

Victim Offender Mediation Refusals

A study of mediator perceptions

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Restorative Justice has been described as a way to bring the victim and offender together to promote a better understanding of the consequences of the crime and healing for the victim and community (Gerard, 1996, p.3). With this in mind, the researcher conducted a quantitative random study of why mediation refusals occur. The researcher interviewed 45 Victim Offender Reconciliation Program mediators who had mediated cases between 2001 and 2003. It is the hope of VORP and the researcher that the findings in this study will allow VORP to become more successful at obtaining mediation agreements. The literature found within this paper suggests that the success of mediation is determined by the knowledge of the mediator. We hope that the use of the instrument designed for this study will allow us to determine the areas that may present the most problems for mediators.

Victim-offender dialogue in a mediation setting is the primary tool used to bring about restorative justice. A review of the literature on restorative justice and mediation suggests many reasons for the success or failure of the mediation process. Factors shown to contribute to successful mediation include: 1) the mediator's style, 2) the ability of the mediator to show empathy, and 3) the mediator's competence. The mediation process, on the other hand, may be unsuccessful due to some of the following reasons: 1) if there is unequal power between the parties involved, 2) if there is a low motivation to come to an agreement, and 3) if there is no follow-up of the offender to make sure he/she complies with agreement that he/she has made. VORP of the Central Valley has an over 99% agreement rate once the parties agree to mediate. The research process here will utilize a case analysis to examine reasons for success or failure during the lead-in to the mediation process in the Victim Offender Reconciliation Program in Fresno, California. Once people are together an agreement is almost inevitable. What keeps people from coming together?

Review of the Literature

Successful Mediation Factors

Mediator's Style

One of the most important factors leading to successful mediation is the style of the mediator. After researching the mediation process, Kenneth Kressel has found that “improving communications is associated with favorable mediation outcome[s].” (Kressel, 2000, p.533). Robert B. Coates also points out that “the mediator’s skills and style played an important role” in the outcomes of the success or failure of the mediation process (Coates, 1994, p.104). An example of the importance of the mediator’s style can be illustrated by an actual offender found within Coates’ Book who suggests that the mediator who was assigned to his case allowed him and his victim to come to an agreement without significant input from the mediator, and because of this he felt he had a good mediator. It was because of this that the victim the stated “you felt he was not there, but you knew he was” (Coates, 1994, p.104). However, in other cases, victims were dissatisfied by the mediators’ passivity. This passivity showed by the mediator was interpreted by the victim as “the [mediator’s inability] to control the meetings” (Coates, 1994, p. 98). As shown by these two examples, the style of the mediator plays a major role in whether or not the mediation process will be successful or unsuccessful.

Empathy

Within the mediation process, the mediator is a third party who is there to act as a “catalyst, confidante and counselor to all.” It is because of this that mediators need to develop a style that is conducive to building empathy with both the victim and the offender (MacCarley, 2003, p.2). Morton and Deutsch contend, “[empathy is] the core component of helpful responsiveness to one another” (2000, p.58). The importance of this can be seen in the book Victim Meets Offender, where empathy of the mediator contributed to a successful mediation session in which both the victim and offender felt that their needs

were met. Through this process, offenders were able to “[understand] the victim’s point of view and be put in their shoes,” which encouraged empathy on their part. At the same time, the mediator’s openness to the offender created positive feelings between the victim and the offender, which helped the mediation process to be successful. This is evident in the statements by the offender who “expressed good feelings about being understood and even cared about by their victim and mediator” (Coates, 2002, p.102).

Competence

Due to the fact that mediators are dealing with two groups of people who are in conflict, it is important for them to be competent negotiators. The need for mediators to be competent stems from the fact that they must be able to help “participants collaborate to create meaning” in order to reach an agreement (Coleman, 2002, p.140). Throughout the mediation process, the mediator must also be able to help the two parties create a “flexible plan for reaching [an] agreement informed by a sound understanding of each party’s interests, and constraints” (Kressel, 2002, p.534). Krauss and Morsella concur that during mediation sessions, it is important that mediators “try to understand the intended meaning” of both parties (Krauss, Morsella, 2000, p.96). Since victims most often come to the mediation process feeling disempowered, it is satisfying for them when they feel that their needs have been met. In conjunction with this type of victim satisfaction and growth of empowerment in both parties, when offenders feel “cared about” at the same time as they feel empathy for their victims, the mediator has competently created a climate in which an agreement can be reached (Coates, 1994, p.104).

Unsuccessful Mediation Factors

Lack of equal power between victim and offender

According to McCold the “restorative justice process provides an opportunity to turn conflict into cooperation, leading to real and lasting resolution,” however, this is difficult when there is an unequal distribution of power between the two groups” (Mackey, 2000, p.3). Most scholars suggest that the “deep

structure of most conflicts is dictated by preexisting power relations” (Coleman, 2000, p.109).

Subsequently, when there is a difference of distributive power between the victim and the offender the mediation process is likely to be unsuccessful in the absence of effective power balancing strategies employed by the mediator. This fact has become apparent “to practitioners [who mediate disputes] in which one side is much more powerful than the other” (Kressel, 2000, p.525). This presence of unequal power within the mediation process tends to thwart the mediation relationship because one party lacks self-confidence and the other has resources, which allows them to not invest in the mediation process. Unequal power is endemic to the victim offender dialogue process, requiring careful attention by the mediator. Victim offender mediation training prepares mediators to use this skill set.

Low motivation to come up with an agreement

McCold has come to believe that true “restorative justice requires that direct stakeholders participate in a process where they determine the outcomes.” He also states that the mediation process which is a “cooperative [approach] can not be compelled although they can be encouraged” (as cited in Mackey, 2000, p.3). This idea however, shows that within the mediation process, the “mediator’s perceptions that the parties have low motivation to resolve the conflict have been found negatively associated with the probability of settlement” (Kressel 2000, p.524). For this reason victim offender mediation training by VORP of the Central Valley, Inc. teaches mediators to assume successful settlement as the inevitable outcome. Within the mediation process, “the victim does not want to get hurt again, and the offender and his or her family do not want to be coercively threatened or retaliated against. Therefore it is understandable that people would want to tune each other out, especially if there is any hint of disagreement, disrespect, or devaluing of one another in the mediation process” (VORP handbook, 2003, p.38). Motivation could be negatively impacted if either party suspects that the other will not work at an agreement respectfully. It is incumbent upon the mediator to help both parties feel valued and empowered so that they can enter into the

mediation process motivated to make an agreement. The concept of a “commitment to be constructive” is a valuable tool in this effort.

Lack of follow-up with the offender to make sure that the agreement is kept

Gerard quotes Kay Pranis in her 1995 article as stating, “the role of the community in community sentencing” is that the “community’s main responsibility is to on-going maintenance of community harmony” (Mackey, 2000, p.2.). McCold also affirms this idea by stating that “a holistic approach to restorative justice [is] needed because it engages the victim, offender, and their communities of care in a cooperative process to determine what is needed to repair the harm to those affected” (Mackey, 2000, p.2). Due to the fact that mediation is thought to be the tool to bring about restorative justice, Pranis concluded, “that its primary tasks in the new configuration are to ‘take ownership’ for its members and to implement the terms of accountability” (as cited in Gerard 1997 p.7). What she seems to be suggesting is that the whole community has a role in following up to facilitate the process of conflict resolution. The importance of follow-up can be seen in McCold’s statement in which she states that “programs which support crime victims, but do not address the offender[’s] needs for that [person’s] accountability and fail to address [the] victim and [the] offender’s relationship and reintegration issues can only be said to be partly restorative” (Mackey, 2002, p.3). This is the reason why VORP trains mediators to follow up with offenders and victims to make sure that restitution is happening, and employs a full-time agreements manager. To encourage successful resolution, VORP-trained mediators refer their clients to a person within the agency whose job it is to connect the offender and his family with support services. If the agreement is not being kept, the mediator follows up to find out why and decides whether or not to revisit the agreement or send the case back to court. In cases without this type of follow-up, Kressel states “victims were most dissatisfied when there was mediation lacking authority in assuring completion of restitution and/or inadequate punishment” (1994, p.97). Overall, the mediation process is designed to help heal the victim and offender’s

once-severed relationship, through community participation. The end result is that the victim and the offender through the mediation process are able to make things right between themselves. However, if one of the disputing parties feels as though the mediation process failed to do this, than he/she will feel cheated and true restorative justice will not be accomplished.

The literature does not discuss who or what causes mediation refusals. However, it does suggest that lack of motivation, unequal power, and lack of follow-up are factors in unsuccessful mediations. The researcher used a random quantitative study to find out why mediation refusals occur. The researcher analyzed through open-ended questions why mediators who volunteer for VORP believe mediation is refused, and who is most likely to refuse mediation. The literature review above will then be compared against these findings to determine if they run concurrent with the findings of the researcher.

Methodology

The dependent variable within this study is the reason why mediation refusals take place in the mediation process of Victim Offender Reconciliation Program (VORP) of the Central Valley, Inc. The data within this study was collected by surveying people who have acted as a mediator for VORP in the last three years. The independent variables within this study are the professional status and age of the mediators. Due to the type of survey the researcher conducted, and because the mediators are some distance from the agency and have completed their mediations some time in the past, the most practical way to collect data for this survey was to create a telephone questionnaire. The objective is to learn why mediation refusals may occur. Since the offenders are juveniles and confidentiality is an issue, the best sources of information available are the mediators who were involved with the cases.

The researcher used a random method of choosing mediators who have been involved with cases in which one or both parties refused to become involved in the mediation process, thus preventing the opportunity for successful mediation. VORP of the Central Valley, Inc. has over 7,000 case records dating

back to 1982. Using records from 2001 through 2003, the researcher selected 95 mediators to be interviewed out of a possible 708. However, the researcher was only able to reach 47% of the total 95 mediators, meaning that 45 mediators were actually interviewed. The selected subjects were stratified based upon their status and age.

Results

The demographics that were utilized in this study were gender, age, years of mediation experience and ethnicity. The researcher put thirteen questions to the forty-five individuals that would become his sample. SPSS software was utilized to develop the statistical information that is found in the results section of this paper. The questions were designed to measure the different perspectives of mediators regarding why mediation refusals might occur. The demographic variables are discussed below, along with the data collected by the researcher, which compares and contrasts with the literature review above.

Gender

Overall, the researcher found within his sample that the majority of mediators were women. Males made up 37.8% of the total sample. This is a relatively small number when compared to the 62.2% of the female mediators who were interviewed. The researcher's assumption was that it would be more evenly split between males and females.

Age

The ages of the mediators varied, however, the group that was represented the least in this study was the mediators who were between the ages of 18 and 20, because they made up only 2.2% of the total sample. Mediators who were between the ages of 21-35 represented 31.1 percent of the total mediators interviewed, which was significantly higher than the mediators who were between the ages of 18-20. However, the age group that was most prevalent in this study was those mediators who were between the ages of 36-50. Overall, this age group made up a grand total of 42.2% of the sample. An even more

interesting figure is that mediators between the ages of 51-70 made up 24.4% of the surveying population. VORP of the Central Valley, Inc. seems to attract mature mediators.

Ethnicity

It was thought that Caucasians would make up the majority of the researcher's sample. This assumption held, with African Americans making up only 2.2% of the total mediators surveyed, Asians representing 2.2%, and Hispanics 11.1% of the mediators who participated in this study. These numbers pale in comparison to Caucasians who made up 66.7% of the mediators who participated in this study.

Years of mediation experience

Before reviewing the results of the study, the researcher believed that the majority of the mediators would have had less than one year of mediation experience. However, the individuals who answered this survey who had 1-5 months of mediation experience represented 20.0% of the sample while 28.9% of the overall sample claimed to have been mediating for 6-11 months, giving a cumulative percent of only 48.9, less than half of the overall mediators surveyed for this study. The majority of the individuals surveyed stated that they had been mediating between 1 and 5 years, giving them an overall accumulation of 33.3% of the total mediators surveyed. One of the statistics that really sticks out is the fact that 15.6% of the individuals who were surveyed had been mediating between 6 and ten years. The number of mediators who had more than ten years of mediation experience only represented 2.2% of the overall mediators who were surveyed for this study. VORP of the Central Valley, Inc. has been in operation over twenty years.

Survey Questions

The first four questions of this study were designed to measure the mediator's perception of who is more likely to cause mediation refusals. The four questions that the researcher used to measure the mediator's responses were 1) How often did victims refuse mediation? 2) How often did male victims refuse

mediation? 3) How often did female victims refuse mediation? and 4) How often did parents of victims cause refusals?

The charts in Appendix 1 show the responses made by mediators. The responses by these mediators suggest that they do not perceive victims as the ones who refuse to mediate. This contrasts with the anecdotal evidence provided by VORP of the Central Valley, Inc. staff who see victims as the more likely refusers. However, 35% of the mediators (16) did claim that groups of victims sometimes in fact refused mediation. Mediators saw male victims as a major source of mediation refusals, because 26.7 (12) of the mediators claimed that males often caused mediation refusals. Female victims, on the other hand, were perceived by the mediators to be less likely to cause mediation refusals because a majority of the mediators or 45.5% (20) believed females were not to blame for the mediation refusal that they experienced. When the mediators were asked to give their perception of the parents of the victims to see whether or not they caused mediation refusals, 44.4 (20) of the mediators surveyed thought that parents rarely caused mediation refusals.

The next five questions were designed to help researchers understand whether or not groups of offenders, male offenders, female offenders, or parents of offenders were the cause of mediation refusals. The questions that were designed to measure the perceptions of the mediators are: 5) How often did offenders refuse mediation? 6) How often did male offenders refuse mediation? 7) How often did female offenders refuse mediation? 8) How often did parents of offenders cause refusals?

Within the case files of VORP exist a high number of cases in which a group of individuals are tied together in one case. This led the researcher to believe that there would be a high number of mediators who had dealt with and experienced mediation refusals from individuals who were involved in these types of groups. Overall, 46.7% (21) of the mediators who made up this sample came to the conclusion that offenders rarely caused mediation refusals. Another interesting finding in this study is that the mediators'

perceptions of high mediation refusal among male offenders seem to differ from the mediators in this study who seem to think they are not a high source of mediation refusals. Twenty out of 45 mediators or 44.4% of the sample came to the conclusion that male offenders never caused mediation refusals. Only a small minority or 8.9% (4) claimed that male offenders caused mediation refusals often. Though 46.7% (21) of the mediators felt female offenders never caused mediation refusals, a higher number of mediators felt that females were more likely to cause mediation refusals than males. When the mediators were asked about the parents of the offenders and if they were the cause of the mediation refusals, the majority of the respondents or 51.1% (23) of the mediators thought that parents of offenders never cause mediation refusals. Only a small minority or 6.7% of the mediators who were surveyed suggested that the parents of the offender sometimes cause mediation refusals.

The survey then turned from who was more likely to cause mediation refusals, to the factors that may cause mediation refusals. The questions that were developed to measure the perceptions of the mediators are 9) Was age a factor in any of the refusals that you experienced? 10) Was gender a factor in mediation refusals? 11) Did ethnicity play a role in the refusals you have experienced? 12) How often did safety factors contribute to mediation refusals?

Age did not seem to play a part in mediation refusals with 68.9% of those interviewed saying that age never played a part in the refusals they experienced. When mediators were asked if gender was an important factor that could thwart mediation, a majority of the mediators or 64.4% came to the conclusion that gender never caused mediation refusals. Overall, a combined 22.2% of the surveyed population came to the conclusion that they did not know whether or not gender was the factor that ultimately caused the mediation refusal that they had experienced.

In addition to these questions, the researcher wanted to find out the mediators' perception of the importance of ethnicity when it came to mediation refusals. In response to this, an overwhelming 68.2% of the mediator's came to the conclusion that ethnicity had nothing to do with mediation refusals.

One of the main reasons why mediators were asked how often safety factors contributed to refusals was due to the fact that within the literature review and in the cases found within VORP, it appears that safety factors are a major reason why mediation refusals occur. However, 48.9% of the mediators that made up the sample came to the conclusion that safety factors never caused mediation refusals. Only 8.9% of the total mediators thought that safety factors sometimes caused mediation refusals, while 2.2% thought that safety factors often caused mediation refusals.

The instrument that was devised to discern the mediators' perspectives of why mediation refusals occurred utilized short answer questions. The questions that the mediators were asked to respond to are 1) give the main reason you believe mediation is refused, 2) how would you try to reverse a refusal so that both parties would participate in mediation? 3) Please list any ideas you have that may help VORP be more successful in obtaining agreements to mediate. In the following section we will explore the major themes that derived from these questions.

Out of all of the answers to the question "give the main reason you believe mediation is refused," the answers that were given the most were 1) safety, 2) the victim and offender do not understand the mediation process, 3) the victim or offender lack family support and encouragement to be part of the mediation process.

The next question was devised to see how the mediators would turn what started out as a mediation refusal into a mediation success. In response to this question, the answer that mediators thought was most important was to explain to the victim and the offender the mediation process thoroughly. In trying to help the two parties come together the mediators also felt that it was important to explain the benefits of the

mediation process. Another important factor that ranged through the responses of the mediators was that cases needed to be processed faster so that apathy does not occur in the victim or offender. Another key that the researcher found was that mediators need to be actively listening and trying to determine what the barriers to mediation are.

The last question in this survey was designed to try to obtain ideas for VORP so that they could become more successful at obtaining agreement through the mediation process. The main view offered by the mediators suggested that the mediators themselves have to be able to present themselves as trustworthy. Another was in which the mediator's felt that VORP could achieve more success in obtaining agreements was by incorporating a mediator mentorship program. One of the aspects that was also spoken about was that in order for VORP to become more successful, they needed to become more public about mediation and what it is. Another theme that was mentioned frequently was the fact that mediators need to be closer to the offenders' age and ethnicity.

Discussion

The major findings of this survey concluded that the majority of the mediators believe that among victims, the majority of the time it is groups of victims that are most likely to cause mediation refusals. Male and Female offenders were viewed as being unlikely to refuse mediation. It was a surprise to discover that mediators did not see age, gender, or ethnicity as important factors causing mediation refusals.

Within the literature review of this paper, it is found that both lack of competence and lack of motivation to come up with an agreement within the mediation process can determine the failure or success of mediation. The mediators in this study were asked to give the main reason why they believed mediation is refused. Safety and lack of understanding of the mediation process were the primary answers given. When analyzing this data it becomes apparent that there is a relationship between the competence of the mediator and successful mediation outcomes. The reason that this relationship exists is due to the fact that

when there is a competent mediator, he or she is able to provide the information needed to the parties so that they can thoroughly understand the process of mediation. The researcher also has come to the conclusion that a competent mediator would be able to help the victim and offender see the overall benefits of mediation. Our key finding is that competence of the mediator and a perception of safety are the necessary ingredients for successful victim offender dialogue. This finding flies in the face of anecdotal evidence to the contrary.

The literature suggests that a perception of lack of safety is the primary reason for mediation failure. The mediators surveyed concur, despite the fact that the majority of the mediators answered that safety issues never caused mediation refusals. A logical conclusion is that a competent mediator creates the sensation of safety which permits mediation to go forward. This indicates that the perception of mediator competence is the key variable in victim offender mediation refusals. The less competent the mediator is perceived to be, the more likely it is that a party will refuse. This finding matches the experience of the elder of the authors, who has never had a mediation refusal by a party in over twenty years of victim offender mediation, while college students taking a course in victim offender mediation sponsored by VORP of the Central Valley, Inc. commonly experience several refusals before completing a case, some in the last year having as many as seven refusals before a successful case.

Limitations

One of the main limitations of this study is that the mediators, who can never know the real reason why the mediation refusals that they experienced occurred, provided the information for the study based on their perceptions. They may simply be mistaken. Another significant problem is the high percentage of individuals who modestly acknowledged that they simply did not know the answer to the question. VORP of the Central Valley, Inc. has no way to definitively track mediation refusals, although as a result of this study much more attention is being given to the issue.

Another limitation may have been the instrument itself. The wording may have confused some participants. They may not have been able to understand when the question involved groups or individuals, males or females. They may not have responded accurately to the questions involving differences between victims and offenders. Another key factor in their responses may have been social desirability, their desire to give answers that reflected well on them and the agency. The fact that the researcher was an intern with the agency may also have affected the responses.

The researcher tested the instrument prior to conducting the study. While testing this instrument the researcher chose mediators who were from different backgrounds, age, levels of education, and life experience. Through this process the researcher was able to adjust the instrument to measure the responses more accurately. The results serving to confirm anecdotal evidence from very experienced persons in the field suggests the instrument's efficacy.

Implications

VORP of the Central Valley, Inc. has been at the forefront of the field in training new victim offender mediators. This important mission is seen through this study as being at odds with producing successful mediations, since inexperienced mediators who do not appear to be competent are most likely to generate mediation refusals. A method for revisiting those who refuse an inexperienced mediator may be necessary to offer the process to the greatest number while continuing to prepare new mediators. This learning is of great importance to VORP of the Central Valley, Inc. and has important implications for its work, and the work of the hundreds of victim offender dialogue agencies in the U.S.

Future Research

This preliminary study has raised significant issues for the operation of VORP of the Central Valley, Inc. The researcher believes that VORP needs to develop an instrument to survey victims and offenders who refuse to be part of the mediation process, and to offer these people a more experienced mediator before

accepting a final refusal. This could be done in person or by phone at the time of the refusal. Further research into VORP training methods is necessary to determine what qualities or skills engender the perception of mediator competence necessary to a successful mediation. Mediator age needs to be discerned as a significant variable in future studies, since age and competence tend to be connected in the minds of many people.

Conclusion

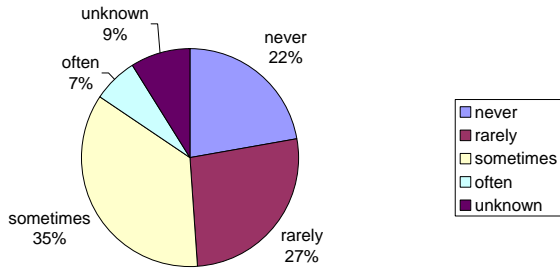
The researcher utilized a quantitative random study to better understand why mediation refusals occur. This study was conducted on behalf of Victim Offender Reconciliation Program of the Central Valley, Inc. so that they can become more successful at obtaining mediation agreements. It is the hope of the researcher that this study will not only help VORP, but will also help change every life they touch through the dedicated mediators who help make restorative justice possible in Fresno, California.

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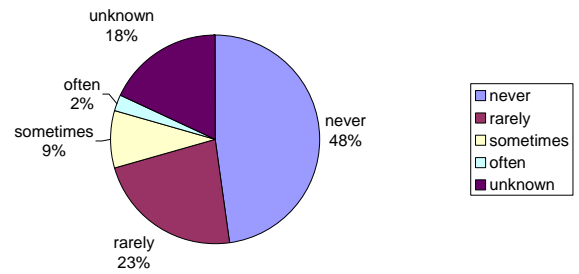
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Appendix 1

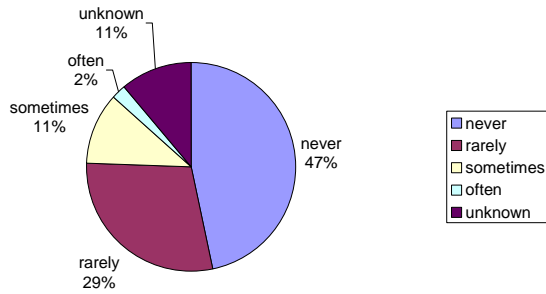
Victim Refusals



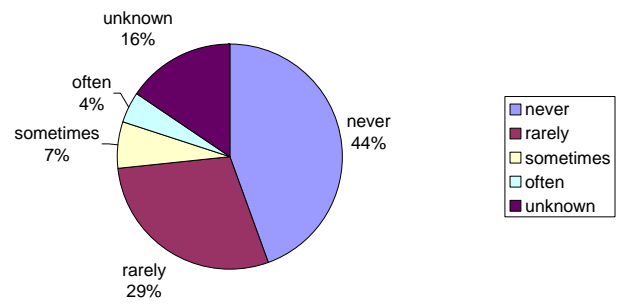
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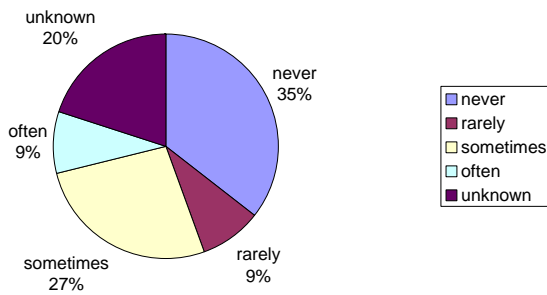
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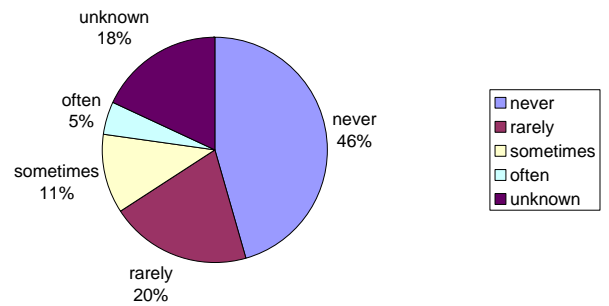
Victim parents refuse



Male victim refusals

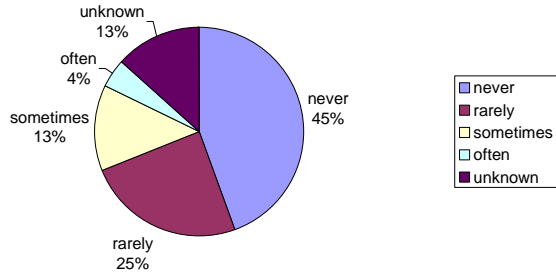


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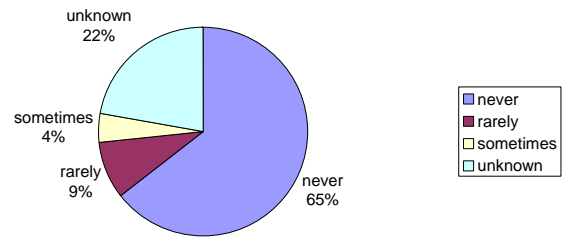


Mediation Refusals

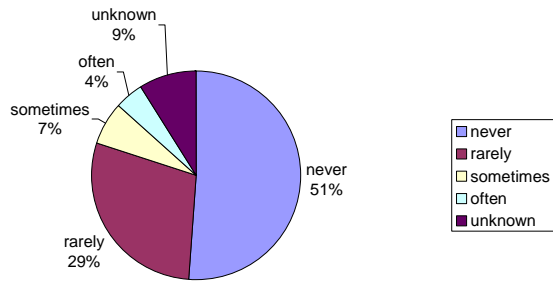
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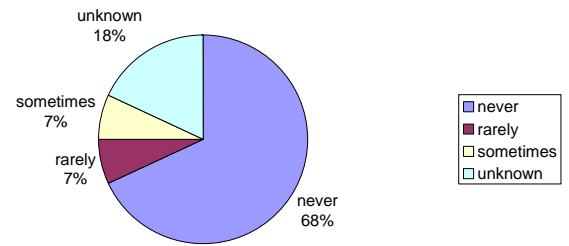
Gender as a factor



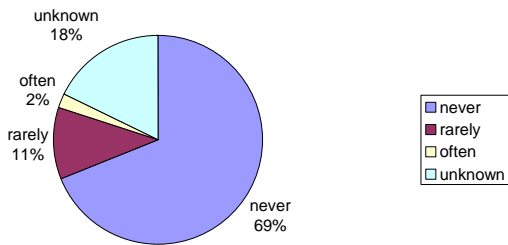
Offender parent refusals



Ethnicity as a factor



Age as a factor



Safety as a factor

