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Mark S. Umbreit

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MEDIATION OF VICTIM OFFENDER CONFLICT

MARK S. UMBREIT*

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I. INTRODUCTION

Interest in alternative dispute resolution has grown enormously over the past decade, yet, applying mediation techniques in the context of victim offender conflict remains one of the least understood fields of conflict resolution. To some, it is not only unusual, but perhaps, inappropriate. Understanding the practice of victim offender mediation, as part of the larger alternative dispute resolution movement in America, is important since it represents a rapidly

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growing field.

In 1978, there were a handful of programs involved in victim offender mediation and reconciliation, primarily in the midwest. Today, there are programs in nearly 100 jurisdictions throughout the country, including major urban jurisdictions as well as smaller communities.¹ The vast majority of these programs continue to be sponsored by private organizations working closely with the courts, while a growing number of victim offender mediation programs are being directly sponsored by probation departments.²

This article will attempt to not only describe the process of applying mediation techniques in victim offender conflict, but to also examine the extent to which it may be similar to other applications of mediation. Specific areas to be addressed in this article include: an overview of the victim offender mediation process; client satisfaction with a victim offender mediation program in Minnesota; the meaning of fairness to victims in mediation; and a comparison with the traditional definition of mediation.

II. VICTIM OFFENDER MEDIATION

A. Overview of Process

With rare exception, crime victims are placed in a totally passive position by the criminal justice system, oftentimes not even receiving basic assistance or information. Victims often feel powerless and vulnerable. Some even feel twice victimized, first by the offender and then by an uncaring criminal justice system that does not have time for them. Offenders are rarely able to understand or be confronted with the human dimension of their criminal behavior: that victims are real people, not just objects to be abused. Offenders have many rationalizations for their criminal behavior. It is not unusual for anger, frustration, and conflict to be increased as the victim and offender move through the justice process.

Contrary to the frequent de-personalization of both victims and offenders in the criminal and juvenile justice systems, the victim offender mediation process draws upon some rather old fashioned principles which recognize that crime is fundamentally against people—not just the State. Rather than placing the victim in a passive role and reinforcing an adversarial dynamic which often results in little emotional closure for the victim and little, if any, direct

1. The figure of nearly 100 victim offender mediation programs is based upon programs listed in M. UMBREIT, *VICTIM OFFENDER MEDIATION: CONFLICT RESOLUTION & RESTITUTION* (1985); PACT INSTITUTE OF JUSTICE, *VICTIM-OFFENDER RECONCILIATION & MEDIATION PROGRAM DIRECTORY* (1986); U. S. DEPT. OF JUSTICE, *RESTTA DIRECTORY OF RESTITUTION PROGRAMS* (1987); and the author's awareness of additional programs that are developing but are not listed in the above directories.

2. Umbreit, *Victim Offender Mediation and Judicial Leadership*, 69 *JUDICATURE* 202 (1986); See also Umbreit, *Victim Offender Mediation: A National Survey*, *FEDERAL PROBATION* (1986).

accountability by the offender to the person they have wronged, victim offender mediation facilitates a very active and personal process at work in conflict resolution. In doing so, it represents a rather unique process within the larger criminal justice system; one that attempts to address the interests of both victims and offenders.³

In providing an overview of the victim offender mediation process, the author will attempt to present a relatively "generic" description of important characteristics. He will draw upon his experience in providing technical assistance and training to local organizations in more than thirty (30) cities throughout the country that are operating or developing programs. These programs have been in such diverse jurisdictions as: Milwaukee, WI; Chapel Hill, NC; Billings, MT; Oakland, CA; Ames, IA; Beloit, WI; Rochester, MN; St. Louis, MO; and Miami, FL. The author's earlier experience with the initial Victim Offender Reconciliation Program ("VORP") model of victim offender mediation in northern Indiana and his current experience with the VORP project of the Minnesota Citizens Council on Crime and Justice in the Minneapolis/St. Paul area, will be drawn upon heavily.

The primary goal of victim offender mediation and reconciliation programs is to provide a conflict resolution process which is perceived as fair by both the victim and the offender. The mediator facilitates this process, by first allowing time to address informational and emotional needs, followed by a discussion of losses and the possibility of developing a mutually agreeable restitution obligation (i.e., money, work for the victim, work for the victim's choice of a charity, etc).⁴

The victim offender mediation process can be summarized by four distinct phases:

1. Intake Phase
2. Preparation for Mediation Phase
3. Mediation Phase
4. Follow-up Phase.⁵

B. *Intake Phase*

The intake phase begins when the referral of a case (usually from probation) is received and ends with assignment of the case to a staff or volunteer case manager (mediator). Three tasks need to be accomplished during the intake phase. These include:

3. M. UMBREIT, *CRIME AND RECONCILIATION: CREATIVE OPTIONS FOR VICTIMS AND OFFENDERS* 99-103 (1985).

4. M. UMBREIT, *VICTIM OFFENDER MEDIATION TRAINING CURRICULUM* (1985); U. S. DEPT. OF JUSTICE, *RESTTA* (1988).

5. MINNESOTA CITIZENS COUNCIL ON CRIME & JUSTICE, *PROCEDURES AND FORMS MANUAL, VICTIM OFFENDER RECONCILIATION PROGRAM* (1987).

1. Accurately record information about the victim and offender on intake forms.
2. Mail letters of introduction to the victim and offender.
3. Assign the case to a staff or volunteer case manager (mediator).⁶

The victim offender mediation process begins when criminal offenders—most often those convicted of such crimes as theft and burglary—are referred by the court. Most programs accept referrals after a formal admission of guilt has been entered with the court. Some programs accept cases that are referred prior to formal admission of guilt, as part of a deferred prosecution effort. Each case is assigned to either a staff or volunteer mediator.

C. Preparation for Mediation Phase

The preparation for mediation phase represents the “getting them to the table” phase. It begins with the assignment of the case to a case manager and ends with the beginning of the first joint mediation session. The quality of work done during this phase will have a great deal of impact upon the actual mediation session. In fact, unless rapport and trust is effectively established with both the victim and offender, there will be no mediation session. Problems that later may occur in the mediation session often result from not having thoroughly completed this extremely important phase in the victim offender mediation process.

The three primary tasks to be completed during the preparation for mediation phase include:

1. Explain the process to the offender and prepare the offender for participation in the mediation process.
2. Contact and interview the victim to secure their consent to participate and to prepare for the mediation process.
3. Arrange and schedule the mediation session.⁷

Task number one requires: listening to the offender’s story; explaining the program and potential benefits; encouraging their participation; assessing their ability to pay restitution or to do work for the victim or to do community service. Task number two requires: calling the victim to schedule an individual meeting; meeting with the victim to listen to their story; explaining the program and potential benefits; encouraging their participating; and making clear that participation in the program is absolutely voluntary.

Many programs meet first with the offender to determine their perspec-

6. *Id.*

7. *Id.*

tive and attitude about the offense. It can often be helpful for a mediator to share some of what was learned about the offender when the initial meeting with the victim occurs. Every effort is made to avoid having to "sell" the program to the victim over the phone during the first call. Rather, the mediator attempts to obtain a commitment from the victim to meet at a place of their convenience in order to first listen to the victim's version of the offense and the concerns they have, and then to invite their participation in the victim offender mediation process.

It is not uncommon for victims to need time to consider participating, rather than making a quick decision on the spot. Few victims are immediately enthusiastic about such a confrontation with the offender. While the mediator will attempt to persuade the victim to participate by pointing out a number of potential benefits, during this preliminary meeting and throughout the victim offender mediation process the victim has total voluntary choice. They can initially agree to participate and later withdraw. A great deal of sensitivity must be exercised in communicating with victims during the entire process. Because of this, flexibility is required in selecting locations and scheduling meetings, as well as in regard to the overall time frame in which the process will occur.

The strongest ethical principle of the victim offender mediation process is that victims must not be again victimized by the actual mediation program, however unintentionally. In no case is a victim to be coerced into participating in the victim offender mediation and reconciliation process. Encouragement of victim participation in the mediation process must not be confused with coercion. The process is meant to be empowering for victims, presenting them with choices. A helpful technique to encourage victims is by stating something like the following:

Many victims have found it helpful to confront their offender, to let them know what it felt like and to have direct input into developing a restitution agreement. You may or may not find it helpful. If you would like to hear more about the program, you can then make your decision about whether you would like to get involved in it.⁸

The importance of the delicate communication process involved in these preliminary meetings cannot be overstated. Victim participation can easily be lost at the first phone call. The initial process of building rapport and trust with both the victim and offender will be essential during the later joint meeting with both individuals.

The rhetoric of much of the literature in the field, particularly related to the VORP project specifically, would imply that offender participation in the mediation process is also voluntary.⁹ Actual practice in the field would suggest something quite different. When offenders are ordered by the court, via proba-

8. From training materials developed and used by this author, 1987.

9. Zehr, *VORP: An Overview of the Process*, Chapter II in *THE VORP BOOK* (1984).

tion, or are diverted from prosecution if they complete the program, a rather significant amount of State coercion is exercised. Research has also indicated that offenders certainly do not perceive the process as "voluntary."¹⁰ Some programs attempt to temper this by trying to get referrals in the least coercive manner possible and to allow those offenders who are strongly opposed to participating, or who are determined to be inappropriate for mediation by the program staff, to opt out of the program.

D. Mediation Phase

The mediation phase begins with the first face-to-face conference between the victim and offender and ends with the referring agency's approval of the agreement as either part of a deferred prosecution program or as a condition of probation. There are four primary tasks to complete during the mediation phase. These include:

1. Conduct the mediation session.
2. Secure signatures on restitution agreement.
3. Schedule a follow-up conference, if appropriate.
4. Transmit agreement to referral source.¹¹

It is only after the initial separate contact and an expression of willingness by both the victim and offender to proceed that the mediator schedules a face-to-face meeting. The meeting begins with the mediator explaining his or her role, identifying the agenda, and stating any communication ground rules that may be necessary. The first part of the meeting focuses upon a discussion of the facts and feelings related to the crime. Victims are given the rare opportunity to express their feelings directly to the person who violated them, as well as to receive answers to many lingering questions such as "Why me?", or "How did you get into our house?", or "Were you stalking us and planning on coming back?" Victims are often relieved to finally see the offender, who usually bears little resemblance to the frightening character they may have conjured up in their minds.

During the meeting, offenders are put in the very uncomfortable position of having to face the person they violated. They are given the equally rare opportunity to display a more human dimension to their character and to even express remorse in a very personal fashion. Through open discussion of their feelings, both victim and offender have the opportunity to deal with each other as people, oftentimes from the same neighborhood, rather than stereotypes and objects.

Following this very important sharing of facts and feelings, the second part of the meeting focuses upon discussion of losses and negotiation of a mu-

10. R. COATES & J. GEHM, VICTIM MEETS OFFENDER: AN EVALUATION OF VICTIM OFFENDER RECONCILIATION PROGRAMS (1985).

11. See MINNESOTA CITIZENS COUNCIL, *supra* note 5.

tually acceptable restitution agreement as a tangible symbol of conflict resolution and a focal point for accountability. Importantly, the court does not simply order a specific restitution amount. If victim and offender are unable to agree upon the amount or form of restitution, the case is referred back to the referral source (oftentimes the sentencing judge), with a good likelihood that the offender will be placed in a different program. Mediators do not impose a restitution settlement. A written restitution agreement has been negotiated and signed at the end of the meeting by the victim, offender, and mediator in more than 95% of all meetings in many programs.¹² Joint victim offender meetings usually last about one hour, with some meetings in the two hour range.

Contrary to what many might think, the expression of feelings by the victim typically does not take the form of highly emotional, verbal violence. Some of the initial anger is dissipated through the preliminary meeting with the mediator. Yet, it is often important that some of the initial intensity of feelings be recalled and expressed directly to the offender during the joint meeting.

Most often, the victims and offenders involved in mediation had no prior relationship. Rather than a primary emphasis upon restitution collection, many victim offender mediation and reconciliation programs first emphasize the importance of allowing enough time to address the frequent need for information about the offense and the related feelings of both parties. Restitution is an important additional goal, but for many programs, only primarily as a symbol of conflict resolution or "reconciliation."

The mediation session is not meant to be primarily a process to rehabilitate the offender. Nor is it meant to be primarily a victim assistance process. Instead, it is designed to address the needs of both victims and offenders in a manner which personalizes the process of justice by facilitating the empowerment of both parties to resolve the conflict at a community level.

Attempting to address some of the needs of both parties does not, however, mean that they are treated as if they are both equally contributing to the conflict. To the contrary, since the issue of guilt is not even at question and since one party has been clearly violated, special sensitivity must be exercised in working with the victim. Every effort must be made to prevent a re-victimization experience through coercing them into the program or hassling them in some other way. Every effort must be made to present victims with choices, rather than judgmental statements. Victim participation in the mediation process must be totally voluntary, in full recognition that offender participation includes a significant degree of State coercion as part of their "choice."

While certainly not meant for all victims and offenders, research and experience in the field would suggest that the conflict between those victims and offenders who participate in mediation can be humanized, stereotypes of each

12. See R. COATES & J. GEHM, *supra* note 10 at § 15a.

other lessened, and fear reduced. The mediation process is believed to result in a more satisfactory experience of justice for both the victim and offender.¹³

E. Follow-up Phase

The follow-up phase begins with the approval of the restitution agreement by the referring agency and ends with the final closure of the case. The four primary tasks to be completed during this phase include:

1. Maintain monthly phone contact with the victim to monitor fulfillment of the restitution agreement.
2. If the offender is out of compliance, work with the offender and probation officer to secure compliance.
3. Conduct the pre-scheduled follow-up joint conference with the victim and offender.
4. Complete final paperwork related to closing the case.¹⁴

It is becoming increasingly evident to many victim offender mediation practitioners that closer monitoring and follow-up of cases is needed, including the scheduling of additional victim offender meetings when appropriate. In order to strengthen the process of reconciliation and personal accountability of the offender to his or her victim, one or more follow-up meetings between the victim and offender can play a significant role.¹⁵ These follow-up meetings, briefer and less structured than the initial victim offender mediation session, provide an informal opportunity to review the implementation of the restitution agreement, to discuss any problems that may have arisen related to the payment schedule, and to simply share "small talk" if the victim and offender feel so moved.

The need for and willingness to have follow-up meetings is certainly tempered by the actual amount of restitution to be paid. If only a very small amount of restitution is owed, a follow-up meeting might not be appropriate. On the other hand, if a larger amount is due, brief follow-up sessions (mid-contract and "close-out" meetings) can be quite helpful. As with the initial victim offender mediation session, victims must not be coerced into follow-up meetings. To date, only a relatively small proportion of victim offender mediation cases include follow-up victim offender meetings.

F. Empowering Style of Mediation

The practice of mediation in general can include a variety of different styles, some of which are more appropriate for specific types of conflict or

13. See generally R. COATES & J. GEHM, *supra* note 10.

14. See MINNESOTA CITIZENS COUNCIL, *supra* note 5.

15. Umbreit, *Follow-up Victim Offender Meetings: An Extension of the Mediation Process*. In VORP: Emerging Issues. (PACT Institute of Justice: Michigan City, IN) (1987).

levels of intensity than others. Within the context of victim offender conflict, there are two distinct styles of mediation: an empowering style and a controlling style. In many respects, these two styles of mediation are quite similar to the "therapeutic style" and "bargaining style" of mediation found by Silbey and Merry in the context of parent-child mediation.¹⁶

An empowering style of mediation consists of three main elements:

- 1) getting them to the table,
- 2) getting the meeting started, and
- 3) getting out of the way.

"Getting the parties to the table" (i.e., willing to try the process) through the building of trust is the foundation upon which the entire process rests. This preparation for mediation effort, as noted previously, often requires more work than the actual mediation session.

"Getting the mediation session started" in a way that not only makes the participants as comfortable as possible, but also clear as to the purpose of the meeting and the role of the mediator, sets the tone for instilling ownership of the process. The major goal of the mediator at this point is to initiate direct face-to-face communication between the victim and offender, rather than through the mediator.

The third element, and perhaps the most difficult for many mediators, is "getting out of the way." Once the parties are speaking directly to each other within the context of the stated purpose of the mediation session, the mediator should only intervene to help clarify issues, make transitions, or prevent any abuse. In uncomfortable moments of silence when the mediator has an urge to comment, he or she should first count to ten and allow more space for the parties to think things through and initiate interaction with each other.

While "getting out of the way" is central to an empowering style of mediation, it is not to be understood as giving up ultimate control of the process. The mediator should always remain in control of the process, particularly vigilant of any verbal abuse that might be occurring, most likely from an adult victim toward a juvenile offender. Being in control, however, does not have to mean being verbally dominant throughout the mediation process.

Within the context of an empowering style of mediation, the mediator is most active during the beginning of the mediation session (through clearly explaining the process, instilling a sense of ownership, and initiating direct face-to-face communication between the parties) and at the end of the session (through assisting in the development of a mutually agreeable restitution plan, presentation of options if necessary, securing signatures, scheduling a follow-up session, distributing evaluation forms, and closing the meeting).

A great deal of emphasis is placed upon the value of direct face-to-face communication between the victim and offender with minimal interruption by

16. Silbey & Merry, *Mediation Settlement Strategies*, LAW & POLICY (Jan. 1986).

the mediator. Discussion of the broader context of the conflict, including the sharing of personal information about each other and the expression of feelings about the conflict, is important. If one were to do a content analysis of an empowering style of mediation, the mediator is likely to be talking at most 20% of the time and the victim and offender 80%. In a very real sense, the mediator fades into the background once the important transition from talking through the mediator to talking directly to each other is made.

G. *Controlling Style of Mediation*

A controlling style of mediation also requires the first two elements of "getting the parties to the table" and "getting the meeting started," although it is likely that a more aggressive and manipulative strategy will be employed to address these tasks. Rather than taking the extra time to encourage ownership in the process and as much voluntary choice as possible, the mediator may be quick to persuade the parties that they "should" participate.

"Getting the meeting started" from a controlling style of mediation is likely to mean making it clear that the mediator is and will remain totally in charge (as the expert). The controlling style may often require that the parties speak through the mediator rather than addressing each other face-to-face. Instilling active ownership in the process has little importance, as does direct, uninterrupted face-to-face communication. The mediator is likely to be initiating most of the questions.

Whereas an empowering style of mediation encourages discussion of the entire context of the conflict and encourages open expression of feelings and the sharing of personal information about each other, a controlling style of mediation is more likely to narrow the issues to be discussed. Feeling may have little relevance. The emphasis is often on the bottom line of reaching a written restitution agreement. Reconciliation between the victim and offender, which implies healing of some of the emotional wounds and reducing the frequent feelings of fear and vulnerability, are of little concern.

Mediators who employ a controlling style of mediation are likely to think they know what is best for the victim and offender. Such a judgmental attitude is directly contrary to an empowering style of mediation. Some mediators who employ a controlling style might actually construct the agreement and present it to the parties. A content analysis of a controlling style of mediation would be likely to find the mediator talking 80% of the time and the parties involved 20% of the time. Controlling mediators do not fade into the background. To the contrary, they remain actively involved in a rather domineering way throughout the entire session. They are the "experts" and they don't want to lose control or even give the appearance of losing control.

MEDIATION STYLES

	<u>Empowering</u>	<u>Controlling</u>
Direct victim/offender communication	Maximum	Minimal
Victim/offender facing each other	Always	Sometimes
Range of victim/offender discussion	Broad	Narrow
Importance of context/feelings	Very	Minimal
Presentation of choices	Frequent	Infrequent
Judgmental statements	Infrequent	Frequent

There is increasing evidence that emotional and informational needs of crime victims often surpass simply the need for compensation.¹⁷ A humanizing of the justice process appears to be one of the main benefits of victim offender mediation.¹⁸ In addition, one of the most common experiences of crime victims is a heightened sense of vulnerability and powerlessness.¹⁹ Given these facts, an empowering style of mediation would seem to be far more appropriate in the context of victim offender conflict. It would certainly be more likely to diminish stereotypes that victims and offenders hold toward each other and to encourage the parties to deal with each other as people rather than objects.

An empowering style will not, however, always be appropriate for two basic reasons. First, one or both of the parties may be so inarticulate or uncomfortable with the mediation process that they are simply unable to engage in any extended direct discussion about the offense or themselves. Second, one of the parties may be extremely verbally aggressive and likely to totally intimidate the other party. In either of the above cases, a more directive and controlling style of mediation would become necessary in order to insure a fair process.

In a very real sense, the two styles represent polar extremes along a continuum of mediation styles. In many cases, actual practice may well fall somewhere between the two pure types. Every attempt, however, should first be made to employ an empowering style of mediation. This will be far more likely to maximize the benefits to both parties. It will also be far less likely to re-

17. Maquire, *The Impact of Burglary Upon Victims*, BRIT. J. OF CRIMINOLOGY 20(3) (1980); J. HARDING, *VICTIMS AND OFFENDERS, NEEDS AND PERSPECTIVES* (1982).

18. See R. COATES & J. GEHM, *supra* note 10.

19. Berglas, *Why Did This Happen to Me?*, 19 PSYCHOLOGY TODAY 41-48 (1985).

victimize the victim by once again placing them in a passive role, which the justice system has done to them throughout the process. In the context of victim offender mediation, a more directive and controlling style of mediation should only be employed when efforts to use an empowering style have been first exhausted or when the prevention of verbal abuse by one or both of the parties becomes clearly needed.

III. CLIENT SATISFACTION WITH PROGRAM IN MINNEAPOLIS/ST. PAUL

The VORP project in Hennepin and Ramsey counties (Minneapolis/St. Paul area) of Minnesota was initiated in 1985, by the Minnesota Citizens Council on Crime and Justice, a private non-profit agency. This program employs the type of process described earlier in this article, including the four phases of intake, preparation for mediation, mediation, and follow-up. Referrals of juvenile offenders come to the program from probation officials, most at a post-adjudication level, with a much smaller number as a diversion from prosecution. Both staff and community volunteers serve as mediators. Burglary is the most common offense referred, along with several other property offenses and a limited number of assaults.

During the two-year period of 1985 and 1986, a total of 183 offenders and 179 victims were referred to the program. This resulted in 54% of the victims and 64% of the offenders actually participating in a mediation session. A total of 128 restitution agreements were negotiated during this two-year period and 79% of these agreements were successfully completed.²⁰

MINNEAPOLIS/ST. PAUL
VICTIM OFFENDER RECONCILIATION PROGRAM

Offenders referred	183
Victims referred	179
-Individual households	67%
-Business or non-profit	33%
Victim participation in mediation	54%
Offender participation in mediation	64%
Restitution agreements negotiated	128
Successful completion	79%
Monetary restitution completed	\$11,376
-victim	\$8,280
-insurance	\$3,096

20. Memo from Burt Galaway to Dick Ericson and Mark Umbreit (Feb. 10, 1988) (regarding 1985-86 VORP Completion, Minnesota Citizens Council on Crime and Justice).

Personal service restitution completed for victim	127 hrs
Community service completed	489 hrs
Contributions to charities	\$90
Apologies only	27

The program in Minnesota, through the author who served as the Principal Investigator, has completed a special research project to examine the degree to which crime victims are satisfied with the mediation process and to gain a better understanding of the meaning of fairness to crime victims. Because of funding limitations, the same issues could not be examined from an offender perspective, although some limited data was collected related to offender satisfaction, as noted below.

The victims who participated in a mediation session with their offender indicated a very high level of satisfaction with the mediation process. Ninety-seven per cent (97%) indicated that they were treated fairly in the mediation session and 94% indicated that the mediator was fair. Common themes relating to the sense of fairness experienced in the mediation process were: making the parties feel comfortable; stating clear expectations for the mediation process; allowing both parties to express their feelings; presenting options; and, not siding with either the victim or offender. One specific victim felt the mediation process was very fair because "he just let us negotiate and gave us some guidance." Another stated "we were both allowed to speak . . . he didn't put words into anybody's mouth." Those who did not experience the mediation process as fair were most likely to indicate that the mediator sided with the offender.

Victims found it helpful to meet with their offender in 86% of the cases interviewed in this study. A number of different reasons were given. For many, simply getting answers to questions like "why me?" and "were you watching me?" in addition to learning other information about the crime and the offender, were important. Some victims indicated their need to "let the kid know he hurt me personally, not just the money. . . . I felt raped."

Meeting the offender helped reduce the fear of being re-victimized for a number of victims. After the mediation session, the offender seemed less scary and more human. "It put my mind at ease because we had conjured up the big thugs breaking in . . . they were small kids." Many victims indicated that participation in the VORP was helpful because it let them get personally involved in the justice system; they no longer felt completely left out and on the sidelines. One victim stated that VORP was the only part of the justice system that presented her with options for direct participation.

Participating in the mediation session with their offender was not found to be helpful to some victims because of the negative, non-repentant attitude of their specific offender. "I felt he wasn't owning up to it." "He just slouched all the way down and just sat and half-heartedly gave answers."

The restitution agreements that were negotiated in the victim offender mediation sessions were perceived as fair by 93% of the victims. A number of reasons were given. "I think restitution is something that needs to happen to replace or pay for the losses . . . they need to personally make restitution." "I don't see how anything can better point out what the extent of the damage was than to have them participate in making it right again."

When examining the issue of why victims of burglary even agreed to meet with their offender, as well as what they found to be the most satisfying element in the mediation process, some interesting data emerges. The hope of gaining restitution for their losses was the most commonly identified reason that victims agreed to participate in the mediation process, with their concern to directly participate in the justice process being the second explanation given. When asked what they found to be the most satisfying element of their actual experience in the victim offender mediation process, gaining restitution for their losses was *not* identified as either their first, second, or third choice. Meeting the offender was found to be the most commonly identified reason for their satisfaction with the victim offender mediation process, with the care displayed by the mediator being second. This finding is remarkably similar to the earlier findings of Coates and Gehm related to their evaluation of several programs in Indiana.²¹

A smaller sample of offenders (N=11) were surveyed to assess their level of satisfaction with the program. Of the offenders surveyed in 1987, all indicated that the restitution agreement was fair, and all indicated that they were satisfied with the mediation session (45% very satisfied; 55% satisfied). Ninety-one per cent (91%) indicated they had a more positive opinion about the victim after the mediation session. Several comments made by offenders are particularly illustrative. "The victim was very understanding and the program helped me." "When I came to the meeting, I expected the victim to be more harsh with me, but they were very considerate and I appreciated that." "I think that having these victim offender meetings helps a great deal. I believed that my agreement was fair to both parties, yet some things money cannot replace."²²

21. See R. COATES & J. GEHM, *supra* note 10.

22. See Memo, *supra* note 20.

VORP CLIENT SATISFACTION**Victims (N=31)**

Restitution agreement was fair	93 %
Treated fairly in mediation	97 %
Mediator was fair	94 %
Mediation was helpful	86 %

Offenders (N=11)

Restitution agreement was fair	100 %
Satisfied with mediation session	100 %
Satisfied with services of case manager	100 %
More positive opinion about the victim	91 %

IV. TYPOLOGY OF VICTIM CONCERNS ABOUT FAIRNESS

In addition to collecting information about client satisfaction with the victim offender mediation process, the program in Minneapolis/St. Paul was concerned with gaining a more thorough understanding of the meaning of fairness to crime victims referred to the program. While the present literature in the field does address the issue of fairness in a rather abstract and one-dimensional level,²³ very little is known about what fairness means within the context of victimization and in the words of crime victims themselves. By focusing upon victims of burglary referred to the VORP project in the Hennepin County component, whether they chose to participate or not, the findings of this specific study cannot in any way be generalized to victims at large. The data that emerged from 50 intense, face-to-face interviews with burglary victims does, however, provide very rich insight into the meaning of fairness for some victims.

As a result of these interviews, three major dimensions of fairness emerged:

1. Punishment of the offender,
2. Compensation for the victim, and
3. Rehabilitation of the offender.

Victim participation in the justice process, including mediation for many,

23. See generally B. GALAWAY, PUBLIC ACCEPTANCE OF RESTITUTION AS AN ALTERNATIVE TO IMPRISONMENT FOR PROPERTY OFFENDERS: A SURVEY (1984); D. Thomson & A. Ragona, *Popular Moderation Versus Government Authoritarianism: An Interactionist View of Public Sentiments Toward Criminal Sanctions*, CRIME AND DELINQUENCY 33(3) (1987).

was a dominant and major element of fairness that these victims expressed. Participation was not a dimension with greater or lesser degree of concern. After reviewing the data, a typology of three “pure” victim concerns about fairness was constructed. While many victims represented combinations of these “pure” types, the typology offered in Table 4 clearly identifies the major dimensions of fairness that emerged from the data. As is so often the case, the use of metaphors captures the essence of a more complex phenomenon in a very brief and informative manner. As Table 4 indicates, “the healer,” “the fixer,” and “the avenger” all represent the most dominant themes expressed by the 50 victims of burglary who were interviewed after having been referred to the VORP project in Hennepin County (Minneapolis area), 62% of whom actually participated in a mediation session.

TYPOLOGY OF VICTIM PERSPECTIVES OF FAIRNESS

	<u>Type A</u> “The Healer” N = 24	<u>Type B</u> “The Fixer” N = 14	<u>Type C</u> “The Avenger” N = 12
FOCUS:	Offender	Victim	Society
PRIMARY CONCERNS:			
1) Kids need help, counseling, and guidance.	1) Need to face consequences by repairing damage.	1) Criminal justice system too lenient, most often just a slap on the hand.	
2) Rehabilitation can reduce future criminal behavior.	2) Full compensation to victim is required.	2) Firm punishment is needed, jail or juvenile institution.	
3) Punishment is important but not as much as taking responsibility for their lives.	3) Direct accountability to victim is important.	3) Rehabilitation or restitution often important, but are secondary concerns.	
EXAMPLES:			
1) “I’m not so worried about the money, as the kids.”	1) “I didn’t want vindictiveness, all I wanted was restitution.”	1) “The punishment isn’t harsh enough—it was too lenient.”	

- | | | |
|------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|
| 2) "If choice was for restitution or help for the kid, I would go for the betterment of the kid." | 2) "It's only fair that I should get what was wrongfully taken from me returned." | 2) "It's been a slap on the wrist, he should serve time in a prison." |
| 3) "Fairness is consequences. Those who make mistakes should get the help they need so that they stop doing it." | 3) "Restitution is the major thing, they need to personally make restitution—strong connection between their actions and consequences." | 3) "A good-sized deterrent is the only thing that is going to make these people take notice." |

FREQUENCY: Most Frequent

Least Frequent

One further observation must be made in connection with the above table. It should be noted that each group in the typology is not mutually exclusive. Rather, each group represents the dominant or primary characteristics expressed by victims of burglary in this study. For example, while the primary concern of many victims fits Type A, these same individuals may also be concerned about some of the characteristics in Type B or Type C but at a more secondary and less intense level.

V. SIMILARITIES/DIFFERENCES WITH TRADITIONAL MEDIATION

A. *Definition of Mediation*

A rather generic definition of mediation is provided by the National Institute for Dispute Resolution:

[m]ediation is a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences. Mediation is usually a voluntary process that results in a signed agreement which defines the future behavior of the parties. The mediator uses a variety of skills and techniques to help the parties reach a settlement but is not empowered to render a decision.²⁴

Seven criteria are presented by the National Institute for Dispute Resolution as being important in the judging of a dispute resolution mechanism.

24. NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, *PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION* 37 (1984).

Listed, these are:

1. It must be accessible,
2. It must protect the rights of disputants,
3. It should be efficient in terms of cost and time,
4. It must be fair and just,
5. It should assure finality and enforceability,
6. It must be credible, and
7. It should give expression to the community's sense of justice.²⁵

B. Similarities

Mediation of victim offender conflict is certainly not part of the mainstream of the alternative dispute resolution movement and is even viewed by some as a questionable application of mediation techniques. The process of victim offender mediation, however, is essentially consistent with the definition and criteria provided by the National Institute for Dispute Resolution. It is a structured but informal conflict resolution process making use of a third party, in most cases, with no coercive power. The exception to this is in those victim offender mediation programs operated directly by probation offices or departments of correction, which represent the minority of victim offender mediation programs. Consistent with all applications of mediation, the mediator in victim offender conflict does not impose a settlement. In addition, participation in the process does have a voluntary dimension, totally for the victim, but far less so for the offender.

In terms of the seven criteria presented by the National Institute for Dispute Resolution, the practice of victim offender mediation does address each point. It ranks high on accessibility and cost in that it is a process which is clearly affordable to all parties, since it is extremely rare that any fees are charged. The physical location and scheduling of mediation sessions is usually based upon the convenience of the participants.

The victim offender mediation process also ranks very high on client perception of fairness, as noted above. There is clear enforceability in the process. The negotiated restitution agreement becomes a part of the court record and if the agreement breaks down, the victim can file a claim in civil court.

The fact that judges, prosecutors, and other officials are referring many hundreds of cases a year to victim offender mediation programs illustrates the credibility of the process within the legal community of many jurisdictions. The fact that most victim offender mediation programs are supported by one or a combination of several local funding sources, including tax dollars, United Way, corporate gifts, private foundations, individuals, and churches or synagogues indicates credibility of the program as an expression of the commu-

25. *Id.* at 16-17.

nity's sense of justice.

The criteria which the process does not fully address, as is the case with many other mediation programs, is in the area of protecting the rights of the disputants. The rights of the victim are certainly protected by most programs. As noted above, if the negotiated agreement breaks down, the victim has a right to file a claim in civil court in most jurisdictions. Whether all of the due process rights of the offender are fully protected in the victim offender mediation process is an entirely different issue. For example, is the offender protected from self-incrimination, resulting from a frank admission of other unreported crimes during a mediation session? Can the mediator be required by the court to testify against the offender in relation to a statement made without the presence of legal counsel?

C. Differences

While victim offender mediation is clearly a rather unusual application of mediation techniques, it is certainly not contrary to the basic definition and criteria related to mediation. However, because the context in which this type of mediation operates is quite unusual, there exist a number of distinct differences with more traditional applications of mediation.

Whereas nearly all other applications of mediation are among individuals with some type of prior situational or interpersonal relationship (e.g., landlord/tenant, spouses, employer/employee, farmer/creditor, etc.) most, but not all, participants in victim offender mediation are strangers. In addition, the issues related to the conflict are far clearer in the context of victim offender mediation. There is a clear "victim" and a perpetrator who has admitted his or her guilt. Determination of guilt is not the focus of the mediation process. As a time-limited, problem-solving intervention, the mediation process promotes a more restorative sense of justice through the sharing of information and the negotiation of restitution by the victim and offender themselves.

Precisely because there is a clear victim and offender, an enormous situational imbalance of power exists. Both parties are not assumed to be contributing to the conflict, necessitating the need for more neutral terminology such as "disputants." One of the individuals has been violated and therefore special attention must be directed toward the victim in order to insure that he or she is not re-victimized by the mediation process. This additional sensitivity to the victim does not have to come at the cost of being insensitive to the offender or violating the very process of third-party negotiations. It does, however, mean that victims must have absolute voluntary choice in participating in the program; and the time and location of the mediation session must not violate their sense of what is appropriate and convenient.

Some might think that mediation among strangers would be quite difficult. Actual experience would suggest the contrary. There is far less emotional and historical baggage entering the mediation process. The breaking down of stereotypes, and the related fears, becomes a prominent dynamic in the media-

tion process rather than having to address issues of betrayal and mistrust that are rooted in highly charged emotions and/or lengthy prior relationships.

In addition to the situational imbalance of power, there is usually also a generational imbalance of power. Typically, the offender is a juvenile or young adult and the victim is an adult. Particularly when the offender is inarticulate, it is important to prepare, even coach, the offender during the prior individual meeting as to how to respond to various questions the victim may have. This is coaching in the sense of informal role playing, rather than directing the individual on literally what to say in response to specific questions. By thinking through some of the possible questions and expressing their thoughts in a less threatening situation, the offender is likely to be more prepared to directly interact with the victim during the mediation session. This represents one strategy for attempting to balance power in the context of age and communication differences.

One of the most significant ways that victim offender mediation differs from more traditional applications of mediation relates to politics and ideology. Americans have strong feelings about crime and punishment. These are particularly seen in the way that the most atrocious, and least representative, crimes are often highlighted by the media and many politicians.

The practice of alternative dispute resolution within the context of civil court conflict may be controversial to some but it certainly does not confront major ideological barriers related to crime control policy in American society. The moment mediation enters the criminal justice process, it has stepped over a powerful ideological threshold.

There is growing evidence among both criminal justice officials and the participants themselves that victim offender mediation can be quite consistent with the community's sense of justice and fairness. Yet, there is likely to remain strong resistance by some officials and citizens to the very notion of the restorative type of justice embodied in the victim offender mediation process. The more dominant retributive sense of justice with its emphasis on the severity of punishment, on behalf of State interests, even at the cost of addressing the direct interests of the person violated by the offense, is deeply rooted in contemporary American culture and is unlikely to be dramatically changed in the near future.

VI. CONCLUSION

Through the process of mediating victim offender conflict, there exists an opportunity for the anger, frustration, and fear of some victims to be reduced; offenders can be held accountable for their behavior, can make amends, in a very real and personalized way; victims can receive compensation for their losses; and some offenders can be diverted from initial or continued costly incarceration in local jails or state correctional facilities. Research conducted in Minnesota and on several of the initial VORP's in Indiana, while somewhat critical of the lack of consistent case follow-up, has found that both victims

and offenders benefit through a more humanizing experience with the justice process. The victim offender mediation process results in very high levels of participant satisfaction and perceptions of fairness.

Application of conflict resolution techniques in the context of criminal behavior is somewhat similar to other types of mediation, but there do exist a number of very clear distinguishing characteristics of victim offender mediation. It is certainly not meant for all victims and offenders. Nor is it meant to diminish the fine work being done by the many other important programs serving the needs of victims or offenders. Rather, the growing North American interest in mediation of victim offender conflict, whenever appropriate, represents a small, but creative presence within the broader fields of dispute resolution and criminal justice.

