

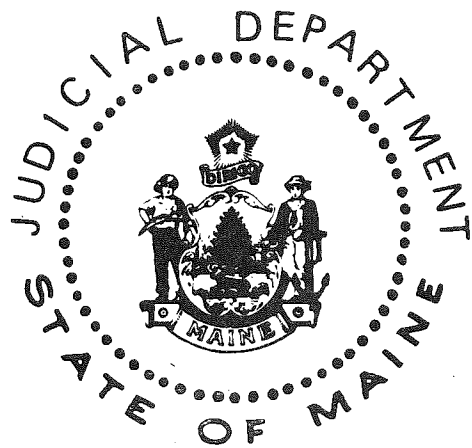
MAINE STATE LEGISLATURE

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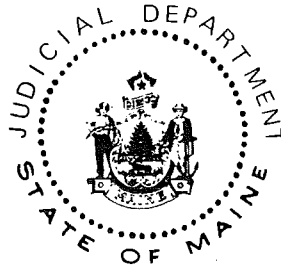
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MEDIATION IN MAINE
FIVE YEARS OF PROGRESS



**A Report to the Chief Justice
from the
Court Mediation Service
Judicial Department
State of Maine**

November 1982



COURT MEDIATION SERVICE

November 16, 1982

The Honorable Vincent McKusick
Judicial Department
State of Maine
142 Federal Street
Portland, Maine 04101

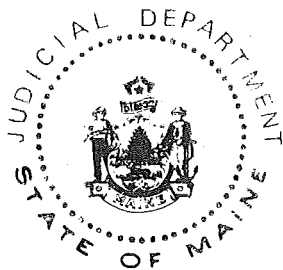
Dear Chief Justice McKusick:

Attached is a report on the progress of the Court Mediation Service, including recommendations for its continued improvement.

Mediation has taken root and thrived as an effective method of resolving certain types of disputes which come into the Maine courts. Each year for the past five years the number of cases mediated has increased; in fiscal 1982, for example, the total number of cases processed was 724, up 11% over fiscal 1981. Even more significantly, 434 of the 724 conflicts referred to the Service in 1982 were mediated to a resolution; that translates to a success rate of nearly 60%. The average cost per resolved case in 1982 was \$35.35; the average for all disputes heard was \$21.19.

The dollar cost, however, is only a partial measure of the success of mediation. There are numerous advantages which are not easily quantifiable, but which have an important impact nonetheless. This is especially true in domestic cases, where our experience has demonstrated that mediation is generally a better solution than litigation.

Where adversarial trials tend to exacerbate differences, mediation works to lead the parties to a common ground. Because the mediator has more time to listen than our overburdened trial judges, the underlying causes of disputes are more likely to be aired; and because a mutually acceptable mediated solution more often than not leaves the parties on speaking terms, compliance with the resulting court order is facilitated, which is critically important when the custody of children is involved. In intra-family disputes, mediation makes a unique contribution both to the judicial system and to the welfare of the parties.



COURT MEDIATION SERVICE

page 2

Despite those advantages, the use of mediation in domestic cases declined this year, down from 130 in fiscal 1981 to 83 in fiscal 1982. Those figures indicate that substantial work remains to be done in making judges, lawyers and disputants more aware of mediation. Statistical data also shows that, during 1981 and 1982, mediation was used in only 18 of the 32 District Courts and 3 of the 16 Superior Courts. Clearly the benefits of mediation are unevenly distributed throughout the state.

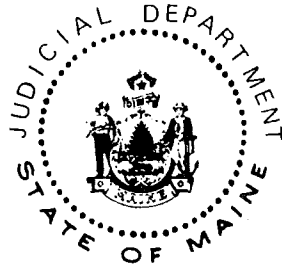
This attached report is submitted in the hope that it will assist in promoting mediation in all Maine courts, particularly in domestic disputes, so that the progress made by the Court Mediation Service over the past five years can continue to expand.

Sincerely,

A handwritten signature in cursive script that reads "Lincoln Clark".

Lincoln Clark
Administrator

LC/st



COURT MEDIATION SERVICE

ACKNOWLEDGEMENTS

A draft of this report was submitted for review to the twelve mediators of the Court Mediation Service, but the undersigned takes responsibility for any errors and misinterpretations which may have survived their scrutiny.

Christopher L. Vaniotis of Bernstein, Shur, Sawyer and Nelson has made a notable contribution to the clarity and readability of this report by editing an earlier draft.

The support services of Susan MacDonald and Andrea Russell, Clerks of Cumberland District Court, and Evelyn LaRochelle of the Administrative Office of the Court have been splendid.

Judge Robert W. Donovan, the coordinating Judge for the Court Mediation Service has been a wonderful crutch to overcome our minor policy and administrative tribulations.

Finally, Chief Justice McKusick deserves the credit for the establishment of the Court Mediation Service in the Judicial Department. Maine is the first state in the Union to fund such a program. From inquiries received from all over the country one might anticipate "As Maine goes, so".

Lincoln Clark
Court Mediation Service
Portland, Maine
November 1982

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SECTION I

The Court Mediation Service

The Court Mediation Service offers disputants an alternative to a full, formal, adversarial trial. Mediation may be suggested by the court, or initiated at the request of the parties or their attorneys; it is always voluntary. The mediation conferences may be scheduled by appointment, as is usually done in domestic matters, or they may be recommended on an ad hoc basis by the judge on the day of hearing, as is usually done in disclosure or small claims cases.

The mediation process itself bears almost no resemblance to a court adjudication. A trial is a formal contest, conducted according to sophisticated rules of evidence and procedure, where legally-trained experts play the major roles and a judge (or jury) clothed with the coercive power of the state renders a decision; the decision is based upon legal precedent and principles, and is generally a "zero-sum" solution -- i.e. one party wins and the other loses.

A mediation session on the other hand is an informal dialogue, conducted with no pre-set restrictions on the content of the conversation and no rigid rules of procedure, where the parties themselves (perhaps assisted by their attorneys) take primary responsibility for presenting their problems and where the mediator -- usually a non-lawyer -- attempts to propose, but cannot impose, successful solutions. Mediation tends to persuade the parties that it is in their best interest to make some adjustments to their original positions. As long as it is not contrary to law, the resolution reached by agreement may be flexible and innovative in form and may reflect a compromise not achievable through adjudication.

Mediation does not free the parties from all legal restraints. The court retains its power to reject a mediated solution and submit the dispute to adjudication. In addition the mediators themselves, who operate under a written Code of Ethics (See Appendix B), may decline to recommend a solution to the court if it appears patently unjust (as when one party intimidates the other into submission). In the majority of cases, however (60% in 1982), the parties reach a solution acceptable to themselves, the mediator and the court.

Clearly many disputes require formal legal proceedings; questions of constitutional law or statutory construction, for example, should not be mediated. In cases where successful resolution really depends on adjusting human relations, on the other hand, application of the less formal and more flexible mediation process makes considerable sense. Where mediation is appropriate, it offers several advantages to litigation.

In many cases, especially domestic matters, mediation can save court time, freeing up judges for genuine legal problems. In other cases, such as disclosure and small claims hearings, mediation may actually take longer than an appearance before the judge. That increase in the amount of time devoted to the case, however, is likely to produce a result more satisfying to the disputants, who come away feeling that their grievances got a complete airing and that they participated in fashioning a solution; consequently enhancing the likelihood of compliance with the resulting court order. In addition, mediation instituted early enough in a dispute may provide a remedy for disputants of limited means who might otherwise be unable to afford legal fees for the research, discovery, and motion practice which precede their eventual day in court. Properly used, mediation can not only lighten the load of the judiciary, it can also increase access to justice and produce superior results.

The Appendices to this report contain previous reports, articles, and samples of implementing forms, all of which more fully describe the Court Mediation Service. In response to the request of the Committee on Domestic Relations of the Cumberland Bar Association for information to give to lawyers about the mediators and Court Mediation Service, Appendix A was prepared. Appendix C contains a number of statistics about the program, some of which will be analyzed in Section 2.

SECTION II

Comments on the Mediation Statistics

The Administrative Office of the Courts has prepared an excellent statistical report comparing mediation in 1981 and 1982 (Appendix C).

The raw data came from mediator's case reports (Appendix D).

Some of the data in the statistical report warrant explication. They also have induced some policy recommendations.

Table A. The total number of cases mediated rose from 655 in 1981 to 724 in 1982, or 11%. The number of domestic cases, however, declined from 130 to 83, or 36%.

Recommendation #1. We do not have data on the ratio of the total number and types of civil cases tried to the number and types referred to mediation. Such information would facilitate the establishment of realistic targets for mediation and provide a means to measure progress. Accordingly it is recommended that the administrative Office of the Courts be asked for such data.

Table B. The increase in the number of District Court cases from 631 to 712 is largely due to the work of Jane Orbeton, who, as mediator based in Hallowell, mediated 119 more cases in 1982 in Augusta, Skowhegan and Waterville (plus a few others). There were also significant increases in Brunswick, Lewiston, Rockland and Wiscasset.

Significant declines occurred in Biddeford, from 42 in 1981 to 0 in 1982, in Portland, from 351 to 297, and in Bangor from 1 to 0.

Since the compilation of the statistics mediation has resumed in Biddeford.

The decline in Portland is due primarily to the discontinuance of the presence of a mediator on Wednesday afternoons when landlord-tenant cases and disclosures are heard, and to the decline in domestic cases. The judges, with the concurrence of the mediators, felt that mediation of Wednesday cases was not conferring significant benefits on the parties or on the Court.

The record in Bangor is a great disappointment. A variety of strenuous efforts there have been made, but so far, in vain.

Recommendation #2. Effort should be continued to get a viable program going in Bangor.

Table C. Only 3 of the 16 Superior Courts used mediation in 1981 - 1982, and the number of cases dropped 50%, from 24 to 12.

Recommendation #3. That there be consultation with the Regional Presiding Justices of the Superior Court to explore the potential for more mediation of domestic cases, and to consider expansion of mediation into other matters as well.

Table D. The total number of mediated cases is overstated because "Continued" cases are double-counted -- when first heard and again when reheard. However, not all "Continued" cases are reheard by the mediator -- some are settled by negotiation of the attorneys, some others go directly to a judge for trial.

The number of cases "Referred to Judge" underestimates the contribution of mediation. Often mediation that does not result in a full settlement nevertheless clarifies and narrows the issues. This saves time when the case goes to trial. In other instances, a case is tabulated as "Referred to Judge" when there is but a single unresolved issue, e.g., attorney's fees.

Table E. The average cost per case heard declined 26% from \$28.64 to \$21.19 and for cases resolved, 25% from \$47.01 to \$35.35. For reasons observed in the discussion of Table D, cases "Resolved" is not the sole criterion of the contribution of mediation. Thus the true cost of a mediated case is more than \$21.19 but less than \$35.35.

The average cost may rise in 1983 due to increasing the mediator's half-day fee from \$37.50 to \$50, but it should not rise by 33 1/3% (see discussion of Table F).

Table F. The time taken to mediate all types of cases diminished from 1981 to 1982. This is probably due to the increasing expertise of the mediators. Greater expertise means quicker perception of a non-mediatable case, e.g., some auto accidents, some custody disputes, and quicker resolution of a dispute. Unfortunately, the data are incomplete due to mediators failing to record the time a case is concluded.

Recommendation #4. Mediators should be reminded of the importance of keeping accurate time logs as a means of evaluating the effectiveness of the program.

Table G. The data on "Attorney Involvement in Mediation" indicates that fewer parties are retaining lawyers -- 37.4% in 1981 and 20.6% in 1982.

Lawyers are involved in most divorces but frequently lawyers send their clients to mediation and then subsequently review the proposed settlement. This obviously saves the parties expense. The number of pro se domestic cases may be increasing slightly.

Recommendation #5. Lawyers should be encouraged to advise clients of limited financial means that such clients can represent themselves in a mediation conference and subsequently have the proposed settlement agreement reviewed by the attorney.

SECTION III

Methods of Promoting Mediation

Since the inception of the Court Mediation Service, a number of methods have been used to publicize mediation. Chief Justice McKusick has distributed memoranda to judges, court clerks and the general public (see Appendices E, F, and G). Both the Superior Court and District Court in Cumberland County have sent notices to attorneys (Appendices H and J) and provided forms to facilitate requests for mediation (Appendix I) and scheduling (Appendix K).

There has also been some press coverage of the Court Mediation Service, including articles in the ABA Journal (Appendix L) and the Maine Bar Bulletin (Appendix M). An intensive analysis of "Small Claims Mediation in Maine: An Empirical Assessment" by Craig A. McEwen and Richard J. Maiman was published in the Maine Law Review, Volume 33, November 2, 1981. Several of the mediators and Judge Donovan have addressed conferences of judges, meetings of regional bar associations, meetings of organizations of divorced persons and university classes. Finally, and probably most significantly, judges have talked to other judges and lawyers to other lawyers about mediation. Such word-of-mouth promotion is particularly effective, and it is hoped that this report will serve as a catalyst for increased dialogue within the legal profession.

Recommendation #6. All of the above mentioned methods of promoting mediation should be continued, and expanded wherever possible. In particular the memoranda to judges, clerks and the notices to attorneys should be revised to reflect the progress of the Court Mediation Service and to more strongly encourage its use.

Recommendation #7. A concerted effort should be made to increase public awareness of the availability of the Court Mediation Service, so that disputants can consider mediation even if it is not suggested by an attorney. Legal feature writers for all the state's newspapers should be invited to do articles on court mediation. Television and radio stations should also be contacted, and some thought might be given to allowing television coverage of an actual mediation session (with the consent of the parties, of course).

Recommendation #8. This report should be disseminated widely. It should go to judges, clerks of the court, community bar associations, libraries, lawyers and legislators; it should be made available to civic leaders, community organizers, clergy, mental health workers, and anyone who is likely to be involved in helping people deal with conflict and disputes. The more people know about mediation, the more wide-spread will be its use, and the greater its benefits.

SECTION IV

Statutory Authorization for Mediation

Chief Justice McKusick asked the Court Mediation Service whether steps should be taken to give mediation further impetus by establishing legal authority for its use, as by statute or court order. This request was referred to an Ad Hoc Committee of the Maine Bar Association composed of:

H. Michael Alpren
Judith Andrucki
Cushman Anthony
Summer Bernstein
Phyllis Givertz
Caroline Glassman
Catherine Johns
Ellen Kandoian
Dorothy Moore
George Shur
Fredda Wolf

After a series of meetings their conclusion was the following proposed statute:

Title 19 §696. Mediation

1. In any action for divorce, for judicial separation, or for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of said property, and in all child custody proceedings other than child protection proceedings as defined in Title 22 §4001 et seq., the Court shall determine what efforts the parties have made to settle their dispute, and may recommend that the parties meet with a mediator to attempt to reach a resolution.
2. A Court Mediator shall be made available without charge to the parties to any action hereunder upon the request of both parties made to the Clerk of the District or Superior Court having jurisdiction over the matter.

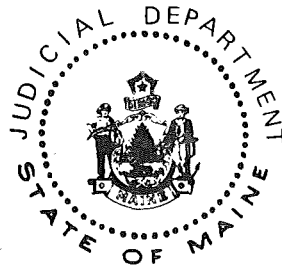
3. Persons of integrity and impartiality who have received training in mediation techniques shall be appointed to a panel of Court Mediators for a period of three years upon the recommendation of a Court Mediator selection committee. Members of the Court Mediator selection committee shall be designated by the Chief Justice.

4. Every settlement reached through mediation shall be submitted to the Court for approval.

5. All actions hereunder where the parties have made good faith efforts to settle their dispute with the assistance of a Court Mediator but were unsuccessful in whole or in part shall be given priority in scheduling for trial over those actions where such efforts have not been made.

6. No mediator who has attempted to settle any dispute pursuant to this section may be required to testify in any court proceeding concerning any matter disclosed during mediation sessions.

Recommendation #9. The Judicial Department should review the statute proposed by the Ad Hoc Committee with a view towards possibly submitting it, or a similar statute, to the Legislature.



COURT MEDIATION SERVICE

Organization of the Court Mediation Service

What is it? The Court Mediation Service offers an alternative to trial in court. Mediation works well in resolving many civil cases -- small claims, landlord-tenant, disclosures, and particularly, divorce cases.

Mediation usually saves the judge, lawyers, and clients time and money. A Court order of a mediated settlement often results in better compliance than an adjudicated decision and lessens the antagonism of the litigants.

Does Mediation get Court orders sooner? The experience with mediated cases is 63% resolutions, 7% continuances, and 30% referrals to Judge. As an incentive to encourage mediation, many judges give priority on the Court calendar to issue orders following resolutions and for hearing unresolved cases.

What Districts are served? Mediators are available to all Maine District and Superior Courts where needed.

Who runs the Service? Judge Robert Donovan has been appointed by Chief Justice McKusick as the coordinator of the Court Mediation Service with the Courts. The administrator is Lincoln Clark.

Who are the Mediators? There are twelve mediators:

Aroostook County -- Lloyd Chase - married; four children; Houlton School Administrator; B.S. Ed., M. Ed., University of Maine. He began mediating in 1980.

Bangor -- Wilma Bradford - married; four children; A.S., Westbrook College. She began mediating in 1980.

Augusta, Farmington, Skowhegan -- Jane Orbeton - married; two children; Attorney; A.B., Bryn Mawr College; J.D., Georgetown University. She began mediating in 1981.

Lewiston, Auburn -- Richard Wagner - married; four children; Professor of Psychology, Bates College; B.A., Haverford College; Ph.D., University of Michigan. He began mediating in 1980.

-2-

Alternate -- James Carrigan - married; four children; Dean of the College, Bates College; A.B., Bates College; Ph.D., University of Rochester. He began mediating in 1977.

Brunswick, Bath and Districts Northeast --

Paul Hazelton; married; three children; Professor of Education, Bowdoin College; B.S., Bowdoin College; Ed. M., Harvard University. He began mediating in 1979.

Alternate on Leave -- Roy Greason - married; three children; President of Bowdoin College; A.B., Wesleyan University; Ph.D., Harvard University. He began mediating in 1977.

Portland, Biddeford, Springdale, Kittery, Bridgton --

Lincoln Clark - married; ten children; Special Master U.S. District Court; A.B., Ph.D., University of Chicago. He began mediating in 1977.

Walter Corey - married; three children; Attorney; A.B., Princeton University; J.D., Yale University. He began mediating in 1977.

Donald DeMuth - married; four children; former Executive Director Community Counseling Center; A.B., Hillsdale College; M.S.W., Western Reserve University. He began mediating in 1979.

Dorothy Moore - married; two children; Associate Professor of Education, University of Southern Maine; B.S., Ed.D., University of Maine. She began mediating in 1978.

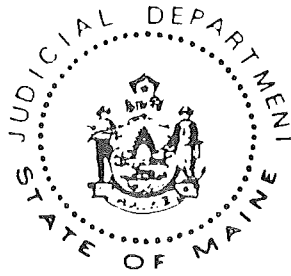
Edgar Spencer - married; three children; retired Texaco executive; B.A. Princeton University. He began mediating in 1978.

How are Mediators selected: Applicants apply to the Administrator of the Court Mediation Service. When a vacancy exists the qualifications of all applicants from the district are reviewed by a Committee of Mediators. The most promising is interviewed and invited to sit in on some mediation sessions. If favored by the mediators the applicant then requests the approval of the presiding Judge in his/her District to submit for formal appointment by Judge Donovan.

Who pays the Mediators: The mediators receive a modest per diem and travel expenses from the Judicial Department.

May lawyers choose the Mediator? Lawyers may jointly request the services of any particular mediator and, if available, s/he will be assigned.

How is Mediation Arranged? The Judge/Justice via the Clerk of Court phones the Administrative Office of the Courts (Miss LaRochelle - 775-1500) stating when, where and for what kind of case(s) a mediator is desired and who the lawyers are. Miss LaRochelle and Mr. Clark then schedule the mediation.



COURT MEDIATION SERVICE

CODE OF CONDUCT FOR MEDIATORS

A mediator should conduct himself* at all times in a manner that promotes public confidence in his integrity and impartiality in the pursuit of justice. The provisions of this Code should be construed and applied to further this objective.

1. Just Resolution.

(a) To reduce the risk of sanctioning an unjust resolution of a dispute, if a mediator believes that either an agreed or a proposed resolution is not just, he should propose what he believes is just. (This problem typically happens when there is a great discrepancy in the bargaining power or patience of the disputants.) If either disputant rejects the mediator's final proposed resolution, he should refer the case to the judge. A mediator's proposals shall not be construed as violations of impartiality.

(b) If only a partial resolution is reached, the mediator should invite the disputants to be present when he informs the judge about the issues that remain to be adjudicated.

(c) If the disputants are so intransigent that prolonging the mediation looks fruitless, the mediator might well consider proposing that the mediation be continued to a later date before giving up and referring the case to the judge.

2. Disqualification.

(a) If the mediator has reason to believe that he could not act with complete impartiality, he should disqualify himself.

(b) The mediator should promptly inform the disputants about any matter that might reasonably cause his impartiality to be questioned and offer to disqualify himself. Before making this offer, however, the mediator might well inform the disputants that unless they both agree to a resolution, it will not be transmitted to the judge for approval as an order of the court.

3. Confidentiality.

(a) If no resolution is reached, the mediator should refer the case to the judge without disclosing any information about what transpired during the mediation.

*In recognition of sexual equality, in this Code, himself = himself or herself; his = his or her and he = he or she.

ADMINISTRATIVE OFFICE OF THE COURTS

P.O. Box 4820 Downtown Station
Portland, Maine 04112
207-775-1500

Appendix C

Dana R. Baggett
State Court Administrator

August 23, 1982

MEMORANDUM:

TO: Lincoln Clark

FROM:  Debra E. Oiken, Research and Planning Director

REFERENCE: Mediation

Pursuant to your recent request, enclosed are statistics compiled by the Administrative Office of the Courts concerning mediation proceedings during Fiscal Years 1981 and 1982.

If you have any questions, or would like additional information, please contact me.

f

cc: Hon. Vincent L. McKusick, Chief Justice
Dana R. Baggett, State Court Administrator

COURT MEDIATION STATISTICS

FISCAL YEARS 1981-1982

ADMINISTRATIVE OFFICE OF THE COURTS

AUGUST, 1982

Prepared by:

Debra E. Oiken, Research and Planning Director
Alan R. Robitaille, Research Assistant

STATISTICAL SUMMARYTABLE A: Mediation Caseload Summary - By Type of Case

During 1981, 59.5% of all mediations involved small claims cases, while such cases constituted 74% of all mediations in 1982.

TABLE B: District Court Mediation - By Court Location

Portland, Lewiston, and Augusta remained the highest users of mediation during both fiscal years, while mediation was not used at all in a total of fourteen (14) courts.

TABLE C: Superior Court Mediation - By Court Location

Cumberland, York, and Sagadahoc were the only Superior Court locations in which mediation was used during the two-year period.

TABLE D: Mediation Caseload - By Type of Disposition

Approximately 60% of all cases were successfully resolved by the mediators.

TABLE E: Mediation Expenditures

The average cost per case during the two-year period was \$24.73, although the cost decreased significantly from 1981 to 1982.

TABLE F: Time Required For Mediation

This table reveals that domestic cases require considerably more time for mediation than any other type of case.

TABLE G: Attorney Involvement in Mediation

During 1982, 20.6% of all mediated cases involved one or more attorneys, a significant decrease from the 37.4% reported in 1981.

APPENDICES: I, II, III, IV

These appendices detail mediation caseload by type of case for each court location.

MEDIATION CASELOAD SUMMARY
BY TYPE OF CASE

Fiscal Years 1981 - 1982

	<u>SMALL CLAIMS</u>	<u>LANDLORD/ TENANT</u>	<u>DISCLOSURE</u>	<u>DOMESTIC</u>	<u>TOTAL</u>
<u>FY81:</u> District Court	390	115	19	107	631
Superior Court	<u>-</u>	<u>-</u>	<u>1</u>	<u>23</u>	<u>24</u>
TOTAL	390	115	20	130	655
<u>FY82:</u> District Court	536	93	11	72	712
Superior Court	<u>-</u>	<u>-</u>	<u>1</u>	<u>11</u>	<u>12</u>
TOTAL	536	93	12	83	724
<u>FY81-82:</u> District Court	926	208	30	179	1343
Superior Court	<u>-</u>	<u>-</u>	<u>2</u>	<u>34</u>	<u>36</u>
TOTAL	926	208	32	213	1379

DISTRICT COURT MEDIATION
BY COURT LOCATION

Fiscal Years 1981-1982

<u>COURT LOCATION</u>	<u>FY 81</u>	<u>FY 82</u>	<u>TOTAL</u>
Augusta	48	110	158
Bangor	1	-	1
Bath	6	1	7
Bar Harbor	1	-	1
*Belfast	-	-	-
Biddeford	42	-	42
Bridgton	3	6	9
Brunswick	26	45	71
*Calais	-	-	-
Caribou	1	-	1
*Dover-Foxcroft	-	-	-
Ellsworth	1	-	1
Farmington	-	7	7
*Fort Kent	-	-	-
*Houlton	-	-	-
*Kittery	-	-	-
Lewiston	77	93	170
*Lincoln	-	-	-
*Machias	-	-	-
*Madawaska	-	-	-
*Millinocket	-	-	-
Newport	5	-	5
Portland	351	297	648
*Presque Isle	-	-	-
Rockland	6	25	31
*Rumford	-	-	-
Skowhegan	-	19	19
*South Paris	-	-	-
Springvale	38	35	73
*Van Buren	-	-	-
Waterville	24	62	86
Wiscasset	<u>1</u>	<u>12</u>	<u>13</u>
TOTAL	631	712	1343

*Mediation not used.

SUPERIOR COURT MEDIATION
BY COURT LOCATION

Fiscal Years 1981-1982

<u>COURT LOCATION</u>	<u>FY 81</u>	<u>FY 82</u>	<u>TOTAL</u>
*Androscoggin	-	-	-
*Aroostook	-	-	-
Cumberland	21	10	31
*Franklin	-	-	-
*Hancock	-	-	-
*Kennebec	-	-	-
*Knox	-	-	-
*Lincoln	-	-	-
*Oxford	-	-	-
*Penobscot	-	-	-
*Piscataquis	-	-	-
Sagadahoc	1	1	2
*Somerset	-	-	-
*Waldo	-	-	-
*Washington	-	-	-
York	<u>2</u>	<u>1</u>	<u>3</u>
TOTAL	24	12	36

*Mediation not used.

MEDIATION CASELOAD
BY TYPE OF DISPOSITION

Fiscal Year 1981

<u>TYPE OF DISPOSITION</u>	<u>SMALL CLAIMS</u>	<u>LANDLORD/TENANT</u>	<u>DISCLOSURE</u>	<u>DOMESTIC</u>	<u>TOTAL</u>
Resolved by Mediator	252	66	13	68	399
Referred to Judge	110	39	3	36	188
Continued	<u>28</u>	<u>10</u>	<u>4</u>	<u>26</u>	<u>68</u>
TOTAL	390	115	20	130	655

MEDIATION CASELOAD
BY TYPE OF DISPOSITION

Fiscal Year 1982

<u>TYPE OF DISPOSITION</u>	<u>SMALL CLAIMS</u>	<u>LANDLORD/TENANT</u>	<u>DISCLOSURE</u>	<u>DOMESTIC</u>	<u>TOTAL</u>
Resolved by Mediator	327	54	6	47	434
Referred to Judge	144	33	1	19	197
Continued	<u>65</u>	<u>6</u>	<u>5</u>	<u>17</u>	<u>93</u>
TOTAL	536	93	12	83	724

MEDIATION EXPENDITURES
Fiscal Years 1981-1982

	<u>FY 81</u>	<u>FY 82</u>	<u>TOTAL</u>
Professional Fees	\$16,809.09	\$14,462.50	\$31,271.59
Mileage and Expenses	1,869.41	878.81	2,748.22
Printing	<u>80.11</u>	<u>00</u>	<u>80.11</u>
TOTAL	\$18,758.61	\$15,341.31	\$34,099.92

Number of Cases Heard	655	724	1379
Average Cost Per Case	\$28.64	\$21.19	\$24.73
Number of Cases Resolved	399	434	833
Average Cost per Resolved Case	\$47.01	\$35.35	\$40.94

TIME REQUIRED FOR MEDIATION*

<u>FISCAL YEAR 1981</u>	<u>SMALL CLAIMS</u>	<u>LANDLORD/TENANT</u>	<u>DISCLOSURE</u>	<u>DOMESTIC</u>
Average time required per case	33 minutes	29 minutes	36 minutes	2 hours and 45 minutes
Range	5 minutes to 2 hours	5 minutes to 1½ hours	5 minutes to 3 hours	10 minutes to 8 hours
Percent of cases for which time was not recorded	37%	36%	35%	25%
 <u>FISCAL YEAR 1982</u>				
Average time required per case	26 minutes	15 minutes	25 minutes	2 hours and 15 minutes
Range	5 minutes to 2 hours	10 minutes to 1½ hours	10 minutes to 3 hours	20 minutes to 7 hours
Percent of cases for which time was not recorded	52%	44%	33%	39%

*Many mediation records did not include the time spent, as evidenced by the "Percent of cases for which time was not recorded" category.

ATTORNEY INVOLVEMENT IN MEDIATION

	<u>ATTORNEY FOR PLAINTIFF ONLY</u>	<u>ATTORNEY FOR DEFENDANT ONLY</u>	<u>ATTORNEYS FOR BOTH PARTIES</u>	<u>NO ATTORNEY INVOLVEMENT</u>	<u>TOTAL</u>
<u>FISCAL YEAR 1981</u>					
Number of cases	83	32	130	410	655*
Percent of total caseload	12.7%	4.9%	19.8%	62.6%	100%
Percent of total caseload in which one or more attorneys were involved ----- 37.4%					
<u>FISCAL YEAR 1982</u>					
Number of cases	42	26	81	575	724
Percent of total caseload	5.8%	3.6%	11.2%	79.4%	100%
Percent of total caseload in which one or more attorneys were involved ----- 20.6%					

DISTRICT COURT
MEDIATION CASELOAD BY TYPE OF CASE
FISCAL YEAR 1981

APPENDIX I

25

<u>COURT</u>	<u>SMALL CLAIMS</u>	<u>LANDLORD/TENANT</u>	<u>DISCLOSURE</u>	<u>DOMESTIC</u>	<u>TOTAL</u>
Augusta	39	9	-	-	48
Bangor	1	-	-	-	1
Bar Harbor	-	-	-	1	1
Bath	5	-	-	1	6
*Belfast	-	-	-	-	-
Biddeford	35	7	-	-	42
Bridgton	2	1	-	-	3
Brunswick	22	4	-	-	26
*Calais	-	-	-	-	-
Caribou	-	-	-	1	1
*Dover-Foxcroft	-	-	-	-	-
Ellsworth	-	-	-	1	1
*Farmington	-	-	-	-	-
*Fort Kent	-	-	-	-	-
*Houlton	-	-	-	-	-
*Kittery	-	-	-	-	-
Lewiston	64	13	-	-	77
*Lincoln	-	-	-	-	-
*Machias	-	-	-	-	-
*Madawaska	-	-	-	-	-
*Millinocket	-	-	-	-	-
Newport	4	-	-	1	5
Portland	166	67	19	99	351
*Presque Isle	-	-	-	-	-
Rockland	6	-	-	-	6
*Rumford	-	-	-	-	-
*Skowhegan	-	-	-	-	-
*South Paris	-	-	-	-	-
Springvale	29	6	-	3	38
*Van Buren	-	-	-	-	-
Waterville	16	8	-	-	24
Wiscasset	<u>1</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>1</u>
Sub-Total	390	115	19	107	631
Percent of Total	59.5%	17.6%	0.1%	19.8%	
TOTAL FOR FISCAL 1981	390	115	20	130	655

*Mediation not used.

DISTRICT COURT
MEDIATION CASELOAD BY TYPE OF CASE
FISCAL YEAR 1982

<u>COURT</u>	<u>SMALL CLAIMS</u>	<u>LANDLORD/TENANT</u>	<u>DISCLOSURE</u>	<u>DOMESTIC</u>	<u>TOTAL</u>
Augusta	104	5	-	1	110
*Bangor	-	-	-	-	-
*Bar Harbor	-	-	-	-	-
Bath	-	-	-	1	1
*Belfast	-	-	-	-	-
*Biddeford	-	-	-	-	-
Bridgton	4	2	-	-	6
Brunswick	30	13	-	2	45
*Calais	-	-	-	-	-
*Caribou	-	-	-	-	-
*Dover-Foxcroft	-	-	-	-	-
*Ellsworth	-	-	-	-	-
Farmington	7	-	-	-	7
*Fort Kent	-	-	-	-	-
*Houlton	-	-	-	-	-
*Kittery	-	-	-	-	-
Lewiston	78	14	-	1	93
*Lincoln	-	-	-	-	-
*Machias	-	-	-	-	-
*Madawaska	-	-	-	-	-
*Millinocket	-	-	-	-	-
*Newport	-	-	-	-	-
Portland	184	39	7	67	297
*Presque Isle	-	-	-	-	-
Rockland	17	8	-	-	25
*Rumford	-	-	-	-	-
Skowhegan	18	1	-	-	19
*South Paris	-	-	-	-	-
Springvale	24	7	4	-	35
*Van Buren	-	-	-	-	-
Waterville	59	3	-	-	62
Wiscasset	<u>11</u>	<u>1</u>	<u>-</u>	<u>-</u>	<u>12</u>
SUB-TOTAL	536	93	11	72	712
(Percent of Total)	(74.0%)	(12.8%)	(1.7%)	(11.5%)	
TOTAL FOR FISCAL 1982	536	93	12	83	724

*Mediation not used.

SUPERIOR COURT
MEDIATION CASELOAD BY TYPE OF CASE
FISCAL YEAR 1981

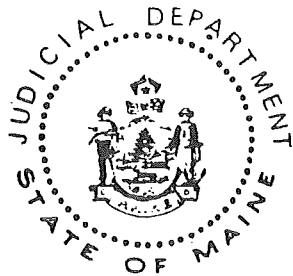
<u>COURT</u>	<u>SMALL CLAIMS</u>	<u>LANDLORD/TENANT</u>	<u>DISCLOSURE</u>	<u>DOMESTIC</u>	<u>TOTAL</u>
*Androscoggin	-	-	-	-	-
*Aroostook	-	-	-	-	-
Cumberland	-	-	-	21	21
*Franklin	-	-	-	-	-
*Hancock	-	-	-	-	-
*Kennebec	-	-	-	-	-
*Knox	-	-	-	-	-
*Lincoln	-	-	-	-	-
*Oxford	-	-	-	-	-
*Penobscot	-	-	-	-	-
*Piscataquis	-	-	-	-	-
Sagadahoc	-	-	1	-	1
*Somerset	-	-	-	-	-
*Waldo	-	-	-	-	-
*Washington	-	-	-	-	-
York	-	-	-	2	2
SUB-TOTAL	-	-	1	23	24

*Mediation not used

SUPERIOR COURT
MEDIATION CASELOAD BY TYPE OF CASE
FISCAL YEAR 1982

<u>COURT</u>	<u>SMALL CLAIMS</u>	<u>LANDLORD/TENANT</u>	<u>DISCLOSURE</u>	<u>DOMESTIC</u>	<u>TOTAL</u>
*Androscoggin	-	-	-	-	-
*Aroostook	-	-	-	-	-
Cumberland	-	-	-	10	10
*Franklin	-	-	-	-	-
*Hancock	-	-	-	-	-
*Kennebec	-	-	-	-	-
*Knox	-	-	-	-	-
*Lincoln	-	-	-	-	-
*Oxford	-	-	-	-	-
*Penobscot	-	-	-	-	-
*Piscataquis	-	-	-	-	-
Sagadahoc	-	-	1	-	1
*Somerset	-	-	-	-	-
*Waldo	-	-	-	-	-
*Washington	-	-	-	-	-
York	-	-	-	1	1
 SUB-TOTAL	 -	 -	 -	 11	 12

*Mediation not used.



CASE REPORT

COURT MEDIATION SERVICE

Court _____ Judge/Justice _____ Mediator _____

Docket No. _____ Date _____ Time Begun _____ Time Ended _____

Plaintiff _____ Plaintiff's Attorney _____

Defendant _____ Defendant's Attorney _____

Category: Individual Proprietorship Corporation Government Agency

Plaintiff	()	()	()	()
Defendant	()	()	()	()

Type of Case: Small Claim (), Landlord-Tenant (), Disclosure (), Domestic ()
Other (), (Describe) _____

Plaintiff's Claim: Amount \$ _____ or other than money (), (Describe) _____

RESOLUTION OF CASE. If resolved: Amount \$ _____ or other than money () with conditions _____

If not resolved; case continued (), referred to Judge (), Other (), (Explain) _____

Agreed by _____ (Plaintiff) _____ (Defendant)

The above RESOLUTION OF CASE is hereby approved and adopted as an order of the Court.

_____ (Judge/Justice)

C-O-P-Y

Appendix E

STATE OF MAINE
SUPREME JUDICIAL COURT
PORTLAND, MAINE 04112

Vincent McKusick
Chief Justice

January 9, 1980

MEMORANDUM

TO: District and Superior Court Judges
FROM: Chief Justice McKusick
RE: Mediation Services

As you know, the Legislature has approved an appropriation in the judicial budget to provide a court mediation service.

Judges in the District and Superior Courts in Cumberland County have been using mediators for the past two years on a trial basis. In recent months, the mediation service has been extended to Kittery, Lewiston, Brunswick and Augusta. Now it is feasible to extend the service to additional courts.

The initial experience with mediators in small claims has been successful. Even more successful has been their use to handle cases for amendment of divorce decrees and to work out initial settlements for divorces.

Simultaneously with this memorandum, the enclosed memorandum and notice are being sent by the State Court Administrator to all Clerks of Court.

I can wholeheartedly commend to you the use of the mediation service.

Enclosure (2)

State of Maine
ADMINISTRATIVE OFFICE OF THE COURTS
P.O. Box 4820 DTS
Portland, Maine 04112

January 9, 1980

MEMORANDUM

To: Clerks of Court

From: State Court Administrator

Re: Mediation Service

Enclosed are two copies of "Availability of Mediation Service". Please put one of them on your bulletin board where attorneys and the general public can read it.

Arrangements have already been made to provide the services of a mediator in several Maine courts. If not in your court, the procedure to engage the service is to phone 775-1500, ask for the Mediation Clerk, and state the time and place when a mediator is desired. When the Mediation Clerk has arranged the assignment, the appointment will be confirmed.

In order to utilize fully the services of a mediator, you may be able to schedule several cases on a particular day.

As the mediation service develops, a regular mediator will be assigned to your court with whom you may arrange mediation appointments directly.

Enclosures (2)

STATE OF MAINE
SUPREME JUDICIAL COURT
PORTLAND, MAINE 04112

AVAILABILITY OF MEDIATION SERVICES

The services of mediators to assist contesting parties in small claims and domestic disputes are now available for all Maine courts when desired and needed.

The purposes of the mediation service are to relieve court dockets and provide a supplementary method of resolving disputes by enabling the contesting parties to participate in reaching a settlement.

Requests for the services of a mediator may be made to the presiding judge who, if he approves the request, will instruct the clerk of the court to schedule the time and place for mediation.

In the event that mediation does not result in a mutually satisfactory settlement, the case will be referred to the presiding judge who should then reschedule it on the court's docket without penalty or prejudice to the parties.

(signed)

Chief Justice Vincent McKusick

January 9, 1980

Notice to Counsel

As a result of the experience with the use of mediators in the 9th District Court, the services of mediators are now available in the Superior Court in Cumberland County in divorce cases. Mediation is a strictly voluntary process. At any time after a divorce case is at issue, the parties may jointly file a written request for mediation with the Clerk. The request must contain a list of times at which the parties will be available to meet with the mediator. The clerk will arrange with a mediator for a meeting at one of the times requested and give notice to the parties. No continuances will be granted and the clerk should not be contacted with requests for continuance.

At the mediation hearing the mediator will undertake to obtain the agreement of the parties on the issues in dispute. It is the responsibility of counsel to see that any agreement reached through mediation is reduced to writing and presented to the court for approval.

At least until the end of the year, the service will be free of charge.

Harry P. Glassman
Regional Presiding Justice

REMINDER TO COUNSEL

RE: MEDIATION IN DIVORCE ACTIONS

We again wish to recommend to counsel and their clients the use of the Court Mediation Service in divorce cases. The mediators currently serving the Ninth District Court have now had five years experience. Recent data has shown that their efforts have been successful 2 out of 3 cases. Many clients do not realize that this Service is available free of charge and will appreciate your calling it to their attention.

Mediation offers the parties an opportunity for an amicable resolution of their differences as well as the chance to fashion a mutually acceptable agreement.

At any time after a divorce case is at issue, the parties may jointly file a request for mediation with the Clerk. The Clerk will arrange for a mediator to be available at convenient time.

At the session the mediator will undertake to help the parties reach an agreement to be presented by counsel to the court for approval at an uncontested hearing.

Robert W. Donovan
Judge, Maine District Court

STATE OF MAINE
CUMBERLAND, ss

NINTH DISTRICT COURT
SOUTHERN CUMBERLAND
DOCKET NO. _____

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VS.

NOTICE OF MEDIATION
HEARING

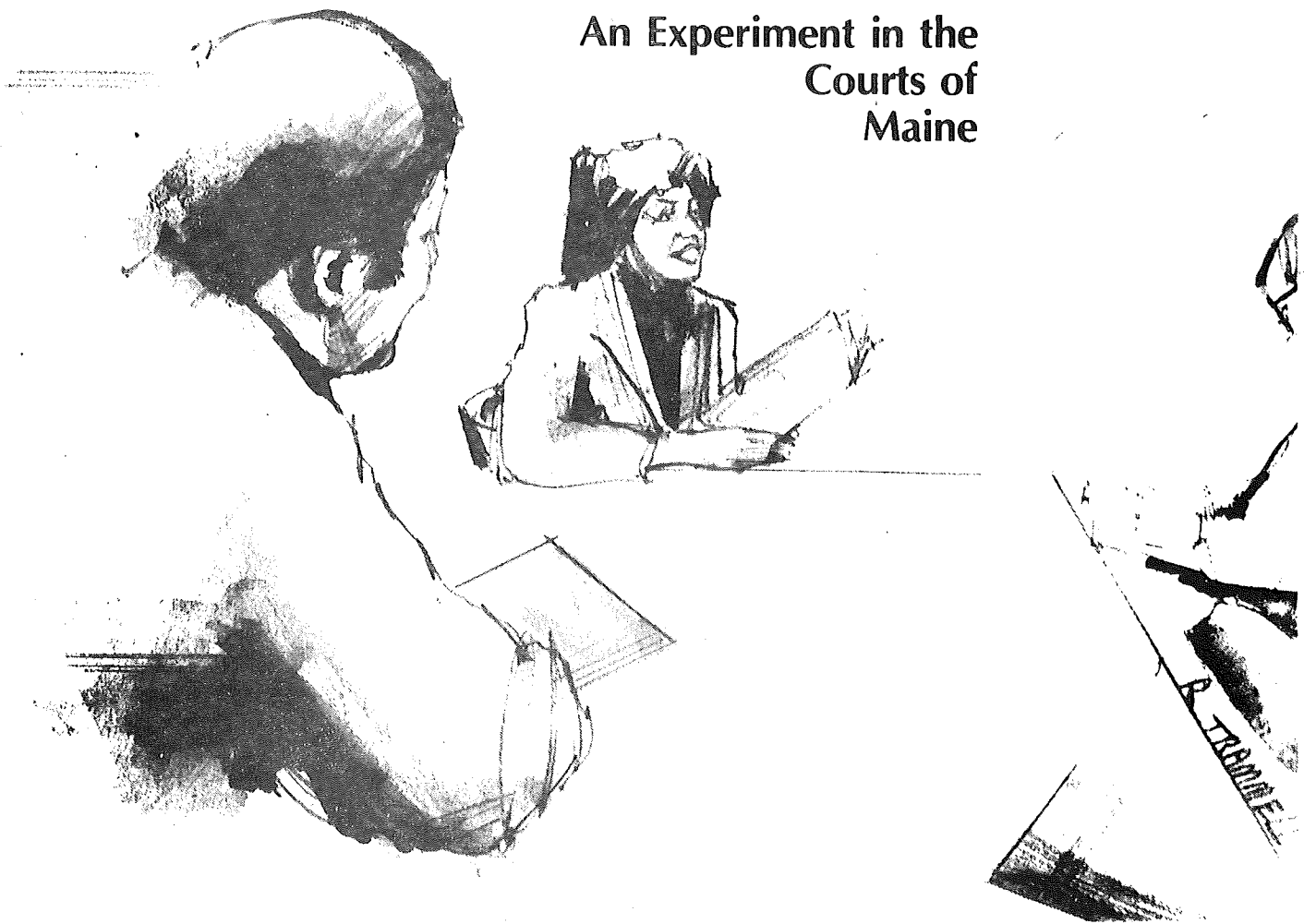
At the joint request of counsel for the parties
the above divorce matter is set for mediation hearing
at _____ on _____. The session will
be held at Ninth District Court, 142 Federal Street,
Portland, Maine.

Dated: _____

Andrea Russell
Deputy Clerk

Humanists as Mediators:

An Experiment in the Courts of Maine



Mediation leading to workable resolutions is a sensible alternate to judicial decisions in which winner takes all.

By A.L. Greason

FOUR years ago in the Ninth District Court in Portland, Maine, there began a modest experiment in the mediation of small claims cases before adjudication. Today mediation is an established alternative, not only in small claims but in other civil matters, in several district courts in Maine and in the Superior Court in Portland. Originally funded by grants, the program is now a regular resource of the courts and is supported by the judiciary budget. Individuals appearing in small claims court are beginning to anticipate mediation, lawyers with divorce cases increasingly ask for mediation, and judges are requesting that mediators be assigned to their courts.

What lies behind the growth and acceptance of this program? One factor is the conviction of the program's originators that certain kinds of disputes are better resolved if the parties participate constructively in resolutions instead of confronting each other before a judge. The successes of the original experiment have helped, too. Part of the explanation also lies in the unique nature of the mediators in this project, as well as in the informal, open-end, and sometimes unorthodox nature of the mediation process.

The program began in 1976 when several members of the Cumberland County Bar Association, believing that the use of "community mediators" in minor disputes would both lighten the court docket and resolve problems in

more equitable ways, convinced the Maine Labor Relations Board and the Maine Council for the Humanities and Public Policy to join the county bar association in sponsoring a mediation program. Three district judges agreed to try the program. Several part-time mediators were available from the Maine Labor Relations Board and from a group of about 20 humanists (largely college teachers) who had completed a seminar, also sponsored by the humanities council, in community conflict resolution at the University of Maine Law School. Mediators were to receive a modest daily fee and reimbursement for their expenses. They would meet from time to time among themselves and with the judges. They would keep records, to be submitted



parties can be worked out. If the mediation is successful, the arrangements agreed on will usually be acceptable to the court. If the parties do not agree, then the case will be heard by the court later today. In hearing cases, the judge will give priority to those cases that have tried mediation. You will, therefore, not lose time by trying mediation. Mediation entails no obligations you do not agree to. It sometimes leads to mutually agreeable resolutions not always available in court."

The statement is intended to encourage mediation. (Were this not a court matter, the promise of "priority" would almost seem a bribe!) When two parties agree to try mediation—and most do—they adjourn with a mediator to a conference room. After mediation, the mediator and the disputants return to the courtroom, where the mediator explains briefly to the judge the results of the mediation and, if the mediation has been successful, requests the approval of the court.

At the end of the first year, mediators had resolved about 65 per cent of their cases. They had expanded their services to cases involving forcible entry, disclosure, and motions to amend divorce decrees, as well as small claims. Before the second year was out, judges in both the superior and district courts were recommending mediation to couples seeking a divorce. It is now possible to have a divorce mediated during the morning and to have the results acted on by the court in a brief hearing during the early afternoon. Here the rate of success has been 90 per cent.

What began as an experiment funded by grants from the Cumberland County Bar Association, the humanities council, and later a private foundation is now, at the request of the court, funded by the state in its judicial budget. Mediation appears to have come of age.

The satisfactory results of the early program certainly strengthened the confidence of those involved, and the simple and orderly procedures for including mediation within the judicial process helped to establish an easy and comfortable rapport between judges and mediators. But ultimately the success of mediation must be accounted for by the quality of the mediators and by the nature of mediation itself.

One premise successfully tested by the Maine experiment is that a mediator need not be a lawyer. In the early stages of the program, two mediators who were lawyers were helpful to other

mediators in explaining the legal system. The problems referred to mediation, however, are usually problems in human relations—in judgment and understanding—and not essentially in law. Today all the mediators are lay people. Most of them are or have been teachers in the humanities. Those few who have come from the business community come from jobs in which their specialty was personnel work.

What all the mediators have in common is experience in working with people. The Maine mediators are a remarkably compassionate group of men and women—not in a sentimental way but in their belief that human beings should be encouraged to treat one another fairly and with dignity. Knowing better than to take themselves too seriously, they see what is comic about themselves and others, and so they retain the detachment necessary for mediation. In an old-fashioned sense they are humanists seeking to resolve differences by generating among those concerned a better understanding of the facts and a broader perspective on the problem. Those are the ingredients that make insight, sympathy, and compromise possible.

Mediators literally sit down with the parties

Whatever personal skills mediators may possess, they depend for much of their effectiveness on the process and nature of mediation. A mediator who sits down with the parties literally sits with them, often around a table in a conference room. Like them, the mediator wears the clothes of the everyday world. When the parties are on a first-name basis, the mediator often finds himself on a first-name basis with them, too. The most frequent comment heard after mediation is an expression of relief that an appearance before a judge has been avoided. Although there is inevitably tension in mediation, it is quite different from the tension of the courtroom.

What the mediator says at the start is important. He reminds the parties that they are in mediation only as long as they wish to be, but that as long as they are, each has a veto; each in a sense is in charge. Once they step back into the courtroom, the judge will take over and make the decisions for them, and they may discover that there is a winner and a loser. In mediation they can at least

monthly, on their cases and the resolutions reached. The program would begin on a weekly basis in the Portland Small Claims Court. What happened then would depend on the success of the pilot program.

By the end of the first year the procedures, through trial and error, had become settled. Each Wednesday morning two mediators sat in the front row of the courtroom to hear the judge open court and explain the new option available to the parties. The explanation went—and still goes—more or less like this:

"There is currently available to you a special service called mediation. If both parties in a dispute agree to mediation, they will meet with a mediator to see whether a resolution agreeable to both

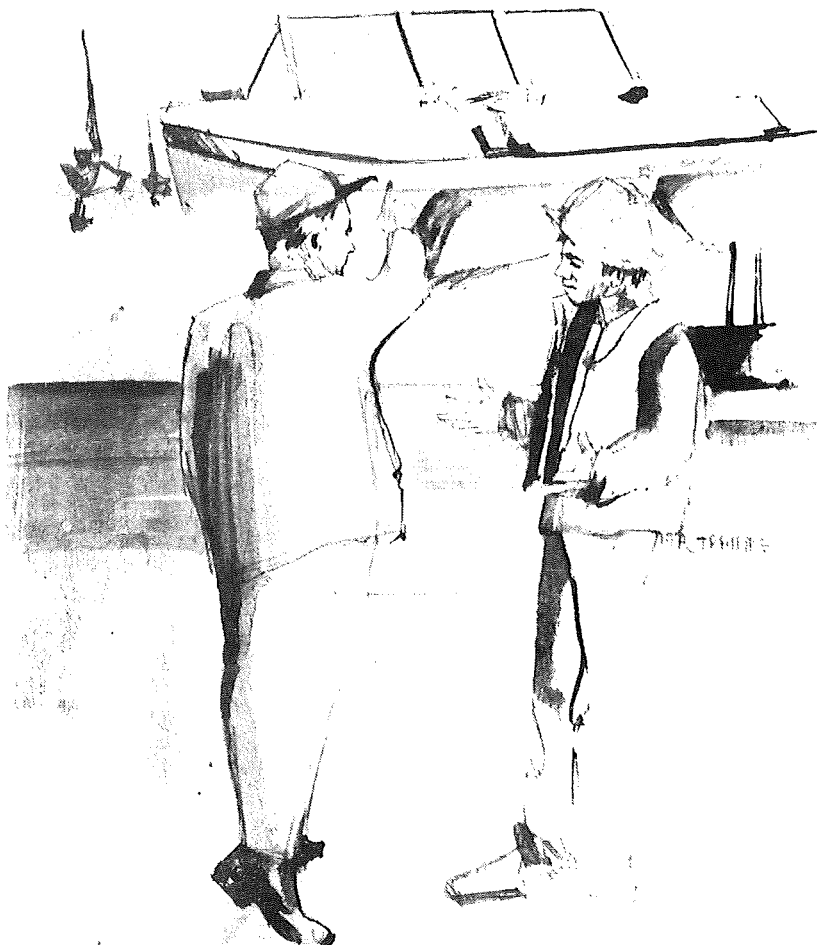
try to see whether there is a resolution, perhaps not ideal but certainly workable, that both parties can live with. If they set out in that spirit, they are told, then together they can expect to work matters out.

Tell us about your side of the problem

In a small claims case, where lawyers are seldom present, the mediator reads the complaint and invites the plaintiff to explain it more fully. Next the mediator turns to the defendant: "Now there are invariably two views on a problem. Tell us what yours is." The groundwork is prepared, and the process of mediation is under way.

In a divorce case, where legal counsel is usually present, the mediator requests the lawyer for the plaintiff to sum up the areas of disagreement—not in the marriage, for divorce cases go to mediation only after the court is convinced that the grounds for divorce are adequate, but in the settlement of ancillary questions of property and custody. The lawyer for the defendant amends the list of disagreements until there is general accord on what matters are disputed. The mediator then sets about establishing the order of significance of these matters, an order which may differ for the individual parties, and thus prepares the way for "give and take" as well as for a systematic approach to the differences.

Whether the problem in dispute concerns the simple return of a security deposit of \$100 or the complex arrangements of a couple's dividing houses, furniture, cars, investments, and children, certain methods may be used by mediators that are not always available to the judge. For example, the mediator separates the parties, talking with each individually in an effort to assess their true concerns and the reasons for them. He can let people speak emotionally and irrelevantly, even shout obscenities, if necessary. This at least clears the air and convinces people that they are being heard—that what is important to them is being listened to. This is the atmosphere in which personal problems can be successfully mediated. In divorce mediation, the mediator may meet separately with the attorneys, too, and although judges also may do this, the mediator, by discouraging attorneys from playing their adversarial roles, may learn from them about possible and realistic reso-



lutions.

The informality of the mediation process offers a flexibility in service to the clients that is not available in a courtroom hearing, in which the plaintiff's complaint is the issue to be tried. In mediation, the complaint is often only part of the issue, and any acceptable solution depends on settling the problem in its entirety.

Consider, for example, a recent case in small claims court. The plaintiff requested a payment of \$400 or the return of his boat, which the defendant had in his possession under the impression that half of the boat had been given to him by the plaintiff in exchange for half of the cost of maintenance. Since the defendant had been paying all maintenance costs for three years (an investment of \$700), he had concluded that the boat must now be his. The plaintiff

insisted that only half of the use of the boat had been given to the defendant. Both wives were present at the mediation, and each vociferously supported her husband. What seemed a simple, although awkward, misunderstanding about a boat, however, expanded to include three weekends of brush-clearing and a month of carpentry done for the defendant by the plaintiff in exchange for four acres of land. The quality of the carpentry and the value of the land then became issues of dispute.

At the end of a half hour of talk, declamation, and shouting, the following resolution was agreed on: The plaintiff could pick up his boat any time during the next ten days in recognition of his complete ownership of it; and the land given to the plaintiff in exchange for labor would revert to the defendant in exchange for a payment of \$220. The

two couples left amicably.

Mediators occasionally have stepped outside the conference room—to examine rust damage to a car that had supposedly been protected against rust or to inspect a boat on a trailer allegedly damaged by a prospective buyer poking for wood rot. A car was once sent back to a car wash to determine whether the alignment of the starter wands could have scratched the car's exterior finish as claimed. In each instance the parties seemed to feel that their problems were being squarely addressed, and resolution was possible because the mediator could reach out to examine the difficulty.

In divorce mediation it is possible to concentrate on details such as those governing visiting rights: what days, what hours, what streets, what people will or will not drive the children in a car. These matters are important to the

lution, has no second guess. In mediation, the very process of offering tentative resolutions can lead the way to a mutually acceptable final resolution.

Some civil matters, of course, cannot be mediated, and they ought not to be referred to mediation; if they have been, the experienced mediator promptly sends them back. Points of law certainly belong in the courtroom. So, too, do most insurance matters in which the determination of liability establishes whether a given insurance company must pay. Nor is mediation of help if one party is clearly lying about a basic fact: "I made a deposit of \$500." "He never gave me a cent."

It is debatable, perhaps, whether mediation should be stopped when one party, in the judgment of the mediator, has yielded too much. Some mediators argue that any resolution acceptable to both parties is an acceptable resolution

a judge. Discussion around the conference table consumes more time than an argument before the bench. Successful mediation can save the court money, however, by avoiding continuances and appeals. It can save money for disputants in small claims court by sending them back to their jobs sooner, with both a settlement and a method of payment agreed on. Disputants are spared the costs entailed if a writ of execution and a disclosure hearing are required. In mediated divorce settlements, the parties avoid the costs of a full trial as well as the wait for a trial date.

Case for mediation is grounded on humanistic grounds

Although these savings are important, the case for mediation is perhaps best made on humanistic grounds. It is an option that can lead to a more equitable resolution than a judge is free to provide. People are more likely to adhere to arrangements that they have helped to formulate. Most important for the parties involved in a successful mediation, all leave the courtroom with some pride in having resolved their problem themselves. They have not engaged their adversary before a judge and lost. With mediation, the court ceases to be what it often seems: one more dimension of a world given to confrontation. Instead it provides an opportunity to work out a problem, to exercise humanity, to explore the nature of fairness.

Mediation in Maine, with its humanistic emphasis, is offering another avenue to justice.



parties, and once agreed to, the arrangements will probably be carried out in a better spirit than broader arrangements imposed by a judge. Children as well as parents benefit from mediation.

Just as methods of engaging a problem differ between judges and mediators, so do the ways in which they resolve or try to resolve a case. The judge determines, while the mediator simply proposes. If the mediator's proposal is not acceptable to the parties, other proposals that take into account the unacceptability of the original proposal may be offered. The reasons for the party's objecting to a resolution sometimes suggest a new and more equitable solution. The judge, obliged to make a decision after listening to the parties treat one another as adversaries rather than as partners in seeking a so-

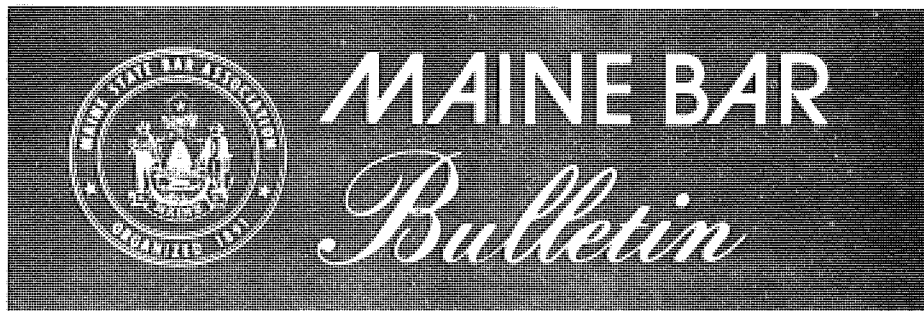
because the mediator has fulfilled his role as catalyst. But others contend that mediators are more than catalysts and that they fulfill their function only when the human values they espouse are reflected—if only faintly!—in the final resolution. There is probably general agreement that when one party appears to have frightened, threatened, or bullied the other toward an absurd resolution and thereby affronted, both in method and result, the mediator's own sense of fairness, mediation ought to be called to a halt and the judge informed that the case must go to trial. The mediator, although shepherding people through a process, cannot entirely forget himself—nor should he.

One caveat is perhaps in order for those interested in introducing this type of mediation into their courts. It is not more efficient than a hearing before

POSTSCRIPT: In July, 1979, Maine newspapers announced that the National Science Foundation had awarded to a professor of sociology at Bowdoin College a grant of \$75,000 for the study of mediation in small claims court. As a result, each mediation session is now taped for intensive analysis. The mediators find some satisfaction in this measure of their significance, but they also find amusement in the fact that about \$10,000 more is being spent to study the project than has been invested in it since its inception.

Journal

(A.L. Greason is professor of English at Bowdoin College, where he has taught for 27 years. He has served as a mediator for three years in the program described in this article.)



VOL. 15 NO. 3

MAINE STATE BAR ASSOCIATION

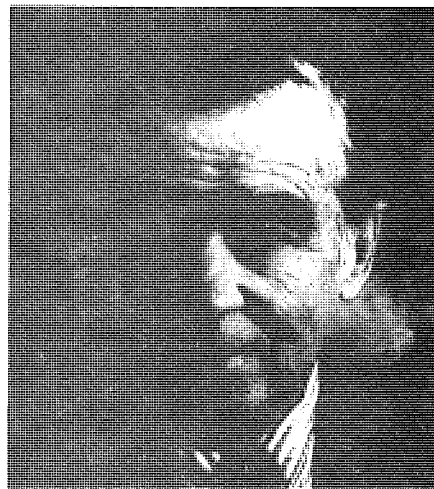
The Maine Court Mediation Service



Catherine R. Johns, Esquire

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In October, 1977, the Court Mediation Service was launched by the Cumberland County Bar Association, as an experiment to accelerate the resolution of small claims.¹ Since then, nearly two thousand cases have been mediated in fourteen District Courts



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and three Superior Courts extending from Kittery to Caribou. The experiment was financed by a series of private grants. Deemed a success, the service was incorporated into the Judicial Department at the

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beginning of the fiscal year July 1, 1980, with a budget of \$25,000.00. It is the only mediation project in the Country operated within the Court system under Court supervision. With the encouragement of the Chief Justice, the volume and variety of mediated cases and number of Courts utilizing mediators has increased monthly as judges and lawyers have had positive experiences with mediation.

At the present time, there is a panel of twelve part-time mediators, five in Portland and seven elsewhere in the state. By design, they are all laymen appointed by the Chief Justice's appointee as Coordinating Judge for Mediation (Judge Robert Donovan) to serve as disinterested third parties. They are trained in periodic "mediator's workshops." They include retired professors, business executives, a school superintendent and a community-active housewife. As a general policy, lawyers are not appointed. The mediators are paid a per diem of \$75.00 from the Court budget.

The types of mediated cases have been: small claims (55%); domestic (25%); landlord-tenant (14%); disclosures (4%); miscellaneous (2%). The outcomes of 674 analyzed cases were:

Disposition	All Cases	Domestic Cases
Resolved	63%	67%
Continued	7%	15%
Referred to Judge	30%	18%
	100%	100%

The percentages of cases "Referred to Judge" illustrates the obvious point that mediation is not a panacea for resolving all disputes. Some cases are better resolved by trial than by mediation. The unresolved cases occur for many reasons. Among them are: lack of skill of the mediator; pressure of time; uncooperative lawyers; desire of one or both parties "to tell it to the Judge"; and insistence that the issue is a "matter of principle."

Q. What is a mediated resolution?

A. A mediated resolution is a settlement of a dispute agreed upon by the parties, and reached with the aid of a mediator, and the advice of the parties' attorneys, if any. Typically, the Judge approves the resolution and enters it as an order of the Court. He may, however, disapprove the resolution. If this happens, or if the parties do not reach a resolution, the case is heard by the Court. The case is rescheduled on the Court's docket without penalty or prejudice to the parties. Since mediation is designed to enable parties to negotiate a settlement of their differences, like all pre-trial settlement negotiations, what is said in the mediation session is not admissible as evidence in a trial.

¹A fuller account is given by A. L. Greason in "Humanists as Mediators: An Experiment in the Courts of Maine," *Journal of the American Bar Association*, May, 1980.

Q. How does mediation differ from arbitration and counseling?

A. Mediation differs from arbitration in that the mediator does not render a judgment. He is restricted to making recommendations for the parties' consideration. The mediator works with the parties to find a common ground to provide a basis for the resolution of their differences.

Mediations differs from counseling in that counseling seeks to salvage the relationship between the parties, whereas, mediation works for a mutually acceptable resolution of the problems resulting from the breakdown of a relationship. In domestic matters, this means that the thrust of mediation is not to preserve the marriage, as with counseling, but to assume the inevitability of divorce and resolve such matters as custody, visitation rights, alimony and property settlement — including, who gets the wheelbarrow.

Q. How does mediation compare with a trial?

A. The special advantage of mediation is its flexibility. The mediator is not bound by rules of evidence or civil procedure. Consequently, he can, with the consent of the parties, meet with them singly or together, with or without the attorney(s) present.

Mediation allows for a dialogue between the parties. Dialogue becomes a part of the remedy by giving the parties an opportunity to air grievances and frustrations while working toward a resolution. Compliance with a Court Order of a mediated resolution seems more likely than compliance with a Court Order following a trial because of the participation and commitment of the parties to a resolution.

Finally, mediation, as an alternative method of dispute resolution, helps to relieve congested Court dockets and to reduce Court costs.

Perhaps a weakness of mediation is that its success is dependent, in large part, upon the quality of the mediators. Maine has been fortunate in having good mediators. The success of a mediator lies principally in his ability to present, at the right time, suitable recommendations that are regarded as fair and unbiased.

Concern has been voiced that mediators do not enjoy testimonial privilege. Therefore, a mediator could be subpoenaed and required to testify regarding what happened during mediation. If the issue should arise, the opposing attorney should file a motion to quash the subpoena. (To date no mediator has been subpoenaed). A definitive remedy of this situation may require action by the Legislature or by Court rule.

Finally, mediation can be abused. Mediation should not be exploited as a means to some end other than the resolution of a dispute. Attorneys should not use mediation to replace or enlarge the rules of discovery. It is not an arena for intimidation and harassment. It is not counseling.

Q. What is the attorney's role in mediation?

A. The attorney in mediation is functioning in a role akin to his traditional role as negotiator, rather than as advocate. Although he still represents his client's interests, those interests are presented not as ultimatums, but as objectives. Compromise and creativity make mediation work. Prior to mediation, the attorney should explain the process to his client, especially that the objective is to reach a settlement and that any settlement will require his agreement. He can assure the client that the mediator is a disinterested third party, and that any recommendations he may make are attempts to help reach a resolution that is mutually acceptable to the parties.

In addition to participating in the mediation dialogue, the attorney should advise his client of the legal implications of any proposals. He may also express his opinion to the mediator on legal questions which arise in the course of mediation.

Typically, the attorney is expected to draft the Court Order setting forth the agreement(s) of a successful mediation. If all the issues are not resolved, he should specify those requiring a hearing by the Court.

The attorney, and his client, should feel free to take advantage of the flexibility offered by mediation to consult with each other or privately with the mediator. The attorney is free to consult with the opposing attorney as the need arises. The attorney can also be helpful in maintaining the momentum of the mediation. For example, if the parties are at an impasse, but the attorney thinks there is some validity to the opposition's position, it is often strategically sound to give the mediator a cue by asking him for his recommendation.

It is the responsibility of the attorney to see that the mediation process is not misused. If he believes that this is happening, he should help the mediator to get the process back on the track.

Q. How is the mediation process initiated?

A. Mediation is available through the Court. This means that the Court must first have jurisdiction of the case. Once the Court's jurisdiction is established by filing suit, a request for mediation can be made at any time to a Judge or to the Clerk of Courts by agreement of both parties. A date and a mediator will be assigned.

Mediators are also available on the hearing dates for civil matters in many District Courts, so that the parties can agree to mediate rather than try their case on the date of the trial. Thus far, the Superior Courts have utilized mediators only for domestic cases, by arranged appointments.

It is to be expected that there will be continuing procedural refinements adopted by the Court Mediation Service: the servicing of more Courts, and experimenting with other types of cases. For example, viola-

tions of fire and building codes, and neighborhood boundary and property disputes.

Experience indicates that mediation has been particularly successful in resolving domestic disputes and has been greatly appreciated by judges, lawyers and litigants. The fact that about one-third of the marriages in Maine end up in a divorce is a statistic that points up the value of a strong mediation program in Maine.

Mediation is an alternative for resolving disputes for Maine attorneys to consider where prior negotiation has been unsuccessful or where an adversarial trial may have undesirable consequences on the future relations of the litigants. And, it often saves time and money for the Court and the litigants.