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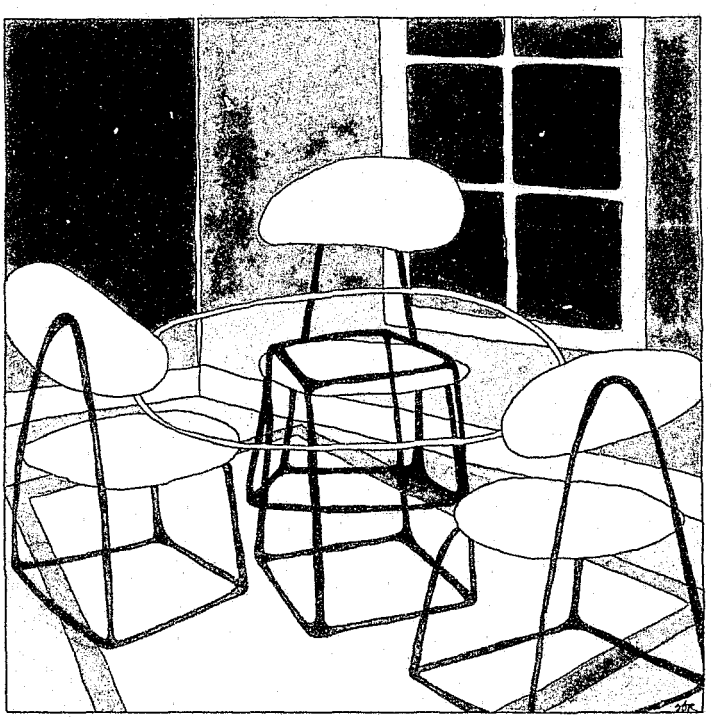
Court-sponsored Mediation of Divorce, Custody, Visitation, and Support:

Resolving Policy Issues



Susan Myers ○ Geoff Gallas ○ Roger Hanson ○ Susan Keilitz

Using alternatives to traditional litigation is a major contemporary approach to achieving cheaper, faster, and better dispute resolution. For the past decade and a half, a variety of alternative dispute resolution (ADR) processes have been applied to particular types of civil and criminal cases. Arbitration, mediation, conciliation, and early neutral evaluation are examples of these processes, which differ in varying degrees from the traditional court process. One application of ADR that has drawn enthusiastic supporters is the use of mediation in domestic relations cases (divorce mediation). Support for this procedure is seen in the scale of its adoption: divorce mediation has been implemented in one form or another in thirty-six states and the District of Columbia, with more than 120 programs operating in the states.[1]

Given the importance of families and mediation's potential for maintaining ongoing relations between family members, mediation may be a superior process for resolving child-related issues of divorce, and not merely a useful adjunct to traditional court processing. Moreover, because child support is a major issue in most divorces, mediation has the potential of affecting the success of achieving more adequate financial support for children of divorce—a policy goal made clear in child support guidelines adopted by the states. As of this year, all fifty states and the District of Columbia have adopted child support guidelines,[2] and the movement toward prescriptive guidelines is clear.[3] Mediation may help increase the understanding of child support orders based on the guidelines and may also better ensure compliance.

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In 1987 the Conference of State Court Administrators (COSCA) Committee on Alternative Dispute Resolution asked the National Center for State Courts (NCSC) to survey ADR practices in the states. Following up on this work in 1988, NCSC conducted a national survey of divorce mediation programs in the states. One-hundred-and-eighteen programs responded.[4] The responses revealed a vast field of diverse, unevaluated experimentation with divorce mediation. It is virtually impossible to point to a model, much less a typical, divorce mediation program.

Although the COSCA/NCSC divorce mediation survey found that the creation of new divorce mediation programs peaked in the late 1970s and early 1980s, enthusiasm for the alternative forum remains strong: sixty-one known new programs have been adopted in the last five years.[5] However, the pattern of adoption of new programs still shows limited diffusion. The fact that thirty-six states and the District of Columbia have at least one divorce mediation program must be considered in light of the fact that thirteen states have programs in only one trial court jurisdiction, and only eight states have created statewide divorce mediation programs. Most of the nation's 2,420 domestic relations courts handling marriage dissolution have yet to attempt divorce mediation.[6] It may be that these jurisdictions are awaiting clearer analysis of the programs already adopted before initiating their own programs.

The extent to which divorce mediation is beneficial to the parties, the children, and the judicial system is far from clear. The results of a few research studies suggest that divorce mediation achieves some positive effects. The conclusions that can be drawn from most of these studies are limited, however. They provide little guidance to judges, court administrators, and legislators seeking to implement new or modify existing divorce mediation programs within the context of their own court's resources and priorities and their own state's child support guidelines and support enforcement responsibilities. Judicial system planners and policymakers need more information about the effects of court-connected mediation programs to help them decide whether initiating or continuing a mediation program is right for their jurisdiction or state, to guide their decisions about the best structure and procedures for the program, to secure program funds, and to justify the innovation. The specific criteria for guiding these decisions must take into account not only cost and time savings but also the quality of mediation.

This article has a twofold purpose. First, we will review current practice and recent research on divorce mediation to illustrate what we know and still need to learn about the *structure* of divorce mediation programs and *outcomes* of divorce mediation. Second, we will suggest ways to resolve two major policy issues that judges, court administrators, and legislators should address before implementing divorce mediation programs: (1) how to evaluate mediation's success in meeting goals of cost or time savings and improved quality; and (2) how to identify the best *structure* for a mediation program in a given jurisdiction.

Structure of divorce mediation

Available divorce mediation research and the COSCA/NCSC divorce mediation survey indicate differences among programs in their approaches to five organizational issues: (1) the program's relationship to the court; (2) methods of referring cases to mediation; (3) the scope of issues mediated and how child support guidelines affect the scope of negotiable issues; (4) the mediator's role, qualifications, and professionalization (and the related issue of the role of attorney representation in mediation); and (5) the management of court-connected mediation.

Relationship Between Courts and Divorce Mediation Programs

A divorce mediation program may be court annexed (funded and organized by the court to meet goals set by the court), court sponsored (funded in some part by the court and receiving referrals from the court, but organized independently from the court), or private (no court relationship). Most divorce mediation programs surveyed in the COSCA/NCSC study (86 percent) had some relationship to the courts.[7] Mediation may be instituted statewide or by jurisdiction according to statute, court rule, or local practice.

Method of Referring Cases to Mediation

Referral choices include both the method of referring cases to mediation (on a voluntary basis, at the court's discretion, or mandated for certain issues or case types) and the referral source (whether mediation cases are identified through court intake procedures, by attorneys, or by the judge). Thirty-seven percent of the programs responding to the COSCA/NCSC divorce mediation survey claimed that mediation was mandatory for at least one divorce-related issue (custody, visitation, or support).[8] Some programs mandate mediation of particular predecree issues, such as contested custody or visitation. Others mandate mediation only where minor children are involved in a contested divorce, while still others mandate participation only for postdecree issues, such as motions to modify divorce decrees.

When given a choice, disputants do not resoundingly volunteer to settle disputes through mediation. One study of child custody mediation in Denver, Colorado, found that one third of the parties refused voluntary, free mediation.[9] The study concluded that on cost considerations alone, programs involving mandatory or discretionary referral to mediation will be more efficient than pure voluntary programs. Because individuals with high-socioeconomic status tend to use voluntary mediation programs, mandatory programs also might achieve a more-even socioeconomic distribution of participants.[10]

Some proponents of divorce mediation reject the option of mandating participation, finding a basic inconsistency with parties being *required* to become involved in a process premised on participation and consent.[11] Yet, satisfaction with mandatory programs appears to be reasonably high. Pearson and Thoennes found satisfaction with voluntary and mandatory mediation programs to be at about the same level, around 75 to 80 percent. Settlement rates also did not vary according to whether mediation was voluntary or mandatory; in both a voluntary program in Minneapolis and a mandatory program in California, the rate of reaching a final agreement was about 41 percent.[12] To identify a preferred format for referring cases to mediation, these initial studies need to be augmented by more experiments and comparisons that investigate the relationship between methods of referral and a range of outcomes beyond satisfaction, including the

extent to which agreements are durable, fair, and equitable.

SCOPE OF ISSUES MEDIATED AND THE EFFECT OF CHILD SUPPORT GUIDELINES

How many and which issues should be mediated in a program? Is a mediated settlement more likely to occur when the issues considered are broad or narrow?[13] The COSCA/NCSC divorce mediation survey indicates that mediation programs handle three key issues aside from the divorce itself: child custody, visitation, and child support.[14] While all the programs reported handling custody and visitation, more than one-third of the surveyed programs *refrained from* mediating child support issues. This fact was somewhat surprising given the fact that one of the most significant policy trends in domestic relations matters is the federal government's interest in setting income-based formulas for child support awards.[15] This interest is most recently evident in the legislation adopted by the U.S. Congress requiring all states to have presumptive child support guidelines in place by 1990.[16] The law also calls on the states to develop procedures for periodic court review of support awards. Although states vary in the extent to which guidelines supplant judicial discretion,[17] most have adopted some form of child support guidelines.

Merely establishing child support guidelines, however, does not automatically ensure that child support orders resulting from either court processing or mediation will conform consistently across cases and over time with the amounts prescribed by the guidelines. One reason for possible discrepancies between the amounts prescribed by the guidelines and the actual orders is that there may be trade-offs between the issues of custody, visitation, and child support. One party may receive less in child support because of what is regarded as a victory concerning child custody. We do not know yet how common such trade-offs are or whether they are more likely to occur in a particular dispute resolution forum. Negotiation can also occur around issues of financial disclosure. These factors have been offered to explain why a study of mediated child support in Delaware found that mediated support orders were for less than orders issued from the courts.[18] As mediation opens up the range of issues for discussion (one of its extolled virtues), the opportunity may exist for concessions on those issues to be traded off against child support.

MEDIATOR ROLES, TRAINING, AND PROFESSIONALIZATION

Mediators can assume the role of a neutral facilitator, be more of an advocate for settlement, or even promote a particular type of settlement. If the parties reach a stalemate, mediators in some programs simply report this fact to the court, but in other programs they may recommend a particular settlement.

> . . . sound court management strongly influenced disputants' views of the fairness of the forum. . .

Desired qualifications for mediators almost always include specific training in mediation skills, but there is disagreement over whether a particular type of educational training should qualify a person to mediate divorce and, if so, which discipline (social work, law, public justice) best prepares mediators to intervene in domestic disputes. The recently adopted rules of the Florida Supreme Court (which have been interpreted to require divorce mediators to be either experienced trial court judges or attorneys with at least five years' membership in the Florida Bar) have highlighted the tension between those who would base mediator qualifications on academic or professional credentials and those who would emphasize specific mediation training and skills.[19]

Professionalization is a related issue. If a program requires its mediators to possess a specific academic degree or length of professional practice, it is unlikely to use volunteer staff. On the other hand, programs that require skill-related training of its staff could be expected to use volunteers. Furthermore, mediators' interest in autonomy may compete with court managers' interest in consistency in outcomes across cases. As requirements for fair and uniform settlements of custody and support disputes increase and as the number and range of cases diverted from courts to mediation grow, the question of the most-appropriate training for mediators will continue to be debated.[20]

MANAGEMENT OF MEDIATION PROGRAMS

Two studies that have associated positive outcomes with alternative dispute resolution have found management to be the crucial factor in the success of such alternatives to litigation. A study of divorce mediation in Arizona conducted by Trost and Braver found only a weak relationship between mediation and settlement rates, while the characteristics of the jurisdictions had a large impact on the level of settlement rates.[21] This study raises the expectation that a jurisdiction that experiences improved dispute resolution with the introduction of mediation may already have been well managed; the best aspects of well-administered courtrooms may simply be transferred to the mediation process.[22]

A recent study of alternative dispute resolution applied to personal injury cases found that sound court management strongly influenced disputants' views of the fairness of the forum and their evaluations of the justice system as a whole. Management affects two important dimensions of quality: the dignity and the perceived thoroughness or carefulness of the procedure.[23] Hence, before courts embrace or reject mediation as a means of improving performance, they need to know how and to what extent the close management of dispute resolution contributes to improved performance above and beyond the nature of the alternative forums themselves.

Outcomes of divorce mediation

A first generation of empirical studies has assessed some of the merits and limitations of divorce mediation.[24] These studies have investigated a range of possible effects that divorce mediation has on individual cases, the parties, and courts.

Measurable outcomes of mediation include (1) the rates at which cases are settled; (2) the degree of compliance with settlements or court awards; (3) the extent of relitigation after cases have been resolved; (4) the relative satisfaction of the disputants with mediation and litigation; and (5) the extent of time or money saved by the disputants and the court.

SETTLEMENT RATES

An experimental study of adjudicated and mediated custody and visitation cases carried out in Denver, Colorado, found that 60 percent of all the cases reached either full or partial agreement.[25] Eighty percent of the mediated cases resulted in party stipulations. In 20 percent of the cases, the parties returned to the court for adjudication. In contrast, the parties resorted to adjudication in about half of the cases that did not experience mediation. Similarly, a study of the Family Law Mediation Program of Orange County, California, reported a successful settlement rate of 76 percent. In this evaluation, where expedited case processing also was a measure of success, hearings in the Family Law program were held within one to two weeks of case filing, whereas resolution of the cases by the court was delayed by six to twelve months.[26]

Although these relatively high settlement figures for mediated cases suggest that mediation may be a superior process, data from the Center for Policy Research study of mediation in Delaware indicate that support orders resulting from mediated cases were lower than support orders rendered by the courts.[27] This finding raises important unanswered questions about mediation. In general, how closely do adjudicated support orders resemble goals for support set by a state's guidelines? Do mediation programs adopt the same guidelines and apply them similarly? Or do mediation programs choose not to mediate this issue at all because of the state's regulatory interest in encouraging fair and equitable support orders? Do disputants comply more often with mediated rather than litigated child support awards?

COMPLIANCE

Two studies indicate that mediation compares favorably to litigation on the criterion of compliance with settlements and court awards. A 1982 study of divorce mediation in Denver reported compliance rates of 79 percent for mediation and 67 percent for court processing.[28] A second study of family mediation analyzed data from three programs in California, Connecticut, and Minnesota. This study reported that child support payments were irregular or absent in one-third of the mediated cases, as opposed to one-half of the court-processed cases. Infrequent visitation was not reported in any mediated cases but was a problem in 30 percent of the litigated cases.[29]

Although mediation appears to have a beneficial effect on compliance with agreements, questions remain about the relationship between compliance and settlement levels (dollar amounts of support orders, for example). Does compliance decline as the dollar amount of child support orders increases? Is compliance always greater when cases are mediated or only when cases have certain characteristics that make parties more inclined to comply, such as uncontested divorce, length of the marriage, or income of the parties?[30]

Two studies indicate that mediation compares favorably to litigation on the criterion of compliance. . .

RELITIGATION

The evidence on the effects of mediation on relitigation is somewhat more mixed than the findings on settlement and compliance. One study found significant decreases in relitigation with mediated disputes—in some programs as much as a 50 percent decrease.[31] A study of mediation in Delaware found, however, that the number of motions to modify settlements, withhold wages, or file for enforcement were equivalent in the two forums.[32] Furthermore, a recent study of a mediation program in Arizona found that mediation participants were actually *more* likely to file postdecree complaints than were those pursuing their claims in the traditional court process.[33]

Other data suggest that while relitigation rates may decline in cases that are successfully mediated, the highest relitigation rates occur in cases that attempt mediation but fail.[34] The benefits of successful mediation, therefore, may be great, but the hazards of using mediation in inappropriate cases also are high.[35]

It is essential for program planners to know if mediation's impact on relitigation is more positive or more negative for certain types of cases than for others. The unclear picture of the effects of mediation on relitigation suggests the need for more focused comparisons of relitigation rates after mediation and litigation. As with the issue of compliance, the comparisons of forums should take into account case characteristics such as the divisiveness of the dispute, the income of the disputants, the age of the children, and the length of the marriage. In addition, the effects of program policies on postdecree modification should be examined.

SATISFACTION

Although some proponents of divorce mediation have equated the user's satisfaction with the quality of justice, the conclusions that can be drawn from most surveys of user satisfaction are limited in two ways. First, findings on satisfaction are equivocal. One experimental study found a 77 percent satisfaction rate among users of mediation as opposed to a 40 percent rate for those who did not participate in mediation.[36] In Delaware, on the other hand, 56 percent of the mediation respondents disliked mediation more than a hearing before a judge or a master. There was also a widespread perception among mediation participants that the Delaware mediation process was biased and perfunctory and that the range of issues mediated was too narrow. This negative response may stem from the fact that the process used in Delaware resembles case evaluation more than mediation. The Delaware program lacks many of the characteristics usually attributed to mediation, such as open discussion about a range of issues and strict mediator neutrality regarding outcomes. Still, successful settlement was high (80 percent).[37] Do these findings mean that settlement does

not depend on user satisfaction, and, therefore, the mediation process can succeed even in highly constrained settings?

Second, the data showing positive reactions to divorce mediation are limited because they do not differentiate between the reactions of men and of women. Two studies of participant satisfaction that did take gender into account indicate that satisfaction rates vary significantly by gender and not in the direction often assumed by mediation's proponents. While it is often claimed that mediation can benefit women (usually the custodial parent) more than court processing can, these studies found that men were more comfortable with mediation and that women preferred adjudication.[38] Future research must analyze gender-based differences in satisfaction with mediation.

One potential explanation for high settlement even in the absence of high satisfaction and for gender-based differences in satisfaction hinges on the distinction between satisfaction with actual outcomes and satisfaction relative to expectations. A study of personal injury tort cases in three forums found that satisfaction with each forum depended less on absolute outcomes than on outcomes compared to expectations.[39] This raises the possibility that if an alternative forum like mediation raises expectations for outcomes for either disputant, satisfaction with mediation may be lower than with litigation even if the disputant tends to do better in absolute terms with mediation.

EFFICIENCY

Information on the efficiency of mediation is contradictory. Whereas some claim that mediation realizes great savings in case-processing time,[40] a study of custody and visitation mediation in Oregon showed that the average cost of mediation exceeded the cost of court processing by a factor of up to three.[41] How mediation is adopted and institutionalized may affect its efficiency. Divorce mediation will help relieve court congestion only if courts or attorneys can identify appropriate candidates for mediation at an early (pretrial) stage; claim the support of the judiciary, bar, and legislature; attract an adequately large pool of disputants; and secure gains in efficiency through the use of affirmative management strategies. The degree and method of institutionalization of divorce mediation and its integration into state court systems are crucial predictors of its viability as an efficient process.

Resolving policy issues

Our review of divorce mediation research suggests that two policy issues remain unresolved. First, we need to identify strategies to evaluate whether mediation is cheaper, faster, and better than traditional litigation. Second, we must be able to choose program structures, management approaches, and particular case types for divorce mediation programs that are most likely to improve the quality and efficiency of dispute resolution experienced by disputants.

How mediation is adopted and institutionalized may affect its efficiency.

EVALUATION CRITERIA

Administrators of court-connected divorce mediation programs need to define specific criteria of successful program performance before they can find their way through the maze of options for structuring a new or improved program. These evaluation criteria, in turn, will reflect the goals administrators and the public believe mediation is especially qualified to meet. The two basic goals that mediation advocates believe divorce mediation can best meet are increased program *efficiency* (faster pace at reduced cost) of the dispute resolution process and improved *quality* of justice experienced by the disputants.

EFFICIENCY

Some claim that shifting the resolution of divorce-related disputes from litigation to mediation will achieve more efficient dispute resolution for the courts. Further research comparing the cost in dollars and disposition time (from case filing to disposition) of mediation to litigation is needed before this claim can be verified or generalized to most divorce mediation programs. Care should be taken to state up front where the goal of savings fits into objectives for divorce mediation programs, as there is some evidence that a dominant interest in efficiency can compromise progress on dimensions of quality.[42]

Cost. The cost of mediation and litigation can be measured by summing the cost to disputants (including attorneys' and mediators' fees, out-of-pocket expenses, and hours spent preparing the case, at the proceedings, and awaiting resolution) and the operational cost to the public of the mediation program versus traditional litigation (including staff compensation multiplied by the time spent on a case and the cost of trials de novo). As is true of other alternative forums, transaction costs for the parties may decrease even as costs for the public at large increase.

Pace. As noted above, the pace of case disposition is one determinant of the cost of disposing of cases in a given forum. By comparing programs that mediate all and some issues with those that do not mediate any divorce issues, it would be possible to infer what range of issues is most expeditiously handled in mediation or in court. Additionally, data gathered on case characteristics (such as whether the divorce is contested, the intensity of the dispute, the number of children involved, whether the case is based on no-fault or fault grounds, the length of the marriage, and the income of the disputants) would allow us to assess those case types that are most amenable to prompt disposition in mediation.[43] By identifying the issues of divorce and the types of disputes that experience faster disposition at less cost in mediation than in litigation, new research could guide policymakers in making crucial structural choices for new and present divorce mediation programs.

QUALITY

Because of the complexity of our expectations for quality in the experience of divorce mediation, it is helpful to divide the concept into five distinct dimensions: access, participation, fairness, compliance, and satisfaction. It is important to know whether divorce mediation represents an improvement over litigation on any of these dimensions.

Access. Aspects of access include the amount, equality, and quality of disputant

access to the justice system gained through the use of ADR processes. In the context of divorce, access can be evaluated by whether the justice system touches more participants more directly, the uniformity of availability of mediation services, consistency in the quality of mediators, and the convenience of the services to all potential participants. Management of court-connected mediation necessarily calls for close oversight by the courts to ensure that (1) all judges follow guidelines for referring cases in mandatory and discretionary programs and are knowledgeable about voluntary programs; (2) services rendered meet uniform standards for quality and effectiveness; and (3) no undue physical, geographic, procedural, or language barriers prohibit access to mediation.

Participation. The benefits of participation are emphasized in domestic relations disputes because of the unique demands placed on the disputants' relationship before and after the divorce. Divorcing partners are expected to disengage from the marriage while sustaining communication effective enough to settle the divorce and to maintain long-term commitments to the spouse and children. It is argued that this expectation for effective short- and long-term communication between divorcing disputants is more apt to be met if the parties have the opportunity to control the resolution process itself.

Divorce mediation proponents believe that greater participation is achieved in mediation by discussing, analyzing, and resolving disputes in a less formal setting, with simplified procedures, and where the mediator allows the parties to air all relevant issues without restriction to technical legal points. This opportunity for participation in mediation is said to contribute to the disputants' enlarged understanding and appreciation of the process and to a broader understanding by the mediator of the issues important to the disputants.[44] Open but directed communication encouraged in mediation also enables the husband or wife to understand the perspective and needs of the other party. The mediation process can transform the parties from intransigent adversaries to more-flexible and empathetic negotiators.

Several dimensions of participation can be used to evaluate a mediation program, including the opportunity for the disputants to choose the disputing forum,[45] the disputants' latitude to represent their interests in the process (either personally or through an attorney), their understanding of the process, and the coherence of mediation within the context of the entire marriage dissolution process (including separation, division of property, spousal support, and settlement of custody, visitation, and child support issues). The forum's management may strongly influence increased participation by disputants; a well managed mediation program may well increase the parties' understanding of the resolution process and the program's overall coherence.

Fairness. The fairness of a dispute resolution process and the outcomes it generates are crucial determinants of the quality of procedural justice experienced by disputants. A procedure's fairness—the degree to which it balances the conflicting interests of disputants—can be evaluated in terms of participants' views of the process or the actual outcomes of the process. Divorce mediation will be viewed as a fair procedure if the mediator's role is one of neutrality and if the mediator displays no bias toward a disputant or a particular outcome. A fair procedure will also be marked by the dignity and carefulness or thoroughness of the process.[46]

> Management of court-connected mediation necessarily calls for close oversight by the courts. . .

Agreements reached in divorce mediations should also be characterized by fairness across parties. Do similarly situated parties reach similar agreements, particularly when compared to decisions rendered in the traditional process?

Divorce mediation is also fair to the extent that the interests of the custodial and the noncustodial parent are balanced and the degree to which the interests of minor children are protected through custody, visitation, and child support agreements.

Two issues related to outcomes are particularly relevant to evaluating divorce mediation: custody arrangements and levels of child support. Over the last two decades, policymakers have begun to focus on the quality of the relationship between the noncustodial parent and the child after the divorce. In the past, the custodial parent took sole responsibility for the child, but the current movement is toward calling on both parents to fulfill most or all dimensions of parenting obligations (financial, emotional, and physical) after the divorce. This emphasis on continued parental responsibility has been reflected in new forms of custody and visitation agreements: joint physical or legal custody and greater time sharing in visitation schedules. Many states have adopted legislation that ratifies one or more of these joint parenting arrangements.[47]

Policymakers also have nearly unanimously endorsed efforts to increase support awards as a way to address the best interests of children. A comparison of the average size of support orders produced by mediation with support orders resulting from litigation (for families of similar income levels and with equivalent numbers of children) would reveal whether one forum favors the financial interests of one parent over the other and by implication how children fare in each forum.

Compliance. Compliance is a dimension of quality in dispute resolution because the efficacy of the system as a whole depends on producing agreements that last. The issue of compliance in the context of divorce is particularly complex because the situation of divorcing parents is rife with opportunities for failure, given the difficulty of arranging visitation and support agreements and the length of time these agreements must last (at least until children reach majority age). Compliance with agreements on divorce-related issues (including custody, visitation, and support) can be seen in two ways. The first is to measure the integrity of settlements: whether obligors pay, whether there are motions to modify or enforce orders, whether parties comply with visitation schedules or whether these are modified through practice or formal motions to the court. Alternatively, compliance with mediated or litigated settlements can be assessed in part according to whether the

forum produces agreements with enough flexibility or creativity to allow adjustment over time without necessitating a new court appearance. Ease of modification may also be affected by policies set by a court or a state. Some states, for example, prohibit motions for amendment within a year of the initial agreement, while others require annual court review of visitation or support agreements.[48]

Satisfaction. Disputants' satisfaction with the process and outcomes of divorce mediation is an important measure of the quality of justice mediation provides. Those who experience greater access to mediation, greater fairness, improvement in their relationships because of the nature of the process, and greater compliance with agreements are likely to report improved satisfaction not only with their specific settlements but with the justice system as a whole. Although complete satisfaction of every disputant is an impossible goal for any dispute resolution program to meet, satisfaction that is equal or better than that with the traditional process is a reasonable expectation for divorce mediation programs that have developed standards for improved access, participation, fairness, and compliance.

Structural choices for divorce mediation programs

The criteria of success for a divorce mediation program theoretically guides the structural choices made in order for that program to meet its goals. Without evaluation, neither the relationship between the program's goals and its structure nor its success in reaching those goals can be measured

A program initiated in response to a need for reduced cost and improved speed will make structural choices about the scope of issues to mediate, level of adoption (depending on whether mediation is found to be faster and less expensive than litigation—still an open question), and referral process (discretionary referral is most efficient because it can both capture more cases than can voluntary referral and select cases that are most likely to result in relatively quick and lasting settlements). This program will also be likely to undertake a system of affirmative case management to increase efficiency gains.

Where greater access is the motivating goal for statewide adoption of a program, mandatory mediation for all divorce issues would be an obvious strategy. Mandatory referral does not, however, guarantee that high quality divorce mediation is equally available to all disputants. Concern for improved access will therefore be manifest both in the uniformity of the referral process, concern for the consistency of mediator skills and practices, and physical accessibility of the programs. Concern for geographic access has been addressed through placing divorce mediation programs and other alternatives to traditional court processes physically adjacent to a court in the form of the multi-door, court-annexed ADR program. Here a full menu of alternatives is made available to the disputants in the court context.

A program with the goal of effective participation may well choose a referral process that is strictly voluntary following consistent presentation of the availability of the program and its possible benefits. If the aim is to transform the parties from adversaries to cooperative participants, the skills of mediators, and therefore their training, will be high concerns.

A program concerned predominantly with the fairness of its process (perhaps arising from a need to raise confidence in a particular court or the justice system in a state as a whole) will also be careful to define the mediator's role, qualifications, and professional status and will be conscious of management decisions that affect the coherence and consistency of the process. In terms of generating fair outcomes—balancing the interests of the parents and promoting the interests of the children—a program would look closely at the scope of issues it would mediate. Some choose to mediate all issues, assuming that broadly defining the dispute contributes to comprehensive settlement and better compliance. Other programs limit the issues to custody and visitation, believing that formal adjudication in the context of definite child support guidelines most effectively protects the interests of the custodial parent and children or that successful resolution of these matters in mediation will spill over into agreement on child support obligations in court.

If improved compliance, particularly with child support orders, is a program's most-salient objective, the program may attempt to encourage participation by the parties even when guidelines are prescriptive, construe the negotiable issues broadly, and provide mechanisms for both monitoring payments and periodically adjusting the agreements without a court appearance. Close monitoring will be evident in the court's relationships with enforcement and social service agencies and in the degree of concern for affirmative case management.

Looking ahead

We are now poised to make significant advances toward solving the policy dilemmas facing court administrators who are or may soon be managing divorce mediation programs. Success depends upon reliable information drawn from research that employs a comparative strategy linking the most-important goals of divorce mediation to alternative program structures. Such research can help determine which program structures and what methods of selecting divorce mediation cases and training mediators promote lower costs and increased access, participation, fairness, compliance, and satisfaction. The next step in divorce mediation research should take seriously the role of management in determining the benefits to be derived by court adoption of divorce mediation. We urgently need to identify those management strategies for court-sponsored divorce mediation programs that work best to improve their quality and efficiency and to respond to demands for higher, more-uniform child support awards; greater shared parenting; improved compliance; and effective modifications without increased litigation. scj

Notes

1. In divorce mediation, disputants negotiate directly (rather than through attorneys) in the presence of a neutral third party (the mediator) who may guide the negotiation process but who must respect agreement outcomes reached by the disputants. Mediation may be contrasted to arbitration, where the third party is empowered not only to guide the process but also to determine its outcome. Within this definition, there is considerable variation in how mediators facilitate the parties' negotiations. For example, see Susan Silbey and Sally Merry, "Mediation Settlement Strategies," *Law and Policy* 7 (1986).

2. Twenty-two states have adopted presumptive guidelines; twenty-one have advisory guidelines; six have presumptive guidelines for administrative processes, but advisory for courts; four have presumptive guidelines for administrative processes, but none for courts. Only one state has yet to adopt guidelines for administrative or court processes, and

this state is in the process of adopting guidelines to be implemented early in 1989. Summary by Janice T. Munsterman and Thomas A. Henderson, National Center for State Courts, February 29, 1988, and updated in a phone call in December 1988.

3. See The Family Welfare Reform Act, H.R. 1720, Child Support Enforcement Amendments, which include provisions requiring the federal government to devise and test programs to review support orders in four states. The amendments require the states to have procedures for periodic reviews of child support awards in place beginning two years after the legislation takes affect. Federal policy reflected in the Child Support Enforcement Amendments now favors mandating periodic review of all child support awards obtained through enforcement agencies and review of awards every three years, including AFDC clients.

4. Susan Myers, Geoff Gallas, Roger Hanson, and Susan Keilitz, "Divorce Mediation In the States: Institutionalization, Use, and Assessment," 12 *State Court Journal* 4 (1988), pp. 17-25.

5. Myers et al., 1988.

6. Conference of State Court Administrators *State Court Organization 1987* (National Center for State Courts: Williamsburg, Va.). The states report numbers of courts involved in marriage dissolution in various ways, usually following jurisdictional affiliations such as district, circuit, or county. This number may understate the actual number of courts handling dissolution, because in several states, the number of courts exceeds the number of jurisdictions involved.

7. It should be noted, however, that the sampling procedure employed in the COSCA/NCSC divorce mediation survey overrepresented court-related mediation programs by *undersampling* private divorce mediation programs and practitioners. See Myers et al., 1988, p. 20.

8. Ibid.

9. Jessica Pearson and Nancy Thoennes, "Mediation and Divorce: The Benefits Outweigh the Costs," 4 *Family Advocate* 26 (1982).

10. Ibid.

11. Richard Danzig "Toward the Creation of a Complementary Decentralized System of Criminal Justice," 26 *Stanford Law Review* 1 (1978).

12. Jessica Pearson and Nancy Thoennes, "Reflections on a Decade of Divorce Mediation Research," in Kressell & Pruitt, eds., *The Mediation of Disputes: Empirical Studies in the Resolution of Conflict* (San Francisco: Jossey-Bass, 1987).

13. Pearson and Thoennes, 1987; Myers, et al., 1988.

14. Other issues far less frequently mediated include modifications of initial agreements and paternity.

15. The Federal Child Support Enforcement Amendments of 1984 required the states to furnish child support guidelines by October 1, 1987, to judges and those empowered to set child support awards (Pub. L. No. 98-387, Sec. 18—Codified at 42 CFR 302.56). Explicit goals of the 1984 U.S. Child Support Enforcement Amendments are to redress (1) the unequal financial costs of divorce borne by custodial parents (mostly mothers) and children, (2) minimal support orders that fail to adjust the existing distribution of wealth in the noncustodial parent's favor, and (3) the problem of inadequate compliance with or nonpayment of support orders by noncustodial parents. The amendments also responded to growing concern with the highly variable nature of child support orders within and among court jurisdictions. The variation allegedly reflected judicial discretion in setting awards and imprecise formulation of the cost and goals of child support.

16. See The Family Welfare Reform Act, H.R. 1720, Child Support Enforcement Amendments.

17. See note 2, *supra.*

18. Center for Policy Research, "Report on the Child Support Mediation Program of the Family Court of Delaware," 1985.

19. George Nicolau, discussion at the Fifth New York Conference on Dispute Resolution, Syracuse, N.Y. 2 *ADR Report*, pp. 244-247 (July 7, 1988).

20. An issue related to mediator roles is the role of attorneys in the mediation process. Although there is widespread agreement that the parties to a divorce should have representation, there remains disagreement over whether attorneys should be allowed or encouraged to participate in the actual divorce mediation sessions.

21. Melanie R. Trost and Sanford L. Braver, "Mandatory Divorce Mediation: Two Evaluation Studies," Arizona State University (1987). Report presented to the Conciliation Court of the Supreme Court of Arizona, Maricopa County.

22. Research suggests that effective court management in general depends upon a strategy of affirmative case management. Such a strategy includes at least six components: (1) the existence of broad performance standards such as timeliness, fairness, and access; (2) the presence of methods to review performance on an ongoing basis; (3) a strict and well-enforced policy on the number of extensions and continuances permitted; (4) the ability of a court to know the current status of cases on a daily, monthly, or annual basis; (5) the availability of reports on the status of pending cases on an aggregate and an individual case basis; and (6) prompt notification of parties and attorneys in pending cases of the next due date and of overdue events, late filings, and so forth. For further discussion of affirmative case management practices, see Steven Flanders, *Case Management and Court Management in the United States District Courts* (Washington, D.C.: Federal Judicial Center, 1977); Ernest C. Friesen, "Cures for Court Congestion," 23 *The Judges' Journal* 4 (1984); Larry L. Sipes, "Where Do We Go From Here?" 23 *The Judges Journal* 4 (1984); and Barry Mahoney, *Changing Times in Urban Trial Courts* (National Center for State Courts: Williamsburg, Va., 1989).

23. Allen E. Lind, Robert J. MacCoon, Patricia A. Ebener, William L.F. Felstiner, Deborah R. Hensler, Judith Resnik, and Tom R. Tyler, "The Experience of Justice: Litigants' Views on the Civil Justice System" (The RAND Corporation, No. R-3708-ICJ/NSF, 1988).

24. It should be noted that program evaluation by divorce mediation programs themselves has been extremely limited. The COSCA/NCSC divorce mediation survey found that most of the responding programs had not even identified criteria for evaluating their programs' success. The programs were strongest on tracking settlement rates and case-processing times. They were weakest on recording cost-per-case data, data on settlement characteristics (such as the average amount of child support orders), and rates of noncompliance with agreements.

25. Pearson and Thoennes, 1982.

26. *Dispute Resolution* No. 19, Summer 1986. The Child Support Enforcement Amendments of 1984 required judicial systems to adopt expedited processes to obtain and enforce support orders. Federal reimbursement and incentive funds under these amendments were made contingent upon compliance with the amendments. Specifically, states were required to complete 90 percent of child support cases within 90 days to receive federal funds.

27. Center for Policy Research, 1985.

28. Pearson and Thoennes, 1982.

29. Jessica Pearson, "Divorce Mediation: An Overview of Research Results," in Jay Folberg and Ann Milne, eds., *Divorce Mediation: Theory and Practice* (New York: Guilford Press, 1985).

30. Neil Vidmar, "Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance," 21 *Law and Society Review* 1, pp. 155-164 (1987).

31. Pearson and Thoennes, 1982.

32. Center for Policy Research, 1985.

33. Trost and Braver, 1987.

34. Pearson and Thoennes, 1982.

35. There may be a structural reason for such uneven conclusions about mediation and relitigation. If mediated agreements include a provision for informal (out-of-court) postdecree modification, relitigation should be low. Conversely, if a mediation program established by statute *requires* periodic review by a court, postdissolution court cases are likely to multiply. See also note 2, *supra.*

36. Pearson and Thoennes, 1982.

37. Center for Policy Research, 1985.

38. Daniel S. Shaw and Joanne A. Jackson, "A Clinical Description of Model of Child Custody Mediation" in J.P. Vincent, ed., *Advances in Family Intervention, Assessment, and Theory* (University of Virginia: Charlottesville, 1987). Also, Robert Emery and Melissa M. Wyer, "Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents," in 55 *Journal of Consulting and Clinical Psychology* 1 (1982).

39. Lind, et al., 1988.

40. A. Parker, "A Comparison of Divorce Mediation vs. Lawyer Adversary Processes and the Relationship to Marital Separation Factors," unpublished doctoral dissertation (1980).

41. Pearson, 1985.

42. Lind et al., 1988. This may help explain the low satisfaction found by Pearson and Thoennes with mediation in Delaware.

43. Vidmar, 1987.

44. McEwen and Maiman, 1984. Vidmar (1987) makes the argument that high satisfaction and compliance rates are explained not by the dispute forum, but rather by certain case characteristics, especially admitted liability.

45. While some argue that mandatory mediation is by nature coercive, others maintain that even mandated programs can be highly participatory. The distinction is between coercion *into* mediation (which may be present) and coercion in the mediation process (which is absent). See Stephen B. Goldberg, Eric D. Green, and Frank E. A. Sander, "ADR Problems and Prospects: Looking to the Future," 69 *Judicature* pp. 291-299 (1986).

46. Lind et al., 1988, pp. 45 and 63.

47. Sally Merry and Susan Silbey, "What Do Plaintiffs Want? Reexamining the Concept of Dispute," 9 *Justice System Journal* 4 (1984).

48. Federal policy reflected in the Child Support Enforcement Amendments of the Family Welfare Act (H.R. 1720) now favors mandating both periodic review of all child support awards obtained through enforcement agencies and review of awards every three years including AFDC clients.