When the Government Holds the Power or the Purse

Opportunities and Challenges for Mediation

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When the Government Holds the Power or the Purse - Opportunities and Challenges for Mediation.

I. What is mediation in the context of a government setting?

II. For what types of issues is mediation particularly suited? Obviously it depends on your level of governmental immunity in your statutes or case law.

Court Cases : Any case in which the local government is sued in tort type cases such as government vehicles and citizen vehicles, slip and fall on sidewalks, improper signage, utilities issues, medical negligence cases if the governmental entity is the owner of the hospital or clinic.

Personnel issues: Depending on whether your employes are part of civil service, unions, or just serving at the will of the governmental entity, a structure could be in place to handle employee disputes or just to resolve a law suit based on discrimination of some type.

Condemnation issues where the government needs the space for a governmental building or roads, etc.

Disputes between sports authorities and sports teams if the contracts provide for mediation

Pre-Suit Issues:

Environmental Cases either there is a court cases or there is a controversy concerning water rights,

space rights, use of public land, toxic site clean-up, location of a landfill, location of a baseball stadium,

Regulations or Rule-Making - All parties can be invited to attend so that the rule-making is more consensul and thereby creating more buy-in by the persons affected.

Zoning Issues: If a particular zoning matter becomes controversial, then there could be a structure in place to convene meetings which are facilitated by a third party.

III. Why is mediation of potential value to a governmental entity?

Mediation is a private, confidential process at least to come to the settlement. Most jurisdictions will have to sign off on the settlement so there is a public element to any settlement.

Mediation is a voluntary process. It can be started at any time, pre or post litigation.

The Media often cites only the sensational elements in a case involving the government, so there is little explanation available to a governmental official.

Mediation allows an issues to be better contained than individual headlines, e.g. an allegation of racism or discrimination in a department or agency.

IV. What are the difficulties?

Some cases or controversies do not lend themselves to mediation such as times where the government is in an emergency, when a fundamental value or principle is at stake, a legal opinion or precedent is necessary, or the community is so polarized that other methods need to be used before a group meeting can be arranged.

Obviously the public officials need to be supportive of the process or it will fail.

Getting authority to settle a case may be difficult or tedious.

Changing the culture of the agency or officials may be difficult, as the government is always in the right.

V. Specific Examples of ALTERNATIVE DISPUTE RESOLUTION IN MONTGOMERY COUNTY, MARYLAND

A. Maryland ADR Commission

1. **Chief Judge Robert M. Bell creates Commission in February of 1998 to expand dispute resolution options.**

2. **Action Plan implemented, including program in Circuit Courts around the State.**

3. **State and local government agencies are encouraged to institute or participate in ADR Programs.**

B. Implementation by the Circuit Court for Montgomery County, Maryland

1. **Former Chief Judge Paul Weinstein aggressively promotes ADR, in particular, "voluntary" mediation.**

2. **Under the Court's differentiated case management system, at the initial scheduling conference, parties are routinely asked if they will agree to ADR at the close of discovery. Subtle pressure from the Judge generally produces an affirmative response. If the parties are so inclined, "early" mediation also is an option.**

3. **Trial dates are assigned at a pre-trial conference. There, the parties again are asked if ADR would be helpful.**

4. If so, mediation is set prior to trial. Our experience is that mediation during this interval (between pre-trial conference and trial) is most beneficial and has the highest chance of success.

5. Court's ADR Coordinator issues an Order identifying the mediator and requiring mediation by a certain date.

6. Mediators are chosen based on experience with case type.

7. Parties can request a different mediator and the Court will assign another.

C. The County's Response to the ADR Program

1. Initial reluctance.

2. Factors inhibiting participation:

   a. The client does not pay attorney's fees on an hourly basis.
   b. Once liability is denied, it is difficult to shift to settlement mode.
   c. Strong aversion to "nuisance" settlements.
   d. Institutional/bureaucratic difficulty of getting quick approval of monetary authority.

3. Court pressure leads to increased participation.

4. Good results, high success rate, positive reinforcement.

5. Certain mediators gain trust based on success. Repeat business follows and Court is willing to steer parties toward certain mediators assuming both parties consent.

D. Montgomery County's Settlement Authority Process

1. **Self-insurance through statute-based Self-Insurance Fund.**

2. **Claims administration through outside third-party administrator hired under contract.**

3. **Claims Settlement Committee meets monthly and has final authority.**

4. **All self-insured entities are represented on the Committee, which is chaired by the County's Risk Manager. Quorum needed for action.**

5. **Assistant/Associate County Attorneys prepare memoranda requesting settlement authority.**

6. **Committee may approve, disapprove or modify the request.**

E. Mediation Process

1. **Court-approved mediator presides. Generally, well known local lawyers and retired judges.**

2. **Submission of written position statement to mediator.**

3. **Confidentiality agreement signed at outset.**

4. **Pre-approved authority used during negotiations at mediation.**

5. **Representative of Risk Management accompanies attorney to mediation.**

6. **Risk Manager has small amount of flexibility that can be utilized at mediation.**

7. **Transparency of the County's internal process versus the desire to keep the specifics confidential.**

8. If successful, the mediator has the parties sign a document indicating that the case has settled, which is then provided to Court.

9. If mediation session fails, a subsequent increase in authority generally requires demonstration of new facts discovered at mediation.

F. Success Rate

1. Generally high.

2. Familiarity on the part of certain mediators with the County's claims settlement process enhances the chance of success.

G. Arbitration

1. Automatic in most property damage cases as a result of participation in statewide program with insurance companies and other self-insurers (Arbitration Forums).

2. In personal injury cases, not favored by the Office of the County Attorney where liability is seriously disputed. Usually, either go to trial or mediate/settle.

H. Pre-Suit Mediation

1. Not frequently used by our office.

2. Internal investigation and informal settlement discussions preferred at that stage.

I. Employment Disputes

1. County personnel regulations require internal mediation of certain employment disputes; however, outside mediators are not used.

2. Collective bargaining agreements require internal mediation by a panel of designated

representatives; however, outside mediators are not involved in union grievance process.

3. EEO officer conducts internal mediation of discrimination claims. Local Human Rights statute requires internal mediation of discrimination claims conducted by EEO officer.

J. Family Services Cases – Juvenile Court

1. Child in Need of Assistance cases: mandatory mediation before adjudication.

2. Termination of Parental Rights Cases: voluntary mediation under statewide program.

3. Montgomery County considers itself a leader in the statewide movement toward early mediation of child welfare cases.

Biographical Information for IMLA Conference

Mary Byrd Ferrera practices law with Farrar and Bates, LLP, a civil litigation firm in Nashville, Tennessee. In addition to other areas of civil defense, Ms. Ferrara defends city and county governments, officials, and employees in federal and state employment claims, § 1983 civil rights claims, First Amendment (billboard) claims; police liability claims; Governmental Tort Liability Act claims; zoning and land use claims; and workers compensation claims. She was formerly an Assistant Attorney General with the Tennessee Office of Attorney General and Reporter.

Prior to locating in Nashville, Ms. Ferrara was engaged in the general civil practice of law with the firm of Byrd and Byrd Attorneys in Paducah, Kentucky. While in Kentucky she served as McCracken County District Judge as well as a Hearing Officer with the Kentucky Environmental Protection Cabinet. While in Kentucky she and taught courses in Business Law and Real Estate Law at Paducah Community College, and was also available to conduct mediation through Resolute Systems.

Ms. Ferrara is a graduate of Lambuth University and the University of Mississippi College of Law. She is licenced to practice law in Kentucky and Tennessee and is admitted to practice before the United States District Court in Western Kentucky, Western Tennessee, Middle Tennessee, and Eastern Tennessee, as well as the United States Sixth Circuit Court of Appeals and the United States Supreme Court.

Ms. Ferrara is married and has two children.

Paul Leonard is an Associate County Attorney with the Office of the County Attorney for Montgomery County , Maryland. He is a graduate of Georgetown University Law Center and previously was in private practice with the law firm of Reed, Smith, Shaw & McClay in Washington, D.C. Mr. Leonard has been with the County Attorney's Office for 15 years and works in its Litigation Division providing liability defense for the County, the local Board of Education, a municipality and numerous other entities of local government self-insured through a common, self-insurance fund. Mr. Leonard's practice involves defending Montgomery County and local government employees on a wide variety of liability issues including: police excessive force; unlawful arrest; discrimination claims; employment disputes; First Amendment and libel issues; premises liability; motor vehicle cases; schools cases; parks and recreation issues; and numerous other types of claims. Mr. Leonard is a regular participant in a mediation program initiated by the Court of Appeals of Maryland and implemented by the state courts in Maryland. He also has experience with mediation in federal courts and other jurisdictions.



Paula A. Flowers initially practiced with Farmer & Luna in Nashville from the firm's establishment in January 2002 until January 2003, when Governor Bredesen asked her to become the Commissioner of Commerce and Insurance where she served until January, 2007. In addition to her responsibilities as regulator and fire marshal, she was a member of the Tennessee Worker's Compensation Advisory Council, the State Insurance Plan Committee and the Tennessee Health Services Development Agency. She chaired the National Association of Insurance Commissioners' Receivership and Insolvency Task Force as well as NAIC's Earthquake and Seismic Activity subworking Group and the Antifraud Task Force. She was a member of the NAIC's Financial Regulation Accreditation Committee and Vice Chair of the Worker's Compensation Task Force. During her time as commissioner she oversaw numerous class action settlements and negotiated national regulatory settlement agreements with other state and federal authorities.

In 2007 she returned to Farmer & Luna. Among her many clients, she represents Mt. Juliet, a suburb of Nashville as their City Attorney. The present Insurance Commissioner has appointed to oversee a receivership of a major insurance company. She is presently a Supreme Court Rule 31 Listed Mediator.

Ms. Flowers graduated from the University of Tennessee Law School *summa cum laude* in 1997, after having worked as a environmental compliance engineer for Lockheed Martin Energy Systems at the Department of Energy's Y-12 Plant in Oak Ridge, Tennessee. After graduation, she worked for Waller Lansden, Dortch & Davis. During that time she served as Special Counsel to the Department of Commerce and Insurance for commercial and Medicaid insurance company rehabilitations and liquidations.

Ms. Flowers is married and has three children.



Marietta Shipley recently retired in September 2006 as judge of the Second Circuit Court in Nashville presiding over civil jury and non-jury trials for the past 16 years. She is now the President of The Mediation Group of Tennessee, LLC which has twenty-three persons serving as mediators and arbitrators www.themediationgrouptenn.com Some of the members of the Group are retired judges while others maintain an active practice.

While she served as judge she was a pioneer in the field of alternative dispute resolution for the courts. She was on the Tennessee Bar Association ADR Committee and then a charter member of the Supreme Court ADR Commission., which developed Tennessee Supreme Court Rule 31approved by the Supreme Court in 1996. She is presently a Rule 31 listed Civil/Family Mediator and is a member of the Panel of Mediators serving the Middle District and Eastern District of the Federal Court.

She was one of the pilot judges for the Parenting Plan Legislation, which provided a structure for parents to plan for the future of their children upon divorce. She served as a Member of the Appellate Mediation Task Force, which developed a appellate mediation model, which is presently before the Supreme Court. During her judgeship she served on the Board of Directors of The Academy of Family Mediators (now Association of Conflict Resolution.).

While she was judge she mediated numerous civil matters in settlement conferences, from personal injury cases to malpractice cases. She also provided case management conferences for family cases, which often led to settlement. She was Chair of the Judicial ADR Committee, which primarily brought education to the judges statewide so they were ready to respond to this helpful tool in resolving disputes. Many of the jurisdictions now either exchange cases for settlement or routinely send them out for mediation, resulting in cases moving forward more quickly. In 2006 she founded the Tennessee Association of Professional Mediators and is now president.

She is married to Dr. David McMillan, a psychologist, who also mediates cases and serves as a parent coordinator. He is a member of The Mediation Group of Tennessee. She has a dog named Greco and a cat named Sable. The two get along very well.

Judge Barbara Haynes



A native of Davidson County, Judge Barbara Haynes is a graduate of Isaac Litton High School and took her B.S. Degree from the University of Tennessee in 1959. She earned her J.D. from the Nashville School of Law in 1976.

Judge Haynes has been a Legal Assistant on a Congressional Staff and a partner in the law firm of Haynes and Haynes. Elected Judge of Division I of the General Sessions Court in 1982, Judge Haynes has served in Third Circuit Court since 1990. From 1986 to 1994 Judge Haynes was Chair of the Tennessee Sentencing Commission. She has championed the use of mediation and settlement during her judicial career. She is the principal settlement judge for the circuit courts in Davidson County, having handled hundreds of settlement conferences both for Davidson County and outlying counties. She has been the principal mediator in many government condemnation cases and environmental cases with multiple parties.

Judge Haynes is an active member of many business, civic and professional organizations. She is immediate past chair of Children's Hospital Board. She is married to Senator Joe M. Haynes and they have three children and seven grandchildren.

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Consensus Building Tools for New Challenges at the State and Local Levels

by Robert Jones

Source: The Policy Consensus Initiative (PCI)

The PCI builds and supports networks that provide states with leadership and capacity to achieve more collaborative governance.

(December, 1997)



First, the Bad News

Elected officials are constantly being asked to do more with less. Increasingly, they must think smarter, act quickly and learn new and better ways of working together - with each other and with others - to focus limited time, energy and resources on a state or local government's most pressing problems. Rapid social, cultural, political and environmental change is transforming communities and states, bringing to the forefront conflict among interests and individuals with diverse and sometimes divergent needs and concerns. The speed of this change makes it difficult for states and communities to develop and maintain a consensus on current priorities and on long term visions for their future.

The familiar and traditional syndrome in government of "decide, announce and defend" has increasingly led to the public's resistance to top-down solutions, which further widens the gulf between elected and appointed officials and the various "publics" they serve. These problems, poorly managed or left unattended, quickly turn into powerful barriers to positive change and result in litigation and public dissatisfaction.

At the local level, the context for decision making, governance and leadership is a constantly changing and challenging proposition. Coalitions form and dissolve around specific issues and the composition and agenda of groups change as local government officials are called upon to address deficiencies in housing, public safety, transportation, recreation, social services, economic development, and quality of life issues. All this is dealt with against a backdrop of uncertain sources of funding; increasing responsibilities for problem solving without adequate resources; polarized interest groups; and a public that is feeling frustrated, distrustful, overtaxed and alienated from governmental decision making.

At the state level, legislatures are often not well suited for the development of consensus needed to Implement new public policies. Agencies and appointed officials work with, and sometimes against, stake-holder groups in making tough decisions. Overlapping jurisdictions and lack of clear roles make intergovernmental cooperation and coordination difficult - and intergovernmental dispute resolution a necessity. Some states are dealing with an increasingly sour public mood by attempting regulatory reform and streamlining efforts. Overall, these efforts seek to strike the proper balance among protection of the public's interest in a healthy economy, a clean environment and quality communities. This is a process fraught with conflict and disputes.

Now, the Good News

In this difficult context can anything work to produce effective solutions? The good news is that there is a growing interest and a promising track record at the local, regional and state level, often guided by statewide offices of dispute resolution, in using collaborative approaches to public problem solving. These processes bring stakeholders and citizens together to develop consensus for needed actions on public problems; increase inter-agency and intergovernmental cooperation; and improve public and private sector coordination, collaboration and partnerships.

In nearly 20 states, publicly recognized and supported offices offering assistance in developing agreement on public solutions with public, private and non profit interests. These efforts utilize an array of consensus building tools to solve critical public problems including mediation, facilitated consensus building and public participation and other forms of collaborative problem solving. They have been deployed to deal with a variety of issues such as affordable housing, water management, emergency medical services provision, facility siting, community visions, budget priorities, environmental and land use issues, and public employment claims and grievances.

Expanding the Consensus Building Tool Kit

There are a variety of ways to build consensus on public issues and problems. More and more, to make progress in addressing key state, regional or community problems, it is necessary for elected and appointed leaders to bring groups of stakeholders and citizens together to both understand and to build consensus on the nature of the problem, and formulate and agree on options for its solution. The concept of building consensus and leadership for action on public problems has been advanced by the growing number of these statewide offices.

Consensus building on public issues features a spectrum of approaches that have been used separately or in combination. These have included facilitated policy development, mediated negotiations and productive public involvement. Facilitated large group processes have been used to create a dialogue among key stakeholders and build consensus around complex public policies, regulations or proposed legislation, ordinances or plans. Mediated negotiations using skilled neutrals to help parties negotiate mutually acceptable resolutions have been successfully used at a number of points in local, regional and state government decision making and in litigation processes. Facilitated public involvement has helped to effectively incorporate public concerns, needs and values into governmental decision making. It has been used by the public, private and non profit sectors to build consensus on future community visions, deal with the development of plans, and facilitate development proposals and the resolution of a wide range of public issues.

The potential advantages of consensus building approaches include:

- Better decisions. As groups learn about each others' views and needs, and develop

common ground for action, they can create solutions that better reflect the concerns of other parties as well as their own.

- Faster implementation. Parties are less likely to block implementation if they understand that a plan or policy reflects their input and has been crafted to meet their basic interests. Parties involved in consensus building often make commitments to participate in the implementation.
- Bridge community differences. Consensus building processes allow communities and the affected interests to bridge differences and work together to find mutually acceptable solutions based on common interests.
- Educate constituencies. Consensus building processes can educate constituents on the complex nature of the problems and issues and on others' concerns that will need to be addressed in solutions.
- Deal productively with shared power for decision-making. Consensus building processes bring a wide array of stakeholders to the table to seek mutually beneficial solutions as a response to the reality that power has become widely and thinly distributed with many interests able to block or veto the possibility of action.
- Create new resources. There are fewer federal, state and local dollars available to deal with critical issues facing our society. Consensus building processes can engage a range of public, private and community institutions and leadership to bring a wider array of resources to bear on the problem.
- Manage diversity and build common ground. Consensus building processes can help increasingly diverse communities improve inter-group relations, build trust and find common ground.
- Intergovernmental collaboration. Consensus building can effectively Involve different governmental units and nongovernmental actors in building a collaborative agreement on issues that cut across jurisdictional lines.

Applications and Experience: the Florida Conflict Resolution Consortium

In 1987 the Florida Conflict Resolution Consortium was established by the Florida Legislature at Florida State University to assist public and private sector and citizen interests at the state, regional and local levels in building consensus without resort to litigation on the challenging problems precipitated by the state's rapid growth in population during the 1970's and 1980's. Around that same time, the state's Supreme Court initiated its program to institutionalize mediation in the judicial process and created the Florida Dispute Resolution Center. Together, these two offices have provided dispute resolution and consensus building assistance, education and evaluation in Florida's administrative, political and judicial contexts.

Examples of the roles the Consortium has played include: recently designing and running the Governor's Conference on Administrative Dispute Resolution for 250 participants from over 12 executive agencies interested in increasing their use of dispute resolution; assisting in the implementation of new dispute resolution legislation related to property rights; and designing a two-day program on dispute resolution for the annual meeting of the Florida Association of Counties.

Beyond education, the Consortium has been directly involved in facilitating and mediating large group processes to demonstrate the value of collaboration in building consensus around complex public policies, regulations, litigation and proposed legislation. These facilitated and mediated processes have been convened by local governments, regional agencies, the governor and executive agencies.

State offices focused on consensus building and dispute resolution play a vital role in assisting those interests and institutions in the state in utilizing a range of collaborative tools to address community, regional and statewide challenges and problems. These programs use and refine these innovative tools to provide cost-effective and quality outcomes on controversial but critical public issues. Two hundred years ago DeToqueville observed, "You can tell how many good ideas the Americans have had, because they have built an organization around each one." Today state programs providing consensus building and dispute resolution services are organizations devoted to a good idea whose time has come.

Deciding whether to use consensus building

When to Consider Using...

- An issue is complex
- Many parties are involved
- No one agency or jurisdiction has complete control over the solution to the problems or access to resources
- The issues are negotiable and/or People are willing to participate

When Not To Use...

- When a local government faces an emergency
- When level of concern is not great
- When a fundamental value or principle is the focus of problem
- Legal clarification is needed; and/or
- Community is so polarized that face-to-face discussions are not possible

Addressing concerns with consensus building

Abdication of power?
Public leaders retain their legal responsibility and final decision making authority in consensus processes

Does it undermine representative government?
Public consensus processes supplement democratic processes

What about accountability?
Implementation of consensus processes is controlled by elected leaders

Will it take too much time?

Measuring Value in Mediation: A Case Study of Workplace Mediation in City Government[Δ]

D. HARDISON WOOD[*] & DAVID MARK LEON[♦]

I. INTRODUCTION: NEW YORK CITY'S WORKPLACE MEDIATION PROGRAM IN CONTEXT

The Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, and various employer "affirmative action" policies have ushered in an era marked by increased diversity in the American workplace, including state and local government workplaces.[1] Today, employers face the challenge of fostering harmonious working relationships among a diverse workforce.[2] The City of New York, a municipal employer of approximately 300,000 workers, is no exception.[3]

[Δ] This Paper was presented at the American Bar Association's Section of Dispute Resolution Annual Meeting in Los Angeles on April 14, 2005.

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[♦] Law Clerk, New York City Office of Administrative Trials and Hearings; J.D., University of Miami School of Law (2003). It should be noted at the outset that this Paper was prepared by employees of the New York City Center for Mediation Services and the New York City Office of Administrative Trials and Hearings, rather than an external consultant. Nevertheless, the views presented herein represent those of the Authors, and not necessarily those of the Agency. The Authors would like to thank the staff of the New York City Office of Administrative Trials and Hearings, especially Chief Administrative Law Judge (ALJ) Roberto Velez, Deputy Chief ALJ Charles McFaul, and ALJ Ray Kramer for their advice and insight. The Authors would also like to thank the Director of the New York City Center for Mediation Services, Justo A. Sanchez, and Professors Maria Volpe, James Kornbluh, and Sarah Burns for their valuable guidance and support.

[1] *See* Barbara Coyle McCabe & Christopher Stream, *Diversity by the Numbers: Changes in State and Local Government Workforces, 1980–1995*, 29 PUB. PERSONNEL MGMT. 93 (2000), *available at* http://www.ipma-hr.org/newsfiles/2000_1_mccabe.pdf.

[2] Federal Employment discrimination actions increased both in raw numbers and as a percentage of federal courts' caseloads in the 1990s. *See* Marika F. X. Litras, *Civil Rights Complaints in U.S. District Courts, 1990–98*, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/crcusdc.pdf. There has been a recent trend of such actions being filed by currently employed or terminated workers, rather than prospective employees. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991).

[3] As of June 30, 2004, the City employed 259,085 full-time workers, and 32,519 part-time workers. CITY OF NEW YORK, THE GREEN BOOK: OFFICIAL DIRECTORY OF THE CITY OF NEW YORK 657–58 (Krishna Kirk ed., 2004).

When New York City employees are faced with a workplace dispute, they may attempt to resolve it themselves or in consultation with management; they may consult with their union; or they may file complaints with their agency's Equal Employment Opportunity (EEO) office, the Federal Equal Employment Opportunity Commission, or the city or state civil rights enforcement agencies.[4] If the employee files a complaint within the agency, New York City's Equal Employment Opportunity Policy applies, as implemented by each agency's own rules.[5] The city's EEO policy forbids a broad swath of discriminatory behavior in the workplace,[6] but it, like "[t]itle VII and similar laws do[es] not enact a 'generalized code of workplace civility.'"[7] No process exists to address complaints of unfair or disrespectful treatment, for example. So to address interpersonal conflict, employees are often left "viewing every conflict involving a member of a protected class through the lens of forbidden bias."[8] This leads to unsubstantiated EEO complaints—and, presumably, lingering workplace conflict—in many city agencies.

In addition, Administrative Law Judges (ALJs) at the New York City Office of Administrative Trials and Hearings (OATH)—the city's central administrative tribunal—noticed on many occasions that disciplinary actions pending before them originate as, and remain at core, interpersonal workplace disputes.[9] In the opinion of the ALJs, the interpersonal dispute at

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[4] *See generally* CITY OF NEW YORK, EQUAL OPPORTUNITY EMPLOYMENT POLICY (2005), *available at* http://www.nyc.gov/html/dcas/downloads/pdf/misc/eeo.pdf [hereinafter NYC EEO Policy].

[5] *Id.*

[6] *See id.* at 1–2 (forbidding illegal discrimination in the agency workplace based on perceived or actual age, marital status, alienage, national origin, color, prior arrest or conviction, creed, race, disability, religion, sexual orientation, and gender; permitting agency head to take corrective disciplinary measures against violators).

[7] Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487, 498 (2003) (quoting Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 611 (2001)).

[8] Berger, *supra* note 7, at 525.

[9] OATH has been an independent, central tribunal for New York City government since 1979. Office of Administrative Trials and Hearings, http://www.nyc.gov/html/oath/ (last visited Dec. 14, 2005). OATH's ALJs hear cases covering a range of topics, including vehicle forfeiture, real estate and land use, licensing, civil rights, city contracts, and regulatory enforcement of city environmental health and safety codes. *See id.* About 66% of OATH's cases involve city agencies disciplining employees pursuant to section 75 of the New York State Civil Service Law. *See OATH Annual Report*, OATH BENCHNOTES, Spring 2004 , at 7, 7 (noting that 1,442 out of 2,189 cases docketed at OATH in Fiscal Year 2004 were employee discipline cases), *available at*

the heart of many such cases could have been addressed in its early stages, and would never have needed to appear for formal adjudication. Recognizing the potential for early mediation of such workplace disputes, OATH launched its Center for Mediation Services (the Center) in spring 2003.[10] Although such programs exist in many private corporations,[11] states,[12] and agencies of the federal government,[13] the Center is one of a very small number of municipal workplace mediation programs.[14] To date, such programs have been evaluated for effectiveness by focusing on a number of indicators, including resolution rates, participant satisfaction surveys, and reduction in complaint volume.[15] Cost-benefit and value analysis of such

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http://www.nyc.gov/html/oath/pdf/benchnotes30.pdf. These cases may involve employees violating their agency's EEO policy. *See id.*

[10] *See Message From Chief Judge Roberto Velez*, OATH BENCHNOTES, Spring 2003, at 1, *available at* http://www.nyc.gov/html/oath/pdf/benchnotes28.pdf; *see also* Morell E. Mullins, *Manual for Administrative Law Judges*, 23 PEPP. J. NAT'L ASS'N ADMIN. L. JUDGES 1, 11, 21, 39 (2004) (describing alternative dispute resolution as a natural and necessary tool for administrative law judges' docket management). *See generally* Berger, *supra* note 7, at 487 (arguing in favor of early, broad-gauged mediation of workplace disputes).

[11] *See generally* DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS (1998).

[12] Such states include Minnesota, *see* Minnesota Alternative Dispute Resolution, Workplace Mediation, http://www.mnadr.state.mn.us/workplace.htm (last visited Dec. 14, 2005); Ohio, *see* The DAS Workplace Mediation Program, http://das.ohio.gov/hrd/pmdrmediation.html (last visited Dec. 14, 2005); and Virginia, *see* Mediation Services, http://www.edr.state.va.us/mediation.htm (last visited Dec. 14, 2005).

[13] *See, e.g.*, Department of Energy Office of General Counsel, Dispute Resolution, http://www.gc.doe.gov/index_adr.html (last visited Dec. 14, 2005); U.S. Department of Agriculture, Conflict Prevention and Resolution, http://www.usda.gov/cprc/ (last visited Dec. 14, 2005); U.S. Department of the Navy, Alternative Dispute Resolution, http://adr.navy.mil (last visited Dec. 14, 2005).

[14] Other city workplace mediation programs include the City of Seattle. *See* Seattle Personnel Department, Personnel Rules, *available at* http://www.ci.seattle.wa.us/personnel/personnelrules/rule_1.2.asp (last visited Dec. 14, 2005). It bears noting that the City of New York is the largest city in the United States, with a population in excess of eight million. *See* New York City, http://en.wikipedia.org/wiki/New_York_City (last visited Dec. 14, 2005). In fact, if it were a state, New York City would be the eleventh largest state. *See* http://www.census.gov (last visited Dec. 14, 2005). Thus, to some degree, it is also appropriate to compare the Center's operations with some state and federal workplace mediation programs.

[15] *See* Indiana Conflict Resolution Institute, Project: United States Postal Service, http://www.spea.indiana.edu/icri/usps.htm (last visited Dec. 14, 2005) (listing ways in

programs is exceedingly rare. This may be because "[t]raditional cost-benefit analysis does not capture many of the benefits derived from ADR service programs because these benefits are often intangible and not easily quantifiable."[16] Nevertheless, estimates of cost savings have been made.[17]

This paper reports the results from the first two years of the Center's services, evaluates these results, and discusses ways to begin measuring the value of a centralized workplace mediation program. Part II details the Center's operations, noting time and cost savings, and participant satisfaction with the program. Part III discusses the value that centralized mediation brings to the city, noting that the Center tends to generate good return on investment, reduce opportunity costs, and contribute to a productive work environment. Part IV addresses challenges faced by the Center. Finally, Part V concludes that the Center's model provides a valuable service to New York City, one that will likely lead to greater benefits if expanded.

II. REPORTING AND EVALUATING THE CENTER'S FIRST TWO YEARS

The Center has three main programs. First, the Center offers workplace dispute mediation to all city employees.[18] Second, the Center's staff members provide training in conflict management to any interested city agency.[19] And third, the Center serves as a conflict research and resource center, offering information and consultation to address disputes involving the city.[20] This section describes the Center's three programs, reports data and evidence of customer satisfaction from the first two years of the

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which the U.S. Postal Service workplace mediation program was evaluated). Evaluations of mediation programs generally address factors including time savings (compared to adjudication), cost avoidance (compared to adjudication or inaction), and customer satisfaction. *See* Evaluation of Federal ADR Programs, 65 Fed. Reg. 59,200, 59,208 (Oct. 4, 2000); *see also* Jennifer E. Shack, *Bibliographic Summary of Cost, Pace, and Satisfaction Studies of Court-Related Mediation Programs* (2003), *available at* http://www.caadrs.org/downloads/MedStudyBibliography.pdf (summarizing evaluations of court-connected mediation programs in Illinois).

[16] *See* Evaluation of Federal ADR Programs, *supra* note 15.

[17] *See* JEFFREY SENGER, FEDERAL DISPUTE RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT 3–5 (2004) (summarizing time and cost savings associated with federal government ADR programs).

[18] *See* City of New York Center for Mediation Services, http://www.nyc.gov/html/oath/html/mediation.html (last visited Dec. 14, 2005).

[19] *Id.*

[20] *See* City of New York Center for Mediation Services, About the Center [hereinafter About the Center], http://www.nyc.gov/html/oath/html/med_about.html (last visited Dec. 14, 2005).

mediation program, and compares those results with other dispute resolution processes available to city employees.

A. *Mediation at the Center*

Mediation at the Center is a confidential, voluntary process, offered at no charge to city agencies or employees.[21] The Center uses a facilitative single or co-mediation model, where trained staff facilitates discussions between the participants and allow the participants to come to their own resolution.[22] Resolution agreements reached in mediation are structured by the participants.[23] No money exchange or disciplinary action takes place. The agreement can involve such terms as participants treating each other with respect, or not interacting with each other in the future. Details on how terms of the agreement will be carried out are also explored and incorporated into the agreement, so that the agreement serves as a roadmap for the parties' future relationship. The mediators "reality test" agreements with the parties, a technique designed to result in more durable and realistic agreements.

The cases can best be characterized as various types of "workplace disputes," involving managerial or interpersonal problems in workplace relationships.[24] Essentially, the parties' working relationship forms the subject of negotiations.[25] The Center's mediation program is designed to be "plenary in scope, encompassing virtually all employment-related issues instead of dealing solely with claims of violations of legal rights."[26] The cases come from a variety of city agencies, and tend to be referred early in the course of a dispute.[27] If not referred to mediation, these workplace disputes could persist at the agency, leaving open the possibility that they could evolve into actionable legal claims, or simply continue to drain time, energy, and resources away from the agency's work.

Referrals to the Center come primarily from agency EEO officers and disciplinary advocates.[28] Cases referred from agency EEO officers have been

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[21] *See* City of New York Center for Mediation Services, Frequently Asked Questions, http://www.nyc.gov/html/oath/html/med_faq.html (last visited Dec. 14, 2005) [hereinafter FAQs].

[22] For more detail on the method of mediation used at the Center, see JOSEPH B. STULBERG, TAKING CHARGE / MANAGING CONFLICT, 59–126 (1987).

[23] *See* FAQs, *supra* note 21.

[24] *See id.*

[25] *See* id.

[26] Berger, *supra* note 7, at 523.

[27] For a discussion of the benefits of early mediation, see *id.* at 516–23.

[28] *See* FAQs, *supra* note 21.

subject to a preliminary investigation and often a finding that the underlying complainant lacks a factual basis for a viable EEO complaint. Pursuant to the city's EEO policy, complainants and respondents have the right to request mediation.[29] However, the decision whether a case will be mediated is ultimately the EEO officer's.[30] To assist EEO officers in making good decisions about the type of cases that are appropriate for mediation, the Center is currently in the process of tailoring a screening tool, which will contain uniform referral criteria.

The Center also receives referrals from agencies seeking resolution of disputes that led to, or could lead to disciplinary hearings. Like agency EEO officers, agency disciplinary advocates also carefully screen for cases where interpersonal disputes form the core of a complaint, and where the costs of administrative litigation would be disproportionate to the disciplinary sanction likely to be imposed. Agencies are authorized under the city's charter to address matters subject to administrative adjudication through alternative dispute resolution.[31] Although criteria differ in each agency, generally, any case involving severe power imbalances or physical violence, corruption, repeated instances or allegations of discrimination, threats to public safety, or claims filed with outside agencies or organizations will not be referred.

The cases range in scope and severity. For example, one case involved two co-workers, one an African-American female and the other a Caucasian male. They sat in adjoining cubicles, and had such a close relationship that others in the office referred to them as "husband and wife." However, on a few occasions, the woman engaged in loud telephone conversations the man could not help but overhear. One of the conversations was about her daughter. He asked her to quiet down on one occasion, and she yelled at him. At some point, an investigator from the city's Administration for Children's Services appeared at the woman's home, inquiring as to the well-being of the woman's daughter. The woman blamed her male co-worker, and filed an EEO complaint against him. He then filed a cross-complaint against her. The agency referred the case for mediation, and it was resolved amicably.

Another case involved five medical professionals from a city hospital. One of these workers experienced personality conflicts with her supervisors and co-workers, and the agency sought to have her disciplined. In three separate sessions involving five parties and three mediators, the case was resolved.

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[29] NYC EEO Policy, *supra* note 4.

[30] *Id.*

[31] New York City Administrative Procedure Act (NYC Charter § 1046(d)).

The Center takes several measures to guarantee fairness to parties in the mediation of their workplace disputes.[32] First, employees are informed from the outset by Center staff what the mediation process entails. After a referral, the staff directly contacts parties and informs them about the mediation process, including the core principles of confidentiality and party self-determination, and discusses potential outcomes.[33] The goal is for parties to understand and be well-informed about the full range of mediation potentials and limitations.[34] Second, mediation at the Center is totally voluntary. Nowhere in their terms of employment are city employees required to attend mediation if they are engaged in a workplace dispute. And once in mediation, parties are not required to enter into any agreements.[35] Third, employees maintain the right to be represented in mediation at the Center.[36] Representatives can be attorneys, union representatives, or any other person selected by the participant. Fourth, all mediators are professionally qualified.[37] Mediators are a combination of OATH ALJ's and staff attorneys, Center staff, and independent mediators. [38] All OATH ALJs and staff attorneys have experience and expertise in issues arising from city employment, including federal, state and local employment and anti-discrimination laws.[39] All mediators attend a 32 hour mediation training given by a mediation trainer certified in the State of New York.[40] Although

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[32] These measures are informed by AMERICAN ARBITRATION ASSOCIATION, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995), *available at* http://www.adr.org/sp.asp?id=22078.

[33] City of New York Center for Mediation Services, The Mediation Process, http://www.nyc.gov/html/oath/html/med_process.html (last visited Dec. 14, 2005).

[34] *See id.*

[35] FAQs, *supra* note 21.

[36] *Id.*

[37] *Id.*

[38] Although the Center already offers mediators with diverse professional backgrounds and different racial, ethnic, and gender profiles, plans are underway to develop a roster of independent, specialized mediators who will be compensated with a small stipend.

[39] OATH's jurisdiction includes city employment discrimination and disciplinary cases. *See, e.g.*, Jaggi v. Police Dep't, OATH Index No. 1498/03 (2004) (ordering police department to reinstate and provide reasonable accommodation for Sikh police officer who requests to wear turban on duty); Fire Dep't v. Silvestri, OATH Index No. 613/05 (2005) (recommending that fire department commissioner terminate firefighter for violating department rules against possession of alcohol and assaulting co-worker).

[40] The amount of training is designed to meet or exceed standards for New York State court-annexed mediation programs. For more on such programs see Court Annexed

some mediators are city employees, they are employed by a neutral agency, and are precluded from assignments involving adjudication of the rights of any party appearing in a case they mediated. Finally, because mediation referrals come to the Center in the early stages of a dispute, it remains possible that certain actionable facts unknown to referring agency personnel could be communicated in mediation. If such facts compromise the parties' self-determination, the integrity of the process, or the mediator's neutrality, the mediator may bring it to the parties' attention, and, if the situation so warrants, end the mediation and refer the case to a different mediator, or return the case to the agency.[41]

Also, if communications made in mediation include any specific allegations or acknowledgments of corrupt, criminal, or other serious misconduct by or against agency personnel, such allegations are exempt from the confidentiality provisions that otherwise bind the mediator.[42] Serious misconduct includes not only corrupt or criminal conduct, but also any egregious breach of agency rules for which one could reasonably expect to be terminated from employment, including serious violations of EEO policy, illegal drug use, theft of agency time or property, falsification of agency records, or lying under oath.[43] This exception to the confidentiality policy was developed because city employees are bound by reporting requirements.[44] Specifically, all city employees are required to report any information concerning corruption, criminal activity, or conflicts of interest,[45] and managerial employees are obligated to report potential EEO

ADR Programs, http://www.courts.state.ny.us/ip/adr/court_annexed.shtml (last visited Dec. 14, 2005).

[41] FAQs, *supra* note 21.

[42] *See* The City of New York Center for Mediation Services, Mediation Guidelines (on file with the Ohio State Journal on Dispute Resolution).

[43] *See, e.g.*, Transit Auth. v. Kerr, OATH Index No. 1234/00 (May 10, 2000), *modified on penalty*, Auth. Dec. (July 18, 2000), *modified on penalty*, NYC Civ. Serv. Item No. CD03-22-M (Feb. 5, 2003) (issuing suspension for violation of EEO policy); Dep't of Correction v. Potter, OATH Index No. 969/96 (Apr. 29, 1996), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD97-40-A (June 4, 1997) (terminating correction officer for illegal drug use); Health & Hosp. Corp. v. Corsini, OATH Index No. 218/03 (Mar. 25, 2003) (recommending termination for employee who facilitated theft of time by falsifying overtime records); Dep't of Correction v. Wilder, OATH Index No. 1636/00 (June 20, 2001), *aff'd*, NYC Civ. Serv. Item No. CD03-63-SA (Sept. 23, 2003) (terminating employee for lying under oath). All decisions are available at http://www.citylaw.org/cityadmin.php.

[44] *See, e.g.*, NYC Mayor's Exec. Order No. 16 (July 26, 1978), *available at* http://www.nyc.gov/html/doi/html/whistblr-eo16.html.

[45] *Id.*

violations.[46] In addition to its current mediation guidelines, the Center's staff is currently developing codified standards of conduct for its mediators, incorporating these reporting requirements, and elements of the Model Standards of Conduct for mediators developed by leading professional organizations.[47]

The Center's mediation program is thus, in some respects, a work in progress. Nevertheless, the Center has achieved outstanding results in its first two years of operation.

B. *Mediation Data & Comparison of Mediation with Alternatives*

In the first two years of operations—from March 2003 to March 2005—the Center received fifty-four referrals for mediation, of which thirty-six cases involved participants agreeing to participate in mediation.[48] Of the thirty-six mediations conducted at the Center, thirty-one resulted in mutually acceptable resolution.[49] This gives the Center a resolution rate of eighty-six percent in cases where mediation was commenced.[50] With a few exceptions, all cases resolved in mediation involved a written resolution agreement signed by both parties.[51] The average time from filing to resolution was thirty-three and one-half days, with average mediation session time of only two and seven-eighths hours.[52]

Forty of the fifty-four referrals came from EEO officers, of which twenty-four cases went to mediation, and twenty were resolved in mediation.[53] Of the fourteen disciplinary cases that were referred to mediation, twelve were mediated and eleven were resolved in mediation.[54] This higher rate of participation and resolution in disciplinary cases may be because the possibility or reality of pending disciplinary charges—as opposed to unsubstantiated EEO complaints—provided more incentive for workers to mediate, and ultimately resolve disputes.

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[46] *See* NYC EEO Policy, *supra* note 4.

[47] *See, e.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), *available at* http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf.

[48] *See infra* Figure 1; NYC Center for Mediation Services Tracking Sheet [hereinafter Case Tracking Sheet] (on file with the Ohio State Journal on Dispute Resolution).

[49] *See infra* Figure 1.

[50] *See id.*; Case Tracking Sheet, *supra* note 48.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

Most of the referrals for mediation came from the New York City Police Department (NYPD) and the New York City Health and Hospitals Corporation (HHC).[55] All of the NYPD's thirty referrals were from EEO officers, with sixteen being mediated and thirteen resolved in mediation.[56] By contrast, all of the HHC's twelve referrals came from labor relations officers processing disciplinary charges.[57] Of those referrals, ten were mediated and nine were resolved in mediation.[58]

These figures compare favorably with the time and cost of conventional means of resolving city workplace disputes. The resolution rate for the Center's mediations is significantly higher than OATH's Fiscal Year 2004 (FY04) pre-hearing settlement rate of fifty-five percent.[59] The average time to disposition at OATH in FY03 by way of adjudication was seventy-nine days from initial filing,[60] and the average time to disposition by way of settlement was sixty-five days, both significantly longer than the mediated cases took.[61]

The data presented here comes from an admittedly small sample, and data gathering and analysis is ongoing.[62] Nevertheless, conclusions may still be drawn, albeit at a lower confidence level and with a greater confidence interval than if a larger sample size was possible. This is acceptable because the Center is a local government agency using its own data to make operational and budgetary decisions, rather than, for example, an academic research institution seeking definitive research findings. Even taking into account the small sample size, one can be ninety-five percent confident that, for example, the entire city workforce of 300,000 would experience

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[55] *Id.*

[56] *See id.*; *infra* Figure 1.

[57] Case Tracking Sheet, *supra* note 48.

[58] *Id.*

[59] NYC MAYOR'S MANAGEMENT REPORT 212 (2004). This rate also compares favorably to other court-connected mediation programs. For example, in the United States District Court for the Eastern District of New York, 53.64% of all mediated cases settled. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK: MEDIATION REPORT, JULY 1, 2003 TO JUNE 30, 2004, *available at* http://www.nyed.uscourts.gov/adr/MediationReport0704.pdf (last visited Dec. 14, 2005). The lower resolution figures from the Eastern District may reflect the hardening of parties' positions by the time a federal complaint has been filed. If so, these figures would reinforce the case for early mediation.

[60] OATH Monthly Management Report (June 2004) (on file with the Ohio State Journal on Dispute Resolution).

[61] *Id.*

[62] Between March 31, 2005 and July 31, 2005, the Center received 13 more referrals. *See* Case Tracking Sheet, *supra* note 48.

mediation resolutions at a rate of roughly between seventy-five to ninety-seven percent.[63] Thus, it is evidenced that mediation at the Center results in a higher resolution rate, and takes less time than traditional case processing.

C. *Participant Satisfaction*

After a mediation session has concluded, the participants fill out an evaluation form. Those participating in mediation at the Center reported a high degree of satisfaction with the process.[64] Of those who completed evaluations, eighty-seven percent of participants agreed that mediation was a better way of handling their dispute than a more formal process would have been.[65] Ninety percent of participants also agreed that in a similar situation they would use mediation again.[66] And notably, ninety-two percent agreed that they would recommend mediation to co-workers.[67] A follow-up participant survey is currently underway to assess whether participants remain as fully satisfied as they indicated immediately after mediation, why certain parties who were referred did not agree to appear, and why other parties failed to resolve their dispute in mediation.

D. *Management / Interested Party Satisfaction*

Agency management personnel and municipal employees' unions also express satisfaction with the Center's mediation program.[68] An associate director of human resources at a City hospital noted that all of the employees he referred to mediation at the Center have upheld their agreements, and the result has been improved camaraderie in the workplace.[69] In addition, he perceives a "ripple effect" extending to other employees, and he sees fewer overall workplace problems. He describes himself as a "deeply satisfied customer."[70]

Municipal employee union representatives also view the Center's program as a success. A representative of District Council 37, the largest

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[63] *See* Sample Size Calculator, http://www.surveysystem.com/sscalc.htm (last visited Dec. 14, 2005).

[64] *See* Case Tracking Sheet, *supra* note 48; *see also infra* Figure 2.

[65] *Id.*

[66] *Id.*

[67] *See* Figure 2, *infra*.

[68] *Center for Mediation Resolves Disputes*, PUB. EMP. PRESS, Feb. 2004, at 2.

[69] Interview with John Perez, Associate Director of Human Resources, Woodhull Medical and Mental Health Center, in N.Y., N.Y. (2004).

[70] *Id.*

municipal employees' union in New York City, described mediation at the Center as "an excellent program."[71] Referring agencies have taken note, and case referrals to the Center increased thirty-five percent from year one to year two.[72]

Thus, in its first year of operations, the New York City Center for Mediation Services has proven itself a highly successful dispute resolution center, increasing dispute resolution efficiency, improving employee morale, and satisfying participants and other interested parties.

E. *Training*

The Center also serves as a conflict management training center for city employees and law students.[73] In the Center's first year, its staff, with the assistance of outside training consultants, presented conflict management training programs to employees at the New York City Fire Department, the New York City Department of Housing Preservation and Development, EEO officers from various agencies, and law students from the New York University School of Law Mediation Clinic.[74] The Center's trainers tailored each training to the needs of the particular group, and—according to evaluations from trainees—each was well received.[75]

Once trained in conflict management methods, city employees can more adeptly resolve their own conflicts or those of their subordinates and co-workers. In addition, employees who are aware of the Center's mediation services can more easily refer cases for early resolution, effectively moving back the starting point for early intervention.

F. *Research & Resource Center*

The Center also serves as a data collection and dissemination point for value-added research projects, and as a process expert, convener, and resource center for conflicts involving city agencies.[76] Staff members collect and analyze data while conducting research on "best practices" in mediation. Staff members also observe trends in particular agency workplace settings and communicate those trends directly to the agency decision makers. And

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[71] *Center for Mediation Resolves Disputes*, *supra* note 68.

[72] Case Tracking Sheet, *supra* note 48.

[73] *See* About the Center, *supra* note 20.

[74] *Id.*

[75] For more detail on these training sessions, see City of New York Center for Mediation Services, *supra* note 18.

[76] *See* About the Center, *supra* note 20.

the Center serves as a centralized resource for city agencies and parties to conflicts involving City agencies, employees, and the public. Recently, the Center responded to a city agency's request for assistance in analyzing issues in conflict and selecting a mediator for negotiations between a major university located in the city and the surrounding community, arising from the university's physical expansion of its campus.

III. FINDING VALUE IN MEDIATION

As outlined above, the first two years' results for the Center paint a picture of a successful and growing program. The main drivers of success in this view are: settlement rate, decrease in time to disposition, and customer satisfaction at the end of the mediation. While these criteria are perhaps well suited for analysis of an individual program's performance, they tell us little with respect to the overall, generic value proposition, i.e., does a successful mediation program actually deliver value to the city? And if so, how?

The remainder of this paper lays out the preliminary value points for a centralized workplace mediation program. Further study and evaluation are in order, but even with the limited data reported, one can ascertain that such programs generate return on investment, opportunity cost savings, and improvement in working conditions.[77]

A. *Return on Investment*

The Center has developed its mediation program so far on a modest budget. With each case it resolves, it generates return on investment for the city. In terms of actual hourly cost, mediation proves to be a far cheaper process than litigation, because it requires less time. This can be illustrated using rough approximations based on cases tried at OATH. The average case litigated at OATH in Fiscal Year 2003 took approximately thirteen hours of ALJ trial time, at a rate of forty-six dollars per hour.[78] This figure accounts for all types of cases, rather than just disciplinary, EEO, or Commission on Human Rights cases. However, this figure does not account for decision-writing time, which can be equal to or greater than trial time.[79] Thus, a conservative estimate of the total average cost to the City of litigating a case

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[77] These three concepts overlap, but are presented separately to facilitate easier understanding.

[78] *See* OATH Monthly Management Report, *supra* note 60 (318 trials were completed in 169 seven-hour work days).

[79] *Id.*

at OATH is at least twelve hundred dollars.[80] By contrast, mediating at the Center takes on average five hours, with the actual mediation taking less than three hours, plus perhaps two hours of preparation.[81] Mediators have been paid at an average rate of forty dollars per hour, making the total average cost of mediating at OATH about two hundred dollars, over eighty percent less than the average cost of litigating a disciplinary case. Thus, the return on investment (ROI) for the Center's mediation program so far involves at least eleven thousand dollars, from the eleven disciplinary cases that have been resolved in mediation.[82]

Assuming lawsuits—and possibly costly settlements and verdicts—can be avoided by resolving workplace disputes before they can escalate into actionable claims, ROI increases exponentially. Over the past five years, New York City has paid over $29,000,000 in verdicts and settlements in connection with approximately 320 employment discrimination lawsuits.[83] Although those cases are generally qualitatively different from the cases currently being referred to the Center, it is plausible that any case, if left unaddressed, could develop into a more serious situation where legal rights are violated. To the extent that early mediation prevents such situations, the Center saves the city from costs associated with defending against litigation, and possibly from paying huge verdicts.

Put another way, for the past five years, the city paid an average of approximately sixty employment discrimination verdicts per year, with an average payout of $90,000, worth about $5,400,000 in annual liability. One may assume that many of these cases—especially "hostile work environment" cases—began as simple workplace disputes or misunderstandings, which, if mediated early on, could have been resolved. Resolving these disputes before they turn into lawsuits would yield substantial ROI.

Even if no lawsuits are ultimately avoided through mediation, the Center generates returns by resolving cases that may otherwise linger and devour agency resources. In other words, there is likely to be a significant improvement in operating efficiency. The cost of lingering workplace

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[80] This figure does not account for support staff time or agency attorney time, both at OATH and the referring agency, which can range from approximately twenty-five to fifty dollars per hour, depending on seniority. Nor does it account for the hidden costs of possible ongoing conflict in the workplace while cases are pending, or after cases have been adjudicated. These costs may well exceed the costs associated with ALJ bench time and decision-writing time.

[81] *See* Case Tracking Sheet, *supra* note 48.

[82] *See infra* Figure 1.

[83] NYC EEO Lawsuits & Settlements (NYC Law Dep't) (on file with the author).

conflict cannot be underestimated.[84] By some estimates, thirty to forty percent of a manager's daily activities are spent addressing some form of workplace conflict.[85] Such conflict can involve perceived unfairness or lack of respect. These types of issues take management and workers away from other tasks and can lead to lost work time, decreased morale and productivity, poor decision-making, and other problems.[86] The aggregate cost of these items can add up to a significant sum. For instance, an assessment of a mediated conflict between three New England medical professionals estimated the cost of their conflict at over $60,000.[87]

To use a simplified example focusing only on paid time, assume that two employees, both paid thirty dollars per hour, wasted a total of 100 hours during a six-month period because of an interpersonal conflict at work. The agency would lose a minimum of $6,000, the amount of salary paid for those hours of work. Now assume that same conflict is resolved earlier in mediation, and only ten hours of paid time was wasted. In this case, the agency saves $5,400, or ninety percent of the original cost. Such specific savings can be multiplied by the number of mediations where amicable resolution results. If the details above were the average case for each of the thirty-one cases the Center resolved in mediation between March 2003 and March 2005, savings would equal $167,400.

As the Center's caseload increases, these kinds of savings will far surpass the operating cost of the mediation center. The amount of savings in excess of the operating cost is return on investment. Assuming a consistent resolution rate, return on investment increases in direct proportion to the Center's caseload.

B. *Opportunity Cost Savings*

By settling cases through mediation, the Center also provides opportunity cost savings throughout the city's conflict resolution systems. "Opportunity cost" can be defined in different ways, but the central concept involves

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[84] *See* James A. Cram & Richard K. MacWilliams, *The Cost of Conflict in the Workplace*, THE BCC CONNECTION, Jan. 2000, *available at* http://www.crambyriver.com/costofconflict.html (noting the problems associated with unaddressed workplace conflict).

[85] Rian Thomas, Conflict Management Systems: A Methodology for Addressing Conflict in the Workplace (Sept. 2002), http://www.mediate.com/articles/thomasR.cfm (analyzing Carol Watson & L. Richard Hoffman, *Managers as Negotiators*, 7 LEADERSHIP Q. 1 (1996) and Kenneth W. Thomas & Warren H. Schmidt, *A Survey of Managerial Interests with Respect to Conflict*, ACAD. MGMT. J., June 1976).

[86] *See* Cram & MacWilliams, *supra* note 84.

[87] *See infra* Figure 5.

comparing the cost of one alternative with the cost of another.[88] As noted above, on the micro-level, the Center's mediation program, on average, saves the city approximately ninety percent of the cost of unaddressed EEO cases, and at least one thousand dollars, or about eighty percent of the cost per disciplinary case resolved in mediation. In this section, the comparison is on the macro-level, between the cost of the City's current workplace dispute resolution systems—involving disciplinary and anti-discrimination litigation—and mediation of appropriate cases at the Center. It is important to note that even though actionable claims remain in the system, the Center lowers the overall volume of conflicts in the dispute resolution system by resolving cases at an early stage. The difference between the costs expended processing the old conflict volume and the costs associated with processing the new volume represents the opportunity cost savings the Center creates.

The Center's training and research functions add to the opportunity cost savings by fostering knowledge of conflict management tools and skills. Where city employees and managers are conscious of conflict and know how to approach interpersonal disputes constructively, fewer disputes develop into formal cases, requiring less expenditure of agency resources resolving those disputes. By having fewer conflicts and fewer cases to process, those managing the City's dispute resolution process—EEO officers, union representatives, disciplinary advocates, agency attorneys, and ALJs—have more time and resources to allocate to each remaining case. This ought to continue to reduce conflict volume over time by allowing more attention to be focused on the more difficult or more serious conflicts. Opportunity cost savings thus comprise a major benefit of the Center's program.

Figure 3 depicts a cross-section view of how the mediation program generates opportunity cost savings. The uppermost diagonally descending line labeled "1," represents the mean conflict resolution slope. The slope begins with a fixed pool of disputes, say 125,000 total disputes per year—one for every other full-time City employee—and slopes down when more conflicts are resolved over time. The end point for this diagonal is the average number of fully litigated claims the city pays for per year.

Presently, there are a number of points on this line where conflicts are resolved in one fashion or another. One such benchmark is the point at which a complaint is filed. Fewer complaints are filed than there are total workplace disputes. Hence, the pool of 125,000 total existing disputes is "cleaned" of the conflicts that resolve themselves before escalating to an EEO or disciplinary complaint.[89]

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[88] *See, e.g.*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 816 (10th ed. 2002).

[89] Conflicts that resolve themselves should not be confused with conflicts that, although not memorialized in an EEO complaint, will nevertheless persist, causing

Another benchmark is the completion of a preliminary investigation. City EEO and disciplinary officers report a large percentage of the total number of complaints that—after preliminary investigation—never result in the prosecution of formal charges. Such conflicts may be serious, but they are not legally actionable. As a result, these complaints cease to exist in the pool of possible conflicts that could become a civil action.[90] In this way, the overall complaint volume continues to decrease over time.

To conceptualize how a successful mediation program affects the conflict resolution curve, one can simply reduce the number of conflicts at the point in time at which mediation is conducted. Here that point would usually be after initial investigation, but before formal charges are pursued.

In Figure 3, the curve labeled "2" shows how mediation reduces conflict volume and attendant costs. Line 2 represents a new, lower conflict volume produced by the successful mediation program. With the data from the first two years of mediation at the Center, one can reduce overall conflict volume in the city workplace by at least thirty-one disputes.[91] Lowering this mean saves resources by lowering opportunity cost. To the extent cases are resolved in early mediation, fewer resources are expended investigating and processing the case, and less workplace efficiency is sacrificed. It is important to note that where an active and successful mediation program operates, every benchmark along the new dispute curve has a lower y-axis score, representing a lower volume of conflict at that point in time.

Even if the same amount of cases are settled via mediation each year, there is already an opportunity cost savings throughout the entire conflict resolution system. But assuming that the Center increases its caseload, greater savings will be realized. Over time, as more and more cases are resolved through mediation at the Center, the lower curve in Figure 3 deepens to form a new curve, labeled "3," indicating an increase in savings. Thus, as with ROI, the benefits of opportunity cost savings increase in direct proportion to caseload.

C. *Improvement in Working Conditions*

Finally, the Center's services will likely lead to marginal improvement in agency working conditions. So far, mediation participants have indicated

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employee turnover, low morale, reduced productivity, and other problems associated with unaddressed workplace conflict. *See* Cram & MacWilliams, *supra* note 84.

[90] Again, this is assuming such conflicts are actually resolved before completion of a formal investigation.

[91] *See* Case Tracking Sheet, *supra* note 48; *see also infra* Figure 1.

high satisfaction levels in their post-mediation surveys.[92] Over time one can reasonably expect that this satisfaction translates into a more comfortable, and thus more productive, working environment. This benefit of the Center's mediation program will also likely increase in direct proportion to the Center's caseload.

IV. CHALLENGES & FUTURE IMPROVEMENTS

As demonstrated above, the value of the Center's services increases as the Center's caseload grows. However, after two years of operations, only eight city agencies have referred cases for mediation, and only two agencies have referred more than three cases.[93] This may have to do with the lack of an executive mandate or legislation requiring agencies to refer cases for mediation. Such mandates and legislation have already been issued at both the state [94] and federal level,[95] with significant results.[96]

A similar mandate to mediate has already been created for another New York City Agency. The Civilian Complaint Review Board (CCRB) is authorized under the City Charter to:

> receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse

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[92] Case Tracking Sheet, *supra* note 48.

[93] *See infra* Figure 1.

[94] *See, e.g.*, Fla. Exec. Order No. 02-87, § 1 (Mar. 20, 2002), *available at* http://sun6.dms.state.fl.us/eog_new/eog/orders/2002/march/eo2002-87-03-20-02.html ("Each executive agency Secretary shall: (a) review the agency's processes for managing conflicts and controversies to ensure that its dispute resolution and conflict management processes are efficient and effective; (b) determine whether those systems could be improved through the use of facilitation, mediation, negotiated rulemaking, and/or other ADR processes; and (c) take the necessary steps to implement those improvements").

[95] 5 U.S.C. § 572 (2005) ("An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding,"); *see also* SENGER, *supra* note 17, at 11–16 (summarizing federal legislation and executive orders and memoranda promoting the use of ADR in federal government).

[96] According to EEOC statistics, 1,546 federal government workplace disputes in which a formal complaint had been filed were resolved in ADR processes in Fiscal Year 2003. FY 2003 EEO Activities—Agencies in Alpha Order Formal Complaints, http://www.eeoc.gov/federal/adr/datatables/fy03/fcalphaorder.html (last visited Dec. 14, 2005); *see also* SENGER, *supra* note 17, at 3–5 (summarizing time and cost savings associated with federal government ADR programs).

> of authority, discourtesy, or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability.[97]

As part of its functions, the CCRB was authorized to "establish a mediation program pursuant to which a complainant may voluntarily choose to resolve a complaint by means of informal conciliation."[98] In 1997, its first year of operation, the CCRB mediated two cases.[99] Its case load rose steadily until, in 2004, the CCRB successfully mediated 113 complaints, the highest level in the agency's history, and a significant increase compared to the prior years.[100]

Based on its own success, and the success of other state, federal and city agencies, including the CCRB, the Center would like to see the Mayor issue an Executive Order mandating agencies to evaluate and refer appropriate EEO and disciplinary cases for mediation at the Center. The increased case load that would result from such an order would, over time, generate significant return on investment, promote cost savings, and ultimately improve the city's workplace culture.

In the absence of an executive or legislative mandate, the Center would like to receive more referrals from different agencies' EEO and disciplinary officers. However, over the past two years, a number of EEO officers have expressed reservations or resistance to referring cases for mediation at the Center. Some EEO officers prefer to keep the management of their agency's conflict "in house." Other EEO officers are concerned about personal and agency liability. And still others see their case load in narrower terms, meaning that if a complaint leads to a substantiated violation of the agency EEO policy, it warrants corrective measures, and if the complaint is unsubstantiated after investigation, no further action need be taken. At present, staff members are meeting with a focus group of EEO officers to address some of these concerns. As mentioned above, the group's first undertaking will be to develop a case assessment tool that determines which cases are appropriate for mediation.

The Center would also like to see that a higher percentage of cases referred are actually mediated. The first two years saw only two-thirds of referrals go to mediation (of fifty-four referrals, thirty-six times both participants agreed to mediation, but eighteen times one or more parties did

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[97] NYC Charter § 440(c)(1).

[98] NYC Charter § 440(c)(4).

[99] *See infra* Figure 4.

[100] CCRB Performance, http://www.nyc.gov/html/ccrb/html/about.html (last visited Dec. 14, 2005); *see also infra* Figure 4.

not want to go to mediation).[101] To improve this percentage, the Center has developed a website[102] and a user brochure for participants—or possible participants—in mediation.[103] Part of this effort involves continued clarification of the Center's relationship with OATH. Employees facing disciplinary charges come to OATH for hearings, and the Center would like to avoid confusion with OATH's adjudication function. Toward this end, the Center has developed its own logo, and secured devoted office space separate from OATH's offices.

V. CONCLUSION

The first two years of operations at OATH's Center for Mediation Services proved to be very successful. A high rate of settlement achieved in a shorter period of time than litigation, all within an average session time of about three hours is certainly a good start. By reducing the number of conflicts in city agencies, the Center is able to achieve good return on investment, realize opportunity cost savings, and improve working conditions for city employees. Thus, there is clearly value in a centralized mediation program. Based on its early success, the Center hopes to dramatically increase its caseload over the course of the next few years, and generate further decreases in workplace conflict and its associated costs.

[101] *See* Case Tracking Sheet, *supra* note 48; *see also infra* Figure 1.

[102] *See* City of New York Center for Mediation Services, *supra* note 18.

[103] *See* City of New York Center for Mediation Services Mediation Brochure, *available at* http://www.nyc.gov/html/oath/pdf/med_brochure.pdf.

Figure 1: Cases Referred to the Center (March 2003—March 2005)[104]

TOTALS BY AGENCY

Referring Agency	Referred	Mediated	Resolved
Police Department	30	16	13
Health & Hospitals Corporation	12	10	9
Fire Department	3	3	2
Dep't of Environmental Protection	2	2	2
Dep't of Health & Mental Hygiene	2	1	1
Law Department	3	2	2
Department of Employment	1	1	1
Commission on Human Rights	1	1	1
Totals	54	36	31

TOTALS BY AGENCY AND TYPE OF CASE

Referring Agency	EEO Referrals	EEO Mediated	EEO Resolved	Disciplinary Referrals	Disciplinary Mediated	Disciplinary Resolved
Police Department	30	16	13	0	0	0
Health & Hospitals Corp.	0	0	0	12	10	9
Fire Department	3	3	2	0	0	0
Dep't of Envt'l Protection	1	1	1	1	1	1
Dep't of Health	2	1	1	0	0	0
Law Department	2	1	1	1	1	1
Department of Employment	1	1	1	0	0	0
Comm'n on Human Rights	1	1	1	0	0	0
Totals	40	24	20	14	12	11

[104] As of January 1, 2006, the Center's total referrals are above 80, and total number of cases mediated above 50, with over 45 resolved.

Figure 2: Mediation Evaluations

Participants were asked to respond to twelve statements:

1. The Center's offices were a good setting for mediation.
2. The Mediation Center staff was helpful.
3. Before coming, I was provided with all the information I need to participate.
4. The mediators did not take sides.
5. The mediators took time to listen to my concerns.
6. I feel the agreement (if one was reached) represents a fair arrangement.
7. Mediation helped me understand the concerns of the other participants.
8. Mediation was a better way of handling this situation than pursuing a more formal action.
9. In a similar situation, I would use mediation again.
10. Mediation helped me learn something I can use in the future to solve problems.
11. I would recommend mediation to other employees.
12. I found the forms easy to read and understandable.

Participants rated their response to these statements on the following scale:

1 = strongly disagree * 2 = disagree * 3 = no opinion * 4 = agree * 5 = strongly agree

Sixty-one participants responded. The responses were as follows:

Statement	Average Score	Agree or Strongly Agree
1	4.49	90%
2	4.66	95%
3	4.39	85%
4	4.74	95%
5	4.84	97%
6[105]	4.84	91%
7	4.43	90%
8	4.52	87%
9	4.51	90%
10	4.49	92%
11[106]	4.57	92%
12	4.64	95%

[105] 57 participants responding.
[106] 60 participants responding.

Figure 3: Opportunity Cost Savings Curve

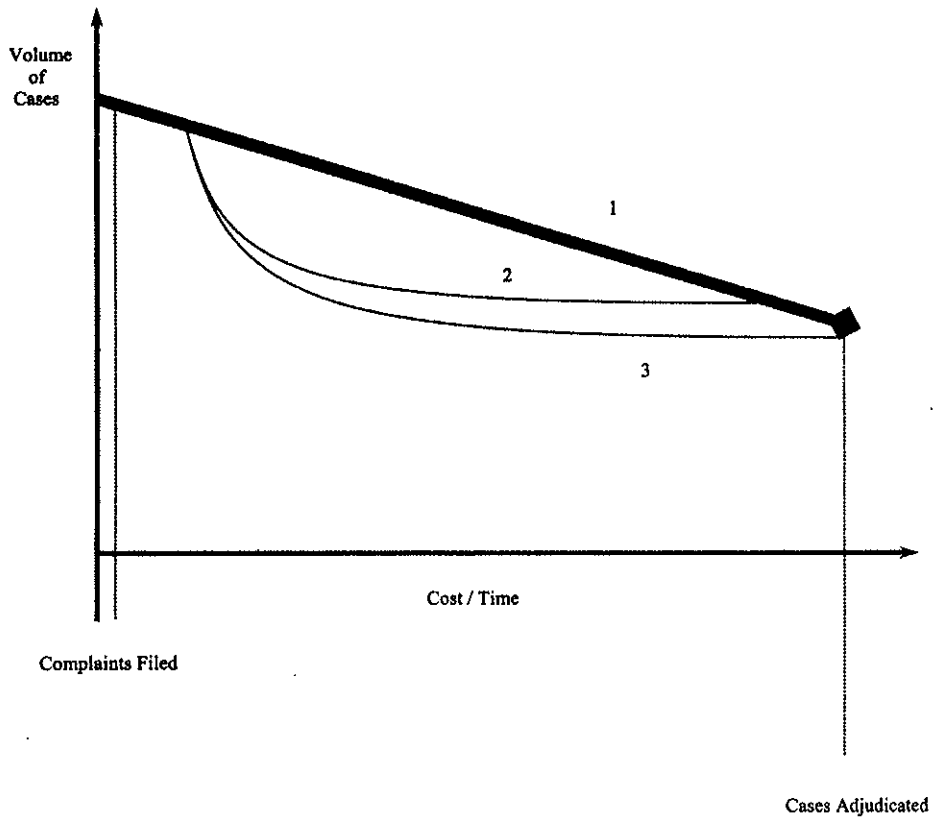
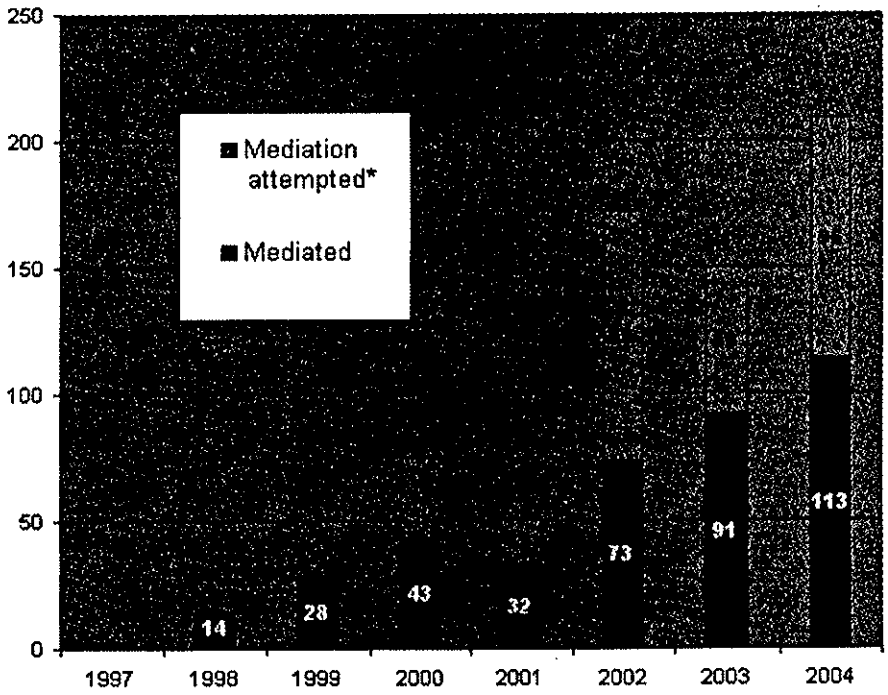


Figure 4: CCRB Mediation[107]



* A case is closed as mediation attempted when the civilian and officer both agree to mediate but the civilian fails to appear for the scheduled mediation twice without good cause, or fails to respond to phone calls and letters to set up such a session.

[107] *See* CCRB Performance, *supra* note 100.

Figure 5: Dana Measure of Cost of Conflict[108]

A. Employees Involved

Employee	Annual Salary	Salary + Benefits	Workweek Hours	Length of Unresolved Conflict (In Weeks)
Nurse 1	$22,000	$33,000	37.5	52
Nurse 2	$33,500	$50,250	28.0	12
Doctor	$100,000	$150,000	37.5	52

B. Cost of Conflict (based primarily on employee salaries & benefits)

Factor	Subtotal
1) Wasted time & energy	$ 4,526.13
2) Reduced decision quality	$ 1,500
3) Loss of skilled employees	$ 42,000
4) Restructuring	$ 1,858.33
5) Lowered job motivation	$ 2,938
6) Lost work time	$ 9,300
7) Health costs	$ 293.85
Total Costs	**$ 60,746.31**

[108] These tables are a simplified version of calculations from Mediation Institute Training International, The Dana Measure of Financial Cost of Organizational Conflict, *available at* http://www.mediationworks.com/mti/costs1.htm (last visited Jan. 10, 2006). This analysis was generated by the Dana Mediation Institute based on a conflict involving a doctor and two nurses in a patient care facility in New England. Although exact calculations may vary, it is clear that conflict has a significant quantifiable impact on the workplace.

Consensus Building Tools for New Challenges at the State and Local Levels

by Robert Jones

Source: The Policy Consensus Initiative (PCI)

The PCI builds and supports networks that provide states with leadership and capacity to achieve more collaborative governance.

(December, 1997)



First, the Bad News

Elected officials are constantly being asked to do more with less. Increasingly, they must think smarter, act quickly and learn new and better ways of working together - with each other and with others - to focus limited time, energy and resources on a state or local government's most pressing problems. Rapid social, cultural, political and environmental change is transforming communities and states, bringing to the forefront conflict among interests and individuals with diverse and sometimes divergent needs and concerns. The speed of this change makes it difficult for states and communities to develop and maintain a consensus on current priorities and on long term visions for their future.

The familiar and traditional syndrome in government of "decide, announce and defend" has increasingly led to the public's resistance to top-down solutions, which further widens the gulf between elected and appointed officials and the various "publics" they serve. These problems, poorly managed or left unattended, quickly turn into powerful barriers to positive change and result in litigation and public dissatisfaction.

At the local level, the context for decision making, governance and leadership is a constantly changing and challenging proposition. Coalitions form and dissolve around specific issues and the composition and agenda of groups change as local government officials are called upon to address deficiencies in housing, public safety, transportation, recreation, social services, economic development, and quality of life issues. All this is dealt with against a backdrop of uncertain sources of funding; increasing responsibilities for problem solving without adequate resources; polarized interest groups; and a public that is feeling frustrated, distrustful, overtaxed and alienated from governmental decision making.

At the state level, legislatures are often not well suited for the development of consensus needed to Implement new public policies. Agencies and appointed officials work with, and sometimes against, stake-holder groups in making tough decisions. Overlapping jurisdictions and lack of clear roles make intergovernmental cooperation and coordination difficult - and intergovernmental dispute resolution a necessity. Some states are dealing with an increasingly sour public mood by attempting regulatory reform and streamlining efforts. Overall, these efforts seek to strike the proper balance among protection of the public's interest in a healthy economy, a clean environment and quality communities. This is a process fraught with conflict and disputes.

Now, the Good News

In this difficult context can anything work to produce effective solutions? The good news is that there is a growing interest and a promising track record at the local, regional and state level, often guided by statewide offices of dispute resolution, in using collaborative approaches to public problem solving. These processes bring stakeholders and citizens together to develop consensus for needed actions on public problems; increase inter-agency and intergovernmental cooperation; and improve public and private sector coordination, collaboration and partnerships.

In nearly 20 states, publicly recognized and supported offices offering assistance in developing agreement on public solutions with public, private and non profit interests. These efforts utilize an array of consensus building tools to solve critical public problems including mediation, facilitated consensus building and public participation and other forms of collaborative problem solving. They have been deployed to deal with a variety of issues such as affordable housing, water management, emergency medical services provision, facility siting, community visions, budget priorities, environmental and land use issues, and public employment claims and grievances.

Expanding the Consensus Building Tool Kit

There are a variety of ways to build consensus on public issues and problems. More and more, to make progress in addressing key state, regional or community problems, it is necessary for elected and appointed leaders to bring groups of stakeholders and citizens together to both understand and to build consensus on the nature of the problem, and formulate and agree on options for its solution. The concept of building consensus and leadership for action on public problems has been advanced by the growing number of these statewide offices.

Consensus building on public issues features a spectrum of approaches that have been used separately or in combination. These have included facilitated policy development, mediated negotiations and productive public involvement. Facilitated large group processes have been used to create a dialogue among key stakeholders and build consensus around complex public policies, regulations or proposed legislation, ordinances or plans. Mediated negotiations using skilled neutrals to help parties negotiate mutually acceptable resolutions have been successfully used at a number of points in local, regional and state government decision making and in litigation processes. Facilitated public involvement has helped to effectively incorporate public concerns, needs and values into governmental decision making. It has been used by the public, private and non profit sectors to build consensus on future community visions, deal with the development of plans, and facilitate development proposals and the resolution of a wide range of public issues.

The potential advantages of consensus building approaches include:

- Better decisions. As groups learn about each others' views and needs, and develop

common ground for action, they can create solutions that better reflect the concerns of other parties as well as their own.

- Faster implementation. Parties are less likely to block implementation if they understand that a plan or policy reflects their input and has been crafted to meet their basic interests. Parties involved in consensus building often make commitments to participate in the implementation.
- Bridge community differences. Consensus building processes allow communities and the affected interests to bridge differences and work together to find mutually acceptable solutions based on common interests.
- Educate constituencies. Consensus building processes can educate constituents on the complex nature of the problems and issues and on others' concerns that will need to be addressed in solutions.
- Deal productively with shared power for decision-making. Consensus building processes bring a wide array of stakeholders to the table to seek mutually beneficial solutions as a response to the reality that power has become widely and thinly distributed with many interests able to block or veto the possibility of action.
- Create new resources. There are fewer federal, state and local dollars available to deal with critical issues facing our society. Consensus building processes can engage a range of public, private and community institutions and leadership to bring a wider array of resources to bear on the problem.
- Manage diversity and build common ground. Consensus building processes can help increasingly diverse communities improve inter-group relations, build trust and find common ground.
- Intergovernmental collaboration. Consensus building can effectively Involve different governmental units and nongovernmental actors in building a collaborative agreement on issues that cut across jurisdictional lines.

Applications and Experience: the Florida Conflict Resolution Consortium

In 1987 the Florida Conflict Resolution Consortium was established by the Florida Legislature at Florida State University to assist public and private sector and citizen interests at the state, regional and local levels in building consensus without resort to litigation on the challenging problems precipitated by the state's rapid growth in population during the 1970's and 1980's. Around that same time, the state's Supreme Court initiated its program to institutionalize mediation in the judicial process and created the Florida Dispute Resolution Center. Together, these two offices have provided dispute resolution and consensus building assistance, education and evaluation in Florida's administrative, political and judicial contexts.

Examples of the roles the Consortium has played include: recently designing and running the Governor's Conference on Administrative Dispute Resolution for 250 participants from over 12 executive agencies interested in increasing their use of dispute resolution; assisting in the implementation of new dispute resolution legislation related to property rights; and designing a two-day program on dispute resolution for the annual meeting of the Florida Association of Counties.

Beyond education, the Consortium has been directly involved in facilitating and mediating large group processes to demonstrate the value of collaboration in building consensus around complex public policies, regulations, litigation and proposed legislation. These facilitated and mediated processes have been convened by local governments, regional agencies, the governor and executive agencies.

State offices focused on consensus building and dispute resolution play a vital role in assisting those interests and institutions in the state in utilizing a range of collaborative tools to address community, regional and statewide challenges and problems. These programs use and refine these innovative tools to provide cost-effective and quality outcomes on controversial but critical public issues. Two hundred years ago DeToqueville observed, "You can tell how many good ideas the Americans have had, because they have built an organization around each one." Today state programs providing consensus building and dispute resolution services are organizations devoted to a good idea whose time has come.

Deciding whether to use consensus building

When to Consider Using...

- An issue is complex
- Many parties are involved
- No one agency or jurisdiction has complete control over the solution to the problems or access to resources
- The issues are negotiable and/or People are willing to participate

When Not To Use...

- When a local government faces an emergency
- When level of concern is not great
- When a fundamental value or principle is the focus of problem
- Legal clarification is needed; and/or
- Community is so polarized that face-to-face discussions are not possible

Addressing concerns with consensus building

Abdication of power?
Public leaders retain their legal responsibility and final decision making authority in consensus processes

Does it undermine representative government?
Public consensus processes supplement democratic processes

What about accountability?
Implementation of consensus processes is controlled by elected leaders

Will it take too much time?

Measuring Value in Mediation: A Case Study of Workplace Mediation in City Government[Δ]

D. HARDISON WOOD[*] & DAVID MARK LEON[♦]

I. INTRODUCTION: NEW YORK CITY'S WORKPLACE MEDIATION PROGRAM IN CONTEXT

The Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, and various employer "affirmative action" policies have ushered in an era marked by increased diversity in the American workplace, including state and local government workplaces.[1] Today, employers face the challenge of fostering harmonious working relationships among a diverse workforce.[2] The City of New York, a municipal employer of approximately 300,000 workers, is no exception.[3]

[Δ] This Paper was presented at the American Bar Association's Section of Dispute Resolution Annual Meeting in Los Angeles on April 14, 2005.

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[♦] Law Clerk, New York City Office of Administrative Trials and Hearings; J.D., University of Miami School of Law (2003). It should be noted at the outset that this Paper was prepared by employees of the New York City Center for Mediation Services and the New York City Office of Administrative Trials and Hearings, rather than an external consultant. Nevertheless, the views presented herein represent those of the Authors, and not necessarily those of the Agency. The Authors would like to thank the staff of the New York City Office of Administrative Trials and Hearings, especially Chief Administrative Law Judge (ALJ) Roberto Velez, Deputy Chief ALJ Charles McFaul, and ALJ Ray Kramer for their advice and insight. The Authors would also like to thank the Director of the New York City Center for Mediation Services, Justo A. Sanchez, and Professors Maria Volpe, James Kornbluh, and Sarah Burns for their valuable guidance and support.

[1] *See* Barbara Coyle McCabe & Christopher Stream, *Diversity by the Numbers: Changes in State and Local Government Workforces, 1980–1995*, 29 PUB. PERSONNEL MGMT. 93 (2000), *available at* http://www.ipma-hr.org/newsfiles/2000_1_mccabe.pdf.

[2] Federal Employment discrimination actions increased both in raw numbers and as a percentage of federal courts' caseloads in the 1990s. *See* Marika F. X. Litras, *Civil Rights Complaints in U.S. District Courts, 1990–98*, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/crcusdc.pdf. There has been a recent trend of such actions being filed by currently employed or terminated workers, rather than prospective employees. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991).

[3] As of June 30, 2004, the City employed 259,085 full-time workers, and 32,519 part-time workers. CITY OF NEW YORK, THE GREEN BOOK: OFFICIAL DIRECTORY OF THE CITY OF NEW YORK 657–58 (Krishna Kirk ed., 2004).

When New York City employees are faced with a workplace dispute, they may attempt to resolve it themselves or in consultation with management; they may consult with their union; or they may file complaints with their agency's Equal Employment Opportunity (EEO) office, the Federal Equal Employment Opportunity Commission, or the city or state civil rights enforcement agencies.[4] If the employee files a complaint within the agency, New York City's Equal Employment Opportunity Policy applies, as implemented by each agency's own rules.[5] The city's EEO policy forbids a broad swath of discriminatory behavior in the workplace,[6] but it, like "[t]itle VII and similar laws do[es] not enact a 'generalized code of workplace civility.'"[7] No process exists to address complaints of unfair or disrespectful treatment, for example. So to address interpersonal conflict, employees are often left "viewing every conflict involving a member of a protected class through the lens of forbidden bias."[8] This leads to unsubstantiated EEO complaints—and, presumably, lingering workplace conflict—in many city agencies.

In addition, Administrative Law Judges (ALJs) at the New York City Office of Administrative Trials and Hearings (OATH)—the city's central administrative tribunal—noticed on many occasions that disciplinary actions pending before them originate as, and remain at core, interpersonal workplace disputes.[9] In the opinion of the ALJs, the interpersonal dispute at

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[4] *See generally* CITY OF NEW YORK, EQUAL OPPORTUNITY EMPLOYMENT POLICY (2005), *available at* http://www.nyc.gov/html/dcas/downloads/pdf/misc/eeo.pdf [hereinafter NYC EEO Policy].

[5] *Id.*

[6] *See id.* at 1–2 (forbidding illegal discrimination in the agency workplace based on perceived or actual age, marital status, alienage, national origin, color, prior arrest or conviction, creed, race, disability, religion, sexual orientation, and gender; permitting agency head to take corrective disciplinary measures against violators).

[7] Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487, 498 (2003) (quoting Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 611 (2001)).

[8] Berger, *supra* note 7, at 525.

[9] OATH has been an independent, central tribunal for New York City government since 1979. Office of Administrative Trials and Hearings, http://www.nyc.gov/html/oath/ (last visited Dec. 14, 2005). OATH's ALJs hear cases covering a range of topics, including vehicle forfeiture, real estate and land use, licensing, civil rights, city contracts, and regulatory enforcement of city environmental health and safety codes. *See id.* About 66% of OATH's cases involve city agencies disciplining employees pursuant to section 75 of the New York State Civil Service Law. *See OATH Annual Report*, OATH BENCHNOTES, Spring 2004 , at 7, 7 (noting that 1,442 out of 2,189 cases docketed at OATH in Fiscal Year 2004 were employee discipline cases), *available at*

the heart of many such cases could have been addressed in its early stages, and would never have needed to appear for formal adjudication. Recognizing the potential for early mediation of such workplace disputes, OATH launched its Center for Mediation Services (the Center) in spring 2003.[10] Although such programs exist in many private corporations,[11] states,[12] and agencies of the federal government,[13] the Center is one of a very small number of municipal workplace mediation programs.[14] To date, such programs have been evaluated for effectiveness by focusing on a number of indicators, including resolution rates, participant satisfaction surveys, and reduction in complaint volume.[15] Cost-benefit and value analysis of such

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http://www.nyc.gov/html/oath/pdf/benchnotes30.pdf. These cases may involve employees violating their agency's EEO policy. *See id.*

[10] *See Message From Chief Judge Roberto Velez*, OATH BENCHNOTES, Spring 2003, at 1, *available at* http://www.nyc.gov/html/oath/pdf/benchnotes28.pdf; *see also* Morell E. Mullins, *Manual for Administrative Law Judges*, 23 PEPP. J. NAT'L ASS'N ADMIN. L. JUDGES 1, 11, 21, 39 (2004) (describing alternative dispute resolution as a natural and necessary tool for administrative law judges' docket management). *See generally* Berger, *supra* note 7, at 487 (arguing in favor of early, broad-gauged mediation of workplace disputes).

[11] *See generally* DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS (1998).

[12] Such states include Minnesota, *see* Minnesota Alternative Dispute Resolution, Workplace Mediation, http://www.mnadr.state.mn.us/workplace.htm (last visited Dec. 14, 2005); Ohio, *see* The DAS Workplace Mediation Program, http://das.ohio.gov/hrd/pmdrmediation.html (last visited Dec. 14, 2005); and Virginia, *see* Mediation Services, http://www.edr.state.va.us/mediation.htm (last visited Dec. 14, 2005).

[13] *See, e.g.*, Department of Energy Office of General Counsel, Dispute Resolution, http://www.gc.doe.gov/index_adr.html (last visited Dec. 14, 2005); U.S. Department of Agriculture, Conflict Prevention and Resolution, http://www.usda.gov/cprc/ (last visited Dec. 14, 2005); U.S. Department of the Navy, Alternative Dispute Resolution, http://adr.navy.mil (last visited Dec. 14, 2005).

[14] Other city workplace mediation programs include the City of Seattle. *See* Seattle Personnel Department, Personnel Rules, *available at* http://www.ci.seattle.wa.us/personnel/personnelrules/rule_1.2.asp (last visited Dec. 14, 2005). It bears noting that the City of New York is the largest city in the United States, with a population in excess of eight million. *See* New York City, http://en.wikipedia.org/wiki/New_York_City (last visited Dec. 14, 2005). In fact, if it were a state, New York City would be the eleventh largest state. *See* http://www.census.gov (last visited Dec. 14, 2005). Thus, to some degree, it is also appropriate to compare the Center's operations with some state and federal workplace mediation programs.

[15] *See* Indiana Conflict Resolution Institute, Project: United States Postal Service, http://www.spea.indiana.edu/icri/usps.htm (last visited Dec. 14, 2005) (listing ways in

programs is exceedingly rare. This may be because "[t]raditional cost-benefit analysis does not capture many of the benefits derived from ADR service programs because these benefits are often intangible and not easily quantifiable."[16] Nevertheless, estimates of cost savings have been made.[17]

This paper reports the results from the first two years of the Center's services, evaluates these results, and discusses ways to begin measuring the value of a centralized workplace mediation program. Part II details the Center's operations, noting time and cost savings, and participant satisfaction with the program. Part III discusses the value that centralized mediation brings to the city, noting that the Center tends to generate good return on investment, reduce opportunity costs, and contribute to a productive work environment. Part IV addresses challenges faced by the Center. Finally, Part V concludes that the Center's model provides a valuable service to New York City, one that will likely lead to greater benefits if expanded.

II. REPORTING AND EVALUATING THE CENTER'S FIRST TWO YEARS

The Center has three main programs. First, the Center offers workplace dispute mediation to all city employees.[18] Second, the Center's staff members provide training in conflict management to any interested city agency.[19] And third, the Center serves as a conflict research and resource center, offering information and consultation to address disputes involving the city.[20] This section describes the Center's three programs, reports data and evidence of customer satisfaction from the first two years of the

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which the U.S. Postal Service workplace mediation program was evaluated). Evaluations of mediation programs generally address factors including time savings (compared to adjudication), cost avoidance (compared to adjudication or inaction), and customer satisfaction. *See* Evaluation of Federal ADR Programs, 65 Fed. Reg. 59,200, 59,208 (Oct. 4, 2000); *see also* Jennifer E. Shack, *Bibliographic Summary of Cost, Pace, and Satisfaction Studies of Court-Related Mediation Programs* (2003), *available at* http://www.caadrs.org/downloads/MedStudyBibliography.pdf (summarizing evaluations of court-connected mediation programs in Illinois).

[16] *See* Evaluation of Federal ADR Programs, *supra* note 15.

[17] *See* JEFFREY SENGER, FEDERAL DISPUTE RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT 3–5 (2004) (summarizing time and cost savings associated with federal government ADR programs).

[18] *See* City of New York Center for Mediation Services, http://www.nyc.gov/html/oath/html/mediation.html (last visited Dec. 14, 2005).

[19] *Id.*

[20] *See* City of New York Center for Mediation Services, About the Center [hereinafter About the Center], http://www.nyc.gov/html/oath/html/med_about.html (last visited Dec. 14, 2005).

mediation program, and compares those results with other dispute resolution processes available to city employees.

A. *Mediation at the Center*

Mediation at the Center is a confidential, voluntary process, offered at no charge to city agencies or employees.[21] The Center uses a facilitative single or co-mediation model, where trained staff facilitates discussions between the participants and allow the participants to come to their own resolution.[22] Resolution agreements reached in mediation are structured by the participants.[23] No money exchange or disciplinary action takes place. The agreement can involve such terms as participants treating each other with respect, or not interacting with each other in the future. Details on how terms of the agreement will be carried out are also explored and incorporated into the agreement, so that the agreement serves as a roadmap for the parties' future relationship. The mediators "reality test" agreements with the parties, a technique designed to result in more durable and realistic agreements.

The cases can best be characterized as various types of "workplace disputes," involving managerial or interpersonal problems in workplace relationships.[24] Essentially, the parties' working relationship forms the subject of negotiations.[25] The Center's mediation program is designed to be "plenary in scope, encompassing virtually all employment-related issues instead of dealing solely with claims of violations of legal rights."[26] The cases come from a variety of city agencies, and tend to be referred early in the course of a dispute.[27] If not referred to mediation, these workplace disputes could persist at the agency, leaving open the possibility that they could evolve into actionable legal claims, or simply continue to drain time, energy, and resources away from the agency's work.

Referrals to the Center come primarily from agency EEO officers and disciplinary advocates.[28] Cases referred from agency EEO officers have been

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[21] *See* City of New York Center for Mediation Services, Frequently Asked Questions, http://www.nyc.gov/html/oath/html/med_faq.html (last visited Dec. 14, 2005) [hereinafter FAQs].

[22] For more detail on the method of mediation used at the Center, see JOSEPH B. STULBERG, TAKING CHARGE / MANAGING CONFLICT, 59–126 (1987).

[23] *See* FAQs, *supra* note 21.

[24] *See id.*

[25] *See* id.

[26] Berger, *supra* note 7, at 523.

[27] For a discussion of the benefits of early mediation, see *id.* at 516–23.

[28] *See* FAQs, *supra* note 21.

subject to a preliminary investigation and often a finding that the underlying complainant lacks a factual basis for a viable EEO complaint. Pursuant to the city's EEO policy, complainants and respondents have the right to request mediation.[29] However, the decision whether a case will be mediated is ultimately the EEO officer's.[30] To assist EEO officers in making good decisions about the type of cases that are appropriate for mediation, the Center is currently in the process of tailoring a screening tool, which will contain uniform referral criteria.

The Center also receives referrals from agencies seeking resolution of disputes that led to, or could lead to disciplinary hearings. Like agency EEO officers, agency disciplinary advocates also carefully screen for cases where interpersonal disputes form the core of a complaint, and where the costs of administrative litigation would be disproportionate to the disciplinary sanction likely to be imposed. Agencies are authorized under the city's charter to address matters subject to administrative adjudication through alternative dispute resolution.[31] Although criteria differ in each agency, generally, any case involving severe power imbalances or physical violence, corruption, repeated instances or allegations of discrimination, threats to public safety, or claims filed with outside agencies or organizations will not be referred.

The cases range in scope and severity. For example, one case involved two co-workers, one an African-American female and the other a Caucasian male. They sat in adjoining cubicles, and had such a close relationship that others in the office referred to them as "husband and wife." However, on a few occasions, the woman engaged in loud telephone conversations the man could not help but overhear. One of the conversations was about her daughter. He asked her to quiet down on one occasion, and she yelled at him. At some point, an investigator from the city's Administration for Children's Services appeared at the woman's home, inquiring as to the well-being of the woman's daughter. The woman blamed her male co-worker, and filed an EEO complaint against him. He then filed a cross-complaint against her. The agency referred the case for mediation, and it was resolved amicably.

Another case involved five medical professionals from a city hospital. One of these workers experienced personality conflicts with her supervisors and co-workers, and the agency sought to have her disciplined. In three separate sessions involving five parties and three mediators, the case was resolved.

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[29] NYC EEO Policy, *supra* note 4.

[30] *Id.*

[31] New York City Administrative Procedure Act (NYC Charter § 1046(d)).

The Center takes several measures to guarantee fairness to parties in the mediation of their workplace disputes.[32] First, employees are informed from the outset by Center staff what the mediation process entails. After a referral, the staff directly contacts parties and informs them about the mediation process, including the core principles of confidentiality and party self-determination, and discusses potential outcomes.[33] The goal is for parties to understand and be well-informed about the full range of mediation potentials and limitations.[34] Second, mediation at the Center is totally voluntary. Nowhere in their terms of employment are city employees required to attend mediation if they are engaged in a workplace dispute. And once in mediation, parties are not required to enter into any agreements.[35] Third, employees maintain the right to be represented in mediation at the Center.[36] Representatives can be attorneys, union representatives, or any other person selected by the participant. Fourth, all mediators are professionally qualified.[37] Mediators are a combination of OATH ALJ's and staff attorneys, Center staff, and independent mediators. [38] All OATH ALJs and staff attorneys have experience and expertise in issues arising from city employment, including federal, state and local employment and anti-discrimination laws.[39] All mediators attend a 32 hour mediation training given by a mediation trainer certified in the State of New York.[40] Although

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[32] These measures are informed by AMERICAN ARBITRATION ASSOCIATION, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995), *available at* http://www.adr.org/sp.asp?id=22078.

[33] City of New York Center for Mediation Services, The Mediation Process, http://www.nyc.gov/html/oath/html/med_process.html (last visited Dec. 14, 2005).

[34] *See id.*

[35] FAQs, *supra* note 21.

[36] *Id.*

[37] *Id.*

[38] Although the Center already offers mediators with diverse professional backgrounds and different racial, ethnic, and gender profiles, plans are underway to develop a roster of independent, specialized mediators who will be compensated with a small stipend.

[39] OATH's jurisdiction includes city employment discrimination and disciplinary cases. *See, e.g.*, Jaggi v. Police Dep't, OATH Index No. 1498/03 (2004) (ordering police department to reinstate and provide reasonable accommodation for Sikh police officer who requests to wear turban on duty); Fire Dep't v. Silvestri, OATH Index No. 613/05 (2005) (recommending that fire department commissioner terminate firefighter for violating department rules against possession of alcohol and assaulting co-worker).

[40] The amount of training is designed to meet or exceed standards for New York State court-annexed mediation programs. For more on such programs see Court Annexed

some mediators are city employees, they are employed by a neutral agency, and are precluded from assignments involving adjudication of the rights of any party appearing in a case they mediated. Finally, because mediation referrals come to the Center in the early stages of a dispute, it remains possible that certain actionable facts unknown to referring agency personnel could be communicated in mediation. If such facts compromise the parties' self-determination, the integrity of the process, or the mediator's neutrality, the mediator may bring it to the parties' attention, and, if the situation so warrants, end the mediation and refer the case to a different mediator, or return the case to the agency.[41]

Also, if communications made in mediation include any specific allegations or acknowledgments of corrupt, criminal, or other serious misconduct by or against agency personnel, such allegations are exempt from the confidentiality provisions that otherwise bind the mediator.[42] Serious misconduct includes not only corrupt or criminal conduct, but also any egregious breach of agency rules for which one could reasonably expect to be terminated from employment, including serious violations of EEO policy, illegal drug use, theft of agency time or property, falsification of agency records, or lying under oath.[43] This exception to the confidentiality policy was developed because city employees are bound by reporting requirements.[44] Specifically, all city employees are required to report any information concerning corruption, criminal activity, or conflicts of interest,[45] and managerial employees are obligated to report potential EEO

ADR Programs, http://www.courts.state.ny.us/ip/adr/court_annexed.shtml (last visited Dec. 14, 2005).

[41] FAQs, *supra* note 21.

[42] *See* The City of New York Center for Mediation Services, Mediation Guidelines (on file with the Ohio State Journal on Dispute Resolution).

[43] *See, e.g.*, Transit Auth. v. Kerr, OATH Index No. 1234/00 (May 10, 2000), *modified on penalty*, Auth. Dec. (July 18, 2000), *modified on penalty*, NYC Civ. Serv. Item No. CD03-22-M (Feb. 5, 2003) (issuing suspension for violation of EEO policy); Dep't of Correction v. Potter, OATH Index No. 969/96 (Apr. 29, 1996), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD97-40-A (June 4, 1997) (terminating correction officer for illegal drug use); Health & Hosp. Corp. v. Corsini, OATH Index No. 218/03 (Mar. 25, 2003) (recommending termination for employee who facilitated theft of time by falsifying overtime records); Dep't of Correction v. Wilder, OATH Index No. 1636/00 (June 20, 2001), *aff'd*, NYC Civ. Serv. Item No. CD03-63-SA (Sept. 23, 2003) (terminating employee for lying under oath). All decisions are available at http://www.citylaw.org/cityadmin.php.

[44] *See, e.g.*, NYC Mayor's Exec. Order No. 16 (July 26, 1978), *available at* http://www.nyc.gov/html/doi/html/whistblr-eo16.html.

[45] *Id.*

violations.[46] In addition to its current mediation guidelines, the Center's staff is currently developing codified standards of conduct for its mediators, incorporating these reporting requirements, and elements of the Model Standards of Conduct for mediators developed by leading professional organizations.[47]

The Center's mediation program is thus, in some respects, a work in progress. Nevertheless, the Center has achieved outstanding results in its first two years of operation.

B. *Mediation Data & Comparison of Mediation with Alternatives*

In the first two years of operations—from March 2003 to March 2005—the Center received fifty-four referrals for mediation, of which thirty-six cases involved participants agreeing to participate in mediation.[48] Of the thirty-six mediations conducted at the Center, thirty-one resulted in mutually acceptable resolution.[49] This gives the Center a resolution rate of eighty-six percent in cases where mediation was commenced.[50] With a few exceptions, all cases resolved in mediation involved a written resolution agreement signed by both parties.[51] The average time from filing to resolution was thirty-three and one-half days, with average mediation session time of only two and seven-eighths hours.[52]

Forty of the fifty-four referrals came from EEO officers, of which twenty-four cases went to mediation, and twenty were resolved in mediation.[53] Of the fourteen disciplinary cases that were referred to mediation, twelve were mediated and eleven were resolved in mediation.[54] This higher rate of participation and resolution in disciplinary cases may be because the possibility or reality of pending disciplinary charges—as opposed to unsubstantiated EEO complaints—provided more incentive for workers to mediate, and ultimately resolve disputes.

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[46] *See* NYC EEO Policy, *supra* note 4.

[47] *See, e.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), *available at* http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf.

[48] *See infra* Figure 1; NYC Center for Mediation Services Tracking Sheet [hereinafter Case Tracking Sheet] (on file with the Ohio State Journal on Dispute Resolution).

[49] *See infra* Figure 1.

[50] *See id.*; Case Tracking Sheet, *supra* note 48.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

Most of the referrals for mediation came from the New York City Police Department (NYPD) and the New York City Health and Hospitals Corporation (HHC).[55] All of the NYPD's thirty referrals were from EEO officers, with sixteen being mediated and thirteen resolved in mediation.[56] By contrast, all of the HHC's twelve referrals came from labor relations officers processing disciplinary charges.[57] Of those referrals, ten were mediated and nine were resolved in mediation.[58]

These figures compare favorably with the time and cost of conventional means of resolving city workplace disputes. The resolution rate for the Center's mediations is significantly higher than OATH's Fiscal Year 2004 (FY04) pre-hearing settlement rate of fifty-five percent.[59] The average time to disposition at OATH in FY03 by way of adjudication was seventy-nine days from initial filing,[60] and the average time to disposition by way of settlement was sixty-five days, both significantly longer than the mediated cases took.[61]

The data presented here comes from an admittedly small sample, and data gathering and analysis is ongoing.[62] Nevertheless, conclusions may still be drawn, albeit at a lower confidence level and with a greater confidence interval than if a larger sample size was possible. This is acceptable because the Center is a local government agency using its own data to make operational and budgetary decisions, rather than, for example, an academic research institution seeking definitive research findings. Even taking into account the small sample size, one can be ninety-five percent confident that, for example, the entire city workforce of 300,000 would experience

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[55] *Id.*

[56] *See id.*; *infra* Figure 1.

[57] Case Tracking Sheet, *supra* note 48.

[58] *Id.*

[59] NYC MAYOR'S MANAGEMENT REPORT 212 (2004). This rate also compares favorably to other court-connected mediation programs. For example, in the United States District Court for the Eastern District of New York, 53.64% of all mediated cases settled. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK: MEDIATION REPORT, JULY 1, 2003 TO JUNE 30, 2004, *available at* http://www.nyed.uscourts.gov/adr/MediationReport0704.pdf (last visited Dec. 14, 2005). The lower resolution figures from the Eastern District may reflect the hardening of parties' positions by the time a federal complaint has been filed. If so, these figures would reinforce the case for early mediation.

[60] OATH Monthly Management Report (June 2004) (on file with the Ohio State Journal on Dispute Resolution).

[61] *Id.*

[62] Between March 31, 2005 and July 31, 2005, the Center received 13 more referrals. *See* Case Tracking Sheet, *supra* note 48.

mediation resolutions at a rate of roughly between seventy-five to ninety-seven percent.[63] Thus, it is evidenced that mediation at the Center results in a higher resolution rate, and takes less time than traditional case processing.

C. *Participant Satisfaction*

After a mediation session has concluded, the participants fill out an evaluation form. Those participating in mediation at the Center reported a high degree of satisfaction with the process.[64] Of those who completed evaluations, eighty-seven percent of participants agreed that mediation was a better way of handling their dispute than a more formal process would have been.[65] Ninety percent of participants also agreed that in a similar situation they would use mediation again.[66] And notably, ninety-two percent agreed that they would recommend mediation to co-workers.[67] A follow-up participant survey is currently underway to assess whether participants remain as fully satisfied as they indicated immediately after mediation, why certain parties who were referred did not agree to appear, and why other parties failed to resolve their dispute in mediation.

D. *Management / Interested Party Satisfaction*

Agency management personnel and municipal employees' unions also express satisfaction with the Center's mediation program.[68] An associate director of human resources at a City hospital noted that all of the employees he referred to mediation at the Center have upheld their agreements, and the result has been improved camaraderie in the workplace.[69] In addition, he perceives a "ripple effect" extending to other employees, and he sees fewer overall workplace problems. He describes himself as a "deeply satisfied customer."[70]

Municipal employee union representatives also view the Center's program as a success. A representative of District Council 37, the largest

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[63] *See* Sample Size Calculator, http://www.surveysystem.com/sscalc.htm (last visited Dec. 14, 2005).

[64] *See* Case Tracking Sheet, *supra* note 48; *see also infra* Figure 2.

[65] *Id.*

[66] *Id.*

[67] *See* Figure 2, *infra*.

[68] *Center for Mediation Resolves Disputes*, PUB. EMP. PRESS, Feb. 2004, at 2.

[69] Interview with John Perez, Associate Director of Human Resources, Woodhull Medical and Mental Health Center, in N.Y., N.Y. (2004).

[70] *Id.*

municipal employees' union in New York City, described mediation at the Center as "an excellent program."[71] Referring agencies have taken note, and case referrals to the Center increased thirty-five percent from year one to year two.[72]

Thus, in its first year of operations, the New York City Center for Mediation Services has proven itself a highly successful dispute resolution center, increasing dispute resolution efficiency, improving employee morale, and satisfying participants and other interested parties.

E. *Training*

The Center also serves as a conflict management training center for city employees and law students.[73] In the Center's first year, its staff, with the assistance of outside training consultants, presented conflict management training programs to employees at the New York City Fire Department, the New York City Department of Housing Preservation and Development, EEO officers from various agencies, and law students from the New York University School of Law Mediation Clinic.[74] The Center's trainers tailored each training to the needs of the particular group, and—according to evaluations from trainees—each was well received.[75]

Once trained in conflict management methods, city employees can more adeptly resolve their own conflicts or those of their subordinates and co-workers. In addition, employees who are aware of the Center's mediation services can more easily refer cases for early resolution, effectively moving back the starting point for early intervention.

F. *Research & Resource Center*

The Center also serves as a data collection and dissemination point for value-added research projects, and as a process expert, convener, and resource center for conflicts involving city agencies.[76] Staff members collect and analyze data while conducting research on "best practices" in mediation. Staff members also observe trends in particular agency workplace settings and communicate those trends directly to the agency decision makers. And

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[71] *Center for Mediation Resolves Disputes*, *supra* note 68.

[72] Case Tracking Sheet, *supra* note 48.

[73] *See* About the Center, *supra* note 20.

[74] *Id.*

[75] For more detail on these training sessions, see City of New York Center for Mediation Services, *supra* note 18.

[76] *See* About the Center, *supra* note 20.

the Center serves as a centralized resource for city agencies and parties to conflicts involving City agencies, employees, and the public. Recently, the Center responded to a city agency's request for assistance in analyzing issues in conflict and selecting a mediator for negotiations between a major university located in the city and the surrounding community, arising from the university's physical expansion of its campus.

III. FINDING VALUE IN MEDIATION

As outlined above, the first two years' results for the Center paint a picture of a successful and growing program. The main drivers of success in this view are: settlement rate, decrease in time to disposition, and customer satisfaction at the end of the mediation. While these criteria are perhaps well suited for analysis of an individual program's performance, they tell us little with respect to the overall, generic value proposition, i.e., does a successful mediation program actually deliver value to the city? And if so, how?

The remainder of this paper lays out the preliminary value points for a centralized workplace mediation program. Further study and evaluation are in order, but even with the limited data reported, one can ascertain that such programs generate return on investment, opportunity cost savings, and improvement in working conditions.[77]

A. *Return on Investment*

The Center has developed its mediation program so far on a modest budget. With each case it resolves, it generates return on investment for the city. In terms of actual hourly cost, mediation proves to be a far cheaper process than litigation, because it requires less time. This can be illustrated using rough approximations based on cases tried at OATH. The average case litigated at OATH in Fiscal Year 2003 took approximately thirteen hours of ALJ trial time, at a rate of forty-six dollars per hour.[78] This figure accounts for all types of cases, rather than just disciplinary, EEO, or Commission on Human Rights cases. However, this figure does not account for decision-writing time, which can be equal to or greater than trial time.[79] Thus, a conservative estimate of the total average cost to the City of litigating a case

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[77] These three concepts overlap, but are presented separately to facilitate easier understanding.

[78] *See* OATH Monthly Management Report, *supra* note 60 (318 trials were completed in 169 seven-hour work days).

[79] *Id.*

at OATH is at least twelve hundred dollars.[80] By contrast, mediating at the Center takes on average five hours, with the actual mediation taking less than three hours, plus perhaps two hours of preparation.[81] Mediators have been paid at an average rate of forty dollars per hour, making the total average cost of mediating at OATH about two hundred dollars, over eighty percent less than the average cost of litigating a disciplinary case. Thus, the return on investment (ROI) for the Center's mediation program so far involves at least eleven thousand dollars, from the eleven disciplinary cases that have been resolved in mediation.[82]

Assuming lawsuits—and possibly costly settlements and verdicts—can be avoided by resolving workplace disputes before they can escalate into actionable claims, ROI increases exponentially. Over the past five years, New York City has paid over $29,000,000 in verdicts and settlements in connection with approximately 320 employment discrimination lawsuits.[83] Although those cases are generally qualitatively different from the cases currently being referred to the Center, it is plausible that any case, if left unaddressed, could develop into a more serious situation where legal rights are violated. To the extent that early mediation prevents such situations, the Center saves the city from costs associated with defending against litigation, and possibly from paying huge verdicts.

Put another way, for the past five years, the city paid an average of approximately sixty employment discrimination verdicts per year, with an average payout of $90,000, worth about $5,400,000 in annual liability. One may assume that many of these cases—especially "hostile work environment" cases—began as simple workplace disputes or misunderstandings, which, if mediated early on, could have been resolved. Resolving these disputes before they turn into lawsuits would yield substantial ROI.

Even if no lawsuits are ultimately avoided through mediation, the Center generates returns by resolving cases that may otherwise linger and devour agency resources. In other words, there is likely to be a significant improvement in operating efficiency. The cost of lingering workplace

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[80] This figure does not account for support staff time or agency attorney time, both at OATH and the referring agency, which can range from approximately twenty-five to fifty dollars per hour, depending on seniority. Nor does it account for the hidden costs of possible ongoing conflict in the workplace while cases are pending, or after cases have been adjudicated. These costs may well exceed the costs associated with ALJ bench time and decision-writing time.

[81] *See* Case Tracking Sheet, *supra* note 48.

[82] *See infra* Figure 1.

[83] NYC EEO Lawsuits & Settlements (NYC Law Dep't) (on file with the author).

conflict cannot be underestimated.[84] By some estimates, thirty to forty percent of a manager's daily activities are spent addressing some form of workplace conflict.[85] Such conflict can involve perceived unfairness or lack of respect. These types of issues take management and workers away from other tasks and can lead to lost work time, decreased morale and productivity, poor decision-making, and other problems.[86] The aggregate cost of these items can add up to a significant sum. For instance, an assessment of a mediated conflict between three New England medical professionals estimated the cost of their conflict at over $60,000.[87]

To use a simplified example focusing only on paid time, assume that two employees, both paid thirty dollars per hour, wasted a total of 100 hours during a six-month period because of an interpersonal conflict at work. The agency would lose a minimum of $6,000, the amount of salary paid for those hours of work. Now assume that same conflict is resolved earlier in mediation, and only ten hours of paid time was wasted. In this case, the agency saves $5,400, or ninety percent of the original cost. Such specific savings can be multiplied by the number of mediations where amicable resolution results. If the details above were the average case for each of the thirty-one cases the Center resolved in mediation between March 2003 and March 2005, savings would equal $167,400.

As the Center's caseload increases, these kinds of savings will far surpass the operating cost of the mediation center. The amount of savings in excess of the operating cost is return on investment. Assuming a consistent resolution rate, return on investment increases in direct proportion to the Center's caseload.

B. *Opportunity Cost Savings*

By settling cases through mediation, the Center also provides opportunity cost savings throughout the city's conflict resolution systems. "Opportunity cost" can be defined in different ways, but the central concept involves

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[84] *See* James A. Cram & Richard K. MacWilliams, *The Cost of Conflict in the Workplace*, THE BCC CONNECTION, Jan. 2000, *available at* http://www.crambyriver.com/costofconflict.html (noting the problems associated with unaddressed workplace conflict).

[85] Rian Thomas, Conflict Management Systems: A Methodology for Addressing Conflict in the Workplace (Sept. 2002), http://www.mediate.com/articles/thomasR.cfm (analyzing Carol Watson & L. Richard Hoffman, *Managers as Negotiators*, 7 LEADERSHIP Q. 1 (1996) and Kenneth W. Thomas & Warren H. Schmidt, *A Survey of Managerial Interests with Respect to Conflict*, ACAD. MGMT. J., June 1976).

[86] *See* Cram & MacWilliams, *supra* note 84.

[87] *See infra* Figure 5.

comparing the cost of one alternative with the cost of another.[88] As noted above, on the micro-level, the Center's mediation program, on average, saves the city approximately ninety percent of the cost of unaddressed EEO cases, and at least one thousand dollars, or about eighty percent of the cost per disciplinary case resolved in mediation. In this section, the comparison is on the macro-level, between the cost of the City's current workplace dispute resolution systems—involving disciplinary and anti-discrimination litigation—and mediation of appropriate cases at the Center. It is important to note that even though actionable claims remain in the system, the Center lowers the overall volume of conflicts in the dispute resolution system by resolving cases at an early stage. The difference between the costs expended processing the old conflict volume and the costs associated with processing the new volume represents the opportunity cost savings the Center creates.

The Center's training and research functions add to the opportunity cost savings by fostering knowledge of conflict management tools and skills. Where city employees and managers are conscious of conflict and know how to approach interpersonal disputes constructively, fewer disputes develop into formal cases, requiring less expenditure of agency resources resolving those disputes. By having fewer conflicts and fewer cases to process, those managing the City's dispute resolution process—EEO officers, union representatives, disciplinary advocates, agency attorneys, and ALJs—have more time and resources to allocate to each remaining case. This ought to continue to reduce conflict volume over time by allowing more attention to be focused on the more difficult or more serious conflicts. Opportunity cost savings thus comprise a major benefit of the Center's program.

Figure 3 depicts a cross-section view of how the mediation program generates opportunity cost savings. The uppermost diagonally descending line labeled "1," represents the mean conflict resolution slope. The slope begins with a fixed pool of disputes, say 125,000 total disputes per year—one for every other full-time City employee—and slopes down when more conflicts are resolved over time. The end point for this diagonal is the average number of fully litigated claims the city pays for per year.

Presently, there are a number of points on this line where conflicts are resolved in one fashion or another. One such benchmark is the point at which a complaint is filed. Fewer complaints are filed than there are total workplace disputes. Hence, the pool of 125,000 total existing disputes is "cleaned" of the conflicts that resolve themselves before escalating to an EEO or disciplinary complaint.[89]

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[88] *See, e.g.*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 816 (10th ed. 2002).

[89] Conflicts that resolve themselves should not be confused with conflicts that, although not memorialized in an EEO complaint, will nevertheless persist, causing

Another benchmark is the completion of a preliminary investigation. City EEO and disciplinary officers report a large percentage of the total number of complaints that—after preliminary investigation—never result in the prosecution of formal charges. Such conflicts may be serious, but they are not legally actionable. As a result, these complaints cease to exist in the pool of possible conflicts that could become a civil action.[90] In this way, the overall complaint volume continues to decrease over time.

To conceptualize how a successful mediation program affects the conflict resolution curve, one can simply reduce the number of conflicts at the point in time at which mediation is conducted. Here that point would usually be after initial investigation, but before formal charges are pursued.

In Figure 3, the curve labeled "2" shows how mediation reduces conflict volume and attendant costs. Line 2 represents a new, lower conflict volume produced by the successful mediation program. With the data from the first two years of mediation at the Center, one can reduce overall conflict volume in the city workplace by at least thirty-one disputes.[91] Lowering this mean saves resources by lowering opportunity cost. To the extent cases are resolved in early mediation, fewer resources are expended investigating and processing the case, and less workplace efficiency is sacrificed. It is important to note that where an active and successful mediation program operates, every benchmark along the new dispute curve has a lower y-axis score, representing a lower volume of conflict at that point in time.

Even if the same amount of cases are settled via mediation each year, there is already an opportunity cost savings throughout the entire conflict resolution system. But assuming that the Center increases its caseload, greater savings will be realized. Over time, as more and more cases are resolved through mediation at the Center, the lower curve in Figure 3 deepens to form a new curve, labeled "3," indicating an increase in savings. Thus, as with ROI, the benefits of opportunity cost savings increase in direct proportion to caseload.

C. *Improvement in Working Conditions*

Finally, the Center's services will likely lead to marginal improvement in agency working conditions. So far, mediation participants have indicated

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employee turnover, low morale, reduced productivity, and other problems associated with unaddressed workplace conflict. *See* Cram & MacWilliams, *supra* note 84.

[90] Again, this is assuming such conflicts are actually resolved before completion of a formal investigation.

[91] *See* Case Tracking Sheet, *supra* note 48; *see also infra* Figure 1.

high satisfaction levels in their post-mediation surveys.[92] Over time one can reasonably expect that this satisfaction translates into a more comfortable, and thus more productive, working environment. This benefit of the Center's mediation program will also likely increase in direct proportion to the Center's caseload.

IV. CHALLENGES & FUTURE IMPROVEMENTS

As demonstrated above, the value of the Center's services increases as the Center's caseload grows. However, after two years of operations, only eight city agencies have referred cases for mediation, and only two agencies have referred more than three cases.[93] This may have to do with the lack of an executive mandate or legislation requiring agencies to refer cases for mediation. Such mandates and legislation have already been issued at both the state [94] and federal level,[95] with significant results.[96]

A similar mandate to mediate has already been created for another New York City Agency. The Civilian Complaint Review Board (CCRB) is authorized under the City Charter to:

> receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse

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[92] Case Tracking Sheet, *supra* note 48.

[93] *See infra* Figure 1.

[94] *See, e.g.*, Fla. Exec. Order No. 02-87, § 1 (Mar. 20, 2002), *available at* http://sun6.dms.state.fl.us/eog_new/eog/orders/2002/march/eo2002-87-03-20-02.html ("Each executive agency Secretary shall: (a) review the agency's processes for managing conflicts and controversies to ensure that its dispute resolution and conflict management processes are efficient and effective; (b) determine whether those systems could be improved through the use of facilitation, mediation, negotiated rulemaking, and/or other ADR processes; and (c) take the necessary steps to implement those improvements").

[95] 5 U.S.C. § 572 (2005) ("An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding,"); *see also* SENGER, *supra* note 17, at 11–16 (summarizing federal legislation and executive orders and memoranda promoting the use of ADR in federal government).

[96] According to EEOC statistics, 1,546 federal government workplace disputes in which a formal complaint had been filed were resolved in ADR processes in Fiscal Year 2003. FY 2003 EEO Activities—Agencies in Alpha Order Formal Complaints, http://www.eeoc.gov/federal/adr/datatables/fy03/fcalphaorder.html (last visited Dec. 14, 2005); *see also* SENGER, *supra* note 17, at 3–5 (summarizing time and cost savings associated with federal government ADR programs).

> of authority, discourtesy, or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability.[97]

As part of its functions, the CCRB was authorized to "establish a mediation program pursuant to which a complainant may voluntarily choose to resolve a complaint by means of informal conciliation."[98] In 1997, its first year of operation, the CCRB mediated two cases.[99] Its case load rose steadily until, in 2004, the CCRB successfully mediated 113 complaints, the highest level in the agency's history, and a significant increase compared to the prior years.[100]

Based on its own success, and the success of other state, federal and city agencies, including the CCRB, the Center would like to see the Mayor issue an Executive Order mandating agencies to evaluate and refer appropriate EEO and disciplinary cases for mediation at the Center. The increased case load that would result from such an order would, over time, generate significant return on investment, promote cost savings, and ultimately improve the city's workplace culture.

In the absence of an executive or legislative mandate, the Center would like to receive more referrals from different agencies' EEO and disciplinary officers. However, over the past two years, a number of EEO officers have expressed reservations or resistance to referring cases for mediation at the Center. Some EEO officers prefer to keep the management of their agency's conflict "in house." Other EEO officers are concerned about personal and agency liability. And still others see their case load in narrower terms, meaning that if a complaint leads to a substantiated violation of the agency EEO policy, it warrants corrective measures, and if the complaint is unsubstantiated after investigation, no further action need be taken. At present, staff members are meeting with a focus group of EEO officers to address some of these concerns. As mentioned above, the group's first undertaking will be to develop a case assessment tool that determines which cases are appropriate for mediation.

The Center would also like to see that a higher percentage of cases referred are actually mediated. The first two years saw only two-thirds of referrals go to mediation (of fifty-four referrals, thirty-six times both participants agreed to mediation, but eighteen times one or more parties did

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[97] NYC Charter § 440(c)(1).

[98] NYC Charter § 440(c)(4).

[99] *See infra* Figure 4.

[100] CCRB Performance, http://www.nyc.gov/html/ccrb/html/about.html (last visited Dec. 14, 2005); *see also infra* Figure 4.

not want to go to mediation).[101] To improve this percentage, the Center has developed a website[102] and a user brochure for participants—or possible participants—in mediation.[103] Part of this effort involves continued clarification of the Center's relationship with OATH. Employees facing disciplinary charges come to OATH for hearings, and the Center would like to avoid confusion with OATH's adjudication function. Toward this end, the Center has developed its own logo, and secured devoted office space separate from OATH's offices.

V. CONCLUSION

The first two years of operations at OATH's Center for Mediation Services proved to be very successful. A high rate of settlement achieved in a shorter period of time than litigation, all within an average session time of about three hours is certainly a good start. By reducing the number of conflicts in city agencies, the Center is able to achieve good return on investment, realize opportunity cost savings, and improve working conditions for city employees. Thus, there is clearly value in a centralized mediation program. Based on its early success, the Center hopes to dramatically increase its caseload over the course of the next few years, and generate further decreases in workplace conflict and its associated costs.

[101] *See* Case Tracking Sheet, *supra* note 48; *see also infra* Figure 1.

[102] *See* City of New York Center for Mediation Services, *supra* note 18.

[103] *See* City of New York Center for Mediation Services Mediation Brochure, *available at* http://www.nyc.gov/html/oath/pdf/med_brochure.pdf.

Figure 1: Cases Referred to the Center (March 2003—March 2005)[104]

TOTALS BY AGENCY

Referring Agency	Referred	Mediated	Resolved
Police Department	30	16	13
Health & Hospitals Corporation	12	10	9
Fire Department	3	3	2
Dep't of Environmental Protection	2	2	2
Dep't of Health & Mental Hygiene	2	1	1
Law Department	3	2	2
Department of Employment	1	1	1
Commission on Human Rights	1	1	1
Totals	54	36	31

TOTALS BY AGENCY AND TYPE OF CASE

Referring Agency	EEO Referrals	EEO Mediated	EEO Resolved	Disciplinary Referrals	Disciplinary Mediated	Disciplinary Resolved
Police Department	30	16	13	0	0	0
Health & Hospitals Corp.	0	0	0	12	10	9
Fire Department	3	3	2	0	0	0
Dep't of Envt'l Protection	1	1	1	1	1	1
Dep't of Health	2	1	1	0	0	0
Law Department	2	1	1	1	1	1
Department of Employment	1	1	1	0	0	0
Comm'n on Human Rights	1	1	1	0	0	0
Totals	40	24	20	14	12	11

[104] As of January 1, 2006, the Center's total referrals are above 80, and total number of cases mediated above 50, with over 45 resolved.

Figure 2: Mediation Evaluations

Participants were asked to respond to twelve statements:

1. The Center's offices were a good setting for mediation.
2. The Mediation Center staff was helpful.
3. Before coming, I was provided with all the information I need to participate.
4. The mediators did not take sides.
5. The mediators took time to listen to my concerns.
6. I feel the agreement (if one was reached) represents a fair arrangement.
7. Mediation helped me understand the concerns of the other participants.
8. Mediation was a better way of handling this situation than pursuing a more formal action.
9. In a similar situation, I would use mediation again.
10. Mediation helped me learn something I can use in the future to solve problems.
11. I would recommend mediation to other employees.
12. I found the forms easy to read and understandable.

Participants rated their response to these statements on the following scale:

1 = strongly disagree * 2 = disagree * 3 = no opinion * 4 = agree * 5 = strongly agree

Sixty-one participants responded. The responses were as follows:

Statement	Average Score	Agree or Strongly Agree
1	4.49	90%
2	4.66	95%
3	4.39	85%
4	4.74	95%
5	4.84	97%
6[105]	4.84	91%
7	4.43	90%
8	4.52	87%
9	4.51	90%
10	4.49	92%
11[106]	4.57	92%
12	4.64	95%

[105] 57 participants responding.
[106] 60 participants responding.

Figure 3: Opportunity Cost Savings Curve

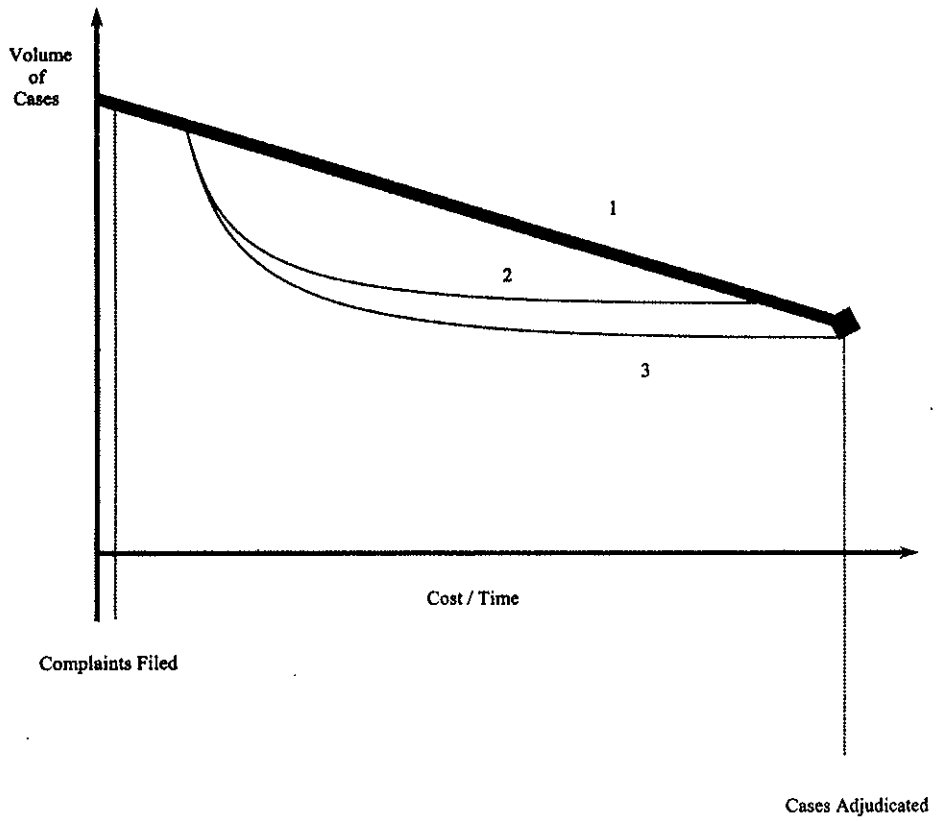
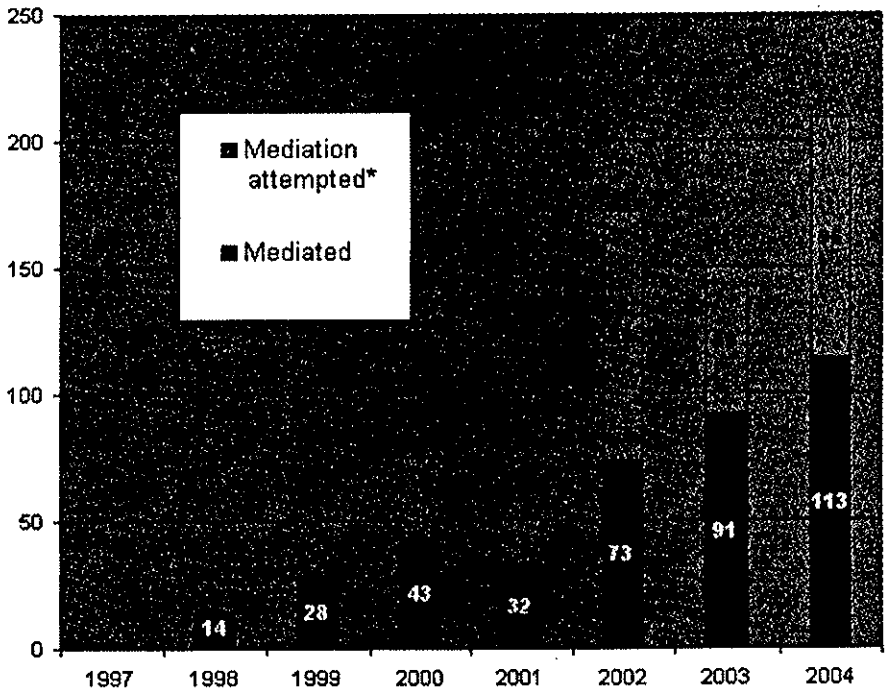


Figure 4: CCRB Mediation[107]



* A case is closed as mediation attempted when the civilian and officer both agree to mediate but the civilian fails to appear for the scheduled mediation twice without good cause, or fails to respond to phone calls and letters to set up such a session.

[107] *See* CCRB Performance, *supra* note 100.

Figure 5: Dana Measure of Cost of Conflict[108]

A. Employees Involved

Employee	Annual Salary	Salary + Benefits	Workweek Hours	Length of Unresolved Conflict (In Weeks)
Nurse 1	$22,000	$33,000	37.5	52
Nurse 2	$33,500	$50,250	28.0	12
Doctor	$100,000	$150,000	37.5	52

B. Cost of Conflict (based primarily on employee salaries & benefits)

Factor	Subtotal
1) Wasted time & energy	$ 4,526.13
2) Reduced decision quality	$ 1,500
3) Loss of skilled employees	$ 42,000
4) Restructuring	$ 1,858.33
5) Lowered job motivation	$ 2,938
6) Lost work time	$ 9,300
7) Health costs	$ 293.85
Total Costs	**$ 60,746.31**

[108] These tables are a simplified version of calculations from Mediation Institute Training International, The Dana Measure of Financial Cost of Organizational Conflict, *available at* http://www.mediationworks.com/mti/costs1.htm (last visited Jan. 10, 2006). This analysis was generated by the Dana Mediation Institute based on a conflict involving a doctor and two nurses in a patient care facility in New England. Although exact calculations may vary, it is clear that conflict has a significant quantifiable impact on the workplace.