

# MAINE STATE LEGISLATURE

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# 116th MAINE LEGISLATURE

## FIRST REGULAR SESSION-1993

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Legislative Document

No. 1034

H.P. 767

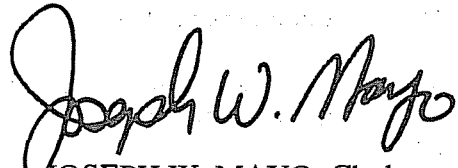
House of Representatives, March 25, 1993

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**An Act to Encourage Mediation Before Litigation.**

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Reference to the Committee on Judiciary suggested and ordered printed.

  
JOSEPH W. MAYO, Clerk

Presented by Representative HEINO of Boothbay.  
Cosponsored by Representatives: DEXTER of Kingfield, GRAY of Sedgwick, STEVENS of Sabattus, Senators: HARRIMAN of Cumberland, SUMMERS of Cumberland.

2 Be it enacted by the People of the State of Maine as follows:

4 Sec. 1. 14 MRSA c. 202 is enacted to read:

6 CHAPTER 202

8 MEDIATION

10 §521. Short title

12 This chapter may be known and cited as the "Prelitigation  
Mediation Act."

14 §522. Actions covered

16 This chapter applies to all civil legal claims when no  
governmental entity is a party to the action.

18 §523. Exceptions

20 Notwithstanding section 522, this chapter does not apply to  
22 the following:

24 1. Domestic relations. Domestic relations disputes already  
covered by the mediation provisions of Title 19, sections 214,  
26 581 and 636;

28 2. Medical malpractice. Professional negligence claims  
subject to the mediation provisions of Title 24, chapter 21,  
30 subchapter IV-A; or

32 3. Workers' compensation. Claims subject to resolution  
under the Workers' Compensation Act.

34 §524. Appointment of mediators

36 The Chief Judge of the District Court or the Chief Justice  
38 of the Superior Court, whichever will have jurisdiction over the  
claim if it proceeds to litigation, shall appoint a mediator from  
40 persons under contract to the court mediation service under Title  
4, section 18, subsection 2, to hear any claim subject to this  
42 chapter.

44 §525. Submission of claims

46 1. Notice of claim. A person may commence an action by:

48 A. Serving a written notice of claim, setting forth, under  
oath, the type of legal claim alleged, the nature and  
50 circumstances of the injuries and damages alleged and the

2 person against whom the claim is made. The notice of claim  
4 must be filed with Superior Court within 20 days after  
6 completion of service; or

8 B. Filing a written notice of claim, setting forth, under  
10 oath, the type of legal claim alleged and the nature and  
12 circumstances of the injuries and damages alleged, with the  
14 Superior Court. The claimant must serve the notice of claim  
16 on the person against whom the claim is made. The return of  
18 service must be filed with the court within 90 days after  
20 filing the notice of claim.

22 Service must be made in accordance with the Maine Rules of Civil  
24 Procedure, Rule 4.

26 2. Confidentiality. The notice of claim and all other  
28 documents filed with the court in the action during the  
30 prelitigation mediation process are confidential.

32 3. Fee. At the time of filing a notice of claim with the  
34 court, the claimant shall pay to the clerk a filing fee of \$200  
36 per notice filed.

38 4. Appearance; filing fee. Within 20 days of receipt of  
40 notice of service upon the clerk, the person or persons against  
42 whom the claim is filed or the claimant's representative shall  
44 file an appearance before the mediator with a copy to the  
46 claimant. At the time of filing an appearance, the person or  
48 persons against whom a claim is filed in the notice shall pay a  
50 filing fee of \$200 per notice.

5. Waiver of fee. Any party may, at the time of filing,  
apply to the mediator for a waiver of the filing fee. The  
mediator shall grant the waiver if:

A. The party is indigent. In determining indigency of the  
party, the mediator shall consider the factors contained in  
the Maine Rules of Civil Procedure, Rule 44(b);

B. The party is or was an employee of another party and  
that other party stipulates that the employee at the time of  
the claimed injury was acting in the course and scope of  
employment with that other party; or

C. The waiver is necessary to avoid requiring an individual  
who is a party to the case from paying 2 or more filing fees  
because a professional association or other business entity  
of which the individual is a member is also named as a party  
and has substantially the same interests as the individual  
in the case.

2           6. Filing of records; time for hearing; extensions. Within  
4           20 days of entry of appearance, the person or persons against  
6           whom the claim is filed shall contact the claimant's counsel and  
8           by agreement shall designate a timetable for filing all the  
10           relevant documents necessary to a determination of the mediator  
12           and for completing discovery. If the parties are unable to agree  
14           on a timetable within 60 days of the entry of appearance, the  
            claimant shall notify the mediator. The mediator shall then  
            establish a timetable for the filing of all relevant documents  
            and reasonable discovery, which must be filed at least 30 days  
            before any hearing date. The hearing may not be later than 120  
            days from the service of the notice of claim upon the clerk.

16           7. Discovery; subpoenas. The mediator, upon application of  
18           a party, may permit reasonable discovery. The mediator may rule  
20           on requests regarding discovery or may allow the parties to seek  
            a ruling in the Superior Court. The mediator has the same  
            subpoena power as a Superior Court Justice.

22           8. Combining hearings. Except as otherwise provided in  
24           this subsection, there must be combined hearing or hearings for  
26           all claims under this section arising out of the same set of  
28           facts. When there is more than one person against whom a notice  
            of claim has been filed based on the same facts, the parties may,  
            upon agreement of all parties, require that hearings be  
            separated. The mediator may, for good cause, order separate  
            hearings.

30           9. Extensions of time. All requests for extension of time  
32           under this subchapter must be made to the mediator. The mediator  
34           may not extend any time period under this chapter for good cause,  
36           except that the mediator may not extend any time period that  
            would result in the hearing being held more than one year from  
            the filing of notice of claim upon the clerk unless good cause is  
            shown.

38           10. Dismissal. Cases pending before a mediator may be  
40           dismissed as follows.

42           A. Voluntary dismissal is governed as follows.

44           (1) Any action before a mediator may be dismissed by  
46           the claimant by filing a notice of dismissal at any  
48           time before the hearing or by filing a stipulation of  
50           dismissal signed by all parties who have appeared in  
            the action. Unless otherwise stated in the notice of  
            dismissal, stipulation or order the dismissal is  
            without prejudice.

2           (2) Except as provided in subparagraph (1), an action  
4           may not be dismissed on the claimant's motion except on  
              order of the mediator and on terms and conditions the  
              mediator determines proper.

6           B. Involuntary dismissal is governed as follows.

8           (1) On failure of the claimant to prosecute or to  
10           comply with rules or any order of the mediator and on  
12           motion by the mediator or any party, after notice to  
14           all parties has been given and the party against whom  
16           sanctions are proposed has had the opportunity to be  
              heard and show good cause, the mediator may order  
              appropriate sanctions, which may include dismissal of  
              the case. If any sanctions are imposed, the mediator  
              shall state the sanctions in writing and include the  
              grounds for the sanctions.

18           (2) Unless the mediator in an order for dismissal  
20           specifies otherwise, a dismissal under this paragraph  
22           is with prejudice for purposes of proceedings before  
24           the mediator. A dismissal with prejudice is deemed to  
              be the equivalent of a finding for the defendant on all  
              issues before the mediator.

26           11. Default. In addition to the sanctions set out in  
28           subsection 10, paragraph B, the following sanctions may be  
              imposed against a defendant in a case pending before the mediator.

30           A. On failure of a defendant to comply with the rules or  
32           any order of the mediator, and on motion by the mediator or  
34           any party, after notice to all parties has been given and  
36           the party against whom sanctions are proposed has had the  
38           opportunity to be heard and show good cause, the mediator  
              may order appropriate sanctions, which may include default.  
              If any sanctions are imposed, the mediator shall state the  
              sanctions in writing and include the grounds for the  
              sanctions.

40           B. Unless the mediator in its order for default specifies  
42           otherwise, a default under this subsection is deemed to be  
44           the equivalent of a finding against the defendant on all  
              issues before the mediator.

46           §526. Waiver of mediation

48           The court may hear motions to waive mediation in cases in  
              which no complaint has been filed and:

2           1. Questions of law. No facts are at issue and all  
unresolved issues are questions of law; or

4           2. Extraordinary cause. On affidavit, for extraordinary  
cause shown.

6           **§527. Hearing**

8  
10           1. Procedure. The claimant or a representative of the  
claimant shall present the case before the mediator. The person  
12           against whom the claim is made or that person's representative  
shall make a responding presentation. Wide latitude must be  
14           afforded the parties by the mediator in the conduct of the  
hearing, including, but not limited to, the right of examination  
and cross-examination by attorneys. The mediator shall make all  
16           procedural rulings and those rulings are final. A tape recorded  
record must be maintained by the mediator. The record must be  
18           maintained until 30 days after the mediator's decision and then  
destroyed pursuant to section 528. The record may not be made  
20           public and the hearings may not be public without the consent of  
all parties. The Maine Rules of Evidence do not apply. Evidence  
22           must be admitted if it is the kind of evidence upon which  
reasonable persons are accustomed to rely in the conduct of  
24           serious affairs. The mediator shall make findings upon evidence  
presented at the hearing, the records and any expert opinions  
26           provided by or requested by the mediator or the parties. The  
standard of proof for findings is a preponderance of the evidence.

28  
30           After presentation by the parties, as provided in this section,  
the mediator may request from either party additional facts,  
32           records or other information submitted in writing or at a  
continued hearing and that continued hearing must be held within  
30 days.

34           2. Settlement; mediation. The mediator shall attempt to  
36           mediate any differences of the parties before proceeding to  
findings.

38           3. Failure to comply. In case of failure of a party,  
40           without good cause, to attend a properly scheduled hearing to  
participate in authorized discovery or to otherwise substantially  
42           comply with this chapter, the mediator shall make a finding  
against that party and that finding has the same effect as a  
44           finding against that party under section 528.

46           **§528. Findings**

48           At the conclusion of the presentation, the mediator shall  
make findings in writing within 30 days and serve these findings

2 on the parties by registered or certified mail within 7 days.  
3 Within 30 days following service of these findings, the parties  
4 shall submit to the court any of the following documents  
5 applicable to the claim:

6 1. Agreement. The agreement reached by the parties through  
7 mediation on any issues, reduced to writing and presented for  
8 approval as a court order, including, when applicable, an  
9 agreement that the claim is withdrawn with prejudice;

10 2. Certificate of mediation. A certificate of mediation  
11 signed by the mediator stating that the mediator finds that the  
12 parties made a good faith effort to mediate all issues and  
13 stating any unresolved issues; or

14 3. Complaint. A complaint arising from the claim and not  
15 resolved through mediation.

16 The findings, notice of claim and record of the hearing must  
17 be preserved until 30 days after final judgment or the case is  
18 finally resolved, after which time they must be destroyed. The  
19 mediator shall return all documents to the parties providing  
20 those records.

21 **§529. Confidentiality and admissibility**

22 1. Proceedings before mediator confidential. Except as  
23 otherwise provided in this section and section 530, all  
24 proceedings before the mediator, including its final  
25 determinations, must be treated in every respect as private and  
26 confidential by the mediator and the parties to the claim.  
27 Findings or other writings of the mediator, any evidence or  
28 statements made by any party or that person's representative  
29 during a hearing are not admissible and may not be submitted or  
30 used in any way for any purpose in any subsequent court action or  
31 any other public disclosure made, unless the party who made the  
32 statement or presented the evidence agrees otherwise. If the  
33 findings are:

34 A. Unfavorable to the person against whom the claim is  
35 brought, the findings, without explanation, are admissible  
36 in any subsequent court action against that person by the  
37 claimant based on the same set of facts upon which the  
38 notice of claim was filed; and

39 B. Unfavorable to the claimant, the findings, without  
40 explanation, are admissible in any subsequent court action  
41 against the person based on the same set of facts upon which  
42 the notice of claim was filed.



2 Under paragraphs A and B, the findings are admissible only  
3 against the party against whom those findings were made. The  
4 confidentiality provisions of this section do not apply if the  
5 findings were influenced by fraud.

6 2. Testimony privileged and confidential. The testimony of  
7 any expert, whether called by any party or the mediator, is  
8 privileged and confidential and that expert may not be asked or  
9 compelled to testify at a later court proceeding concerning the  
10 findings or expert testimony or opinions expressed during the  
11 hearing, unless by the party who called and presented that  
12 nonparty expert, except testimony that is required to prove an  
13 allegation of fraud.

14 3. Discovery; subsequent court action. The Maine Rules of  
15 Civil Procedure govern discovery conducted under this chapter.  
16 The mediator has the same authority to rule upon discovery  
17 matters as a Superior Court Justice. Notwithstanding subsection  
18 1, in a subsequent Superior Court action all discovery conducted  
19 during the prelitigation mediation proceedings is deemed  
20 discovery conducted as a part of that court action.

21 This subsection applies to all claims in which the notice of  
22 claim is served or filed on or after January 1, 1994.

#### 23 §530. Effect of findings

24 A finding by the mediator on a claim under this chapter must  
25 be implemented as follows.

26 1. Payment of claim; determination of damages. If the  
27 findings of the mediator are for the claimant, the person against  
28 whom the claim was brought must promptly enter into negotiations  
29 to pay the claim or admit liability. If liability is admitted,  
30 the claim may be submitted to the mediator, upon agreement of the  
31 claimant and the person against whom the claim was brought, for  
32 determination of equitable remedy of damages. If suit is brought  
33 to enforce the claim, the findings of the mediator are admissible  
34 as provided in section 529.

35 2. Release of claim without payment. If the findings of  
36 the mediator are adverse to the claimant, the claimant must  
37 release the claim or claims based on the findings without remedy  
38 or be subject to the admissibility of those findings under  
39 section 529, subsection 1, paragraph B.

#### 40 §531. Statute of limitations

41 The applicable statute of limitations concerning actions  
42 under this chapter is tolled from the date upon which notice of  
43 claim is served or filed on or after January 1, 1994.

2 claim is served or filed in Superior Court until 30 days  
3 following the day upon which the claimant receives notice of the  
4 findings of the mediator.

6 **§532. Failure to mediate; penalty**

8 A person who commences an action under this chapter in a  
9 court of this State without first filing a notice of claim under  
10 section 525 and without filing a certificate of mediation with  
11 the complaint, unless a waiver of mediation has been granted  
12 under section 526, shall pay all costs and double attorney's fees  
13 of the defendants if the complaint is dismissed or judgment is  
14 for the defendants in court.

16 **STATEMENT OF FACT**

18 This bill encourages private parties to fully negotiate  
19 their differences before filing lawsuits thus saving attorney's  
20 fees and freeing citizens and the courts from the burden of  
21 nonmeritorious lawsuits by requiring that all claims to which no  
22 governmental entity is a party be submitted to mediation. The  
23 bill is modeled on the Maine Revised Statutes, Title 24, chapter  
24 21, subchapter IV-A, which requires prelitigation screening and  
25 mediation of malpractice claims.

26 Failure to submit a claim to mediation, or to mediate in  
27 good faith subjects a plaintiff who subsequently loses on the  
28 claim in court to payment of costs and double attorney's fees to  
29 the defendants.

32 The court may waive mediation on motion for extraordinary  
33 cause shown or when only questions of law are involved.

36 Existing mediation procedures for domestic relations cases  
and medical malpractice cases and workers' compensation  
procedures remain in place and are not affected by this bill.