

# MAINE STATE LEGISLATURE

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JAMES E. TIERNEY  
ATTORNEY GENERAL



87-1

STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
STATE HOUSE STATION 6  
AUGUSTA, MAINE 04333

January 20, 1987

Dana Baggett  
State Court Administrator  
Administrative Office of the Courts  
P.O. Box 4820 DTS  
Portland, Maine 04112

Dear Mr. Baggett:

In response to your letter of January 6, inquiring whether a person who is a member of the Maine Legislature may continue to serve under contract as an official court mediator, it is the Opinion of this Department that there is no constitutional impediment to service or employment in those two capacities.

Your inquiry raises questions under two provisions of the Maine Constitution. First, the "separation of powers" clauses, Art. III, §§ 1 and 2, provide:

The powers of this government shall be divided into three distinct departments, the legislative, executive and judicial.

No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others . . . .

In addition, Art. IV, Part Third, § 11, provides in relevant part:

No . . . person holding any . . . office of profit under this State, justices of the peace, notaries public, coroners and officers of the militia excepted, shall have a seat in either House during his . . . continuing in such office.

With respect to the former clause, it is apparent that a member of the Legislature is a person "belonging" to the Legislative Department who, in functioning as a legislator, exercises the powers of that department. Consequently, it would violate the separate of functions clause of the Constitution if a legislator were to either "belong" to the Judicial Department or exercise the powers of the Judiciary. However, neither appears to be the case with respect to the mediators serving in the court mediation service.

You have provided a copy of the form "contract for special services" used by the Judicial Department to retain mediators, which expressly provides that the mediator is to perform mediation services "as an independent contractor and not as an officer, agent or employee of the [Judicial] Department." It further appears from the contract that the mediator is under no obligation to perform any services upon the direction or demand of the department, and the mediator's independent judgment is expressly required. These contractual provisions are consistent with 4 M.R.S.A. § 18(2), in which the Legislature has specified that "the mediators shall not be considered employees of the State for any purpose." A review of the statutory functions committed to the court mediation service confirms that mediators have no authority to bind or compel any action by the parties to the judicial proceedings in which they become engaged. Accordingly, it is the conclusion of this Department that court mediators neither "belong" to the Judicial Department nor exercise the constitutional powers committed to that Department, and a Legislator may therefore act as a mediator without violating Art. III, §§ 1 or 2 of the Maine Constitution. See also Op. Me. Att'y Gen. 86-12, a copy of which is attached.

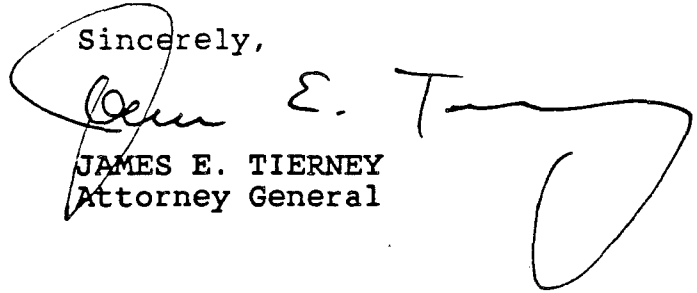
Analysis under Art. IV, Part Third, § 11 is similar. Both this office and the Justices of the Supreme Judicial Court have previously offered the opinion that an "office of profit" "implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office." Opinion of the Justices, 3 Me. 481, 482 (1822). See also Opinion of the Justices, 95 Me. 564, 585 (1901) (3 Justices); Op. Me. Att'y Gen. (May 14, 1976). As concluded above, court mediators exercise no part of the judicial power, and therefore do not hold an "office of profit under this State," and are not barred from service in the Legislature by Art. IV, Part Third, § 11 of the Maine Constitution.

Finally, there is no apparent overlap of the functions of a legislator and a court mediator which might make the offices incompatible. The Legislature obviously determines the full budget of the Judicial Department, from which mediators are

paid for their services, but the exercise of that legislative power does not directly interfere in any way with performance of the mediator's functions. Unless the duties of two offices are such that a person holding them both cannot faithfully perform the functions of both, the two offices are not incompatible. See generally Howard v. Harrington, 114 Me. 446 (1916).

I trust this is fully responsive to your inquiry. Please let me know if this office may be of further service.

Sincerely,

A handwritten signature in dark ink, appearing to read "James E. Tierney". The signature is written in a cursive style with a large, sweeping flourish at the end.

JAMES E. TIERNEY  
Attorney General

JET/ec

cc: Rep. Margaret Pruitt Clark  
Lincoln Clark, Dir. of Court Mediation Service