

Quality and Growth of Court-Connected Mediation in Virginia

In 1989, the Commission on the Future of Virginia's Judicial System issued a Report that outlined ten major recommendations, including the recognition that, in order to offer the most effective, responsive, and appropriate methods for resolving disputes, the justice system must offer an array of dispute resolution programs along with adjudication.

To facilitate the development of alternative methods for resolving disputes, the Futures Commission recommended the creation of the Department of Dispute Resolution Services within the Office of the Executive Secretary, which was established in April 1991. Since that time, the use of alternative dispute resolution methods to aid in resolving court-referred disputes has grown tremendously. Judges and users of the court system in Virginia have come to value mediation because it promotes more creative and enduring resolutions to disputes. In this article, we will highlight various aspects of mediation in Virginia that demonstrate its quality and expansion.

Environmental Scan

The Department of Judicial Planning annually conducts an environmental scan survey by telephone to gather feedback from Virginia's citizens who use its court system. This information is valuable in assessing the public's perception of the court system and identifying areas needing improvement. In the 2003 survey, the following statement was included. *"Some people have suggested that the courts should just apply the law, while others think the courts should try to solve the underlying problems that bring people to court. Please tell me if you Strongly Agree, Agree, Disagree, or Strongly Disagree."* Among a series of five statements correlating to this issue, one statement specifically dealt with mediation. It stated, *"The courts should provide mediators to help people work out a solution acceptable to both sides."* An overwhelming majority of responders, 88.2 percent, said they either agreed or strongly agreed with that statement.

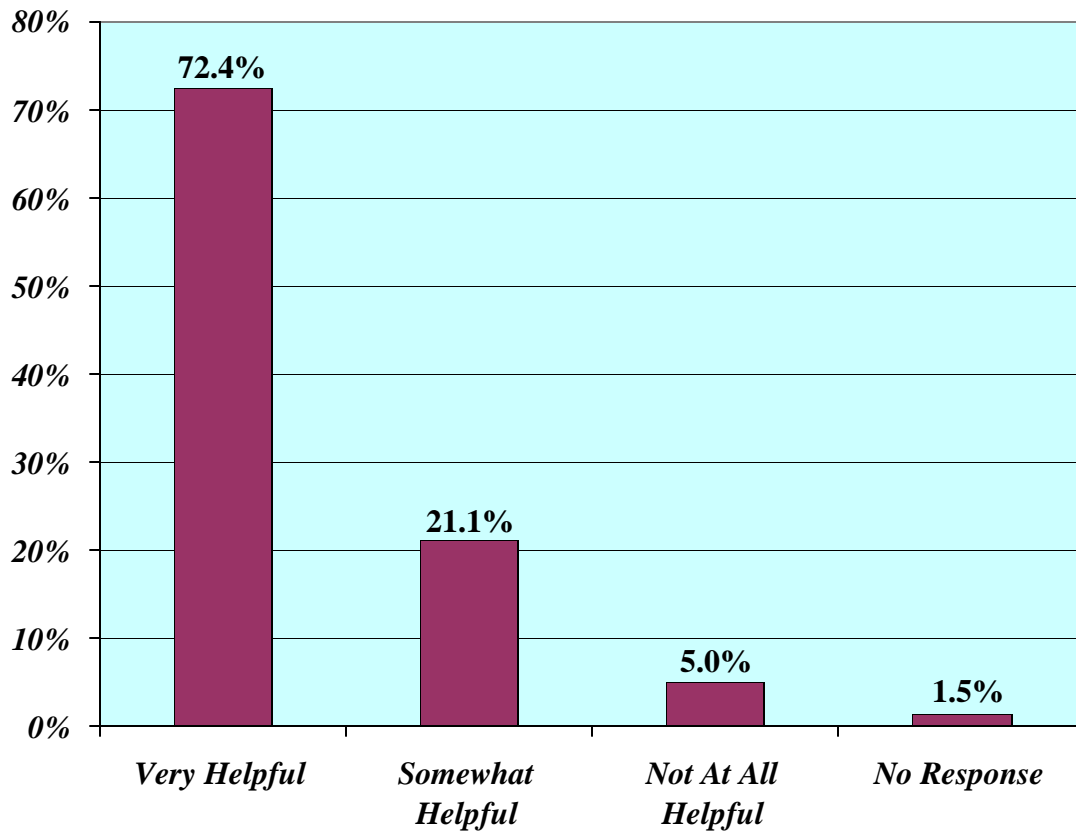
Each response to the mediation statement was broken down by demographic factors such as locality (urban/rural), gender, court involvement, age, education, race and income. All responses were basically even and didn't appear to be affected to any degree of significance by these demographic factors. Although the differences were very slight, more rural responders, more females, more of those who have experienced court involvement, more of those under the age of 35, more of those with less education, more African-Americans, and more of those with incomes less than \$25,000/year answered positively. In short, 486 out of the 551 citizens polled view mediation as a valuable service that should be provided by the courts.

Client Satisfaction

All certified mediators in Virginia are required to provide parties with an exit survey at the conclusion of each court-referred mediation. This information enables the Department of Dispute Resolution Services to monitor the quality of mediation services provided by certified mediators. Responses from these surveys are entered in a database in order to track client satisfaction with mediation. The graphs that follow depict the over 20,000 responses gathered to date and indicate clearly that parties appreciate mediation as a tool in resolving disputes.

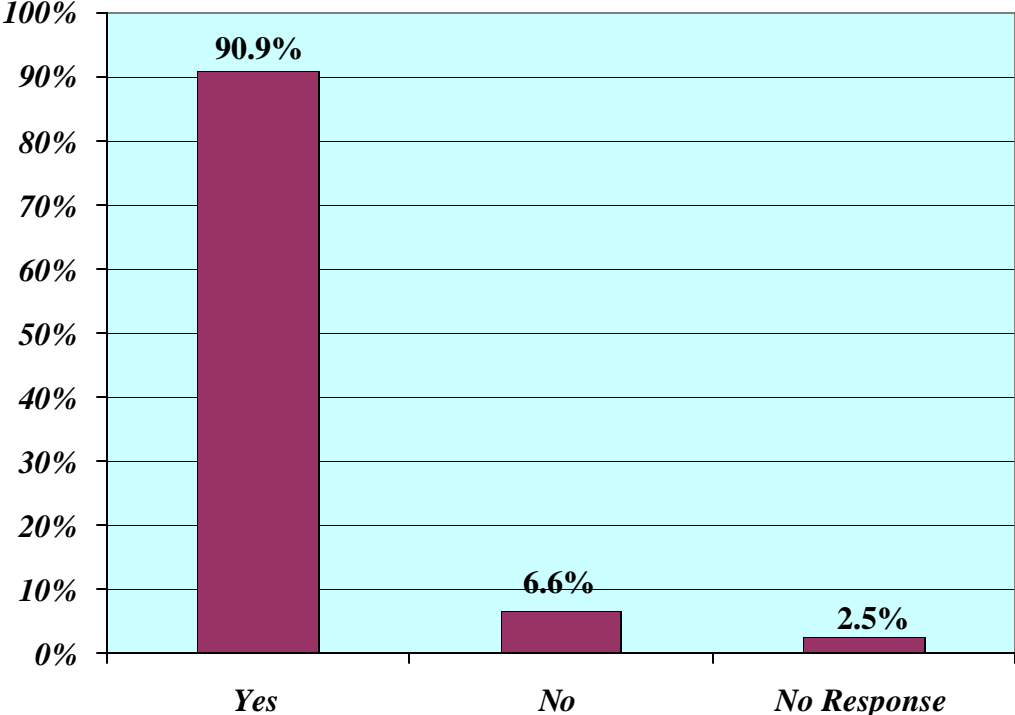
It is notable that 93.5 percent of parties surveyed state that the mediation process was helpful. The agreement rate in court-referred mediation cases is reported as 84.0 percent, indicating effectiveness in resolving disputes of many kinds of issues. When asked if the parties would use mediation again, 90.4 percent answered “Yes”. In response to the question, “Would you recommend mediation to others?” 93.9 percent of users responded affirmatively.

The Mediation Process Was:

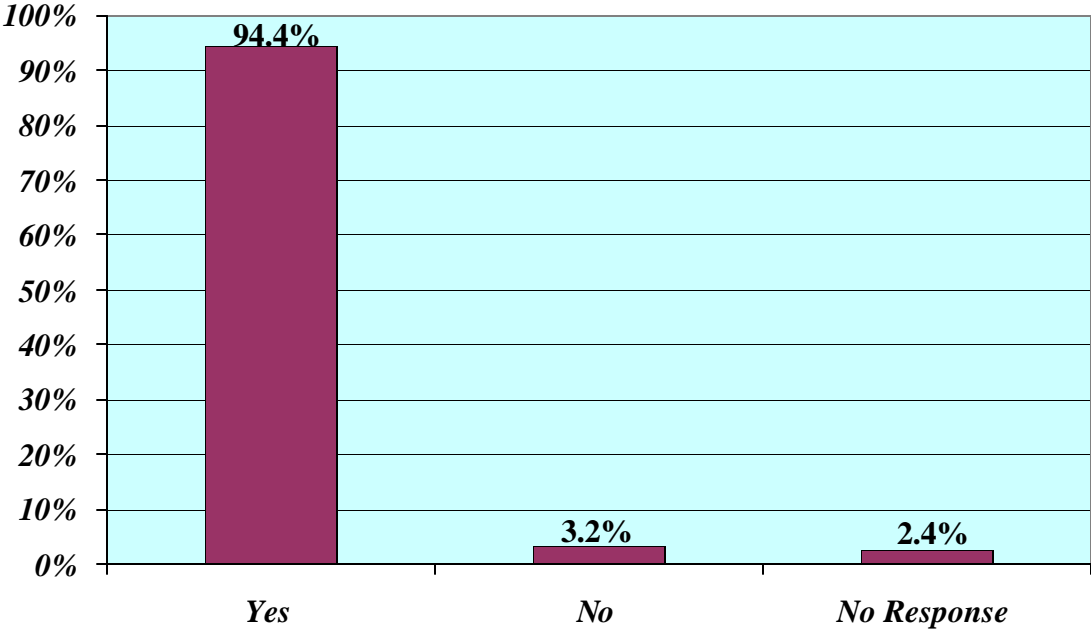


Summary: 93.5% Helpful

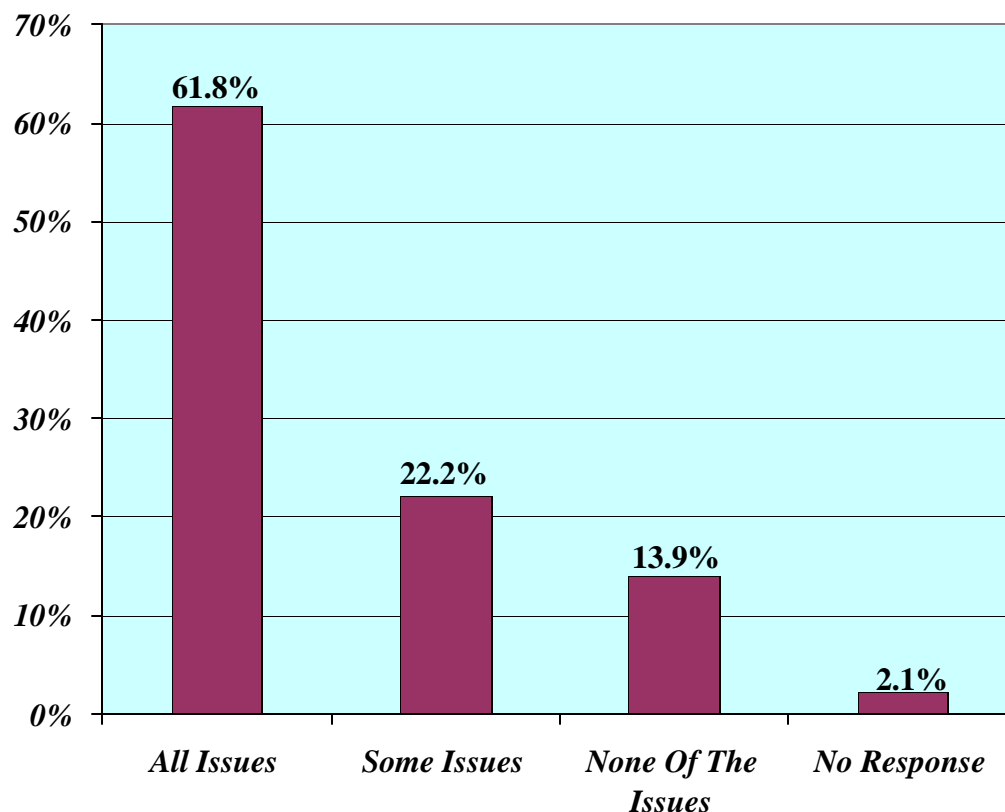
Would You Use Mediation Again?



Would You Recommend Mediation To Others?



Your Mediation Ended With An Agreement On:



Summary: Agreement Reached in 84% of Mediations

Complaint Process

In an effort to enforce the Standards of Ethics and Professional Responsibility for Certified Mediators and the Guidelines for the Training and Certification of Court-Referred Mediators, a procedure was developed by the Office of the Executive Secretary to address complaints against court-certified mediators.

The Department of Dispute Resolution Services reviews every Client Evaluation Form submitted and follows up on any negative evaluations of mediators by the parties to mediation. Likewise, any concerns reported directly to the Department by letter or telephone are given serious attention and the complaint procedures are applied. If the complaint involves a procedure that is a combination of mediation with another dispute resolution process, such as med-arb, the scope of review under these procedures is limited to the mediation portion of the proceeding. Also, the matter, which is the subject of the complaint, must be concluded before the complaint will be considered.

A Mediator Complaint Panel and a Mediator Review Committee work with the Director of the Department of Dispute Resolution Services and the Executive Secretary to review and address

complaints. The Mediator Complaint Panel's responsibility is to determine whether the allegations would, if true, constitute a violation of the Standards or the Guidelines. If their determination is that there would be no violation, the complaint is dismissed and no formal action initiated. If a complaint falls into this category but indicates there is a need for intervention or training, the letter notifying the mediator of the decision not to take formal action on the complaint may also suggest appropriate training or mentorship.

If the complaint would, if true, constitute a violation, a letter is sent to the mediator and copied to the complainant describing the Panel's concerns and allowing the mediator twenty days to respond. Upon review of the response, the Panel may either dismiss the complaint or the Director will further investigate the facts leading up to the complaint. Upon completion of the investigation, all findings will be shared with the Panel, whereupon they may determine that a facilitated meeting to allow the complainant and the mediator an opportunity to meet and discuss the issues would be appropriate. If such a meeting is not appropriate, if either party chooses not to participate, or if the meeting does not result in a satisfactory resolution of the matter, the Panel forwards the investigation results to the Review Committee.

The Review Committee will then conduct an informal proceeding within sixty days at which time the parties will have the opportunity to present witnesses, documents and other information in support of their position. Parties may be represented by counsel but the focus will be on dialogue with the parties themselves. The Committee will issue a written decision within 15 days after the hearing, informing the complainant and the mediator either that the matter is concluded without formal action or that they are imposing a range of selected sanctions on the mediator. Those options include: sending a formal letter identifying the corrective action necessary; notifying the dispute resolution center, court service unit, or other entity with whom the mediator is affiliated of the complaint and its result; requiring one or more consultations or co-mediators with a "mentor" selected from the list maintained by the Review Committee; requiring some form of group or individual training; or decertifying the mediator.

If the complaint is dismissed, at any point in the process, the complainant may request review by the Executive Secretary. The Executive Secretary may uphold dismissal or reopen the complaint to be reconsidered by the Committee. Likewise, if the complaint is found to have merit, the mediator has the right to make a written request for appellate review by the Executive Secretary. The decision of the Executive Secretary in these matters is final.

In the twelve years since the establishment of the Department of Dispute Resolution Services, approximately fifty-five informal complaints related to mediator misconduct have been received through letters, phone calls and exit surveys. Of those fifty-five complaints, there have been eight formal complaints and two appeals to the Executive Secretary.

The kinds of accusations involved in these complaints include perceptions of the following:

- ❖ lack of neutrality
- ❖ mediator allowing party to be cheated
- ❖ parties being rushed into a decision
- ❖ mediation being used as a cheap discovery tool
- ❖ not being permitted to express personal concerns
- ❖ parent not being notified that child met with mediator earlier
- ❖ unauthorized practice of law

- ❖ counseling rather than mediation being offered
- ❖ being given the impression they could not see a lawyer and that it was against the law to impede mediation
- ❖ mediator was flirting with party
- ❖ domestic violence issues ignored
- ❖ child support guidelines not completed in the presence of the parties
- ❖ mediator made statement that “the state frowns on sole custody”
- ❖ feeling pressured into agreement
- ❖ mediator not believing party and changing his words around against him
- ❖ mediators being harsh, threatening, intimidating, judgmental and abusive
- ❖ mediator acting as judge rather than conducting a facilitative mediation, working with the attorneys rather than the parties
- ❖ mediator misguiding parties with regard to the court’s procedures
- ❖ mediator showing bias and lack of objectivity
- ❖ betrayal and having been misled on financial issues
- ❖ mediator failing to describe mediation process, confidentiality, voluntary, etc.
- ❖ concern that mediator talked to party’s spouse prior to mediation
- ❖ not having received a copy of the agreement after the mediation
- ❖ mediator’s failure to facilitate a positive discussion
- ❖ discrimination and being offended by the mediator
- ❖ breach of confidentiality
- ❖ mediator doing most of the talking; lack of interaction and productive discussion
- ❖ failure to conduct separate orientation session
- ❖ mediator suggesting solutions to the problems and obligating parties not present
- ❖ mediators caucusing with the other party longer
- ❖ party’s concerns were not a priority; mediator just wanted an agreement
- ❖ being pressured to put discussion on paper

Several of the fifty-five complaints did not involve a mediation but were related to mentoring and training situations. The Department of Dispute Resolution Services addressed all formal and informal complaints in a manner that was considerate and responsive to the complainants’ needs as well as instructive and useful to the mediators involved. The fact that there were only eight formal complaints over the period of twelve years with over 1000 certified mediators is quite remarkable.

Judges’ Perspective

In an analysis of the 2003-2004 responses to the Request for Proposals (RFP’s) submitted by mediation centers as well as individual mediators throughout the Commonwealth for grant funds from the Supreme Court of Virginia, participants attached letters of reference from their respective area judges. These letters included comments with regard to mediation services being offered in their courts.

The Office of the Executive Secretary received 89 letters of reference from Judges at all levels of court around the Commonwealth. 41.6 % of the responses were from judges and court personnel in the Juvenile and Domestic Relations District Courts, 30.3% from the Circuit Courts, and 28.1% from the General District Courts. Responses indicated that collaboration with mediation providers was proving to be extremely effective in serving the needs of the courts and litigants. The judges’ comments indicated overwhelming support for continued funding of

mediation contracts, both for mediation services and for mediation coordinators in the courts under their jurisdiction.

From one satisfied judge, we read, *“The . . . Center does an outstanding job and provides an invaluable service to the General District Court. This court could not function nearly as effectively in handling our civil docket without your continued effort to assist and guide the litigants to a satisfactory resolution of their problems.”*

One benefit that was recognized was the positive effect that mediation has on enabling clients' cases to receive prompt scheduling, and many expressed appreciation for the way mediation has reduced their court's caseload. Judges noted the importance of educating parties about the mediation process before they appear in court. They expressed their desire to have mediators available for screening and consultation with the parties at or before their initial court appearance due to the fact that the first hearing is sometimes two or three months after the petition or motion to amend is filed. Mediators throughout the Commonwealth are making concerted efforts to educate the community about mediation through initiatives such as educational displays at the local courthouse.

Along with finding mediation to be an effective tool for resolving custody, visitation and child support issues, there is also an outgrowth of support for newer services within districts, such as truancy mediation, which is seen to provide a benefit not only to the courts but also to the schools and families. An interest was expressed in the exploration of expanding mediation services to child dependency matters.

A J&DR judge writes, *“I am confident that mediation is an essential tool for the court to have as we try to achieve permanency for children as quickly as we can. . . . The value of ADR and in particular mediation is uncontroverted. What we need to be able to do is to help the lawyers involved in this work understand that value.”*

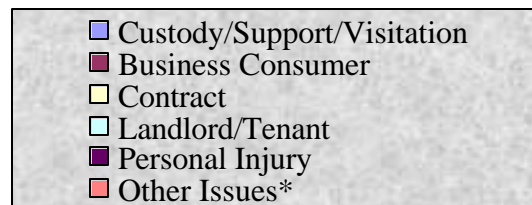
Quality mediators and coordinators have brought great credibility to the field of mediation in Virginia. In areas where new mediation programs have been implemented, mediators have assisted with information regarding procedures in other jurisdictions, information on the many facets of mediation, and proactive suggestions to enhance mediation services around the state. Numerous letters of recommendation noted the positive working relationship that mediators have with the judges and the clerks' offices and their ability to be responsive to the courts' needs. This display of professionalism, coupled with the ability to produce successful results as an alternative to litigation, has allowed for mediators' work to become well known and also allay previous hesitations with regard to the usefulness of mediation.

One J&DR judge readily admits, *“I was skeptical of the usefulness of mediation until convinced otherwise by the remarkable, successful results obtained by the mediators [our coordinator] hired. Her people are reliable and talented, and I am well satisfied with their work.”*

The compilation of feedback provided by the judges shows that mediation services in the courts have proven to be a valuable alternative for dispute resolution and that mediation will continue to receive strong support by judges and court personnel as a powerful resource. One northern Virginia circuit court judge sums it up very succinctly, *“I intend to continue referring as many cases as possible since I believe it is really the best way for parties to settle their differences.”*

Case Statistics

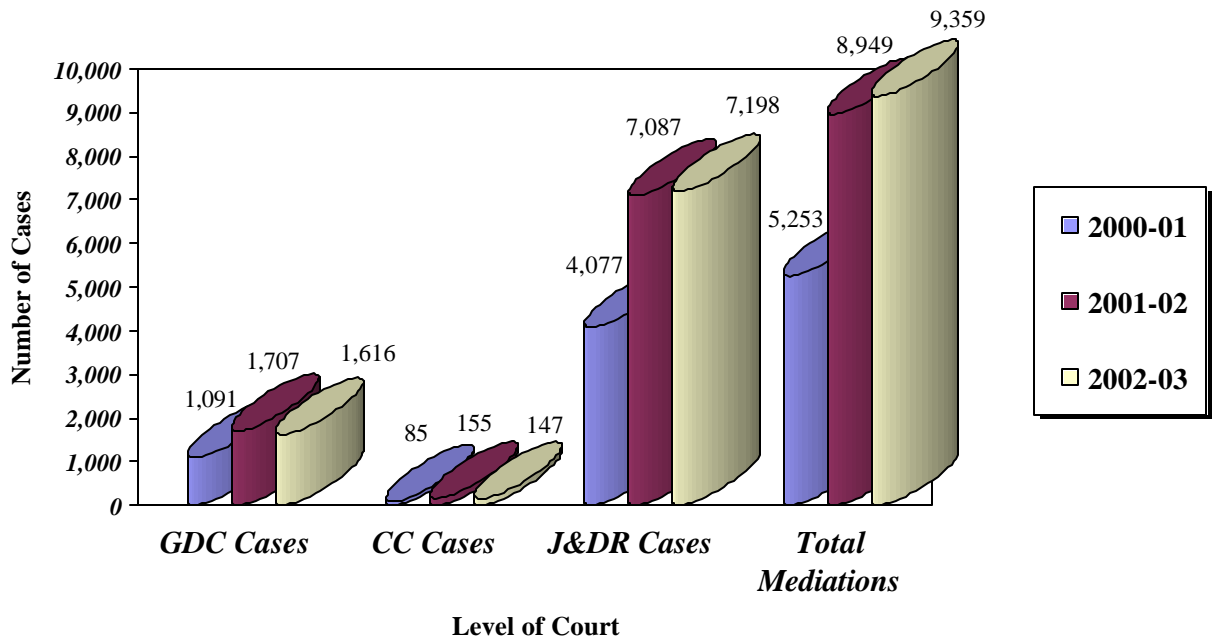
Since the inception of the Mediator Information System on the court's website, we are better able to track valuable information regarding the mediations being done in our courts. For example, mediators entering data after each mediation are asked to indicate the type of dispute mediated by choosing one of several categories. The following chart illustrates the breakdown of the cases entered to date in MIS.



Note that a rather large percentage (13%) of these cases were categorized as "Other Issues". The most predominant types of cases being entered by MIS users into the "other issues" category are: auto accident, CHINS, criminal, debt, equitable distribution and spousal support, employment, neighborhood, paternity, personal property, show cause, truancy, and unlawful detainer. While several of these types of cases have recently been added to the MIS options, this chart indicates the need to consider adding several more. It is interesting to note that more than half (64.37%) of the cases reported are custody, visitation and support (CVS) mediations.

Graphs in the latter portion of this article illustrate that J&DR District courts are referring many more cases to mediation than the General District and Circuit Courts at this point in time. It is clear, however, that each year more of the non-CVS cases are receiving referral to mediation. The next graphic depicts a three-year summary of the numbers of court-referred mediations in each level of court. As the key explains, the statistics cover the fiscal years of 2000-2001, 2001-2002, and 2002-2003. **Please note that the 2002-2003 figures are incomplete in that we could only include cases invoiced and paid through mid-June, the time of the posting of *Resolutions* to our website. We anticipate a considerable increase in the volume of cases by close of the fiscal year.**

3-Year Summary of Court-Referred Mediations



It is also useful to see where the mediations are being done in Virginia. The maps that follow illustrate how each court in the state is doing in terms of referring its cases to mediation. We want to express our special appreciation to Dr. Cyril Miller of our Department of Judicial Planning for his invaluable assistance in the color-coding of these maps.

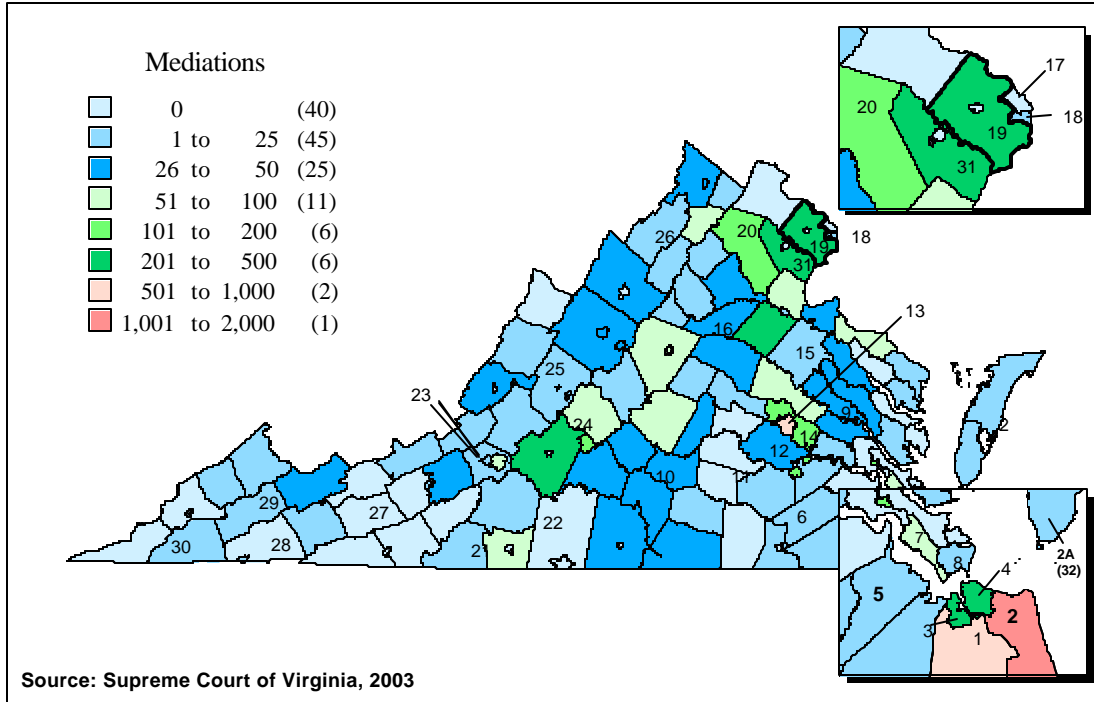
The first map on the following page depicts the number of custody, visitation and support cases mediated in each court thus far for the 2002-2003 fiscal year. Again, these figures are incomplete because they report only those cases invoiced through mid-June.

The second map shows the total number of custody, visitation and support cases mediated in each court since the amendment to Section 20-124.4 (SB 127) took place in July 2000, which provides for payment in the amount of \$100 for each custody, visitation and support case mediated. These figures include 2000-2003 (through mid-June of 2003).

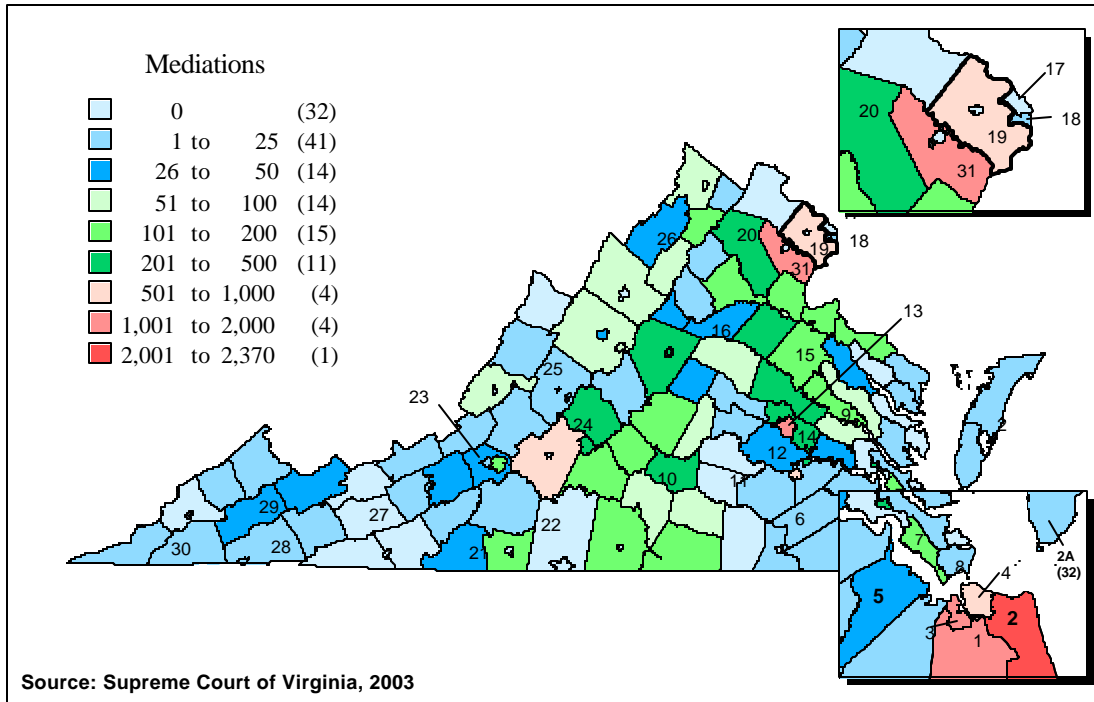
Map #3 illustrates the number of cases mediated in each court under the mediation services contracts awarded annually to mediators and mediation centers. These cases include non-CVS cases in J&DR District Courts and well as cases in General District Courts and Circuit Courts.

The final graph below shows the amount of expenditures for mediation services in the courts over a period of nine fiscal years, 1994-95 through the current 2002-2003 fiscal year. Again, please keep in mind that the figures for this year are incomplete as they only include cases invoiced and paid through mid-June.

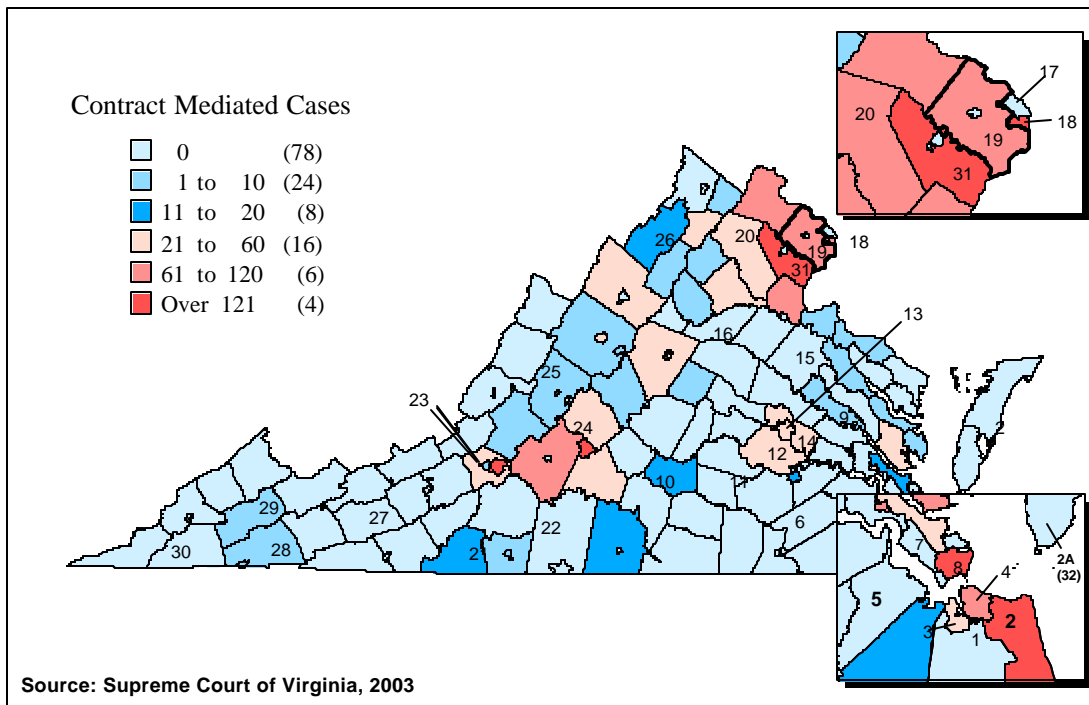
Custody, Visitation and Support Mediations, FY 2002-2003



Custody, Visitation and Support Mediations, FY 2000-2003

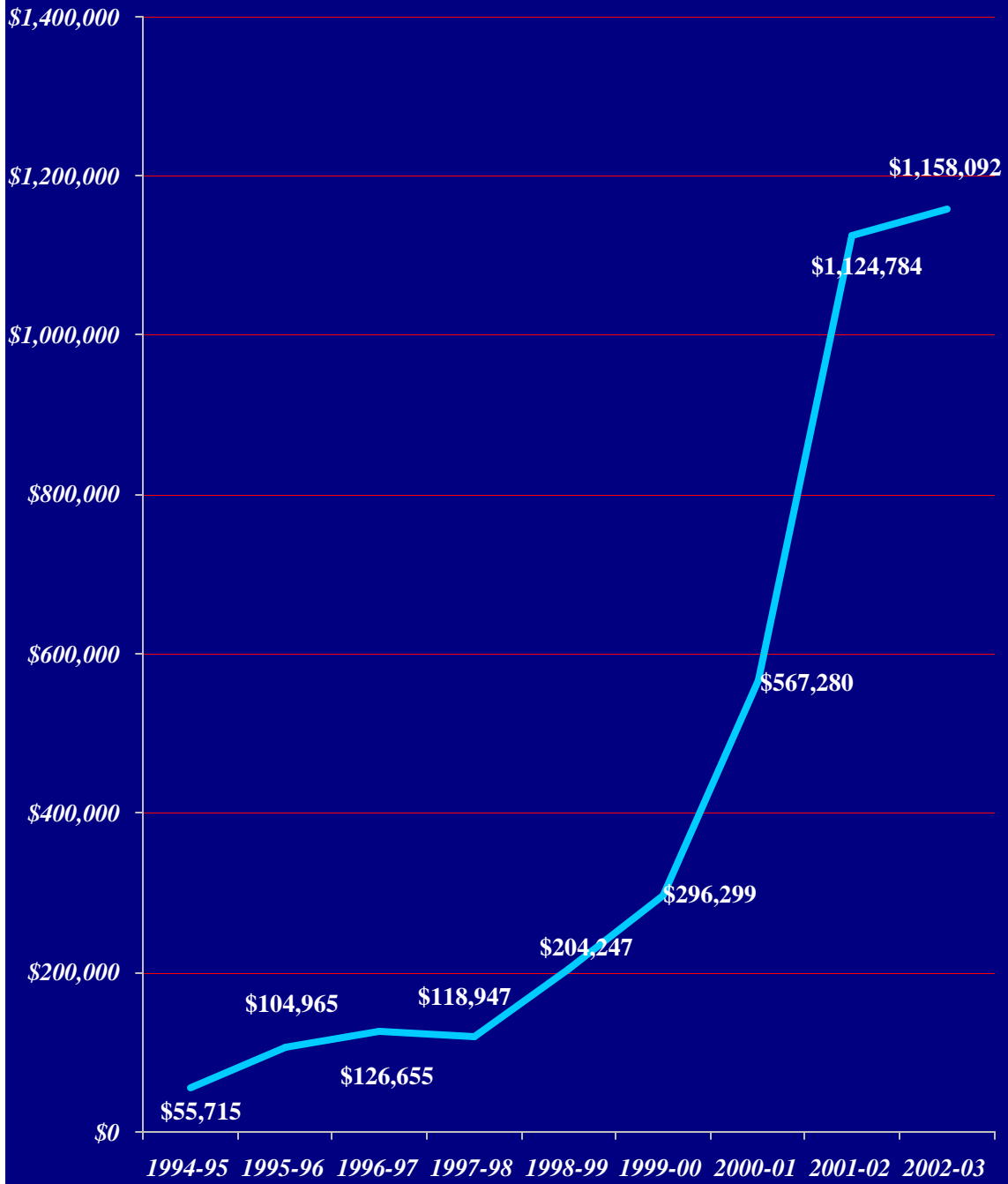


Cases Mediated Under Contracts, FY 2002-2003



The final graph below shows the amount of expenditures for mediation services in the courts over a period of nine fiscal years, 1994-95 through the current 2002-2003 fiscal year. Again, please keep in mind that the figures for this year are incomplete as they only include cases invoiced and paid through mid-June.

Mediation Expenditures By Fiscal Year



It is exciting to see the steady growth of mediation in Virginia, and we look forward with enthusiasm to the years ahead in this expanding field. With this development, we will also continue to strive for excellence and to provide the highest quality services to the courts and the citizens in Virginia.