

OFF-RAMPS AND REST AREAS

Shortly after Interstate Highway 93 enters Vermont, there is a rest area. Stopping there to use one of the vending machines, you may find that it fails to dispense. If you can find an attendant, you will be provided a telephone number or internet address to contact and try to get your money back. That's about it. Should you complain, you will be told something like, 'We don't have anything to do with the machines. They're run by an outside company.'

Should you run into a similar situation on route 80 in Iowa or Nebraska, an attendant may give you your money back, or will at least provide you with a postcard to mail to the vending company. What determines how we are treated in these situations?

Many who are involved with our court system as parties, jurists, lawyers or administrators, have long felt that our traditional adversary system of justice exacerbates the hurt couples feel in the process of divorce or separation, often to the lasting detriment of both parents and their children.

As a result, programs have been developed in many states to recruit mediators who contract with the courts to provide their services. But as with motoring, these programs sometimes make the process more pleasant, and sometimes less so.

In our State, for example, while mediation occurs at the family courts, the facilities are not always the best, and resort is often had to private venues. While some efforts have been made to create a different scenario, the mediators in practice do their own screening, scheduling and postponements, enforce disclosure and other rules, collect their own fees, and either resolve the issues, or send the parties back to the adversary system. As such, court sponsored divorce mediation has been well described by the oft-used term, 'off-ramp.'

One might think that to be truly effective, reforms in our court system would have to take place in the heart of the system, not 'off-ramp.' So what can be done to make mediation more a part of the court system, and the court system more a part of mediation? While wondering about this, I looked at some files, statutes and rules, and had several conversations with mediators and parties in our neighboring State of Maine.

In Maine's family courts, mediators are overseen by the Court Alternative Dispute Resolution Service, which recruits and trains mediators. Absent exceptional circumstances, mediation must take place at the courts. Unless court-waived or funded from another source, mediator's fees are collected by the courts. Scheduling and postponements are addressed directly by the courts. Financial disclosures must be written and provided to the court before mediation. Mediation is limited to two sessions of approximately two hours each, unless the parties both desire to invest in no more than one or two additional meetings. The mediators explore and reduce to writing the subjects of both agreement and disagreement in a report to the court. The report is agreed upon and signed by all parties and counsel, as well as the mediator. Typically, when parties return to the courtroom with their remaining issues, the magistrate, before hearing and deciding those issues, will encourage and order further mediation when the parties feel it would be helpful. In short, mediation is well integrated into the court's decisional, as well as procedural process.

Of all the Maine practices, the one that interested me most was the report of mediation. The report is not only about reaching an agreement; but also, about defining the areas of both agreement and dispute. As it unfolds, the Maine process moves into the courtroom, where a magistrate may decide the most thorny issues. While the process is not seamless – statements made in mediation ordinarily remain confidential – the parties are present and participating throughout. All of the participants, the parties, the lawyers, the mediators, the magistrates and judges, work together in arriving at resolution of the issues to be decided.

Of course, concept is not execution. In the current period of economic stress, when many parties cannot afford new fees for additional court services, all jurisdictions must be struggling to make their systems work. Success or failure will often depend on whether we are working together, or working separately. For many years, New Hampshire lawyers undertook training and served pro bono, or without charge, mediating numerous civil disputes in the Superior Court. Perhaps family lawyers, if asked, would agree to fulfill their pro bono obligations by training and serving in a similar fashion in fee-waived cases in our family courts. Through efforts like these, and consideration of practices in other states, our courts will come closer to regulating divorce and separation in a manner that is not only less painful, but possibly even fruitful for dissolving families.