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Final Progress Reports

#75ED-01.0010

#76DF-01.0017

Three copies to:

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F I N A L P R O G R E S S R E P O R T S

Grant #75ED-01.0010

#76DF-01.0017

INTRODUCTION

The Committee's Standards and Goals grant became fully operational in March, 1977. However, for over a year the Committee staff had discussed and debated the best manner in which to develop standards for the Massachusetts criminal justice system. The staff clearly felt that the first standards effort was a failure for two primary reasons. First, the Standards and Goals staff was a spearate CCJ unit, completely isolated from the Program Development Unit. Second, the previous S & G effort was neither focussed nor an integral part of the total planning process.

The Committee decided that the Standards and Goals staff should be a part of the Program Development Unit, and should participate in nearly every step of the Committee's planning process. This would insure that standards would not be developed in an "ivory tower", and also insure that standards would be an integral component of the Committee's program strategies.

THE PLANNING PROCESS

The Committee's 1978 Planning Process has been described in great detail in other agency documents (see Inter-Agency Agreement, Grant Correspondence, Existing Practices Documents). However, since an understanding of the planning process is crucial to a discussion of the standards effort, the following brief description of the planning process is provided:

1. Conduct Needs Assessment - This effort will identify and define problem areas warrenting intense examination and will produce a hierarchy of problems for prioritization.

2. Initiate Problems Selection - Upon completion of the definition of needs, the hierarchy of problems will be analyzed and specific problem areas will be identified for in-depth examination by the Planning Task Forces.

3. Prepare Documentation of Current Problems and Practices - After analysis of the problem data, the Task Forces will produce detailed reports describing the situation in each problem area with recommendations of specific problems for committee prioritization. These reports will then be reviewed by outside experts, members of the Criminal Justice Community and Committee members for appropriate input.

4. Initiate Problem Solving - Once the specific problems within each priority area have been selected, the Planning Task Forces, in conjunction with line agency staffs, outside experts, and representatives of the CJDA's will formulate problem solving approaches. These approaches will be within a short range and medium range solution perspective.

THE PLANNING PROCESS, Cont'd:

5. Prepare Multi-Year Strategies - As the results of the problem solving effort are documented, the Program Sepcialists will initiate the development of multi-year strategies for collectively addressing the problems within their priority areas. Stragegy development efforts will culminate in a series of Executive Review meetings for finalization of the documentation.

PROGRESS IN FIRST QUARTER

During January and February, 1977, the Program Development Unit wrote the job descriptions, six-month workplan, and the training and orientation program for the Standards and Goals grant. Due to a stringent hiring process, it took approximately three weeks for the Program Developers to screen, interview and hire the five Standards and Goals Specialists and the secretary.

By the middle of March, all grant personnel were hired and ready for work. For the first week and a half, the Standards and Goals staff were given orientation on the Committee's organization and function, the planning process, and the Standards and Goals workplan. By this time, the first step in the planning process had been completed and the Committee was ready to begin the documentation of current practices phase.[1]

The Standards and Goals Specialists, under the supervision of the Program Developers and working closely with the planning Task Forces (comprised of CCJ and CJDA staff), had the major responsibility for collecting the data for, and writing, the Current Practices Document. This was a key element in the planning process and the standards development process. The Committee felt that the S&G Specialists should have first hand knowledge of the identified problem area before realistic standards could be developed. In addition, the research phase, although short, gave the Standards and Goals staff the opoortunity to form the necessary relationships with operating criminal justice agencies, and begin to focus on realistic, attainable goals.

The Current Practices Documents were completed by April 15th, and mailed out to the staff Task Forces, Committee members, members of the Criminal Justice Community, and selected outside experts. Problem-solving sessions were conducted during the last week of April to develop solutions to the identified problems. A major focus of these sessions was the identification of appropriate areas for the development of standards.

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[1] The priority problems are: (1) Community Crime Prevention; (2) Uniformity of Sentencing; (3) Pre-Sentence Reports and Alternative Sentencing; (4) Children in Need of Services; (5) Offender Manpower Services; (6) Drug and Alcohol Services; and (7) Services For Developmentally Disabled Offenders.

PROGRESS IN FIRST QUARTER, Cont'd:

The Committee is now at the stage of developing its multi-year strategies for the identified problem areas. These strategies will, in effect, be the Committee's workplan for funding, TA standards development, and Legislative action for the next one to three years. Specific criminal justice goals will be set and standards will be developed to meet those goals.

PROGRESS IN SECOND QUARTER

During the second quarter of the grant, the staff completed their work on the multi-year strategies and the draft standards. These documents were included in the 1978 Plan.

PROGRESS IN THIRD AND FOURTH QUARTERS

Staff work varied considerably during this quarter based upon the program area and problem selected. The Crimp Prevention Standards were completed with the funding of the Massachusetts Crime Prevention Burear in 1978. The Police S&G Specialist, therefore, completed his work prior to the project's funding and accepted a position in another unit. Likewise, the Probation S&G Specialist completed her work when the Juducial Probation Project, the mechanism for implementing the Probation standards, became operational in early 1978.

Much of the work on the Corrections standards were completed, although the bulk of the work is on-going. One of the major objectives of the Corrections Standards and Goals Specialist was in the area of offender manpower services. As a result of his and others' efforts, an Advisory Board consisting of the Commissioner or Directors of all state agencies involved with providing manpower services to fofenders. This has led to the joint funding (MCCJ and the State Employment and Training Council) of the Coordinated Offender Employment Resource System, a statewide program.

The Committee on Criminal Justice is currently assisting all state and county correctional agencies in implementing the national standards developed by the ACA. In addition, we are continuing our specific efforts in offender manpower services and drug and alcohol services for offenders.

The Courts Standards and Goals Specialist completed the standards and goals work on uniformity of sentencing during this period. A major sentencing guidelines project has been funded by the CCJ and hopefully, it will result in a rational, acceptance system of sentencing offenders. A new problem area, alternatives to dispute resolution, was assigned to the Courts S&G Specialist in the Fall of 1977.

The Juvenile Justice S&G Specialist continued his work with the statewide CHINS consortium, and the two local CHINS consortia, on the development and implementation of standards relative to Children In Need of Services. He also continued working on

developing the specifications of the CHINS diagnostic study.

FINAL QUARTER [Extension Period]

During this period, the Courts S&G Specialist worked with a special committee of judges, clerks and probation officers who have been selected by the Chief Justice for the specific purpose of studying alternative means of dispute resolution at the district court level.

The Courts S&G Specialist, with the assistance of staff from the Evaluation Unit and the Statistical Analysis Center, developed a questionaire which was used to survey all of the judges and clerks in the district courts in the Commonwealth to learn what procedures are used at present and whether any improvements could be brought about by the introduction of mediation or arbitration units into the court system. Ms. DiGiovanni also observed a limited number of clerks' offices throughout the state to gain first hand knowledge of how disputants who arrive in the clerk's office seeking assistance are treated by the clerks and by staff persons.

The materials gathered served as the basis of a document describing existing procedures in the District Courts with regard to alternative means of dispute resolution. (See attached).

CONCLUSION

Overall, we consider the latest standards and goals effort to have been a very successful one. This project played a key role in the achievement of the following:

- Development of sentencing guidelines
- Focussing attention on alternatives to dispute resolution
- Development of standard presentence reports
- The development and funding of the statewide Coordinated Offender Employment Resource System
- The CHINS Diagnostic Study
- The statewide CHINS Consortium
- The funding of the Juvenile Law Reform Project
- The funding of three drug and alcohol programs in state correctional institutions.

TRIAL COURT OF THE COMMONWEALTH
DISTRICT COURT DEPARTMENT

REPORT OF THE SPECIAL COMMITTEE TO STUDY ALTERNATIVE MEANS OF DISPUTE RESOLUTION TO THE CHIEF JUSTICE OF THE DISTRICT COURT DEPARTMENT

Special Committee to Study Alternative Means of Dispute Resolution

Hon. Anthony J. DiBuono (Framingham), Chairman
Hon. John C. Cratsley (Roxbury)
Hon. Henry P. Crowley (Brookline)
Joseph R. Faretra, Clerk-Magistrate (East Boston)
Hon. Louis J. Gonnella (Woburn)
Delbert A. Greenwood, Chief Probation Officer (Gardner)
John R. Johnson, Clerk-Magistrate (Greenfield)
James Marchetti, Assistant Director, Urban Court Project (Dorchester)
David E. Stevens, Clerk-Magistrate (Brockton)

Toby Jill Kamens, Administrative Attorney

Administrative Office of the District Court Department

August, 1978

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INTRODUCTION

The Special Committee to Study Alternative Means of Dispute Resolution was established by Chief Justice Samuel E. Zoll and was charged with the study of court-supervised methods other than formal court action for resolving disputes between individuals who seek court assistance. The following persons were appointed to the Committee by Chief Justice Zoll:

Hon. Anthony J. DiBuono (Framingham), Chairman
Hon. John C. Cratsley (Roxbury)
Hon. Henry P. Crowley (Brookline)
Joseph R. Faretra, Clerk-Magistrate (East Boston)
Hon. Louis J. Gonnella (Woburn)
Delbert A. Greenwood, Chief Probation Officer (Gardner)
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James Marchetti, Assistant Director, Urban Court Project (Dorchester)
David E. Stevens, Clerk-Magistrate (Brockton)

The membership represents court personnel of different geographical locations, with attendant variations in population.

Following the first meeting of the Committee, which was held on October 3, 1977, the members scheduled approximately one meeting each month at the First Southern Middlesex Division (Framingham). Representatives from the Massachusetts Committee on Criminal Justice--Steve Limon, Courts Specialist and Rita DiGiovanni, Standards Specialist--and a Harvard College student doing research--Charlotte Salomon--have also attended these meetings of the Committee. The Committee wishes to extend its special thanks to them for their invaluable assistance, encouragement and active participation in the deliberations of the Committee and in the preparation of this report.

Committee meetings have served an educational purpose. Specifically, "mediation," one alternative means of dispute resolution, has been the focus of discussion. In order to understand better this alternative forum, the Committee has explored various Massachusetts mediation programs. Representatives from two such projects have attended Committee meetings and have explained the mediation programs serving the Dorchester Division and the First Bristol Division (Taunton). Brian Callery, Director of the Urban Court Project in Dorchester and former Director of the Earn-it program in Quincy, and James Marchetti, Assistant Director of the Urban Court Project, described the Dorchester Urban Court Mediation Component. Hon. Guy Volterra, Chief Probation Officer Bernard Chadwick and Project Director Paul Nerney reviewed the Mediation Services project operating in the First Bristol Division (Taunton). A question and answer period following these presentations further clarified the mediation process. (A more detailed discussion of Massachusetts mediation projects can be found at pages 9-15).

In addition to studying Massachusetts alternative dispute resolution mechanisms, the Committee has also considered nationwide programs. A presentation by Daniel McGillis, co-author of Neighborhood Justice Centers: An Analysis of Potential Models,[1] enhanced the Committee members' understanding of minor dispute resolution techniques utilized throughout the country. Neighborhood Justice Centers: An Analysis of Potential Models describes "dispute processing projects" in existence in Boston, Columbus, Miami, New York, Rochester and San Francisco and also sets forth various options available to a community in planning an effective dispute resolution program. A later section of this report is devoted to a discussion of these nationwide projects.

On March 17, 1978, the Committee, in cooperation with the Massachusetts Committee on Criminal Justice, sent a questionnaire to Judges, Clerks and Chief Probation Officers in the District Court Department. The purpose of the survey was to gather data relative to alternatives to the formal courtroom process, in particular, mediation, used throughout the Commonwealth. The questionnaire and a summary of the replies are included as Appendix A. The poll sought information regarding formal and informal mediation programs connected to the court process and, in addition, more specific information from the Clerk-Magistrates of the District Court Department. Of 320 questionnaires distributed, 207 replies were received. Seventy-one of the 72 District Courts in existence prior to court reorganization were represented in the survey. Rita DiGiovanni and other members of the Committee on Criminal Justice are to be commended, with thanks, for their assistance in analyzing this information.

Subsequently, the Committee discussed various options available to the District Court Department for the implementation of experimental mediation programs. This discussion was based on a review of the mechanics of the "show-cause" hearing and national and local mediation models. Charlotte Salomon, a research assistant who attended a number of "show-cause" hearings, enhanced the Committee's understanding of the techniques used by Clerk-Magistrates during minor citizen dispute hearings.

The following report recommends the adoption of experimental mediation programs. In particular, specific suggestions are made for Clerk-Magistrates who might use these mediation techniques in small claims actions. In light of the increased powers of the Clerk-Magistrates pursuant to the court reorganization legislation, the Committee's recommendations may be especially useful.

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[1]Daniel McGillis and Joan Mullen, Neighborhood Justice Centers: An Analysis of Potential Models (Washington, U.S. Gov. Printing Office, 1977).

DEFINITION AND DISCUSSION OF MEDIATION

As defined by the Committee, "mediation" is a voluntary, alternative means of dispute resolution in which an objective third party, i.e. the mediator, aids the disputants to resolve a dispute of a civil or criminal nature by mutual agreement.

The Committee, in defining "mediation," has excluded treatment programs and pre-trial diversion programs which serve to treat the accused, except to the degree that such an approach is used as part of a solution to a dispute between parties who have voluntarily brought their matter before an objective third party seeking a mutually satisfactory solution.

The mediators may be Clerk-Magistrates, other court personnel, or community volunteers. Clerk-Magistrates, if they are to mediate disputes, will be assuming a different role with the disputants than heretofore. Currently Clerk-Magistrates have the power to directly or indirectly "impose a settlement" in a "show-cause" hearing by issuing or not issuing a complaint. A mediator, on the other hand, does not exercise the power to impose a settlement, but rather helps resolve the dispute by identifying areas of agreement and articulating possibilities for compromise. The mediator, though he lacks the authority of the court, can operate under the supervision of the court. The efforts of the mediator might lead to an informal solution, or they might result in a written "agreement" among the parties. The disputants should not be coerced by the mediator or the court to abide by their self-chosen resolution to the dispute, but should voluntarily follow it. A disgruntled complainant, however, always has ultimate recourse to the judicial process--application for a complaint, possible arraignment and trial.

The Committee is of the opinion that mediation can be an effective method for resolving certain disputes typical to the District Court Department. Mediation can be easily accessible enabling disputants to use it upon initial contact with the judicial system. Further, disputants are not deprived of their rights to use formal court procedures if and when they wish.

The virtues of mediation are many. First, the rules of evidence do not apply.[2] Disputants may express themselves in a dialogue and need not answer questions posed on direct and cross-examination. The hearsay rule, which excludes testimony in the courtroom, is inapplicable. The reliability of information disclosed in a mediation session is not of primary importance. Rather, the expression of previously uncommunicated feelings and the consideration of the underlying causes of the controversy take precedence. Further, a disputant is not bound to prove his

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[2] Fred M. Dellapa, Citizen Dispute Settlement: A New Look at an Old Method, 51 Fla. Bar Journal 516, 518 (1977).

case by a preponderance of the evidence or beyond a reasonable doubt.

Second, the formalities present in a courtroom are not followed. The disputants do not take an oath at the commencement of the mediation session. Representation by counsel is also absent. Instead of relying on a lawyer's assistance, a disputant may speak for himself and describe what transpired.

Third, the mediation sessions are held in a room or courtroom removed from the public eye. The privacy spares the disputants the embarrassment of public disclosure of their controversy.

Fourth, the scheduling of mediation sessions, as opposed to court trials, is generally much more flexible. Sessions of the District Court Divisions are held from 9:00 a.m. to 4:00 p.m., and so disputants often lose work time or incur babysitting expenses. Mediation may occur during the day or evening at a time most convenient to the disputants.

Fifth, mediation of minor disputes may avert the occurrence of more serious disputes between the parties. It has been hypothesized that mediation will not reduce the volume of court cases. "The gain, if it is to be made at all, is in the area of prevention--keeping minor disputes from becoming major ones that really do add to trial court calendars."[3]

Sixth, a mediation agreement is a most effective means of resolving certain types of disputes. It is a mutually acceptable, self-imposed resolution to a controversy. The disputants, instead of accepting a judicial resolution which may not be agreeable to either or both of them, reach their own accord. A mediation session is directed toward people, while adjudication is directed toward acts.[4] During mediation, the disputants vent their hostile feelings and attempt to grapple with the underlying causes of their controversy. They, unlike a Judge, are not confined to a determination of whether a criminal act occurred. No finding of guilt or innocence is made. Rather, the disputants try to understand what triggered the controversy which eventually culminated in an alleged criminal act and attempt to reach a lasting agreement. For once the disputants are forced to discuss "deep-cutting" issues without evasion.[5]

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[3] John C. Cratsley, Community Courts: Offering Alternative Dispute Resolution Within the Judicial System, 3 Vt. Law Review 1, 25 (1978).

[4] Lon L. Fuller, Mediation - Its Forms and Functions, 44 So. Cal. Law Review 305, 328 (1971).

[5] Lon L. Fuller, p. 309.

Seventh, the disputants and other citizens may develop a more positive attitude toward the court. The use of pre-trial mediation and conciliation techniques in matters contested in the Bristol County Division of the Probate Court Department, pursuant to Mass. R. Dom. Rel., Rule 16, has, according to a poll, "altered the views of the general public toward the court."[6] The survey was undertaken to prove that clients who use the pre-trial procedure to conclude successfully their cases "tend to have a more positive and satisfactory concept of the court than those who have litigated their cases in the traditional manner."[7] The results of that survey tend to validate this hypothesis. Possible reasons for this altered concept can be attributed to several factors. For once, both sides are able to explain their view of the problem to a neutral party who will listen. The disputants are not frustrated by a lack of understanding of legal terminology or by the strict formality in the courtroom. Instead they may explore the underlying causes of their conflict. One can conclude that mediation of certain types of District Court Division disputes will also improve the public's opinion of the District Court Department.

To understand better the dynamics of mediation, a review of a typical mediation session is helpful. A dispute, similar to the one described below, was referred to mediation by the Clerk-Magistrate of the court. The sequence of events was as follows:

On Monday morning Mrs. Ring appeared in the Clerk-Magistrate's office seeking issuance of process against Mrs. Smith for an assault and battery on Tom, Mrs. Ring's six-year-old son. A "show-cause" hearing was scheduled for the following Monday. On that date, Mrs. Ring and her mother, and Mrs. Smith and her daughter, appeared for the hearing. The Clerk-Magistrate listened to the disputants' recapitulation of the alleged incident. At that time Mrs. Ring stated that she did not want to press charges, but merely wanted the Smith family to stop abusing her son. It was evident to the Clerk-Magistrate that the assault and battery charge was the culmination of many isolated "neighborhood" quarrels that had taken place during the last year. The Clerk-Magistrate asked the disputants if they wanted to discuss their controversy in an informal setting and attempt to reach an agreement with the aid of a neutral third party. He further explained that the alternative forum for the resolution of their dispute would not exclude the possibility of a hearing before a Judge. The disputants agreed to meet with a mediator.

The mediator first asked the complainant, Mrs. Ring, to explain her reasons for pressing criminal charges and then asked

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[6] James A. Casey and Ernest Rotenberg, A Comparative Analysis, Public Opinion of the Probate Court Trial Process: Trial vs. Pre-Trial, The Resolution of Contested Cases, p. 12 (unpublished, 1978).

[7] Casey and Rotenberg, p. 3.

Mrs. Smith to describe her version of the event. The disputants spoke in loud, accusatory tones, and interrupted each other frequently denying allegations made. On occasion Mrs. Smith's daughter and Mrs. Ring's mother made isolated comments.

In the course of the session the following information was disclosed. Mrs. Ring lives with her six-year-old son in a home adjacent to the Smith's. The families share a common driveway, and their back yards are not separated by a fence or other barrier. When Mrs. Ring moved into the home a year and a half ago, she did not have a telephone and did not own a car. For six months the families were quite friendly, and Mrs. Ring would use the Smith's telephone on occasion. Then the trouble began. Allegedly Mrs. Ring used the telephone without permission one night. Then she bought a car and frequently was unable to park it in the driveway shared by both families because the Smith's car took up too much space. Finally, Tom Ring trespassed on the Smith's property, began taunting the family and allegedly was hit several times in retaliation.

The mediator let the parties vent their hostility and asked each one how she would like to resolve the dispute. Mrs. Ring stated that she did not want the Smiths to harm her son, that she should be notified of his misconduct and that she would punish him if it were justified. The Smiths said that they were planning to install a fence dividing the families' properties to discourage Tom from trespassing on their property and bothering them. Mrs. Ring agreed to drop the assault and battery charge if the Smiths would tell her of her son's misbehavior instead of remedying the situation themselves.

A brief court hearing would not have served the same beneficial purpose as the mediation session. The Judge would be charged with the determination of one fact--did an assault and battery on Tom occur. The underlying causes for the assault and battery would not be a consideration in the courtroom. Rules of evidence and time constraints would have prevented the disputants from expressing their feelings openly and honestly and from reaching a workable settlement. The mediation session enabled the disputants, who had not spoken to each other for several months, to work out an amicable resolution to their problems.

DESCRIPTION OF NATIONAL DISPUTE RESOLUTION PROJECTS

The concept of alternative means of dispute resolution is not a novel one. Experimental projects have developed in various parts of the country with a view to aiding disputants who have an ongoing relationship to settle their controversy. The National Institute of Law Enforcement and Criminal Justice has funded research studies of such alternative processes.[8] The American Bar Association has also become interested in this subject matter

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[8] McGillis and Mullen, Neighborhood Justice Centers: An Analysis of Potential Models, p. 4.

and has established a Committee on Resolution of Minor Disputes.[9] In addition, Chief Justice Warren Burger, Attorney General Griffin Bell, the American Arbitration Association, the Institute for Mediation and Conflict Resolution, local governments and criminal justice agencies have been supportive of this concept.[10]

In the past seven or eight years, mediation programs have developed in various parts of the country. Although they differ in many aspects, they share the goal of providing alternative forums for the resolution of certain types of disputes. To gain a better insight of mediation projects established in other parts of the country, a brief comparison of four typical national projects will be made.

The Columbus Night Prosecutor Program, the Miami Citizen Dispute Settlement Program, The New York Institute for Mediation and Conflict Resolution Dispute Center and the San Francisco Community Board Program, more fully described in Neighborhood Justice Centers: An Analysis of Potential Models,[11] are of recent origin. The Columbus project began operations in 1971; the New York and Miami projects in 1975; and the San Francisco project in 1977.

Funding by the Law Enforcement Assistance Administration has been instrumental in the development of these projects, which have been sponsored by various agencies. The City Attorney's office in Columbus, the Administrative Office of the courts in Florida, the Institute for Mediation and Conflict Resolution in New York, and the Community Board Program in San Francisco have coordinated these projects.

The stages when disputants have been referred to mediation have varied considerably. Some referrals have come from the court system, whereas others have been initiated prior to court contact. The San Francisco program, unlike the other projects, only accepts pre-arrest referrals. The referral sources have also varied. The City Prosecutor's screening staff, the State Attorney's office, the court, the police, citizens, schools and other agencies have all referred cases to mediation.

The types of disputes referred to mediation generally involve civil or criminal disputes between disputants involved in a long-term relationship. Some of the projects specialize in certain kinds of disputes. For example, the Columbus project accepts many bad check cases, and the New York project restricts itself to a specific list of offenses.

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[9] McGillis and Mullen, Neighborhood Justice Centers: An Analysis of Potential Models, p. 3.

[10] McGillis and Mullen, p. 31.

[11] Daniel McGillis and Joan Mullen, Neighborhood Justice Centers: An Analysis of Potential Models (Washington, U.S. Gov. Printing Office, 1977).

The number and type of people selected as mediators have varied. The San Francisco project has a panel of five mediators, whereas the New York project uses one to three citizen mediators, depending on the severity of the dispute, the number of available mediators and the number of disputants. One mediator conducts a mediation session in Columbus and Miami. It is interesting to note that those projects that employ one mediator per session do not use community mediators. Law students in Columbus and professionals (attorneys, psychologists and sociologists, for example) in Miami mediate disputes. San Francisco, unlike the other projects, uses volunteer mediators. The other programs reimburse their mediators either on a per hour or per session basis.

The training source and the number of hours of training for mediators have also varied. The mediators have received training from the Educational and Psychological Development Corporation of Columbus, Ohio (Columbus), or from the Institute for Mediation and Conflict Resolution (New York), or from a training program developed by a psychologist-mediator (Miami). The training has consisted of 12 hours (Columbus), 50 hours (New York), or a two-day training session (San Francisco).

Various distinctions among the mediation sessions are also noteworthy. The Columbus project conducts sessions in the prosecutor's office; the Miami project uses a courtroom; and the other projects schedule mediation sessions in an office building removed from the courthouse. The amount of time allotted per session may differ. The maximum time limit established in the Miami, New York and San Francisco projects is two to three hours. The Columbus project, which processes many more cases than the other programs, limits sessions to 30 minutes.

The form of agreement reached also differs. The Columbus project does not draft written agreements unless so requested. The other three projects require a written agreement. Two of these projects use written and signed agreements, and in one instance this agreement is enforceable in court pursuant to a state statute (New York).

In addition to these more established programs, three projects coordinated by the National Institute for Law Enforcement and Criminal Justice have developed within the year on the initiative of Attorney General Griffin Bell.[12] Atlanta, Kansas City and Los Angeles have organized experimental Neighborhood Justice Centers. These projects were developed in response to Senate Bill No. 957, 95th Cong., 1st Sess. (1977), which provides for a clearing house, resource center and funding for experimental mediation units.

The Atlanta project, sponsored by Neighborhood Justice Centers Incorporated, operates under court auspices in a house.

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[12] See Paul Nejelski, "The Federal Role in Minor Dispute Resolution," U.S. Dept. of Justice, unpublished address to the National Conference on Minor Dispute Resolution, May 26, 1977.

The Kansas City project, a city-managed program, is located in an office building; and the Los Angeles program, sponsored by the Bar Association, maintains a storefront location. These three projects serve heterogeneous communities with small populations varying from 50,000 to 90,000 people.

DESCRIPTION OF MASSACHUSETTS MEDIATION PROGRAMS[13]

There are a number of mediation programs which are currently operational in Massachusetts. The programs are specifically designed to offer mediation services as an alternative to formal court process; and mediators, whether or not they are court personnel, have identifiable duties which are separate from normal court-related duties. Several programs are formally structured with trained staff persons and are located in offices outside of the courts. Some of the formalized programs are operating with grant funding and incorporate on-going training. Other programs are operating on an informal basis, with personnel who may or may not be part of the court system intervening in appropriate cases and assisting the parties in reaching a mutually acceptable solution to their disputes.

Formal Programs

Urban Court Mediation Unit, Dorchester. The Urban Court Mediation Unit is the best-developed and comprehensive mediation program existing in Massachusetts. Since its inception in 1975, the mediation unit has been available to community people in the Dorchester area to deal with all types of disputes involving parties who know each other. The types of disputes include domestic problems, neighborhood disputes, landlord and tenant issues, school-related problems, and employment disputes. Most referrals to the program are made either by the Clerk-Magistrate or by the Judges in the Dorchester Division. A small percentage of referrals are made by the police or the District Attorney.

Approximately 50 community residents serve as mediators and usually hear cases in panels of two or three. The mediators volunteer their services and receive a stipend of $7.50 per session for expenses. When the program was organized, an intensive 40-hour training program for mediators was conducted by the Institute for Mediation and Conflict Resolution of New York City. The staff has since developed sufficient experience to conduct their own training as new mediators join the program.

Although most referrals to the program are made by the Judge or Clerk-Magistrate, the unit remains distinct from the court

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[13] The Committee thanks Rita DiGiovanni, Standards Specialist at the Massachusetts Committee on Criminal Justice, who gathered and prepared the information on Massachusetts mediation programs contained in this section of the report. Appendix B contains the names and addresses of these programs.

and is located in a storefront office several blocks from the courthouse. This separate location was selected because of space restrictions in the court building and because the program's organizers believed that the project should be separate from the court in order for it to be more easily regarded by the community as an alternative to court procedures. Mediation sessions are scheduled about one week after initial contact and are conducted at the disputants' convenience during weekdays, weekends or evenings. The average length of a session is about two hours.

Agreements are expressed in written form, but all of the mediator's records and notes are destroyed. Follow-up calls are made to the parties two weeks after the session and again three months later.

Approximately 350 referrals are made per year, and about 280 of those result in mediation sessions. Mutually acceptable solutions are reached in approximately 260 cases each year.

Mediation Component, Youth Resource Bureau, Lynn. In August, 1977, a one-year CETA grant was awarded to the Lynn Resource Bureau for the development of a mediation component. The program consists of six staff persons, including a project coordinator, two counselors, and three community organizers. During the first months of the program's existence, the staff concentrated their efforts on selecting mediators and familiarizing the community with the program. Outreach was done through newspapers, and contacting community agencies to encourage community people to volunteer their services as mediators. Approximately 40 hours of training was prepared for the mediators by the program director and Urban Court trainers. There are approximately 15 mediators available for hearings at the present time, although more candidates are being selected and follow-up training is planned.

The Lynn program began taking referrals in April, 1978, and statistics are available for April and May only. Approximately 14 cases were referred each month and eleven of those were mediated. An average of seven cases a month have been successful.

Most referrals to the program have come from police, probation officers, and the community. To date, referrals have not been made on a regular basis from the Southern Essex Division (Lynn), but the Judges and Clerk-Magistrate have expressed a desire to channel appropriate cases to the program and a referral mechanism for the court is being prepared.

The cases handled to date have involved parties who know each other. Most of the cases have been neighborhood problems, landlord and tenant disputes, and family arguments. Although the mediation program is a component of the Youth Resource Bureau, the unit deals with adults as well as with juveniles.

The mediation program has office space in the Youth Resource Bureau in downtown Lynn. Like the Urban Court staff, the program

organizers believe that offices which are distinct from the court facilitate the program to being perceived as an alternative to formal process.

The mediation sessions are held at the convenience of the disputants on weekdays, weekends, or in the evenings. Sessions average from two to three hours, and individuals are encouraged to schedule additional sessions if necessary. One mediator conducts the session with one staff person present to offer assistance. If an agreement is reached, it is reduced to writing and signed by the participants. The parties are encouraged by the staff and the mediators to contact the office if a breakdown in the agreement occurs. The staff usually makes follow-up calls to the parties after one week and again after one month. The Lynn program has recently designed a "disposition sheet" which is a close-out mechanism for cases which have been mediated and have been successful for at least three months. The disposition sheets include information about the agreements and the follow-up calls, and serve as record-keeping devices for the program.

Court Mediation Services, Taunton. Court Mediation Services (CMS) is a CETA-funded program operating within the probation department of the First Bristol Division (Taunton). The staff includes three mediators who conduct all mediation sessions. The program has been operating since December, 1977, and has handled 50 to 60 referrals. Thirty-five of those cases were mediated and 22 resulted in agreements. Follow-up calls made after three months have revealed that 95% of the agreements reached have been successful.

Most referrals to the program are made by the Clerk-Magistrate at the time of the Clerk-Magistrate's hearing, or a small claims hearing. Some referrals have been made by the District Attorney and a small number have come from community agencies.

The mediation sessions are patterned after the Urban Court model, with each party having an opportunity to present his or her case and the mediator attempting to aid them in reaching a satisfactory resolution. If the sessions are successful, agreements are put into writing and are signed by the parties. Unlike the Dorchester program, Court Mediation Services offers disputants an opportunity to mediate their cases on the same day that they appear in the Clerk-Magistrate's office. The staff has found that disputants are much more willing to enter mediation and to reach agreements if the mediation services are available to them on the same day that they are in court. Therefore, a "cooling off" period of several days is not usually provided. However, mediation sessions are always scheduled at the convenience of the parties and may be held in the evening or on Saturdays.

Mediation sessions are held in the CMS office which is across the street from the courthouse. The program staff has found that their separate location has allowed them to create an informal and relaxed atmosphere which has been conducive to

the mediation process. Although the CMS program is a component of the probation department, all parties agreed that an office outside the courthouse will enable community residents to identify the program as an alternative to judicial process.

Mediation is usually conducted by one mediator rather than by a panel, but in disputes involving husbands and wives an attempt is made to include a male and a female mediator. Sessions average two to three hours.

The CMS program has a sub-component which provides referrals to disputants who need social services or counseling. Referrals are made voluntarily and are usually incorporated into the settlement reached by the parties.

The CMS staff calls all disputants two weeks after an agreement is reached to determine whether any problems have developed. Follow-up calls are also made after three months, and disputants are encouraged to report on the status of their agreement, the success of any referrals made, and their attitudes toward the mediation process in general.

Initial training in mediation and in judicial process was made available to CMS staff over a four-week period when the program was initiated. Staff trainers from the Urban Court Project prepared portions of the training, and the remainder was prepared by Hon. Guy Volterra and Assistant Chief Probation Officer William McAndrew who had participated in a mediation training program sponsored by the American Arbitration Association.

Informal Programs

Assistance in Domestic Disputes, Middlesex County. Begun in early 1978, the AIDD program is a component of Regional Probation Services, which provides crisis intervention and mediation services to individuals involved in domestic disputes. At present, the program is operating in the Cambridge, Somerville, Woburn, Concord and Lowell Divisions.

The AIDD program was not created to provide formal mediation to disputants. Rather, the program was designed to assist individuals through their domestic difficulties in order to keep the family or the relationship intact.

The program has offered services to families since January, 1978. To date 131 people have been assisted.

Referrals to AIDD are made chiefly by Clerk-Magistrates, with a small number coming from probation officers, District Attorneys, and community agencies. Initial contact is usually made with the complainant, and a needs assessment is done at that time. When the alleged defendant is notified that a request for a complaint has been filed, AIDD staff become involved in working with the defendant to assess his or her needs. If the parties are willing to participate in the program, subsequent appointments

are made in order to work through the problems the parties are experiencing and to reach an agreement which will enable them to reunite. Numerous sessions are held with the parties and the AIDD staff over a period of up to three months. When the parties require assistance from specialized counselors or psychiatric workers, these individuals are invited to participate in the sessions. If an agreeable settlement cannot be reached, the sessions are discontinued and a report is filed with the Clerk-Magistrate or the probation office. The services of the AIDD staff are still available to the parties, however, should they decide to resume the sessions at a later time.

In cases in which the sessions are successful, the agreements reached by the parties are informal and are not usually put into writing. The staff has just begun to use written agreements on an experimental basis. Follow-up is done by staff after several months.

The AIDD staff consists of seven individuals including a Director, two advocates who work with the complainants and prepare the initial needs assessments, two evaluators who work with the alleged offenders, and two administrative aides. The evaluators and advocates rotate from one court to another on a daily basis. Since AIDD is a component of Regional Probation Services, an AIDD Board of Directors has been established including the Commissioner of Probation and the Chief Probation Officers of each participating court. The program staff believes that this close relationship with the probation department has resulted in greater acceptance of the program by other court personnel.

Specific training in mediation skills has not yet been done in the AIDD program. However, the AIDD staff hope to expand their services and offer more formalized mediation in domestic cases. A joint training program in mediation techniques is currently being planned for AIDD staff and Clerk-Magistrates, and will take place in the next several months.

The central office of the AIDD program is in the Third Eastern Middlesex Division (Cambridge). Limited facilities have been made available to the staff in each of the other participating courts.

Domestic Crisis Intervention, Cambridge. In the Third Eastern Middlesex Division (Cambridge), assistance in resolving disputes involving domestic violence is provided by a Domestic Crisis Intervenor who works out of the Clerk-Magistrate's office. This individual makes referrals to the AIDD program described above and to the Victim/Witness program at the court which provides assistance and information to victims and witnesses involved in pending cases.

To the extent that the Domestic Crisis Intervenor (DCI) becomes involved in attempting to resolve domestic problems, he or she provides an informal mediation service. The DCI intervenes at the Clerk-Magistrate's hearing stage and, in appropriate cases, attempts to assist the parties in resolving their

disputes. The DCI participates in the hearing, serving as mediator, counselor, or referral agent as the situation demands.

Following the hearing, additional sessions are scheduled and if mediation attempts prove successful, the case is diverted from the trial process. If mediation is unsuccessful, or the contract is broken, a complaint is issued and the matter is scheduled for trial.

An average of six domestic crisis cases are handled each month. At the present time, the DCI becomes involved in cases only at the stage of the Clerk-Magistrate's hearing and does not receive referrals from any other source. Mediation sessions are scheduled one afternoon each week at the courthouse.

Aid for Battered Women, New Bedford. The probation office in the Third Bristol Division (New Bedford) has begun a program to assist battered women, which incorporates a mediation segment in order to aid the parties in resolving their problems without going through the trial process. The program was initiated during the first several months of 1978, when Chief Probation Officer Joseph Souza and the Judges reached an agreement that some assistance in these domestic cases was a necessity in their court.

Probation Officer Joanne Long coordinated the program which accepts referrals from the Clerk-Magistrate's office following the issuance of a complaint. Referrals have been made within the last three months, and approximately 12 cases have been handled to date. Like the AIDD program staff, the intake person assesses the needs of the victim and the alleged defendant and encourages them to participate in the program. The staff is aware that many cases are not referred to the program because the victims never reach the point of securing complaints, but they feel that a pending complaint is necessary in order to secure a commitment from the parties.

Intake sessions are done on a one-to-one basis, first with the victim and then with the alleged defendant. It is estimated that intake requires six to eight staff hours per case. Counseling sessions are then held weekly at the YMCA in New Bedford. Referrals for the men involved in the violence cases are usually made to the Center for Human Services.

When an agreement between the parties can be reached, a "contract" is drafted for their signatures. Frequently the terms of the contract involve a commitment from the alleged defendant to attend counseling sessions or drug or alcohol-related programs. The case is brought before the Judge, who has the discretion to accept or reject the proposed agreement of the parties. If it is accepted, the case is continued without a finding for a specific period of time; then it is dismissed. No follow-up procedures have been defined yet because the program is new. However, the staff intends to define a formal mechanism for follow-up.

To the extent that the cases which are referred to this program proceed through the complaint-issuing and hearing stages, the program is not truly an alternative to formal process. However, it does involve the general concepts of mediation and the parties are offered an informal arena in which to present their views and reach a mutually acceptable solution.

Mediation Program, Quincy. An informal mediation program has been developed in the East Norfolk Division (Quincy) through the efforts of Hon. Albert Kramer and members of the Earn-it staff. No funding has been available to formalize the program, and Earn-it staff have been mediating cases on a volunteer basis since May, 1977. The staff took referrals and carried a substantial caseload during the evenings and on Saturdays until January, 1978, when funding and staff limitations became prohibitive. At the present time, members of the Earn-it staff mediate only a small number of cases in which the parties agree to schedule their mediation sessions during weekdays.

During the six months that the staff was actively involved in mediation, approximately 30 cases were mediated. In only one instance were the parties unable to reach an agreement, and in two instances, the agreements were unsuccessful.

The vast majority of referrals to the program have been made by the Presiding Justice of the East Norfolk Division (Quincy), with several referrals coming from the Clerk-Magistrate and the probation staff. The mediation sessions are patterned after the Urban Court model, with a panel of two or three mediators to hear each case. The sessions are held in the law library in the Quincy courthouse, and average two to three hours in length. However, the staff has successfully mediated several complex neighborhood disputes involving numerous families which developed into lengthy sessions of seven to eight hours.

Training was made available through the cooperation of the Urban Court Project Director, who arranged for a number of Earn-it staff to participate in a training program in Dorchester.

If the parties resolve their problem, the agreement is reduced to writing and is signed by the parties. Follow-up is done after four weeks and again after three months. If there are no problems at that time, the case is automatically dismissed.

IMPLEMENTATION OF MODEL EXPERIMENTAL PROGRAMS

The Committee would like to recommend the implementation of experimental mediation programs in one or more District Court Divisions in Massachusetts. In analyzing the possibilities for experimental programs, the Committee has focused on six variables in the mediation process: geographical location, stage for referral of disputants, persons performing mediation, cases appropriate for mediation, the mediation procedure and training of mediators.

1. Geographical Location. The mediation process may be organized in a rural, suburban, and/or urban setting. One or more District Court Divisions in each geographical location, such as within a county, or several divisions in the same geographical location, such as one region of a county, could commence a mediation program. The virtues of selecting different courts representing different locations are many. Each community has different needs and problems. The population, median age of residents, ethnic groupings and economic backgrounds of each community are varied. These factors, to a large extent, determine the users and the types of disputes which are brought to the District Court Department. The initiation of a mediation program in each of the three geographical settings mentioned would enable the Committee to learn of those communities which can best benefit by the mediation process.

Of additional interest to the Committee is the extent to which disputants who do not live in the city or town where the courthouse is located would use the mediation process. Many of our District Court Divisions serve communities some distance from the courthouse. There is concern that disputants in these outlying towns might not utilize the court to its fullest extent. When the courthouse is far removed from the outlying cities and towns within the court's jurisdiction, it is possible that disputants pursue means outside of the court for the resolution of their disputes. It may be necessary to enhance the awareness of the public and court personnel of the mediation alternative and improve methods of access to it.

2. Stage For Referral. The Committee acknowledges that mediation can be initiated at various stages of the process, beginning with the police and ending with the judiciary. Specific stages which the Committee has identified include police radio-calls, police station walk-ins, Clerk-Magistrate's counter walk-ins, Clerk-Magistrate's "show-cause" hearings, arraignments, pre-trial conferences, and dispositions after trial. For experimental purposes it would be wise to begin with a small and controllable referral source and as circumstances warrant expand to meet community and court needs. The Committee is of the opinion that at present mediation can best serve its purpose when referrals are made either by the Clerk-Magistrate at the "show-cause" hearing or by the Judge at arraignment or trial. The referral source should explain the mediation process and its purpose to enable disputants to make an informed choice.

a. Clerk-Magistrate. Referrals to mediation may come from the Clerk-Magistrate's office, as the Clerk-Magistrate has the initial court contact with one or more of the disputants. The Clerk-Magistrate could screen the types of disputes determined by the court or the program to be ripe for mediation. In lieu of or during a "show-cause" hearing, the Clerk-Magistrate could refer disputants who choose to mediate their dispute to mediation. Additionally, the Clerk-Magistrate may mediate small claims matters pursuant to the court reorganization legislation.

b. Arraignment. Referrals to mediation may also occur after a complaint has been issued and during arraignment. When the arraigning Judge feels that mediation would be in the best interests of the parties and the public, he should explain how that alternative means of dispute resolution works and, upon assent of the disputants, refer the case to mediation. The Judge may continue the case for a period of time to enable the parties to mediate the dispute. On the continuance date, the Judge should receive a written report of the mediation process at which time he has the option of granting a continuance to allow the mediated result to occur, or setting a trial date if mediation has failed.

c. Trial. The potential for mediation may not be obvious until the trial date. At that time it would be appropriate for the Judge to make a referral to mediation. The same procedures for referral at arraignment would apply at the trial stage.

3. Persons Performing Mediation. Mediation may be performed by one or more of the following people: a Clerk-Magistrate, other court personnel, or community members. Among the advantages of having mediation performed by court personnel are that (1) the disputants may view mediation as having greater credibility in that it is directly tied to the institution they came to in the first place, and (2) a limited expense will be incurred for training. Possible disadvantages of court-personnel mediators are that (1) the court personnel may have had prior unsatisfactory contact with the disputants, and (2) the disputants may be unduly influenced by the authority of a court-related individual.

Among the advantages of community mediators are that (1) the community members will most certainly constitute a broader cross-section of the community, (2) they will be seen by the disputants as "peers" and not persons with the coercive power of court personnel, and (3) they will be able to hold mediation sessions in the evening or on weekends. Some disadvantages of having community members as mediators are that (1) the disputants may view mediation as having limited credibility due to the "unofficial" standing of the mediators, and (2) there may be an economic cost depending on the extent of training, use of court resources, type of follow-up and utilization of volunteer or paid mediators.

Various options exist for the selection of the impartial third party or parties. One or more court personnel may serve as mediators. Community members alone, or in conjunction with one or more court-related persons, may mediate a dispute. Volunteers from the community may be selected from various geographical locations, economic strata, age groups, ethnic backgrounds, or professional levels.

The number of impartial mediators used for each dispute may also vary. Some court projects may prefer to use one mediator for a given dispute. Others may utilize panel mediators for all disputes or may vary the number of mediators used depending on the severity of the dispute, its nature, or its complexity.

4. Cases Appropriate For Mediation. The "winner-takes-all" approach of adjudication is not well suited to resolve certain types of disputes which are brought to the District Court Divisions. Disputes arising between individuals in a long-term relationship, such as family members, neighborhood residents, buyer and seller, and landlord and tenant, as well as disputes occurring within an established public institution, such as a school, welfare department or housing development, generally are not amenable to an all-or-nothing solution typical of our adjudicative process. A narrow focus on the immediate matter in issue in these types of controversies will not avoid or minimize future disputes nor will it effectively resolve the underlying problem. Mediation of these types of disputes will enable the disputants to better understand their day-to-day living situations and will elicit the adjustments necessary to make their lives more stable. Changes in behavior may result from the mediation process. Potentially more serious altercations may be averted.

One or more of the above-mentioned types of disputes may be selected for an experimental mediation program. The needs of the community and the court should dictate which disputes may be mediated. The volume, or the amount of time required for court hearing, of certain kinds of controversies may be the determining factor.

One type of controversy that will be subject to mediation in all District Court Divisions is the small claims dispute. Pursuant to G.L. c. 218, s. 22, as amended by Sec. 186 of Ch. 478 of the Acts of 1978, Clerk-Magistrates may mediate small claims cases. The statute provides in relevant part as follows:

> At the commencement of an action under the procedure the plaintiff shall be informed that such action may be submitted to the magistrate for mediation and resolution at the request of either party and with the agreement of both parties. The magistrate shall make appropriate note of any agreement so reached, and entry of judgment shall be made by the court. Any action which is not resolved by agreement may, at the request of any party, be heard by a justice under the preceding paragraph.

This legislation will permit Magistrates to mediate

> claims in the nature of contract or tort, other than slander and libel, in which the plaintiff does not claim as debt or damages more than seven hundred and fifty dollars, except that said dollar limitation shall not apply in an action for property damage caused by a motor vehicle . . . . G.L. c. 218, s. 21, as amended by Sec. 186 of Ch. 478 of the Acts of 1978.

The statute offers two alternative procedures for the resolution of small claims matters, mediation or court hearing. Parties that choose the judicial forum will testify in court before a Judge, who after hearing evidence, will make a binding determination. Those that elect mediation will try to resolve their dispute in a private setting, aided by a Clerk-Magistrate. Disputants who are unable to reach an accord may, upon request, "be heard by a justice." For those that are able to reach an agreement, an "entry of judgment shall be made by the court."

The legislation provides certain safeguards for those parties that seek to mediate their dispute. First, the "agreement of both parties" is required for the small claims action to "be submitted to the magistrate for mediation and resolution." Since all parties must consent to have their dispute mediated, one disputant may not elect the alternative process as a delaying tactic. To ensure that the parties "agree" to the mediation forum, it is necessary to make provisions for an informed choice. As one author wisely cautioned, "[alternative] forums should be made available, but consumers should be subject to their jurisdiction only if they choose to be, and the choice must be voluntary and knowledgeable."[14]

Further, on request of a party, a Justice may hear "any action which is not resolved by agreement." The parties are not prevented from requesting a court hearing if they are unable to settle their dispute in a mutually acceptable manner. Once they have reached an accord, however, their agreement has the force of a judicial determination. In accordance with the statute, an agreement shall be noted by the Clerk-Magistrate and "entry of judgment shall be made by the court." The promulgation of rules may clarify many issues left unresolved by the legislation. The location of the sessions, the decorum followed during mediation, the permissible types of agreements, the manner of enforcing judgments entered by the court pursuant to the agreement, and the forms to be completed when the parties seek a court hearing after failure of mediation are some of the undetermined issues.

5. Mediation Procedure. When disputants elect to mediate their dispute, their choice should be an informed one. They should understand the mediation process, its purpose, and the details of the judicial alternative for resolving their dispute. The impact of their decision should also be explained. They should be notified that, irrespective of their initial decision to mediate their dispute, they may have a court hearing. A document explaining mediation and the alternative court process could be given to each disputant, reviewed and signed before the mediation session is begun; or a Clerk-Magistrate, mediator, intake worker or other person could explain the forums for

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[14] Mark Budnitz, Consumer Dispute Resolution Forums, 13 Trial 45, 47 (1977).

resolution of the dispute.

The role of the mediator during the mediation process is set out in the literature describing the skill.[15] At the commencement of a mediation session, the mediator should explain that he is not a Judge, that any decisions rendered are not legally binding, and that the proceeding differs from a trial. Throughout the process, he should not find fault with any of the disputants, but should assume the role of an objective third party in assisting the disputants to reach an agreement. He should not accept as accurate any disputant's version of a contested issue and should never take sides. Further, he should act as a referee, controlling the use of abusive language and loud outbursts and directing the parties to discuss the disputed issues.

As the mediation session progresses, the mediator's role changes. At first, the mediator serves as a confidant. He listens to each disputant relate his version of the controversy and tries to control interruptions and interjections by the other disputant. The rendition of the cause of the quarrel is beneficial for two reasons. The disputants have a need to tell a neutral third party why they have been wronged. Frequent interruptions, denials of accusations made, scolding, and threats are to be expected and constitute an important part of the initial therapeutic process. In addition, the mediator needs to learn some background information about the controversy.

Once the disputants have aired their grievance, the mediator must assume a more active role in trying to isolate the areas of agreement and disagreement. Some specific questions may be asked to clarify the nature of the dispute. This probing enables the parties to discover, perhaps for the first time, when and why the problem was initiated, what had escalated the controversy and what attempts, if any, had been made to resolve the dispute. Once the contested issues are discerned, the mediator should encourage the disputants to discuss them further.

Next, the mediator must play an active part in discerning whether a mutually acceptable solution can be reached. The mediator may ask each disputant how the dispute may be resolved. If that tactic proves ineffective, it may be necessary for the mediator to speak to each disputant privately. The use of the caucus technique[16] will enable the mediator to learn each party's "bottom line." Privy to this information, the mediator may guide parties to reach a mutually acceptable agreement when the disputants reconvene.

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[15] See Fuller, Mediation - Its Forms and Functions, and McGillis and Mullen, Neighborhood Justice Centers: An Analysis of Potential Models.

[16] McGillis and Mullen, p. 65.

The mediator may make suggestions and describe alternatives. The disputants may demonstrate an unwillingness to compromise. Symbolic gestures--grabbing a pocketbook, putting on a coat, frequently looking at a watch--as well as verbal expressions of dissatisfaction may indicate that an impasse has been reached. The mediator may outline the areas of accord and discord and then may suggest the convening of another mediation session to discuss the remaining issues.

The disputants may be unable to reach an agreement because their needs cannot be satisfied in an hour or two session. A mediator cannot assume the role of a counselor, but he may refer disputants to various social service agencies.[17] A community resource manual setting forth available counseling services and departments to assist in housing, health and welfare matters could be developed and updated periodically. Such a resource directory would benefit mediators and also Clerk-Magistrates not participating in mediation.

Frequently the disputants will continue discussing their differences and will reach an agreement. An agreement may, for example, require modification of behavior, participation in counseling or other social services, or an exchange of money. Any agreement reached by the disputants may be written, signed and witnessed; or written and signed; or written; or oral. A written rendition of an agreement frequently serves as a reminder to the disputants and demonstrates their good faith.

At the conclusion of the mediation session, disputants should be notified of the follow-up procedure and their options should there be a breakdown in the agreement. Two of the alternative approaches for follow-up are as follows: (1) the mediator or another person affiliated with the mediation program may contact the disputants by telephone or by mail a certain period of time after an agreement is reached, or (2) the arraignment Judge may review the mediation agreement or a report relative to the mediation session after it is reached and then again at a future date. The manner of handling a breakdown in the mediation procedure can also differ. The disputants may be urged to try mediation again, they may appear before the Judge for formal review of what has transpired, or they may receive a "de novo" hearing by the Judge.

6. Training. To implement a mediation program effectively, it will be necessary to educate and train court personnel in mediation. Those who mediate disputes will need to learn mediation techniques. Other court personnel who will refer cases must learn how to decipher those cases best suited for mediation.

The training source, the type of training, and those people selected for training may vary. A number of agencies have developed

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[17] Dellapa, Citizen Dispute Settlement: A New Look at an Old Method, p. 521.

training programs. The Institute for Mediation and Conflict Resolution in New York (IMCR), an offshoot of the New York Institute for Mediation and Conflict Resolution Dispute Center, has provided training for mediators throughout the country, including the Urban Court mediation staff. Urban Court Incorporated, formed by the Urban Court Project, is in the process of organizing a training program. UCI has provided informal training for the staff at the Court Mediation Services program in Taunton and the Urban Court Mediation Unit in Dorchester. Other potential training sources include the American Arbitration Association and the American Negotiation Institute located in Illinois.

It would appear that several days of training will be necessary. An intensive course or a number of sessions scheduled over a period of time could be organized. The cost of the instruction will depend on which organization schedules the training and the number of training hours.

The type of training provided may differ depending on the training source. However, the role of the mediator, mediation techniques and the types of cases most suited for mediation, at a minimum, will form a predominant part of any mediation program. As described previously, potential mediators must recognize that they are to assume the role of neutral third parties who do not pronounce judgments or threaten the disputants, but rather guide them to reach a mutually acceptable agreement. A portion of their training should be devoted to mastery of various mediation techniques. Role playing will enable them to learn when to interrupt the disputants, what types of questions to ask, how to tone down arguments between the parties, how to decipher areas of accord and discord, how to prevent an impasse in the discussion and how to guide the parties to the formation of an agreement. The technique used by panel mediators will probably differ to a certain extent, in that they must work as a team and must avoid acting as a divisive force.

Clerk-Magistrates, pursuant to the court reorganization legislation, will be mediating small claims matters. They could also mediate other types of disputes in an experimental program. The role of the mediator and mediation techniques, as described above, should be explained to all Clerk-Magistrates who mediate disputes. In addition, the differences between the role of a Clerk-Magistrate during a "show-cause" hearing and the role of the Clerk-Magistrate during mediation should be highlighted. During "show-cause" hearings, Clerk-Magistrates are charged with the determination of whether process should be issued. As such, they make judgments based on the facts presented. In mediation, the Clerk-Magistrates do not exercise coercive power, but merely assist the disputants in reaching an accord. The significant difference in outcome in these proceedings requires Clerk-Magistrates to adopt different approaches during "show-cause" hearings and mediation proceedings.

Clerk-Magistrates may also refer cases to mediation. As a referral source, Clerk-Magistrates must be able to discern which

cases should be mediated. A referral procedure and proper record keeping should be organized. The development of an amicable relationship between the referral source and the mediation staff is crucial for the implementation of a successful mediation program.

CONCLUSION

The Committee believes that mediation is an alternative which could be useful in the District Court Department. As a result, the Committee recommends the establishment of experimental mediation programs within District Court Divisions. Mediation of small claims matters by Clerk-Magistrates pursuant to the court reorganization legislation will soon become a reality, and preparations to that end should be undertaken. Many minor citizen disputes would appear to be resolvable very effectively through the mediation process. In any event, further examination of this subject matter is warranted.

APPENDIX A

SUMMARY OF RESULTS OF QUESTIONNAIRE TO COURT PERSONNEL[17]

Background Information Regarding the Questionnaire. The Special Committee to Study Alternative Means of Dispute Resolution circulated a questionnaire to all Judges, Clerk-Magistrates and Chief Probation Officers in the District Court Department on March 17, 1978. A follow-up mailing of the questionnaire was completed on May 23, 1978. Approximately 320 questionnaires were distributed and 207 responses were received, resulting in a response rate of 64%. Questionnaires were returned by 84 Judges, 55 Clerk-Magistrates, and 68 Probation Officers. In some cases, responses were received from designees of Clerk-Magistrates or Judges and in several instances three or four members within the same office responded. Of the 73 courts polled prior to court reorganization, including the 72 District Courts and the Boston Municipal Court, 71 courts were represented. The number of courts fully represented by a Judge, a Probation Officer and a Clerk-Magistrate was 40.

The questionnaire was designed to gather data regarding formal and informal mediation programs currently existing in the state, and to offer respondents an opportunity to indicate whether any type of mediation program would be useful to them. For purposes of this survey, "formal programs" are defined as those in which specialized staff are hired and trained to operate the programs, and offices are located outside of the court building. Often the formal programs receive grant funding to enable them to operate as specialized programs. "Informal programs" are defined as those which are operating within the District Court Department without special funding or separate office space. Such programs may be staffed by persons who are part of the existing court structure. However, in order for there to be a mediation program, even on an informal level, the staff must intervene in appropriate cases and do something more than perform their normal duties in processing cases through the judicial system. As objective third parties they must assist disputants to reach mutually acceptable solutions to their problems.

Analysis of Information Regarding Formal or Informal Mediation Programs. Two hundred and seven persons responded to this section of the questionnaire dealing with formal mediation programs, and they identified 21 courts in which they believe formal mediation programs are operating. However, descriptions of the programs and related questions, such as who performed the mediation and whether formal agreements were reached by the parties, revealed that in many instances the programs were counseling projects rather than mediation programs. In other instances, the mediation programs identified were actually part

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[17] The Committee thanks Rita DiGiovanni, Standards Specialist at the Massachusetts Committee on Criminal Justice, for her analysis of the information contained in the questionnaire.

of the judicial procedure, such as Clerk-Magistrate's "show-cause" hearings, rather than being alternatives to the court process.

The courts in which formal mediation projects do appear to be operating include:

The Dorchester Division (Dorchester), where the Urban Court Mediation unit operates;

The Southern Essex Division (Lynn), which is served by the Mediation Unit of the Youth Resources Bureau; and

The First Bristol Division (Taunton), where the Court Mediation Services program is operating in conjunction with the probation department.

Full descriptions of these programs are included in the body of this report on pages 9-15.

A second section of the survey which inquired about the existence of informal mediation programs was answered by 207 participants. There were 62 courts identified as having informal programs. Again, the descriptions of the programs and further inquiries revealed that in many cases the programs were diversion programs incorporating probation departments, social service agencies, CHINS and juvenile referral programs, counseling services, the Department of Public Welfare, the Department of Mental Health and court clinics. However, some responses did identify some informal mediation programs which are operating much as described in the previous paragraph. Those programs are:

Assistance in Domestic Disputes (AIDD), a project sponsored by Middlesex Regional Probation with offices located in Cambridge, Somerville, Concord, Woburn and Lowell, where a domestic crisis specialist is part of the Victim/Witness program to intervene and mediate domestic disputes;

Domestic Crisis Intervention, a program which is operating at the Third Eastern Middlesex Division (Cambridge);

Aid for Battered Women, a program providing mediation and referral services at the Third Bristol Division (New Bedford); and

The Mediation Unit of the Earn-it program, a project operating at the East Norfolk Division (Quincy).

Descriptions of these programs can be found on pages 6-9 of this report.

The responses to the two questions regarding the presence of formal or informal programs reveal that the concept of mediation is unclear. However, the large number of positive responses may suggest that court personnel are in fact intervening in some fashion at early stages of the judicial process

if they feel that certain cases can be settled without going to trial. Review of the responses of Clerk-Magistrates, Probation Officers and Judges as groups adds more light in this context. For example, 86% of the Clerk-Magistrates who responded indicated that they have some type of program, either formal or informal. Seventy-three percent of the Probation Officers responded that they believed that some type of program existed in the courts where they served, but only 54% of the Judges believed mediation was occurring. These percentages may suggest that most of the attempts to mediate cases are being done informally by the Clerk-Magistrates or the probation staff before the case is brought before a Judge. A specific question regarding the stage at which mediation is available to the parties revealed that approximately 90% of the respondents involved in mediation programs make the alternative available before the parties go before the Judge. Approximately 35% of the respondents stated specifically that the alternative is made available at the time of the initial contact with the parties, which is usually when one or more disputants appear in the Clerk-Magistrate's office.

The types of cases in which attempts are made to mediate formally or informally fall into distinct patterns. The cases named most frequently by the participants who answered this section were matters involving domestic violence. Juvenile matters (including CHINS and school-related problems) and neighborhood disputes were the next two types of cases most frequently mediated. Other categories of cases named by a smaller percentage of respondents were landlord/tenant problems and consumer disputes (including small claims cases). It is possible that the percentages recorded in this section are somewhat low since the questions were open-ended and some responses were difficult to group because of the use of different terminology. For example, a number of persons indicated that assault and battery cases were frequently mediated, but they did not indicate whether the parties were unfamiliar to each other, or whether they were neighbors, relatives, etc. Therefore, these responses were recorded separately, but it is reasonable to believe that at least some of the assault and batteries were domestic disputes or neighborhood problems.

The respondents also identified domestic matters, juvenile cases, and neighborhood disputes (in that order) as the kinds of cases in which mediation is most effective. Landlord/tenant problems, disputes among friends and consumer or small claims cases were also mentioned, but by fewer respondents.

Given this information it is not surprising that, on a chart provided in the questionnaire, the respondents also identified the domestic dispute as the type of case which comes before them "very frequently" or "frequently." The majority of respondents stated that neighborhood problems came before them "frequently" or "occasionally," and other types of cases named, such as landlord problems, disputes among friends, school-related problems or consumer problems, were said to appear "occasionally" or "rarely."

Analysis of Information Provided by Clerk-Magistrates Only. A specific section of the questionnaire invited responses from the Clerk-Magistrates only and was designed to gather information regarding the needs of community persons who come into the Clerk-Magistrate's office for assistance and the procedures used by Clerk-Magistrates to deal with these needs. Fifty-five Clerk-Magistrates responded to this section. Forty of the 55 indicated that Clerk-Magistrates or Assistant Clerks are the only persons who assist community residents who come into their offices seeking complaints. Fourteen Clerk-Magistrates indicated that clerical staff are present to receive information or complaints from community people. One Clerk-Magistrate's office utilizes the services of a police officer for this purpose. Most Clerk-Magistrates indicated that the staff who receive information or complaints from the public do not work under any specific instructions. However, one Clerk-Magistrate indicated that staff are required to adhere to the Standards of Judicial Practice, The Complaint Procedure (District Court Administrative Office, 1975).

Sixty-eight percent of the Clerk-Magistrates polled indicated that the number of persons seeking assistance in the Clerk-Magistrate's office in an average week is 50 or under. It is interesting to note, however, that nine of the 55 Clerk-Magistrates estimated that more than 150 persons come into their offices in an average week for assistance.

The Clerk-Magistrates were also asked to estimate how many of the community people who come into their offices want a complaint to be issued and how many do not want a complaint but do seek some other type of aid. Most Clerk-Magistrates estimated that less than 25% of the people who come to their offices definitely do want complaints. The majority of citizens who enter the Clerk-Magistrate's office for assistance either do not want complaints or are uncertain.

Of the 42 Clerk-Magistrates who responded to a question regarding whether the parties involved in disputes knew each other, 33 responded that most disputes involve parties who know each other. In those cases in which Clerk-Magistrates do not feel that the issuing of a complaint is appropriate, 95% of the Clerk-Magistrates who responded indicated that they do attempt to mediate the cases. Several Clerk-Magistrates indicated that they attempt to bring each party in separately, and then both together to try to define a solution. One Clerk-Magistrate indicated that he sometimes brings in a clergyman or a psychiatrist to assist in appropriate cases.

In small claims cases, the vast majority (78%) of Clerk-Magistrates who responded stated that they do not attempt to settle disputes prior to the appearance of the parties before a Judge for hearing. This will undoubtedly change as a result of the recent legislation authorizing mediation of such cases by Clerk-Magistrates. Several Judges who do attempt to mediate small claims matters and who took the time to complete this

section indicated that they attempt to get the parties together and discuss whether or not there is a valid debt. If there is, the parties are given an opportunity to work out a mutually acceptable schedule for payment. Most other Judges simply urge the parties to recess for a short period of time and attempt to reach an out-of-court agreement before a judicial decision is rendered.

Analysis of Information Regarding Attitudes of the Respondents to the Concept of Mediation. The questionnaire invited all the respondents, including Judges, Probation Officers, and Clerk-Magistrates, to comment on the value of mediation as an alternative to formal process. Of the 104 survey participants who responded to this section, 80 indicated that some form of mediation would be helpful in their courts. The types of cases in which these respondents felt that mediation would be of greatest value were in domestic disputes and neighborhood problems. Dog violation cases, assaults, and consumer problems were also mentioned frequently. A substantial number of respondents offered recommendations on how they believe the program should be structured. Suggestions ranged from utilizing independent mediators who would screen and handle cases outside of the court, to organizing Clerk-Magistrates and Probation Officers to mediate under the instruction of the Judges. One recommendation involved the establishment of a panel consisting of a mediation coordinator, advocates for the disputants, a legal advisor and referee, and persons to handle follow-up on mediated settlements.

Thirty-five individuals commented that a mediation program would not be useful in the divisions in which they were located. The most common reason cited was the lack of personnel in the Clerk-Magistrate's or probation office to handle the additional paperwork. Several other respondents believed that the divisions were not large enough to warrant the institution of a program.

In a final section of the questionnaire, respondents were given the opportunity to comment generally on the mediation process. These comments ranged from enthusiastic support for existing programs and potential new models, to expressions of concern over removing cases from the courtroom and endangering due process rights. Support for mediation came from Judges, Probation Officers and Clerk-Magistrates, and several respondents expressed interest in implementing mediation units with the assistance of the Committee. The reservations which were expressed concerned the need for training and for development of standards and procedures for mediation programs.

Whether programs would be more useful in urban or rural courts was mentioned only in a small number of comments. Several representatives of larger courts felt that mediation programs would be helpful because the volume of cases is so high. However, another urban area respondent noted that the kinds of cases that are appropriate for mediation do not appear in large courts very often. One rural court representative felt a program would be

helpful there because many of the cases on the daily docket are appropriate for resolution outside of court.

The negative comments came mostly from Clerk-Magistrates rather than Judges or Probation Officers and expressed the theme that Clerk-Magistrates should be responsible for deciding which matters are appropriate for trial. Many of these respondents noted that if probation and Clerk-Magistrate's offices were enlarged, the mediation function could be handled in those offices. One Clerk-Magistrate expressed extreme discomfort at dealing with the entire area of mediation in a general way and commented that cases should be analyzed on an individual basis by the Clerk-Magistrate and the Judge.

As a final note, it is interesting that the comments received from those individuals in courts where programs now exist were all favorable. Several Judges urged that more mediation programs be implemented and that existing experimental programs be expanded.

APPENDIX B

NAMES AND ADDRESSES OF EXISTING MASSACHUSETTS MEDIATION PROGRAMS

1. Urban Court Project - Mediation Program
   560 A Washington Street
   Dorchester, Massachusetts 02124

   Brian Callery, Director
   Della Rige, Mediation Supervisor

2. Youth Resource Bureau - Neighborhood Mediation Project
   One Market Street
   Lynn, Massachusetts 01901

   Richard Bedine, Director

3. Court Mediation Services
   4 Court Street, Suite 23-24
   Taunton, Massachusetts 02780

   Bernard Chadwick, Director
   Paul Nerney, Supervisor

4. Assistance in Domestic Disputes
   Middlesex County Courthouse
   40 Thorndike Street
   16th Floor
   Cambridge, Massachusetts 02141

   Richard J. Simonian, Director

5. Tom Reardon, Domestic Crisis Intervenor
   c/o Victim/Witness Program
   Middlesex County Courthouse
   40 Thorndike Street
   13th Floor
   Cambridge, Massachusetts 02141

6. Aid for Battered Women
   10 South Sixth Street
   New Bedford, Massachusetts 02740

   Joanne Long, Director

7. Earn-it Program - Mediation Component
   East Norfolk Division
   District Court Department
   50 Chestnut Street
   Quincy, Massachusetts 02169

   Joyce Hooley, Director

APPENDIX C

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MICHAEL S. DUKAKIS
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PATRICIA McGOVERN
EXECUTIVE DIRECTOR

December 12, 1978

Mr. Neal Berg
Financial Management &
Grants Administration
Office of the Comptroller
L.E.A.A.
633 Indiana Avenue, N.W.,Room 942
Washington, D.C. 20531

Dear Neal,

I would like to thank you for taking the time out of your busy schedule to give us some "hands on" fiscal TA. You answered several questions which had concerned me for some time, as well as reinforced our view that we were burdening ourselves with overly restrictive special subgrant conditions.

I would also like to thank you for the assistance you gave Greg Torres two weeks ago. He said you were very helpful on an issue concerning the Open Harbors grant.

Please let us know when you get another opportunity to visit the Northeast Region.

Sincerely,

Ruth Ann Jones

Ruth Ann Jones
Director, Program Operations

RAJ:my

c.c.: Paula Hayes

END