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# TRIP REPORT: COURT- CONNECTED MEDIATION 17 JANUARY–4 FEBRUARY 2006

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1 MARCH 2006

This publication was produced for review by the United States Agency for International Development. It was prepared by Robert Randolph, Carr Swanson and Randolph

Prepared for the United States Agency for International Development, USAID Contract Number 367-C-00-04-00097-00, Strengthened Rule of Law and Respect for Human Rights in Nepal. This Trip Report is submitted in accordance with the requirements of ARD, Inc.'s contract and covers activities set forth in the ARD Work Plan for the period of 1 October 2005 to 30 September 2006.

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# STRENGTHENED RULE OF LAW AND RESPECT FOR HUMAN RIGHTS IN NEPAL

TRIP REPORT: COURT-CONNECTED MEDIATION  
17 JANUARY 2006 - 4 FEBRUARY 2006

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## **DISCLAIMER**

The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.



**ALTERNATIVE DISPUTE RESOLUTION IN  
NEPAL**

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**Report on Trip to Expand Opportunities  
In  
Court-Connected Mediation**

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**Robert C. Randolph  
Carr, Swanson, and Randolph, LLC**

**February 2006**

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# ALTERNATIVE DISPUTE RESOLUTION IN NEPAL

## **I. Statement of Work and Deliverables**

Robert C. Randolph of the firm of Carr, Swanson and Randolph visited Nepal from January 17-February 4, 2006 in connection with the ARD Inc. Rule of Law Project's Court-Connected Mediation Initiative in Nepal. During January 16-21 CSR Consultant, Judge Patrick King of Boston, Massachusetts, also visited Nepal for the purpose of working with Randolph and the appellate courts, particularly the Supreme Court, to develop rules, forms and a manual for appellate mediation.

USAID tasked the CSR consultants with a work plan (Statement of Work or "SOW") providing for (1) the design of an appellate mediation program, including proposed procedures, forms and a manual; (2) training of the judges and court staff in the use of the appellate mediation procedures and forms; (3) consultation with FNCCI to discuss and, if agreeable, enter into a MOU for implementing a commercial mediation center at FNCCI; (4) consultation with the Nepal Bar Association to gain the support of the bar for appellate mediation in Nepal and training for lawyers in mediation skills; (5) further work with the designated Nepali PR firm to develop a media strategy; and (6) consultation with Ministry of Law and Justice on drafting a mediation law for Nepal.

In support of these activities, the CSR consultants were requested to provide, as deliverables, (1) a draft manual containing procedures and forms for appellate mediation in the courts; (2) a training plan for training judges and court staff on implementation of the rules and procedures contained in the manual; (3) a plan for working with a PR firm on a media campaign; (4) a draft mediation law; and (5) a written trip report.

As noted with greater specificity below, the consultants' planned activities were substantially disrupted by the political unrest encountered during the visit which necessitated a rescheduling of some activities, cancellation of others and a general inability to meet with those stakeholders and others whose concurrence is needed to finalize the draft procedures, forms, and manual for implementing appellate mediation in Nepal. During the first week (January 17-21), planned activities and meetings were severely disrupted and curtailed by the political struggle between the King and political parties, which resulted in the imposition of nightly curfews and a culminating day long curfew on Friday, January 20.

During the second week, the political parties imposed a nation-wide general strike ("bandh") on Thursday, January 26, in retaliation for the curfews imposed by the King during the previous week. Although CSR was able to plan activities around the "bandh", the general level of uncertainty, insecurity, and unease interfered with the capacity to schedule meetings and plan activities. Nevertheless, the ARD Rule of Law (ARDROL)

program was able to schedule late afternoon programs with the Patan Appellate Court, Supreme Court Registrar's office and Bar Association which materially advanced the pace of implementing appellate mediation in Nepal.

## **II. Discussion of Activities and Accomplishments During Trip.**

### **A. Designing Appellate Mediation Program and Train Judges and Court Staff (SoW Nos. 1 and 2)<sup>1</sup>.**

Consultants' initial plan was for Judge King to arrive a day early and work with the Court to establish training priorities and needs in preparation for a two day Design and Training session with the Judges and court staff to take place at the end of the first week. However, the nightly curfews, curtailment of phone service and the demonstrations planned for Friday January 20<sup>th</sup>, with the threat of an all day curfew, necessitated the cancellation of activities planned for January 20-21.

Fortunately, ARDROL staff reacted quickly to the changed circumstances and was able to schedule, on short notice, a well-attended three hour "Introduction to Appellate Mediation" program for Supreme Court Justices and Personnel on Wednesday January 18<sup>th</sup>, the day after Randolph's arrival.

It was regrettable that CSR and ARDROL were unable to make full use of Judge King's expertise during his week-long visit. With communications curtailed and travel around the City problematical, it was difficult, if not impossible, to schedule meetings. There was a beneficent "silver lining," however, in that ARDROL very quickly organized the January 18<sup>th</sup> program, which enabled the consultants to meet and develop good relationships with a number of the Justices and Judges, particularly members of the drafting committee, such as the Chair (Supreme Court Justice Khil Raj Regmi) and District Court Judge Khatiwada.

In preparation for the planned sessions with the Judges and court staff during the first week, the consultants had developed a set of draft procedures and forms to use as a basis, in the course of the Judge's workshop, for the development of a final set of procedures, forms and manual and training for Judges and court staff in the use of the procedures and forms. Without consultation with ARDROL or CSR consultants, however, the drafting committee produced a set of appellate mediation rules that lacks some of the basic necessary provisions and that also appears to be in no particular or logical order. Although CSR consultants were unable to meet with the drafting committee during the first week, the consultants connected with the committee at the January 18<sup>th</sup> program and were able to meet with the committee during the second week to discuss the purpose and intent of a number of the drafting committee's draft provisions. Consequently, CSR consultants have revised the drafting committee's rules, keeping the original language wherever possible, and arranged the rules in logical order. The CSR consultants look forward to working with the drafting committee during the March trip to complete the rules and forms.

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<sup>1</sup> Note Sub-Paragraph headings relating to SoWs will follow the order set forth at paragraph 2 of page 4.

During the second week, the plan was to provide intensive training for the Judges and court staff in the systems and rules drafted during the first week. Due to the disruption of the first week's schedule and the continuing unrest during the second week culminating in the Bandh of January 26th, the CSR consultants were unable to conduct the planned trainings for the Judges and Court staff.

However, ARDROL again reacted very quickly to the changed circumstances and organized a meeting with the drafting committee on January 25<sup>th</sup> and two very successful workshops during the second week with Patan Appellate Court officials (January 27) and the Supreme Court Registrar's Staff and Justices (January 31) and the Patan Appellate Court/local district courts (January 27). At the workshops great progress was made promoting appellate mediation, introducing the "revised rules," obtaining buy-in from the "stakeholders" and familiarizing the participants with appellate mediation best practices.

In addition, CSR has recommended a training program for Nepali mediators and judges which includes: basic mediation training, advanced mediation training, a mediation "practicum" (where trainees mediate "mock cases"), administrative training for mediation administrators at FNCCI, case evaluation and referral training for judges and "train the trainer" modules. It is anticipated that CSR will be able to conduct initial basic training for mediators in March (both Judges and non-Judges), along with training for FNCCI administrative staff.

### **B. Establishing a Mediation Center at FNCCI (SoW No. 3).**

The successful adoption of commercial mediation in Nepal is dependent on a "buy-in" and close cooperation from the business community. Accordingly, CSR has previously recommended creating "private provider" programs within FNCCI to resolve pending commercial disputes, including disputes that have not been filed in court.

During the visit, ARDROL and CSR consultants made great strides towards achieving the goal of establishing a mediation center at FNCCI. A MOU between ARDROL and FNCCI was drafted during the CSR consultants visit, approved in principle by USAID and ARD-Burlington and forwarded to FNCCI where it is under consideration. It is anticipated that the MOU will be ready for signing during the CSR consultants March visit.

### **C. Establishing a Working Relationship with the Bar Association (SoW No. 4).**

ARDROL and the CSR consultants recognize that attorneys are the gatekeepers for their clients, and, as such, attorneys can significantly impact the successful and timely implementation of a mediation program. The local bar has generally been an obstacle and stumbling block in most countries where USAID has sought to introduce mediation by spreading the word that mediation will reduce fees, disserve clients and undermine the judicial system. During the September Roundtables most participants did not view lawyers as allies in a campaign to expand mediation in Nepal. The participants believed that lawyers, for economic reasons, viewed mediation as a threat. There was also a consensus that lawyers create unreasonably high expectations of success in litigation in the minds of their clients which makes settlement all the more difficult.

However, during the visit ARDROL and the CSR consultants managed not only to neutralize any potential opposition to ARDROL's mediation initiative, but have, in fact, made the National Bar Association (NBA) a strong ally in implementing court connected mediation in Nepal. The NBA hosted a workshop on ARDROL's appellate mediation initiative on February 2, which was chaired by the President of the NBA and well received by all the participating lawyers. The ARDROL workshop was well publicized and received mention on both local TV and in the local and National press.

As a result of the warm relationship developed by NBA and ARDROL over the past six months, the NBA invited ARDROL's Chief of Party to address the 10<sup>th</sup> All Nepal Lawyers National Conference and present a paper on court referred appellate mediation in Nepal.

### **D. Working Further with PR Consultant, and other media outlets, to Promote Court-Connected Mediation in Nepal.**

In the September Roundtable participants agreed that there is lack of public awareness in Nepal about the nature of mediation, and its benefits, which, in turn, lessens the demand for mediation as an alternative to litigation. Consequently, the CSR consultants and ARDROL have been working with a PR consultant, Urban Pixel, to develop a media strategy. Urban Pixel's first draft was deemed to be too ambitious and expensive for the ARDROL budget.

During the visit, ARDROL and the CSR consultants met with Urban Pixel, the PR consultants to develop a scaled down PR proposal. As a consequence, ARDROL and Urban Pixel are considering a revised \$10,000 proposal (excluding direct costs) that focuses primarily on newspapers, magazines, television and radio, while using other support materials such as brochures. The campaign can be supplemented by other media and press coverage that ARDROL can generate independently by working with such organizations as the NBA and the Supreme Court.

In addition, ARDROL is considering funding a special issue of the Business Law Journal focusing on ADR (mediation) and targeting commercial lawyers and business groups; securing a license to dub extant mediation videos into Nepali; and producing an original Nepali mediation video which can be used to as both a training tool and a vehicle for promoting mediation generally in Nepal.

**E. Consulting with the Ministry of Law and Justice (MOLJ) to Draft a Mediation Statute for Nepal.**

Participants at the September Roundtables cited the lack of a formal legal basis for mediation as a major issue. Currently, Nepal does not have a statute authorizing mediation; nor does it presently have a sitting parliament which could pass a mediation law. In the initial SoW, CSR was tasked with writing a draft mediation law for consideration by the MOLJ.

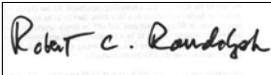
In Kathmandu, the CSR consultants and ARDROL decided to “back-burner” this effort given concerns about the legitimacy of a statute enacted into law through Royal decree in the absence of a parliament. However, CSR met with Dr. Bhurtel of the MOLJ in Washington in February and, during the course of the meeting, Dr. Bhurtel expressed a strong interest on moving forward with the enactment of a statute, dismissing concerns about the efficacy of a statute proclaimed into law through Royal decree. Consequently, the CSR consultants recommend that ARDROL reconsider the previous decision and move the draft mediation law forward for consideration.

**III. Deliverables**

The CSR consultants have drafted appellate mediation forms, procedures and explanatory material which have been delivered to ARDROL. Also, the CSR consultants have submitted a draft mediation law to ARDROL and drafted the MOU for a potential FNCCI-USAID partnership. Urban Pixel has produced a revised media plan which would, if implemented, adequately promote mediation in Nepal. This trip report is submitted as a CSR deliverable.

Respectfully submitted,

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February, 2006



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