COMMUNITY-BASED DISPUTE RESOLUTION

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I. Introduction

In 1976, the American Bar Association, the Judicial Conference of the United States, and the Conference of Chief Justices sponsored a National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the "Pound Conference"). One outcome of the conference was endorsement of neighborhood justice centers, programs designed to "make available a variety of methods of processing disputes, including arbitration, mediation, referral to small claims courts as well as referral to courts of general jurisdiction."2

By 1978, when only about a dozen community dispute resolution programs existed nationwide,3 the United States Department of Justice issued grants for neighborhood justice centers in Los Angeles, Kansas City, and Atlanta.4 With the start of the Reagan revolution, federal funding ended in 1980.5 But the community dispute resolution movement steadily grew.

In 1980, the American Bar Association Standing Committee on Dispute Resolution reported only 100 neighborhood and community dispute resolution centers.6 Today there are, by some estimates, over 300 centers in at least forty-eight states and the District of Columbia.7 At their best,
the community based programs reflect "the will of a community to take responsibility for its own problems and are indicative of a new kind of citizen participation."8

According to Paul Wahrhaftig, an early community mediation theorist and proponent, the community program movement comes out of two distinct approaches: a court calendar model and a community empowerment model.9 Under the court calendar model, legal professionals seek to simplify access to the traditional justice system by tracking lay people into specialized resolution mechanisms for those disputes which do not merit full scale litigation.10 The community empowerment model, in contrast, holds as a central principle that individuals know which disputes they can best handle and how.11

Wahrhaftig argues that the community empowerment model, freed from the confines of a court-referred complaint which identifies specific parties and an exact grievance, best facilitates the disputants' productive focus on underlying interests and creative problem-solving.12

Today, community centers across the country handle an extraordinarily wide variety of conflicts, including: disputes between neighbors, consumer cases, landlord-tenant conflicts, criminal cases, truancy, juvenile delinquency, and police and youth conflicts, as well as more complicated wide-ranging community concerns like placement of halfway houses or other zoning issues.13 The past decade has seen not only a growth in programs, but also larger budgets and increasing institutionalization.14 More and more frequently, community centers formally ally with courts, the criminal justice system, or other public agencies. At least two of the nation's larger community-based programs recently dropped the word "neighborhood" from their names.15 Depending on your perspective, these developments are either a striking symbol of success (a move to

8. Testimony of Jolene Gitis, Administrator of Community Programs for the Mediation Center, at February 24, 1984 hearings conducted by the Senate Committee on Judicial Administration on Senate File No. 1366, subsequently enacted. See 1984 Minn. Laws ch. 654, Art. 2, § 133 (Community Dispute Resolution Programs) (codified as amended at MINN. STAT. § 494.01 (1990)).
10. Id.
11. Id.
12. Id.
13. DISPUTE RESOLUTION FORUM: "RESEARCH INTO MEDIATION: WHAT WE KNOW, WHAT'S LEFT TO LEARN", NATIONAL INSTITUTE FOR DISPUTE RESOLUTION 10 (October 1989).
14. ABA PROGRAM DIRECTORY, supra note 6, at Introduction.
15. Houston's Dispute Resolution Centers were formerly known as the Houston Neighborhood Justice Center. The Justice Center of Atlanta was formerly known as the Neighborhood Justice Center of Atlanta, Inc. See ABA PROGRAM DIRECTORY, supra note 6, at Introduction and 88.
larger scale and more complex disputes) or a betrayal of the community empowerment ideology that originally spearheaded the community dispute resolution movement.

II. An Overview Of the Community Movement

The last decade’s explosion in overall number of programs is matched by an equally stunning diversity of program design, targeted disputes, and referral and funding sources. The Dispute Resolution Center in St. Paul is representative of a mid-size community-based program handling a general case load, including disputes between neighbors, friends, employers and employees, landlords and tenants, or consumers and merchants. With an annual budget of approximately $70,000, the Center’s two full-time staff supervise forty volunteer mediators handling over 500 cases a year, many referred by city and suburban small claims courts. The Center’s non-court cases are referred by city agencies, neighborhood councils, and attorneys. The Center is beginning a special outreach project to meet the needs of senior citizens in high rises and other institutional settings. Funding is a combination of state, foundation, city and county government grants.16

Honolulu, Hawaii’s Neighborhood Justice Center handles the same diverse caseload in far greater numbers and with a budget exceeding $600,000. In 1990, over 200 volunteer mediators mediated 1,488 cases. In addition, the Center runs a specialized Conflict Management Program (“CMP”) to handle complex community conflicts like resource competition, construction sitings, and environmental and land-use disputes. While mediation services are provided free of charge, the CMP service is conducted on a contract basis.17

Other programs mediate only specific types of disputes. For example, the Student Mediator Alternative Resolution Team (“SMART”) program in Long Island City, New York, trains student, teacher, and parent mediators to resolve student-student, student-teacher, and student-parent disputes both inside and outside school hours. With a $30,000 budget, the SMART teams annually handle 140 mediations, eighty-five percent of which address student-student conflicts.18

The Family Mediation component of the Neighborhood Youth Diversion Program in the Bronx, New York, utilizes 140 community volunteers to mediate juvenile problems including intra-family conflict, and persons in need of supervision. The program has a $400,000 annual budget and takes referrals from probation departments, child protection services, police, schools, and family court services.19

17. ABA PROGRAM DIRECTORY, supra note 6, at 91.
18. Id. at 235.
19. Id. at 220.
Still other programs focus exclusively on criminal matters. For example, North Carolina's Charlotte Mecklenberg Community Relations Committee Dispute Resolution Program uses $102,000 in city, court, and IOLTA funds to mediate over 650 cases annually — mostly assaults, misdemeanors, and breaking and entering. Ninety percent of the cases are referred by the prosecutor’s office. If an agreement is reached, the criminal case is dropped from the docket. The program reports an eighty-nine percent success rate. Twenty-five volunteer mediators work with one full-time staff and one part-timer.20

A Cincinnati, Ohio Private Complaint program mediates more than 6,000 cases annually, mostly "bad check" cases brought by local businesses. According to 1988 case statistics, eighty-three percent of the mediated cases resulted in agreements; only five percent of the cases later resulted in warrant referrals. A $400,000 annual budget provides for five full-time staff who supervise a large pool of volunteer mediators, many of whom are law and graduate students.21

Other programs focus on the relationship of criminal defendant and victim. The Post-Conviction Mediation Program sponsored by the Oklahoma Department of Corrections uses 110 volunteer mediators to assist eligible offenders (individuals convicted of felonies who have not been incarcerated in any state penal institution within the last ten years) and their crime victims to voluntarily mediate agreements concerning such sentencing issues as length of incarceration, community service, victim restitution, substance abuse treatment, counseling, and education. The court has ultimate authority to decide whether or not to modify previously imposed sentences pursuant to the mediated plan.22

For all this diversity, there are certain constants within the community dispute resolution movement. These centers seek to settle disputes between individuals, often those in ongoing relationships. Community mediation also reaches beyond the resolution of individual disputes. Ideally, each mediation also has a learning component: as people work together to solve a problem they learn about each other in ways that will aid future interactions.23 Indeed, at least theoretically, mediation is preferable to litigation because it more easily facilitates resumption of relationships after the dispute is resolved.24 Many centers have the additional goal of educating the community concerning mediation techniques. Indeed, by some estimates, there are over 20,000 trained mediation advocates nationwide as a

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20. Id. at 260.
21. Id. at 275.
22. Id. at 287.
result of community center efforts.\textsuperscript{25}

Programs are appealing because they provide relief for the court system, empower people to design their own win-win solutions to problems, and lower the cost of settlement for disputants and society.\textsuperscript{26}

Most community programs use conciliation and mediation as their primary dispute resolution processes. Conciliation involves only a limited role for the third party intervener. A conciliator acts as a conduit or "go between", often using the telephone or correspondence to facilitate direct negotiations between disputants.\textsuperscript{27} Community mediators play a more active role in helping to resolve disputes. One useful definition defines community mediation as:

a voluntary, confidential, dispute resolution process in which trained, supervised, volunteer community members, not parties to the dispute in question and acting in an impartial manner, are invited or accepted by the disputing parties to assist them in identifying and discussing issues of mutual concern, exploring various solutions, and developing a settlement mutually acceptable to the disputing parties.\textsuperscript{28}

A very small number of community programs use a hybrid mediation/arbitration model.\textsuperscript{29} Under this model, the parties agree to first try mediation but allow the mediator or a second party to ultimately issue a binding decision should the parties find themselves unable to finalize an agreement.\textsuperscript{30}

Most conciliators or mediators are local volunteers who participate in a training program sponsored by the community center. Training consists of simulations and role play; usually, there is also an apprenticeship phase where volunteers first observe and then co-mediate disputes.

Typically, when conducting conciliations or mediations, volunteers adhere to detailed procedures covered during training. Most mediations begin with the volunteer explaining the process of mediation, which for many disputants is a new approach to problem-solving. Each party is given an opportunity to present his or her side of the problem. By asking probing questions and utilizing active listening techniques, the mediator helps to define issues and identify underlying interests. Then, the mediator encourages the parties to collectively design solutions which best serve both par-

\textsuperscript{25} L. Singer, \textit{supra} note 3, at 111.


\textsuperscript{27} D. McGillis & J. Mullen, \textit{supra} note 1, at 10.

\textsuperscript{28} A. M. Davis, \textit{Community Mediation in Massachusetts: A Decade of Development} 1975-1985, 3 (1986) [hereinafter A.M. Davis].

\textsuperscript{29} \textit{National Institute for Dispute Resolution, Dispute Resolution Forum: The Status of Community Justice} 3 (December 1988) [hereinafter Dispute Resolution Forum].

ties' interests. If consensus can be reached, the mediator helps draft an agreement, which, depending on the program, may or may not be legally enforceable. Usually, mediations take no more than two hours.31

While most programs use one or perhaps a team of two mediators, a number of programs instead utilize larger panels to better reflect community interests. Proponents suggest that the panel concept best emphasizes cultural diversity and sensitivity;32 moreover, using multiple mediators is most consistent with the community programs' central mission to educate citizens about new models of dispute resolution.33 Using multiple-member panels also has practical advantages. Mediators with different styles complement each other's strengths and weaknesses.34 Disputants have opportunities to identify with different mediators.35 Finally, multiple-member panels do a better job providing disputants with the validation and empathizing that is so critical to solving problems and rebuilding relationships.36

In theory, neighborhood programs allow prompt community resolution of disputes using community values instead of the rule of law. These programs recognize that our traditional justice system is particularly ill-suited for certain kinds of minor disputes not easily solved by awarding monetary damages — common problems like noise, pets, parking, and arguments between neighbors. As noted by one community mediation proponent, "[b]arking dog disputes . . . are sometimes said to be 'minor' conflicts. But if the dog is yours and the intended sleep is mine, that's a major dispute."37 Perhaps more important, these so-called "minor" disputes between neighbors and acquaintances all too frequently evolve into major conflict, sometimes even escalating to criminal violence.38

Indeed, many neighborhood disputes simply cannot be resolved in the court system. In Florida, court created community centers report that approximately twenty-two percent of all cases could not have been brought in

32. Telephone interview with Terry Amsler, Executive Director of the Community Board Program in Oakland, California (July 18, 1991) [hereinafter Amsler].
33. Id.
34. Telephone interview with Julie Matsumoto, Director of Development for the Conciliation Forums of Oakland, California (July 17, 1991).
35. Id.
36. Id.
38. A. M. Davis, supra note 28, at 5 (noting studies indicating that large numbers of perpetrators of violent crime know their victims).
any court.\textsuperscript{39} The range of settlement options available in mediation goes far beyond a court's power to award monetary damages or grant limited forms of injunctive or other equitable relief.

Even if courts could impose equitable solutions in these types of disputes, equitable solutions not accepted by the parties would have little lasting value. Moreover, state and federal court systems are dealing with mushrooming case loads.\textsuperscript{40} Although a full ninety percent of civil court cases settle prior to trial,\textsuperscript{41} the settlement process is often haphazard, the settlement comes too late, and only after great expense and personal stress.\textsuperscript{42} And, there are whole classes of disputes that are traditionally handled by courts but only extremely poorly: minor assaults, theft, or simple harassment. Trials on such cases rarely actually occur. When trials do take place, the focus is on a specific complained-of behavior rather than a series of events or the details of a relationship of which the complained-of event is just one symptom. A court's decision, while perhaps alleviating the symptom, is rarely a cure for the underlying conflict.

Furthermore, access to traditional justice is expensive; in cases with low dollar value, the cost of litigation far exceeds the value of the case. Community-based mediation programs help disputants avoid the procedural complexities of litigation, not to mention expensive and excessive pre-trial discovery, as well as the potential for disclosure of sensitive information (including the fact that conflict exists at all).

This simplicity means prompt dispute resolution. For example, the Dispute Resolution Center in St. Paul opens and closes cases within twenty-one days,\textsuperscript{43} as opposed to an approximate ten-week wait to have a case heard in Ramsey County Conciliation Court.\textsuperscript{44} New York state's sixty-five community programs report an average initial screening-to-resolution time of 14.1 days.\textsuperscript{45}

III. The Community Movement's Theoretical Underpinnings

Community mediation proponents trace the ideological source of the community dispute resolution movement to anthropological studies of the Kpelle tribal "moots" — Liberian gatherings of village elders which dispensed an informal style of justice.\textsuperscript{46} In theory, the moots, which involve

\begin{itemize}
\item \textsuperscript{39} L. Singer, \textit{supra} note 3, at 122.
\item \textsuperscript{40} Edwards, \textit{Alternative Dispute Resolution: Panacea or Anathema?} 99 Harv. L. Rev. 668, 669 (1986) [hereinafter Edwards].
\item \textsuperscript{41} \textit{Id.} at 670.
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} 1990 Dispute Resolution Center Annual Report and Statistical Tabulation Sheet 1.
\item \textsuperscript{44} Time from filing to court date in Ramsey County as of January 23, 1991. Phone conversation with Ramsey County Conciliation Court clerk, January 23, 1991.
\item \textsuperscript{45} M. Crosson, \textit{supra} note 31, at 15.
\item \textsuperscript{46} Wahrhaftig, \textit{supra} note 9, at 1463.
\end{itemize}
community members addressing problems by applying shared values, solve
certain community problems more effectively than the court system. This
conclusion follows from the proposition that a community moot's solution
to a dispute will likely reinforce prevailing social mores and be informally
enforced by the community.47 In contrast, court decisions based on legal
rules and imposed upon disputing parties less frequently reflect commu-
nity consensus and may lack full community support.

These distinctions are supported by anthropological literature. Dispu-
tants with multi-faceted relationships will generally compromise; dispu-
tants with limited social ties will instead seek adversarial victory rather than
compromise.48 Yet, empirical studies of actual mediation programs are
conflicting. McEwen and Maiman's 1979 study of a mediation experiment
in Maine small claims courts concluded that parties with long-term relation-
ships were no more likely to choose mediation than those with no ties.49 And, the same study showed that parties in long-term relationships
were found no more likely to reach settlement once in mediation.50 In
contrast, a 1976 study of New York small claims arbitration programs
showed a definite preference for arbitration by those in past
relationships.51

In the law review article often heralded as laying the theoretical
groundwork for the community dispute resolution movement, Professor
Richard Danzig observed that in the criminal context, courts are primarily
identified as adjudicators of guilt.52 Danzig postulated that a very different
function is possible — an integrative, conciliatory function.53 In Danzig's
view, the traditional court system compares poorly with the "more primitive"
tribal moot. The court, Danzig reasoned, emphasizes the social
distance between judge and disputant and uses rules of procedure to narrow
issues under discussion. The end result is assignment of blame for past
conduct.54

The tribal moot, in contrast, emphasizes the bonds between facilitator
and disputants, and encourages wide-ranging discussion so that all ten-
sions and issues get addressed. The end result is community consensus

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49. McEwen & Maiman, supra note 24, at 249.
50. Id. at 251.
51. Id. at 249 n.29.
53. Id. at 42.
54. Id. at 43.
about future conduct.\textsuperscript{55}

Danzig hypothesized about the structure of contemporary community moots — suggesting they could handle family disputes, landlord/tenant conflicts, small torts and breaches of contract, misdemeanors — indeed any cases without significant externalities.\textsuperscript{56} In the traditional legal system, large numbers of these cases are simply never resolved because disputants are intimidated either economically or in some other manner.\textsuperscript{57} Likewise, minor criminal violations often are not prosecuted at all because they are considered too trivial.\textsuperscript{58} Danzig reasoned that moots might be preferred for their prompt dispatch of cases, better location, and more caring attitude.\textsuperscript{59}

Adapting the community moot to contemporary American society has not been easy. First, the greatest need for community centers is in urban areas, an environment with far less cohesiveness and less community familiarity than the African moot. Not surprisingly, almost eighty percent of all contemporary community dispute resolution programs are in cities with populations greater than 100,000.\textsuperscript{60} In contemporary American cities, neighbors often have little or no communication. Frequently, the initial phone call from a community center is the first notice a responding party has that a neighbor believes there is a problem needing resolution!

Indeed, one of the reasons local dispute centers may have such high conciliation rates is that simply facilitating the process of getting neighbors to talk to each other, whether in mediation or through an intermediary, often leads to resolution of conflict. Indeed, one community center in the District of Columbia discovered that in one third of the cases where a complainant failed to appear for a scheduled mediation, the reason was the parties' own conciliation of the problem.\textsuperscript{61}

Another major difference between the African moot and contemporary American society is that in the latter there is a much higher awareness of legal rights and remedies. There is also a greater emphasis on individual-state relationships,\textsuperscript{62} making it far more likely that individuals will choose external, state-funded formal institutions to resolve their problems.

\textsuperscript{55} Id.
\textsuperscript{56} Id. at 43-44.
\textsuperscript{57} Id. at 44.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 47.
\textsuperscript{60} ABA Program Directory, supra note 6, at 2 of Introduction.
\textsuperscript{61} Dispute Resolution Forum, supra note 29, at 8.
\textsuperscript{62} Merry, supra note 48, at 2061-62.
IV. Theory in Practice

A. Increasing Institutionalization

Nationwide, the majority of centers are affiliated with courts or public agencies. In 1984, one third of all community centers were court affiliated; by 1990, more than half were. In part, this institutionalization is driven by funding needs. Federal funding for community programs ended in 1980. Only a limited number of states fund community dispute resolution. And, typically, state funding is part of judiciary appropriations and is implicitly or expressly linked to court annexation. Private foundations have always been a valuable source of community center funding, however, foundations often see increasing institutionalization as an indication of stability. Community centers are increasingly turning to user fees; however, fee-for-service alone is not the answer when the user pool is largely low-income.

Centers affiliate with courts and public agencies not only to increase funding options, but also to maintain steady caseloads. Walk-ins have always been a small portion of most community centers' total caseload. This is, at the very least, a theoretical disappointment.

Court affiliation maximizes case numbers but brings inexorable pressure to handle cases quickly; in the resulting twenty-minute "courthouse step" mediations, mediators (and parties) face tremendous pressure to "split the difference" rather than engage in a deliberate sorting out of interests and devising of creative solutions. The process produces settlements but may have little impact on disputants' future approach to problem solving. Court affiliation also brings varying degrees of institutional control over final outcomes. This loss of autonomy is troubling to many community center proponents.

Paul Wahrhaftig suggests that court-annexed programs, even those utilizing volunteer mediators, are often limited from seeking real solutions to disputants' problems. In court-annexed cases, argues Wahrhaftig, some mediators inevitably feel constrained to limit the focus of their inquiry to

63. Wahrhaftig, supra note 9, at 1467.
64. L. Singer, supra note 3, at 128.
65. Id. at 120.
67. During the April, 1989 to March 31, 1990 reporting year, the United Way and private foundations provided 13.7% of New York state program funding. M. Crosson, supra note 31, at 17. In 1985, private foundations and corporations provided 19% of the funding for Massachusetts' 28 community programs. A. M. Davis, supra note 28, at 37.
68. ABA Program Directory, supra note 6, at 2 of Introduction.
69. Dispute Resolution Forum, supra note 29, at 3. The community board programs, with their multi-member panels and aggressive community outreach, do far better than the norm. For example, fully one half of all cases handled by Oakland's Community Board Program are self-referred. Amsler, supra note 32.
70. Merry, supra note 48, at 2070.
the previously and professionally defined issues and parties.\footnote{71}

Wahrhaftig also bemoans the "creeping professionalism" of the court or agency linked programs. These programs have regimented training programs and often over-rely on caucusing.\footnote{72} Others conclude that the involvement of lawyers and other professionals inevitably increases adversarial dynamics.\footnote{73}

Most community center clients are poor or lower-middle class, many from minority groups.\footnote{74} In 1989-90, New York state's sixty-five community centers reported that more than half of all initiating parties had annual incomes under $16,000; close to forty percent of respondents reported similar low incomes.\footnote{75} Similarly, St. Paul's Dispute Resolution Center 1990 statistics indicate that fifty-five percent of all disputants earned $15,000 or less.\footnote{76}

In contrast, mediators "tend to be wealthier and better educated than the disputants."\footnote{77} In part, the disparity may be attributed to the fact that most centers' training programs, unintentionally or not, favor educated professionals both in recruitment and evaluation.\footnote{78} Whatever the cause, the disparity surely calls into question just how community-based the community dispute resolution movement actually is.\footnote{79}

\subsection*{B. Measuring Success}

When parties agree to mediate, they most likely will reach agreements. Some studies indicate that seventy-five percent of cases mediated are successfully resolved.\footnote{80} In New York and Massachusetts, both states with large numbers of community centers, the resolution rate is eighty-five percent.\footnote{81} Not surprisingly, ninety percent of all those participating in New York's programs stated they were satisfied with the process.\footnote{82}

McEwen and Maiman's 1979 study of Maine small claims court reported a 66.1\% mediation success rate. According to McEwen and Maiman, settlement rates depend both on the type of dispute and charac-

\footnote{71. Wahrhaftig, supra note 9, at 1470.}
\footnote{72. See id. at 1471.}
\footnote{73. Rosenberg, Resolving Disputes Differently: Adieu to Adversary Justice? 21 Creighton L. Rev. 801, 815 (1987-88).}
\footnote{74. L. Singer, supra note 3, at 123.}
\footnote{75. M. Crosson, supra note 31, at 40.}
\footnote{76. 1990 Dispute Resolution Center Annual Report and Statistical Tabulation Sheet 2.}
\footnote{77. L. Singer, supra note 3, at 123.}
\footnote{78. See Yngvesson, Inventing Law in Local Settings: Rethinking Popular Legal Culture, 98 Yale L.J. 1689, 1703 (1989).}
\footnote{79. Id.}
\footnote{80. Dispute Resolution Forum, supra note 29, at 3.}
\footnote{81. M. Crosson, supra note 31, at 1 (New York); A. M. Davis, supra note 28, at 75-76 (Massachusetts).}
\footnote{82. M. Crosson, supra note 31, at 9.}
tectistics of the parties. The researchers noted that the highest settlement rates were for unpaid bills and private sales, eighty-five percent and eighty-three percent respectively. The researchers attributed these high settlement rates to the fact that 1) defendants either admitted responsibility and settlement turned on payment plan; or 2) defendants had good defenses and settlement turned on compromise.

Traffic accidents had the lowest settlement rate at forty-one percent, probably due to strong disagreement on underlying facts, mistrust, or need for adjudication of responsibility. Consumer complaints, personal loans, landlord-tenant, and contract actions showed settlement rates all close to the 66.1% average.

Business plaintiffs and individual defendants reached agreements ninety-four percent of the time. Settlements between tenant plaintiffs and landlord defendants were also quite high — reaching eighty-three percent. In contrast, landlord plaintiffs and tenant defendants settled only fifty percent of the time. Surprisingly, McEwen and Maiman found no statistically significant correlation between settlement rates and how long disputants knew each other.

Once parties reach a settlement, available data suggests that compliance rates are quite high. New York state's sixty-five community programs reported an eighty percent compliance rate for cases mediated between April, 1989 and March, 1990. In their Maine small claims court study, McEwen and Maiman found that 70.6% of the mediated agreements providing a monetary settlement were subsequently paid in full compared with only 33.8% of the adjudicated cases.

Interestingly, the McEwen and Maiman study further concluded that

84. Id. at 248.
85. Id. at 250.
86. Id.
87. Id.
88. Id.
89. Id.
90. Id.
91. Id. at 251.
92. Id.
93. Of those organizations listed in the 1990 ABA Program Directory providing compliance statistics, most indicated compliance rates in excess of 80%.
95. McEwen & Maiman, supra note 24, at 261. There is some dispute regarding the actual compliance rate for adjudicated cases in small claims courts nationwide. One 1978 study suggested that two thirds to three quarters of all plaintiffs collected judgments after contested trials. J. C. Ruhnka & S. Weller, SMALL CLAIMS COURTS: A NATIONAL EXAMINATION 165 (1978). The success rate drops to between one fourth and one half after defaults. Id. McEwen and Maiman suggest such compliance totals are probably overly optimistic because they are based on reports of only those 30% of plaintiffs who choose to respond to questionnaires. McEwen & Maiman, supra note 24, at 261 n.43.
in those cases tried after unsuccessful mediations, 52.8% were fully paid and an additional 13.9% were partially paid, leading the researchers to hypothesize that the mediation process itself, regardless of outcome, "helps to inculcate a sense of responsibility about payment."

In theory, the fact that the parties voluntarily design and then enter into agreement is one reason for such high compliance rates in successful mediations. Indeed, according to follow up surveys conducted by McEwen and Maimon, seventy-three percent of defendants who had not yet paid obligations after successful mediations felt a "strong" or "some" legal obligation to make their payments, compared with only thirty-one percent of defendants forced to litigate. In addition, sixty-four percent of the mediation defendants reported a "strong" or "some" moral obligation to make payments, compared with only twelve percent of the defendants after adjudication.

There may be an even simpler reason for high compliance rates after mediation. In those agreements calling for exchange of money, effective mediators often make sure that the parties develop a specific payment plan, something rarely, if ever, included in a typical small claims court judgment.

Anecdotal evidence suggests that high compliance also stems from the fact that parties in mediation often design creative solutions to their problems, including letters of apology, forms of equitable relief, and other promises which courts simply cannot sanction or enforce. However, there is little empirical evidence to suggest that court annexed mediations result in observably more creative solutions. Indeed, McEwen and Maimon found that only twelve percent of resolved mediated cases called for any promises other than monetary payment.

C. Confidentiality

In the vast majority of states, communications made during the mediation process are considered confidential either by express statute, rules of evidence, or the common law. Exceptions to this general rule vary from state to state. For example, under state guidelines promulgated for com-

96. McEwen & Maimon, supra note 24, at 262.
97. Id. at 264.
98. Id. at 263.
99. Id.
100. L. Singer, supra note 3, at 128. Indeed, McEwen and Maimon report that 65% of mediated agreements included payment plans, whereas only 24% of adjudications did so. McEwen & Maimon, supra note 24, at 252.
102. See N. Rogers & C. McEwen, Mediation: Law, Policy, Practice 96 (1989). For example, under Minnesota law, any communication relating to the subject matter of the dispute by any participant during dispute resolution shall not be used as evidence against a participant in a
munity dispute resolution programs in Minnesota, the statutory protection
for confidential communications made during mediation does not relieve
the mediator and/or dispute resolution organization from a statutory obli-
gation to report suspected neglect or sexual abuse of children or vulnera-
ble adults.103

Confidentiality is necessary to create an atmosphere conducive to ne-
gotiation.104 The promise of confidentiality helps assure disputants of the
mediator's impartiality and helps guarantee that the process will not be
used as an evidence-gathering tool by more sophisticated parties over less
sophisticated ones.105 Also, the pledge of confidentiality encourages vol-
unteers to be mediators by eliminating the threat of subpoenas.106

judicial or administrative proceeding. This shall not preclude the use of evidence
obtained by other independent investigation.

MINN. STAT. § 494.021 (1984). Similarly, in Massachusetts,
All memoranda, and other work product prepared by a mediator and a mediator’s
case files shall be confidential and not subject to disclosure in any judicial or adminis-
trative proceeding involving any of the parties to any mediation to which such materi-
als apply. Any communication made in the course of and relating to the subject
matter of any mediation and which is made in the presence of such mediator by a
participant, mediator or other person shall be a confidential communication and not
subject to disclosure in any judicial or administrative proceeding; provided, however,
that the provisions of this section shall not apply to the mediation of labor disputes.

MASS. GEN. L. ch. 233, § 23C (1985). And, in New York,
Except as otherwise expressly provided in this article, all memoranda, work prod-
ucts, or case files of a mediator are confidential and not subject to disclosure in any
judicial or administrative proceeding. Any communication relating to the subject
matter of the resolution made during the resolution process by any participant, me-
diator, or any other person present at the dispute resolution shall be a confidential
communication.

N.Y. JUD. LAW § 849-b(6).

103. Community Dispute Resolution Programs Operational Guideline 4.01, in relevant
part, provides:
All files relating to a case in a community dispute resolution program are to be classi-
ﬁed as private data on individuals, pursuant to Minnesota Statutes, Section 13.02,
subd. 2, with the following exceptions:
. . . (2) Data relating to suspected neglect or sexual abuse of children or vulnera-
able adults are to be subject to the reporting requirements of Minnesota Statutes,
Section 626.556 and 626.557.

MINN. STAT. § 626.556, subd. 3(a) provides:
A person who knows or has reason to believe a child is being neglected or physically
or sexually abused, as deﬁned in subdivision 2, or has been neglected or physically or
sexually abused within the preceding three years, shall immediately report the infor-
mation to the local welfare agency, police department, or the county sheriff if the
person is:
(1) a professional or professional's delegate who is engaged in the practice of the
healing arts, social services, hospital administration, psychological or psychiatric
treatment, child care, education, or law enforcement.

MINN. STAT. § 626.557, subd. 3 imposes a parallel mandatory reporting obligation with re-
spect to neglect or sexual abuse of vulnerable adults.

104. Rice, Mediation and Arbitration as a Civil Alternative to the Criminal Justice System, 29 AM. U.
106. Id.
Arguably, wide-ranging discussions (without control of rules of evidence) is one real strength of mediation — the parties discuss what they believe is relevant. This is often a sure path to discover underlying interests rather than merely focusing on parties' initial bargaining positions. This full disclosure is possible only with a promise of confidentiality.\textsuperscript{107}

D. Enforceability

Whether a mediated agreement is an enforceable contract is governed by state contract law. To the extent an agreement contains all the requisites of an enforceable contract — parties with legal capacity, legal subject matter, definite and complete terms, consideration, and evidence of mutual agreement — the agreement might be enforceable.\textsuperscript{108}

Not all community programs intend for their volunteer mediators to draft legally enforceable agreements. Indeed, many community mediation activists contend that the absence of externally imposed enforcement mechanisms is most consistent with the underlying theory of mediation — that people are empowered to decide how best to resolve their disputes.\textsuperscript{109} Encouraging resort to litigation undercuts this theoretical linchpin. In practice, many programs prefer to re-mediate disputes rather than encourage litigation, and good agreements contain contingencies to cover default. Those programs which are court-annexed or affiliated usually provide for automatic referral to small claims court or imposition of judgments upon default.\textsuperscript{110}

E. Mediator Training

Community programs depend on volunteer mediators. Many operating centers have only one or two paid staffers.\textsuperscript{111} The vast majority employ four or less.\textsuperscript{112}

Currently, there are no uniform training or qualifying standards for mediators in community-sponsored programs. According to one activist, the aspirational standard is: "Hard head. Thick skin. Big feet. Warm heart. Big ears. Small mouth. Cast iron rear end. Clear eyes. Big, strong bladder."\textsuperscript{113}

\textsuperscript{107} L. Riskin & J. Westbrook, *Dispute Resolution and Lawyers* 118-19 (1987 ed.).
\textsuperscript{109} For example, at least half of all center directors in Massachusetts believe that mediated agreements should never be viewed as legally enforceable documents. In the words of one director, "[t]he whole purpose of the service is to avoid the legal approach." A. M. Davis, *supra* note 28, at 26.
\textsuperscript{110} In Massachusetts, the statute authorizing mediation of small claims cases provides that agreements are considered the equivalent of court orders. See A. M. Davis, *supra* note 28, at 26.
\textsuperscript{111} ABA Program Directory, *supra* note 6, at 1-554.
\textsuperscript{112} Id.
\textsuperscript{113} Laue, *supra* note 37, at 21.
Notwithstanding a lack of uniform standards, the training regimes are remarkably consistent across the country. Most programs require volunteers to participate in a twenty to thirty hour initial training including lectures and simulations. Many programs use an apprenticeship model, where students first observe actual mediations, then co-mediate with experienced volunteers and finally mediate alone under observation.

Those states which financially support community programs mandate specific training minimums. For example, in Minnesota, current state guidelines require a minimum of twenty-five hours of basic training and eight hours of annual follow-up training. Although Minnesota centers are free to design their own curriculum, the guidelines mandate that certain topics be covered, including the history of dispute resolution, review of state community program guidelines, justice system description, the varying role of the neutral, intake procedures of centers, and the actual process of mediating. In addition, the curriculum must include at least one hour of specialized training addressing issues of violence.

As the community-based dispute resolution movement matures, pressure increases to generate uniform standards and even consider accreditation of mediators. For some activists such "creeping professionalism" stands in stark conflict with the community empowerment ideology that began the movement almost two decades ago. Others view the move toward uniform standards and accreditation as an inevitable result of mediation’s success — a development not inherently bad so long as community groups have a significant role in promulgating standards that encourage rather than limit mediator diversity.

V. COMMUNITY PROGRAMS IN MINNESOTA

In 1981, the Minnesota legislature authorized study and funding of "programs which provide convenient access to effective, inexpensive and expeditious alternative dispute resolution." Toward this end the state court administrator's office received a $100,000 appropriation to enable the Judicial Planning Council to fulfill the legislative mandate. Initial grants were used to start two community-based organizations, the Ramsey County Dispute Resolution Center, and the St. Louis Park Juvenile Mediation Project (now called the West Suburban Mediation Center).

114. Community Program Guideline 6.01.
115. Community Program Guideline 6.02, subd. 1-6.
116. Community Program Guideline 6.02, subd. 7. Pursuant to 1991 Minn. Laws, Ch. 321, § 6, subd. 1, the current guidelines will be amended to specifically outline "standards for training mediators and arbitrators to recognize matters involving violence against a person."
117. Amsler, supra note 32.
118. Telephone interview with James Levin, Executive Director of the Dispute Resolution Center, St. Paul, Minnesota (July 22, 1991).
In 1982, a surcharge on civil filings was initiated to generate funds for civil legal services. Up to fifteen percent of the funds were made available for nonprofit regional alternative dispute resolution corporations, defined by statute as a “nonprofit corporation which trains and makes available to the public individuals who provide fact-finding, conciliation, mediation, or nonbinding or binding arbitration services.” Eligible community programs first began receiving the dedicated funds in 1983.

In 1984, community centers first received IOLTA (“Interest on Lawyer Trust Accounts”) grants. That same year, the legislature established a community dispute resolution program and directed the state court administrator’s office to develop community program guidelines.

A permanent state funding mechanism was created in 1987 however, the legislature waited until 1990 to appropriate funding ($100,000) for community programs. The 1990 $100,000 appropriation was restricted to those community dispute resolution programs which among other requirements:

1) had adopted state guidelines;
2) had been certified by the state court administrator;
3) proved that at least two thirds of their annual budgets come from sources other than the state; and
4) demonstrated support by community organizations, administrative agencies and judicial and legal system representatives.

Five community centers applied for and received state funding. The 1991 Omnibus State Department Bill provides an additional $100,000 for community programs in each year of the next biennium.

Under the guidelines and the governing statute, community programs are specifically excluded from mediating disputes involving violence against persons or incidents that arise out of situations which might support charges for criminal sexual conduct or incest, matters relating to guardianship, conservatorship, civil commitment, termination of parental rights, mistreatment of vulnerable adults, and certain family law matters.

120. MINN. STAT. § 480.241 (1982).
121. MINN. STAT. § 480.242, subd. 2(b) (1982).
122. MINN. STAT. § 480.24, subd. 5 (1982).
123. MINN. STAT. § 494.01, subd. 3 (1984).
124. MINN. STAT. § 494.04, subd. 1 (1987).
125. 1990 Minn. Sess. Law Serv. 584 (West).
126. MINN. STAT. § 494.05, subd. 1 (1990).
127. Telephone interview with Janet Marshall, State Court Administrator’s office (June 3, 1991). The five organizations were: Dispute Resolution Center; West Suburban Mediation Center; Mediation Services for Anoka County; Minneapolis Mediation Project; and North Hennepin Mediation Project.
128. 1991 Minn. Sess. Law Serv. 345 (West).
like dissolution and child custody.\

The exclusion from mediating disputes involving violence against persons was, and is, quite controversial. The Community Dispute Resolution Subcommittee charged with responsibility to develop the guidelines recommended that the exclusion of "any matter involving violence against persons" be amended to instead exclude "[a]ny matter involving violence against persons where serious injury to a person has been caused by the violence or where the violence has involved the use of weapons." The committee so recommended because community centers are frequently called upon to mediate simple assaults between neighbors. Women's domestic violence advocates strongly and successfully opposed the modification, arguing that mediation's informality does not adequately protect the rights of a victim or "weaker" party.

The Minnesota Civil Mediation Act states that mediated agreements are governed by the law of contracts but binding only if the agreement so states and parties have received certain written information regarding the mediator's duty and the consequences of entering into a mediated agreement. Whether the Act governs mediations conducted by

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129. See Community Program Guideline 5.00 et seq. and Minn. Stat. § 494.03. Section 494.03, as amended by 1991 Minn. Laws Ch. 321, § 6, provides that community program guidelines shall exclude from mediation:

(1) any dispute involving violence against persons, including incidents arising out of situations that would support charges under sections 609.342 to 609.345 [criminal sexual conduct], or 609.365 [incest];
(2) any matter involving a person who has been adjudicated incompetent or relating to guardianship, conservatorship, or civil commitment;
(3) any matter involving neglect or dependency, or involving termination of parental rights arising under sections 260.221 to 260.245 [termination of parental rights]; and
(4) any matter arising under section 626.557 [maltreatment of vulnerable adults] or sections 144.651 to 144.652 [patients and residents of health care facilities], or any dispute subject to chapters 518 [marriage dissolution], 518A [uniform child custody act], 518B [domestic abuse], and 518C [Uniform reciprocal enforcement of support act], whether or not an action is pending, except for post-dissolution property distribution matters and post-dissolution visitation matters. This shall not restrict the present authority of the court or departments of the court from accepting for resolution a dispute arising under chapters 518, 518A, and 518C, or from referring disputes arising under chapters 518, and 518A to for-profit mediation.

130. M. Kearney, DISPUTE RESOLUTION GUIDELINES REPORT 13 (February 1985) (emphasis in original) [hereinafter M. Kearney].

131. Id.

132. Id. at 12.


134. The Civil Mediation Act, in relevant part provides:

Subdivision 1. GENERAL. The effect of a mediated settlement agreement shall be determined under principles of law applicable to contract. A mediated settlement agreement is not binding unless it contains a provision stating that it is binding and a provision stating substantially that the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights. Id.
state certified community dispute resolution programs has never been litigated. Indeed, under community program guidelines promulgated pursuant to Minn. Stat. § 494.015, community programs in Minnesota are required only to explain whether their agreements are binding or non-binding. The Community Dispute Resolution Guidelines Report specifically concluded that "the decision as to whether settlement agreements should be binding or not should be left, for now, to each center." The Committee declined to decide whether those centers intending to create binding agreements need follow the express requirements of the Civil Mediation Act.

Arguably, the community programs and mediations conducted by volunteer mediators working for state certified programs are not governed by the Civil Mediation Act. First, the Civil Mediation Act and Community Dispute Resolution Program are two distinct pieces of legislation with no cross-references. The latter legislation was intended to fund non-profit community dispute resolution centers, establish standards for centers relying on volunteer mediators, and set minimum standards for centers to accept court-referred disputes. After a review of the legislative history, the Community Dispute Resolution Subcommittee specifically concluded that the guidelines were "not meant to apply to the professions of mediation and arbitration."

Guidelines promulgated pursuant to the legislation exclude whole categories of disputes from mediation by community programs and mandate specific training requirements for volunteer mediators. The Civil Mediation Act, in contrast, authorizes any person to act as a mediator for compensation so long as the mediator provides to disputants a written statement of the mediator's qualifications.

Moreover, mediations conducted by community programs are subject to strict confidentiality restrictions. Yet the Civil Mediation Act specifically provides that mediated settlement agreements may be set aside or

135. Community Dispute Resolution Guideline 2.08.
136. M. Keaney, supra note 150, at 10. The Committee noted a divergence of views within the community dispute resolution movement regarding the efficacy of binding agreements and a theoretical inconsistency with mediation's stated goal of giving disputants more responsibility over decisions. While emphasizing that in practice, most centers simply mediate disputes where initial agreements fall through, the Committee also suggested that reconsideration of the issue might be warranted by the State Court Administrator should experience dictate a different result. Id.
137. Id. at 6.
138. Id.
140. Minn. Stat. § 494.021 provides:
Any communication relating to the subject matter of the dispute by any participant during dispute resolution shall not be used as evidence against a participant in a judicial or administrative proceeding. This shall not preclude the use of evidence obtained by other independent investigation.
reformed.\textsuperscript{141} And, Minn. Stat. § 595.02, subd. 1(k), passed in conjunction with the Civil Mediation Act, specifically authorizes parties to be examined concerning communications made in the course of mediation in connection with litigation to set aside or reform a mediation agreement.\textsuperscript{142} Although the Community Dispute Resolution Subcommittee recommended that the legislature amend Minn. Stat. § 494.02 to include a similar exception for communications made during mediations conducted by non-profit community centers, the recommendation was rejected.

Notwithstanding the above observations, it is probably prudent for community centers to advise mediators to follow the requirements of the Civil Mediation Act should parties desire legally enforceable agreements. The requirements are not particularly onerous. They can easily be incorporated into standard "agreement to mediate" forms. More important, when programs seek to create legally enforceable agreements, it is only fair that disputants receive the minimal disclosures suggested by the Act.

VI. LIMITS TO COMMUNITY PROGRAM MEDIATION

Why don't people voluntarily mediate more often? A simple answer is ignorance about availability of alternatives. A more disturbing but more accurate response may lie at the very heart of American conceptions of dispute resolution: once a dispute is serious enough to be public, individuals tend to focus on principles and rights.\textsuperscript{143} People trust that the adversarial system will work fairly, protect their interests and compel a proper resolution.\textsuperscript{144} Sadly, for community mediation proponents, what limited research is available confirms that even satisfied mediation clients return to court for subsequent disputes.\textsuperscript{145}

Some resistance to community mediation, at least among legal professionals, is attributable to a general fear that significant use of community

\begin{footnotes}
\item[141.] Minn. Stat. § 572.36 provides:
In any action, a court of competent jurisdiction shall set aside or reform a mediated settlement agreement if appropriate under the principles of law applicable to contracts, or if there was evident partiality, corruption, or misconduct by a mediator prejudicing the rights of a party. That the relief could not or would not be granted by a court of law or equity is not ground for setting aside or reforming the mediated settlement agreement unless it violates public policy.

\item[142.] Minn. Stat. § 595.02, subd. 1(k) provides:
A person cannot be examined as to any communication or document, including worknotes, made or used in the course of or because of mediation pursuant to an agreement to mediate. This does not apply to the parties in the dispute in an application to a court by a party to have a mediated settlement agreement set aside or reformed. A communication or document otherwise not privileged does not become privileged because of this paragraph. This paragraph is not intended to limit the privilege accorded to communication during mediation by the common law.

\item[143.] Merry, \textit{supra} note 48, at 2063.

\item[144.] \textit{Id.}

\item[145.] \textit{Id.} at 2064.
\end{footnotes}
mediation and alternative dispute resolution techniques generally, will diminish judicial development of legal rights for the disadvantaged, or perhaps just as dangerously, channel those with fewest resources to mediation. The fact that parties often appear in community mediations without counsel raises additional concerns.

Not all issues are ripe for mediation. There is an emerging consensus that domestic violence should not be mediated. Physical violence or the threat of physical violence limits personal autonomy; not only does this call into question the "fairness" of the outcome but also irrevocably prejudices the process of mediation, which by its very nature emphasizes personal autonomy.

In addition, effective mediators try to move the disputants beyond past battles to an identification of underlying interests and compromise. A primary goal is to avoid assigning blame. This theoretical heart of mediation permits a batterer to avoid external condemnation and acceptance of responsibility for actions. For some acts which are also crimes, there is agreement that processing through the criminal system makes little sense — small acts of vandalism, juvenile delinquency. Arguably, there is no such consensus on the far more serious crime of domestic assault.

VII. Conclusion

In little more than a decade, the community dispute resolution movement has progressed from theoretical discussions to increasing sophistication and institutionalization. The initial promise of a truly alternative dispute resolution mechanism totally independent of the traditional legal system now seems almost naive. The exigencies of funding and difficulty maintaining steady caseloads have driven most centers to seek ever stronger affiliations with the courts and other public agencies.

The next decade will likely see intense debate about mediator training, ethics, and promulgation and adoption of uniform standards. This "creeping professionalism" will be a major challenge to what is left of the community empowerment ideology still underlying the community center movement.

Notwithstanding these pressures, the diversity of community dispute models bodes well for the continued vitality of the community dispute resolution movement. Such diversity reflects mediation's great strength and

146. See Edwards, supra note 40, at 679-80.
147. See Brunet, Questioning the Quality of Alternative Dispute Resolution, 62 Tul. L. Rev. 1, 46-47 (1987).
148. Between 1987-88 and 1990 the number of community programs mediating domestic violence dropped from 66 to 16. ABA Program Directory, supra note 6, at Introduction.
150. Id. at 868-69.
central defining value — tolerance for diversity and respect for creative and collaborative problem-solving.

At its best, community mediation empowers individuals to make critical decisions about their lives, while simultaneously treating others with dignity and respect. Such a process should not be characterized as an alternative. Rather, mediation should be recognized for what is truly is — "a central process in all civil societies. Litigation is the alternative." 151

151. Laue, supra note 37, at 16-17.