Introducing Cognitively Impaired Individuals to Victim-Offender Mediation

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For a Restorative Justice approach to be truly effective, it must be comprehensive enough to include any individual. In the context of a Victim-Offender Mediation (“VOM”) or Victim-Offender Dialogue (“VOD”), however, which requires nuanced decision-making, good listening skills and the sophistication and humility to accept wrongdoing or apologize and forgive, it is tempting to exclude certain individuals who may not seem, at first blush, to have the automatic capability of performing those activities – i.e., individuals with cognitive impairments. However, these people deserve to be included and would be valuable participants in the restorative process, and to the larger community who may be incorporated vis-à-vis the participation of the cognitively impaired individual. Though current VOD models do not contain safeguards to successfully incorporate individuals with cognitive impairments, such safeguards can and should be made, and are explored and explained below.

I. Introduction

Restorative Justice offers a victim and his offender the opportunity to fill in many of the holes that the criminal justice system leaves empty.1 Specifically, various forms of Restorative Justice provide a forum for the offender to apologize to the victim, for the victim to forgive the offender, for the offender to offer tailor-made reparations to the victim, and for the victim to restore the offender to the community in return. Particularly, in VOM or VOD, the victim and offender, perhaps accompanied by family and/or supporters, engage in a discussion mediated by

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1 “VOM breaks away from the more traditional “trail ‘em, nail ‘em, and jail ‘em” approach of the justice system. It deals primarily with offering offenders of less serious crimes a chance to repair harms they caused, and victims a chance to have their questions answered. VOM focuses on having the offender pay back the innocent victim and society for the harm of his or her crime.” Catherine Pugh, Comment, What do you Get When You Add Megan Williams to Matthew Shepard and Victim-Offender Mediation? A Hate Crime Law That Prosecutors Will Actually Want to Use, 45 CAL. W. L. REV. 179, 215 (2008).
a neutral third party in which they bring up each of those elements. Though there may be some tangibility to these components – i.e. creating specific reparations for the offender in the form of paying money to the injured party – most of it rests on both parties’ ability to understand, apologize, forgive, and take responsibility. These skills can be multi-layered and extremely complex. Thus, though this seems to be taken for granted in victim-offender mediation models, it seems that both parties would need to be capable of having a high enough mental capacity to understand and express these complex processes in order to effectively participate.

While VODs seem to cater to intellectually capable individuals, crime occurs throughout society – regardless of gender, race, age, and mental capacity. If an individual does not possess the ability to process complex emotions over time (since the initial incident) and acutely (for example, by reading the other party’s social cues within the actual mediation), take responsibility for his actions, or even use words during a VOD, does that mean he is unqualified to participate? Taken a step further, does this mean that individuals with developmental, social or cognitive disabilities are essentially exempt from the Restorative Justice system? And if not, what happens when either the victim or the offender are mentally impaired in some way? Would offenders understand their wrongs in a way that would reduce individualized recidivism, or even allow

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2 “VOM is a form of reparative or restorative justice where the victim has a face-to-face dialogue with her offender about the impact of the crime committed against her,” and “focuses on remedying the harms caused rather than on retribution.” Id. at 214.

3 Sexual assault statistics, for example, illustrate the diversity across various identifying characteristics among victims. Regarding age, “More than half of all rapes of women occur before age 18; 22% occur before age 12.” (Full Report of the Prevalance, Incidence, and Consequences of Violence Against Women, Findings from the National Violence Against Women Survey, November, 2000). National Sexual Violence Resource Center website, http://www.feminist.com/antiviolence/facts.html. Additionally, sexual violence does not discriminate on the basis of race, as “about 81% of rape victims are white; 18% are black; 1% are of other races.” Id., citing Violence Against Women, Bureau of Justice Statistics, U.S. Dept. of Justice, 1994. Moreover, sexual discrimination does not exempt victims based on their income, as “about half of all rape victims are in the lowest third of income distribution; half are in the upper two-thirds. Id., citing Violence against Women, Bureau of Justice Statistics, U.S. Dept. of Justice, 1994.
them to provide meaningful apologies? Likewise, would a mentally challenged victim deserve or benefit from an offender’s heartfelt apology, in the same way one would benefit if he was fully cognitively functional? What changes or safeguards can be implemented within VODs to help these individuals understand and participate in the system? How should VOD models be modified to accommodate these sorts of concerns?

a. Method

This project initially set out to examine whether St. Louis has a restorative approach to dealing with mentally ill offenders and victims and, if there is not one, to consider “ideal” methods of handling parties who do not understand wrongdoing, and how to get them to understand. I interviewed social workers for juveniles, adults and the elderly, an expert with social justice in the mental health services sector, a public defender, a neuroscience M.D./Ph.D. student, a mediator, and a law lecturer for mediation and alternative dispute resolution who is involved with restorative justice within the St. Louis community. After speaking with such a wide cross-section of experts about this issue, it became clear that the initial question – whether St. Louis has a restorative approach to dealing with mentally ill offenders and victims – incorrectly presupposed that there should be or is a restorative approach to dealing with cognitively impaired parties. Thus, the adjusted primary question became whether cognitively impaired victims or offenders were suitable for any type of restorative approach. From there, discussion focused on when and how it would be appropriate to integrate such individuals. For parties thought to be “appropriate” for a VOD or restorative justice, it was important to consider how best to get such parties to understand specifically the harm caused, how one party could forgive, and how the other party could repair. Of course, determining who is appropriate for this system necessarily begs the question of who is not – so additional time was spent deliberating
over where, if possible, to draw the line between which cognitively impaired individuals would
and would not be appropriate for Restorative Justice. Finally, interviewees considered
constructing an “ideal” restorative justice model for people within these categories, and what
elements would be the most helpful to give parties to such a process a meaningful experience.

b. Findings

It seems, after these discussions, that the line should only be drawn when both parties –
regardless of their cognitive capabilities – are unwilling to engage in mediation together. It
appears that, after a certain cognitive cutoff, individuals may not be able to really process
apology or harm, or engage in a dialogue. Though they may not recognize any harm committed
against them, or appreciate an apology from the offender, their families, caregivers or other
supporters may still be affected, and may greatly benefit from being able to participate in some
form of VOD on behalf of or in conjunction with these parties. There are, however, individuals
who are still considered cognitively impaired, but are more high-functioning, and may directly
benefit from participating in a VOD. In either scenario, it would be appropriate to modify a
typical VOD to include various safeguards to accommodate these individuals. Such
modifications include, but are not limited to:

i. Careful screening of both parties and the supporters or family of the
cognitively impaired individual;

ii. Identifying and understanding what type of impairment the person has, how it
affects that individual’s actions and how it may impact them during the VOD;

iii. Preparing any involved non-impaired parties for how to understand the
impaired individual’s condition;
iv. Pinning down, in concrete and simplified terms, the events of the incident and the cognitively impaired individual’s feelings, to help the individual recall events or express himself during mediation;

v. Revising actual mediation-related documents to accommodate varying degrees of understanding;

vi. Reading those documents out loud to all involved parties;

vii. Asking questions simplistically to isolate each concept and focus on one at a time;

viii. Leaving room for the actual process to be flexible, i.e., taking periodic breaks to allow the individual to process information; and

ix. Including family and medical/psychiatric experts to help assess how to best get the individual to be receptive, or whether he/she is appropriate for mediation.

c. Brief Proposal

Bearing these suggestions in mind, I propose that St. Louis make room for VOD involving participants who may be cognitively impaired. It will be important to work with the medical community to gain a deeper understanding of how these individuals may most benefit from any restorative justice experience. Additionally, it will be important to implement the changes broadly categorized above. In conjunction with this proposed program, it will also be helpful to initiate advocacy within the legal, social work and medical community, alerting people that such a possibility exists, why it may be useful or helpful, what it entails, and who would be appropriate for it. It is possible that many people who would be appropriate for this type of VOD have self-selected out of it because they were not aware that it was possible, or because
they did not think they were qualified to participate. Adding the advocacy component will be crucial to integrating this option – and thus, its participants—into the community. Additionally, it will be important to seek and draw upon the feedback both of the involved medical experts, and of parties who participate in this variety of VOD in its nascent stages, to continually improve the program and understand how to maximize its usefulness to parties of varying degrees of cognitive capability.

II. Lowering the Barrier to Entry in VOD for Cognitively Impaired Individuals

All parties interviewed seemed to agree that, at least in some circumstances, it could be conceivable that parties with cognitive disabilities could and should be included in the restorative justice process. The sole medical interviewee suggested some more discrete line-drawing between who would, categorically, be appropriate for VODs, and who would not. The rest of the interviewees, all either social workers or attorneys (or both), provided more anecdotal discussion of case-specific scenarios in which VODs would or would not be appropriate for individuals with cognitive disabilities.

a) Where and How to Draw the Line

In light of how difficult it is to classify individuals’ cognitive capabilities, Washington University in St. Louis Medical Student Josiah Gerdts suggests that determining which cognitively impaired individuals are suitable for VOM should most easily and reasonably be based on IQ, across, rather than between, various disabilities. Classification difficulty stems, in part, from the transience of certain disorders. For example, approximately five to ten percent of the pediatric population suffers from developmental delays, which will diffuse with age.

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4 Telephone Interview with Josiah Gerdts, M.D./Ph.D Candidate in Neurobiology, Washington University in St. Louis, School of Medicine (Apr. 10, 2009).
Additionally, a transient cognitive disturbance like “a viral infection could cause encephalitis,”
or “someone could be exposed to a substance that could lead to strange behavior for a while.”

Though such developmentally delayed or acutely-suffering individuals may act cognitively
impaired for a short time – for example, while committing an offense, or while engaging in a
post-trauma VOD with the victim – the effects are not long-term. The cognitive capability
classification is further nuanced because, in addition to temporarily cognitively impaired
individuals, “one to three percent of the general population is mentally retarded,” and “severe
mental retardation affects .3 percent of the population.” In addition to these percentage
numbers, Gerdts notes that “variations within a disorder are so great that [individuals who
possess that disorder] are not a homogenous group. Some Schizophrenics, for example, are
psychotic, and some just have mild delusions.”

Thus, to account for the fact that many cognitive impairments could be temporary, and
that variation among individuals with various labeled cognitive disorders (like Down Syndrome
or Autism Spectrum Disorders) may be greater than variation between individuals with such
disorders, Gerdts concludes that “the ‘line’ between who can’t do restorative justice and who,
among these individuals, can, should be defined in terms that transect disorders” and cannot be
drawn to exclude all members with a certain disorder. Groups on either side of this “line”
should be “classif[ied] . . . in terms of deficits and levels of deficits.” He explains that “deficits”

5 Id.
6 Id.
7 Id.
8 Id.
9 Id.
are qualities that could be ascribed to an individual because of his disorder – such as the inability
to process certain concepts, speak for oneself, etc. Gerdts notes that “IQ is the most measurable
and easiest to use to categorize,” and is useful for determining “absolute cutoffs” because it
“correlates pretty well with a person’s overall understanding, and their cognition.”

The IQ scale ranges from 1-200, with 100 being average. Individuals with mild retardation have an IQ
of approximately 50-70. These individuals “can read simple writing up to a sixth grade level,
can understand things like addition and subtraction, can write their names, and simple
messages.” They are typically members of a “supported living” environment or a “group
home,” and “may have a social worker that sees them on a regular basis, but they can live on
their own, and can be employed at a routine job.” “Standard Down Syndrome” individuals
would be placed within this category. Gerdts notes, however, that despite these individuals’
limited academic achievements, they “can certainly understand apology and harm.” Similarly,
individuals with “moderate retardation have IQs ranging from 40-50.” They have “very simple
academic achievements;” for example, they “can read some words, can write their names, and
count.” Like individuals with mild retardation, these individuals “typically live in a group
home.” However, they “are not in charge of their own finances,” and “can be employed,” but

10 Id.
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id.
typically only “in sheltered workshops.”

Universe individuals in those two categories, individuals with “severe retardation” range on the scale from 20 to 40, and “have no academic achievements. They live in group homes or nursing homes.” And, finally, profoundly retarded individuals have IQs below 20, and possess similar quality of life characteristics as individuals who are severely retarded.

When asked to discuss the relationship between individuals’ placement on the IQ scale and their capacities to participate effectively in VODs, Gerdts concluded that individuals in the two upper categories of retardation could probably, with assistance, engage, while individuals in the latter two categories would be exempt. Gerdts noted that individuals within the upper two echelons of mental retardation are capable of being “taught boundaries,” and that “explicit rules are something that anyone [within these categories] could learn.” Unlike those individuals, however, people in the lower two categories are not capable of processing those complex ideas, are “in constant medical care,” and are too incapacitated to participate.

Unlike Gerdts, interviewees from the legal and social work community provided more anecdotal and circumstantial responses, noting, generally, that cognitively impaired individuals could be included in VODs, subject to certain limitations, but not drawing any strict lines between who may participate and who may not.

17 Id.
18 Id.
19 Id.
20 Id.
21 Id.
For one interviewee who illuminated situations in which limiting involvement from cognitively impaired individuals in VODs would be appropriate, such limitations did not even hinge on the individual’s ability to “understand.” Michigan Social Worker Wanda Joseph, for example, believes VOD involving cognitively impaired individuals may be prevented in “situations where the victim continued to be in a vulnerable relationship with the offender, such as [where] the offender was the caregiver, and would have extended time alone with the victim after the mediation.”22 She notes that “another extremely challenging situation . . . would be if the impairments included the inability to speak or communicate directly.”23 However, Joseph contends, as discussed later, that even individuals in this “extremely challenging situation” could be included in VOD, with extensive preparation.

Other perspectives note that, at a certain point, an individual’s inability to understand the concepts within a VOD may make it inappropriate for them to participate.24 Instead of creating a hard-and-fast rule about who was appropriate for VOD, however, Missouri Public Defender Janet Thompson believes an individual’s propriety for VOD participation is “something that needs to be looked at on a case by case basis.” She “had one client, for example, who was not only mentally retarded, but had schizophrenia.”25 Though she admittedly “d[id not] know if he

22 E-mail from Wanda Joseph, Mediator and Social Worker, Creative Conflict Resolutions (Apr. 1, 2009) (on file with author).

23 Id.

24 Telephone Interview with Janet Thompson, Assistant Public Defender, State of Missouri (Mar. 31, 2009). “At a certain level, the individual may have such a limitation that it might not be appropriate, because those limitations are going to impact their ability to participate.” Id.

25 Id.
would have been capable of participating in that process, because his function was so low,” she
“think[s] that’s a question that should be explored.”26

Another interviewee provided a useful framework of VOD goals to pinpoint the difficulty
in achieving those goals when either the victim or the offender has a cognitive impairment.
According to Washington University Law lecturer James Reeves, “generally, under restorative
justice principles, a primary objective of the dialogue process is to help the offender understand
the harm that s/he caused and who has been harmed by the actions of the offender. The parties
should also be capable of discussing how the harm can be repaired and who has responsibility for
repairing the harm. Obviously if either the victim or the offender has a cognitive impairment, the
impairment may interfere with the impaired party’s ability to engage in a productive dialogue.”27

While each individual who expressed circumstances under which, or reasons why, VOD
participation by cognitively impaired individuals may be limiting or should be limited, each one,
and others within the community, articulated benefits to their inclusion, and circumstances under
which it would be helpful or appropriate. Professor Reeves notes that while, as discussed above,
the cognitively impaired individual may not be able to participate conventionally, there is not
necessarily a downside to including him or her. “Unlike the traditional criminal justice system,”
he notes, the victim-offender dialogue process is not a punitive process, so there is no danger of
“punishing” an offender who may not understand that the offender’s actions were wrong. The
goal of the dialogue process is healing, so people other than just the victim and the offender may
benefit [f]rom the process.”28 “In terms of limitations from a process perspective, [Reeves]

26 Id.
27 E-mail from James Reeves, Law Lecturer, Washington University in St. Louis, School of Law (Apr. 3, 2009).
28 Id.
would not anticipate that a dialogue involving an impaired person would be significantly
different than any other dialogue.”  

b) Why and When to Include

After determining, by and large, that individuals with cognitive impairments may and
could be included in VODs, responses as to when such inclusion would be appropriate varied
along a spectrum. Interviewees ranged from suggesting (1) that determinations should be made
on a case-by-case basis depending on the nature and severity of the individual’s impairment, (2)
that inclusion should depend on the victims’ desired outcome, (3) that a cognitively impaired
individual could always be present provided that family or supporters were there to speak on his
behalf, (4) that cognitively impaired individuals may participate because they are similar to other
categories of individuals who successfully participate, (5) that such individuals should always be
present because it is important to the process and, (6) that they may participate in their own right,
because there is intrinsic value in it for them.

Some individuals suggest that propriety should be examined on a case by case basis,
turning on the extent of the individual’s ability to comprehend the concepts involved in a VOD.
According to them, the determination “depends on the level of cognitive impairment, and how it
impacts them. A lot of clients have problems [in the area of mental retardation].” However,
some restorative justice experts believe “they can understand that they've hurt someone. They
can apologize to the best of their ability.” Others find, however, that “depending on the nature
and extent of the impairment . . . it may be that the impaired person would not be capable of

29 Id.
30 Thompson, supra note 24.
31 Id.
directly participating in the dialogue at all.” 32 Instead, the most effective and realistic way to include such individuals would be to invite family members or other guardians to speak on the individual’s behalf.

Other approaches to determining suitability of the participation of cognitively impaired individuals turn on what the victim wants from the VOD, and whether that can be achieved. Some interviewees believed VOD would be possible “if, for example it’s the offender who has the cognitive impairment, but the victim still wants something.” 33 Though the “voice” a victim can achieve in this context “may be a soliloquy rather than a dialogue,” VOD would still be appropriate because “this process is about giving the victim a voice.” 34 In addition to giving the victim an opportunity to speak, “if the offender has an impairment and the victim hears about that, that may answer some of the victim’s questions – what happened, and why me.” 35

Another approach suggests that impaired individuals may bring about a productive VOD for the non-cognitively impaired individuals, provided that they may speak and engage with each other on behalf of the impaired individual. In this case, it may be “possible to have a productive dialogue when one party has an impairment. For example, where the offender has a cognitive impairment but is well supported by a parent or guardian who can attend the dialogue and speak with the victim on behalf of the offender, the dialogue process may be helpful. While the offending juvenile may get little out of the dialogue in terms of understanding the harm, etc.,” Reeves notes “the victim may benefit by having an opportunity to meet the person who

32 Reeves, supra note 27.
33 Thompson, supra note 24.
34 Id.
35 Id.
committed the offense and by having someone speak on behalf of the offender to acknowledge responsibility for the offense and the resultant harm.”

However, “a discussion of repairing the harm may be limited. Similarly, where the victim is the party with a cognitive impairment, those impacted by the offense in addition to the victim (family, friends) could benefit from a dialogue although the victim may not understand the dialogue process. If family members, for example, can attend the dialogue and accept an apology from the offender, be present on behalf of the victim when the offender takes responsibility for the harm, and discuss repairing the harm on behalf of the victim and the family, a dialogue may be productive.”

Though Reeves’ determination also looks at what the victim may be able to get out of the process, he takes the model a step further, noting that the cognitively impaired individual’s participation, regardless of what side he is on, may be productive if supporters are present to speak on his behalf.

Other interviewees suggested that cognitively impaired individuals should be included in a VOD because their deficits are similar to those of other groups who are successfully included – namely, children. According to Community Mediation Center of Independence Director, Diane Kyser, VODs with cognitively impaired individuals can be “likened . . . to a young child participating in RJ.” Kyser included that “brain reasoning capacity does not really kick in until the second half of the second grade or the third grade, but kids are able to make choices long before that.” Others agreed with Kyser’s philosophy, and noted that cognitively impaired individuals would not only be appropriate for VOD because of their similarity to children but, in

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36 Reeves, supra note 27.

37 Id.

38 E-mail from Diane Kyser, Director, Community Mediation Center (Mar. 19, 2009).

39 Id.
some cases, advantaged. According to Sandee Gamet, Kyser’s colleague at the Community Mediation Center, “children have a wonderful capacity for asking for or giving genuine forgiveness. Their lives are not nearly as messy or baggage laden as adults. My experience would be that this would be the same for individuals who function at a mental age of a child.”40 Karren Baird-Olson of California State University – Northridge echoes Gamet’s perspective that people with cognitive disabilities may, in fact, be excellent candidates for VODs. According to Baird-Olson’s “experience . . . often those with learning challenges are at an advantage because they are not hindered by extensive defense mechanisms.”41

Other approaches focus on the importance to the process of the individual’s participation, regardless of the degree of impairment or others’ presence on his behalf. Social worker for the elderly Brenda Wolfer’s philosophy is “to have the elder(s) present at the mediation[,] even if their cognitive thinking is impaired in any way. They can participate to whatever degree is possible.”42 She notes that participation amongst these individuals is “just as important for them as for their family,” and that it “creates a different dynamic to the process.”43

Finally, one interviewee concluded that cognitively impaired individuals should be included in the process because they have a right to participate, and because the process could bring value to them, rather than vice versa. As an example of this reasoning, Ms. Joseph described an experience in her work several years ago “as a recipient rights officer for the local

40 E-mail from Sandee Gamet, Community Mediation Center (Mar. 19, 2009).

41 E-mail from Karren Baird-Olson, Ph.D. in Sociology, California State University – Northridge (CSUN) (Mar. 19 2009).

42 E-mail from Brenda Wolfer, Social worker focused primarily on elderly populations (Mar. 19, 2009).

43 Id.
community mental health services.”44 Her job was “to ensure that the staff and agency respected the rights of the people they served and that the people served knew their rights. As part of that job, [she] conducted training for people with mental illness and with developmental disabilities (cognitive impairments).”45 Joseph recounted “a memorable experience” when she “was talking with a room full of people with cognitive impairments, some of whom had limited abilities to speak[,] . . . about abuse and neglect, what it was, what it was like for people who were abused and neglected, and what they would like to have happen if they experienced the harm.46 In the conversation,” Joseph noticed “it was clear that most of the people in the room understood clearly what the harm in abuse and neglect was. They could describe it in specific terms, and they described the full range of harm – mental, emotional, physical, sexual.”47 Additionally, they “knew what it was to be unsafe, to not have their needs met by their caregivers, (neglect) though they didn't put it in those terms. And they were clear that abuse needed to stop and that the abuser needed to apologize. They seemed to have a good understanding of ‘I’m sorry,’ and “all part[s] of restorative justice – describing the harm, how to repair the harm, how to be accountable and safe.”48 Joseph “was amazed how well the participants understood the harm in abuse and neglect and had a grasp on the need for apologies and for healing.”49 Likewise, “if the offender is the developmentally disabled one, it may be easy for them to say ‘I’m sorry,’ because

44 Joseph, supra note 22.
45 Id.
46 Id.
47 Id.
48 Id.
49 Id.
they’ve probably been conditioned to.”50 Joseph notes that, even within developmentally
disabled populations, she is “pretty particular about working with offenders so that they
understand as much as possible what their behavior was, and what it is they’re asking
forgiveness for or apologizing for.”51 In her argument for inclusion of these individuals, she
notes “that can’t happen very well without them having heard from the other person.”52 Here,
rather than focusing on the value to the other parties in having a cognitively impaired individual
participate, or limiting their role to being a symbol of the harm caused to involved family or
supporters who are affected and capable of expressing it in a normalized way, Joseph focuses on
the intrinsic value in this process for the cognitively impaired individual himself. She notes that
these individuals have the ability to understand the concepts, even if at a basic level, and would
benefit from being able to engage with those concepts in a VOD.

III. Implementing Safeguards and Standards

Once the threshold question of whether individuals with cognitive impairments had a
place in restorative justice, the next question to examine was how to incorporate them in a way
that would enable both them and other involved parties to get the most out of their experience.
Interviewees suggested several criteria for preparing all individuals for a process involving
someone with a cognitive impairment, adjusting participants’ expectations, and including
safeguards to keep the process focused and productive. Suggestions centered on extensive pre-
conference preparation, and included ideas for screening processes, identifying and
understanding the individual’s impairment, preparing the non-cognitively impaired individuals

50 Id.
51 Id.
52 Id.
for what to expect, helping the cognitively impaired individual understand his own feelings, in
simple terms, about the incident in question, scaling back mediation-related documents to more
basic terms, reading documents aloud, asking specific questions, allowing flexibility in the actual
process, and including family members, supporters, and medical experts for assessment and
assistance.

Several interviewees emphasized that “great care should be exercised in the pre-dialogue
preparation.”53 In particular, Reeves noted that “the facilitators will need to carefully assess the
suitability of the participants and set appropriate expectations for the dialogue.”54 Additionally,
Reeves stressed that “the facilitators will need to raise the issue of impairment very early in the
preparation phase so that the non-impaired party can make an informed decision [about] whether
to participate in the dialogue.”55 Joseph explains it is important “to make sure – as much as
possible – that the offender had a clear understanding of accountability and accepted his or her
responsibility for the harm done.”56 She also stressed that “careful screening” would be useful in
cases where the victim may need someone to speak on his behalf, “to be as clear as possible that
the one speaking for the victim did not have their [sic] own agenda.”57 Joseph also noted the
importance of “exploring in the pre-conference meeting [the cognitively impaired individual’s]

53 Reeves, supra note 27.
54 Id.
55 Id.
56 Joseph, supra note 22.
57 Id.
understanding of apology, or their understanding of . . . harm.” 58 To flesh out these issues during a pre-conference meeting, Gamet offers some helpful questions to consider:

1. Is the individual with mental impairment the offender or the victim?
   a. If this person is the offender, does the victim understand the limitations of making things right for them?
   b. Are they willing to accept the capacity with which the offender understands what they did and can repair the harm? Does this person have the capacity to not reoffend?
   c. If this person is the victim, what will they gain?
   d. Will they understand the process or will they be fearful of re-engagement with the offender?
2. What is the nature of the impairment?
3. What are the expectations of outcome?59

In conjunction with carefully screening individuals, knowing and understanding the type of impairment a person has will tremendously help the parties know whether and how to proceed. According to Thompson, “people running [the VODs] need to have awareness of [the individuals’] impairments and how those kinds of impairments impact people’s ability to communicate, their ability to act appropriately in a mediation setting, and those kinds of things.” 60 Joseph recalled participating “in a victim offender mediation where one of the participants received special education and seemed cognitively impaired,” though she “didn’t

58 Id.
59 Gamet, supra note 40.
60 Thompson, supra note 24.
know of his disability, going into the mediation. With that lack of preparation,” she notes, she is “not sure that he was able to fully participate.” Similar to Thompson, Joseph is “fairly certain,” however, “that if [they] had structured the conversation and setting, and been able to take more time with [the victim] ahead of the mediation, he would have been able to articulate a better understanding of the concepts.”

In addition to knowing and understanding a participant’s cognitive impairment, the interviewees found it important to prepare the non-impaired parties for interacting with the impaired individual, and adjusting their expectations where appropriate. “The non-impaired party will need to fully understand that the other party has an impairment and must also understand the impact of the impairment on the dialogue process – that is, that the non-impaired party may be talking with a representative person, for example, and that the impairment person may only to able to participate in the dialogue on a limited basis.” Preparing cognitively impaired individuals will be “more work for the mediator,” but in the long run it is beneficial for the parties to understand what they will be able to take out of the mediation, and to reduce surprises.

Once both sides have been screened and prepared, the next phase would be to implement changes to the actual process. Both in the pre-conference and mediation/dialogue phases, 

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61 Joseph, supra note 22.

62 Id.

63 “Whenever you’re talking about any of these processes,” Thompson said, “it’s a question of preparing both sides for the process. If the defendant is cognitively impaired, [] let the victim know what the other side’s impairment is, then they’re going to adjust what they expect.” Thompson, supra note 22.

64 Reeves, supra note 27.

65 Thompson, supra note 24.
interviewees found it would be extremely helpful to extract from the impaired party a concrete, simple statement of facts, and communicate with them about their feelings in similarly tangible and basic terms.66 In that vein, Joseph emphasized the importance of “mak[ing] things visible – the more tangible, the better.”67 She suggested that the parties should “set up a pre-conference meeting with each of the parties to help them draw out the story, and its facts, in very concrete terms” so that the cognitively impaired participant can draw on those facts during the mediation and they can tell the story.68 To facilitate this process, Joseph suggested “exploring the different feeling words with a feeling chart, matched with faces,” which the mediator and caregiver can then use to work with the individual to “ask them what their faces felt like, and have them be explicit.”69 Though this seems like a minor adjustment, “simplification and taking it out of abstract ‘harm’ and putting into concrete terms really helps [people with] mental disabilities.”70

In addition to helping the victim or offender understand the story or their feelings in their own simplified terms, Family Court Restorative Justice Coordinator Bonnie Miller suggested altering the terms of VOD to help cognitively impaired individuals understand those as well. Like others interviewed, Miller likened this process to her experience engaging in restorative justice with juveniles, in which she “revised all documents in Victim Offender [Mediation] to make them less legalese, more readable, and focus[ed] on the issue of harm” to accommodate

66 Joseph, supra note 22.
67 Id.
68 Id.
69 Id.
70 Id.
their ability to process. Additionally, Miller noted it was helpful to “read all document[s] out loud, to try and make the process amenable to kids, parents and possibly victims who have reading difficulty or learning disabilities.” Finally, Miller noted that in primary interviews with kids, she focuses “on asking them the harm questions and helping them understand the effect of their offense on the victims, victims’ families, their own parents and themselves. We work on apologies and we help figure out ways to repair harm.”

In addition to simplifying the terms of the mediation, it will be important for participants to be flexible in structuring the process. Participants will need to consider “how to structure the conversation so that the person with disabilities may be able to take it in.” Participants’ “ability to understand [they] may have to cut short the joint session and put in time outs in the meeting so the person can process what’s happened or take a break” will be essential, she notes. Parties may need the “ability to sit still for an hour and a half,” for example, “so flexibility in the way we think we have to have ground rules will be key.”

In addition to altering the elements of the process, many interviewees suggested incorporating other people in the process beyond the mediator and the aggrieved parties – namely caregivers, parents/guardians or other supporters, and medical experts – to assess the individual’s propriety for a VOD, and how to best get the individual to be receptive to it. Joseph noted the inclusion of these individuals is particularly important because “many cognitively

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71 E-mail from Bonnie Miller, Restorative Justice Coordinator, Family Court of St. Louis County (Mar. 31, 2009).
72 Id.
73 Id.
74 Joseph, supra note 22.
75 Id.
impaired individuals have receptive capabilities – they can understand, but can’t necessarily communicate that they do. So family can help ‘translate’ for the victim or offender to the other party, because they know what that individual is going through.”\textsuperscript{76} The “important task with other parties is to be able to describe what they’ve seen happen, and describe the harm. On both sides, the family and support people of the victim and the offender, to be able to describe the harm in terms of what they’ve observed in the changes of the victim or offender, or what kinds of experiences the person had that are facts.”\textsuperscript{77} Getting background from people who are able to communicate about the impaired person’s experience will help the other parties “get some understanding about how the [cognitively impaired] person functions, and what helps that person understand.”\textsuperscript{78}

Parallel to including people with extended personal experience with the cognitively disabled person, several interviewees highlighted the importance of including medical experts in the process.\textsuperscript{79} In addition to helping the individuals directly involved with the mediation, Thompson notes incorporating medical professionals could be a healthy way to involve the larger community, and help people understand the cognitively impaired person in context.\textsuperscript{80} For example, “in a juvenile system, . . . if you’ve included some of the mental health professionals and the educational component, you’ve probably drawn in school systems and other pieces of the

\textsuperscript{76} Id.

\textsuperscript{77} Id.

\textsuperscript{78} Id.

\textsuperscript{79} “It is worth acknowledging that there are so many differences among not only different categories of illness but even within, so it would be very appropriate to involve the medical community, in particular a psychiatrist, to help decide what the best remediation would be.” Gerdts, \textit{supra} note 4.

\textsuperscript{80} These programs are “not just one-dimensional like the criminal justice system is right now –it’s more multifaceted and reaches out through the community.” Thompson, \textit{supra} note 24.
community so the Restorative Justice process becomes more community-based.” This way, she explains, “you can bring more people into the process, and allow more people to have a stake in how these Restorative Justice processes are working. Instead of having a VOD, and that’s it, the stakeholders become more, and broader.”81 Incorporating medical experts will enable VOD participants to better understand that if someone has “done something criminally stupid, part of that may be the impairment. That may have had an impact on why [the incident] happened. If we can address the impairment in a broader context,” that will be highly effective and helpful for restorative justice.82 Whether having an independent contractor on call for the situation in which someone with a cognitive impairment will be participating in a VOD, or having someone in a permanent position, it would be desirable “to have a program that has the professionals already in place to evaluate.”83 The “ultimate victim offender dialogue will be a much better process because it will be more informed” and treatment will be holistic.84

Though a few individuals toyed with the idea of opening up participation among cognitively impaired individuals to other restorative justice models, both those individuals and the majority of responders focused on modifying current VOM, and treated that as the most successful model. Similar to Thompson’s theory about the community effects of integrating medical professionals into the process, individuals, for example, who considered peace-making circles as opposed to VOD, noted that that model may benefit the restorative justice participants by opening up the experience to the community and including the cognitively impaired person in

81 Id.
82 Id.
83 Id.
84 Id.
that community. Sentencing circles may be more difficult for individuals with developmental disorders, however, because while it has the potential to be supportive, it “may be overwhelming” for them,85 and “it is possible that the [cognitively impaired] person may not be able to function appropriately.”86 Individuals who considered these alternative models, and others, thus concluded that the preferable model would be a “modified VOM.”87 Similarly, Reeves “do[es not] think that major changes would be required in the victim-offender dialogue process in order to accommodate impaired parties,” and notes that “safeguards mentioned” above “would be [his] primary concern.”88

**Conclusion**

After speaking with each of these experts, it is clear that there is a place within Restorative Justice for cognitively impaired individuals, and that the ideal method would be some form of VOD. Therefore, the St. Louis restorative justice community is strongly encouraged to develop contingency modifications to its current VOD system in case individuals with cognitive disabilities are interested in participating. Whether for the individual’s intrinsic right to participate in a dialogue about an event that has affected people close to him, or because members of his family deserve the opportunity to voice themselves and learn from the events that have taken place, it is appropriate for parties to actively discuss possible participation in a VOD when one of the parties is cognitively impaired. After an extended pre-conference

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86 Thompson, *supra* note 24.

87 “I’m most comfortable with VOM and I can see using it in that form with really extended pre-conference meeting – probably longer than the actual VOM. I’d probably emphasize this model,” and “emphasize drawing out the story in the victim or offender’s language, and focus on extended pre-conference meetings.” Joseph, *supra* note 22.

88 Reeves, *supra* note 27.
meeting, workable VOD modifications seem to incorporate various safeguards to ensure that both parties, and those who may be speaking for them, can communicate with and understand each other as effectively and thoroughly as possible. Modifications should include, but are not limited to, reframing legal mediation terms and other concepts core to the mediation in simpler terms, reading simplified documents aloud, managing the expectations of all involved parties, maintaining flexibility throughout the process in case extending or breaking sessions is necessary, and hiring or otherwise including care-giving and/or medical experts. Specific usage of those modifications may vary, however, depending on the needs and desires of the involved parties, and feedback from people who actually have used this process, once in place, about which methods were and were not effective. Additionally, advocacy about any program developed will be essential to its effectiveness and survival – as many victims and offenders who are cognitively impaired, or their guardians, may not be aware that restorative justice exists, or that they are capable of participating. Overall, altering the VOD process would be extremely beneficial because it would not only restore the involved offender to community, but it would also help reintegrate individuals who, because of a disability, may frequently be excluded.