

Mediator Qualifications and Effectiveness

by Lincoln Clark*

Introduction

A common problem in mediation programs is how to have effective mediators. The solution is approachable in three ways - - selection, training and evaluation. Rigid requirements are often established to qualify for selection such as advanced degrees in social work, psychology, humanities or law, with "X" years of specified experience. There is often provision for several hours of formal training and evaluations to improve the mediator's performance. In addition, the mediator is supposed to be impartial, empathetic, able to control emotional outbursts, elicit and propose creative solutions, and to facilitate communication between the parties and attorneys. Mounting skepticism with the a priori hypotheses in the literature as guides to find and develop such paragons, however, has led the Court Mediation Service of Maine to seek empirical evidence to improve its selection procedures.

The result of the study was surprising in that no correlation was found between the educational or experiential qualifications of mediators and their performance. While the attributes of an effective mediator may be hypothesized they are not known.

Annexed Dispute Resolution

The effectiveness of mediators is undoubtedly affected by the nature of the system in which the mediators function. Mediation systems in the United States are commonly referred to as "Alternative Dispute Resolution." The system in Maine, however, is better described as "Annexed Dispute Resolution" since it is integrated into the court system and is not an alternative to the court.

Mediation began in Maine in 1977 philanthropically financed and informally related to the court.¹ Mediation began with small claims and landlord-tenant cases but soon undertook domestic relations cases. In 1984 it was statutorily annexed to the Judicial Department by the establishment of the Court Mediation Committee and the Court Mediation Service.² The Committee, chaired by the Chief Justice, sets the policies and monitors the Service. The Committee appoints the Service's director, deputy director and mediators from nominations made by the Service.

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¹ The early history is recounted in A.L. Greason's "Humanists as Mediators: An Experiment in the Courts of Maine," American Bar Association Journal, 66, 579, May 1980.

² Maine Revised Statute § 18 (1984).

The statute mandates mediation of all contested domestic relations cases when minor children are involved and is available when desired by the parties or ordered by the court.³

In the mediation all disputed issues are tackled: residence of the child, allocation of parental rights and responsibilities, parental contact, child and spousal support, medical costs, marital property, and legal fees. All issues are subject to mediation because of their interdependence with the child's "best interests." For example, who gets the home may influence where the child will primarily reside or who gets the car may relate to the child's transportation needs.

If all issues are resolved, a settlement agreement is drafted, usually by the petitioner's attorney, cleared with the defendant's attorney, and submitted to the court. Otherwise the case is continued to a second or a third session, or the parties decide that the unresolved issues can be settled by themselves (or by their attorneys), or the case is referred to the court for trial on the unresolved issues.

In 1986 there were 3,737 mediation sessions in Maine's 49 courts of which 2,715 were for domestic relations and 1,022 for small claims and other types of civil cases. Of these, 2,032 domestic and 926 non-domestic cases were disposed in 1986. There were 1.34 sessions per domestic case and 1.10 sessions per non-domestic case. The type and disposition of the domestic relations cases is shown in Exhibit A.

The mediations were conducted by 58 mediators serving on a part-time basis, paid \$50 a half-day or \$75 a day plus transportation expenses. The budget of the Court Mediation Service has risen each year and is now approaching \$400,000.⁴

Indices of Effectiveness

Mediation literature is full of exhortations to select and train for effectiveness and abounds with hypotheses.⁵ Interesting studies have reported on background skills and behavior in mediations -- personality, instinct, age, gender, previous experience, training, mediation experience. All of these, and more are "input factors." Effectiveness, however, can not be determined from input alone. Since effectiveness is the ratio of output to input, a measure of output is needed.

Several indices of output have been considered. Most desirable, would be a measure of the mediator's contribution to laying the foundation for good post-divorce co-parenting, but this would take years to develop.

³ 19 Maine Revised Statutes § 18 (1984).

⁴ A fuller description is in Lincoln Clark and Jane Orbeton's, "Mandatory Mediation of Divorces: Maine's Experience," *Judicature*, February - March 1986, Vol. 69/No.5

⁵ For an excellent summary and review, see Kenneth Kressel, "Family Mediation Research: Critical View and Future Directions," the Role of Mediation in Divorce Proceedings: a Comparative Perspective, South Royalton, Vermont: Vermont Law School, Dispute Resolution Project.

Another discarded approach was attorneys' evaluations of the mediator. The variability in the responses of the petitioners' and defendants' attorneys seemed too unreliable.

Inasmuch as an agreement alone has little value unless the parties comply with it, the concept of a "compliance index" is appealing. It could be constructed by analysis of motions to amend or enforce the court's decree. Data gathered in 1984 on cases docketed in 1982 did indicate that completely resolved mediated cases had substantially fewer post-divorce motions than contested cases that went directly to trial. The variance in reporting in the docket books in Maine's 49 courts have, however, cast much uncertainty about the data's reliability. For example, post-divorce motions for "substantial change in circumstances" are frequently not ascertainable.

One measure of the "output" of mediation is the disposition recorded on the Court Mediation Service Domestic Case Report (see Exhibit B) where the mediator checks "Resolved," "Continued," "Other," or "Referred to Trial." "Resolved" signifies that the case has been converted from a contested to an uncontested case which is ready for review, change, or an order in the court hearing. If all the issues have not been resolved, the case may be "Continued" to another session, "Referred to Trial" for the unresolved issues, or "Other." "Other" includes "awaiting verification of a bank statement," "parties intend to clear the agreement with an attorney who was not present," "parties say they themselves can resolve the remaining issues," etc.

Another session does not invariably follow a "Continued" case. Parties may negotiate a resolution of the remaining disputed issues before the date of a scheduled continuance or decide on a reconciliation and drop the divorce proceeding -- this has happened.

"Other" encompasses various reasons that further mediation is not required. In addition to reasons for not needing the mediator, it has allegedly been improperly checked in order to avoid hurting the mediator's "batting average."

Limitations of the Effectiveness Index

Most indices have limitations and the proposed is not immune. The contribution of the other participants in the mediation session, or the mere convening of the session, may be confused with that of the mediator. For example, mediators upon arriving late for a session have on occasion found that the parties, and their attorneys have negotiated a complete agreement. The cases, properly reported as "Resolved," is a tribute to mediation but scarcely to the mediator. Or the disposition may not be definitive because one or both parties reneges after the session before the reported agreement reaches the court. Or the court may order the parties back to mediation as a sanction when the court finds that one or both parties failed to appear at the time scheduled for the mediation or failed to mediate in "good faith".

From the total number of dispositions the "continued" sessions must be removed in order to obtain the total number of cases since continued sessions usually end up in a different disposition

category in a future time period. Cases can be classified according to whether or not they are "Referred to Trial." Those that are not "Referred to Trial" are the complement of "Resolved" and "Other" cases. This permits the construction of an "Effectiveness Index" as, either the ratio of "Referred to Trial" or the "Resolved" plus "Other" cases to the total number of cases disposed in a time period, excluding the "Continued" cases.

The judiciary focuses on the percentage of cases "Referred to Trial" since the lower it is, the more mediation is reducing the court's docket of contested hearings. Mediators, however, prefer the percentage of "Resolved" plus "Other" since it is perceived as better signifying positive accomplishment.

Despite its embodied limitations, the wide range of the mediators' scores and the large number of cases, makes the "Effectiveness Index" a useful management tool.

The Mediator Profile

Maine mediators are selected primarily from the result of interviews, usually a minimum of four -- the regional coordinator, the regional judge, the director of the Court Mediation Service and the liaison judge with the Court Mediation Committee. Their resumes, probably have some influence since the heterogeneity of the mediators suggests that identified subjective factors are significant determinants. They include present or former accountants, attorneys, bankers, business executives, college presidents, deans and professors, community leaders, psychologists, social workers, sociologists, a retired judge, a probation officer, and Navy captain. They have been classified six ways with the number of cases mediated and the percentages referred or not referred to court for trial in Exhibit C.⁶

The 24 mediators 50 years old or older did not refer to trial 74.8% of their cases compared to 74.4% by the 34 younger mediators.

The 27 men did not refer 76.7% compared to 72.3% by the 31 women.

Attainment of higher educational degrees paid off slightly. The 39 mediators with advanced degrees did not refer to trial 75.7% of their cases compared to 72.8% by the 19 with only a bachelor's degree.

Classified as having social work experience were those who have a M.S.W. or Ph.D. in Psychology or Sociology and several years of experience. Those 43 mediators who did not come under the hubris of social work statistically outperformed the 15 mediators who did, 75.0% to 72.9%.

Administrative experience for purposes of this study was defined as having significant

⁶ The total 2,032 cases tabulated in Exhibit C is less than the 2,363 cases in Exhibit A due to the deletion of 331 Continued cases.

administrative responsibility over employees or volunteers. Those 34 with much Effective administrative experience outperformed the 24 with little administrative experience 77.4% to 71.6%.

Mediators who had more than 50 cases did not refer to trial 77.2% compared to 71.9% by those who mediated less than 50 cases. Tests of the significance of the differences in the percentages have not yet been made. The data for Administrative and Number of Cases particularly warrant testing. Conceivably even more revealing would be analyses of mediators with various combinations of characteristics, e.g., older vs. younger men and women with or without higher degrees, older vs. younger social workers, levels of education and kind of professional experience.

Use of Index

The 58 mediators have been ranked by percentage of number of cases not referred to trial. The range extended from 100% to 0.0% with a mean average of 74.6%. Thus mediators' percentages can be regarded like traffic signals. Those with high percentages are "green" and are considered "top" mediators. Those in the middle are "yellow" will probably improve with training and experience. Those in the low range are "red" and warrant special scrutiny. Their record may have suffered from their remoteness from other mediators, insufficient training, a "difficult" judge or attorney, or a long run of unmediatable cases.

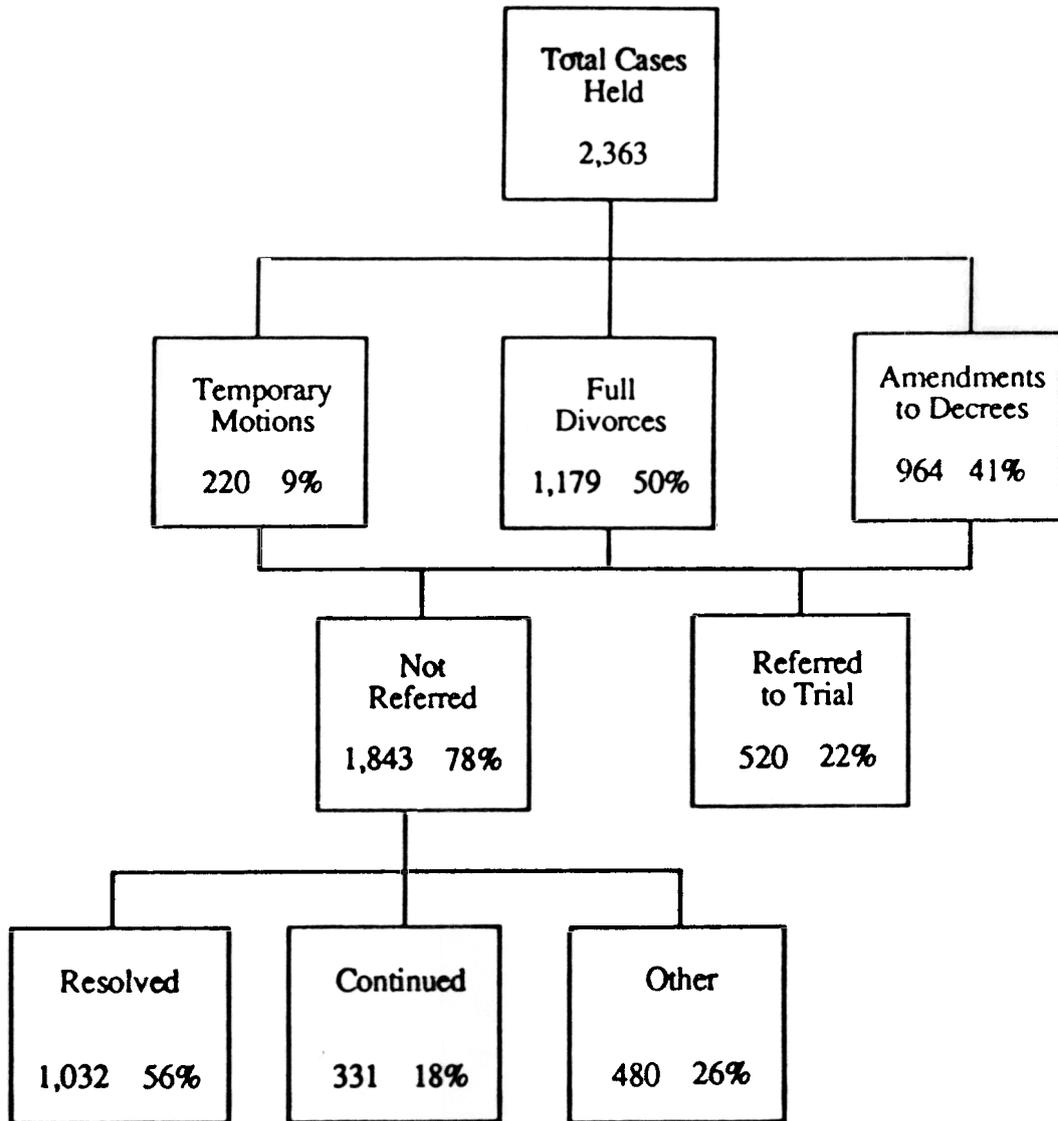
Training is effected primarily by having the new mediator observe experienced mediators, by co-mediating, by studying the Mediator's Handbook, by attending periodic regional and state-wide workshops. The new mediator receives between 60 to 80 hours of training before starting to mediate and during the first year.

All mediators are evaluated by a series of observations and interviews. The purpose is primarily to develop programs for improvement. The new mediator is evaluated within 6 months, then if approved, is given a 2 year contract and re-evaluated before its expiration.

No mediator has been terminated solely on the basis of his/her score on the Effectiveness Index. The determination of a good mediator is still very much an art, not a science.

The major lesson to be learned from Maine seems to be a warning against counting on arbitrary untested educational or experiential prerequisites for effective mediators. Data shows that there is great variability in the effectiveness of the mediators but thus far no empirical explanation of the variations has been found. This leaves us resigned to the hypothesis that while we do not know for sure, the best indicator of mediator effectiveness is the composite subjective opinions of the several interviewers of prospective mediators. Somehow the minds of the interviewers integrate and evaluate multiple unspecified, or unknown, factors that govern the effectiveness of mediators.

Exhibit A
 Court Mediation Service
 Domestic Relations Cases, 1986
 Type and Disposition



Key:

Total Cases Scheduled: Number of cases mediated during the year.

Temporary Motions: Contested temporary motions pending divorce.

Divorces: Contested divorces.

Amendments to decrees: Contested post-divorce amendments and/or motions for contempt.

Resolved: All issues resolved in mediation.

Continued: Additional session or sessions yet to be held.

Other: Cases in which the parties need more information, time to reflect, or can resolve remaining or their own.

Referred: Cases to be scheduled for a contested trial in court.

Not Referred: Sum of Resolved, Continued and Other cases.

Exhibit B
COURT MEDIATION SERVICE DOMESTIC CASE REPORT

Date of Mediation: _____ District Court _____
Docket No. _____ Superior Court _____
Plaintiff _____ Plaintiff's Attorney _____ (Y/N)
Defendant _____ Defendant's Attorney _____ (Y/N)

CASE TYPE: (Temporary order (Divorce) Divorce Amendment) Other

SESSION: (First) Second (Third
(Not Held - due to non-appearance of (Plaintiff, (Defendant, (Both parties
(Other _____

ISSUES TO BE RESOLVED: (Parental rights and responsibilities, (Parental Contact, (Child Support,
(Spousal support, (Marital Property, (Debts, (Legal Fees, (Other _____

DISPOSITION: Check only one disposition

- (**RESOLVED** - The parties request an uncontested hearing in court based on:
(An agreement drafted by the attorney of the (plaintiff or the (defendant and approved by the other party or;
(The attached report
- (**CONTINUED** -- Another mediation session to be held:
(on _____ at ____:____ AM/PM or
(when scheduled by the Clerk of Court, (when mediation is available, or
(when arranged with the mediator.
- (**OTHER** - - Another mediation session is not required.

(**REFERRED TO TRIAL** -- Parties will request a trial in court on these issues: (Parental rights and responsibilities, (Parental Contact, (Child Support, (Spousal support, (Marital Property, (Debts, (Legal Fees, (Other _____

(Mediator submits to the court the question of failure to mediate in good faith by:
(Plaintiff, (Defendant, (Both parties.

AGREED BY _____ Plaintiff _____ Defendant

Mediator _____ Time Begun _____ Time Ended _____

Exhibit C
Profile of Mediators
Court Mediation Service, 1986

| | <u># Mediators</u> | <u># Cases</u> | <u># Referred</u> | <u>% Referred</u> | <u>% Not Referred</u> | |
|------------------------------|--------------------|----------------|-------------------|-------------------|-----------------------|------|
| <u>Age</u> | | | | | | |
| <50 | 34 | 1051 | 269 | 25.6% | 74.4% | 100% |
| ≥50 | 24 | 981 | 248 | 25.2% | 74.8% | 100% |
| <u>Gender</u> | | | | | | |
| Men | 27 | 1032 | 241 | 23.3% | 76.7% | 100% |
| Women | 31 | 1000 | 277 | 27.7% | 72.3% | 100% |
| <u>Education</u> | | | | | | |
| <Master's | 19 | 793 | 216 | 27.2% | 72.8% | |
| ≥Master's | 39 | 1239 | 302 | 24.3% | 75.7% | |
| <u>Experience:</u> | | | | | | |
| <u>Social Work</u> | | | | | | |
| Yes | 15 | 472 | 128 | 27.1% | 72.8% | 100% |
| No | 43 | 1560 | 390 | 24.3% | 75.0% | 100% |
| <u>Administrative</u> | | | | | | |
| Much | 34 | 1029 | 223 | 22.6% | 77.4% | 100% |
| Little | 24 | 1003 | 285 | 28.4% | 71.6% | 100% |
| <u># Cases</u> | | | | | | |
| < 50 | 45 | 1007 | 283 | 28.1% | 71.9% | 100% |
| ≥ 50 | 13 | 1025 | 234 | 22.8% | 77.2% | 100% |