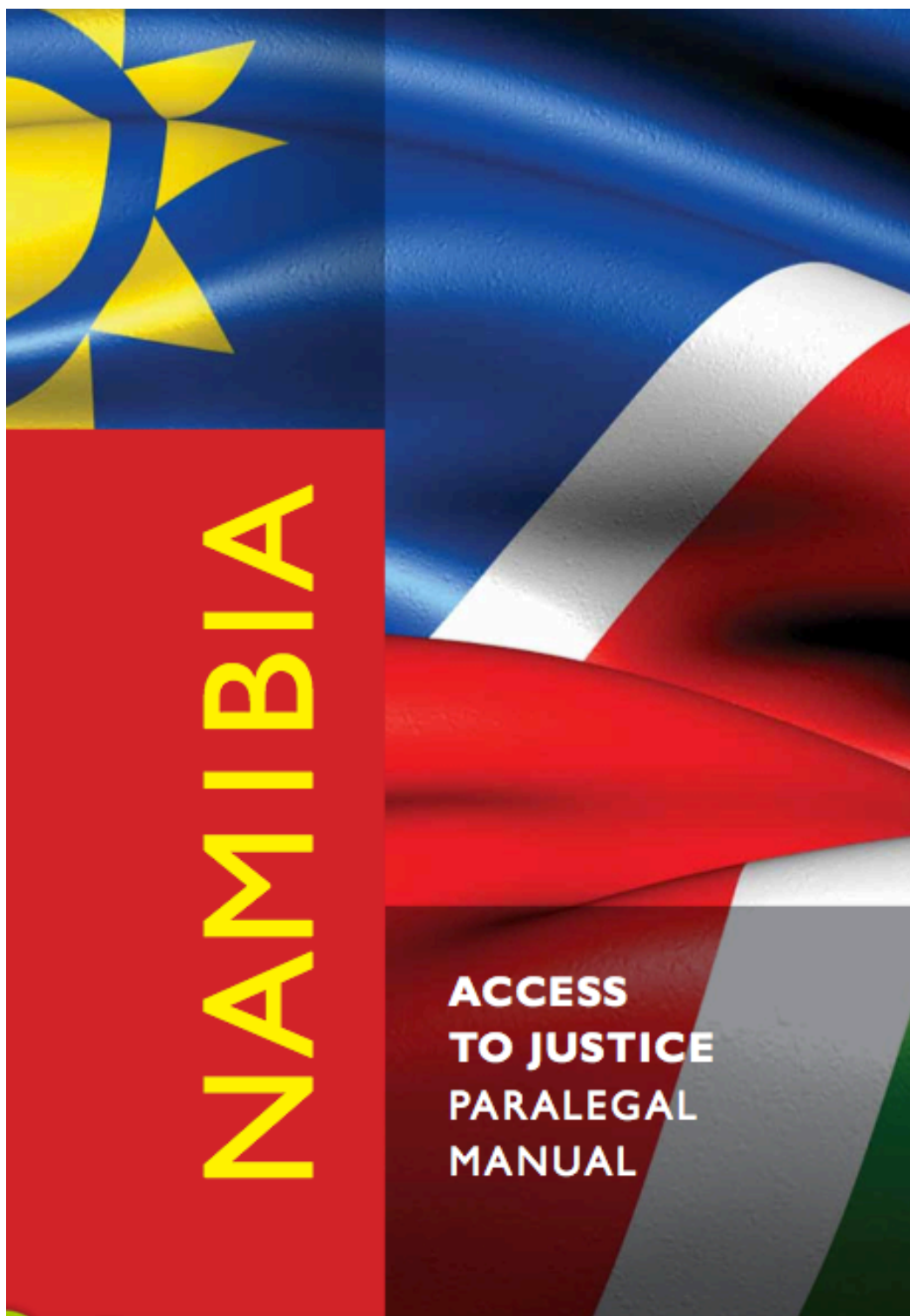


Excerpt from:



8. NEGOTIATION, MEDIATION, ARBITRATION SKILLS

Conflict resolution often requires skills which include negotiating, mediating, and arbitrating.

I. NEGOTIATION

A. NEGOTIATION SKILLS

Most of us deal with some form of negotiation every day. The paralegal will constantly be involved in negotiating on behalf of clients.

B. WHAT IS NEGOTIATION?

Negotiation takes place when two or more people or groups who have a conflict come together to try to agree on how best to resolve this conflict. This might mean that one side must compromise. Usually it means that both sides compromise so that they can reach a settlement. This is called a 'win-win' situation.

C. HOW DO YOU NEGOTIATE?

The main purpose of being a negotiator is to get the best settlement possible for the person or group whom you are representing. To do this, a negotiator needs certain skills such as:

- Finding out facts and information about the other side before you start to negotiate
- Knowing what questions to ask
- Knowing how to create the right atmosphere for successful negotiation – if you are too aggressive too early in the negotiation, this will create a tense atmosphere
- Knowing how much to tell the other person or group - for example, you should not give too many details too early in the negotiation as this could give the other person or group an advantage
- Knowing when to put your proposals to the other person or group
- Controlling your attitude toward the other side - all kinds of different emotions, prejudices, different values and cultures can affect your attitude toward the other side. This can make it harder for you to communicate properly with them.

EXAMPLE

A union official negotiates with the manager of a farm about the rights of workers have to join the union. The union official is very emotional because the manager is threatening to dismiss the workers. The union official also believes that the manager is not concerned about the workers and that he is cruel and immoral.

The manager is also very emotional. He believes that the union official is trying to take over the farm. He is worried about financial losses and believes that as soon as workers join a union they will go on strike. He believes that all workers are lazy and only want money to spend on alcohol.

In this example, there are many conflicting emotions, prejudices, and values between the two sides. This will affect negotiations between the two parties.

D. PREPARING FOR NEGOTIATION

Before beginning negotiations, you should:

- a. Identify the issue – understand the issue requiring resolution
- b. Be clear about your mandate – understand your client's desire
- c. Define your objectives – work out the key points that you want to achieve
- d. Select a negotiation team – it is usually better to have more than one person on a negotiating team
- e. Get to know the other side – study the other side's position and ask who will be participating in the negotiation
- f. Plan your actual presentation – organise the information you have gathered in a logical format so that you can easily use it in the negotiation.

E. THE PROCESS OF NEGOTIATION

Every negotiation is different and the process can differ. However, the flow chart (below) illustrates how a negotiation might proceed. In this example, the client is an employee who has been dismissed and would like her job back. You have to negotiate with the manager of the company where the employee was dismissed.



NEGOTIATION PROCESS

Identifying the goal and getting a mandate

THE EMPLOYEE WANTS HER JOB BACK.



PREPARING AND PLANNING FOR THE NEGOTIATION

- Find out all the details about the dismissal of the employee. Find out how many warnings she received in the past, her length of service, what her job was, whether she was a member of a union, why she thinks she was dismissed, and so on.
- Find out about the company, the name of the manager, whether the company has a reputation for treating its workers badly, and so on.
- Plan what you are going to say to the manager when you call.



MEETING OR CONTACTING THE OTHER SIDE

- Call the manager. Explain who you are representing and the reasons for your telephone call. Ask for the manager's side of the story. Explain that the employee wants her job back.
- The manager might refuse and also might make you a different offer (this is called a counter-offer).
- You do not have a mandate to accept a counter-offer. Tell the manager that you must go back to the employee.



GOING BACK TO THE PERSON OR GROUP YOU ARE REPRESENTING

Go back to the employee and explain what the manager has offered. (If you think it is a good settlement, you can try to encourage the employee to accept it.) If the employee accepts the offer, call back the manager and say that you agree to the company's offer.



PUTTING THE SETTLEMENT INTO PRACTICE

- Immediately write a letter to the company confirming the agreement.
- If the company does not keep to its side of the agreement, you must meet again with the employee and decide together what you are going to do.



2. MEDIATION

Where two conflicting parties cannot reach agreement on the issue causing the conflict, they can agree to ask a third party (called a “mediator”) to help them reach a solution. A mediator is a person who acts as a facilitator between the parties but does not make a decision about who is right or wrong. A mediator is not a judge. The mediator goes on assisting both sides until the parties themselves come to an agreement. If it is clear that the parties are not going to reach an agreement, the mediator might have to withdraw from the process. The parties will then have to find another way to resolve their conflict; for example, by using arbitration or going to court.

The main job of a mediator is to keep the parties in the negotiation communicating with each other. To do this, the mediator must get the trust and confidence of both parties and keep this trust by always being objective. The mediator must try to find out exactly what the problem or conflict is about. When the two sides meet together, the mediator must encourage both sides to be realistic about what they want from the other side and what they are prepared to give.

If you representing a person or group at a mediation, you need to prepare for the mediation in the same way as for a negotiation.

A. EXAMPLES OF ISSUES WHERE A MEDIATION MIGHT BE USEFUL

- Consumer complaints – You can use mediation or arbitration to solve consumer complaints. For example, a second-hand TV which your client bought breaks down completely after a month. The company that sold it refuses to fix it. It is too expensive to go to court, so you could ask the company to agree to call in a third party to act as a mediator between your client and the company. This is a cheaper and much quicker way of solving the problem.
- Community or neighbourhood disputes – Mediation can be very helpful in conflicts between different political groups, or landlords and tenants.
- Potential criminal matters – In some cases, mediation could be used to bring the person who committed the crime together with the victim of the crime, to see whether they can reach any agreement as an alternative to laying a criminal charge.

- Education – Mediation can also be helpful in disputes between students and teachers, students and administrators, parents and administrators, and so on.
- Environment – Disputes between communities and authorities relating to water, dams, waste disposal, and land development can be resolved through mediation.
- Family or divorce – Family, domestic violence, and divorce matters often use mediation for resolution.

B. PLANNING A MEDIATION SESSION

You should be flexible when you plan a mediation session. For example, a more informal mediation between two neighbours needs a different approach compared to a mediation between a consumer and a company. An example of a half-day mediation session is shown on the following page.

3. ARBITRATION

In an arbitration, a third party, acceptable to both parties, is called in to help the parties resolve the conflict. The difference between an arbitration and a mediation is that in an arbitration, the arbitrator is called on to make a decision about who is right or who is wrong. In other words, the arbitrator acts like a judge. The arbitrator chairs the hearing at which both parties present evidence. He or she reviews all relevant documents, takes testimony from witnesses, reviews the law, and makes a decision regarding who wins the arbitration. The arbitrator writes down the reasons for his or her decision in a judgment and gives this to the parties.

Before the arbitration takes place, the parties should agree in writing on the parameters (extent and limit) of the arbitrator’s powers. For example, will the arbitrator’s decision be final or will there be a right of appeal? Usually the parties agree that the decision of the arbitrator is final. This means the parties must obey this decision and the losing party cannot appeal against the decision.

An arbitrator should use proper legal principles to interpret the evidence, but the arbitration process is usually less formal than a court proceeding.



HALF-DAY MEDIATION SESSION	
1. INTRODUCTION: The mediator will explain the structure and aims of the mediation	10 minutes
2. OPENING OF MEDIATION: a. Welcome b. Introductions c. Agreeing to rules and procedures	15 minutes
3. STATEMENT OF POSITIONS: a. Each side will present its position (point of view). b. The mediator will summarise these positions. c. The mediator will pose clarifying questions. d. The parties respond.	30 minutes
4. FINDING COMMON GROUND (ISSUES THAT BOTH SIDES AGREE ON): a. The mediator will ask each side what it is prepared to do. b. The mediator will then summarise the common ground and add alternative solutions.	30 minutes
5. SEPARATE MEETINGS: At this point, it is likely that the mediator will speak to both sides separately. He or she may even go back-and-forth several times.	60 minutes
6. REACHING AGREEMENT: The mediator will work to bring both sides to a common solution and/or present a solution that he or she thinks is fair and that both parties should accept.	30 minutes
7. CONFIRMING AGREEMENT: a. The mediator will ask each side to state whether they agree to the proposed solution. b. The mediator will go over each point of the agreement. c. The parties, with the mediator's help, will put the agreement into written form.	30 minutes
8. CLOSURE OF MEDIATION: a. The mediator will discuss other issues such as monitoring and publicising of the agreement. b. The mediation session will then be closed.	15 minutes



9. COMMUNITY EDUCATION AND TRAINING WORKSHOPS

Educating people about legal rights can be efficiently done through community education and training workshops. Workshops should be planned so that they have direction and also so that something practical comes out at the end. When planning a workshop, keep these guidelines in mind:

1. GOAL

- Why are you running the workshop?
- What is your goal?
- What legal issues will be discussed?

2. PARTICIPANTS

- Who will attend the workshop?
- How many people will come?
- If it is a big group, you may want to plan for smaller group sessions during the workshop. A group of more than 30 people is difficult to manage and makes it harder for everyone to participate in a way that is meaningful.

3. LANGUAGE

- Which language or languages will you use?
- Will you need translation? If so, who will do the translating? Translation takes a lot of time and skill. It must be planned in advance.

4. TIME AND VENUE

- When is the best time for running the workshop?
- How long will the workshop last?
- Where is the most suitable venue? This will depend on the size of the group.

5. CONTENT

- What will be covered in the workshop?
- What level of detail will be needed for a successful workshop?

You can divide your workshop into the following sections:

- a. The beginning: This includes your welcome, introductions, ground rules for the workshop, and setting expectations.

- b. The middle: This is where you deal with transferring knowledge and/or skills to people. This may include breakout sessions and practice sessions. For example, if you are running a workshop on mediation skills, then you need to explain the theory to people and then give them time to practice the mediation process.
- c. The end: This includes your summary of the workshop, evaluation by participants, and your own concluding remarks.

6. METHODS

- How will you get the message to people?
- What workshop methods will help you to achieve this? Having attendees participate and practice is the most successful method.

7. FACILITATORS AND RESOURCES

- Who will run different parts of the workshop?
- What resources will they need to run the workshop effectively?
- Prepare the resources you will need in the workshop – for example, handouts and charts, small group questions, feedback forms, and so on.

Always remember that advance preparation makes for the most successful workshop. If you are planning on giving a workshop, you should work with others to plan it and use available resources (like the NPA and LAC) during your preparation.



ABOUT THIS MANUAL

This reference manual is intended to act as a guide to paralegals (Namibia's community educator/advocates) and other people and organisations that provide advice regarding Namibians' legal, civil, and human rights. The manual draws on the extensive experience of the community-based paralegals who, since 1998, have been serving their communities on a volunteer basis working under the auspices of the Namibia Paralegal Association (NPA). These paralegals assist Namibians with the challenges they face in their everyday lives.

The manual was written and designed by a team of lawyers and law students working in collaboration with the NPA, with a view toward enriching the reader's understanding of certain areas of law, the kinds of challenges that people face in trying to advocate for their rights, and the strategies that can be used to address them. The manual is designed to help paralegals and other readers find answers to some of the most pressing social and economic problems facing Namibians today. The manual includes chapters dedicated to specific areas of the law and forms that can be reproduced for use in addressing specific problems.

