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Eviction Prevention Through Hawai'i's Tenant-Landlord Mediation Program

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Hawai'i Appleseed envisions a Hawai'i that puts its people first—a Hawai'i where everyone can meet their basic needs while living happy, healthy and creative lives. We advocate for economic justice for and with Hawai'i's people.

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EXECUTIVE SUMMARY

EVICTIONS ARE HARMFUL for everyone involved. Landlords and tenants both want stability in housing arrangements. For landlords, the process of eviction and finding new tenants is costly. For tenants and their families, the costs are even higher: A forced move may mean the loss of their security deposit and belongings, a change in schools, a longer commute to work, and a negative mark on their rental history that can make finding suitable housing more difficult. For some tenants, eviction will result in homelessness. Finding ways to increase housing stability by resolving disputes between landlords and tenants benefits everyone.

This study aims to ascertain whether or not there are ways to increase housing stability by examining the temporary measures Hawai'i put into place in response to the COVID-19 pandemic. To avoid the threat of mass evictions brought on by large scale job loss, Hawai'i created rent relief programs that helped tenants and landlords cover rent shortfalls, and created a pre-litigation mediation program through enacting Act 57 (2021), which is the primary focus of this study.

The unique circumstances created by the pandemic permitted the examination of three different mediation programs that varied with respect to timing of the mediation (pre-litigation versus post-case filing), duration of mediation, availability of rental relief, use of video conferencing, and other factors. To better understand the comparative outcomes of the different approaches to landlord-tenant mediation, the research team for this study analyzed data on the outcomes from these three different approaches. Additionally, the team conducted 20 one-on-one interviews with attorneys, tenants and mediators involved in the Act 57 mediation program to better understand the participants' perceptions about the mediation process.

The analysis revealed that Act 57 pre-litigation mediations had far higher rates of success when compared to the other two programs, both of which held the mediation post-filing of an eviction action (known as "summary possession" in Hawai'i and elsewhere)—one in effect prior to the pandemic and the other during. Within the samples reviewed for the study, 87 percent of the Act 57 cases resulted in settlement compared to 47 percent of pre-COVID summary possession mediations and 52 percent for the summary possession meditations during COVID.

More significantly, of the mediated settlement agreements reviewed for the study, 85 percent of Act 57 cases resulted in the tenant remaining in their home, which only occurred 11 percent of the time in the pre-COVID summary possession settlements, and 20 percent of the time in the summary possession settlements during COVID.

The outcome data, coupled with the participants' perceptions, suggests the following insights:



Kailua, Hawai'i
// Brian Garrity

- The availability of rental relief is a key factor to ensuring housing stability, but combining rent relief with a robust pre-litigation mediation process is likely to lead to significantly better outcomes than rent relief alone.
- Holding mediation prior to litigation rather than during is likely to help mediation participants avoid an eviction filing and from developing entrenched positions, which can reduce the pressure on tenants to accept settlements that require them to move out, increasing the likelihood of tenants remaining in place.
- Mediation by video conferencing may provide tenants with more comfort and confidence than they would have in an intimidating court environment, placing the parties on a more even field, even if the landlord is represented by counsel at mediation.
- Providing adequate time to mediate may alleviate pressure to rush to a settlement, and contracting paid mediators who are skilled at finding solutions that are mutually beneficial to the needs of both landlords and tenants may increase the likelihood of agreements that permit tenants to stay in their home.

Based on these insights, this report recommends that the Act 57-type mediations be continued in a manner that permits further study of the efficacy of its features, and that the mediation program be paired with emergency rent relief that is more widely available than what existed pre-pandemic.

BACKGROUND

During the pandemic, Hawai‘i—as in other states—saw many of its residents lose their jobs, or incur other economic hardships as a result of COVID-19. A moratorium on evictions for failure to pay rent was issued by the governor, which was extended several times.¹

The state and its counties used federal pandemic-relief funds to create a rental and utility relief program to assist tenants who were unable to pay their rent due to loss in income, and to help avoid a loss in income for landlords and utility providers relying on tenants’ payments. The program for the City & County of Honolulu—Hawai‘i’s most populous county, from which the data for this study was collected—ultimately approved relief of over \$188 million for 14,651 households.²

The specific requirements for the rent relief program evolved during the course of the pandemic, but the program generally required proof of a valid tenancy, rent delinquency, loss of income due to Covid-19, and a gross household income not exceeding a certain threshold (80 percent of the HUD Area Median Income in the most recent iteration of the program). Payments through the program were made directly to the landlord. Landlords who evicted tenants would forgo their ability to receive any rent from the Program.


Applications could be initiated either by the tenant or the landlord through an online portal, after which contracted community-based organizations would work with the landlord and tenant to complete the application.³ Due to the high volume of applicants and the time-intensive nature of processing the applications because of documentation and other requirements, it took many months to get the rental relief into the hands of all the landlords and tenants who requested it.

THE ACT 57 MEDIATION PROGRAM

In anticipation of the end of Hawai‘i’s eviction moratorium in August of 2021, the state passed Act 57 (2021), establishing a landlord-tenant mediation program for the purpose of preventing an onslaught of evictions for tenants who had fallen behind on rent.⁴ As noted by Hawai‘i’s legislature in the bill, at the time, tens of thousands of residents were still unable to pay rent due to pandemic-related job loss, many of whom had not yet been able to access the available rental relief.⁵

Act 57 created a temporary pathway for landlords and tenants to mediate in lieu of litigating an eviction case in court.⁶ Under the Act 57 program, before landlords could file a summary possession action due to non-payment of rent, they were required to provide tenants with notice of the opportunity to schedule a mediation session within 15 days from the date of the notice. In the City & County of Honolulu, the landlord was also required to submit the notice to the Mediation Center of the Pacific (“MCOP”), the entity hired by the county to carry out the mediations under Act 57.

The landlord could not proceed with a summary judgment action for 30 days from the date they provided



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Hawai'i //
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notice to MCOP, which would allow the mediation to take place before the landlord could pursue legal action. If the tenant opted-in to mediate the dispute, MCOP would schedule a free 1.5 hour mediation session for the landlord and the tenant, facilitated by a trained and seasoned mediator.

MCOP accepted 75 applications and interviewed 35 people, hiring 15 mediators as independent contractors. All 15 contractors were seasoned mediators with private practices who had experience in the landlord-tenant arena, and who were available and willing to mediate 4–6 cases a day, six days a week. They were selected based on criteria such as their understanding of effective management of power imbalances, their sensitivity to working with different cultures, and experience working with interpreters. As independent contractors, they managed their own video conferencing accounts and sent the confidentiality agreement out to landlords and tenants, as well as reminders, thereby establishing a foundation of trust earlier in the process with both landlord and tenant.

THE PRE-COVID SUMMARY POSSESSION MEDIATION PROGRAM

Prior to the pandemic, Hawai'i already had a landlord-tenant mediation program in place. The existing mediation program differed from the Act 57 program in several ways, including:

- Mediations occurring after the summary possession court process was well underway (rather than prior to case filing under Act 57);
- The length of the mediation sessions (20–30 minutes versus 90 minutes under Act 57 mediations);
- Being required to make an in-person appearance in court (rather than using video conferencing in Act 57 mediations); and

BACKGROUND

- The use of volunteer mediators rather than paid professionals.

Another important difference, although not an explicit feature of the mediation program, was the availability of pandemic-response rent relief, which Act 57 mediators could refer the parties to—something that was not available pre-pandemic.

THE SUMMARY POSSESSION DURING COVID MEDIATION PROGRAM

Although the vast majority of mediations conducted during the pandemic were done through the Act 57 process, some were not. Landlords could file a summary possession action during the eviction moratorium if the grounds for eviction included allegations regarding a breach of non rent payment-related lease conditions, such as the tenant refusing to vacate the property after the landlord provided notice of their desire to sell.

In these circumstances, landlords were required to provide tenants with a 45-day notice of lease termination before filing a summary possession case with the court. In this way, even where non-payment of rent appeared to be a primary factor for the eviction, landlords could attempt to circumvent the moratorium by providing the 45 day notice and including allegations regarding grounds for termination other than non-payment of rent.

Cases that proceeded in this manner did not go through the Act 57 process. Instead, the Judiciary required the parties to participate in a mediation program that retained the post-filing/pre-trial timing of the pre-COVID summary possession mediation program, but adopted the other features of the Act 57 program (namely providing 1.5 hour mediations, and the use of video conferencing). Additionally, as with the Act 57 program, the landlords and tenants involved in summary possession mediations conducted during COVID had access to the large-scale pandemic rental relief program that was not available pre-COVID.

COMPARISON OF THE THREE MEDIATION PROGRAMS

Program	Pre-Litigation	Volunteer vs. Hired Professional Mediator	Time Allowed or Mediation	Availability of Rental Relief	Mediation Over Video Conferencing	Allegations by Landlord
Pre-Covid Summary Possession	No	Volunteer	20–30 Minutes	No	No	Non-Payment of Rent and/or Other
Act 57	Yes	Hired Professional	1.5 Hours	Yes	Yes	Non-Payment of Rent
Summary Possession During Covid	No	Volunteer	1.5 Hours	Yes	Yes	Non-Payment of Rent and/or Other

METHODOLOGY

To understand the comparative outcomes of the three different approaches to landlord tenant mediation analyzed by this study, the research team analyzed outcome data from the three different approaches and conducted interviews to gain insight into the perceptions of mediation participants.

QUANTITATIVE METHODS

The Mediation Center of the Pacific (MCOP) maintains a database of all the landlord-tenant mediations they conduct on the island of O’ahu, including the three approaches examined by this study. MCOP provided the research team with data on the following:

- All of the eviction cases mediated by MCOP from January 2019 to June 2019, totaling 92 cases (the “Pre-COVID Summary Possession Data Set”).
- All of the eviction cases mediated by MCOP from August 2021 to August 2022 under the Act 57 program, totaling 1,378 cases (the “Act 57 Data Set”).
- All of the eviction cases mediated by MCOP from August 2021 to August 2022 that were done outside of the Act 57 process, totaling 183 cases (the “Summary Possession During COVID Data Set”).

The data provided for each of the cases in the three datasets listed above indicated whether a settlement was reached, and it included limited demographic data such as the income and zip code of the tenant. Determining whether the settlements resulted in the tenant remaining in place required a review of the settlement agreements for each case. Because a review of all of the settlement agreements in all of the data sets was not feasible within the resources available for this study, samples from each data set were reviewed as follows:

- **Pre-COVID Summary Possession Data Set:** Of the 92 cases that were mediated, 43 settled. MCOP reviewed all 43 settlement agreements and provided the research team with data on which of the agreements resulted in the tenant remaining in place. Generally, all contested cases are sent to mediation by the judge before trial.
- **Act 57 Data Set:** Of the 1,378 cases that were mediated, 1201 settled. MCOP provided the research team access to a sample of 41 settlement agreements to determine in which cases the tenant remained in place. To obtain a geographically diverse sample, MCOP selected an even distribution of cases by zip code, but otherwise selected at random.
- **Summary Possession During COVID Data Set:** Of the 183 cases that were mediated, 96 settled. Using

METHODOLOGY



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// Will Caron

a selection process similar to the one used to generate the Act 57 sample of settlement agreements, MCOP provided the research team access to a sample of 31 settlement agreements to determine in which cases the tenant remained in place.

In addition to reviewing the settlement agreements to determine whether the tenant remained in place post-settlement, the review was used to determine the following:

- Whether the parties were represented by counsel;
- Whether rental relief was mentioned in the settlement agreement;
- Whether the agreement indicated the tenant would remain in place as an ongoing tenant; and
- Whether the agreement required the tenant to pay back all back rent;

The research team then used this data to examine the various factors that may have contributed to the differing outcomes under each of the three programs.

QUALITATIVE METHODS

To gain insights from the perceptions of program participants, a total of 20 interviews were conducted over the course of three weeks. Interviewees were all individuals who participated in mediations after August 2021 as follows:

- Six mediators (all of whom participated in the Act 57 mediation program);



- Two attorneys (one representing multiple landlords and one representing multiple tenants, both of whom participated in all three mediation program categories);
- 12 tenants (one of whom participated in the Summary Possession During-COVID mediation program; 11 who participated in the Act 57 mediation program);
- No landlords were interviewed because none responded to outreach efforts for the study.

All of the interviewees were identified by MCOP. The tenants who received outreach emails were selected at random. MCOP sent an email to an initial batch of 40 tenants, half of whom went through the Act 57 mediation program, and half of whom went through the Summary Possession During COVID mediation program. The initial batch of emails garnered eight tenant interviews. A second batch of tenants was emailed to secure an additional four tenant interviews.

MCOP reached out to all of the mediators that participated in mediations after August 2021, eight responded, and six were ultimately interviewed.

On O‘ahu, there are two attorneys that handle the vast majority of landlord representation in summary possession cases, and one attorney that handles most of the tenant representation (in the relatively rare instances where tenants are represented). One of the two landlord attorneys and the sole tenant attorney were interviewed.

All of the interviews were conducted by the same interviewer utilizing the same set of questions created for each category of interviewee.

INSIGHTS FROM A REVIEW OF THE DATA

OVERVIEW OF DIFFERENT OUTCOMES BETWEEN PROGRAMS

Based on a review of the data from the three different programs—Pre-COVID Summary Possession mediations, Act 57 mediations, and Summary Possession During COVID mediations—along with the review of the mediation agreements included in the samples, it is clear that the mediations conducted under the Act 57 program had overwhelming positive outcomes relative to the other mediation programs.

While dealing with 15 times the number of cases mediated pre-COVID, settlement rates were 40 percent higher under the Act 57 program. More importantly, of the cases that settled and that were reviewed for the study, the Act 57 program resulted in 74 percent more tenants remaining as ongoing tenants than in the pre-COVID sample.

Program	Number of Mediations	Number of Mediations that Settled	Percent of Mediations that Settled	Number of Settlement Agreements Reviewed	Percent of Reviewed Agreements that Results in Tenant Leaving Property	Percent of Reviewed Agreements that Results in Tenant Remaining as Ongoing Tenant
Pre-Covid Summary Possession	92	43	47%	43	89%	11%
Act 57	1,378	1,201	87%	41	15%	85%
Summary Possession During Covid	183	96	52%	31	80%	20%

When compared to the Summary Possession During COVID mediations, the Act 57 mediations retained much higher rates of settlement and housing stability for the tenants (87 percent of cases settled under Act 57 versus 52 percent under the Summary Possession During COVID mediations; 85 percent of settlements in the Act 57 sample resulted in the tenant remaining in place versus 20 percent in the Summary Possession During COVID sample).

Notably, there was a relatively small difference between the percentage of mediations that settled between the Pre-COVID Summary Possession and Summary Possession During COVID mediations (47 percent versus 52 percent). Additionally, of the settlement agreements reviewed from each of those data sets, there was a relatively small difference in the percentage of agreements that resulted in the tenant remaining in place (11 percent versus 20 percent).

In trying to ascertain the impact of rent relief, it is interesting to note that such relief was available to the participants of both the Act 57 and Summary Possession During COVID mediations, yet the outcomes were vastly different. The outcomes for the Summary Possession During COVID participants were only marginally better than the outcomes for the Pre-COVID Summary Possession participants despite the availability of rent relief for the former, but not the latter. Taken together, these comparisons suggest that the availability of rental relief, on its own, may have only a slight impact on mediation outcomes.

This does not mean the availability of rental relief is inconsequential. Indeed, information garnered from the data provided by MCOP and participant interviews demonstrates that rent relief was used frequently in the mediated settlements in which tenants retained their housing. Rather, the information considered for this study suggests that, to be effective, rent relief needs to be combined with other factors. One such factor is likely timing the mediation prior to the commencement of litigation rather than after—one of the primary differences between the Act 57 and Summary Possession During COVID processes. Another factor could be differences in the pool of mediators used for the different types of mediations.

JANUARY–JUNE 2019 PRE-COVID SUMMARY POSSESSION MEDIATIONS

To help establish a baseline of mediation outcomes, we reviewed data from a six-month period prior to COVID—approximately January through June of 2019. During this time period, 92 summary possession cases were mediated. Of those, 47 percent reached agreement, and of those cases agreed, 11 percent allowed the tenant to remain in the residence as an ongoing tenant. This means that 89 percent of settled cases still resulted in the tenant leaving the property. These mediations were conducted without any availability of rental assistance, as those programs had not been set up yet and COVID had not yet impacted the ability of tenants to pay rent. The settlement agreements did not contain enough information to determine if the case was brought due to non-payment of rent, other reasons, or a combination of the two.

JUNE 2021 TO AUGUST 2022 SUMMARY POSSESSION DURING COVID MEDIATIONS

We reviewed data and settlement agreements from June 2021 through August 2022 for cases that were referred to mediation by the court after landlords initiated a summary possession case. These cases avoided the Act 57 requirement of pre-litigation mediation by alleging lease violations in addition to non-payment of rent.

Other than the route by which these cases arrived in mediation, the most significant differences between the Act 57 mediations and the During-COVID Summary Possession Mediations were the timing of the mediations (pre-litigation versus mid-litigation) and the pool of mediators conducting the mediations (paid professional mediators versus volunteers).

DATA INSIGHTS



During this time period, 183 summary possession cases were mediated. Of those, 52 percent reached agreement. Of the 31 settlement agreements reviewed in this category, 20 percent of the agreements allowed the tenant to remain in the residence as an ongoing tenant. This means that 80 percent of settled cases still resulted in the tenant leaving the property, slightly less than the 92 percent of Pre-COVID Summary Possession settled cases in which tenants moved out.

In the sample of settlement agreements reviewed under this category, landlords were represented by counsel 54 percent of the time. Tenants were represented by counsel less than 1 percent of the time.

	Number of Mediations	Number of Mediations that Settled	Percent of Cases that Settled	Sample Size of Cases Reviewed	Percent of Settled Cases that Resulted in Tenant Leaving Property	Percent of Settled Cases that Resulted in Tenant Remaining as Ongoing Tenant	Percent Landlords Represented by Counsel	Percent Tenants Represented by Counsel
2021	94	46	49%	18	72%	28%	61%	<1%
2022	89	50	56%	13	92%	8%	46%	<1%
Combined 2021 and 2022	183	96	52%	31	80%	20%	54%	<1%



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(O'ahu),
Hawai'i // Jess
Vide

JUNE 2021 TO AUGUST 2022 ACT 57 MEDIATIONS

We reviewed data and settlement agreements from June 2021 through August 2022 for the Act 57 cases. Under Act 57 during this time period, 1,378 mediations were conducted. Of those, 87 percent reached agreement. Of the 41 settlement agreements reviewed in this category, 85 percent of tenants remained in the home. All of the agreements noted that the tenant would repay all back rent owed, with 66 percent of the agreements explicitly noting that rental assistance would be used to do so. In this sample, 5 percent of landlords were represented by counsel and none of the tenants were.

	Number of Mediations	Number of Mediations that Settled	Percent of Cases that Settled	Sample Size of Cases Reviewed	Percent of Settled Cases that Resulted in Tenant Leaving Property	Percent of Settled Cases that Resulted in Tenant Remaining as Ongoing Tenant	Percent Landlords Represented by Counsel	Percent Tenants Represented by Counsel
2021	447	392	88%	20	15%	85%	0%	0%
2022	931	809	87%	21	14%	86%	9%	0%
Combined 2021 and 2022	1,378	1,201	87%	41	15%	85%	5%	<1%

INTERVIEW INSIGHTS

MEDIATORS

Of the six mediators interviewed, one resides in Hawai'i and the other five reside in the Continental United States. The mediators interviewed for this study were screened and hired specifically to participate in the Act 57 mediation program. They did not participate in either the Pre-COVID Summary Possession or Summary Possession During COVID mediation programs, which each utilized local volunteers who conducted mediations at court. Because of this, we were unable to compare mediator perspectives across the different programs.

Each mediator interviewed noted that they had conducted approximately 100 mediations. Each mediator reported a settlement rate of between 85 and 95 percent, and most recalled that in at least 90 percent of the settled cases, the tenant was allowed to remain as an ongoing tenant. These recollections were consistent with the data provided by MCOP and the sample of mediation agreements reviewed.

The mediators noted that they had direct access to those administering rental relief, so they were able to find out where the tenant was in the application process, whether they had been approved and were just awaiting funds, and whether tenants could still apply for rental assistance. All of the mediators who were interviewed conducted their mediations over video conferencing, and noted that a few participants logged in from the Mediation Center of the Pacific, but most participants logged in from their home or other personal location. The mediators felt that video conferencing was instrumental in helping tenants to speak more freely, because they were in a comfortable location, and they were not physically present with the landlord. Several mediators noted that some of the participants also turned their camera off, which allowed them to speak more freely and more comfortably.

Some mediators utilized joint sessions over video conferencing, while others primarily separated the parties. This seems to have been largely a choice of personal style by the mediator and does not seem to have contributed to the success rate of settlement or keeping tenants in place. Mediators reported no issues using video conferencing.

Several of the out of state mediators participated in both Hawai'i's Act 57 mediation program as well as mediation programs in their home state. For those who did both, they all noted that Hawai'i's program was better than the program in the state they were in, specifically because of the access to rental relief and the relatively high frequency of mediations they conducted on a regular basis. They felt that having a constant stream of mediations allowed them to become experts in how the Hawai'i mediations could be resolved using Hawai'i's rental relief program.

In discussions with the Executive Director of the Mediation Center of the Pacific, she noted that she

specifically hired mediators who she felt, through discussion and interviews, would be skilled at initially helping the tenants and landlords view each other as individuals with mutual financial challenges created by the outstanding rent owed by the tenant. She felt this skill would promote greater creativity in negotiations that would enable the tenant to remain in the residence while meeting the financial needs of the landlord. She noted that this approach may be different from the pre-COVID, 20-minute summary possession mediations, which she believed were often primarily focused on how much a tenant could pay and when they would move out.

All of the mediators felt that rental relief was the primary contributor in being able to settle so many cases with tenants being able to remain in place as ongoing tenants. Although the majority of settlements included a component of rental relief, there were still a significant number of settlements that did not explicitly reference rental relief but included a payment plan to catch the tenant up on back rent.

Mediators were asked about the time they had to conduct mediations. The 1.5 hours allowed (and sometimes multiple sessions) is a dramatic increase from the 20–30 minutes allowed in Pre-COVID Summary Possession mediations. Mediators felt that the time given was a reasonable amount. They reported that some mediations were able to be settled more quickly than the time allotted, while some required an additional session.

ATTORNEYS

There are very few attorneys on O‘ahu who represent residential landlords and tenants in eviction-related disputes. Two attorneys were interviewed for the study: an attorney who represents many landlords and an attorney that represents many tenants. The attorneys interviewed had experience with all three of the mediation programs examined in this study, though most of their experience was with the Pre-COVID Summary Possession mediations, followed by the Summary Possession During COVID mediations. The tenants’ attorney noted that in many of the Act 57 mediations, his office provided general advice to tenants but did not represent them at the mediations.

Both attorneys thought that pre-trial mediation would be a positive for all sides. Each recognized the different mindset that a landlord is in once litigation has been initiated and they have begun to incur its financial costs.

The landlord attorney’s main concern with a pre-trial mediation program was that the process needed to be efficient with less return to court dates. He noted that, during COVID, due to the number of appearances required before finally going to trial, the cost to evict a tenant nearly doubled. He believed that because of these extra costs and the time lost, once a landlord went down this road, they were adamant about eviction, and a settlement in which the tenant remains in the unit is less likely. The delays could be attributed to the backlog of cases/mediations that backed up during the eviction moratorium, and an ongoing program would hopefully not see the same delays.

Additionally, if a pre-litigation program is put in place, landlords and tenants could avoid return to court dates entirely, because no summary possession case would have been filed before the mediation took place.

INTERVIEW INSIGHTS



The landlord attorney also expressed concern about the time it could take to get to mediation. He believes it is important that mediations are scheduled and occur quickly once the parties agree to the process. If the mediation does not occur quickly, he believes it will deter landlords from agreeing to take part as they seek quick resolution of their dispute.

Both attorneys reported no issues with using video conferencing for mediations, and said that they actually preferred using it because of its convenience. The landlord attorney commented that he felt that video conferencing mediation reduced some of the leverage or advantage he and the landlord might otherwise have at court, because there is an intimidation factor for tenants going to court. He noted that if a tenant goes to court, the judge explains the situation to the tenant, sends them to a mediator, and the tenant is usually “beaten down” so they end up going along with whatever is suggested. There might be some discussion over when they can leave, but the discussion is more of “when they will leave” and not “if they will leave.”

In the context of litigation, the tenant often has little option but to settle and voluntarily leave or else return to court where the judge will likely rule against them anyway. This might explain why several of the settlement agreements from the Summary Possession During COVID mediation sample resulted in settlements where the tenant agreed to leave and agreed to pay the outstanding rent.

The tenant attorney remarked that it was a benefit to use paid mediators who focused on trying to keep

tenants in place. Similar to the views of the landlord attorney and the MCOP executive director, the tenant attorney believed that, due to the short amount of time available for volunteers to mediate summary possession cases, there seems to be a focus on reaching agreement on when the tenant can move out instead of trying to mediate a solution where the tenant remains in the unit and stays on as a tenant.

TENANTS

Twelve tenants were interviewed for this study. One of the tenants participated in mediation as part of the Summary Possession During COVID mediation program, while the rest of the tenants interviewed were part of the Act 57 program. Only two of the 12 tenants interviewed left the property as part of the settlement, one of whom was the tenant that went through the Summary Possession During COVID program. Ten of the 11 tenants interviewed who went through the Act 57 program remained in place as ongoing tenants with some agreement to pay back rent through either rental assistance or through a payment plan.

All of the tenants reported that their mediation was over video conferencing and that video conferencing was easy to use. Only one of the tenants went into the mediation center to use a computer there, while the rest logged in from home. The majority of tenants indicated they used their cell phone. Only one tenant indicated a brief issue with the technology, which was solved by logging out and logging back in.

Two of the interviewees reported slight difficulties in getting the mediation scheduled or a lack of response, while the rest applauded the ease of the process.

Two of the participants had heard of the program through news sources. Four heard about the program from their landlord. One was sent to mediation from the court. The rest of the tenants heard about the Act 57 program for the first time in the notice they received informing them of their right to mediate before the landlord could file a summary possession action.

All of the tenants interviewed reported that this was their first time mediating and that their mediator was skillful. All felt they could speak freely because they were more comfortable speaking over video conferencing rather than in court and in the same location as the landlord. Some tenants were told the mediator was from out of state, but they did not think it had any effect on the outcome of the mediation. Most of the tenants utilized rental assistance to make up any back rent. The few that did not agreed to use some form of payment plan to catch up.

None of the tenants interviewed were represented by counsel. Although not represented at mediation by counsel, several of the tenants interviewed noted that they had spoken with an attorney for some advice before the mediation. A few reported that the landlord had an attorney at the mediation and “he did all the talking.”

Most of the tenants noted that they understood where their landlord was coming from and understood that the landlord was out of money and they did not hold it against them that they got a notice to be evicted. They were glad the process existed so they could talk and try to work it out. Eleven out of 12 of the tenants interviewed reported that the mediation was over quickly, in under 40 minutes.

ANALYSIS OF THE POTENTIAL IMPACTS OF EACH FACTOR

PRE-LITIGATION MEDIATION

In Hawai'i, and around the country, mediations in eviction cases typically take place after a case has been filed.⁷ Day-of-trial mediation programs have been found to be associated with reductions in eviction or a mitigation of their consequences.⁸ Yet some studies suggest that pre-litigation mediation may be even more effective.

In one such study in which mediation providers were interviewed, the providers believed that offering mediation to the parties before an eviction is filed is advantageous to all parties.⁹ The study points out that pre-litigation mediation may be better at resolving disputes because parties tend to harden their positions once they get to court, especially as costs associated with litigation mount.¹⁰

Another examination of mediations in the context of evictions points to the fact that even when tenants dispute the grounds for eviction, they may be afraid to raise their defenses in the intimidating atmosphere of the courtroom.¹¹ As noted by the study, "On the day of trial, tenants are under tremendous psychological pressure to agree to any terms presented by the landlord to keep a roof over their children's heads."¹² In addition to mitigating this pressure, the study points out that pre-filing mediation helps tenants avoid a stain on their rental history that can make it difficult to find housing in the future. Furthermore, pre-filing mediation has the potential to provide the parties more time to secure rental assistance that could address rent shortfalls.¹³

The suggestion that pre-litigation mediation may be more effective than mediations held during the course of litigation is supported by the data analyzed by the present study, in which one of the primary differences between Act 57 mediations and Summary Possessions During COVID was the timing of the mediation.

The perceptions of the mediation participants interviewed for the present study also align with this conclusion. Both of the attorneys interviewed expressed the belief that pre-trial mediation was a positive for both landlords and tenants, and each attorney likewise recognized the different mindset that a landlord is in once they are in litigation and have begun to incur the costs of litigation. While none of the tenants interviewed had any prior experience with being involved in an eviction case that had been filed in court,

some expressed their belief that going to court would be “harder” or “more intimidating.”

The landlord attorney interviewed for the present study identified the potential drawback of pre-litigation mediation resulting in a delay for a landlord seeking eviction if the mediation proved to be unsuccessful. But we determined the following potential advantages of pre-litigation mediation:

- A higher rate of settlements that help the landlord recover past due rent while allowing the tenant to remain in place;
- Savings in time and money for the parties by avoiding litigation; and
- A reduced burden on the court system when disputes are settled through mediation before a case is ever filed.

AVAILABILITY OF RENT RELIEF

There is no question that rent relief played a key role in the settlement of unpaid rent issues between landlords and tenants. According to Princeton University’s Eviction Lab, which tracks eviction data from across the country, “the communities that were able to distribute rental assistance had lower displacement rates”¹⁴ and “[a]s rental aid programs started closing, eviction filings overall have reached nearly the same level as before the pandemic.”¹⁵

The data and interviews from the present study supports the suggestion that rent relief is key. Out of the 41 settlement agreements reviewed from the Act 57 process, all of them noted that the tenant would repay all back rent owed, with 66 percent of the agreements explicitly noting that rental assistance would be used to do so. It is unclear whether the remaining 33 percent did not utilize rental assistance or if the mediator just did not make reference to it in the settlement agreements.

All of the mediators interviewed confirmed their belief that rent relief was the primary reason so many cases settled with an agreement for the tenants to remain in their homes. Both attorneys believed that rent relief assisted in settling disputes. All but one of the tenants interviewed mentioned that they had received, or would be receiving, some form of rent relief. Some of the tenants expressed their belief that the availability of rental relief helped pay the past due rent, which was key to their landlord's decision to allow them to stay in the home as an ongoing tenant.

Although the importance of rent relief is clear, its availability in the Summary Possession During COVID process did not translate to a high settlement rate or a high rate of tenants being able to reach settlements.¹⁶ This suggests that rent relief alone is not sufficient to ensure housing stability, and other factors may have an impact on the outcome, such as whether mediation was conducted before versus during litigation. Another important factor is the true motivation of the landlord. Whether the landlord is trying to recover unpaid rent, or wants to terminate the relationship with the tenant, could affect whether a case is more or less likely to settle and whether the landlord agrees to allow a tenant to remain as an ongoing tenant. Unfortunately, these motivations are impossible to know or quantify without landlords providing their reasoning.

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View of
Portlock from
Koko Crater,
Hawai'i // Jess
Loiterton

TIME FOR MEDIATION

Mediation is a process that requires the mediator to establish credibility with both parties so that each party feels comfortable speaking freely, while also listening to recommendations made by the mediator. The ability to make connections with mediation participants, no matter how skilled the mediator is, takes time—as does exploring creative options for settlement. As such, it seems likely that the amount of time allocated for mediation is important and directly affects the outcomes of the mediation.

Before COVID, summary adjudication actions were usually sent to mediation if both parties appeared for their return date hearing or trial. At the courthouse, voluntary mediators await assignment, then attempt to settle the case within 20–30 minutes, before the parties need to return to court. With such a short amount of time, mediators have little time to establish connections with participants and explore creative options for settlement.

Mediations under both the Act 57 program and the Summary Possession During COVID programs provided 90 minutes for the mediations to be conducted.

The data reviewed for the present study does not reveal any strong suggestions that the additional time resulted in better outcomes. Pre-COVID Summary Possession mediations conducted in less than 30 minutes had a 47 percent settlement rate. The 90-minute Summary Possession During COVID mediations had a similar settlement rate of 52 percent, while the Act 57 mediations, with the same 90 minute mediations had a much higher settlement rate of 87 percent.

However, both the mediators and attorneys interviewed believed that the additional time was important. All of the mediators felt that at least 45 minutes were needed to establish the necessary relationships with mediation participants to allow for a meaningful session, and they reported that they sometimes needed additional time. The attorneys interviewed noted that the shorter mediation session may affect the options a mediation can explore, and would explain why pre-covid mediation were so focused on mediating a date by which the tenant would move out instead of exploring potentially more complex options under which the tenant could remain in place as an ongoing tenant.

MEDIATOR CHARACTERISTICS

The Act 57 mediations were conducted by a different pool of mediators than both the Pre-COVID Summary Possession and Summary Possession During COVID mediations. The summary possession mediations were mediated by a volunteer mediator from Hawai'i. Act 57 mediations were conducted by paid professional mediators hired specifically for the program, and either residing in Hawai'i or in the Continental United States. The paid mediators handled a higher volume of cases and, as related by MCOP, they were hired specifically for their commitment in trying to find ways to help landlords and tenants reach agreements that allowed tenants to remain as ongoing tenants while repaying the landlords for rent owed.

Because the use of the paid mediators was one of few differences between the Act 57 and Summary Possession During COVID programs, it is possible that the difference in the mediation pool had an impact on mediation outcomes. This possibility is supported by both MCOP and the attorneys interviewed for the study, who all noted that mediators who conducted mediations pre-COVID were largely focused on resolving a case by determining when a tenant would move out instead of focusing on exploring other options, while the hired mediators were specifically focused on finding ways to keep tenants in place.

VIDEO CONFERENCING

Video conferencing was used for both Act 57 and Summary Possession During COVID mediations, not as an attempted improvement to the mediation process, but as a byproduct of the pandemic.

Prior to using video conferencing for the mediations, there was a concern that its use might pose a barrier to participants that lacked access to the appropriate technology, and that mediation over video would make it more difficult for the mediator and the parties to build rapport. On the other hand, potential advantages included:

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- Increased access to mediation because of not having to take time off from work or having to find child care;
- Reduced intimidation that tenants can experience in a formal court setting, helping to mitigate the power imbalance between landlord and tenant; and
- Elimination of the time and expense of travel.

Again, the data reviewed for the present study does not provide conclusive evidence of whether video conferencing had any impact on mediation outcomes. The Summary Possession During COVID mediations had slightly better success rates than Pre-COVID Summary Possession mediations in terms of the percentage of cases settled (52 percent versus 47 percent) and percentage of tenants that remained in the unit (20 percent versus 11 percent).

However, the use of video conferencing was one of multiple differences between the Summary Possession During COVID and Pre-COVID Summary Possession mediations (others included differences in the mediation pool, the time allocated for mediation, and the availability of rent relief).

While the data collected reveals little, the interviews conducted for the study indicate that participants believed the use of video conferencing fostered better outcomes, or at the very least, was a welcome convenience.

Mediators noted that most participants logged in from their home or personal location, while a few logged in from the Mediation Center of the Pacific. The attorneys interviewed stated that they had no problems with the technology, and they favored the convenience of mediating via video conference over in-person meetings.

Tenants reported that video conferencing was easy to use, and primarily used their phones to access the software. They reported no major technology issues. These comments suggest that the lack of access to technology was not a significant barrier to participation in mediation.

Additionally, the mediators interviewed believed that video conferencing was instrumental in helping tenants speak more freely, because they were in a more comfortable location than a courthouse and they were not physically present with the landlord. The mediators reported that some of the participants also turned their camera off, which the mediators believed allowed the participants to speak more freely and comfortably. Similarly, the landlord attorney commented about the potential loss of leverage for landlords without the intimidation factor for tenants of having to go to court.

OTHER POTENTIAL FACTORS

In addition to differences in design of the three mediation programs and the availability of rent relief, it should be noted that there are other factors that may have impacted the outcomes of the different mediation programs.

One such factor is the potential that landlords may have been more willing to entertain settlement in the unique environment created by the pandemic. When the pandemic hit, a large number of tenants lost their jobs and were unable to pay rent.

Landlords may have perceived that their tenants were not “bad tenants” that needed to be replaced. Rather, they may have been perceived as victims of a circumstance that was out of their control and impacted many people at the same time. In such a scenario, landlords may have been more willing to try to keep their current tenants housed rather than seeking to replace them with new tenants, provided the inability to pay the rent did not become a chronic problem.

The above consideration might explain, at least in part, why Act 57 mediations had a much higher settlement rate than Pre-COVID Summary Possession mediations. But it would not explain why the settlement rates between Pre-COVID and Summary Possession During COVID mediations were so similar.

One possible explanation—outside of the other factors discussed above—is that landlords who used the Summary Possession During COVID process may have been more intent on terminating the tenancy than landlords who submitted to the Act 57 process.

To avoid the Act 57 pre-filing mediation requirement, even when rent delinquency was one of the reasons why the landlord wanted to evict the tenant, the landlord had to allege alternative reasons for eviction, such as wanting to sell the unit or the tenant’s destruction of property. It is possible that landlords who used the Summary Possession During COVID process had legitimate reasons for evicting their tenants outside of rent delinquency, which could not be addressed by mediation. Or landlords who used the Summary Possession During COVID process even though their primary motivation for eviction was the rent delinquency may have done so because they were intent on eviction and were hoping to expedite the tenant’s removal.

A final factor that may have contributed to the difference in outcomes between the various mediation programs is the presence of attorneys at the mediations. It is notable that in the Summary Possession During COVID mediations, landlords were represented by attorneys 54 percent of the time, while they were represented only 5 percent of the time in Act 57 cases (tenants were represented less than 1 percent of the time in both types of mediations).

While the data suggests that the presence of attorneys may have led to fewer settlements and fewer instances of tenants remaining in their homes, it also suggests that attorneys were more likely to be present when mediation is conducted during litigation as opposed to before, so mediation design may address the issue.

It is likely that these additional factors had some influence on the outcomes of the Act 57 and Summary Possession During COVID meditations. Nevertheless, the data reviewed by the present study in combination with the information garnered from participant interviews strongly suggests that mediation design and the availability of rent relief had a significant positive influence on the outcomes of Act 57 mediations.

CONCLUSION AND RECOMMENDATIONS

The Act 57 program ended on August 6, 2022, in what should be considered resounding success. The percentage of mediations that resulted in settlement significantly increased from the Pre-COVID Summary Possession mediation program, going from 47 percent to 87 percent. More significantly, the number of tenants that remained in place as ongoing tenants, increased from 11 percent to 85 percent.

For the landlords, the agreements reached through Act 57 mediations often meant they were able to recover back rent and avoid the costly processes of litigating an eviction action and finding new tenants. For families who were able to remain in their homes as a result of Act 57 and the availability of rent relief, they avoided forced moves that often result in the loss of security deposits and belongings, a change in schools, a longer commute to work, a negative mark on their rental history, and for some, homelessness.

Not only did the program promote housing stability for landlords and tenants, but the program effectively reduced the load on the Judiciary by eliminating the need to file any summary possession action for each case that settled.

The Act 57 program diverted from the court system as many as 1,201 eviction cases—the total number of Act 57 cases that were settled during the program’s duration. Doing so undoubtedly reduced strain on judges’ calendars, filing clerks, workers who assist litigants when they get to court, and everyone else involved in the process of a case making its way through the system.

Further study on these costs is necessary, but it is reasonable to anticipate that the costs of mediation under an Act 57-like program—estimated at \$250 to open each case with an additional \$250 for every mediation session conducted (e.g. \$350,000 to open 1,000 cases and hold 500 mediations)—is likely to be either comparable to or lower than the costs to the Judiciary if the cases were to go through the court process.

While it is not feasible to determine with certainty from the data available for this study which of the various factors from the Act 57 program had the greatest impact on the starkly different outcomes between Act 57 mediations and the Pre-COVID Summary Possession and Summary Possession During COVID mediations, when examined along with participant perceptions gathered from the interviews conducted for the study, it is reasonable to conclude that:

- Conducting mediation pre-litigation is likely to have had a significant impact on settlement and whether a tenant remains as an ongoing tenant.

- Providing adequate time to mediate and contracting paid mediators, as opposed to relying on volunteer mediators, also appears to have increased the likelihood of successful mediation.
- The availability of rental relief was key to ensuring housing stability, but rental relief alone is insufficient.
- The use of video conferencing software in lieu of requiring a personal appearance in court provides tenants with more comfort and confidence by placing parties on a more even field, even if the landlord is represented by counsel.

MCOP plans to continue to provide pre-litigation mediation services to landlords and tenants at no cost, as budget permits. However, in absence of a continuing requirement that landlords provide tenants with an opportunity to mediate before proceeding with a summary possession lawsuit, it is likely that pre-litigation mediation will not be used often.

As of publication, no additional funding has been allocated to allow MCOP to continue to use the paid professional mediators that were used for the Act 57 program. Nor has funding been available to cover the expense of the program administrative support that allowed MCOP to reach out to tenants and schedule mediations relatively quickly (usually within 15 days of receiving the notice from the landlord).

While the volume of eviction-related mediations is likely to be below the levels experienced in the aftermath of widespread job loss due to the pandemic, elements of the Act 57 program that have proved to be so effective at maintaining housing stability for landlords and tenants could be incorporated into permanent process changes, including the following recommendations:

1. Require landlords to provide notice of an opportunity to mediate before being able to file a Summary Possession Lawsuit and require participation if the tenant requests mediation.
2. Provide funding to The Mediation Center of the Pacific to hire independent mediators.
3. Provide funding to The Mediation Center of the Pacific for administration of the cases.
4. Provide for up to 1.5-hour mediation sessions with the possibility of one additional session to follow up on how an agreement is working or to renegotiate the terms of the agreement.
5. Allow parties to participate in mediation via video conferencing.

Additionally, access to emergency rental assistance was an important factor in the success of many of the mediations. Concurrent with updates to the existing mediation program for landlord/tenant disputes, access to rental assistance funds should be made permanent.

ENDNOTES

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16. For the mediations in this category that resulted in settlement, we were not able to obtain information on whether rent relief was a factor.