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Mediating Citizen Complaints Against Police Officers:

A Guide For Police and Community Leaders



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Introduction

Mediation, along with other alternative dispute resolution (ADR) methods, has emerged in America as a popular means of settling disputes (Singer 1994). Mediation is widely used in divorce cases, employee-employer disputes, small commercial disputes, and many other areas of life where disagreements and conflicts arise. In general, participants have found mediation more satisfying than going to court or enduring some other formal procedure; it is usually quicker, more efficient, and less expensive. In addition, and perhaps most important, mediation has the potential to build understanding and lessen conflict between people. For all these reasons, mediation has obvious applications in resolving citizen complaints against police officers.

Although mediation is widely used in many areas of American life, few programs offer mediation for citizen complaints against police officers. Mediation is a complex enterprise, and many obstacles can arise in the course of establishing a program. For example, a broad consensus of opinion exists among experts in the field that not all citizen complaints should be mediated, especially use of force complaints. In addition, experienced mediators generally find that citizen complaint cases differ from other kinds of cases they have mediated because of the police officer's inherent power. Moreover, many police officers are unenthusiastic about using mediation to resolve citizen complaints, fearing they may be forced to admit to things they did not do. This misconception is largely due to a lack of understanding of what mediation is and how the process works.

Clearly, communities must address these and other issues before establishing a mediation program. This report explores these and other issues in an effort to help police and community leaders develop successful mediation programs. Chapter 1 defines mediation and describes its goals. Chapter 2 discusses the potential benefits of mediation. Chapter 3 discusses the various key issues involved in a mediation program. Chapter 4 describes existing mediation programs and the reasons for their success or failure. Chapter 5 offers a guide for planning a mediation program.



Chapter 1

Mediation: Definition, Process, and Goals

Introduction

This chapter defines mediation and other forms of dispute resolution, describes the mediation process, and discusses mediation goals.

What Is Mediation? Defining Our Terms

Disputes can be resolved in many ways, for example, by ignoring them, continuing to fight, or going to court. Mediation is a specific form of alternative dispute resolution (ADR). This report defines mediation and other ADR procedures as follows:¹

Mediation involves the informal resolution of a complaint or dispute between two parties through a face-to-face meeting in which a professional mediator serves as a neutral facilitator and where both parties ultimately agree that an acceptable resolution has been reached (Maxwell 1994). The proposed Uniform Mediation Act defines mediation as "a process in which a mediator facilitates communications and negotiations between parties to assist them in reaching a voluntary agreement regarding their dispute"² (National Conference of Commissioners on Uniform State Law 2000).

Conciliation involves the informal resolution of a complaint or dispute with a third party serving as a go-between, but without a face-to-face meeting between the disputing parties, and the complainant ultimately agreeing that the matter has been satisfactorily settled (McGillis 1982).

Arbitration involves the resolution of a complaint or dispute through a formal nonjudicial proceeding before an independent arbitrator, where the final decision is binding on both parties (McGillis 1982).

Hybrid processes combine elements of mediation and other ADR methods. Several hybrid processes exist, for example, court-ordered mediation, which is part voluntary and part involuntary (Goldberg, Sander, and Rogers 1992).

This report discusses only the mediation of citizen complaints.

¹ Many sources define *mediation* and other ADR procedures. See, for example, Singer (1994); Goldberg, Sander, and Rogers (1992); and McGillis (1997).

² There is, however, a trend toward mandatory mediation. See Kovach (1997).



Mediation is powerful because both the complainant and the officer can gain an understanding of *why* the other person acted as he or she did.

— Barbara Attard, Director,
Berkeley (California)
Police Review
Commission

The Mediation Process

Mediation is a process for settling disputes based on the voluntary participation of the disputing parties. It emphasizes dialog between the parties and is a safe environment where the parties can meet and air their views about the events or issues that created the dispute. The process is intended to develop mutual understanding between the conflicting parties. Finally, mediation gives the participants control over the final resolution of the problem (Folberg and Taylor 1984).

A neutral third party, a trained professional mediator, facilitates the mediation process. The mediator does not try to influence or pressure either party to reach an agreement or resolve the dispute in any particular way. The disputing parties *own* the process.

Mediation is a confidential process. Statements made by any of the parties may not be subsequently used in a formal legal proceeding. Thus, each side can freely discuss the issue at hand. The mediation process is summarized in figure 1–1.

Fig. 1–1

Why Should You Choose Mediation?

Mediation is a process in which people meet together with the assistance of a neutral mediator to resolve their differences. It gives both parties a chance to work together to develop a mutually agreeable resolution with the stress, time, and expense of going to court.

Our satisfied clients say:

“The mediator was professional and the solution we reached was fair.”

“We couldn’t have solved this without your expert help.”

“Mediation was not only cheaper, it was far less stressful than going to court.”

Fair
Quick
Results
Affordable
Accessible
Confidential
Commitment
Trained Mediators
Neutral atmosphere
You make the agreement
Most cases reach agreement

Source: Minneapolis Civilian Review Authority. Used by permission.



Goals of Mediation

The basic goals of mediation differ from those of traditional, formal, and legalistic dispute resolution procedures, including traditional procedures for resolving citizen complaints. Traditional dispute resolution focuses on factfinding, pinpointing responsibility, determining guilt or innocence, and punishing those found guilty. Traditional citizen complaint review procedures, for example, focus on determining whether or not the officer committed the alleged misconduct. In contrast, mediation focuses on understanding, problem solving, and reconciliation.

Understanding

Experts on citizen complaints against police believe that many formal complaints, and other problems stemming from police-citizen interactions, are largely the result of misunderstanding or miscommunication.

A recent report on victim-offender mediation programs explains that under mediation "the issue of guilt or innocence is not mediated" (Umbreit and Greenwood 2000). The point is to build understanding between the two parties involved.

Problem Solving

Mediation can be considered a form of problem solving, similar in orientation to other innovative police problem-solving programs (Bayley 1994). Problem solving through mediation involves identifying the factors that led to the complaint in the first place. These factors might include misunderstanding, failure to communicate, or inappropriate behavior. A 1995 report published by the Police Executive Research Forum describes various areas in which collaborative problem solving incorporated mediation to help resolve gang disputes, domestic violence incidents and incidents involving noncompliance with restraining orders, and interdepartmental personnel problems, especially race-related problems (Glensor and Stern 1995).

Reconciliation

Reconciliation involves reaching some agreement that the two parties have listened and gained a better understanding. As previously mentioned, the agreement may include a formal apology by either or both parties. To achieve these goals, the process emphasizes listening and dialog.

Is mediation the way to go?
Absolutely.

— Minneapolis Police
Federation, *Show Up*
(August 1998)



Chapter 2

Potential Benefits of Mediation

Introduction

Mediation of citizen complaints against police officers presents numerous potential benefits for police officers, citizen complainants, police accountability, community policing, the complaint process itself, and the criminal justice system. Note, however, that the benefits identified in this chapter are *potential* benefits, in that citizen complaint mediation programs have not been systematically evaluated (see Walker and Archbold 2000). The potential benefits are summarized in box 2-1.

Box 2-1

Potential Benefits of Mediation

Benefits for Police Officers

1. Better understanding of interactions with citizens.
2. Opportunity to explain actions to citizens.
3. Greater satisfaction with complaint process.
4. Empowerment.
5. Chance to learn from mistakes.

Benefits for Citizen Complainants

1. Greater opportunity to meet goals.
2. Greater satisfaction with complaint process.
3. Better understanding of policing.
4. Empowerment.

Benefits for Police Accountability

1. Greater responsibility for one's actions.
2. Positive changes in police subculture.

Benefits for Community Policing

1. Goals consistent with those of community policing.
2. Problem-solving process.
3. An opportunity for dialog.

Benefits for Complaint Process

1. More efficient complaint processing.
2. Cost savings.
3. Higher success rate.

Benefits for the Criminal Justice System

1. More trust in justice system.
2. Lower crime rate.



Benefits for Police Officers

Potential benefits of mediation for police officers include enhanced understanding of interactions with citizens, the opportunity to explain their actions to citizens, enhanced satisfaction with the complaint process, empowerment, and the opportunity to learn from their mistakes.

Better Understanding of Interactions With Citizens

Mediation can enhance police officers' understanding of their interactions with citizens. This benefit is a direct consequence of the face-to-face aspect of mediation. Traditional complaint investigation procedures do not involve a face-to-face meeting between complainant and police officer, thus offering no opportunity for the officer to hear the complainant's side of the story and gain perspective on how his or her actions affected the complainant. In traditional citizen complaint review procedures the complainant and the officer never meet face-to-face, and as a consequence there is no opportunity for dialog and understanding (Walker 2001).

Several mediation officials interviewed for this report said that many officers, by participating in a mediation session, learned how their behavior affected people. Although officers are generally reluctant to concede wrongdoing, many say "Gee, I learned something today" or "I just didn't realize how that affected him" when speaking to mediation officials after a session.

A mediator for the New York City Civilian Complaint Review Board (CCRB) points out that "[e]ven if the officer and the citizen will not meet again, the officer will meet [other] citizens in the future." In short, what officers learn from the mediation process may affect their future interactions with citizens.

Although anecdotal evidence suggests that police officers learn about citizens by participating in mediation, whether this knowledge translates into better interactions with the public has not been determined. As mediation becomes more widespread, it will be possible to design studies to investigate the actual results of mediation.



Opportunity To Explain Actions to Citizens

Mediation provides police officers with an opportunity to explain what they did and why. In the traditional complaint review process, officers are required to explain themselves to investigators—from either internal affairs or a citizen oversight agency—but they have no opportunity to talk directly to the complainant.

Police officers regard themselves as professionals who take pride in their work. They do not believe they did anything wrong in most complaint incidents. One mediation official quoted an officer as saying, "I want to explain why I acted that way. I am not a bad person." Another officer was quoted as saying, "I am a professional. I have a job to do." Mediation may help officers understand that, although *what* they did on the job is proper, *how* they did it may offend people.

After mediation, the officer was so pleased with the mediation process that he wrote a paper about it and presented it to the entire Police Board.

— California Citizen Oversight Official

Greater Satisfaction With the Complaint Process

Traditional complaint investigation procedures often fail to satisfy officers or citizen complainants. Research shows that rank-and-file police officers are alienated from their own internal affairs units. Publicly, they vigorously oppose external citizen oversight; privately, they oppose oversight by internal affairs as well. Internal affairs investigators are widely regarded as "headhunters" out to get officers. In many departments, officers perceive them to be biased investigators who treat favored officers preferentially and are tough on "less popular" officers (Mulcahy 1995; Chemerinsky 2000).

The Vera Institute study of the complaint process in New York City included a series of interviews with police officers who had been subjected to complaint investigations. It found deep dissatisfaction among the officers. Ironically, their criticisms were almost identical to those of the citizen complainants. Officers viewed investigations as biased against them and expressed a strong desire for face-to-face meetings with complainants. In particular, they wanted an opportunity to explain their actions to citizens (Sviridoff and McElroy 1989a).

Research conducted in other countries has found that informal dispute resolution provides police officers with greater satisfaction than traditional methods. For example, in Queensland, Australia, more than three-fourths of the police officers participating in informal resolution reported they were "very" or "fairly" satisfied with the outcome of that process (Holland 1996a). In other words, mediation may be a more satisfying experience for officers and may benefit them further by improving morale.



³ In some police departments, officers are ineligible for promotion or other personnel actions while a citizen complaint is pending. Mediation can provide a speedier resolution of citizen complaints and thereby may also reduce morale problems arising from blocked career opportunities.

Empowerment

Experts in mediation believe that it empowers each of the parties involved by providing a "safe space," protected by rules of confidentiality, where they can freely express their feelings and opinions. In this setting, mediation empowers police officers by allowing them to take an active role in shaping the settlement of the complaint. By agreeing to participate in mediation, listening, expressing their own views about the events in question, and proposing the terms of a final agreement, officers are empowered to take responsibility for resolving the problem.

In traditional complaint procedures, which are based on a criminal trial model with an emphasis on determining guilt, officers are reluctant to say anything that could be interpreted as an admission of guilt. This includes saying they are sorry. Traditional processes disempower officers by rendering them passive subjects of investigation rather than active participants in resolving the underlying dispute. Mediation, however, creates an opportunity for self-expression and participation (Schwerin 1995).

A Chance To Learn From Mistakes

Existing mediation programs offer a tangible benefit to police officers who choose to participate. If mediation is successful, the complaint does not appear on the officer's personnel record. In effect, mediation functions as a diversion program, analogous to diversion programs in the criminal process (Nimmer 1974). Like traditional diversion programs, mediation gives officers a chance to learn from whatever mistakes they made and move forward in their careers.³

Benefits for Citizen Complainants

Mediation offers several potential benefits for citizen complainants, including an enhanced opportunity to meet goals, greater satisfaction with the complaint process, enhanced understanding of policing, and empowerment.

Greater Opportunity To Meet Goals

Mediation may meet the goals of many citizen complainants better than traditional complaint review procedures. Despite the enormous controversy over citizen complaints, relatively little attention has been paid to the goals of complainants. Why do people file complaints against police officers? What do they want? What can they realistically expect to get?



The limited research on the goals of people who file complaints against police officers suggests that mediation meets complainant goals better than traditional complaint procedures. The Vera Institute interviewed 371 citizens who had filed complaints with the New York City CCRB. The study found that only 20 percent of the complainants had "serious" goals, defined as wanting to have the officer punished. Most of the complainants (60 percent) had "moderate" goals; that is, they wanted some kind of disciplinary action taken against the officer but did not want him or her fired. The remaining 20 percent of complainants had "mild" goals; for example, most simply wanted to report the incident (Sviridoff and McElroy 1989b).

In a series of focus groups in Omaha, Nebraska, individuals were asked to discuss whether they would file a complaint in response to a hypothetical incident of police misconduct and what they wanted to achieve if they did. Many participants indicated a desire for an explanation or apology from either the officer or a responsible official, or they wanted an opportunity to express their views to the officer in person. In New York City, few participants wanted the targeted officer fired (Walker 1997).

Finally, the Alberta Law Enforcement Review Board found that in some instances, "all the citizen wants is an apology" and that mediation provides the officer with a forum in which to "explain to a citizen why he or she acted in a particular manner" (Alberta Law Enforcement Review Board 1997).

Greater Satisfaction With Complaint Process

Because mediation meets the goals of many citizen complainants better than traditional procedures, complainants are more likely to be satisfied with the entire complaint process.

One of the basic goals of citizen complaint procedures is a satisfactory experience for complainants. Other goals include thorough and fair investigations of complaints, sustaining valid complaints, punishing officers guilty of misconduct, deterring future misconduct, improving public attitudes toward police, and enhancing the professionalism of the police department (Walker 2001).

Research indicates that complainants who choose mediation do report higher levels of satisfaction than those who choose the traditional process. A study conducted in the United Kingdom found that 30 percent of complainants were "very satisfied" with the mediation

I don't want the officer disciplined. I want a conversation.

— Citizen complainant,
Portland, Oregon

Overall I think that mediation is the most satisfying solution to nonviolent, less serious cases because being able to understand the situation and maybe even getting an explanation from the other side can help people get over what happened.

— Mediation Program
Official



It is really hard to hate [people] face-to-face, especially if they are trying to explain why they acted or reacted the way that they did.

— New York City Citizen
Oversight Official

process compared to none of those whose cases were formally investigated (Corbett 1991). Finally, a study conducted in Queensland, Australia, found that about 35 percent of complainants were "very satisfied" with mediation, compared to 16 percent of those whose complaints were formally investigated (Holland 1996a).

Better Understanding of Policing

Interviewed mediators reported that mediation offers citizens an opportunity to gain new understanding of the incident about which they had complained, as well as policing in general. Barbara Attard, Director of the Berkeley Police Review Commission, explained that mediation "is powerful because both the complainant and the officer can gain an understanding of why the other person acted as he/she did" (Attard 1999). Mediation officials in another city described a case in which the officer simply explained that he was suffering from job-related stress and was "having a bad day" on that particular occasion. Apparently, the citizen was able to relate to the officer in a new way, seeing him as another person trying to do his job under unfavorable conditions. In another case in that city, the discussion centered on why the officer chose police work as a career, giving the citizen a new perspective of the officer.

One mediator cited a case involving a sergeant who, returning from an extremely stressful call (colloquially referred to as a "dead baby call") and feeling very upset, tailgated a car, ticketed the driver, and used inappropriate language during the interaction. The officer's behavior was indeed inappropriate. The mediation session, however, provided an opportunity for the officer to explain the circumstances of the incident and for the citizen to understand the effect of job stress on the officer's behavior.

The common theme in these examples is that mediation helps citizens penetrate the stereotypes about police officers. A major part of the police-community relations problem in America is that citizens and police officers often stereotype each other, reacting to symbols such as a uniform and badge or certain street clothes. Vivian Berger, who has mediated cases in New York City, explained that some complainants enter mediation thinking they want to teach the officer something but end up learning something themselves.



Empowerment

A major benefit of mediation for participants is the feeling of empowerment, or being heard by the opposing party.⁴ The proposed Uniform Mediation Act highlights the empowerment aspects of mediation by explaining that it involves an "informed self-determination by the parties" (National Conference of Commissioners on Uniform State Law 2000). Self-determination is one of the core ingredients of mediation. Complainants who choose to participate in the process may terminate it at any point if they are dissatisfied. They also play a direct role in shaping the final resolution, which by definition must be one they are satisfied with. Evaluations in Australia and the United Kingdom found that citizens felt empowered when they were able to confront the police officers against whom they had filed complaints (Holland 1996a; Corbett 1991).

⁴ For information about the concept of empowerment, see Bush and Folger (1994) and Schwerin (1995).

Benefits for Police Accountability

Greater Responsibility for One's Actions

Mediation introduces a new dimension to police accountability. In traditional complaint procedures, an officer accused of misconduct is directly accountable only to other police officers: internal affairs investigators, the immediate supervisor, and, in some instances, the chief of police (Walker 2001). The officer never has to directly face or account to the citizen who has filed the complaint. In contrast, an officer participating in mediation is directly accountable to the citizen who filed the complaint. Mediation may help personalize American policing.

Positive Changes in Police Subculture

Mediation may also enhance police accountability by having a long-term effect on the police subculture. The police subculture is characterized by an "us versus them" perspective that views citizens in a hostile light. Its most serious manifestation is the "code of silence," by which officers refuse to report misconduct by other officers (Skolnick 1994; Westley 1970). This characteristic of the police subculture works against building or maintaining a respectful, trusting relationship with citizens. Therefore, only major changes would motivate police officers to become more receptive to informal dispute resolution techniques such as mediation. Because of the face-to-face aspect of mediation, the experience of having to account for one's actions directly to the complainant, and the opportunity to learn how one's actions affect people, mediation may eventually have an effect on the police subculture.



Benefits for Community Policing

Goals Consistent With Those of Community Policing

Mediation of citizen complaints can also strengthen community policing efforts. In fact, mediation is consistent with the basic philosophy and goals of community policing.

The mediation services are an essential part of COP (Community-Oriented Policing) in Portland. It helps strengthen the police-community relationship, and it educates citizens about changes in policing.

—Portland (Oregon)
Mediation Official

The core philosophy of community policing is that police departments should develop close working relationships with community residents, develop partnerships on specific issues or problems, and work to overcome the alienation and distrust of police that often manifest themselves in citizen complaints (Bayley 1994). Both community policing and mediation emphasize the values of cooperation and collaboration, the goals of learning and understanding, and the process of problem solving (Nicholl 2000a).

Unfortunately, traditional citizen complaint review systems often compound the frustration and anger felt by many complainants for several reasons, including delay, lack of information about the status of the complaint, and lack of opportunity to meet face to face with a responsible official. Mediation, hopefully, can satisfy complainants and thus build the trust and confidence essential for effective community policing (see box 2–2).

Box 2–2

Benefits of Mediation for Community Policing

Mediation promotes

1. A philosophy of openness.
2. Partnerships with community agencies.
3. Problem solving.
4. Dialog between police officers and citizens.

Problem-Solving Process

Mediation is a form of problem solving in that the officer sits down with the person who has filed the complaint, discusses the events that led to the complaint, and works out a mutually acceptable understanding with the complainant. Mediation also becomes a way to strengthen the "partnership" between police officers and citizens in communities that identify with community policing philosophies and practices (Glensor and Stern 1995). In her report on community justice, restorative justice, and community policing, Caroline Nicholl explains that community justice "is shifting criminal justice from a purely adversarial approach to include problem-solving methods" (Nicholl 2000a).



Benefits for Complaint Process

More Efficient Complaint Processing

One of the most serious problems with traditional complaint investigation procedures is a delay in reaching a final disposition. This problem affects both internal police complaint procedures and external citizen oversight agencies. In some police departments, investigations take an average of 13 months to complete. The old Washington, D.C., CCRB (abolished in 1995) was successfully sued because some complaint investigations were taking as long as three years. Delay causes dissatisfaction in both complainants and police officers. In some police departments, officers cannot be considered for promotion while a complaint against them is pending (Walker 2001).

Mediation can provide a relatively speedy resolution to a complaint. Once a complaint is referred for mediation, it is simply a matter of scheduling a session at a mutually convenient time. This eliminates the time-consuming process of locating and interviewing participants and witnesses and then reviewing all the reports. Mediation sessions typically last one hour.

Cost Savings

Mediation is much less expensive than traditional complaint investigations. The Minneapolis Civilian Review Authority (CRA) pays a flat rate of \$2,000 a year to the Minneapolis Mediation Center to provide mediators, who work pro bono, to handle police cases. In Minneapolis, each successful mediation case cost \$153 in 1998 and \$133 in 1999. Costs in Portland, Oregon, were around \$150 per successfully mediated case. The proposed budget for the San Diego Police Department mediation program was a total of \$5,000 for the first year. Even if only 10 cases were successfully mediated the first year, the resulting cost of \$500 per case would be substantially less than the cost of a formally investigated case. An annual caseload of about 40 would bring the cost per case in line with Minneapolis and Portland (San Diego Police Department 2000).

We have built a good relationship not only with the community but also with the local police department. So we have a partnership on both sides.

— West Coast Mediation
Official



Little systematic information exists on the costs of traditional citizen complaint investigations, however, and, consequently, putting mediation in a meaningful cost context is difficult. The best estimates were developed by the Minneapolis Redesign Team evaluation of CRA. The team estimated that complaints investigated by CRA cost an average of \$3,649 in 1996, whereas cases investigated by the police department's Internal Affairs Division cost an average of \$6,278. (One conclusion of the evaluation was that, in light of these data, abolishing CRA would not save the city of Minneapolis any money, because current cases would have to be picked up by the police department at a greater cost per case.) The redesign team compared CRA's average cost per investigation to the costs in Berkeley, California, (\$8,571 per case) and Pittsburgh, Pennsylvania, (\$872 per case) (Minneapolis Civilian Review Authority 1997).

In a report on citizen oversight of police produced for the National Institute of Justice, Peter Finn obtained cost estimates for complaint investigations in nine different citizen oversight procedures. The estimated cost per complaint investigation varied tremendously, partly because the agencies surveyed were not comparable in terms of their formal responsibilities. Three oversight agencies with responsibility for conducting their own investigations reported per-case costs of \$4,864 for the Berkeley Police Review Commission, \$3,171 for the Minneapolis CRA, and \$2,237 for the San Francisco Office of Citizen Complaints. Why this estimate for the Berkeley Police Review Commission is half that obtained by the Minneapolis Redesign Team is unknown. However, the discrepancy highlights the difficulty in obtaining reliable data regarding the cost of complaint investigations (Finn 2001).

The Alberta [Canada] Law Enforcement Review Board (1997) estimated that informal resolution of an average complaint was \$1,000 less than the average cost of a formal investigation.

Although more detailed studies are needed, mediation is clearly substantially less expensive than traditional complaint investigation.



Higher Success Rate

Only about 10 percent of all citizen complaints are sustained, meaning that the investigation upheld the complainant's allegation against the officer or officers (Pate and Fridell 1993). Citizen oversight agencies with independent investigatory power also have low sustaining rates (Walker 2001). Community activists regard this rate as evidence that internal police complaint investigation procedures are inadequate and possibly even "whitewashes" of police misconduct.

Low sustain rates are an inherent aspect of complaints against police. In many cases, no independent witnesses to the event and no forensic evidence, such as medical records, exist to support the complaints. These complaints are often characterized as "swearing contests" between two parties. Because officers are innocent until proven guilty, the complaints cannot be sustained (see Walker 2001).

Unsustained complaints generally leave both parties unhappy: complainants feel their issues were not adequately addressed and police officers feel they were falsely accused.

Mediation offers an alternative to this situation. When a citizen complainant is satisfied with the results of mediation (e.g., he or she spoke, was heard, and received an explanation or perhaps an apology) –the process can be counted as a success.

Benefits for the Criminal Justice System

Mediation may also enhance public confidence in the criminal justice system and thus help reduce the crime rate. Procedural justice research suggests that people with greater confidence in the criminal justice system are less likely to break the law (Tyler 1990).

Procedural justice scholars also indicate that people exposed to the criminal justice system are at least as concerned about the fairness of the process as they are about the outcome, and they may be more concerned about process issues. That is, their sense of justice depends not entirely on whether they win or lose but on whether they are treated fairly, have a chance to express their point of view, and have a sense of control over the process.

Mediation offers these opportunities and thus may enhance citizen confidence in the complaint process, the police department, and the criminal justice system. This in turn may contribute to better police-community relations and the success of community policing efforts.



Chapter 3

Key Issues in Mediation

Introduction

Developing a successful mediation program requires careful consideration of key issues. Most existing programs do not mediate many cases, and some mediate none at all. We believe this situation is a result of failure to adequately address key issues associated with the mediation of citizen complaints against police officers (Walker and Archbold 2000).

This chapter discusses these key issues and is based on (1) a review of official documents associated with existing mediation programs, (2) interviews with officials associated with mediation programs, and (3) a review of the literature on mediation, alternative dispute resolution, and citizen complaints against police. In terms of addressing these issues, those actively involved in citizen complaint mediation agree on all but a few of the points. We have used our best judgment regarding the best approach for the more controversial issues.

Voluntary Participation

Voluntary participation is essential to the mediation process. Law professor Kimberlee Kovach, one of the leading experts in ADR, characterizes self-determination and freedom of choice as "the bedrock of the mediation process" (Kovach 1997).⁵

Realistically, however, participation in mediation is more voluntary for the citizen complainant than for the police officer. The complainant can choose not to file a complaint at all, to withdraw a complaint at any time, and to terminate a mediation process. However, if an officer declines to mediate the complaint or withdraws from the process, the complaint will be investigated in the traditional manner, and the complaint will appear on his or her official record. In short, the officer cannot make the complaint disappear completely.⁶ Box 3–1 shows the voluntary aspects of mediation for citizens and police officers.

⁵ Some experts, however, believe that mediation of at least some court cases should be made mandatory; others believe that this would be contrary to the basic idea of mediation. See the discussion in McGillis (1997).

⁶ Scholars have noted that a similar element of coercion affects many "court attached" forms of mediation. See especially the observations in Tomasic (1982).



⁷ In an exception to this approach, the New York City Civilian Complaint Review Board (CCRB) conciliated some use of force cases in the 1980s. Generally, these were cases that had been investigated and where there was insufficient evidence to sustain the complaint. See Sviridoff and McElroy (1988).

Box 3-1
Voluntary Aspects of Mediation

	For the Citizen	For the Police Officer
Filing complaint	Yes	N/A
Choosing mediation	Yes	Yes
Withdrawing from mediation	Yes	Yes
Actively participating in mediation session	Yes	Yes
Shaping final settlement	Yes	Yes
Agreeing to final settlement	Yes	Yes
Making complaint "go away"	Yes	No

N/A = not applicable.

Case Eligibility

Virtually everyone interviewed for this report and most experts in ADR in other areas of life (e.g., divorce, commercial disputes) agree that some categories of complaints should be ineligible for mediation. As one expert put it, "not all disputes *should* be mediated" (Maute 1990).

Seriousness of Allegations

Experienced complaint mediation officials generally agree that use-of-force allegations should be ineligible for mediation. Police officials support this position.⁷

Most mediation programs (Washington, DC; San Francisco; Minneapolis, others) do not mediate use of force complaints (www.occr.dc.gov). The Minneapolis Civilian Review Authority (CRA), however, has made exceptions for cases in which the citizen was not injured. In contrast, the New York City Civilian Complaint Review Board (CCRB) mediates complaints involving officer threats to use force (as long as no injury occurred), to seize property or damage property, to stop and frisk someone, and to notify children's services agency. The New York City CCRB has been criticized by the New York Civil Liberties Union for this policy (New York City Civilian Complaint Review Board 2001). A few programs mediate use-of-force complaints.

We support the policy that complaints involving use of force and threats to use force should not be mediated. Based on conversations with experienced mediators, we do not endorse the mediation of complaints involving threats by police officers. People in the mediation field agree that no complaint involving potential criminal charges against the officer should be eligible for mediation.



Officer Complaint History

Cases involving officers with a history of citizen complaints should be ineligible for mediation. The New York City CCRB does not refer a case for mediation if the officer has been named in three citizen complaints in the past 12 months. The Minneapolis CRA does not mediate a complaint involving an officer who has participated in mediation "for a serious similar misconduct allegation or a similar misconduct allegation within the previous 12 months" (Minneapolis Civilian Review Authority 1990). In Washington, DC, officers can mediate only one complaint in a twelve month period (www.occr.edu.gov). This policy prevents an officer from avoiding departmental discipline for repeated misconduct, which is a valid concern. Mediation programs could expand on the Minneapolis guidelines by disqualifying officers with a recent history of a specified number of sustained citizen complaints or use-of-force incidents.

⁸ Vivian Berger, interview with authors, 2000.

Mediating Racial and Ethnic-Related Complaints

One of the most sensitive mediation issues is complaints alleging the use of offensive language or other prejudicial treatment related to race, ethnicity, and gender. Some people argue that complaints involving allegations of racial, ethnic, or gender slurs should not be mediated at all. As a matter of policy, for example, the San Francisco Office of Citizen Complaints does not mediate complaints involving allegations of racial, ethnic, or gender slurs. This policy represents a decision to treat such complaints as seriously as use-of-force complaints.

The racial and ethnic aspects of complaints is often broader than the formal allegations. Although few complaints involve specific allegations of offensive racist language, many complaints involve underlying racial/ethnic issues. As Vivian Berger, an experienced mediator in New York City, puts it, "While many complaints are not officially about race, they are really about race."⁸ That is, the formal complaint may involve an allegation of discourtesy or failure to provide adequate service, but the underlying dynamics of the incident come from misunderstandings or misperceptions based on race or ethnicity. Consequently, when such complaints are selected for mediation, mediators need to be particularly sensitive to the underlying racial or ethnic dynamics and prepared to address them.

Some experts argue that no complaints involving complainants who are members of racial or ethnic minority groups should be mediated, regardless of the allegation. We do not agree with this view, but because it raises a number of extremely important issues, it is worth examining the pros and cons in detail.



While many complaints are not officially about race, they are *really* about race.

— Vivian Berger, New York City Mediator

Arguments against mediation. Christopher Cooper, an African-American professor of criminology at St. Xavier University in Chicago, a former police officer, and an attorney, argues that all complaints involving racial and ethnic minorities should not be mediated regardless of the allegation (Cooper 2000; Cooper 1999a). The National Black Police Association (2000) goes even further, declaring that "there are few complaints by citizens against police officers that should be considered appropriate for mediation, mainly because a mediation process is valid only when the parties are on an equal playing field."

Cooper, who holds a Ph.D. in criminology, has written articles and a book about police officers acting as mediators to resolve disputes between citizens, argues that instead of solving the problem of race discrimination in policing, mediation "is perpetuating the problem" (Cooper 2000). In his view, mediation is a process through which an officer can avoid "departmental punishment and potential criminal prosecution." He believes that "[p]eople of color have the most to lose from the growing popularity of these [mediation] programs." Cooper is not alone in this view. Other community activists who have been fighting police misconduct also fear that mediation may allow officers who have committed serious abuses to "beat the rap" and avoid discipline.

Many experts in the alternative dispute resolution (ADR) movement are concerned that mediation will work to the disadvantage of historically powerless groups. Some experts, including some feminist scholars, for example, argue that women are likely to be at a disadvantage in divorce, child custody, and spousal abuse mediation because the mediation process perpetuates an inherent power imbalance between males and females (Lerman 1984; Grillo 1991). Some legal scholars point out that litigation has been a powerful instrument of social change that has provided an avenue by which the powerless level the playing field with powerful groups or institutions. These experts fear that the ADR effort to reduce formal adjudication will "undermine the enforcement of rights" and disadvantage the powerless (Garth 1982; Fiss 1984).

Arguments for Mediation. Other experts, however, believe that mediation is particularly well-suited for racial and ethnic-related complaints against police officers. Berger, who has mediated citizen complaint cases in New York City, writes, "I have found that these complaints lend themselves extremely well to nonevaluative, purely facilitative mediation" (Berger 2000).



On one critical point, for example, critics of mediation misrepresent the nature of internal police complaint mediation programs. Cooper writes that citizens who file complaints involving issues of race "will find that their cases are referred to mediation" (Cooper 2000). This is not correct. Except for court-ordered programs, mediation is voluntary; both the complainant and the officer must agree to participate. Moreover, a complainant is free to end the mediation session at any time and for any reason (e.g., if he or she feels victimized by a power imbalance). Refusal to participate or termination of a mediation session by either party leaves the complaint subject to the traditional investigation process. For the same reasons, the concern expressed by the National Black Police Association about the lack of a "level playing field" in most complaints does not invalidate the concept of mediation.

Although some mediation critics allege that mediation will prevent important issues from being properly adjudicated, most mediation programs prohibit mediation in use-of-force complaints. An officer accused of using excessive force must face a formal investigation and possible discipline. Moreover, large-scale police abuses such as systematic harassment (e.g., racial profiling) are best addressed through litigation or policy changes effected through political action (e.g., a statute mandating arrest in domestic violence cases or data collection on traffic stops).

In many complaints against police officers, and in police-community relations generally, the basic problem is the chasm of misunderstanding that exists between the majority community and people of color. As representatives of law and authority, police officers are often perceived as symbols of an oppressive society. For their part, some officers react to young men of color in a symbolic or stereotypical manner. As Jerome Skolnick (1994; orig. 1966) pointed out more than 30 years ago in his classic study *Justice Without Trial*, a tendency to stereotype is an inherent aspect of police work. In many situations, neither the police officer nor the citizen is seeing or responding to the other person as an individual. Bridging the racial and ethnic divide has been the major challenge in policing since the 1960s, driving such reforms as the creation of police-community relation units, team policing, and community policing, as well as spurring a renewed interest in foot patrols (Walker 1999).



A Special Role for Mediation. Mediation is uniquely suited to help bridge the racial and ethnic divide because it is the only procedure for investigating complaints that brings the disputing parties together in a face-to-face meeting. This characteristic may make mediation more likely than any other program to help both parties understand the dynamics of policing and how police and citizens interact. In contrast, the lack of direct contact perpetuated by traditional complaint investigation procedures may aggravate racial and ethnic divisions, leaving both sides angry and suspicious of the other.

One important argument for mediating race- and ethnicity-related complaints is the opportunity for empowerment and self-determination of participants on both sides. Advocates of mediation claim that it empowers participants by giving them control over the dispute process. In contrast, formal legal proceedings, in which laws and lawyers dominate, often make participants feel powerless. Empowerment is especially important in regard to race- and ethnicity-related complaints, because the core issue in police-community relations for nearly 50 years has been the powerlessness many racial and ethnic minorities feel with respect to local police. By empowering officers and complainants as active participants in the process, mediation could lead to dialog between police and the racial and ethnic minorities in a community.

Mediating Complaints by Women

Some critics of mediation are also concerned that the process might disadvantage women who file complaints against police officers. The San Francisco Office of Citizen Complaints, as a matter of policy, does not mediate complaints involving gender-related slurs.

The concerns about mediating complaints filed by women involve the potential imbalance of power when a female citizen seeks to mediate a complaint against a male police officer. Experienced mediators have found that all citizen complaints against police involve special considerations of power because of the unique role of the police. There is some concern that women are more likely than men to be at a disadvantage in a mediation session. Some experts in divorce, for example, are particularly concerned that wives will be at a disadvantage in mediation.



We believe that these concerns are unfounded and that complaints by women should not be excluded. In support of this view, some research on divorce mediation indicates that women participants do not suffer from any power imbalance in the process (Ellis and Stuckless 1996).

Potential Language and Cultural Barriers

Potential language barriers represent an important mediation issue. Because demographic trends indicate increased immigration to the United States, an increasing number of complaints against police officers will probably involve people who either have limited command of the English language or do not speak English at all. Given the expected increase, mediation programs should be able to provide bilingual mediators or translators.

At the same time, mediation program managers should consider and explore ways to better explain the concept of mediation to complainants who do not speak English or are not familiar with the nature of mediation as a means of resolving problems. The more active citizen oversight agencies have adopted community outreach programs to explain the citizen complaint process to people who are new to this country and not familiar with the American criminal justice system and its procedures for handling citizen complaints against police officers (Waker 2001).

Case Screening

Even among cases that are formally eligible for mediation, not all are good candidates for mediation. Program officials must evaluate individual cases for eligibility (see box 3–2). The mediation program staff person responsible for selecting and referring cases must ask, "Are [the parties] capable of dealing fairly with each other?" (Maute 1990). A recent report on victim-offender mediation programs calls for "careful screening of cases" and recommends that program staff and mediators use discretion by asking themselves at each step in the process whether the particular case is suited for and should proceed to mediation (Umbreit and Greenwood 2000a).



Box 3-2
Case Eligibility Checklist

Type of Complaint:

1. Possible criminal charges.
2. Use of force.
3. Racial, ethnic, or gender slurs.

Officer Background:

1. Recent complaint history.
2. Recent mediation history.

The Minneapolis CRA director explained that some complainants are so angry and upset that they would not be able to listen to the other side. Similarly, some police officers who have been subject to prior complaints are known by staff to have attitudes that make them poor candidates for mediation. In either case, such complaints are not referred for mediation because of the low probability of success. Note that unsuccessful mediation would probably be counterproductive, leaving both sides angrier and more alienated than they were originally.

The careful screening that occurs in most programs (which also includes much self-selection by potential participants) is probably why we did not hear about a single mediation session getting out of control—that is, we found no reports of cases in which a participant yelled, screamed, or otherwise behaved in an inappropriate manner.

Police Discipline and Accountability

A major issue in the mediation of citizen complaints is whether it undermines police discipline. Some community activists fear that mediation will allow an officer to "beat the rap." As already noted, mediation functions in effect as a diversion program: no formal departmental discipline can be imposed if the officer successfully mediates the complaint, and no record of the complaint appears in his or her disciplinary file. Therefore, some consider mediation a threat to police accountability. They fear that citizens will view mediation as a "slap on the wrist" for police officers, who might then not take the process seriously. In this scenario, the citizen would enter mediation without the mutual good faith that all mediators and police officials interviewed for this report consider important.

Experienced police mediators argue that mediation does not undermine formal discipline because few if any of the complaint cases referred for mediation (assuming a properly designed program)



are likely to be sustained in the first place. Barbara Attard, director of the Berkeley Police Review Commission, explains, "Investigations of police misconduct complaints have limited efficacy in some types of cases, particularly those that are one-on-one and discourtesy/attitude-based cases. The majority of such cases result in a finding of 'not sustained'" (Attard 1999).

Complaints not sustained result in no discipline of the officer and, in fact, tend to leave both the complainant and the officer feeling angry. Insofar as mediation results in a dialog or better understanding between the parties, some positive result is achieved.

Several mediators and police officials suggested that the disputing parties be informed of the potential outcomes before they participate in mediation. This action could eliminate any misconceptions that community groups or citizens have about the mediation process. A complainant who really wants the officer punished can then decline to mediate.

Getting Both Sides to the Table

One of the greatest obstacles facing mediation programs is getting both sides to the table (Peachey 1989). The few cases mediated by most existing programs testifies to the seriousness of this issue (see Chapter 4).

As Attard explained, "It is difficult to convince parties in police misconduct cases that mediation is a good idea because they do not have an ongoing relationship with each other" (Attard 1999). In contrast, child custody or employee grievance cases involve individuals who will have to deal with each other in the future and therefore have considerable incentive to resolve their problems successfully and maintain a good relationship.

Getting both sides to the table also involves a combination of incentives and persuasion (see box 3–3). Mediation programs offer officers a tangible incentive because a successfully mediated complaint does not appear on an officer's record. Officers are also being paid for the time they spend in mediation. For this reason, the police unions in Rochester, Minneapolis, and San Francisco urge their officers to choose mediation (Minneapolis Police Federation 1998). No equivalent incentives are available for citizens, however. In fact, mediation poses some significant *disincentives* for citizens. They must take time off from work or sacrifice family time to participate in a mediation session. One complainant told officials in Portland, for example, "I'm getting married soon, and I just don't want to put any time into this" (Minard 1997).



⁹ There is reason to be concerned about this issue. A Vera Institute study of complaint processing in New York City in the 1980s found that citizens were being coerced into accepting mediation or conciliation. See Sviridoff and McElroy (1988).

Box 3-3
Getting Both Sides to the Table

Tangible Incentives

Officers: Successful mediation removes complaint from disciplinary file.

Citizen complainants: No direct incentives. Many disincentives (especially time).

Informational Material

Officers and citizens: Must be user-friendly (clear and brief), with a description of advantages and assurance of confidentiality.

Personal Contact

Officers: Assurance from peers and union officials that mediation is a good choice.

Citizens: Many need further explanation; gentle encouragement but without coercion.

Convenience

Officers: On duty, with pay.

Citizens: Scheduling around work and family responsibilities.

In the absence of tangible incentives, many citizen complainants need to be persuaded to choose mediation. Mediation officials in New York City explained that many complainants get "cold feet" at the prospect of the session and that it takes a lot of courage to face a police officer or the specific officer in question. (This point is generally not well understood by police officers; many think citizens are too eager to file complaints and confront them.)

To get complainants to mediation, communities must address several issues (see box 3-3).

First, *good informational material* that explains mediation is extremely important. In one city, a key official conceded that the form letter sent to complainants is not customer friendly and needs to be revised.

Second, communities must decide *who will contact citizen complainants*. In Minneapolis, the initial contact is made by CRA, an agency independent of the police department. Officials in both Rochester and Portland conceded that mediation caseloads may be low because the initial contact is made by a police officer, and complainants may be suspicious.⁹

Third, *continuity in personnel* responsible for mediation is also vital. The number of cases mediated in Rochester has fallen in recent years, possibly because of turnover among officers in the police department's internal affairs unit and the fact that newly assigned officers are neither fully aware of nor committed to mediation.



Creating a "Level Playing Field"

One of the major concerns regarding the mediation of citizen complaints against police officers is the need for a level playing field in mediation and an atmosphere of equality among the parties. Many mediators stated that citizen-police mediation cases are different from other kinds of mediation cases largely because of power differences between police and citizen complainants.

The unique power of police officers derives from two sources: an officer's *formal authority* within the criminal justice system and an officer's *sanction power* to inflict harm on or limit the freedom of another person (Goldstein 1977).

Other power imbalances exist between the police and citizen complainants. For example, officers are more likely to be "repeat players," whereas citizens are likely to be "one-shotters" (Galanter 1974). Some officers may have been the subject of complaints (although not necessarily mediation) and developed strategies for handling themselves. Most complainants are new to the process and therefore more likely to be uncertain and perhaps even fearful.

Establishing a level playing field is particularly important for mediating racial ethnic or gender-related complaints, because the power imbalance is likely to be accentuated by cultural misunderstandings. A complainant of color may feel powerless when confronting a white officer because of feelings of alienation from a white-dominated police department and a white-dominated society, which are not related to the officer's actions. An officer might subtly invoke his or her role as an officer or status as a member of the dominant white society to control the process. A mediator needs to be fully cognizant of both manifest and latent racial dynamics in any mediation session, especially when they are not overtly expressed, and make a special effort to level the playing field, to get both parties to meet each other as individuals, and to address whatever racial or ethnic issues are at work.

The Mediator Handbook advises that the effective mediator neutralize these power imbalances so that the disputants may mediate fairly and equally (Mitchell and Dewhirst 1990). For example, in Minneapolis, mediators address participants by their first names. They do not address participants, for example, as Officer Jones or Dr. Smith. By eliminating reference to professional status, mediators level the playing field.

You need to personalize the service. Do not send form letters to contact people. Instead, you call them over the phone or hand-write any correspondence to them.

— California Citizen
Oversight Official



One of the most important issues uncovered in interviews for this report is the question of police officers wearing a uniform in mediation sessions. Many community representatives are concerned about this issue. The uniform symbolizes the unique power of the police officer, which tends to create a power imbalance in mediation. In every mediation program studied for this report, officers are on duty and being paid during mediation. As a result he or she cannot be barred from wearing the uniform. In New York City, however, officers are instructed to appear in civilian attire (Berger 2000). On the other hand, a few people interviewed feel that the uniform may actually increase the significance of a satisfactory outcome in that the complainant and officer first made contact in these status positions, so the outcome may give the complainant a sense of power and control.

¹⁰ The problem of lack of good faith in mediation is discussed extensively in Kovach (1997). This problem is more likely to arise in court-annexed mediation where the potential threat of formal litigation hangs over the process. (See also Umbreit and Greenwood 2000b).

In the end, if a complainant feels the officer is using the uniform to wield power in a mediation session the best response is to terminate the session. Before taking this step, of course, the complainant should say to the officer "you are not treating me with respect." If such efforts do not work and the complainant is unhappy with the officer's behavior, he or she can terminate the session.

Insincere Participation

One potential problem is insincere participation by either party.¹⁰ An officer may choose mediation to "make the complaint go away," as one officer explained, and go through the motions of the mediation session, doing only enough to achieve a final resolution but without any genuine commitment to the process.

Unfortunately, an officer's true motivations in a mediation session cannot be gauged nor can genuine sincerity be ensured. Perhaps the best measure of an officer's sincerity is the complainant's level of satisfaction that the officer has listened and responded appropriately, even if the officer's response was not an explicit apology. If the complainant feels that the officer is being insincere, the citizen has the option of terminating the session.

If an officer feels a citizen is not participating sincerely, he or she also has the option of terminating the mediation session.



Mediators

Mediator Skills

Mediation programs should only use trained professional mediators. Mediation is an important and complex undertaking, and it should not involve amateurs. Professional standards for mediators have been developed and approved by the American Arbitration Association, the Society for Professionals in Dispute Resolution, and the American Bar Association Section on Dispute Resolution (Hill 1998).

Because complex issues may arise during the mediation process, mediators must possess a combination of human relations and mediation skills. Two experts explain that the ability to be professional, sensitive, street smart, and a good communicator increases the chances that an individual will be effective in mediation (Mitchell and Dewhirst 1990). Mediators must also be able to work with recalcitrant parties who are reluctant to work toward a satisfactory end.

Mediator Neutrality

Some mediators have strong feelings about police that affect their neutrality. Mediation officials in one city explained that some of their mediators have strong feelings of hostility toward police and therefore do not accept police-related cases. At the same time, other mediators have very positive feelings about police or have family members or close friends who are police officers and therefore decline police-related cases.¹¹

The Standards of Conduct for Mediators specify that "a mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator" (American Bar Association et al. 1994). Financial conflicts of interest are not likely to arise in citizen complaint cases, but conflicts arising from political attitudes and personal associations may.

Number of Mediators

Some programs mediate cases with a single mediator, and others use two mediators at each session. For example, co-mediators are routinely used in 70 percent of all victim-offender mediation programs (Umbreit and Greenwood 2000b). This issue is best left to the mediators in each community.

¹¹ For a discussion of the ethical dilemmas of "personal reactions to parties during mediation," see Bush, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*.



Role of Lawyers

Much of the literature on mediation and ADR involves the roles and professional responsibilities of lawyers because divorce mediation and commercial dispute mediation, alternatives to formal court proceedings, typically involve lawyers (Maute 1990).

Citizen complaint mediation does not involve lawyers, so the lawyer-related issues do not arise (see box 3–4). Citizen complaint mediation is an alternative to a formal investigation by a police internal affairs unit or citizen oversight agency. Most experts in the field argue that the involvement of lawyers conflicts with the basic goals of mediation, which include building understanding and not factfinding and determination of guilt.

Box 3–4

Am I Entitled to Representation?

No, you are not entitled to a representative or a lawyer. The purpose of the mediation is for *YOU* to make the decisions *YOU* are comfortable with.

Source: San Diego Police Department, Consent To Mediate form.

Confidentiality

Confidentiality is an essential element of mediation. For mediation to succeed, both sides must feel free to speak candidly (Freedman and Prigoff 1986; Mitchell and Dewhirst 1990). Confidentiality has special relevance for citizen complaints because the officer must be assured that any apology or acknowledgment of wrongdoing will not be used against him or her, either by the police department or by a private attorney in some other legal proceeding. Box 3–5 shows the San Diego Police Department's confidentiality agreement.

Confidentiality is protected by a wide range of Federal and State statutes, along with professional standards for mediators. In Portland, for example, mediators are bound by the Oregon Mediation Association's Standards of Practice (Minard 1997). The interviews and site visits for this report revealed no breaches attempted breaches of confidentiality (e.g., a private attorney seeking to obtain mediation records). In developing new mediation programs, however, local officials should carefully research the applicable State statutes. Although concern about confidentiality exists, we could not find a single violation of confidentiality in a citizen complaint mediation case.



Box 4-5
Mediation Confidentiality Agreement

INFORMATION AND AGREEMENT
SAN DIEGO POLICE DEPARTMENT
Internal Affairs Unit

CONFIDENTIALITY INFORMATION AND AGREEMENT

The confidentiality of this mediation session is governed by California Evidence Code Sections 1115-1128. These evidence code sections pertain to the confidentiality and admissibility of evidence.

Specifically, Section 1119, Mediation Confidentiality, in summary provides:

- Anything said or writing prepared for the purpose of, in the course of, or pursuant to a mediation or a mediation consultation,
- Is inadmissible and not subject to discovery in any arbitration, administrative adjudication, civil action or other non-criminal proceeding,
- All communications, negotiations or settlement discussions by and between participants in the course of a mediation or mediation consultation shall remain confidential.

A communication or a writing, which is confidential under Section 1119, can be admissible or subject to discovery if all persons who conduct or otherwise participate in the mediation expressly agree in writing (Section 1122).

Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its use or introduction in the mediation or mediation consultation (Section 1120).

WE UNDERSTAND AND AGREE THAT THE SAN DIEGO POLICE DEPARTMENT AND REPRESENTATIVES [OF THE SAN DIEGO MEDIATION CENTER] WILL KEEP CONFIDENTIAL ALL STATEMENTS MADE DURING THE MEDIATION SESSION AND THAT WE SHALL NOT SUBPOENA THE REPRESENTATIVE OF THE SAN DIEGO POLICE DEPARTMENT, NOR ANY DOCUMENTS PREPARED AS A RESULT OF THE PROCEEDINGS.

NAME	DATE
NAME	DATE
NAME	DATE



Mediation Session

Structure and Process

The structure and process of mediation sessions are described in many mediation handbooks. The following discussion is adapted from *The Mediator Handbook*, published by the Center for Dispute Resolution at Capital University in Columbus, Ohio (Mitchell and Dewhirst 1990). One outline of the mediation process includes seven stages:

- 1. Introduction.** The mediator introduces the parties, explains the mediation process, and sets forth ground rules for the session.
- 2. Problem determination.** The mediator identifies the problem that brought the two parties together and asks each to explain his or her side of the story.
- 3. Summary.** The mediator summarizes the problem in a neutral and evenhanded manner.
- 4. Issue identification.** The mediator helps the two parties identify specific issues that need to be mediated. The mediator must not introduce his or her interpretation of the dispute. In mediation, dialog between the two parties is the most important part of the process.
- 5. Development of alternatives.** The mediator helps the two parties discuss alternative ways to resolve the dispute. Again, the mediator should not impose a solution (e.g., "Joe, why don't you apologize to Jack"). The emphasis should be on dialog and not on a quick settlement (e.g., "It's getting late; we need to wrap this thing up").
- 6. Selection of appropriate alternatives.** The mediator helps the two parties agree on an appropriate resolution.
- 7. Conclusion.** The mediation session concludes with a clear statement of and agreement on the terms of the resolution.

Different Communication Styles

Mediators need to be sensitive to the fact that people communicate in different ways, and many of these differences are rooted in racial, ethnic, or cultural traditions. One of the best discussions of these issues is in the report *Multicultural Implications of Restorative Justice: Potential Pitfalls and Dangers*, produced by the Center for Restorative Justice and Peacemaking at the University of Minnesota and published by the Office for Victims of Crime of the U.S. Department of Justice



(Umbreit and Coates 2000). As the authors of the report explain (p. 1), "People from different cultures have different ways of speaking and behaving. In addition, a person's cultural milieu determines his or her world view, perception of justice, and communication style." A leading handbook on conflict resolution adds that communication problems across cultures are often the result of "attribution error": one party attributing negative or hostile meaning to communication or behavior by someone of a different cultural tradition when in fact the latter meant no offense (Kimmel 2000).

These observations have enormous implications for the mediation of citizen complaints against police officers. In many instances, differences in communication style may be at the heart of the original complaint against the police officer.

Differences in communication styles may reappear in a mediation session (Umbreit and Coates 2000). These styles include, for example, *body movements*. Many whites express themselves with animated smiles or grimaces, whereas Asians are less likely to use animated facial expressions. In a cross-cultural mediation session, this can lead to misunderstanding. There are also important differences related to *eye contact*. Direct eye contact is highly valued in some cultures as a sign of respect; in others, it is seen as disrespectful or threatening. Another form of communication has been characterized as *paralanguage*. This involves speech patterns such as "hesitations, inflections, silences, volume or timbre of voice, and pace of speaking" (Umbreit and Coates 2000). The restorative justice report points out that in "American-Indian culture, silence is valued as sacred, [whereas] White Americans often feel uncomfortable with silence" (Umbreit and Coates 2000). Finally, there are differences related to *density of language*. Some cultures compress a great deal of meaning in short phrases. The phrase "uh, huh" can convey much to members of the same culture but appear unresponsive to someone from a different culture.

Session Length

There is no fixed length for a mediation session. Nonetheless, most programs plan on sessions lasting about one hour. A recent report on victim-offender mediation programs states that the "mediation session is dialog-driven and typically about an hour (or longer) in length" (Umbreit and Greenwood 2000a). The mediation session should not be so short that participants feel forced into an agreement, but it should also not drag on too long. The mediator should balance keeping the parties focused on reaching an agreement without forcing them into one. If the session is unfocused, with the two parties not addressing the real issues related to the complaint, everyone is likely to be unhappy with the process.



Case Outcomes

Successful Mediations

The typical outcome of a successful mediation session is an understanding that the complaint is resolved to the satisfaction of both parties. This may involve an apology from the officer. Experienced mediators report that officers are reluctant to offer explicit apologies. Several mediators in New York explained that on several occasions, police officers have indirectly apologized to citizens. For example, instead of an officer saying he or she is sorry, the officer might state that he or she is having a bad day or that he or she is sorry the complainant felt (or experienced the incident) that way. In many cases, the result may be that the two parties agree that they have had a chance to express themselves and hear the other's response. In effect, they agree to disagree about the events. Because one of the major goals of mediation is to build understanding, the process of hearing and agreeing to disagree is often sufficient.

Removing the Complaint From the Officer's File

In most programs, when a case is successfully mediated, the complaint is removed from the officer's official file. This is the officer's principal incentive to participate.

The San Diego Police Department procedures explain that "[I]f the citizen complaint is successfully mediated, the complainant will agree to authorize Internal Affairs to 'officially' withdraw the complaint. The case will then be logged and tracked by the assigned 'M' number."

Unsuccessful Mediations

If the two parties cannot reach a satisfactory agreement, the mediation is officially unsuccessful. Mediation may fail because one or both sides decide that no satisfactory resolution has been reached. The option of terminating a mediation session is the most important safeguard for ensuring that both sides make a sincere effort. The officer cannot stonewall and refuse to acknowledge what the complainant is saying. Equally important, the complainant cannot use the session simply to berate the officer. When a mediation session appears to be failing, the mediator should try to help the parties reach an understanding but should not coerce a settlement.



In most programs, when the mediation is unsuccessful the complaint is returned to the police department or citizen oversight agency for investigation in the traditional manner. (However, see the exception to this rule under "An Important Exception" in this Chapter.)

Creative Outcomes

Mediation officials reported examples of creative, nontraditional outcomes of mediation sessions. Creative outcomes include agreements to take some type of action outside the mediation session. The Washington, DC Office of Citizen Complaint Review (OCCR) specifically allows for "some type of corrective action" by the officer "as part of the settlement" (www.oocr.dc.gov).

In perhaps the most notable example found in the course of preparing this report, a white officer in one city accompanied a middle-aged African-American man to church on Sunday morning. The officer had used an offensive racial epithet in addressing the man, who told mediation officials, "He treated me like a dog. I just wish he could see me in church on Sunday to see what kind of person I really am." The mediation officials suggested that he propose this as a mediation outcome. The officer accepted, and reportedly the two had coffee together after church. This case is probably the most notable example of racial bridge building. (For reasons of confidentiality, the city where this case and the one described below occurred cannot be identified).

In another case, in which a police officer had verbally abused a woman in her home and in the presence of her children, the officer agreed to take her son on a police ride-along. In another case, the officer offered to serve as a reference when the complainant applied for a teaching job. These two examples show how mediation can lead to some activity outside the session itself that may help to build understanding between police and citizens. When such creative outcomes are agreed to, however, it is important to document an understanding of what activity will occur and that it was satisfactory. Failure of one side or the other to fulfill the terms of the agreement would be considered unsuccessful mediation.



An Important Exception

At least one important exception to the standard case outcome process is found in Portland, Oregon. There a complaint is "closed" once it is referred for mediation, regardless of the outcome. Program officials are instructed to explain in advance to complainants that "once the mediation begins, the Internal Affairs Division will not continue with the investigation of the complaint." Thus, the initial Consent to Mediate form constitutes completion of a "successful" mediation (Minard 1997).

Considerable disagreement exists over the wisdom of the Portland approach. Many experts think that it undermines the basic purpose of mediation, which is to get both parties to discuss the issue at hand, listen to each other and reach an acceptable agreement. In theory, an officer in Portland could refuse to participate meaningfully (e.g., "stonewall") and yet still have the complaint officially recorded as a "successful" mediation. Similarly, a citizen could refuse to engage in meaningful participation and/or get angry and yell at the officer, and the complaint would be recorded as successfully mediated. After much discussion with experts in the field, we conclude that this aspect of the Portland program is not advisable. The process not only undermines the basic goals of mediation but also jeopardizes police accountability.

Documentation

A successful mediation session should be documented with a statement to that effect signed by both parties and the mediator. Because of confidentiality requirements, the document must not contain details about either the nature of the complaint or the final agreement. Documentation is necessary to prevent either side from attempting to reopen the case at some later date and to formally notify the police department that the complaint was successfully mediated.

Enforcement of Agreements

ADR experts are concerned about the enforcement of mediation agreements (Nicholl 2000b). For the most part, this issue is not a concern with respect to citizen complaints against police officers because the final outcome does not involve the exchange of tangible resources, such as the payment of child support in a divorce settlement or the transfer of assets in the settlement of a commercial dispute. Instead, the agreement involves an understanding that both sides are satisfied with what has been said.



An exception to this rule would be the case of a creative outcome as described above. In such cases, a written understanding of what activity outside the mediation session is supposed to occur. This written understanding may be sealed and remain confidential once the activity occurs and the case is closed as a successful mediation.

Widening the Net?

One problem that has affected many alternatives to traditional criminal prosecution, especially diversion programs, is the phenomenon of "net widening." Net widening occurs when, instead of diverting serious cases out of the system, a program promising less serious outcomes draws in cases that would otherwise be dismissed. Nicholl (2000b) warns that net widening is a potential problem for restorative justice programs.

A form of net widening could occur if mediation programs succeed in handling a significant number of cases. Assuming that mediation affords a more satisfactory experience for complainants and gains a positive reputation in the community, it could encourage the filing of more complaints. An increase in complaints is one consequence of the development of complaint procedures that are more open, accessible, and customer-friendly (Walker 2001).

Danger of Unrealistic Expectations

One of the greatest dangers facing the concept of mediating citizen complaints against police officers involves unrealistic expectations on the part of mediation advocates. Unrealistic expectations may produce disillusionment and a backlash that unfairly labels mediation as a failure.

What are reasonable expectations? First, it is reasonable to expect that only a few cases will be mediated, at least initially. There is a broad consensus that certain categories of serious complaints should not be eligible for mediation and that individual officers with bad disciplinary records should not be eligible to mediate their cases. Additionally, many complainants and police officers will decline to choose mediation. Their wishes need to be respected. Second, no one should expect that mediation itself will solve police-community relation problems or eliminate police misconduct. The potential benefits of mediation described in Chapter 2 may be achieved, but they should be viewed as small incremental improvements at best. Third, mediation should be viewed as only one part of a larger commitment to strengthen police accountability and improve police-community relations.



Planning

In developing new mediation programs, communities need to plan carefully. Lack of planning is probably one of the main reasons so many existing mediation programs handle so few cases. Good planning includes identifying and resolving key issues in advance, securing adequate funding, and developing full and accurate public understanding of the mediation process. Chapter 5 describes a model planning process.



Chapter 4

Existing Citizen Complaint Mediation Programs

Introduction

Few citizen complaint mediation programs exist in the United States. Moreover, most programs mediate only a handful of cases every year. The failure of citizen complaint mediation programs to develop stands in stark contrast to both the enormous number of mediation and other alternative dispute resolution (ADR) programs in other aspects of American life. Moreover, informal resolution in handling citizen complaints is widely used in other English-speaking countries (Bush and Folger 1994; Mills 1991; McGillis 1997).

This chapter describes procedures for gathering information about existing citizen complaint mediation programs, mediation program statistics, factors contributing to the success and failure of mediation programs, a model program in Minneapolis, and mediation in other countries.

This project undertook the National Survey of Citizen Complaint Mediation Programs in 1998 and continued to update the initial findings for the next year and a half. The survey identified the number of mediation programs, activity level of each program, basic program structure, factors contributing to the success of mediation programs, and factors contributing to the failure of mediation programs (Walker and Archbold 2000).¹² The initial survey involved telephone interviews and the collection of official documents. Subsequently, site visits were made to the mediation programs in Minneapolis, Minnesota; Portland, Oregon; Rochester, New York; and New York City.

Survey Methodology

Number of Mediation Programs

Identifying all existing citizen complaint mediation programs was extremely difficult. No directory or listing of programs exists. Consequently, four steps were taken to identify existing programs. In step 1, official documents associated with all citizen oversight agencies in the United States were examined to identify active mediation programs. These documents were collected as part of an ongoing national survey of citizen oversight agencies in the United States (Walker 2001). The documents included (1) enabling ordinances or

¹² For descriptions of mediation programs in several citizen oversight agencies, see Finn (2001).



executive orders, (2) agency rules and procedures, and (3) agency annual reports. In step 2, the staff of all active mediation programs identified in step 1 were interviewed by telephone and asked to identify other police mediation programs. In step 3, officials representing the two citizen oversight professional associations—the International Association for Citizen Oversight of Law Enforcement (IACOLE) and the National Association for Citizen Oversight of Law Enforcement (NACOLE)—were contacted and asked to identify all police mediation programs they knew about. In step 4, officials representing more than 200 mediation agencies listed in a directory published by the National Association for Community Mediation were contacted and asked whether they handled citizen complaints against police. Virtually all existing programs were identified through step 1. The combined result of steps 2, 3, and 4 was the addition of only one program to, and the deletion of one program from, the list initially developed in step 1.

Activity Level of Mediation Programs

Three measures were used to determine the activity level of mediation programs: the total number of complaints referred for mediation, the percentage of those cases that were successfully mediated, and the percentage of all complaints that were successfully mediated. Data were derived from the annual reports of oversight agencies and, when necessary, from telephone interviews with officials.

Basic Program Structure

Mediation program officials were asked to provide documents related to their programs and answer questions about the basic structure and processes of their programs.

Factors Contributing to the Success and Failure of Mediation Programs

Mediation program officials were asked questions related to the factors contributing to the success and failure of mediation programs. These interviews were designed to be exploratory and not to generate definitive findings. It was recognized that everyone interviewed had a vested interest in mediation and that future research on the successes and failures of mediation would require interviews with a broader range of stakeholders.



Survey Results

Number of Mediation Programs

The national survey identified 16 citizen complaint mediation programs in the United States (see Table 4-1). When the survey was completed (mid-1999), only 14 programs were operational. Two programs had been authorized only recently and were not yet operational. Since the national survey was completed, the authors have identified one additional program that is in the planning stage.

Table 4-1
Mediation Programs

<i>City</i>	<i>Agency</i>	<i>Referred cases (year)</i>	<i>Successful cases</i>	<i>% of referred cases successfully mediated</i>	<i>% of all complaints successfully mediated</i>
Albuquerque, NM	Police Oversight Commission/Indep. Review Office	3 (1998)	3	100% (3/3)	N/A
Berkeley, CA	Police Review Commission	1 (1998)	1	100% (1/1)	2.2%
Boise, ID	Office of the Ombudsman	N/A* (1999)	N/A	N/A	N/A
Boulder, CO	Boulder P.D./Professional Standards Unit	3 (1998)	2	66.66% (2/3)	2.94%
Dover, DE	Center for Community Justice	3(1998)	0	0% (0/3)	0%
Kansas City, MO	Office of Citizen Complaints	3 (1998)	3	100% (3/3)	N/A
Milwaukee, WI	Fire & Police Commission	17 (1998)	5	34% (5/17)	5.8%
Minneapolis, MN	Minneapolis Civilian Police Review Authority	39 (1998)	13	33.33% (13/39)	11.5%
New Haven, CT	Community Mediation	1 (1998)	0	0% (0/1)	0%
New York, NY	Citizen Complaint Review Board	14 (1998)	14	100% (14/14)	.0028%
Portland, OR	Neighborhood Mediation Center	24 (1998)	7	28% (7/24)	.0206%
Rochester, NY	Center for Dispute Settlement	5 (1998)	2	40% (2/5)	2.1%
San Francisco, CA	Police Commission/Office of Citizen Complaints	30 (1998)	4	13% (4/30)	.0037%
Santa Cruz, CA	Citizen's Police Review Board	0 (1997)	0	0% (0/0)	0%
Syracuse, NY	Citizen Review Board	13 (1997)	0	0% (0/13)	0%
Washington, DC	Office of Citizen Complaints	N/A* (1999)	N/A	N/A	N/A

* The Washington DC Office of Citizen Complaints and the Boise Idaho Office of the Ombudsman are not yet operational, but will offer mediation and conciliation once they begin operation.



Existing mediation programs are available for only an extremely small percentage of the estimated 17,120 state and local law enforcement agencies in the United States. Additionally, they are associated with a small percentage of the estimated 100 citizen oversight agencies (Bureau of Justice Statistics 1999a; Walker 2001).

Activity Level of Mediation Programs

Number of cases referred for mediation. As table 4–1 indicates, the activity level of most programs is extremely low. The program in Santa Cruz, California, for example, did not have a single complaint referred for mediation in 1998. During the same year, three other programs did not successfully mediate any referred cases. The Dover, Delaware, Center for Community Justice received three referred cases in 1998 but mediated none successfully.

Number of cases successfully mediated. Only three or four of the existing programs have successfully mediated a significant number of cases. The Minneapolis Civilian Review Authority (CRA) mediated 13 cases in 1998, and this number has been increasing steadily since 1995 (see table 4–2). The Neighborhood Mediation Center in Portland, Oregon, successfully mediated seven cases in 1998, but this was a sharp decline from 31 cases in 1996 (Minard 1997). Similarly, the number of cases successfully mediated by the Rochester, New York, Center for Dispute Settlement has been declining in recent years. The New York City Civilian Complaint Review Board (CCRB) successfully mediated 14 cases in 1998, and the program has experienced a significant increase in the past year.

Since the initial draft of this report was completed, the Office of Civilian Complaint Review (OCR) in Washington, DC has established a mediation program that has gotten off to a very fast start. It was not possible to examine that program in detail for this report, but details about its current activities are available on the OCCR web site (www.occr.dc.gov).

Percentage of referred cases successfully mediated. The percentage of complaints referred for mediation that are successfully mediated varies considerably. In 1998, Minneapolis successfully mediated only one-third of the cases referred, and the New York City CCRB successfully mediated all of the 14 cases referred (which was an extremely small percentage of all complaints received). Particularly troubling is the fact that none of the 13 cases referred for mediation in Syracuse, New York, were successfully mediated; in San Francisco, only 13 percent of the referred cases were successfully mediated in 1998.



Percentage of all citizen complaints successfully mediated. The percentage of successfully mediated complaints from all citizen complaints received is extremely low. The highest rate was found in Minneapolis, where 11.5 percent of all citizen complaints were successfully mediated. The New York City CCRB and the San Francisco Office of Citizen Complaints successfully mediated less than 1 percent of all citizen complaints received.

As this report was being completed some disturbing trends appeared in both Rochester, New York, and Portland, Oregon. In both cities, the number of cases referred and successfully mediated as a percentage of total citizen complaints received has declined in recent years. Rochester officials attribute this trend to a lack of continuity in key personnel in the Rochester Police Department. In their program, officers assigned to the internal affairs unit are responsible for contacting citizen complainants and offering mediation. Because of turnover in the unit, it appears that newly assigned officers are not fully acquainted with and committed to mediation.

In Portland, the decline in the number of cases referred for mediation is due in part to a disagreement between the Neighborhood Mediation Center and the Portland Police Bureau over funding of the program. At the time this report was completed, the status of the Portland mediation program was unknown.

Table 4-2
Minneapolis Civilian Police Review Authority

<i>Year</i>	<i>Cases sent to mediation</i>	<i>Successful Mediation</i>	<i>% successful cases</i>	<i>% complaints successfully mediated</i>
1991	14	1	0.07%	N/A
1992	27	6	22.22%	N/A
1993	11	2	18.18%	N/A
1994	17	8	47.06%	5.30% (8/150)
1995	14	4	28.57%	2.7% (4/146)
1996	39	8	20.51%	6.2% (8/129)
1997	30	14	46.67%	8.8% (14/159)
1998	39	13	33.33%	11.5% (13/113)



Basic Program Structure

Program operations. Mediation programs are operated by citizen oversight agencies, community mediation centers, and police departments. Most mediation programs are operated by citizen oversight agencies. Four programs are operated by neighborhood community justice or dispute resolution centers. Only one existing program, in Boulder, Colorado, is clearly operated by the police department, although the San Diego Police Department is developing a program (the program was not operational at the time of publication).

¹³ For information about the source of funding for victim-offender mediation programs, see Umbreit and Greenwood (2000b) and McGillis (1997).

Program origins. Most existing mediation programs were authorized by the ordinance that created the local citizen oversight agency. Generally, mediation is one clause in the larger ordinance. A few programs appear to have originated as extensions of preexisting neighborhood justice centers, with citizen complaint mediation simply added as one new aspect of an ongoing program. The Portland program, for example, began as a pilot project of the Neighborhood Mediation Center in 1993. Only a few programs appear to have been added as an aspect of an existing complaint procedure administered by a police department or a citizen oversight agency (see Chapter 6 for a discussion of the San Diego program). In some instances, program development has proceeded without the benefit of a key local official who fully understands and is committed to the mediation program. In the absence of any published literature on the subject, local officials have had little guidance in developing criteria for addressing specific citizen complaints. (The senior author of this report, for example, talked with officials in one city who thought their ordinance mandated the mediation of all complaints.)

Funding sources. Mediation programs are funded through a variety of arrangements. In Minneapolis, cases are mediated by the Minneapolis Mediation Center, a community-based nonprofit organization supported by funding from city and county government agencies, civic organizations, and individuals and clients. The CRA pays the center a flat fee per year. The fee is used to cover administrative costs; individual mediators handle cases on a pro bono basis. The Portland program was funded by the city of Portland through the Portland Neighborhood Mediation Center.¹³ Mediators in Minneapolis and New York City work on a pro bono basis, which substantially reduces program costs.

Case eligibility. The types of cases deemed eligible for mediation vary across programs. For example, 8 of the 14 active mediation programs only handle cases involving allegations of less serious,

nonviolent police misconduct and do not mediate complaints involving alleged police use of force. Other programs do mediate use of force cases. Some programs, however, do not have clear guidelines regarding case eligibility.

Source of mediators. Most programs have a formal relationship with a local mediation center that provides trained mediators. Other programs draw from a list of certified mediators provided by the local bar association.

Factors Contributing to the Success of Mediation Programs

Supportive community environment. The national survey found that a supportive community environment committed to mediation is likely to be a critical factor in creating a mediation program. For example, the Rochester program, created in 1973, is administered by the Center for Dispute Settlement, which handles a wide range of disputes. The initial success of the Portland mediation program may have been due in part to the city's strong commitment to mediation as indicated the existence of a city-sponsored mediation agency.

Support from police. Support from police, including commanders, rank-and-file officers, and the local police union, is crucial to successfully creating and operating a mediation program that refers a significant number of cases for mediation.

An evaluation of the Minneapolis CRA concluded that an increase in the number of informal resolutions was due to an "enhanced level of trust that exists between the executive director of CRA and the Police Federation [the local police union]" (Minneapolis Civilian Review Authority 1997). The Police Federation has publicly endorsed mediation in its official newspaper (Minneapolis Police Federation 1998).

Two factors appear to be at work in Minneapolis. First, CRA, which handles all citizen complaints, has won the respect of police officers for conducting investigations fairly. In addition, CRA's process enables all officers and citizens to evaluate the quality of their mediation experience. Both groups give CRA very high ratings (Minneapolis Civilian Review Authority 2000). Thus, officers have come to trust CRA in its handling of complaints. Second, a new police chief was appointed in Minneapolis in 1995. According to many persons interviewed for this report, this chief has established new and stricter performance standards for officers. The prospect of genuine



They [officers] shy away from mediation because some view it as admitting that they were wrong or not doing their job. It's about trying to save face.

— New York City Citizen Oversight Official

discipline for a sustained citizen complaint has given officers an incentive to choose the mediation alternative; that is, a meaningful "stick" has made the "carrot" appear more attractive than it otherwise would. In addition, the program's criteria regarding eligible cases and police officers make it impossible for an officer guilty of serious or repeated misconduct to evade investigation and discipline.

Rank-and-file union leaders in San Francisco have also endorsed mediation, and mediation in Portland functions with the tacit support of the police union.

Factors Contributing to the Failure of Mediation Programs

Interviews with mediation program staff, which were conducted by telephone or through site visits, produced data on the perceived reasons for the failure of citizen complaint mediation programs. Failure consists of two dimensions: the low number of mediation programs and the small number of cases mediated each year by existing programs.

Police officer opposition. The most frequently cited obstacle to the creation of mediation programs was opposition from rank-and-file police officers and their unions. This factor was mentioned by 64 percent of all people interviewed in the national survey.

Officers oppose mediation for various reasons, the most common being that they oppose any process in which they might have to admit guilt or apologize. This opposition stems from two factors. First, despite the promised strict confidentiality of statements made during mediation, some officers fear that any admission might subsequently be used against them in a formal proceeding. A leading text on mediation explains that "reluctance to apologize may also be the product of rules of evidence that treat an apology as an admission of fault that can be used to prove wrongdoing" (Goldberg, Sander, and Rogers 1992).

Second, many of the people interviewed believe that police officers see mediation as compromising their authoritative status. Mediation is intended to place both parties to a dispute on equal footing, and officers are reluctant to place themselves in that position.

Police opposition to mediation also contributes to the failure of existing programs in terms of the dearth of cases actually mediated. Site visits to several existing programs revealed that officers were generally reluctant to participate in mediation. However, some site visits also revealed that the local police union failed to share the rank-

and-file officers' attitudes toward mediation. In the communities of several programs, the local police union has begun to recommend mediation to its members. These programs provide a tangible incentive to officers, to the extent that a successfully mediated complaint does not appear on an officer's disciplinary record. In these communities, the major obstacle to greater participation has shifted to citizens (see Chapter 3).

Reports of police officer opposition to mediation appear to be strongest in programs administered by community mediation centers. This suggests that citizen complaint mediation was adopted without first establishing a close working relationship with the police department in general and rank-and-file officers in particular.

Lack of understanding of mediation. The second most important factor inhibiting the development of mediation programs is a lack of understanding of mediation among police officers and citizens. To a great extent, this lack of understanding reflects the novel aspect of mediation in the context of policing. At the time this project was initiated, no published information (apart from local program brochures) about the mediation of citizen complaints was available. Of the vast body of literature on mediation and other ADR procedures, none addresses citizen complaints against police.

Lack of resources. Staff of several mediation programs report that a lack of resources has contributed to the low number of mediated complaint cases. Mediation is probably much less costly than traditional complaint investigations, but the associated costs (mediator fees, administrative costs) must be assumed by some agency. The Minneapolis program appears to be the most successful partly because CRA has made a commitment to fund mediation in anticipation of overall cost savings. After a few years of success, the Portland program became the victim of a disagreement over funding. The lesson appears to be that some agency or government entity needs to make an initial commitment to assume the costs of a mediation program.

Lack of incentives for complainants. Interviews with existing mediation program officials determined that once a program is established with incentives for officers to participate, the low number of mediated cases is often due to the lack of incentives for citizen complainants. Mediation actually involves more work and involvement for the complainant than traditional complaint investigations.



¹⁴ The effectiveness of the Minneapolis CRA relative to other oversight agencies is discussed in Walker (2001) and Finn (2001).

An evaluation of the Portland mediation program identified five major reasons that complainants decline to participate (see box 4–1): their belief that the police officer would not act in good faith, avoidance for unspecified reasons, a lack of time, a desire to put the matter behind them, and a sense of hopelessness (e.g., "I don't see what good it will do to mediate [long sigh]"; (Minard 1997). The desire to put the matter in the past is a purely personal consideration beyond the control of program administrators. However, the first and last reasons are well within the capacity of program administrators. Both can be remedied through well-written printed material that explains mediation and encourages complainants to choose that option.

Box 4–1
Five Reasons Complainants Decline To Participate in Mediation

1. Police officer would not act in good faith.
2. Unspecified reasons for avoiding mediation.
3. Do not have time.
4. Want to put the matter behind them.
5. A sense of hopelessness.

Minneapolis: A Model Mediation Program

Minneapolis currently has the most successful citizen complaint mediation program. Its success is indicated by the number of cases referred for mediation, the number successfully mediated, and the increase in the number of mediated cases in recent years.

The CRA was created in 1990 in response to many years of controversy over use of excessive force by police. The CRA is an independent municipal agency with authority to receive and investigate citizen complaints against Minneapolis police officers. It began operating in 1991. The CRA consists of a board of directors appointed by the mayor and members of the city council, an executive director, three investigators who are not sworn police officers, and seven civilian support staff (although the agency lost one investigator and one other staff person in 2001 because of budget cuts) (Minneapolis Civilian Review Authority 1997, 2000; Walker 2001).

The CRA is one of the most successful citizen oversight agencies in the country. An evaluation conducted by the city of Minneapolis in 1997 concluded that the agency had "been able to substantially decrease the number of evidentiary hearings...because more and more complaints are being resolved through mediation or stipulation of facts" (Minneapolis Civilian Review Authority 1997).¹⁴ The success of

the mediation program in Minneapolis is closely related to the overall effectiveness of the CRA and a strong commitment to accountability on the part of a new police chief, who took office in 1995 (Walker 2001).

Complaint Process in Minneapolis

A citizen who contacts the Minneapolis Police Department is referred to the CRA. The CRA has original jurisdiction over citizen complaints against Minneapolis police officers. However, the police department may open its own investigation of an officer based on its own information. Once a complaint is received by the CRA, it is classified as a precomplaint until it is signed by the complainant. Within 30 days of the date on which a signed complaint is filed, the CRA executive director makes a decision regarding its disposition: dismiss the complaint, forward the case for investigation, or refer it for mediation.

The executive director may dismiss the complaint for one or more of the following reasons: (1) the facts of the case are not disputed, and no reasonable person could sustain a complaint based on the facts; (2) no evidence of officer misconduct exists; (3) the alleged facts are so unbelievable that no reasonable person could sustain the complaint based on such facts; and (4) the complainant fails to cooperate.

If a complaint appears to have merit, the executive director orders an investigation. The investigator has 120 days from the date a signed complaint is filed to conduct a thorough investigation of the case. When the investigation is completed, CRA's executive director determines whether probable cause of misconduct exists. If probable cause is found, a formal hearing is held before a three-person panel drawn from CRA's board of directors. The hearing is a closed quasi-judicial proceeding. CRA's executive director presents the case, and the officer is generally represented by an attorney. After the hearing, the panel privately discusses the matter and votes on whether to sustain the complaint. Sustained complaints are forwarded to the chief of police, who determines what disciplinary action, if any, should be taken. The chief may not overturn CRA's determination that a complaint is sustained.

Selecting cases for mediation. The nature of the complaint is a key issue in the executive director's decision to refer to mediation. As a matter of policy, use-of-force complaints are ineligible for mediation. (The few exceptions to this rule involved cases where there was no injury.) Mediated complaints typically involve situations such as



allegations of officer discourtesy (e.g., use of profanity or abusive language, rudeness, etc.) or verbal conflict that has occurred between the citizen and the officer.

Officers who have mediated a complaint involving a similar allegation in the previous 12 months are ineligible for mediation. CRA also does not refer complaints involving an officer who has been the target of previous complaints and who they believe has attitudes that are incompatible with the spirit of mediation.

CRA officials also do not refer complaints for mediation when they sense that the complainant is angry or unreasonable and consequently is not a good candidate for mediation. Specific characteristics regarding the intensity of the conflict between the officer and the complainant also are important issues when considering mediation. For example, if a verbal confrontation occurred between the two parties or the complaint includes extreme use of force, the complaint might be deemed inappropriate for mediation.

Referring complainants and officers. Once cases are deemed eligible for mediation, CRA staff contact the complainant and then the officer to offer mediation as an alternative. Each party has the right to decline. If one party does decline, the complaint is investigated by CRA in the traditional manner.

Once the complainant indicates an interest in mediating the case, the officer who is the subject of the complaint is contacted. If the officer agrees to participate, the case is referred to the Minneapolis Mediation Center.

Scheduling the mediation session. Once a case has been referred to the mediation center, staff members contact both the citizen and the officer to schedule a mediation session. The location of the session is an important issue because, ideally, it should be convenient to both parties. In Minneapolis, the mediation session is typically scheduled at a neutral location, such as the local library, community center, hotel, or other location (i.e., not at the police department) where both parties will feel comfortable communicating.

Concluding the mediation session. A successful mediation session ends with the citizen and the officer signing an agreement that documents the outcome. The agreement ensures that no further action (legal or otherwise) will be taken on the part of the complainant or the officer. At the end of the session, the mediators, citizens, and officers are debriefed. This ensures that both the citizen and the officer understand and can confirm the goals set forth in the session and whether they have been accomplished. To provide feedback and discuss the dynamics involved in a specific case, mediators are debriefed by CRA.

Mediation session outcomes can take a variety of forms. Mediators in Minneapolis note that citizens and officers individually or collectively may apologize to one another without further action or contact between them. It is not unusual, however, for both parties to agree to disagree. Although both parties agree that the case is closed, they may not agree on the facts of the case or who was at fault. If both the citizen and the officer are unhappy with the outcome of the mediation session, however, the session is deemed unsuccessful and the case is sent back to the CRA for investigation.

The Minneapolis Mediation Center

CRA has established a strong relationship with the Minneapolis Mediation Center, an independent agency that uses volunteers to mediate citizen complaints. The volunteer mediators complete 30 hours of training (as prescribed by the Minnesota Supreme Court), which consists of role playing and observation of mediation sessions. Moreover, mediators must perform eight hours of volunteer service and complete six credit hours of inservice continuing education per year. A staff member at the mediation center states that most mediators exceed their required volunteer hours. In addition, the extra hours help volunteers develop their skills as mediators.

Individual mediators handle cases on a pro bono basis. Interviews with key individuals indicate that most mediators are motivated by strong altruistic feelings. They take personal satisfaction in helping other people resolve their conflicts and believe they are helping build a better community. One mediator described a successful mediation as "magic." However, some volunteer mediators evidently have more self-centered motives, such as laying the foundation for a private mediation practice.



An International Perspective: Complaint Mediation in Other Countries

Mediation and conciliation (see Chapter 1 for definitions), or what they call informal resolution (IR), is far more widely used to resolve complaints against police in other countries, particularly English-speaking countries. In Canada, the United Kingdom, Australia, and several other countries, IR or some other informal procedure is commonly used to settle nonviolent, less serious complaints against police officers. In some agencies, as many as one-third of all complaints are resolved in this manner.

The Police Complaints Authority (PCA) in the United Kingdom introduced IR in 1985. The percentage of complaints resolved through IR has steadily risen from eight percent in 1985 to 24 percent in 1989 and 34 percent in 1997-98 (Corbett 1991; United Kingdom Police Complaints Authority 1998). The Ontario Civilian Commission on Police Services, which is responsible for several dozen local law enforcement agencies, resolved about 15 percent of all complaints in 1998 through IR. The use of IR was significantly higher in some local jurisdictions than in others (about 25 percent of all cases in the Hamilton-Wentworth Regional Police), suggesting that local leadership and resources make a critical difference (Ontario Civilian Commission on Police Services 1999).

The IR procedures used in other countries do not necessarily represent mediation as it is defined in this report, however. IR in these countries often represents conciliation: complaints are resolved without a face-to-face meeting between the complainant and the officer in question and without a third-party mediator (see Chapter 1). Some agencies, such as the Queensland (Australia) Police Service, use both IR (i.e., conciliation) and mediation (Holland 1996a; Holland 1996b). The IR program in Queensland has four stages: officials assess the nature of the complaint, they speak with both parties separately about the alleged complaint, they discuss possible outcomes of the case with both parties separately and come to a mutual agreement, and they determine whether the process was successful. The purpose of IR is not to establish fault, but rather find out what happened and, when necessary, give advice or guidance to the officer without the risk of punishment or threat to promotional prospects" (Holland 1996b). Between mid-1994 and mid-1995, 30 percent of the 3,618 complaints received by the Queensland Police Service were resolved through IR. Only two cases were mediated; the rest were resolved through conciliation (Corbett 1991).



Official data reported in agency annual reports do not always permit meaningful comparisons with other agencies. The 1998 Annual Report of the British Columbia Police Complaint Commissioner, for example, includes the category "Informal Resolutions and Withdrawals" (Police Complaint Commissioner British Columbia 1998). It is not possible to determine exactly how many of the cases in this category were actually conciliated or mediated.



Chapter 5

Planning For a Successful Mediation Program

Introduction

Establishing a successful mediation program requires careful planning. As previously discussed, most existing police complaint mediation programs handle very few cases each year. We believe that this is due in part to a lack of or insufficient planning. In some instances, mediation was authorized by the ordinance establishing a new citizen oversight agency. It is likely that planning the mediation program became a lower priority relative to such issues as hiring staff and creating the basic complaint intake and investigation process. In addition, program officials report that rank-and-file police officers voiced the strongest opposition to the development of mediation programs, suggesting a critical lack of involvement of police and their union representatives in the planning process.

This chapter identifies the important elements of a mediation program planning process, drawing on the experience of the San Diego Police Department.

Elements of the SDPD Planning Process: A Model

Apparently, many if not most existing mediation programs were created with little if any planning. An exception to this rule is the program developed by the San Diego Police Department (SDPD). The formal planning process undertaken by SDPD took nearly two years. Although this may appear to be an extremely long time, key individuals involved believe that the time spent was an invaluable investment. According to a participant in the planning process, program officials can either work out the potential issues in advance or deal with them later.

The elements of the San Diego planning process are summarized in box 5–1.



Box 5-1

Elements of the San Diego Planning Process

1. Recognize the need for planning.
2. Take your time: the process counts.
3. Create a planning mechanism.
4. Pinpoint responsibility.
5. Involve all relevant stakeholders.
6. Research existing mediation programs.
7. Identify key issues.
8. Identify local resources.
9. Discuss and resolve issues.
10. Secure commitments.
11. Finalize plan.

Source: San Diego Police Department (2000)

Recognize the Need for Planning

The idea of mediating complaints against San Diego police officers had been discussed for a number of years. The San Diego Citizens Review Board had brought up the issue several times, and various SDPD members had discussed the issue. SDPD already had some experience mediating other types of cases. For example, working with the San Diego Mediation Center, it had developed a program to ensure compliance with restraining orders in domestic violence or other kinds of neighborhood disputes. In addition, SDPD's own Equal Employment Opportunity office had some success with mediating internal employee problems (Glensor and Stern 1995).

This experience illustrated the potential for mediating citizen complaints. Once the SDPD decided to develop a mediation program, it recognized that careful planning was needed.

Take Your Time: The Process Counts

The director of the Regional Community Policing Institute (RCPI) in the San Diego area, which is funded by the U.S. Department of Justice Office of Community Oriented Policing Services (COPS), emphasizes that program planners must *take the time* to work through all the issues in advance.

Taking the necessary time is often extremely difficult for many of the people involved. Some will be eager to establish the program as quickly as possible. Others who are already familiar with mediation

will be ready to design the program immediately. Virginia Van Meter explains, "we could have written the whole thing [the final report] in a couple of weeks," but she believes that would have been a mistake. As she puts it, "the process is the whole thing."

Why should planners take so much time? First, developing "layers of partnership" is important. A mediation program will bring together agencies that have not necessarily worked together in the past. The police department and the local mediation center, for example, may not have had a prior relationship. It takes time to develop trust and good working relationships. A mediation program may involve agencies that have had negative interactions (e.g., conflict or distrust) in the past. The police department and the independent citizen complaint agency, for example, may have inherited a legacy of conflict and distrust typically associated with the issue of citizen complaints. A good working relationship is essential because, in those jurisdictions where an independent complaint review agency exists, the agency serves as the intake point for complaints. The failure of many mediation programs to handle very many cases is due, in part, to distrust or even active opposition from the local police union. A good planning process includes union representatives and allows time to address concerns and build understanding and trust.

A second important reason for proceeding slowly is that a number of issues need to be thought through and resolved in advance. For example, specific provisions in the union collective bargaining agreement may need to be addressed in the mediation process. Moreover, some states may have provisions in their open meetings or public records laws that have potential implications for a mediation program. As one official explained, it is far better to deal with problems in the initial planning stages and reach consensus than to have a crisis after a program has officially begun.

Create a Planning Mechanism

Once SDPD decided to develop a mediation program, it established a formal planning mechanism. This took the form of a formal mediation planning committee.

Pinpoint Responsibility

Directing the planning committee was the responsibility of the lieutenant commanding the SDPD Internal Affairs Unit.



Involve All Relevant Stakeholders

One of the key elements in the SDPD planning process was involvement of all relevant stakeholders in the citizen complaint process and the planned mediation program. As the commander of the Internal Affairs Unit explained, "the philosophy of the SDPD is one of inclusion and not exclusion."

Consequently, members of the mediation planning committee included:

- SDPD command officers, including commanders responsible for the Internal Affairs Unit.
- Rank and file officers.
- The head of the SDPD EEO office, who had successful experience with mediating internal employee disputes.
- The director of the local mediation center.
- The director of the local citizen oversight agency.
- A representative of the police officers' collective bargaining organization.
- A representative of the collective bargaining organization representing non-sworn employees of the SDPD.
- Representatives of the community.

The RCPI director was not a formal member of the planning committee, but was asked for input at various times throughout the process.

Other communities may have other relevant stakeholders that should be included. The best course of action is to be inclusive and cast as wide a net as possible.

Research Existing Mediation Programs

Considerable time and effort was spent during the SDPD planning process to research mediation programs. For example, SDPD obtained documents from existing mediation programs. Committee members traveled to other cities to study their mediation programs, and in a critical contribution, RCPI funded the travel (planning committees will need to secure the necessary funds for travel and other expenses). The committee also requested draft versions of sections of this report that we had written by the time of their research.

Additional mediation programs will probably be established before this report is published. Existing programs, meanwhile, will have gained more experience. The new program planning experiences will offer more opportunities to learn about which approaches to avoid and which work best.

Identify Key Issues

The SDPD planning committee identified, researched, and discussed key issues associated with mediation programs (see Chapters 3 and 4). The committee then developed 10 specific program objectives (see Box 5–2). The responsibilities of SDPD officials were clearly specified. The Lieutenant in charge of the Internal Affairs Unit was principally responsible for implementing and monitoring the program.

Box 5–2
Objectives of the Mediation Program
San Diego Police Department

- I. To increase the satisfaction of community members and police department personnel with regard to the resolution of citizen complaints.
- II. To foster understanding and open communication between parties in a neutral setting.
- III. To provide the opportunity for parties to accept responsibilities and make changes, if necessary, to resolve conflict.
- IV. To promote effective police/community partnerships.
- V. To reduce the number of complaints filed by citizens.
- VI. To reduce the number of disciplinary actions.
- VII. To develop problem solving opportunities for both parties.
- VIII. To conserve Department resources.
- IX. To improve the Department's image in the community.
- X. To provide a timely alternative to the formal complaint process.

Source: San Diego Police Department Planning Committee.

Resolution of the key issues in San Diego was facilitated by inclusion of all the relevant stakeholders. Particularly important was the inclusion of the union representatives of both sworn and civilian officers of the department. In other cities, the major objections to mediation came from union representatives—and evidently some programs are not successful because of misunderstanding and distrust on the part of rank-and-file officers and their unions. The head of the SDPD's EEO office not only helped to identify and resolve potential



legal problems but also brought the successful experience of that office in mediating internal personnel problems.

One issue that needs to be addressed by all communities is the racial and ethnic composition of the local population. The planning committee needs to determine whether sizeable groups do not speak English, whether the complaint process is accessible to them, and whether the mediation program will be able to accommodate them.

Identify Local Resources

The SDPD planning committee identified the local resources necessary for a successfully functioning mediation program, the most important of these being the source of program mediators.

During the planning process, the planning committee or a subcommittee should identify local mediation centers that might want to be affiliated with the program. If no formal mediation center exists, other sources of mediators (e.g., the local bar association) should be identified.

Once a source of mediators has been identified, the planning committee should discuss financial arrangements that would be acceptable to prospective mediators. Some mediation programs pay individual mediators a fixed fee per case. Other programs rely on unpaid mediators but pay an administrative fee to a mediation center.

The planning committee should also identify the prospective location or locations for mediation sessions. These locations need to be convenient for participants and neutral. For example, a police facility would not be considered neutral by most complainants. The arrangements and possible costs, if any, for these locations should be determined.

Discuss and Resolve Issues

As discussed in Chapter 3, there are a number of complex issues associated with mediation. The planning committee or task force needs to fully discuss and resolve these issues.

With respect to the type of cases that will be eligible for mediation, the San Diego planning committee decided to follow the example of San Francisco and prohibit the mediation of complaints involving racial or gender slurs. Sample forms were developed. A participant feedback survey was also developed.



Secure Commitments

As the planning process nears completion, the planning committee should secure firm commitments from participants, including the mediation center or other source of individual mediators and especially the representatives of the police officer rank and file. A clear understanding that there are no serious objections to the proposed program is critical. Assuming that the planning committee includes representatives of the rank and file, all potential problems should have been discussed and resolved by this point in the process.

Finalize Plan

The last stage in the planning process is to finalize the plan by verifying that consensus exists on all of the major issues. If there are any uncertainties, for example, about funding or the participation of the local police union, then it is best to take additional time to resolve them.

Ongoing Monitoring and Evaluation: Research Questions

Planning a successful mediation program does not end once it has been begun operating. Ongoing monitoring and evaluation is necessary to ensure that the program is working properly and meeting its objectives. Formal program evaluation can help document successes and identify problems that need attention. Unfortunately, little is known about the actual effect of mediating citizen complaints against police officers. Only a few programs have mediated enough cases to enable even modest evaluations. The major research questions related to mediation programs are discussed below.¹⁵

Effect on Participants

Citizen complainants

1. Does mediation provide a more satisfactory experience for citizen complainants than traditional complaint investigation procedures? Specifically:
 - Are complainants more satisfied with the process?
 - Are complainants more satisfied with the outcomes of mediation?
2. Does mediation provide citizen complainants with a better understanding of policing and police officers than traditional complaint investigation procedures?

¹⁵ For discussions of the methodological issues pertaining to evaluating ADR programs, see McGillis (1997), Chapter 4; and McGillis (1986), Chapters 5, 6, and 7. See also the methodology used in Clarke, Ellen, and McCormick (1995).



Police officers

3. Does mediation offer police officers with a more satisfactory experience than traditional complaint investigation procedures? Specifically:
 - Are officers more satisfied with the process?
 - Are officers more satisfied with the outcomes?
4. Do officers gain a better understanding of citizens and citizen complaints through mediation than through traditional complaint investigation procedures?

Police Accountability

5. Do individual officers who resolve complaints through mediation have fewer complaints filed against them?
6. Do officers experienced in mediation have measurably different attitudes about citizens, citizen complaints, and complaint procedures than officers inexperienced in mediation?

Police-Community Relations

7. Does mediation help to lessen conflict between the police and racial/ethnic minority communities? Specifically:
 - Do citizen complainants who experience mediation have a more positive attitude toward police than complainants who do not choose mediation or citizens in the general population?
 - Do police officers experienced in mediation have a more positive attitude toward citizens of different racial/ethnic groups than officers inexperienced in mediation?
8. Does the existence of a mediation program enhance trust and confidence in police among racial/ethnic minority group leaders?

Community Policing

9. Does a mediation program contribute positively to community policing? Specifically:
 - Do citizen complainants perceive a connection between the goals of mediation and the goals of community policing?
 - Do police officers perceive a connection between the goals of mediation and the goals of community policing?
-

Citizen Complaint Process

10. Are mediated complaints resolved more quickly than investigated complaints?
11. Is mediating complaints less expensive than investigating complaints?
12. Assuming evidence shows that mediation provides a more satisfactory experience for complainants, does the existence of a mediation program lead to an increase in the number of complaints filed?

Creation of Mediation Programs

13. What factors contribute to the creation of a citizen complaint mediation program in a local community? What are the most important factors?
 - Community leadership?
 - Police department leadership?
 - Leadership among elected officials?
 - The strength of an ADR culture, as indicated by the prevalence of mediation programs in the local community?
14. What factors inhibit the creation of a citizen complaint mediation program?
 - Opposition from police department leadership?
 - Opposition from the rank and file and the police union?
 - A lack of support from elected officials?
 - A lack of financial resources?
 - The absence of a supportive ADR culture in the local community?

Developing a Significant Caseload

15. What factors contribute to or inhibit the development and maintenance of a reasonable mediation caseload?
 - The quality of informational materials available?
 - Support from police department leadership?
 - Support from the police rank and file or union?
 - Adequate and dependable financial support?
 - Location of and accessibility to mediation sessions?
-



16. What factors account for a significant change in caseloads over time (increase or decrease)?
- Increased public awareness of and satisfaction with the mediation program?
 - Increase in police misconduct?
 - Problems with administration of the mediation program (e.g., staff shortages, client dissatisfaction with services, etc.)?
 - Decrease in police misconduct?

Conclusion

Planning is crucial to the success of a mediation program. As Chapter 4 indicates, most existing citizen complaint mediation programs have extremely low case loads. To a great extent this is due to a lack of understanding or opposition to the mediation of citizen complaints. And as Chapter 3 indicates, there are many complex issues involved in the mediation of citizen complaints against police officers. Careful planning can help to overcome potential problems. The most important lesson of the San Diego planning process, as one key official explained, is taking the time to plan and address all of the key issues in advance.



Chapter 6

Traditional Citizen Complaint Procedures

Introduction

To fully appreciate the potential contributions of mediation, the nature of traditional citizen complaint review procedures must be understood. These procedures, in turn, should be viewed in the context of police-community relations (PCR), the nature of routine policing, and the extent of police misconduct. This chapter discusses these issues and describes the development and characteristics of traditional citizen complaint procedures.

Many citizen complaints are not officially about race, but are *really* about race.

— Vivian Berger, Mediator,
New York City

Citizen Complaint Procedures in Context

Police-Community Relations

The history of PCR defines the context in which citizen complaints arise. The essential features of this history include racial polarization over alleged police misconduct and discontent with internal police complaint procedures.

Concern about police misconduct on the street continues. A number of cities across the country have experienced extreme controversy arising from fatal shootings of citizens and allegations of excessive use of physical force. Additionally, the issue of racial profiling has arisen, involving allegations that traffic police single out African-American drivers for unwarranted stops and searches (American Civil Liberties Union 1999). Consequently, despite many important changes and improvements in policing, allegations of race discrimination and excessive use of force continue to embroil American police (Walker 2000).

Nature of Routine Policing

The nature of routine policing also defines the context in which citizen complaints arise. It is now well established that, contrary to popular mythology, American police officers are primarily peace keepers and problem solvers, not crime fighters. Police officers routinely deal with the many unpleasant and unruly events that others cannot or do not want to handle (Bittner 1990; Reiss 1971; Goldstein 1977). American citizens rely on police to solve all sorts of problems. During some encounters, citizens are hostile, belligerent, or directly abusive or resistant to the officers called to the scene. This puts enormous stress on officers and calls for great self-control on their part.



Officers are asked to handle a wide range of often ambiguous situations. In any given situation, the best course of action for the officer to take, such as arrest or not arrest, issue a warning or spend time counseling the people involved, and so on, simply may not be clear. Discretion is the essence of police work (Davis 1975; Walker 1993).

Perhaps the most important kind of discretion that police must exercise relates to the use of force. Although police officers are legally empowered to use force in certain situations, they may use only the level of force necessary to meet a lawful police objective. Many citizen complaints include allegations that the officer or officers used excessive force. However, whether the officer's use of force was genuinely excessive or whether the officer responded appropriately is often unclear (Geller and Toch 1995).

The setting of routine police-citizen encounters is an important complicating factor in regard to citizen complaints. Routine police work has been characterized as a low visibility activity because officers generally work alone or in pairs, free of direct supervision (Goldstein 1960). Consequently, not only are they free to use their discretion in handling each situation, but they also have considerable opportunities to bend or break the rules if they choose to do so.

The low visibility of most police work has enormous implications for the investigation of citizen complaints. In the absence of independent corroborating evidence (a witness or medical records), most complaints are not sustained.¹⁶ Unsustained complaints often leave both the complainant and the officer unsatisfied, if not angry and alienated. The complainant feels that his or her complaint was not taken seriously or investigated thoroughly or fairly. The police officer feels he or she was investigated for a groundless allegation.

Extent of Police Misconduct

The extent of police misconduct is a matter of great controversy. Studies show that police use of force (i.e., physical force) occurs in about one percent of all encounters between police and citizens (Bureau of Justice Statistics 2001).¹⁷ Some of these studies estimate that about two-thirds of these use-of-force incidents are justified by the circumstances of the event and that about one-third of the incidents are unjustified or excessive (Reiss 1968; Worden 1995). Many critics of police dismiss these estimates as unrealistic ally low. These figures must be considered in the context of several factors, however.

¹⁶ The problems associated with investigating and sustaining citizen complaints are discussed in Walker (2001), Chapter 3.

¹⁷ For a discussion of the problems related to studying police use of force, see Bureau of Justice Statistics (1999b).



First, when the one-third of one percent estimate is applied to the total annual number of police-citizen contacts in any police department, the annual total may appear ominous.

Second, the studies previously cited refer to police use of *force*, not allegations of rudeness, discourtesy, racial or ethnic slurs, or failure to provide adequate service, which are the bulk of citizen complaints (Minneapolis Civilian Review Authority 2000). As a result, the total number of alleged misconduct incidents is far greater than one percent of all contacts. Note also that some citizens might apply the term "police brutality" to incidents that involve a racial slur rather than actual physical force (President's Commission on Law Enforcement and Administration of Justice 1967a). As law professor Charles Lawrence argues, a racial epithet is extremely hurtful and is often felt as if it were a physical blow (Lawrence 1990).

Third, use of force and other misconduct incidents are concentrated in certain segments of the population. More than 30 years ago, Albert Reiss argued that the typical victim of police use of force is a young, low-income male, regardless of race (Reiss 1971). Other research indicates that African-American males are overrepresented among victims of misconduct (Pate and Fridell 1993; Worden 1995). Reiss also argued that individual incidents accumulate over time, creating a sense of systematic harassment in the minds of their victims (Reiss 1971).

Finally, the enormous public attention to allegations of excessive force has deflected attention from the most common forms of police behavior that lead to citizen complaints. Rudeness, discourtesy, or a failure to provide adequate service make up the majority of complaints in every jurisdiction. Moreover, it is widely believed that many more potential complaints of this nature are not brought forward by citizens (Walker 2001). Complaints involving these relatively less serious forms of police misconduct are among those most suitable for mediation.

In sum, scholars widely disagree about the extent of police use of force and other forms of misconduct. Nonetheless, the *perception* of misconduct has been a major issue in American society for decades. Moreover, a widespread perception exists among racial and ethnic minorities that citizen complaint procedures administered by police departments do not adequately address the problem.



Development of Traditional Citizen Complaint Procedures

Since the 1950s, in response to the controversy over brutality and inadequate responses to citizen complaints, civil rights leaders have demanded the creation of independent citizen review procedures to handle complaints (American Civil Liberties Union 1992; National Association for the Advancement of Colored People 1995; Walker 2001). Police departments have responded by either creating internal procedures for handling citizen complaints or revising existing procedures. In the 1960s, many police departments did not even have a special unit or procedure for handling complaints (President's Commission on Law Enforcement and Administration of Justice 1967b). Today, virtually all law enforcement agencies have a formal procedure for receiving and investigating complaints, either through a separate internal affairs unit or an officer designated for that purpose. The law enforcement accreditation standards mandate this approach (Commission on Accreditation for Law Enforcement Agencies 1999).

Improvements in internal complaint procedures include increased staffing, better record keeping and public reporting, and facilitating the filing of complaints (Pate and Fridell 1993). A number of police departments, for example, now house the internal affairs unit in a building separate from the police department to allay citizen anxieties about visiting police headquarters. In addition, and perhaps most important, progressive police chiefs have stressed the importance of accountability and have instituted procedures such as mandatory reporting of use of force and early warning systems to enhance accountability.

Civil rights activists have generally found internal police complaint procedures to be inadequate and continue to demand independent complaint procedures. In the past 15 years, these demands have been increasingly successful, and the number of citizen oversight agencies has grown from an estimated 20 in 1985 to more than 100 by 2001. Most important, about 80 percent of the police departments in the 50 largest cities are subject to some form of citizen oversight (Walker 2001).

Citizen oversight agencies vary considerably in terms of their structure and formal powers. Some are independent of the police departments they serve and are responsible for investigating all citizen complaints. The Minneapolis Civilian Review Authority (CRA) and the San Francisco Office of Citizen Complaints are examples of these agencies. In other jurisdictions, an external oversight agency contributes to the complaint process but does not conduct the initial fact-finding investigation of complaints. Finally, some cities and



counties have an auditor form of oversight (e.g., the San Jose Independent Police Auditor), in which an independent agency audits or monitors the police department's internal affairs unit (Walker 2001; Finn 2001).

The mediation of complaints represents both an *extension* of the citizen oversight movement and a *departure* from it. On one hand, most existing mediation programs are associated with oversight agencies. On the other hand, the operating assumptions of mediation differ from those of traditional internal and external complaint procedures.

Characteristics of Traditional Citizen Complaint Procedures

Despite the *structural* differences between traditional police and citizen oversight complaint investigation systems, they share the *same essential features*, the most important being an adversarial approach to handling complaints. The criminal trial model best exemplifies this approach.

Criminal Trial Model

Both internal and external complaint investigation systems use a *criminal trial model* of dispute resolution (Walker and Kreisel 1996). That is, they are quasi-judicial procedures in which a person is accused of wrongdoing, and the process is designed to determine guilt or innocence for the purpose of punishing those who are found guilty. The essential difference between internal and external complaint procedures is that the investigators are not sworn police officers in the latter. The *formal and adversarial* nature of the criminal trial model has several characteristics.

First, citizen complaints are subject to a formal *fact-finding investigation* to determine whether the officer committed the alleged misconduct. Some complaint procedures include a formal hearing in which the evidence against the officer is presented and the officer or his or her representative has an opportunity to rebut the evidence. Formal hearings of this sort are equivalent to a trial in a criminal proceeding and are the epitome of the formal, adversarial, and quasi-judicial nature of complaint proceedings. Hearings include representation by attorneys, rules of evidence, presentation of evidence, and cross-examination.

Second, the accused officer enjoys a presumption of innocence during the course of the investigation. The burden of proof is on the investigators to develop sufficient evidence to sustain the allegation or allegations.



Third, the disposition of a complaint is based on the *strength of the evidence*. Some agencies use a "preponderance of the evidence" standard, whereas others use a "clear and convincing" standard. If the facts support the allegations, the complaint is "sustained," and the officer is subject to discipline by the police department (Walker 2001).

Fourth, the complaint process is oriented toward the punishment of officers who are found guilty of the alleged misconduct.

Citizen oversight procedures for investigating complaints embrace all these elements. They differ from internal police complaint procedures to the extent that they provide some input into the process by people who are not sworn police officers.

Other characteristics of the criminal trial model. Given the formal, bureaucratic nature of the process, complaint investigations based on the criminal trial model are generally time consuming. One of the most pervasive criticisms of both internal and external complaint procedures is in fact the lack of timely disposition of complaints (Walker 2001). A study in New York City in the 1980s found that 65 percent of complainants felt that the process "had taken too long" (Sviridoff and McElroy 1989b). In the most notorious recent example, the old Washington, D.C., Civilian Complaint Review Board (CCRB) (abolished in 1995) took up to three years to handle some cases. In mid-2000, the internal affairs unit of the Portland, Oregon, police department was taking an average of 13 months to investigate cases. (In response to this problem, the staff of the unit was doubled and disposition times have presumably dropped.)

One of the ironies of traditional complaint procedures is that they have been made increasingly formal to ensure thoroughness and accountability (e.g., requiring more documentation) and to protect the rights of both sides. Elaborate formal procedures, however, effectively delay the process and make it less personal. Delay and impersonality, however, are likely to decrease the level of satisfaction among clients. This problem is not confined to citizen complaint procedures but extends to all modern legal procedures.¹⁸

One significant characteristic of the criminal trial model is that the complainant and the subject officer(s) do not meet. Complainants and officers are interviewed separately. In important respects, the complainant (or "victim") is even more excluded from the process than crime victims in the criminal trial process. At least in the few criminal cases that do go to a trial, the victim might be called to testify and be in the presence of the accused in the court room. It is on the issue of face-to-face contact that mediation differs radically from

¹⁸ Galanter (1974), in fact, argues that the more powerful parties to a dispute (the "haves") are better positioned to manipulate formal procedures to their advantage. See also Menkel-Meadow (1999).



traditional complaint investigation systems, whether internal or external. As Chapter 2 explains, the face-to-face aspect of the process is the key to achieving many of the potential benefits of mediation.

Penal style of social control. Scholars of the sociology of law provide a framework that places citizen complaint procedures in a useful perspective. Existing complaint procedures represent a *penal* style of social control, with punishment being the ultimate result. Donald Black identifies alternative styles of social control and their respective solutions as *compensatory*, in which the solution is some form of payment or other compensation; *therapeutic*, in which the accused person receives some form of help; and *conciliatory*, in which the disputing parties achieve some form of resolution (Black 1976).

Unlike the other styles, the penal style does not include a process for making payment to complainants, helping either the complainant or the police officer, or conciliating the complaint. Mediation clearly falls within the conciliatory style of social control with an emphasis on conflict resolution.

Sustain Rates

Complaint investigation procedures have traditionally been evaluated in terms of the percentage of complaints they sustain in favor of complainants (although some experts argue that the sustain rate is not a good performance measure) (Walker 2001). The data on sustain rates have important implications for mediation.

Police complaint procedures typically sustain between 10 and 13 percent of all complaints. A national survey by the Police Foundation found that municipal police departments sustain only 10 percent of all complaints (Pate and Fridell 1993). This figure is extremely low. Critics of the police cite the fact that the officer "wins" 90 percent of the time as evidence that internal complaint procedures are "whitewashes" that excuse and cover up officer misconduct (Neier 1966).

Independent citizen oversight procedures do not sustain a significantly higher percentage of complaints, however. CRA finds probable cause in only about 10 percent of complaints and then sustains only half of those after a formal hearing (Minneapolis Civilian Review Authority 2000). The problem of low sustain rates is not unique to the United States—the Police Complaints Authority, a national complaints system in the United Kingdom, sustains less than five percent of all complaints (Maguire 1991).

When a complaint is not sustained, both sides feel that they have lost, that they have not been heard, and that the process did not work for them.

— Barbara Attard, Director,
Berkeley Police Review
Commission



Barbara Attard, Director of the Berkeley Police Review Board, argues that unsustained complaints often leave both parties feeling angry and alienated (Attard 1999). Complainants feel that their allegations were not taken seriously, and officers feel they were subject to investigation for no good reason (Sviridoff and McElroy 1989b). In this respect, traditional complaint procedures may only aggravate tensions between the community and the police.

Some experts conclude that low sustain rates are an inherent feature of complaints and complaint investigation procedures and not entirely the result of shortcomings on the part of the investigating agency (although the problems of many agencies cannot be ignored) (Walker 2001; Gellhorn 1966). For this reason, Walker argues that the sustain rate should not be used as a performance measure and that complaint procedures should be evaluated on the basis of other criteria. One criterion is satisfying the goals of complainants, and there is considerable evidence that mediation does a better job of that than traditional complaint investigations (Walker 2001).

Insofar as mediation may result in some positive outcome—an apology, an explanation, or greater understanding between the parties, which can legitimately be considered a "success"—the overall success rate will be higher than the prevailing 10 percent average.

Traditional Informal Complaint Procedures

In practice, police departments have a long history of handling complaints informally. Unfortunately, these practices have been a major part of the problem of inadequate complaint procedures and represent an abuse of the concept of informal dispute resolution.

As previously discussed in this chapter, until the 1960s, most police departments had no formal procedure for receiving or investigating citizen complaints (President's Commission on Law Enforcement and Administration of Justice 1967b). Anecdotal evidence indicates that when aggrieved citizens appeared at police stations to lodge complaints, they were frequently turned away or even threatened with arrest. The Christopher Commission (1991) found that Los Angeles police officers engaged in this practice as recently as the early 1990s. Informal resolution, to the extent it existed, often involved desk officers attempting to dissuade citizens from pursuing the matter, arguing that they had no basis for a valid complaint or that someone would "take care of" the matter (U.S. Commission on Civil Rights 1994). Additional evidence shows that even when the desk officer recorded a citizen's allegation, a formal investigation often never occurred. Following its creation in 1953, the New York City CCRB implemented a series of administrative reforms to ensure that



complaints would be formally recorded and sent to police headquarters for investigation (Kahn 1975).

The practice of using informal methods to discourage citizens from lodging complaints is not confined to the United States. The Alberta (Canada) Law Enforcement Review Board concluded that "in some instances the procedure has been used to stall, deflect, bury, or marginally respond to complaints" (Alberta Law Enforcement Review Board 1997).

Mediation as an Alternative to Traditional Complaint Procedures

Mediation is a very different approach to handling citizen complaints against police officers. Kimberlee E. Kovach, a leading authority on mediation, defines the difference between the adversarial criminal trial model and mediation in the following terms: "The litigation system, based on the win-lose dichotomy, encourages an adversarial approach. Conversely, mediation relies on an interest-based collaborative approach to problem solving" (Kovach 1997). Box 6-1 shows the essential differences between mediation and the criminal trial model.

Box 6-1

Essential Differences Between Mediation and the Criminal Trial Model

Mediation	Criminal Trial Model
Informal process	Formal process
Face-to-face meetings	No face-to-face contact between police officer and complainant
Emphasis on dialog	Emphasis on formal testimony



Chapter 7

Mediation and the ADR Movement in America

Introduction

Mediation is part of a larger alternative dispute resolution (ADR) movement that has swept American society during the past 30 years. Linda Singer, one of the leading experts on the subject, observes that a "quiet revolution is taking place in the methods Americans have available to them for dealing with conflict" (Singer 1994). For example, mediation and other ADR procedures are extensively used in the following areas:

- Divorce and child custody cases.
- Commercial disputes.
- Labor-management conflicts.
- Neighborhood disputes.
- Victim-offender reconciliation programs.
- Multiparty environmental controversies.
- Conflict resolution in elementary and secondary schools.
- Rulemaking by Federal agencies.
- International diplomacy.

Mediation is also an integral part of important new developments in the criminal justice system, including the restorative justice and community justice movements. These movements introduce the principle of shared responsibility into American criminal justice by encouraging neighborhood residents and community organizations to settle problems outside the formal legal system (Clear and Karp 1999; Nicholl 2000a). These movements are also closely linked to the philosophy, goals, and programs of community policing (Nicholl 2000a).

The history of the ADR movement in the United States has some important lessons for the development of citizen complaint mediation programs. This chapter examines the ADR movement in American society in general and in the criminal justice system in particular.

ADR Movement

The growth of ADR during the past 30 years can be accurately characterized as a movement. ADR has been led by activists who are deeply committed to its goals; it has been served by a number of national professional associations; several professional ADR journals have been published; ADR has been widely taught in law schools; a



significant amount of ADR research has been conducted; and, finally, ADR has been applied to many aspects of American life.

In addition, ADR has received substantial support from federal and state governments and private agencies. Federal law requires all federal agencies to develop ADR programs and all federal district courts to develop ADR procedures to reduce caseloads. Most states have also enacted laws to promote ADR procedures. A recent mediation manual listed dispute resolution offices in 21 states (Lovenheim 1996). At the same time, Congress and many states have promoted mediation by enacting statutes to guarantee confidentiality in mediation proceedings (Brown 1991).

¹⁹ See the SPIDR Web site (www.spidr.org).

The legal profession has enthusiastically embraced ADR. The American Bar Association (ABA) cosponsored the 1976 National Conference on the Causes of Popular Dissatisfaction With the Administration of Justice, which is widely credited with sparking the ADR movement. Also in 1976, ABA created the Special Committee on Resolution of Minor Disputes. Since then, ABA has passed a series of resolutions supporting various applications of ADR. The ABA Section on Dispute Resolution, established in 1993, currently maintains an extensive range of activities (American Bar Association 1998). In addition, the Society of Professionals in Dispute Resolution, organized in 1972, has more than 3,600 members and maintains 15 different sectors addressing areas such as commercial, court, family, criminal justice, community, and other disputes.¹⁹ Finally, about 95 percent of all law schools teach some form of ADR (Singer 1994).

In the context of this wide range of activity covering virtually every aspect of American life, the relative absence of citizen complaint mediation programs is remarkable.

Disputes in Everyday Life

Disputes arise all the time in day-to-day life: coworkers, business partners, neighbors, family members, and others have disagreements ranging from the important to the petty. People also have disputes with federal, state, and local agencies or other organizations.



Box 7-1 Responses to Disputes and Possible Outcomes	
Response	Possible Outcome
Ignore	Problem festers/escalates Avoid certain people/situations Problem disappears
Settle informally	Friend or colleague intervenes Face-to-face resolution
Settle formally	Formal complaint filed Lawsuit filed
Use ADR procedure	Mediation Conciliation Arbitration

People respond to disputes in various ways. The most common response is to ignore the problem. This response is called "lumping it" (Felstiner 1974). In some cases, the matter goes away; in other cases, it festers and grows worse. Another response is sitting down and working out differences informally. A friend, colleague, or family member may intervene to help resolve the problem. Such events undoubtedly occur millions of times each year. These informal resolutions are a form of mediation. They are so routine and familiar to us that we do not think of them in those terms (Singer 1994; Sander 1982).

Informal dispute resolution occurs regularly in policing in at least three different ways. First, police officers routinely mediate disputes between citizens. Such actions are a basic part of the "peace-keeping" role of day-to-day policing (Goldstein 1977). Second, police resolve disputes between themselves and citizens in the field; for example, when a citizen grows angry with a police officer over something the officer did, the officer may talk through the problem and eventually calm the citizen. Third, police resolve disputes at the police station, for example, when a citizen lodges a complaint against a police officer. A police official, typically a desk sergeant, may talk to the complainant, and no formal citizen complaint is filed. However, complaints involving civil rights issues sometimes result in the desk sergeant's refusal to accept a complaint or possibly even threatening the citizen (Christopher Commission 1991; National Advisory Commission on Civil Disorders 1968).



Since the 1960s, however, Americans have become less likely to lump it and instead pursue their problem or grievance. This has produced a dramatic increase in litigation and the development of other formal grievance mechanisms within organizations. For example, in the early 1960s, few police departments had a formal process for handling citizen complaints. Today, virtually every agency has some unit or person designated for this purpose, and most big-city police departments are also subject to review by an external citizen oversight agency (President's Commission on Law Enforcement and Administration of Justice 1967b; Walker 2001).

The increasing tendency of people to act on their grievances is reflected in long-term trends in the number of complaints filed against New York City police officers. Complaints increased 10-fold between the early 1960s and the early 1970s (Kahn 1974). No one suggests that police performance deteriorated by a factor of 10 in that decade. Rather, the increase in complaints was attributable to a change in people's attitudes toward pursuing disputes and to improved complaint procedures that facilitate the filing of complaints (see Walker 2001).

Origins of the ADR Movement

Early Manifestations

The ADR movement can trace its origins to the 1937 National Labor Relations Act (the Wagner Act), which guaranteed employees the right to form unions and required employers to negotiate with them in good faith. The resulting collective bargaining agreements inevitably gave rise to numerous disagreements regarding their implementation. Arbitration developed as a formal means of resolving such disagreements outside the courts. "Meet and confer" provisions in contracts also provided a structured process for effecting changes in the workplace.

In 1947, Congress established the Federal Mediation and Conciliation Service (FMCS) to provide mediation and conflict resolution services on a regular and professional basis. FMCS currently maintains 78 field offices and employs almost 200 mediators. The role of FMCS expanded even further with the passage of the 1990 Dispute Resolution Act, which authorizes FMCS to provide mediation and dispute resolution services to all federal, state, and local government agencies. By the 1950s, ADR was well established in one important area of American life.



In 1964, mediation received another significant boost from the Federal Government with the passage of the Civil Rights Act, which created the Community Relations Service (CRS) unit within the U.S. Department of Justice (DOJ). As the civil rights movement escalated and many local communities faced potentially serious conflict, CRS was charged with providing mediation services to local communities. The work of CRS related to police-community relations continues to this day. In 1997, for example, CRS helped resolve more than 1,300 local community problems, many of them involving the police (Community Relations Service 2000; 1997).

ADR as a Social Movement

The early programs devoted to labor management and police-community relations were isolated efforts directed toward specific problems. ADR truly emerged as a social movement with a broad vision for change in the late 1960s and early 1970s, reflecting the idealism and often conflicting values of that turbulent era. Several different intellectual and political forces spurred the ADR movement.

Forces spurring the ADR movement. One of the major catalysts of the ADR movement was discontent with the growing bureaucratization and legal formality of American life. Many ADR activists felt that public bureaucracies, including the courts and other elements of the criminal justice system, were too impersonal, too constrained by formal rules, too slow to resolve problems, and too remote from the lives of real people. For all these reasons, ADR activists argued that the legal system was not adequately serving the needs of its clients or society as a whole. One of the most influential early articles in the neighborhood justice movement, Richard Danzig's 1973 "Toward the Creation of a Complementary, Decentralized System of Criminal Justice," paints a picture of the American criminal justice system as an almost complete failure (Danzig 1973). As the title of his article indicates, Danzig proposed decentralized and informal arrangements to handle criminal justice-related problems.

A demand for social justice, particularly in terms of greater access to the legal system for impoverished racial and ethnic minorities, also provided impetus for the ADR movement. Proponents of this view believed that formal legal procedures failed to serve the needs of the poor and powerless, protecting the interests of only the powerful. A lawsuit, for example, requires a lawyer. Wealthy individuals or organizations are better able to hire a skilled, experienced lawyer and pay for additional investigators or experts when necessary (Auerbach 1983). Social justice critics of the legal system assume that informal and neighborhood-based dispute resolution procedures would be more accessible to those without money or political power.



Another force underlying the ADR movement was a growing distaste for the seeming increase in conflict and litigiousness in contemporary American society. Under the "rights revolution" numerous day-to-day controversies generated lawsuits that reached the Supreme Court and resulted in new constitutional law. Newly self-identified groups such as criminal suspects, prisoners, public school students, welfare clients, tenants, patients, gays and lesbians, and others began to claim formal legal rights and to pursue their rights in the courts. The Supreme Court addressed issues such as religion in public schools and private sexual behavior, including access to contraceptives and abortion services. In addition, routine civil litigation, including primarily commercial disputes, increased. One study in the mid-1970s estimated that 10 million new civil cases were initiated each year; this represented a litigation rate more than 10 times that of Scandinavian countries (see McGillis 1982). Critics of the legal system warned of a "litigation explosion" and lamented a "plague of lawyers." One book characterized America as the "litigious society" (Lieberman 1981). Meanwhile, the increasingly formal procedures of the American legal system seemed to some observers to aggravate conflict rather than resolve it. In this respect, the ADR movement drew upon a popular distaste for lawyers, blaming them for promoting litigiousness and conflict for reasons of professional self-interest. Concern about a rise in social conflict eventually expressed itself as the communitarian movement, which explored various ways to lessen conflict in American society. ADR is one such method.

A desire to make the courts more efficient also propelled the ADR movement. Advocates of this view believed that the court system was seriously overloaded with cases, many of which involved relatively minor disputes, and consequently could not handle the truly important cases. This view was launched in 1976 by the National Conference of the Causes of Popular Dissatisfaction With the Administration of Justice and by a speech by then-Chief Justice of the U.S. Supreme Court Warren Burger. This view differed greatly from other catalysts of the ADR movement in its political outlook. Its proponents accepted the basic elements of the American legal system and simply wanted to make it work more efficiently and effectively (Auerbach 1983).

Perspectives on social reform. As should be evident, disparate forces that had very different values and goals propelled the ADR movement. These can be grouped into two broad perspectives: transformative and efficiency. The transformative perspective is the most ambitious and idealistic.²⁰ Its advocates seek to transform social relations, if not society itself. Transformation includes the empowerment of relatively powerless people, the revitalization of neighborhoods and communities, and a reduction in conflict in

²⁰ For a discussion of the transformative perspective, see Bush and Folger (1994).



American society at large. The efficiency perspective is primarily concerned with the smooth functioning of established legal institutions and seeks to make them more efficient by diverting some cases or potential cases to other avenues. Whereas the efficiency perspective places a high value on established legal institutions and wants to make them work more effectively, the transformative perspective is deeply alienated from those institutions.

Critics of the ADR movement. The assumptions and goals of the ADR movement have been questioned by a number of scholars and political commentators. Some legal scholars, for example, argue that the legal system is not as overloaded as the efficiency perspective suggests. The most serious critique has come from legal scholars and civil libertarians who see litigation and conflict as a positive and powerful instrument of social change, especially with respect to the poor and the powerless. The success of the civil rights movement in eliminating racial discrimination and advancing the interests of African Americans is the touchstone for advocates of this point of view (Fiss 1984; Walker 1998b). These advocates believe that the American legal system, for all its flaws, is one arena in which all people are indeed equal. They worry that the informal procedures of ADR are more likely to favor the powerful than the powerless. Some critics fear that mediating citizen complaints against police will work to the advantage of police and not complainants (see Chapter 4).

First programs of the ADR movement. The first major expression of the ADR movement in the 1970s was the creation of neighborhood justice centers, some of which were sponsored by DOJ. By 1990, an estimated 250 to 440 centers were in operation across the country.²¹ Neighborhood justice centers handle a wide range of what are generally termed "minor disputes": landlord-tenant problems, small commercial claims, disputes between neighbors, employer-employee grievances, and some minor criminal offenses (Tomasich and Feeley 1982).

Other areas of American life also experienced a surge in ADR activity. One major area involved divorce, child custody, and child support mediation (Singer 1994). In addition, the number of cases involving mediation and arbitration of employer-employee disputes, commercial disputes, and multiparty disputes (e.g., environmental issues involving land owners, environmentalists, developers, and various government agencies) increased greatly. International disputes from trade agreements to major political controversies also frequently involved formal mediation procedures.

²¹ Singer (1994) estimated 350 neighborhood justice centers in the United States by 1990.



Concern about violence in elementary and secondary schools stimulated efforts, including the introduction of mediation into schools, to reduce the number of routine conflicts that lead to more serious crime and violence (Kenney and Watson 1998). For example, the National Association for Mediation in Education (NAME) was established in 1984 to promote school-based conflict resolution programs (Girard and Koch 1996). Today, one of the most widely used approaches in schools is peer mediation, where students are trained in mediation techniques so that they can resolve conflicts on their own (Bodine and Crawford 1998).

Mediation in the Criminal Justice System

Many parts of the criminal justice system, including all three traditional components of the system—police, courts, and corrections—eventually adopted mediation as a conflict resolution method. As the review that follows indicates, however, the application of mediation has been inconsistent within the system.

Police Officers as Mediators

One of the earliest manifestations of mediation in the criminal justice system was the mediation of domestic disputes by police officers. This arose independently of the ADR movement in response to research in the 1960s showing that police officers functioned as peace keepers, not crime fighters. Recognizing that police officers frequently handle domestic disputes and rarely make arrests in such incidents, Morton Bard's Family Crisis Intervention (FCI) experiment sought to provide officers with specific skills for handling domestic disputes without making arrests (Bard 1970).

The FCI concept was extremely popular for a few years but subsequently discredited by the emerging women's rights movement. The women's movement identified domestic violence as a social problem, saw police's failure to arrest as aggravating the problem, and emphasized arrest of people guilty of spousal assault. The result was a national movement toward mandatory arrest laws and policies and skepticism toward police's mediation of domestic disturbances (Sherman 1992).

The community policing movement in the 1980s renewed interest in police officers as mediators. Mediation in policing typically takes on two forms: the use of mediation skills by officers themselves to handle specific problems and officer referral of cases to dispute resolution centers. Mediation advocates assert that mediation is well suited for policing, because officers routinely handle many types of



disputes (Cooper 1999a; 1999b). Cooper points out that mediation by police officers does not have to occur in a structured environment such as an office and is therefore well suited to the nature of police work: "Mediation can be conducted by uniformed patrol officers in a multiplicity of venues, including on the street, in a bar, or on a basketball court" (Cooper 1999b).

Cooper also argues that police mediation of citizen disputes does not necessarily result in permanent solutions. Instead, it reflects what he terms "conflict management mediation," which brings a conflict to a manageable level. "All of the matters in controversy have not been addressed or resolved, but enough has been addressed or resolved that disputants have entered into an agreement of their own" (Cooper 1999b). In effect, this approach represents the traditional peace-keeping role of the police.

In addition to training police officers to mediate disputes themselves, interest has recurred in equipping officers to refer citizens to dispute resolution centers (Volpe 1989). For example, officers in Hillsboro, Oregon, receive 32 hours of mediation training. In contrast, the Pittsburgh Police Bureau teaches all officers how to refer cases to the Pittsburgh Mediation Center; some officers are trained in mediation and instruct all officers how to refer cases to the Pittsburgh Mediation Center. There are more than 350 dispute resolution centers across the country, many of which have created wallet-sized cards that police officers can give to citizens involved in conflict situations (Volpe and Christian 1989). The major limitation of police referring citizens to mediation centers is that they have no legal authority to compel them to do so.

Some experts also believe that mediation can be used by supervisors inside the police organization to handle internal conflict as well. "Two police officers who cannot get along may benefit more from mediation than from a transfer, disciplinary measures or a 'let's try to get along' lecture" (Volpe and Christian 1989). In fact, the San Diego Police Department mediation program described in Chapter 6 developed to some degree out of the department's success in mediating employee disputes.

Mediation and Community Policing

As described in Chapter 2, the idea of police officers functioning as mediators is consistent with the values and goals of community policing. A primary goal of community policing is to build relationships and partnerships with community groups to facilitate development of healthy communities.



One aspect of these partnerships is the capacity for neighborhood problem solving (Nicholl 2000a). A 1995 Police Executive Research Forum (PERF) report describes a number of innovative programs that use mediation as a part of problem solving. The problems addressed include neighborhood gangs, domestic violence, and internal police department personnel problems (Glensor and Stern 1995). Cooper, for example, suggests that police can give citizens a sense of empowerment through mediation by helping them engage in the resolution of their own conflicts. "Officers appear less as outsiders and more as community members; police ownership of community problems increase" (Cooper 1999b).

Equally important, use of mediation skills by the police may help reduce conflict and the number of confrontations between police and citizens. This, in turn, improves police-community relations and helps develop positive police-community partnerships (Volpe 1989; Cooper 1999b).

Prison Grievance Mechanisms

In the early 1970s, the criminal justice system adopted mediation to address prison inmates' grievances, primarily in response to the rise of the prisoners' rights movement and a dramatic increase in litigation by prisoners (Call 1995; Hepburn and Laue 1980). Before the prisoners' rights movement, American prisons had few if any procedures for handling inmate grievances. The prevailing law considered prisoners wards of the State who had no legal rights; therefore, no need existed for formal procedures to hear their grievances. The rising tide of inmate petitions in the Federal courts signaled the need for alternative, nonjudicial administrative remedies for inmate grievances (Ducker 1983; Silberman 1988). Many experts subscribing to the efficiency perspective pointed out that the courts could not efficiently and effectively address all of the prison-related disputes presented to them (Kovach 1997).

Within a few years, a variety of mechanisms for resolving inmate grievances had developed. A 1974 survey identified four mechanisms: (1) legal service programs that make legal aid and public defenders available, (2) ombudsmen who investigate and respond to complaints about the corrections department or prisons, (3) formal internal procedures for handling grievances, and (4) inmate councils designed to represent prisoners (McArthur 1974).

Some of the new mechanisms involved the mediation of inmate grievances. Mediation advocates argued that this type of ADR was particularly well suited for prisons. It had the capacity to address interpersonal conflicts among prisoners and respond to inmate



complaints against the institution (Reynolds and Tonry 1981). Silberman (1988) further suggested that mediation might help resolve disputes between staff and inmates, which could reduce the level of violence in a correctional institution.

Victim-Offender Mediation

The most extensive use of mediation in the criminal justice system today is in the area of victim-offender mediation (VOM). The first VOM programs began in the late 1970s, with the participation of a limited number of victims. Currently, thousands of crime victims are involved in approximately 100 victim-offender mediation programs in the United States. In addition, many VOM programs exist in Europe and Canada (Umbreit and Greenwood 2000b).

The core element of VOM is a face-to-face meeting between victims and their offenders. This provides victims with the opportunity to express their feelings and explain the impact the crime has had on them. It also creates a structured process for offenders to account for their actions to the victims in a way that traditional court proceedings do not allow. Offenders have the opportunity to take responsibility for their actions and to "become more aware of the effect of their crime on the victim (and community), to use this knowledge to take stock of the future, and to apologize or to offer repair to the harm or both" (Nicholl 2000a). Finally, VOM allows the two sides to negotiate an acceptable resolution for the harm done (Nicholl 2000a; Umbreit and Greenwood 2000b). The main goal of VOM is not to punish the offender but to repair the harm that has been done and to restore a relationship between the victim and the offender.

Mediation is not regarded as appropriate for all offenders. In fact, VOM has been largely confined to relatively minor offenses, with a special emphasis on juvenile offenders. Umbreit and his colleagues found that the most common types of offenses referred for mediation were vandalism, minor assaults, and theft and burglary. In addition, other property-related offenses and a few severely violent offenses were also mediated in some of the programs. However, some programs do mediate more serious violence-related cases such as assault with a deadly weapon, negligent homicide, domestic violence, sexual assault, murder, and attempted murder (Umbreit and Greenwood 2000b).

VOM may produce a wide range of outcomes. In general, the mediation process first addresses emotional and informational issues, which include the goal of having the victim express his or her feelings and having the offender respond. Some outcomes involve agreements about restitution in the form of money or services. Regardless of the



type of outcome, VOM is intended to "humanize the criminal justice process" for both victims and offenders. Ideally, a general consequence of this process is to legitimize the criminal justice system as a whole (Cooke 1981).

Evaluations have found that VOM programs are generally effective. In his study of mediation programs in four Canadian provinces, for example, Umbreit (1996) found that more than 90 percent of the cases referred to mediation successfully negotiated agreements acceptable to both parties. Moreover, 89 percent of the victims and 91 percent of the offenders reported satisfaction with the outcome of the mediation session. The findings of the study also indicate that most of the criminal justice officials supported mediation for specific criminal offenses and reported satisfaction with the local mediation services.

Community Courts

ADR procedures have been applied to the courts component of the criminal justice system. One such application is the community prosecution program in Portland, Oregon. In its basic approach, this program is closely related to the concepts of community policing and problem-oriented policing. The focus of official action shifts from major crimes to relatively small neighborhood-level disorder problems, with attention to underlying problems (e.g., prostitution, public drunkenness, rowdiness) rather than individual offenders. The Multnomah County (Portland) District Attorney (DA) created a Neighborhood DA, who functions as "facilitator, legal counselor, negotiator, problem solver, and community advocate." Instead of prosecuting individual cases, much of this person's activities involved mediating between conflicting parties and/or negotiating solutions (Boland 1998).

Restorative Justice and Community Justice

Restorative justice and community justice are names applied to a range of programs that embrace many of the activities of community justice centers and VOM. They are based on the premise that victims, offenders, and community members all need to be involved in resolving conflict. The approach is to engage in problem solving or reconciliation through a dialog that brings together the offender and the victim—individual(s) or the community—to negotiate a healing or "restorative" solution (Nicholl 2000a; Galaway and Hudson 1996; Karp 1998).



Galaway and Hudson assert that three elements are essential to the definition and practice of restorative justice: (1) crime is viewed primarily in terms of harm to individual victims, communities, and the offenders themselves and only secondarily as an offense against the State; (2) the aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused by the dispute; and (3) the criminal justice process should facilitate active participation by victims, offenders, and their communities to find solutions to the conflict.

Galaway and Hudson (1996) also argue that mediation is an integral part of achieving restorative justice. Mediation provides: an opportunity for participation in the justice process, a process for victims to receive answers to questions directed toward their offenders, the possibility of restoring the emotional and material losses to victims, the possibility of reducing victims fears, and giving everyone involved a sense of having been treated with respect.

²² For a comprehensive review, see Carnevale and Pruitt (1992).

Effectiveness of Mediation and Other ADR Procedures

The literature on mediation and other ADR procedures indicates mixed results with regard to effectiveness. The ADR movement has achieved some of its original goals but has fallen far short of achieving many of the more ambitious and idealistic goals associated with the transformative perspective. These findings have important implications for citizen complaint mediation programs.²²

Findings

The most positive findings related to mediation and other ADR procedures relate to the more limited goal of providing a more satisfactory experience for participants. Generally, participants in ADR procedures are satisfied with the process and are more satisfied than comparable subjects who have their disputes or cases settled through traditional formal legal proceedings. Mediation also produces relatively high levels of compliance with the terms of agreements. That is, individuals whose small claims court cases or child support payment disputes are mediated are more likely to comply fully with the terms of the settlement than individuals whose cases are settled through formal proceedings.

Mediation and other ADR procedures have been much less successful in achieving the broader and more ambitious social goals associated with the transformative perspective. Evaluations of neighborhood justice centers, for example, show that relatively few cases are generated as "walk-ins." That is, justice centers have not fulfilled the



promise of being able to help settle ongoing neighborhood disputes that are not destined for some more formal legal proceeding. Most cases tend to be referred from formal dispute proceedings, mediation being an alternative means of settlement. In sum, little evidence exists to support the idealistic hope that neighborhood justice centers will significantly improve the quality of life in communities by providing a forum in which to resolve low-level disputes. No evidence shows that neighborhood justice centers have empowered communities in the sense of building new capacities for self-regulation and self-governance. Traditional legal institutions, notably the police and the courts, continue to play as strong a role in regulating conflict as they have in the past.²³

²³ For a discussion of the San Francisco Community Boards experience, see Merry and Milner (1993).

In addition, one review of the literature concluded that mediation is generally more effective when conflict is moderate rather than intense, when the parties are highly motivated to reach settlement, when the issues do not involve general principles, and when the parties are relatively equal in power" (Carnevale and Pruitt 1992). Similarly, Merry's (1992) comparative research on mediation in small-scale and primarily Third World societies raises serious questions about whether informal dispute resolution procedures used in those societies are applicable to modern societies such as the United States. First, mediators typically are respected, influential members of the community who can exercise considerable influence and subtle coercive power. Mediation tends to work because disputes arise in the context of close residential and kinship ties that require people to deal with each other in the future and that make shame and loss of good will powerful instruments of social control. Consequently, in small-scale societies, "mediation depends on a community fabric that links disputants in enduring relationships" (Merry 1982).

At the same time, little evidence shows that mediation has achieved its efficiency-perspective goals; mediation has not significantly reduced court caseloads by diverting them from conventional litigation.



Implications for Mediating Citizen Complaints

The findings regarding the effectiveness of mediation and other ADR procedures have considerable implications for mediating citizen complaints. On one hand, people who experience mediation are generally very satisfied with the process and comply with final agreements. Mediation is also faster and less expensive than litigation or other more formal procedures, suggesting that mediating citizen complaints has the potential for providing greater satisfaction to participants than conventional complaint review procedures and for being more efficient and cost-effective. On the other hand, people should be extremely cautious about expecting mediation to transform the larger context of relationships between police and citizens. The most ambitious hopes of neighborhood justice centers, for example, have not been realized. Moreover, many citizen complaints involve intense feelings about police misconduct, issues of general principles such as the attitude of police toward minorities, and a power imbalance between police officers and citizens.



Conclusion

Mediation is a promising alternative to the handling of citizen complaints against police officers. As Chapter 2 explains, mediation offers many potential advantages to the police, to complainants, the police-community relations, to police accountability, and to community policing.

Mediation represents a very different approach to the handling of citizen complaints than traditional complaint review mechanisms, emphasizing communication and understanding rather than fact-finding and adjudication (Chapter 6).

Mediation is far more complex than most people realize, however. This report has found that few mediation programs exist in the United States and most of those programs actually mediate very few cases each year (Chapter 4).

Mediating citizen complaints involves a number of complex issues related to what kinds of cases should be considered for mediation, the mediation of cases involving racial, or ethnic, or gender issues, and the formal procedures of the mediation process (Chapter 3).

Careful planning is necessary for the development of a successful mediation program. The planning process developed by the San Diego Police Department serves as a model for communities thinking about developing a mediation program (Chapter 5).



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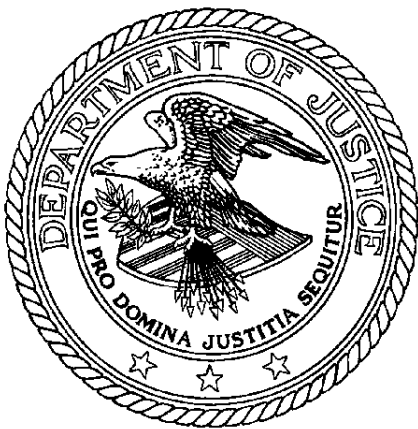
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