

ATTORNEY'S GUIDE TO COURT CONNECTED MEDIATION



Supreme Court of Belize

FOREWORD

The introduction of court-connected mediation is a demonstration of the willingness of the Supreme Court to offer alternative methods of dispute resolution to litigants. Mediation is by no means intended to replace the core function of adjudication conferred on the Courts, but rather, it makes available to parties the opportunity to forge their own solution to their problems.

The multi-door approach to the resolution of dispute is not novel, although it is now being formally manifested as a part of the court system. It is hoped that litigants and their legal representatives alike would embrace this alternative as a means of reducing the cost and duration of litigation and minimizing the residual rancour which often attends the litigation process.

This guide is intended to be a road-map to Attorneys-at-Law as they navigate their clients' causes through court-connected mediation. It will serve to strengthen and entrench medication in the legal landscape.

I would like to commend the Editorial Committee for their industry in providing this invaluable work for the use of the legal profession.



Hon. Kenneth Benjamin
Chief Justice
Supreme Court

Disclaimer

This Guide is intended to be a tool to facilitate a greater understanding of mediation and enable more effective participation in the Court Connected Mediation process by Attorneys-at-Law. Attorneys are advised to consult the rules and amendments in order to understand what can and cannot be done and the role and requirements of Attorneys-at Law. This guide is not legislative and does not replace the Legal Profession (Code of Conduct) Rules or the Civil Procedure Rules. Attorneys are urged to consult the relevant legislation or practice direction.

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INTRODUCTION

What is Mediation?

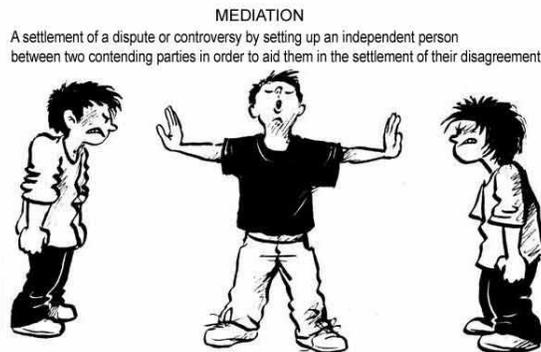
Meeting face-to-face is an effective way to encourage resolution of a dispute. Mediation is a confidential process in which an independent and neutral third party -the mediator is appointed to facilitate a discussion to help the parties reach a negotiated settlement. Any settlement arising at mediation will be one which the parties own, and have created for themselves.

Mediation is used to resolve all types of disputes, including commercial, contracts, employment, construction, and intellectual property disputes. Mediation is more flexible, expeditious and cost-effective than litigation. It provides the parties with an opportunity to participate in settlement negotiations and to jointly craft a solution tailored to the individual circumstances.

Although the tone of each mediation depends on the parties to a great extent, there are some fairly standard steps that each mediation will take. Generally, the mediator makes an opening statement regarding the conduct of the mediation and each party is given the opportunity to present their view of the dispute and to propose a solution.

Attorneys should ensure that the parties fully understand the mediation process and know what to expect before they attend a mediation session. This is to enhance the possibility of resolving the dispute or at least some of the issues between the parties.

In contrast to a trial, mediation is a private process, paid for by the participants, conducted at a time and a place fixed by the court, and by a mediator of their choice. It follows the principles of self-determination and works under an ethical code (r73.10).

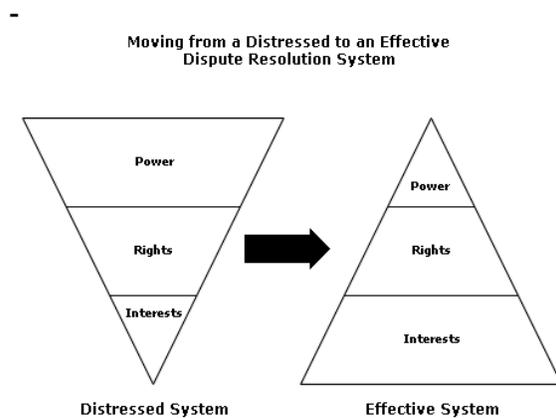


The Role of the Mediator

The mediator facilitates the discussion between the parties to enable them to find a solution to the dispute. The mediator is a neutral third party, not a judge or an arbitrator; and does not impose a decision or make a determination as to right/wrong or win/lose. The mediator is required to abide by the Rules of the Court Part 73.10 "Code of Ethics of Mediators". Mediators must conduct themselves in a manner which instills confidence in their integrity and confidence that disputes entrusted to them are handled in accordance with the highest ethical standards in order to help the parties understand and focus on the important issues needed to reach a resolution.

Court-Connected Mediation

The court system recognizes the effectiveness of mediation and encourages that mediation be utilized in appropriate civil claims. Court Connected Mediation is governed by Part 73 of the Supreme Court of Belize (Civil Procedure) Rules 2005. Mediation was instituted to reduce cost in terms of time and money, delay in litigation and to facilitate fair resolution of disputes. A Judge may refer matters to mediation where he/ she considers it appropriate. Parties may, by consent, notify the Court that they wish to have their claim referred to mediation.



“...the time has come for the Supreme Court to adopt the multi-door approach to the resolution of disputes by offering to litigants, mediation services under its auspices. For such an undertaking to be successful, the Court must be vigilant in offering a process that is imbued with efficiency and integrity...”

– Hon. Kenneth Benjamin –

Overview of the Process

Part 73 requires that

- the mediation takes place within 45 days from the date of referral by the Judge (r73.8 (4)).
- the parties choose a mediator from the Roster of Mediators.
- if parties fail to select a mediator, one will be appointed by the court
- at least seven days before the mediation session, each party prepares the statements of case (Claim Form and Statement of Claim /Application, Affidavits, Defence, Reply to Defence, Counterclaim) identifying the factual and legal issues in dispute and sends them to the mediator via the Mediation Co-ordinator.
- The parties must coordinate and submit a duly executed confidentiality agreement addressed to mediator via the Mediation Co-ordinator.
- the parties pay their respective portion of the mediation fee at least seven days before the mediation session.
- the parties attend the mediation session, with their lawyers if they are represented;
- the parties attending must have the authority to settle, or access to a person with authority to settle throughout the mediation session.

Timing of the Mediation

A Judge may at any stage of the proceedings make an order referring a claim to mediation. After referral is made the Court serves the parties with a 'Mediation Referral Order (Form 45: r73.3 (1)) unless the Court directs that the order is to be prepared by a party. The Notice informs the parties that mediation must take place within 45 days, from the date the order was made by the Judge (referral date). The parties have 14 days from the referral date to choose a mediator by filing a Notice of Selection of Mediator (Form 47) or one will be assigned by the Judge.

The parties by consent may request that their case be referred to mediation by submitting the Notice for Referral to Mediation (Form 46: r73.3(2)) with the name of the selected mediator. Where this is done the 45 days begin to run from the date the Judge makes the referral order.

The parties may request an extension of the time to mediate by making an application to the Court.

Cost of Mediation

Parties must abide strictly by the prescribed fees set out in the Second Schedule to Part 73. Each side is required to pay an equal share of the mediation fees, which covers the initial session of up to 3 hours. For every additional hour

after the first Mediation session there is an hourly rate of \$100. For example, the mediation can continue beyond the initial three-hour mediation period, as long as the parties agree on the mediation fees for the additional time. Mediation sessions are generally held at the Supreme Court or at an offsite location approved by the Court. There may be additional costs for utilizing offsite locations.

Choosing a Mediator

All parties shall attempt, in good faith, to seek to select a mediator mutually agreed by them. All Court Connected Mediation must be connect by a mediator from the approved Roster of Mediators. The selection may be made either at the time of filing a Notice for Referral to Mediation (where the parties consent and request that the matter be referred by the Court) or within 14 days of the matter being referred to mediation by the Court. The parties select a mediator by filing a Notice of Selection of Mediator (Form 47). If the parties fail to select a mediator within the stipulated time the Mediation Coordinator will refer the claim to the Judge who will assign a mediator. Upon a mediator being appointed the Mediation Coordinator confirms the name and availability of the mediator and fixes the date and time of the mediation session in consultation with the parties and mediator.

MEDIATION PROS AND CONS

Why Court-Connected Mediation?		
Reasons	Mediation (Pros)	Litigation (Cons)
Privacy	Mediation sessions are exclusive to the mediation parties and are held in private.	Matters in Court form public records and proceedings can be viewed by the public.
Efficiency & Cost	Mediation sessions are shorter, do not require extensive preparation as for trial and attract less costs.	Preparation for litigation is usually more voluminous and costly.
Rapid Settlement	A dispute that is referred to mediation can be settled very quickly, and in many instances, shortly after the institution of the claim.	Litigation in the court system can take years to resolve disputes between litigants.
Empowerment, Control & Outcome	Parties have a say in what the outcome/solution is.	The Judge decides and there is usually a 'winning' party and 'losing' party.
Time & Convenience	Mediation sessions are scheduled swiftly, require less time and allow parties to fix convenient times.	Litigation is dependent on the Court's scheduling and can become a very lengthy, drawn out process.
Satisfaction	Parties can negotiate on their own terms to create a 'win-win' approach to the dispute.	The outcome is restricted to the legal solution to the issues.
Relationships	Setting is more relaxed and relationships are more likely to be salvageable/preserved.	Creates an adversarial setting that can be damaging to relationships.
Case Management	Cases end quickly so that attorneys can concentrate on other cases which require their attention.	Where all cases have go litigation it means it can lead to an overworked and stressed out attorney
Compliance	Parties usually comply with agreements when they play an active role in the decision making process.	Enforcement proceedings in the Courts can oftentimes become another long drawn-out process

ATTORNEY'S ROLE IN MEDIATION

The Attorney's Role

Rule 19 of the Legal Profession (Code of Conduct) Rules requires Attorneys-at-Law to seek to obtain reasonable settlements of disputes where it is in the best interests of his client. Rule 22(2), provides further that an Attorney must always put his or her client's interest and the exigencies of the administration of justice first, and in particular, before his or her right to compensation for his or her services. Rule 23(3) goes beyond this to require Attorneys-at-law to advise clients to avoid or settle litigation in appropriate cases, in particular "whenever the controversy admits of fair adjustment."

Under the (Supreme Court) Civil Procedure Rule, 2005 litigants and their attorneys have an express duty to help the court to further the overriding objective of those Rules. In turn, the Court must further the overriding objective by actively managing cases which may include encouraging the parties to use any appropriate form of dispute resolution including, in particular, mediation (if the court considers that appropriate) and facilitating the use of such procedures.

Part 73 of the Supreme Court Civil Procedure Rules, 2005

Mediation session refers to an initial mediation including continuation and adjournments of the same matter held with a mediator and attended by parties and or their lawyers to a dispute.

Referral of Matters to Mediation

A Judge may refer a dispute to mediation at any time. An order may be made where the Judge considers that the matter is suitable for mediation or where the parties request that the matter be mediated. Any party may apply to vacate a mediation referral order and dispense with mediation within 15 days of an order (Rules 73.5 & 73.3(1)) if there is good and substantial reason why the matter should not be mediated. The application must be supported by affidavit.

The mediation session is required to be held within 45 days of the Mediation Referral Order unless otherwise ordered by the judge on application of any party (73.8 (4)).

Once a referral order has been made the parties are jointly responsible to attempt in good faith to agree on a mediator. The mediator may be selected at the time of filing the Notice of Referral to Mediation, at the time the court makes the mediation referral order or within 14

days of such order. This is done by filing a Notice of Selection of Mediator in Form 47. Should the parties fail to select a mediator, the Judge will assign a mediator from the Roster of mediators and may issue a Notice in Form 48 to the parties (Rule 73.6(3)).

Once the matter has been referred to mediation the parties are required to make payment of the mediation fee and submit a copy of the Statement of Case to the mediator at least 7 days prior to the mediation session. The parties are also required to sign a Confidentiality Agreement in Form 49 prior to the mediation session (73.7 (1)). Should the claim be settled prior to the mediation the parties are required to promptly inform the Mediation Co-ordinator and provide the details of the terms of the agreement or settlement.

Authority to Settle

Parties attending mediation must ensure that they have the requisite authority to settle the claim at the mediation. If a third party's approval or authorization is required prior to agreeing to a settlement the party attending must ensure that he or she will have ready access or authorization of the third party throughout the session (this also applies to persons attending on behalf of parties that are not natural persons).

Attending mediation without the requisite authority may result in the premature termination of the session

and expose the party attending without authority to sanctions.

Settlement at Mediation

Where the parties arrive at a settlement at the mediation the terms of the settlement should be reduced to writing and signed by the parties. The agreement may be witnessed by the mediator. Rule 73.14(1) requires that where the parties arrive at an agreement resolving some or all of the issues it is to be signed by the parties and the Mediator and lodged with the Mediation Co-ordinator for filing. This must be done within seven (7) days after the agreement is signed.

The parties must also make an application to the Court for an order in terms of the agreement. It is a good idea to determine and agree at the mediation session which party will prepare and file the application.

Confidentiality

Discussions during the mediation and documents prepared solely for the purposes of the mediation are confidential and shall not be disclosed in any other proceedings nor shall any matters disclosed at the mediation be referred to at any subsequent trial or hearing. The duty of confidentiality is not only imposed on parties but also on an Attorney-at-Law representing a party (73.9 (1)).

Sanctions

Where a party, an attorney-at-law representing a party or a mediator fails to comply with any rule, order or direction under Part 73 or breaches the confidentiality provisions of Rule 73.9, any other party, or the Mediation Co-ordinator, may apply to the court supported by an affidavit setting out the nature of the alleged failure or breach and serve a notice of the application and a copy of the affidavit on every other party (73.16 (1)). (Sanctions may be costs sanctions or any other sanction available to the Court under Part 26 of the CPR).

Attorney's Role and Obligations

It is the duty of the Attorney to act ethically in the best interests of the client throughout the mediation. As part of this duty the advocate should be sufficiently familiar with the mediation process, and with the client's instructions and should adequately prepare himself and his client ahead of the mediation.

The Attorney as a Mediation Advocate

An Attorney and client should work together as a team to take the best possible advantage of the benefits of mediation and the possibility of arriving at an acceptable mediated agreement. Court connected mediation allows the parties to be the decision makers instead of the

Judge. As an advocate you are able to influence the outcome of your client's claim and fast forward its satisfactory conclusion. Mediated agreements in the court connected context are somewhat stronger than the decision of a Judge as parties are generally not able to appeal such consent order of the Court. It is therefore crucial that Attorneys become skilled mediation advocates.

Being skilled in Mediation Advocacy requires an Attorney to-

- Know your client's case and know your client.
- Be familiar with the documents which may be useful to your client and may be presented at mediation.
- Understand what is important to his client and why (this may include non-legal matters).
- Be familiar with the rules governing court connected mediation and your duty of good faith as an officer of the Court.
- Together with the client, consider legal and non-legal issues and matters from the opposing party's perspective ahead of the mediation.
- Consider weaknesses in your client's case and the strength of the opposing party's case;
- Consider whether any third party needs to be consulted

prior to the mediation or be available for consultation during the mediation or attend the mediation. (for e.g insurer, CEO, relatives)

- Consider the costs to date and likely to be incurred should the matter not be resolved at mediation.
- Carefully and thoroughly prepare the client for the mediation session, assess risk and evaluate the Best and Worst Alternatives To the Negotiated Agreement that may result from mediation, objectively evaluate the opponent's case, discuss strategy, conduct during the mediation and essentially prepare a 'game plan'.
- Ensure that clients are knowledgeable about the mediation process and understand that it is consensual and that the decision will be made by the client. Reassure and empower their client.

An Attorney must help their client achieve an acceptable resolution by providing appropriate legal advice before and at the mediation. The Attorney should also be knowledgeable about the mediation process and be able to advise the client prior to and during the

mediation process. It requires continuous engagement through listening, assessing, and if appropriate, speaking in order to achieve an outcome which is acceptable to his client. An Attorney's role includes:

- Actively participating in the selection of a mediator and ensure compliance with all rules relating to mediation.
- Sending the appropriate documents to the Mediation Co-ordinator for the attention of the mediator; and make payment of the mediation fees at least 7 days before the mediation session.
- Ensuring review and signature of the Confidentiality agreement by his client prior to mediation.
- Ensuring that client(s) attend with sufficient authority as want of authority may result in the mediation being terminated and sanctions.
- Organizing how the client's case will be presented and managing the presentation during the mediation session.
- Providing ongoing advice to client before and during the mediation session (as to disclosure of documents and information, appropriateness of offers made etc) taking into account matters arising at mediation and how these

- affect the client's interests, claim or risks.
- Continually assessing the mood of the mediation and evaluating how the proposed options for settlement are likely to be in his client's best interests.
- Assisting with the drafting of a settlement agreement.
- Considering whether there are matters which can be agreed to narrow the issues where the mediation does not result in a settlement, and if so, whether these can be reduced into writing.
- Assessing whether the mediation process is being properly used by all parties in good faith.
- undue delays without any genuine intention to mediate the dispute);
- Maintaining the agreed confidentiality and must not disclose anything said or done during the mediation unless all the participants agree (Subject to the terms of any order of a court);
- Complying with any obligations and requirements imposed on them under the mediation agreement and should ensure that their clients are similarly compliant;
- Refraining from requesting or importuning the mediator to disclose information which has been given to them in private sessions (caucuses) with other participants and which the mediator has not been authorized to disclose.
- Not acting on or using information or documents that have been disclosed by other participants in the mediation.
- Not recording or attempting to make written, electronic or digital recording of the mediation or any part of the mediation, and should inform their clients that this is not permissible.

Ethics and Confidentiality

An advocate must behave ethically as required by the Legal Profession (Code of Conduct) Rules and must discharge his functions in a manner befitting his status as an officer of the Court. The Attorney-at-Law fulfills this duty by, among other things:

- Acting in good faith at all times and advising his client as to conduct which might amount to bad faith (such as using the mediation as a fishing expedition or to cause

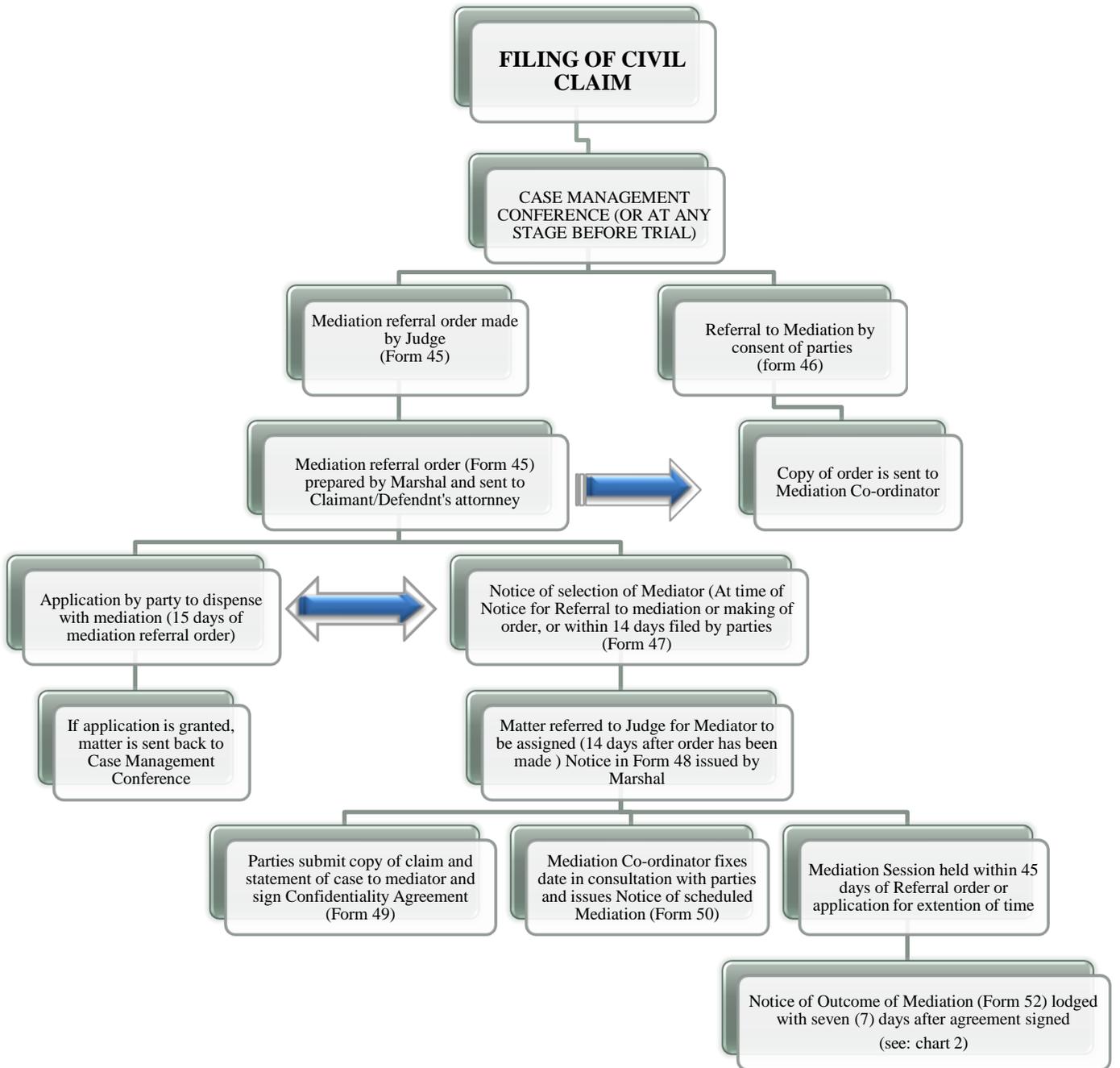
- Ensuring that the client understands that self-determination is crucial to mediation and that the matter is resolved on terms acceptable to the client;
- Not knowingly or recklessly mislead in mediation, whether in respect of facts or an offer or its terms and should discourage the client from so acting;
- of confidentiality which forms the basis of the mediation process.
- Attorneys should bear in mind that any breach of the duty of confidentiality may undermine the integrity of the process and expose the Attorney and or their clients to Court sanctions (see Rule 73.9 and 73.16).

Confidentiality

- Attorneys and clients are equally subject to the duty to maintain confidentiality. It is the duty of Attorneys to ensure that they sensitize their client of the need to keep all matters disclosed during the mediation session confidential.
- The obligation of confidentiality subsists even whether or not agreement is reached.
- Attorneys are encouraged to exercise caution when treating with the media (including social media) regarding any matter which is, or is likely to become a subject of mediation. In particular Attorneys are reminded of the overarching principle and duty

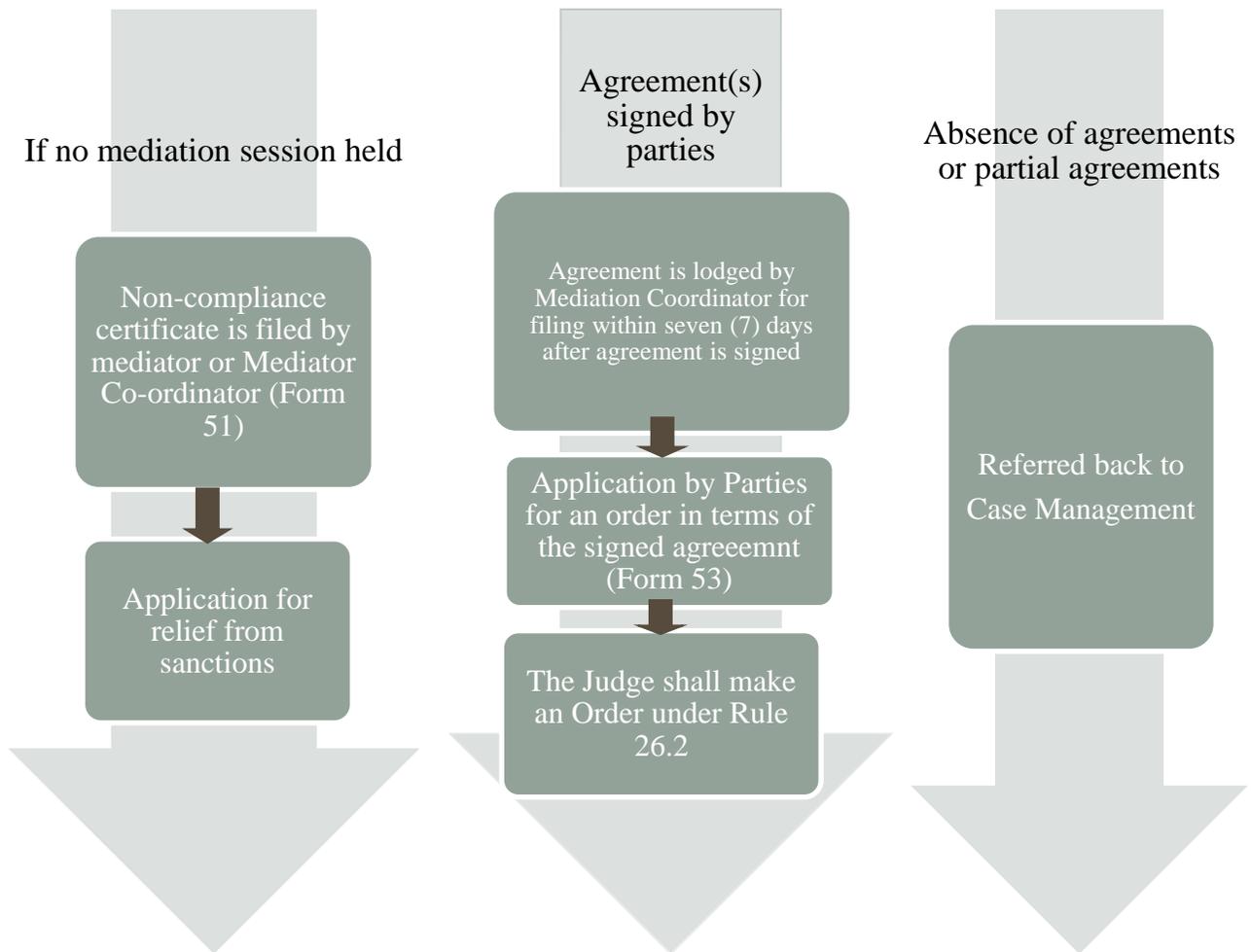
**SUPREME COURT (CIVIL
PROCEDURE) (AMENDMENT)
RULE, 2005
COURT CONNECTED MEDIATION
PART 73**

CHART 1



SUPREME COURT (CIVIL PROCEDURE) (AMENDMENT) RULE, 2005
COURT CONNECTED MEDIATION - PART 73

CHART 2



FREQUENTLY ASKED QUESTIONS

1. Does my client have to attend mediation where ordered by the judge?

Yes, Court-Connected Mediation is regulated by the Mediation Rules of the Court and a mediation order by a Judge is mandatory.

2. What is the cost of mediation sessions?

*\$500.00 First Session (3hrs)
\$100.00 for every additional hour
For use of UWI's facilities there is an additional fee of \$200.00 for initial 3 hour session and \$150 for each additional hour.

3. Can Attorneys speak during mediation sessions?

Yes. The Attorney and client are considered a team and may determine how to present from their perspective. Mediation is a party driven process and the mediator may encourage the parties to actively participate. Attorneys may also advise, guide and consult with their client during the mediation as necessary.

4. How can I get the judge to make a mediation order in favor of my client?

Parties can consent to mediation beforehand and lodge a Notice for Referral to Mediation (Form 46) with the Court and the Judge may make an order to refer the claim to Mediation accordingly.

5. What matters may be referred to mediation?

Any matter can be assigned to mediation except the following:

- i. Family matters*
- ii. Insolvency (Winding up of Companies)*
- iii. Non-contentious Probate Proceedings*
- iv. Criminal matters*

6. Can mediation agreements be enforced by the courts?

Yes, Consent Orders resulting from mediation agreements may be enforced in the same manner as other orders of the Court.

8. Can my client choose who will conduct the mediation session?

Yes. The mediation rules allow parties to choose their mediator. Where they cannot agree within the stipulated time, the Judge will choose the mediator.

9. What does the Judge consider when deciding whether to refer cases to mediation?

When deciding whether to assign a case to mediation the Judge will consider the following: the nature of the dispute, the relationship between the parties, the willingness of the parties to resolve their dispute and opportunities for joint gains not available through the court.

11. Where the matter has been referred to mediation, do I still need to file documents?

Yes, the referral to mediation does not affect the obligations of the parties or operate as a stay unless the Court orders.

12. Where will mediation sessions be held?

Mediation sessions will either take place at rooms available at the Supreme Court of Belize or at the University of the West Indies (Open Campus) or any other locations as approved by the Court.

13. What happens if the Mediation Session does not result in a settlement?

The matter will resume before the Judge and proceed in its normal course.

14. When does a mediation order take effect?

The mediation order takes effect from the date the judge makes the order referring the matter to mediation.