the parties to engage in free flowing dialogue. At this stage in the process, the mediator helps the parties to clarify the issues, uncover their interests, and create a better understanding of the situation and its ramifications on the parties.

### **General Topics to Explore:**

1. The parties' perceptions of the situation.
2. The impact the situation has had on the parties' lives—the practical aspect as well as the parties' feelings and emotions.
3. The rationale behind what a party is requesting. For example, their specific financial losses or cost estimates.
4. Whether other people may have been involved in the situation.
5. The real or perceived motives of the parties—uncover the parties' interests by asking *why* something is important.
6. The history of, or desire for, an ongoing relationship between the parties.
7. The financial and emotional ramifications of the dispute.
8. The parties' financial and support resources (jobs, family, friends).
9. Previous settlement discussions or other interactions.
10. The impact on the parties of not resolving the dispute through mediation.

### **Mediator Techniques: Information Gathering**

1. Actively listen to the parties; provide non-verbal responses.
2. Ask questions in a neutral fashion; use more open-ended questions than closed.
3. Gather information that helps the parties to better understand each other and to identify their interests.
4. Determine whether questions should be asked in individual or joint meetings.
5. Restate information and feelings that are important.
6. Pay attention to the behavior and body language of all of the parties.
7. Take notes while maintaining eye contact. The parties should know that the mediator is focused on them, not on the notes.
8. Focus on the future, to the degree possible, even while collecting information on the past.
9. Stay calm in the face of intense emotions. When the parties exhibit strong emotions, mediators may reassure them that it's okay to get things out and that everyone will get a chance to say what's important to them.

#### **Step 4: The mediator helps the parties identify their issues, concerns and interests.**

At this stage of the process, the mediator helps the parties identify and understand their concerns and the topics that will need to be discussed during the mediation. Mediators summarize the issues and check for accuracy and completeness of the issue list. For example, the mediator might say, *“The issues as I understand them are 1)....., 2)....., and 3).... Is there anything else?”* The parties and the mediator decide which issues to work on first. The mediator may ask the parties where they would like to begin or may choose to start with an issue that the parties will be able to resolve easily.

##### **Mediator Techniques: Issues & Interests**

1. Begin to foster a spirit of teamwork and cooperation.
2. Ask each party to identify the prevailing issues.
3. Restate the issues in an organized and succinct manner.
4. Inquire and probe into underlying or “hidden” issues.
5. Begin to understand the parties’ interests—ask, *“Why is it (the position) important?”*
6. Assist the parties in prioritizing issues and interests.
7. Think and talk about the problem as a shared or joint problem.
8. Shift the focus from positions (what they want) to interests (what they need).
9. Summarize areas of agreement and disagreement.

#### **Step 7: The mediator helps the parties to generate options and devise a workable plan.**

At this stage of the process, whether in joint and/or individual sessions, the mediator helps the parties to think of as many ways as possible that the dispute may be resolved. It is important that several ideas be considered and that the parties do not attempt to evaluate each idea as it is suggested.

##### **Mediator Techniques: Generating Options**

1. Brainstorm options. Throw out several options simultaneously to get the parties thinking in a brainstorming frame of mind.
2. Ask the parties *“What if you tried this or that....”* or *“Others have resolved similar concerns by....”*, or *“Have you considered....”*
3. Suggest possible options. By offering more than one option, mediators guard against unwittingly compelling parties to view their single suggestion as the “right” choice.
4. Develop agreements on general principles, and then work out the details.
5. Break issues into smaller problems and discuss solutions to sub-issues.

6. Do not allow the parties to accept or reject options one at a time.
7. If a party is consistently negative toward suggested options, ask them to replace a rejected option with one of their own.
8. Switch to another issue when the parties seem to be reaching an impasse on one issue.
9. Select a possible option that is neither perfect nor totally acceptable to the parties, but provides a framework for joint modification.
10. If necessary, suggest the use of outside experts or standards, such as estimates by professionals.
11. Encourage the parties to move forward by noting specific areas of agreement.
12. Use individual sessions to help parties consider their options.

At this stage in the process, the mediator helps the parties consider the different options and begin to develop the framework for a possible agreement. The mediator rephrases various options to increase the parties understanding about what one party is offering or what the other party is requesting. The mediator helps the parties to assess the workability of the different options, and encourages the selection of options that meet both parties' interests. The mediator attempts to build a positive momentum and highlights the progress that the parties have made. In some instances, the parties may be asked to "try-out" an interim or temporary agreement.

### **Mediator Techniques: Bargaining and Negotiation**

1. Develop movement by starting to discuss options that might be agreeable to both parties.
2. Don't underestimate the value of symbolic psychological offers or apologies.
3. Review points of agreement and clarify specific language.
4. Develop "package" proposals that are comprehensive and satisfy most interests.
5. Be alert for options that "enlarge the pie." Variables such as time, ancillary resources of the parties, or actions that are "worth" something to one party can sometimes be used to produce the classic win-win solution.
6. Use individual sessions if necessary to:
  - » Help parties think realistically about their situation.
  - » Consider options on their merits.
  - » Test out particular offers.
  - » Help each party present offers in terms that will be more acceptable to the other party.

- » Indicate the likelihood, in your opinion, of the other party accepting an offer.
- » Suggest an idea as your own, so as to not have it rejected simply because it is thought to have come from the other side.
- » Present a worse case settlement offer first, and then present a more favorable offer.
- » Assist the parties to develop a rational and logical argument behind the settlement offer, i.e., assist them to save face in offering or accepting a settlement.
- » Role-play with each party possible proposals from the other side or reactions to the options being discussed: *“How would you react if Mrs. Rodriquez suggested the following option...?”* Or, *“How would you respond if Mrs. Rodriquez’s reacts to your proposal by saying...?”*
- » Phrase offers on a contingent basis, *“If you give him this, then he is likely to consider giving you that.”* Or make the offer contingent upon the receipt of a reciprocal concession on future issues.

**Step 6: The parties finalize their agreement and/or the mediation process is concluded.**

As the mediation process progresses, the parties may appear to be in agreement on the major issues. At this point, it is tempting for mediators to think an agreement is imminent before working out all the details with the parties. Many agreements fail because crucial details were not agreed upon before the mediation was concluded. Be sure to test out the details with each party before assuming that an agreement has been reached.

The agreement is:

- » A reminder of the specific tasks they have agreed to perform.
- » A reminder and documentation of their cooperation.
- » Sometimes an official document maintained as court or administrative records.

A good agreement must do the following:

1. Resolve the immediate dispute.
2. Cover all the issues raised by the parties for which an agreement was reached.
3. Deal with all parties present and any who are absent.
4. Prevent similar disputes from arising in the future.
5. Make sure that the agreement is realistic and satisfactory to all parties.

6. State clearly and succinctly *what* each party must do, and *when* and *how* they must do it—specify amounts, dates, and actions.
7. Avoid non-quantifiable terms such as: “reasonable, adequate, frequent”.
8. Include contingency plans if the agreement does not work out or otherwise needs to be revisited/altered.

**Agreement Format:**

» **Statements of principle(s)**

Identify underlying principles that guide the parties, help clarify intent, and reinforce their shared interests of the parties. For example: *“Mr. White and Mrs. Williamson agree that all staff in the division should be notified of their job expectations and behavior.”* Or, *“Mr. White and Mrs. Williamson agree that this case is settled and should be removed from the court’s docket.”*

» **Specific performance**

Clarify the responsibilities of both parties. Be as detailed and specific as possible, including the time frames associated with each specific performance. For example: *“Mr. White agrees to meet with Mrs. Williamson a minimum of twice per week” (vs. often). He will arrive in Mrs. Williamson’s office at 9:00 a.m. (vs. early) on Mondays and Thursdays to discuss the tasks that must be completed prior to their next scheduled meeting.”* Or, *“Mr. White agrees to pay Mrs. Williams (exact amount), by (method of payment), no later than (date and time).*

» **Non-compliance**

Identify what happens if either party is unable to comply with the terms of the agreement. For example: *“If payment is not executed, Mrs. Williamson will.....”*

PART G

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**Local Coordinator Ndola and Kitwe Trip Report**

**TO:** ANNE MASCHINO  
PROJECT MANAGER  
CHEMONICS INT. INC.

**FAX:** 011-202-955-3400

**FROM:** E. MASUWA

**DATE:** SEPTEMBER 16, 2000

**SUBJECT:** REPORT ON THE TRIP TO NDOLA UNDERTAKEN BY E.MASUWA AND  
L.YOYO TO SET UP ADMINITRATIVE SYSTEMS OF MEDIATION AT  
THE NDOLAR AND KITWE HIGH COURTS. 11-15 SEPTEMBER 2000.

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**A) Introduction**

The purpose of the trip was to ensure that standard administrative procedures are put in place to regulate mediation in Ndola and Kitwe on the lines of Lusaka operations. In Ndola, the Judge-In-Charge Hon. Justice Kabamba was expecting us, and after a short briefing, referred us to the Deputy Registrar with whom we began to work. In Kitwe, the Judge-In-Charge Hon. Justice Wankie was out of the station but Hon. Justice Mwape met us and referred us to Mr. Duncan Miti who apparently has been mandated to run the process at the Kitwe High Court.

**B) Selection of Officers**

Messrs. James Phiri and Godfrey Kapotesha, both High Court Marshals, have been tentatively selected at the Ndola High Court to assist the Deputy Registrar Mrs. Roydha Kaoma in running the mediation process, while Mr. Duncan Miti has been chosen in Kitwe. Mr. Miti is also a Court Marshal.

**C) The Process**

After preliminary matters which included reviewing court documents and materials, we went over the process of mediation up to the time when an Order is signed by the Judge. We agreed at this point to ensure that four (4) Orders are signed, that is, one Order for the Plaintiff(s), one for the Defendant(s), a copy for the file and the other copy for the mediator. Additionally, the serving officer shall complete a sworn affidavit of service in respect of both the plaintiff(s) and defendant(s) and place the same on the file.

We agreed to allow mediators to use their chambers or offices as much as possible instead of the court premises to promote non-adversarial grounds. However, it was agreed that if a mediator insists on using the court building for some reason, rooms be identified where mediation will be taking place in both Ndola and Kitwe. We identified rooms for this purpose.

We then went over the process of case allocation by subject matter and profession, and striking out in the roster as the case may be. It was agreed that the Deputy Registrar would be allocating cases in Ndola while Mr. Miti will be doing so in Kitwe.

After finalizing the case allocation and management mechanisms, we emphasized the importance of having all documents and forms for mediation in place, that is, the "Settlement of Understanding – Role of Mediator" form, the "Consent Settlement Order" form, and the "Mediator Case Reporting" form. We also emphasized the importance of having the Participants and Advocates Survey forms completed for analysis to be undertaken quarterly.

**D) Conclusion**

Success of the mediation program in Zambia will certainly enhance the country's quick and cheap alternative conflict resolution mechanisms. The long term success of the program, however, hinges on several other factors such as support from the Ministry of Legal Affairs and in particular the Attorney General's Office, Judges of the High Court, skilled Mediators and above all party and advocate understanding of the mediation process. It may well be worthwhile to invest in the people running the process to enhance their skills levels. The invaluable lessons we are learning currently through practical experience, in our view, hold promise for even greater achievements in the future.

(Original signed by Erasmus Masuwa)

CC: The Judge-In-Charge

ORIGINAL

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Project Manager  
Chemonics Int. Inc

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**DATE:** SEPTEMBER 16, 2000

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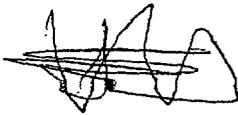
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**Erasmus**

Cc The Judge-In-Charge

PART H

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***Zambia Daily Mail Article***

# USAID tackles alternative dispute resolution

By SITUMBEKO SITWALA

**T**HE United States government has launched a programme to assist the judicial system among some African countries deal with the dispensation of court cases to reduce expenses and delays.

The United States Aid for International Development (USAID), the United States Information Service (USIS) and the US State Department are funding projects amongst other African countries, Tanzania, Uganda, Malawi, Ghana and Zambia, in order to expose the judicial system to alternative forms of resolving disputes apart from the courtroom.

In Zambia, the programme began in 1995 after three local judges, Ireen Mambilima, Peter Chitengi and Weston Muzyamba, went to the USA for one month to study various types of dispute resolutions that have been employed by the US judicial system.

In a recent interview in Ndola, Judge of the Superior Court Nan Shuker from Washington DC, said the three Zambian judges who were in the company of other judges from Tanzania, Uganda and Malawi, spent a week at the National Judiciary

three weeks at the District of Columbia (DC) courthouse.

Alternative dispute resolution is a new concept in Zambia, and until the programme was introduced by the USAID in conjunction with the Law Association of Zambia (LAZ), the country has had no trained mediators to help settle legal battles outside the traditional court system.

It is common knowledge that many a time there has been an outcry for speedy dispensation of justice by the judiciary, but justice delivered in courtrooms may not always



*HIGH Court of Zambia... in the mediation process disputants will enjoy autonomy and control of the outcome of the process. It is envisaged that since the result of the process is designed by the parties involved, there is a likelihood of a high degree of compliance with mediated agreements.*

deliver the fairness that disputants may be expecting. The reason for this crisis of expectations may be attributed to the fact that litigation is characteristically an aggressive and non-pacific method of dispute resolution. In the adversarial approach, as practiced in the Zambian courts, the primary goal is to maximise individual gain and abusive dispute resolution process such as litigation. The magistrate or judge imposes a

solution upon the parties involved. Opening a two week mediation training session for Copperbelt based participants in Ndola on July 13, Chief Justice Matthew Ngulube said the courtroom process usually produces a win or lose result as opposed to the ADR, whose objective is to achieve a mutual win-win outcome. Typically, the process usually produces a win or lose result. At least one party tends

to leave the courtroom with a bloody nose. "Ideal and real justice lies in dispute resolution mechanism that have the capacity and tendency to encompass the interests of all the parties involved," Chief Justice Ngulube said. Mediation is normally a voluntary process, however, under the rules that were introduced with the passage of Statutory Instrument number 71 of 1997, being the High

Court (Amendment) Rules of 1997, reference to mediation is compulsory in Zambia if so ordered by the high court judge. In cases where parties have no wish to settle the matter in a mediation session and would like, instead, to insist on their strict legal rights despite the availability of court-assisted mediation, the action to continue with litigation is, a mediator is supposed to be a neutral third

party who assists that disputants negotiate a private settlement to their dispute. Such a go-between is therefore expected to bring together the parties involved in order to establish possible solutions to their problems. The central quality of mediation is its capacity to re-orient the parties towards each other, not by imposing rules and decisions on them, but by helping warring parties achieve a new and

shared perception of their relationship. Judge Shuker observed that mediation has been known to be cheaper than the traditional courtroom process and that it is extremely useful in maintaining good relationships at both business and personal level. Apart from disputants enjoying autonomy and control of the outcome of the process, it is envisaged that since the result of the process

is designed by the parties involved, there is a likelihood of a high degree of compliance with mediated agreements.

In Zambia, the introduction of mediation mechanism has given birth to the formation of ADR steering committee headed by former LAZ chairman George Kunda.

The mediation courses which were conducted by the USAID and LAZ, drew participants from various professions including law, engineering, land survey, valuation survey, architecture, accountancy and medical.

Mr Kunda, who is interim president of Zambia Association of Arbitrators (ZAA), said mediation was crucial to equipping with skills which will enable mediators facilitate amicable settlement of disputes in accordance with wishes and desires of parties involved.

ZAA comprises arbitrators, mediators and conciliators. USAID specialist in democracy and governance, Sidney Watae, said the programme was introduced in Zambia five years ago to expose the Zambian judiciary to other means of dispute resolution.

About 68 Zambian mediators have so far received accreditation following their participation in two-week courses conducted by trainers from Washington DC.

Lusaka High Court Judge-in-charge Justice Mambilima, who officially closed the training session for Copperbelt based mediators at a ceremony which was also attended by provincial permanent Secretary Arthur Yoyo, assured the law fraternity that mediation would not kill their occupation.

It is expected that with time, mediation will become the preferable mode of dispute resolution because it is more amicable apart from being cheaper.

PART I

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***Service Article***

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## The Process of Alternative Dispute Resolution

### MEDIATION.

#### INTRODUCTION.

Mediation is a process by which the parties, assisted by a neutral third party attempt to systematically isolate points of agreement and disagreement, explore alternative solutions, and consider compromises for the purpose of reaching a consensual settlement of the issues relating to their conflict. It is believed that the parties will be more satisfied, and thus more likely to abide by the agreement, if it is of their own creation and there is evidence to support this premise.

This summary will serve to consolidate in its entirety the basic concepts of what mediation is all about, in terms of Alternative Dispute Resolution.

#### DEVELOPMENT OF CONTEMPORARY MEDIATION.

The United States government sponsored mediation dates from 1913 when the department of labour made it available to the parties in labour disputes. The divorce courts began to recommend mediation to parties in 1939. In the 1960s, specialized forms of mediation were developed by particular institutions and public agencies to attempt to resolve misunderstandings in such areas as community relations, divorce and family law problems. Litigation boom after the 1980s encouraged the promotion of settlement in order to relieve court congestion.

## THE MEDIATION PROCESS

Since mediation is a flexible process, it is impossible to describe specific procedures for conducting mediation. Many of the steps and techniques involved such as having the parties begin by each stating the problem, allowing for ventilation of feelings and emotions, and encouraging joint problem solving – are applicable to all forms of mediation.

It is important that the mediator explains that he is not a judge and is there to help the parties communicate and reach a solution, and that if they reach an agreement, the mediator will assist them to put it in writing which when signed is legally enforceable as a contract.

Even though mediation is a form of private ordering, it is still conducted against the backdrop of the legal system. The parties are aware that if the mediation fails, the dispute may be resolved in a trial through formal application of the legal rules. Though mediation agreements typically neither set nor follow legal precedent, they often have important legal consequences. The agreement may establish or avoid legally enforceable rights. Parties must be afforded a way of knowing about the nature of the adversary process and the results it would likely produce.

Participants in the process of mediation formulate their own agreement and make an emotional investment in its success. They are then more likely to support its terms than those of an agreement negotiated or imposed by others. On the other hand, if mediation were strictly limited to situations in which the party's participation is essentially consensual, many of its contemporary uses would be foreclosed. You therefore find that pressure arises for mediation mandated by law. This therefore signifies that the degree of cooperativeness may vary considerably from party to party and that the mediator must be aware of this possibility. It should also be remembered that coerced participation is not coerced agreement; no party to mediation can be forced to enter an agreement. The objective of the mediator is to ensure that any settlement is acceptable to both sides.

## THE ROLE OF THE MEDIATOR.

An important function for mediators in general and a critical aspect of their ability to settle cases is how they work towards settlement of cases by controlling interaction and communication in the mediation session.

Mediators control the shape of the discussion by manipulating the substance of it so that the disputants attend to what can be agreed upon and ignore or give up on issues where there is no consensus. At the point of writing an agreement, the mediator will pull together the threads of ideas and suggestions by the parties and present them with a written document.

The job of the mediator is to look for bottom lines, to narrow issues, promote exchanges and to sidestep intractable differences of interest. The mediator's neutrality is confined to the content of the agreement. He is neutral to the process; indeed he continually exercises power to control the process to assure a mutual problem definition, a neutral environment, and a joint decision that is mutually acceptable.

The mediator should not desire, nor have the authority to impose a particular settlement. It is recognized that the mediator has an influence on the mediation by her role in helping to define the problem and in encouraging the parties to consider options for the solution, but it is not his/her role to provide evaluation of the strength of the parties' cases or estimates of the probable outcome in court. He/She may use a variety of devices such as focusing the parties on the issues that will achieve a resolution, clearing up the facts and any misconceptions, encouraging understanding of the other parties position, and avoiding unfairness in the mediation process.

#### THE ROLE OF THE PARTY'S ATTORNEY.

It is imperative that Lawyers advise their clients at the earliest possible stage that mediation might be a reasonable alternative to litigation. They would clearly be failing to meet their professional obligations if they didn't. Lawyers should run through the process, explaining the aspirations for the parties jointly resolving the dispute, the role of the mediator, the fact that the lawyer himself has no control of the process, and simply all the ground rules. The clients should be made aware that they are obliged to participate in good faith and take advantage of the opportunity in order to get the dispute fully settled.

#### ENFORCEABILITY OF MEDIATION AGREEMENTS.

The parties may want to know that the agreement is final and effective especially in areas such as labour, commercial and public law disputes. To be legally enforceable, settlement agreements must satisfy the requisites of contract law. For specific performance, a high degree of specificity is generally required, and

the terms must be certain in all particulars essential to enforcement. The courts have held that even though the draftsmanship of the settlement agreement leaves something to be desired and could have been more clearly stated the contract should be specifically enforced if its intent can be defined.

### **MEDIATION IN ZAMBIA**

Mediation in Zambia is a new concept and until the programme was introduced by USAID in conjunction with the Law Association of Zambia (LAZ), the country had no trained mediators to help settle legal battles outside traditional court system.

The first mediation training in Zambia took place in 1996 when two trainers came from USA. Eleven (11) Zambian Lawyers and Judges were trained.

The second mediation training took place in Lusaka from April 17<sup>th</sup> to 21<sup>st</sup>, 2000 and settlement week where mediators were mentored to settle actual cases was from April 24<sup>th</sup> to 28<sup>th</sup>, 2000.

USAID operates with co-operating partners and in this instance, Chemonics International, a global multi-national firm has been contracted for the Zambian Project. For more than 25 years, Chemonics have put energy and talent to work for economic growth and better living standards. Chemonics have co-operate offices on five continents and a multi-national team of experts. Chemonics is one of the largest and most successful firms in the USA.

From business to finance, governance to the environment, Chemonics helps clients make decisions that make a difference in people's lives.

Chemonics sent seven (7) US mediators and trainers to conduct the second training and six (6) for the third training which took place in Ndola from July 31<sup>st</sup> to August 11<sup>th</sup>, 2000. Plans are under way for a third programme to be possibly held in Livingstone for Southern Province practitioners.

Thirty three (33) Zambian professionals were trained in the second programme held in Lusaka and twenty - eight (28) in Ndola on the Copperbelt Province. The first five days of training included substantive discussion of mediation theory and practice with both individuals and groups, mediation demonstrations, and exercises to strengthen communication, negotiation, and facilitation skills. Much of the training was devoted to role play sessions in which the participants practiced mediating disputes characteristic of cases filed in the High court. The

trainers evaluated each participant's performance in these practice sessions as well as the progress of the group as a whole. Throughout the week, the training program and role play assignments were adjusted to ensure maximum learning opportunities.

Among the trained mediators in Zambia are Architects, Lawyers, Engineers, Surveyors, Doctors, Counselors, Insurers etc. After training, participants reinforced their newly acquired skills through practical mediation experience during settlement week and with every case they mediated, the mediators became more confident and enthusiastic about the process. With very few exceptions, the participants in all programmes proved to be extremely talented and dedicated mediators.

During Settlement Week in Lusaka, sixty-two (62) cases were mediated. Out of these, sixty-four (64) percent or 14 cases were fully or partially settled and the rest re-scheduled for mediation or the mediator planned to continue working with the parties after settlement week. Sixty (60) percent of these cases have since been fully settled while five (5) percent have failed at mediation and referred back into the court system.

In Ndola, the programme took an improved turn. Of the cases scheduled for mediation which were 78, 29 were fully settled, 05 were struck out, 12 default judgments entered and 6 cases were referred back to the court system. 14 cases failed and 12 cases scheduled for continued mediation.

While mediation could be said to be a voluntary process, the rules that were introduced with the passage of Statutory Instrument number 71 of 1997, being the High Court (Amendment) Rules of 1997 make reference to mediation when signed by a High Court Judge mandatory.

In cases where parties have no wish to settle the matter in mediation, and would like to insist on their strict legal rights despite the availability of court assisted mediation, they are at liberty to get back into the court system but an effort should be made to attend mediation otherwise a default judgment will be entered or the matter struck out as the case may be.

### **CONCLUSION.**

Overall Mediation has been embraced for a number of reasons. It rejects a confrontational approach to conflict resolution and promises to consider disputes in terms of relationships between parties, and their responsibility to each other. The mediation process is, at least in theory,

cooperative and voluntary, not coercive. The process is to enable the parties to exercise self-determination and eliminate the dominance that characterizes the process of litigation.

Mediation can be effective if only the issue is capable of resolution through modification of perceptions and attitudes. There is also a favourable chance of success if the parties are capable of entering into and carrying out an agreement.

It is anticipated that with time, mediation will become the preferable mode of dispute resolution because it is more amicable and faster apart from being cheaper. The process also helps parties preserve existing business relationships.

**PHILLIP MUSONDA**  
**CHIEF ADMINISTRATOR**