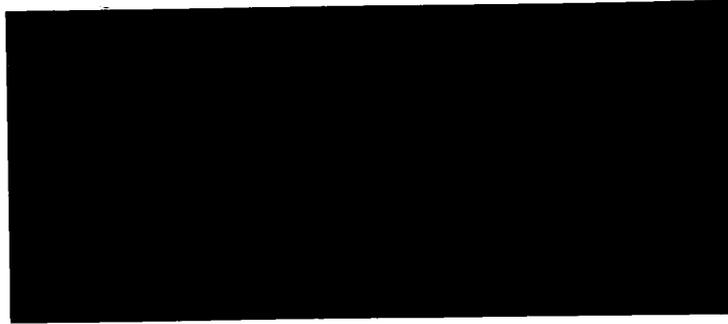


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FINAL REPORT
of the
DIVORCE MEDIATION RESEARCH PROJECT
(90-CW-634)

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ACQUISITIONS

Submitted to:

The Children's Bureau
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INTRODUCTION

This report describes the goals, methodology and findings of The Divorce Mediation Research Project, a three-year project funded by the Children's Bureau of the Administration for Children, Youth and Families of the Department of Health and Human Services.

The project was initiated in the wake of a variety of social trends: the dramatic increase in the divorce rate; the growing incidence of contested custody and visitation matters; widespread popular and professional dissatisfaction with case backlogs, delay and the formality and expense of judicial proceedings; the replacement of fault and sex-based criteria in the award of child custody with subjective criteria that widened judicial discretion; the promulgation of statutes stressing joint custody and the continued involvement of both parents following divorce; the dissemination of research tracing patterns of child adjustment to divorce to parental cooperation levels and parent-child contact; and widespread experimentation with alternatives to litigation including the initiation of divorce mediation services in several courts in the United States.

Many goals were posited for divorce mediation interventions by program architects and advocates. Since the process calls for compromises from both sides while affording each parent the opportunity to gain concessions, proponents believed mediation would yield outcomes that were more acceptable, personalized and satisfactory to disputants than agreements and orders produced in court hearings. Since the process stresses communication and the airing of grievances, proponents believed that mediation would enhance parental cooperation and reduce post-divorce conflict and relitigation.

Since the process underscores personal participation in conflict resolution, proponents believed that mediation would enhance commitment to and compliance with agreements. Lastly, since many private sector services offering mediation failed to attract a sizeable client population, the architects of public sector programs believed that public sector placement would garner the support of the legal community, attract users and help to unclog court dockets and improve the administration of justice.

The extravagant benefits attributed to mediation in general and public sector varieties in particular underscored the need for empirical research. Critics feared that divorcing parents embroiled in a custody or visitation dispute would be too self-centered and embittered to produce responsible agreements concerning their children. Others questioned the ability of mediators to deal with the inevitable disparities in financial, emotional, psychological and social resources between disputants and feared that the weaker party would suffer from the absence of legal representation and make too many concessions. Finally, many wondered whether mediators who are employed and housed in a court setting would be regarded by disputants as neutral or skilled enough to facilitate a satisfactory negotiation. If these concerns were substantiated, the end result of mediation would be increased relitigation, user dissatisfaction, and/or a general absence of equitable outcomes.

Project Goals

On the basis of the claims, pro and con, the Divorce Mediation Research Project developed five major research aims:

- 1) Measure and contrast the outcomes, costs and impacts of mediation and traditional adversarial processes.

- 2) Measure and compare the specific outcomes of several model mediation programs.
- 3) Identify the characteristics of the dispute, the disputants and the mediators which are associated with successful mediation outcomes.
- 4) Elucidate the strengths and weaknesses of court versus community (private) programs and the practical and theoretical issues attendant to each.
- 5) Develop and disseminate recommendations on the characteristics of effective mediation and identify optimal service models.

Methodology

A variety of data collection procedures were employed to create a diverse data base that would allow us to address all these goals. For example, in order to explore the issues of mediation versus adversarial outcomes, the characteristics of disputes, disputants and mediators associated with successful versus unsuccessful mediation interventions, and to evaluate the characteristics of various model programs, it was necessary to study several public sector mediation services. To describe the range of public and private services and their relative merits, it was necessary to survey operating services throughout the United States.

Research Sites

Following discussions with the Program Officer and Project's Advisory Board, we selected three public sector mediation services for in-depth study: the Los Angeles Conciliation Court of the Los Angeles Superior Court, the Custody Resolution Counseling program in the Court Services Division of Hennepin County Court, and the Family Division of the Connecticut Superior Court. All three programs had a relatively long track record, were influential and served a large number of clients each year. However, since each program has a slightly different client base, referral mechanism and

approach to the delivery of mediation services, the sites offered ample opportunities for contrasts and comparisons.

In order to compare the experiences of mediation clients with the experiences of people using the adversarial legal system, we selected a site where court-based mediation was not available, but where the divorce and custody legislation was comparable to that of the mediation sites. After exploring numerous options, we chose to conduct interviews with individuals who had contested custody cases pending in six metropolitan courts in Colorado. As an additional comparison, we also sampled non-contested custody cases in Denver, Colorado. Non-contested custody cases make up the vast majority, probably 90 percent, of all divorces involving children in the United States. We expected that on such measures as satisfaction with agreements or post-divorce adjustment, mediation clients might fall midway between those who used the adversarial system on the one hand and the non-contested population on the other.

Longitudinal Survey

At each research site a full time site researcher was retained to supervise and aid in the data collection. The Research Unit in Denver, Colorado performed all data design and analysis activities and coordinated the data collection across the sites.

Data collection procedures were somewhat different at each research setting. In Los Angeles, mediation may take place in the central office or at one of nine outlying branches. Because the majority of all cases are serviced in the central court, we limited our data collection to this one site. During the time we were collecting data, contested cases were typically referred to mediation directly from a court appearance.

Appointments were set only when mediators were unavailable to conduct a session on an immediate basis. Because it was impossible to identify relevant mediation cases prior to their court appearance, project questionnaires were distributed to clients for completion during the 20 to 30 minute period between the morning court calendar call and the mediation session. Understandably, this procedure was awkward and only 70 percent (256) of the 371 questionnaires distributed in this manner were sufficiently complete to be ultimately included in the study.

In Hennepin County, Minnesota, clients are scheduled for a mediation appointment about two weeks in advance. As a result, it was possible for us to mail our initial questionnaire to respondents and follow this up with a telephone call to remind respondents to complete and return the survey prior to their first mediation appointment. This approach worked well and yielded 108 surveys.

In Connecticut, we used a combination of telephone interviews and mailed questionnaires to contact clients in 8 of the 13 Family Division offices. A total of 160 questionnaires were completed. Respondents were primarily drawn from client populations in Hartford (57), New London (52), Waterbury (27), and New Britain (14). The remaining 12 cases were divided among Rockville, Litchfield, Stamford and Bridgeport.

In Colorado we used the phone and mails to contact individuals who were identified as having contested custody cases. Most of these individuals were scheduled for custody evaluations at the time the questionnaire was administered. The initial survey of contested cases yielded 170 respondents from Denver, Boulder, Adams, Arapahoe, Jefferson and El Paso Counties. A combination of telephone interviewing and mailed questionnaires was also used

to contact individuals who recently filed for divorce in Denver County who had minor children but did not appear to have custody disputes. Our initial sample size in this group stood at 132.

Attempts were made to contact all respondents three months following the initial interview and again 12 months following the first contact. Both phone interviews and mailed questionnaires were used to recontact respondents. The end result was a 20-25 percent attrition rate at each of the sites. The final sample sizes at the one-year follow-up stood at 207 mediation clients in Los Angeles (this included a few individuals who did not complete the initial questionnaires but asked to be contacted for subsequent interviews), 81 clients in Minnesota, 125 clients in Connecticut, 102 individuals in Colorado who contested child custody but did not mediate, and 136 individuals with minor aged children in Colorado who divorced and did not contest child custody or visitation matters.

Retrospective Survey

A 12-15 month lapse of time between the first and final interview is clearly not long enough for all the potential effects of mediation and court interventions to be noted. However, the project timeline did not allow for a longer passage of time to elapse between interviews. To detect longer term patterns, we did a single retrospective survey with parents who had mediated or litigated their custody disputes four to five years ago. Thus, using court records, we identified and contacted parents in Denver who were scheduled for custody evaluations in late 1978 and early 1979. At each mediation site, we used court files and the mediation program's files to contact individuals who mediated custody and visitation cases in 1978 and 1979. Despite the problems associated with attempting to locate parents with

dated contact information, phone interviews were ultimately conducted with 100 respondents who mediated in Los Angeles, 106 who mediated in Connecticut, 169 who mediated in Minneapolis, and 100 parents in Colorado who had contested custody or visitation.

All survey instruments were designed after a review of the literature on divorce and mediation and an exploration of pre-tested and validated scales, indices and items available to measure the relevant concepts. The questionnaires were reviewed by our consultants. They were also pretested by our site researchers to insure that all pertinent information was collected and that the instruments were understandable to mediation clients.

The questionnaires elicited information about the demographic characteristics of disputants, the scale of the divorce dispute, the mutuality of the divorce decision, marital power, communication skills, co-parenting and visitation patterns, reactions to mediation, experiences with and attitudes towards attorneys and courts, relitigation behaviors and individual and child adjustment to divorce. Among the specific pre-tested scales and items we relied upon were: an adjustment to divorce scale developed by Kitson (1979), a parental and co-parental scale developed by Goldsmith and Ahrons (1979), measures of marital communication developed by Powers and Hutchinson (1979), Levy's list of visitation problems (1979) and a checklist of child behaviors developed and tested by Thomas Achenbach and Craig D. Edelbrock of the Center for the Study of Youth Development, Boystown, Kansas (1981).

In-depth Interviews with Parents

At each site, parents who participated in the longitudinal survey were asked if they would also be willing to take part in an in-depth, face-to-face

interview which would be less structured and more detailed. The goal of the indepth interview was to discover more about clients' reactions to the mediation process. Therefore, the first indepth interview took place shortly after the first questionnaire was completed which corresponds roughly with the conclusion of the mediation experience. Although we intended to only interview 15 individuals at each location, we ultimately interviewed 18 non-contesting parents in Denver, 20 individuals with contested cases in Colorado, 19 individuals in Los Angeles, 23 in Connecticut and 34 in Minneapolis. At each location, about ten respondents were re-interviewed in a second indepth interview, 9-10 months later.

Indepth Interviews with Children

An additional population of obvious concern is that of the children of the divorced and divorcing parents who participated in the longitudinal survey. Rather than administering questionnaires to them, we opted to conduct indepth interviews with 6 to 11 year olds. Because of the sensitive nature of the material, we recruited clinicians who treat children to be our interviewers. These interviewers attended a day-long training session conducted by Judith Wallerstein and Dorothy Huntington of the Center for Families in Transition. The session focused on interviewing techniques, as well as reviewing the behaviors and attitudes that might be found in this age group. A major goal of the training session was to insure standard data collection across the sites. It was agreed that the issues to be addressed by each clinician in her written summary of the interview were the child's cognitive and affective understanding of the divorce, and where applicable, his/her cognitive and affective understanding of the custody dispute, the nature of the child's relationship with each parent, the child's social

network ties, and his/her understanding of and reactions to custody evaluations, court appearances, and mediation.

As with the indepth interviews with adults, the first indepth interview with children took place shortly after the first questionnaires were administered. For the mediation samples, this was shortly after the conclusion of the mediation experience. In both Los Angeles and Connecticut, 15 children were interviewed. In Minneapolis, 13 interviews took place, and in Colorado 9 children from contesting families and 11 from non-contesting families were interviewed. Identifying children who fell in the 6-11 year old age group, obtaining parental and child consent, and conducting the indepth interviews were difficult and slow processes. Understandably many parents were reluctant to expose their children to the interview process. This was especially true for parents who were embroiled in custody evaluations and other types of litigation. Given our timeline, many children who were initially interviewed could not be reinterviewed one year later. Thus, of the 63 children originally interviewed, we attempted to reinterview only 41 children and we successfully completed 30, or 73 percent.

Audiotaping

Another data collection procedure which yielded a new perspective on the mediation process was audio taping of sessions. Mediators at all three sites explained to couples that the audio tapes would be treated in a confidential manner and used for research purposes only, and obtained signed consent forms to permit taping. The goal was to code each of the cases using a descriptive listing of behaviors and voice tones. In this manner it would be possible to study the mediation case in terms of individual mediator and spousal behaviors. A total of 149 mediation cases were taped, but of these

only 81 were included in the eventual analysis. Virtually all the usable tapes were from Los Angeles and Connecticut. The remaining tapes were not included for a variety of reasons. Some tapes included too many inaudible portions (51), others arrived too late for inclusion (12); and a few (5) were used to develop the coding system.

Interviews with Court Staff

Yet another perspective on the mediation and litigation of custody disputes was gained through indepth interviews with key professionals at each site. Interviews were conducted with mediators in Los Angeles, Minneapolis and Connecticut to discover the range of styles and approaches in use, the aspects of the particular program that were most satisfying or dissatisfying, and recommendations for program change. In all of the mediation sites, as well as in Colorado, interviews were also conducted with custody evaluators, family court judges, court administrators and attorneys who frequently handle divorce cases. Their interviews revealed how mediation is viewed by the professional community, as well as providing a more complete picture of the divorce experience in contested and non-contested instances. In order to convey the day-to-day operation of each mediation program and to detail the process by which cases enter the system and are processed, each site researcher maintained field notes for the duration of her employment.

Survey of Mediation Services

One of the goals of the Divorce Mediation Research Project was a comparison of the similarities and differences between public and private sector services. In order to address this goal, and in order to more fully

explore the viability of custody mediation, it was necessary to broaden our perspective on mediation from the services delivered in our three research sites to those offered nationwide. To this end, a field researcher was retained to gather information on a national scope. Visits to over 20 public and private sector services in California, Oregon, Georgia and Massachusetts were used to provide preliminary information on the range of services available and the practical and theoretical issues of concern to service providers.

On the basis of the information gained in these site visits, a survey was developed which considers the history of a service, the educational background of the staff and their training in mediation, the types of mediation, legal and counseling services provided, the volume of cases and the format of the session(s). These surveys were mailed to individuals who were members of two large organizations whose members are typically involved in divorce mediation: the Association of Family and Conciliation Courts (200 mailings) and the Family Mediation Association (800 mailings). Although not all divorce and custody mediators belong to these organizations, their membership lists represent the most complete listings of those likely to be practicing mediation. From the 1000 mailings, a total of 315 surveys were returned. Although this response rate may appear low, it is important to note that some individuals were probably members of both groups, thus bringing the total to less than 1000 individuals. Further, since only one questionnaire was requested per organization, mediation teams and groups of mediators typically returned only a single survey. Finally, many of the individuals who belong to the AFCC are not mediators but are judges, therapists, attorneys, researchers and court administrators.

The completed surveys were computer coded and analyzed in order to identify the nationwide patterns in mediation training and service delivery. In addition, given the fact that listings of mediation organizations and private practitioners are not readily available, either to the public, the various helping professionals who serve divorcing parents, or to other mediators, we compiled the survey returns into an annotated state-by-state directory of mediators. Numerous copies of individual state listings from this directory have been mailed to attorneys, mediators and parents who wrote or phoned our office to request copies, and over 750 complete directories have been distributed.

Research on the Implementation of Court Mediation Services

In order to disseminate practical information on how mediation services can be initiated and organized in the public sector and the relative advantages and disadvantages of the various approaches, we retained a consultant to identify the bases of legal authority for public sector mediation services, the alternative methods of administering such programs, and the legal issues raised by the establishment of such services. This process involved reviewing state statutes, court rules and administrative orders, and locating and reviewing documents pertaining to services throughout the nation.

Organization of Findings

The results of our research are presented by topic in 12 chapters. These are divided into two sections. The first section offers a more general approach to divorce mediation. It includes: 1) a summary analysis of current trends and research in mediation; 2) a review of the alternative methods of establishing and administering court-based mediation services; 3)

and an overview of the public and private sector organizations and individuals across the nation offering divorce mediation.

The second section focuses on our research in four states across the nation. This section begins with a description in chapters four, five and six of the three court-based services we studied and a comparison of their similarities and differences. Chapter seven turns next to a description of the study's respondents in these three mediation research sites and a qualitative and quantitative look at their more immediate reactions to the mediation experience. The process of custody mediation as practiced in these three sites is summarized in chapter eight in a coding framework designed to measure spousal and mediator behaviors. Two chapters, nine and ten, consider the characteristics of successful mediations. One piece explores the issue by reporting the results of analyses of the specific verbal behaviors of mediators and spouses during mediation as coded by a neutral party. The second piece attempts to predict mediation settlement using disputants' reports of the characteristics of the dispute, background information about the couple and the disputants' evaluations of the mediator. Chapter eleven is devoted to the relatively long-term outcomes associated with mediated and litigated custody disputes. The final chapter explores the issues of mediation versus litigation with a special emphasis on the effects of each process on children. The research findings presented in each chapter are summarized below. Appendix I contains a copy of all questionnaires utilized in the project. Appendix II contains a list of all project publications and selected conference presentations.

Summary of Findings

Section I.

Chapter 1. An Evaluation of Alternatives to Court Adjudication

Far from being new, recent complaints lodged against the legal system harken back to those alleged by Progressive Era reformers including complaints that courts increase trauma, divisiveness, conflict and a lack of commitment to the judgment rendered (Danzig, 1973; MacCaulay and Walster, 1977; McGillis and Mullen, 1977). One result of this dissatisfaction has been a resurgence of interest in the alternatives of arbitration and mediation. These are distinct processes that are frequently confused (Sander, 1976). Arbitration involves a third party with decision making powers who hears evidence and renders a written opinion that is rationalized by reference to general principles. In mediation, by contrast, the third party serves only to facilitate decision-making by the disputants. The mediator helps the parties to identify and clarify issues, encourages disputants to ventilate their feelings, while refocusing discussions, diffusing anger, pointing out areas of agreement, and encouraging compromise (Rubin and Brown, 1975; Deutsch, 1973). It has been argued that mediation, compared to adjudication, is better able to address the causes of the dispute and to promote durable agreements. It is also argued to be more expeditious and inexpensive (Danzig & Lowy, 1975; Heher, 1978; Witty, 1980; Mnookin & Kornhauser, 1979).

Mediation was used in the early 20th century in cases of domestic disputes. However, its popularity waned as problems emerged such as underutilization of mediation services and unenforceable agreements (Harrington, 1982). The renewed interest in mediation in the 1970's has seen

its use in virtually all substantive areas, including small claims matters, landlord-tenant disputes, felonies involving non-strangers and once again, domestic matters. Evaluations of the success of mediation have in all these settings changed over the years from an interest solely in its ability to reduce case backlogs and costs, to a concern with its ability to improve access to and quality of justice (Danzig, 1973; Singer, 1979; Merry, 1982).

Empirical evaluations of mediation have rarely involved the random assignment of cases to court or the mediation alternative (Pearson, 1979). More typically research has relied on interviews with those who have used mediation and interviews with individuals who have used the courts to resolve comparable disputes (McEwen & Maiman, 1981). Some research is entirely limited to reviews of records such as caseload information and case disposition (Felstiner & Williams, 1979/80).

The empirical evidence that does exist indicates that mediation frequently fails to achieve all the results that have been posited in its behalf. Not infrequently the research indicates that mediation is underutilized, although when it is employed it is perceived to be a more equitable and satisfactory process. Explanations for this underutilization have included a lack of public education, a virtually exclusive reliance on attorneys for guidance in disputes, a reluctance to involve outsiders, insufficient pressure to utilize alternatives to litigation, unwillingness to deal directly with the other party in the dispute, and a strong belief in having one's "day in court". Participation in mediation is of course not a problem in mandatory programs, but for many the idea of compulsory mediation seems to contradict its consensual nature (Danzig, 1973). However, mandating mediation does not seem to reduce its ability to produce settlements (McEwen,

and Maiman, 1981), and disputants in mandatory mediation programs do not seem to feel obligated to settle (McEwen and Maiman, 1982).

Once disputants try mediation, the chances are good that they will produce agreements. Typically, 40-65 percent of the cases which enter mediation result in settlements (McEwen and Maiman, 1981; Cook et al, 1980), and those which do not settle may be more likely to stipulate before a court appearance when compared to those never exposed to the process (Pearson & Thoennes, 1982). In addition, mediated settlements generally reflect greater compromise--whether measured by the incidence of joint custody or smaller settlement figures--than is found in litigated settlements in comparable cases (McEwen & Maiman, 1981; Pearson & Thoennes, 1982). Further, regardless of the outcome of mediation, users are generally satisfied with the process (Felstiner and Williams, 1980, Pearson & Thoennes, 1982).

There is also a general consensus that mediated agreements result in better compliance than do adjudicated settlements (McEwen & Maiman, 1982), although in some cases the pre-existing characteristics of disputants who settle in mediation, versus those who do not, indicate a predisposition to comply (Pearson & Thoennes, 1982). There is less consensus on the ability of mediation to reduce relitigation. Some researchers note merely that mediated settlements are no more likely to be relitigated (PINS mediation project, 1982; Davis, et al, 1980). Others report that there is less recidivism among mediation clients (Heher, 1978; Pearson & Thoennes, 1982).

Savings in time and money for disputants are difficult to document. It is generally accepted that mediated cases move through the system more rapidly than litigated cases. However, if mediation does not result in a settlement, the case may take as long or longer to be processed as do the

purely adversarial cases (Pearson & Thoennes, 1982). Savings in public costs are even more difficult to establish, as are impacts on court case loads and backlogs. For example, many mediation services primarily process cases that would not be otherwise adjudicated. While this may improve access to justice, it does not result in savings of public monies. Nor are underutilized services operating efficiently. However, mediation does appear to remove from the courts certain types of interpersonal cases that are particularly distressing and time-consuming for judges (McEwen and Maiman, 1981; Cook, Roehl and Sheppard, 1980).

One conclusion from previous research on mediation in a variety of substantive areas is that many proponents of mediation have oversold this alternative and have thus inadvertently contributed to unrealistic expectations about the process. A second conclusion is that voluntary mediation programs typically are underutilized by the public which hinders the ability of the process to reduce case backlogs and to offer a cost effective alternative to litigation. Mandatory mediation programs handle a much greater volume of cases and generally do so with high user satisfaction.

At the same time, there are more positive conclusions to be reached. Mediation clients report greater user satisfaction than do those who use the courts. The mediated agreements are also perceived to be more equitable and over time they are more likely to enjoy compliance. Thus, previous research on the use of mediation suggests that it can make a distinct contribution to the satisfactory administration of justice and complement court adjudication in important ways.

Chapter 2. Implementing Divorce Mediation Services In the Public Sector

The resurgence of interest in mediation, and its rapid growth and popularity in the substantive areas of divorce and child custody have attracted the attention of courts across the nation and no doubt raised the possibility of court-based mediation services in many of these jurisdictions. In order to implement divorce mediation services in the public sector, there are at least four issues that must be addressed. Broadly defined, these issues are: 1) the role of the government in mediation services; 2) the legal authority for the mediation services; 3) the service structure that maximizes administrative and cost efficiencies; and 4) the specific procedures that will govern the mediation service.

Role of Government

The government may assume one of several roles in the organization and operation of public sector divorce mediation services. The least active is that of facilitation. Such states merely refrain from enacting incompatible legislation or perhaps define and cite mediation as an alternative in various procedural laws or rules. States or jurisdictions which encourage mediation go beyond the mere mention of mediation and offer incentives to mediate such as an expedited calendar or lower fees.

A more active role involves the provision of services. Jurisdictions which play this role are more effective in exposing large numbers of cases to mediation and to increasing disputants' willingness to try an alternative. The most active role is that of mandating mediation. These jurisdictions require that mediation be attempted before a court appearance will be granted.

Sources of Legal Authority

There is great variety in the sources of legal authority for mediation services. The legislative branch may authorize mediation through explicit statutes and this has occurred in California, Florida and Michigan. In many more states, existing legislation implicitly authorizes such a service in the public sector. Examples of this implicit authorization would include conciliation statutes which are intended to promote reconciliations as well as the amicable settlement of disputes, or statutes emphasizing the goal of protecting the rights of children. Joint custody statutes may also be a source of implicit authorization since they often mention that courts may order parents to seek appropriate assistance in formulating a joint custody plan, or may make consideration of the method used to resolve future disagreements over child care one of the considerations in awarding joint custody.

In most states, the state supreme court may adopt rules of practice and procedures that are effective in all trial courts of the state. This mechanism could be used to create a uniform state-wide procedure for divorce and custody mediation. Each jurisdiction has its own procedures to initiate rules such as those dealing with mediation. Typically, they involve formal communication between the state bar association and the supreme court, via a rulemaking body composed of the public and the judiciary, or by means of a committee which includes members of the public.

Local court rules and administrative orders may be used to formally authorize mediation and informally courts may encourage mediation by such procedures as differentially referring mediated and non-mediated cases to fast and slow dockets. On the positive side, local court rules are easy to

Implement; often they can be enacted by the domestic relations bench. However, in systems where judges frequently rotate, reliance on local court rules may introduce a certain amount of instability in the operation of a mediation service.

A final approach the judiciary may use to authorize mediation is the use of ad hoc judicial orders. Legislation routinely authorizes judges to use outside professionals, such as custody investigators or psychiatric evaluators, to assist them in their determinations of the child's best interests. Logically, judges could refer parties to a mediator by citing this broader legislative authority.

Within the executive branch, agencies that deal with divorcing and divorced families may incorporate mediation into their activities either informally or, where authorized, formally by holding public hearings for input and promulgating rules instituting mediation.

The establishment of mediation by Executive Order has not been fully explored. To the extent that the governor is involved in the enforcement of support orders, and assuming that mediation promotes compliance, it would be possible for the chief executive to order its utilization.

Administration Options

Administration of mediation services through the judicial department offers several advantages. Implicit statutory authority for the program is usually available. The judicial department is usually in a relatively strong position to make budget requests. In addition, there are several potential means of self-funding available to mediation programs within the judicial department, the most obvious being earmarked increases in docket fees. The concept of hiring traditionally titled employees to perform new functions has

a precedent. Just as bailiffs sometimes serve as law clerks, masters or referees could perform mediation duties. Finally a court based service insures that the interaction between the mediation program and the court will be efficient.

Other agencies that might house a divorce mediation service would include marriage and family counseling services, custody investigation services or child support enforcement agencies. There are special considerations in pursuing each of these options. For example, personnel performing family counseling can be readily retrained to provide mediation. Custody investigators might also be retrained although these workers are usually obligated to report to the court and to submit to cross-examination, which would be incompatible with mediation formats that stress confidentiality. In addition, custody investigators are often outside the judicial department. This would introduce the need for coordination across branches of government, a potentially more cumbersome process. Similarly, if mediation were to include child support matters in addition to custody and visitation, a mediation service administered by child support enforcement agencies would require coordination with the judicial department.

In addition to the options above, mediation services could be housed in a separate unit with its own administrative system. This would free the program from using existing personnel or job descriptions, however, in most states, it would also require new legislation and funding.

A final option would involve contracting with the private sector for services. This option eliminates expenditures of public monies for staff training and start-up and, depending upon the responsiveness, stability and quality of the private agency, it could be a viable means of offering

mediation services.

Mediation Procedures

In drafting procedures for public sector mediation, it is necessary to consider how mediation is defined, the eligibility guidelines, how it is initiated, the reciprocal effect of mediation and litigation timetables, confidentiality, the role of attorneys, qualifications for mediators and the role of the public agency in research and education.

Definitions of mediation usually stress the non-adversarial nature of the process and that the authority for decisions rests with the parties, although mediators are often given the responsibility of looking after the child's best interests. Rules of eligibility may state what issues can be mediated, client qualifications (for example excluding cases of known abuse or insuring mediation regardless of marital status, biological parenthood or indigency), the filing and litigation status of mediation clients, and the maximum duration of mediation.

Initiation guidelines must specify whether mediation is mandatory or voluntary. The procedures parties must take to initiate services should be clarified as should any incentives that will be offered to those choosing to mediate.

Family mediators generally prefer to have litigation suspended while parties attempt to mediate. Conciliation legislation may authorize such postponements. Guidelines must note such suspensions as well as clarifying when litigation proceeding will resume in cases which fail to settle.

Mediation services also must consider the degree to which the service provided will be private and confidential. Assurances of confidentiality may rely on claims of privileged communications or the ruling that offers to

compromise and settle are not admissible for the purpose of proving the validity or amount of any claim. Confidentiality may also be protected by contract.

In some jurisdictions mediators may have the authority to exclude counsel for the parties from the mediation conferences. However, in planning public sector services, attention should be given to issues such as whether mediators meet privately with attorneys and whether clients are encouraged to obtain separate legal counsel.

Specifying the qualifications of mediators may touch on the issues of formal education, experience and in jurisdictions using male-female teams, sex may be a bona fide occupational qualification as well. State statutes rarely specify liabilities for abuse of power by mediators. Instead, mediators tend to be covered by the general provisions dealing with the liability of public servants. Finally, some agencies have developed in-house policies and regulations to set professional ethical procedures and standards for their mediators.

Public information dissemination may take the form of periodic programs on divorce or subtopics such as divorce and children, and may include the distribution of printed materials as well.

Based on the preceding information, it is clear that there are a wide number of alternative approaches to the implementation, administration and operation of public sector mediation programs. The issues raised above need to be considered, and from the many options, a jurisdiction must select those that best meet its specific needs, statutory structure and financial resources.

Chapter 3. Divorce Mediation Services In the Public and Private Sector

As the number of divorce mediation services expands, it is important to understand who, in both the public and private sectors, currently offer services. Our survey of members of the Family Mediation Association and the Association of Family and Conciliation Courts offers a portrait of public and private sector services in operation in 1982.

Both public and private practitioners covered in the survey report that the impetus for establishing a mediation service was growing disenchantment with adversarial resolutions in divorce cases. About a third of the public programs also cited the increased number of divorces and the need for more expeditious methods of resolving disputes. Almost half of the public service programs were initiated by judges and typically these judges merely added mediation to the array of counseling and investigative services offered by the court.

Private sector services are generally offered either by sole practitioners or private, profit organizations, and the principal source of income is client fees. Only a small percentage of public programs charged fees. Most relied on state or county funds and many were supported at least in part by earmarked increases in divorce filing fees, marriage license fees and fees for motions to modify or enforce custody/visitation orders.

The average fee charged by a private practitioner varies according to the educational background of the mediator. Those with legal degrees averaged \$68 per hour while those trained as family therapists averaged \$52 per hour. Further, mediators with legal degrees are more likely to be found in the private than in the public sector. The public sector relies almost entirely on social workers and marriage and family therapists. This is

predictable given that most public sector services require master's degrees in family counseling, social work or related fields.

In both private and court-based services, over 70 percent of the mediators report that they have received specific training in mediation. Respondents in both sectors are divided on the issue on licensing of mediators. Opponents contend that the field is too new and too little is known about the necessary training and education. These respondents feel that the fact that many mediators are already certified in the fields of law or social welfare is adequate to protect the public. Those who favor certification and licensing feel it will promote uniformity and quality and deter those with little training or experience from practicing.

Practitioners in the public and private sectors differ in the amount of time they devote to mediation. The private sector respondents spend about 35 percent of their time in mediation while public agency respondents report that mediation accounts for half of their time. Private sector respondents devote the bulk of their time to a variety of other activities including legal services, marriage and divorce counseling, general therapy, non-divorce mediation and arbitration and, in 20 percent of the cases, mediation training.

The type of issues mediated in private versus court-based programs also differ. Almost 70 percent of the private programs mediate all divorce issues, while court services are typically (64%) limited to mediations of custody and visitation matters. In part, this difference may reflect the fact that court programs focus on contested custody cases that would otherwise backlog the courts, while private services feel no need to limit themselves in this respect. Moreover, many court-based services have grown

out of court counseling services that have traditionally focused on non-financial matters.

Public and private-based mediators also tend to view confidentiality issues differently. In public agencies over a third of the organizations report that the same individual acts as both a mediator and an investigator on a case, while virtually no private sector mediators serve this dual function. Not only is it often the case that private sector mediators do not perform investigations, it is also the case that they view the roles of investigators and mediators as far more incompatible than do their public sector counterparts. While many public sector personnel note that clients generally prefer having their investigation conducted by someone they trust and appreciate the savings in time and money that result from mediators also serving as investigators, private sector mediators are fairly consistent in the emphasis they place on the confidentiality of the mediation process.

The public sector programs in our survey averaged nearly nine times the number of cases seen by private programs. Thus, the average number of cases in a public program was 500 as opposed to 60 in a private agency. One major reason for this is differences in referral sources. Public program clients are referred by the court, while private services rely on self-referrals. As a result, finding clients is a problem for over half of the private but only ten percent of the public programs. One consequence of the differences in case volume is the fact that public sector mediations require less time than their private sector counterparts. Public sector mediators report they spend less time introducing the process, provide less information about the legal system and offer less advice on the family's financial situation.

All mediation service providers indicate that it is important to involve

the disputant's attorneys in the process in order to insure their commitment and understanding, but few attorneys attend mediations in either the public or private sector. Mediators in the private sector are fairly evenly divided between those who do and those who do not meet with the children. In the public sector, mediators generally (73%) do not see the children.

Comparing agreement rates is difficult given the low volume of cases in private mediation services as well as the differences in self-referred versus court-referred clients. Generally, in both sectors, between 56 and 65 percent of the cases are reported to end in an agreement. When solutions are reached, mediators and clients typically draft agreements which are then revised by clients' private attorneys. Because agreements in the private sector are more likely to include financial settlements, their agreements are sometimes drafted by advisory attorneys rather than the mediator. About 77 percent of the private and 55 percent of the public sector programs report that they routinely include clauses in agreements discussing the methods of resolving future disputes. However, more (60%) of the public sector than the private sector (37%) mediators report that clients have actually come back to make revisions.

Most respondents have a difficult time describing what types of cases are best suited to mediation. For example, 60 percent of the private and 40 percent of the public sector mediators feel that all issues can be mediated. The unsuitable cases mentioned tend to be those involving violence, neglect, drugs or alcohol abuse. However, most respondents agree that prior communication patterns are important in reaching settlements, as is general divorce adjustment. The traits of a successful mediator are also elusive. Most respondents feel that they use a wide variety of styles and techniques

and that their approach depends upon the individual case.

About half of the respondents in both the public and private sectors express some concern about being challenged with the unauthorized practice of law. However, virtually no respondents in either sector had actually received such a challenge. Overall, the public sector reports that the local judiciary and bar are supportive of the service they offer and the private sector reports greater ambivalence. It is difficult to determine whether the ambivalence and skepticism are the result of private sector mediators' experienced competition with attorneys in the lucrative areas of financial and property settlements or whether the private sector is simply viewed as subject to no particular supervision or quality control.

In general, the survey reveals enormous diversity in the divorce mediation services operating in 1982, and a tremendous surge of services within recent years. No doubt both patterns will continue to hold as the decade progresses.

Section II.

Chapter 4. Custody Mediation In the Los Angeles Conciliation Court

One of the three court-based mediation services selected for indepth study was the Conciliation Court of the Los Angeles Superior Court. The Conciliation Court began as a marriage counseling unit within the court in 1939. From its inception the program enjoyed relatively high status, autonomy, funding, and perhaps most importantly positive ties with the local judiciary. Under the supervision of a series of interested and concerned judges, the Conciliation Court expanded from marriage counseling to the mediation of custody and visitation disputes and pre-marital counseling for minors.

The court first began conducting mediations in 1973 at the instigation of a Family Court Judge. In 1977 a local rule was promulgated making mediation mandatory in all cases of contested custody and visitation. Although the survival of the Conciliation Court came into question with the passage of Proposition 13, California's radical property tax limitation law, a lobbying group comprised of civic leaders and former Conciliation Court clients was successful in pushing for enactment of Senate Bill 961 which made mediation mandatory and provided the Court with a secure funding base generated by earmarked filing fees.

Currently, the Los Angeles Conciliation Court is housed within the Family Law Department and provides services to families in downtown Los Angeles and nine branch courts. Cases involving contested child custody and visitation are routinely flagged through Order to Show Cause proceedings and/or daily Master Calendar Calls. At the daily calendar call, attorneys and their clients obtain a "Minute Order" from the clerk and proceed immediately to the Conciliation Court to be seen by a counselor. In recent months, greater proportions of litigants and attorneys are voluntarily calling the Conciliation Court to schedule an appointment with a counselor prior to the Order to Show Cause Hearing.

The mediations conducted by the staff generally include a brief meeting between attorneys and staff counselors while disputing couples attend an orientation program about mediation and its benefits for children. After the orientation ends, the attorneys usually leave and the counselor meets with the couple. After clarifying his or her role in the mediation process, the counselor attempts to identify the issues in dispute, help the parties to ventilate some anger and explore settlement options. Although children are

not routinely seen by most counselors, some counselors prefer to include the children and/or bring the children to mediation if the parents present dramatically different versions of the child's needs and preferences. Most cases are either resolved or referred back to court after a single mediation session which is unlikely to last more than two or three hours. However, a significant number of cases are scheduled for a second appointment.

The Conciliation Court has adopted a policy of strict confidentiality and no information obtained in mediation may be communicated to judicial officers, investigators or court psychiatrists. Although some counselors regret the loss of information, most support this policy. In 1981, the Conciliation Court processed 4,458 petitions concerning custody and visitation matters. Nearly half of these resulted in some sort of amicable agreement. While the Conciliation Court staff does not typically discuss the financial aspects of divorce, these issues are currently handled in mediation on an experimental basis by panels of attorney mediators.

Interviews with the director of the Conciliation Court and 17 family counselors reveal strong philosophical support for mediation at all staff levels. There is agreement that mediation is a pragmatic problem-solving process as distinct from therapy. However, there are differences in staff approaches to service delivery with some members being more sensitive to the need to service a high volume of clients with the least amount of delay and others making client outcomes a higher priority and taking longer amounts of time with each family.

Counselors express a great deal of job satisfaction and enjoy autonomy and esteem. Staff morale is high and there is fierce competition for a staff position when openings occur. They also feel as though they are providing a

valuable service to people and many enjoy the dynamic environment fostered by the rapid crisis intervention type work. On the negative side, counselors report that they tire of seeing a steady stream of angry parents.

Mediation is widely accepted by the legal and mental health communities in most of California. Judges attend conferences on mediation and many testified in favor of Senate Bill 961 which made mediation mandatory in cases of child custody and visitation. The judges also show their support by refusing to permit attorneys and litigants to short circuit the mediation process. They also respect the confidentiality provisions adopted by the Conciliation Court.

It appears that the attorneys who are most familiar with the Conciliation Court are also the most supportive of the process. These attorneys appreciate not having to deal with the more emotional aspects of the divorce process. On the opposite end of the spectrum are the system's critics who regard mediation as a waste of time, and these attorneys often communicate their antipathies to their clients. Still other attorneys are simply unfamiliar with the process and may inadvertently explain the process to their clients as a reconciliation procedure and/or an evaluation. Attorneys of all dispositions are rarely more enthusiastic about custody evaluations than mediations and tend to criticize the subjective nature of evaluations.

The Los Angeles Conciliation Court remains unique in several respects. Its scale makes it the largest program in the nation. It also moves clients directly from a court appearance into mediation and adheres to the view that couples are psychologically prepared to resolve problems on the day they come to court. The Los Angeles Conciliation Court guarantees its clients'

confidentiality. It also makes mediation mandatory in all cases of contested child custody and visitation and this is strictly adhered to by judges, referees and other judicial personnel. Lastly, the Program continues to change and experiment. In point is the Court's recent move to allow couples to set mediation appointments and its organization of panels of private attorneys to mediate financial disputes.

Chapter 5. Custody Mediation in the Family Division, Connecticut Superior Court

The origins of the mediation service in Connecticut date to 1958 when judges began referring custody and visitation disputes to probation officers for a determination of facts. Probation officers were also assigned support enforcement duties. Probation officers had previously supervised probation and conducted presentence investigations for the criminal court and lacked specific training in family dynamics and divorce. To develop staff expertise, a few officers were assigned divorce cases on a routine basis. In this manner, the Family Division was created.

In 1963, an officer in the court in Stamford, Connecticut, developed a novel technique for resolving many non-support cases. He chose to meet with the parties involved or their attorneys to attempt a resolution. He found that the informal negotiation approach was effective in 65-75 percent of these cases. As time passed, the approach spread to other courts and judges and attorneys became convinced that the "hallway" method was effective in resolving support cases. By 1967, the approach was used to resolve custody and visitation disputes and the tradition of court conferences or negotiations was firmly established in many of Connecticut's courts. The Family Relations Division remained responsible for support enforcement as

well as custody and visitation and the Division grew with the influx of federal monies for support enforcement.

During the mid-1970s, Connecticut's negotiations or conferences began to evolve into a more formal process of mediation. Members of the Family Division staff attended a conference of the Association of Family and Conciliation Courts and visited the mediation program developed in Hennepin County. Several staff members began to experiment with mediation and were encouraged by their results. Other staff members, however, resisted the trend toward mediation and remained convinced of the necessity of the custody study approach and were skeptical about the ability of disputing parents to make responsible decisions about their children. A series of seminars was initiated to discuss mediation and enhance staff support for the process. A pilot mediation program was initiated in the New London Court in 1977. A male-female team was utilized to insure that a single mediator did not dominate the session and to offer a balance between the sexes during sessions with husbands and wives. After six months, it was decided to expand the program to other offices in the state. State-wide expansion was accomplished by selecting certain officers at various courts to participate in experiential training in New London with the experimental team.

While the mediation program emerged from hallway conferences, it never replaced the latter system. At each court location, at least one day a week is devoted to the "short calendar" for brief items such as the promulgation of temporary orders. Short calendar days yield many mediation referrals so one or two representatives of the local Family Relations office attend court on these days. Many counselors conduct brief negotiation sessions at the court. In Hartford, the negotiation process is most developed and one

Individual specializes in on-the-spot negotiations. Negotiations are more directive than mediations, with the counselor often engaging in obvious bargaining and compromise-seeking. The process is used to resolve financial disputes, establish temporary divorce arrangements or resolve minor problems regarding custody or visitation.. More basic custody and visitation disagreements and permanent custody/visitation arrangements are referred for mediation sessions or case studies.

Today, custody and visitation mediation services are offered in the 13 offices of Connecticut's Superior Court by some 37 Family Relations counselors. Although the process is theoretically available to all couples who have filed a motion to modify existing arrangements, the actual provision of mediation services varies from court site to court site. Variations can be attributed to the policies of each Family Relations office, the attitudes of the local bar and the proclivities of individual judges. In some courts, attorneys routinely seek out Family Relations counselors on short calendar days and refer cases for mediation. In other courts, a presiding judge will announce at the beginning of the short calendar call that all disputants must discuss their problems with a Family Relations representative prior to obtaining a court hearing. Only a few judges remain reluctant to refer cases to mediation.

The administration of the Family Relations Division attempts to foster program uniformity and comparability across the state in several ways. First, it uses training, supervisory and salary procedures to promote staff loyalty to the state-wide program as well as the local office. Second, it has promulgated a set of guidelines to be used in determining whether or not a case is appropriate for mediation. Cases are considered inappropriate

when: a) there are allegations or evidence of child abuse or neglect; b) there have been multiple social agency or psychiatric contacts for the parents and/or children; c) the case is post-dissolution and has involved bitter conflict and frequent court appearances and d) one or more adults has "serious psychological problems or has demonstrated erratic, violent or severely anti-social modes of behavior." When these conditions exist, cases are referred for a custody study or court hearing to determine arrangements that will be in "the best interests of the child". Those cases that are referred to mediation and deemed to be appropriate are set for appointment between one to six weeks of a referral date.

The mediation process used by Family Relations counselors commonly involves the generation of client commitment to mediation and discussion of possible solutions to the custody and visitation dispute. Little time is devoted to a discussion of the marriage and divorce although some counselors permit clients to air their grievances for a few minutes before they focus on the issues at hand. The decision to involve children in mediation is strictly a team decision and is rarely invoked. In most offices across the state, attorneys have no direct involvement in mediation.

Agreements generated in mediation are received by the party's attorney who is then instructed to submit it to the court as an interparty stipulation. If a couple fails to reach an agreement in mediation, the Family Relations counselor simply reports to the court that there was no settlement and a court hearing may be scheduled. In large Family Relations offices, cases which move from mediation to custody study are reassigned to a new counselor. Small offices co-mediate with counselors from a nearby office so that there is always a counselor in the original office who is unfamiliar

with the mediation of a case in the event it is reassigned for custody study. In rare instances where co-mediation across offices is not possible, mediators may subsequently have to act as evaluators.

Interviews with mediators reveal that most are in their 20's and 30's. Nearly half hold a Master's level degree or are enrolled in a Master's program. They are trained in mediation in an experiential fashion by supervisors and experienced mediators. They also observe mediations and co-mediate with experienced counselors. During 1981-1982, counselors in two court offices were involved with the mediation of neighborhood and community conflicts on an experimental basis. Counselors are enthusiastic about mediation and enjoy the challenge and sense of accomplishment. Most prefer mediations to custody studies and find it more enjoyable, constructive, and efficient. There is strong support for the team approach to mediation among counselors. However, mediators in some offices do cite problems with heavy case volume and the inability to hold multiple sessions. Several attorneys also expressed concerns that counselors are "overworked and underpaid" and would eventually become jaded. Some counselors would appreciate more ongoing training and the opportunity to co-mediate with a wider variety of counselors and many would like to see more public education about mediation so that clients better understand the goals of the process.

The mediation program of the Family Division of the Connecticut Superior Court remains unique in several respects. First, it is state-wide with mediation services offered at 13 different court locations. Second, the program also offers litigants an opportunity to participate in negotiation sessions designed to resolve disputes on the day of an initial court appearance. Third, the program routinely uses mediator teams comprised of a

male and a female. Finally, the Family Division is experimenting with the mediation of a variety of non-custody matters including spousal abuse and community conflict.

Chapter 6. Custody Resolution Counseling in Hennepin County, Minnesota

The mediation service offered in Hennepin County originated in the Hennepin County Probation Office which began to conduct custody investigations in 1935 as a result of judicial dissatisfaction with the report-making abilities of welfare workers at the Hennepin County Welfare Board. By the late 1940s, probation officers were overwhelmed with divorce cases as well as their traditional probation duties. Upon the recommendation of the judiciary, a legislative study committee was organized to study the processing of domestic relations cases and in 1951 the committee recommended that a Family Court be established and no-fault divorce laws be passed. Although the legislature defeated the proposed bill, it compromised with the establishment of a Domestic Relations Unit within the Adult Criminal Division of the Probation Department. In 1956 and 1957, a specialized Domestic Relations Division was created which firmly established domestic relations work as an independent area of concern. Probation officers working within the Domestic Relations Division became known as family counselors and the quality of the services provided by the specialized division improved.

By 1969, the Division staff consisted of three supervisors and 18 family counselors. Their duties consisted largely of performing custody study reports for the court in all contested divorces. Newer services offered by the Division included marriage counseling, juvenile marriage studies and counseling for divorcing couples. In 1964, the staff also experimented with a new approach to custody study that emphasized family decision-making which

was known as "Multiple Impact Therapy". Although the approach was abandoned because it was too expensive, the philosophical seeds for mediation had been planted and the staff never fully returned to a purely investigative custody study format.

Other events that shaped the emergence of the current mediation service in Hennepin County were the passage of no-fault divorce legislation in 1973, the appointment of a specialized family judge to hear domestic relations matters in 1974, and the appointment of Robert Wyckoff, as director of the Domestic Relations Division, also in 1974. During the ensuing years, the staff organized a public education program about divorce known as a Divorce Experience Program. In 1975, half of the Division's counselors travelled to Madison, Wisconsin to meet with family therapist Carl Whitaker to discuss self-determination for families and to visit an experimental program in Madison, Wisconsin offering litigants alternatives to custody investigations. Based upon these contacts, the staff began to provide mediation services in 1975 and formally adopted a policy to mediate contested custody cases in 1976. Half of the staff viewed mediation as a task-oriented process to reach agreements. The other half viewed it as a therapeutic opportunity to deal with the emotional consequences of divorce. As a result, mediation was referred to as Custody Resolution Counseling to convey the notion that the process involved both problem-solving and counseling orientations.

Today, the Domestic Relations Division consists of a director, a supervisor, 17 family counselors, one child psychologist, two case aides and five support staff. Traditionally, funding was supplied by the county; however, in June 1982 the county adopted a fee system in an effort to balance its operating budget. In cases referred for mediation, the first hour is

provided free of charge and subsequent sessions are billed at \$25 per hour. Many counselors do not approve of the move to make services available on a fee basis, although most do not feel it has significantly changed the programs or its client base.

Cases are flagged for mediation by the presiding judge or one of four referees who hear domestic relations matters. Services are provided to litigants at either the pre- or post-dissolution phase. Case referrals for mediation or custody study vary with the proclivities of individual judges or referees. A survey of referees conducted several years ago showed that studies were preferred in cases involving a good deal of post-decree litigation or where there were allegations of physical abuse. While counselors prefer that all cases be referred for mediation with a study to be initiated only if mediation proves to be inadequate, there is a great deal of variation in the referral habits of referees and judges.

Once referred to the Domestic Relations Division, an intake worker interviews clients and obtains background information. The supervisor assigns each case to a counselor. Counselors schedule appointments with clients usually 2-3 weeks following the intake interview. Mediations are conducted by individuals or teams that are organized on an ad hoc basis.

The staff shares a philosophical commitment to self determination and views mediation as a self-determination process. Despite the diversity in counselor styles, most identify three phases to the mediation process. Phase one involves eliciting commitment to the mediation process and establishing rapport. The second phase of the process involves identifying and discussing problems and disputes. The third phase of the process involves the selection of the most attractive solution alternatives. Mediations last from one to

six sessions, and the average number of hours spent on each case has declined over the years. For example, in 1979, the average was 9.5 hours. In 1980, the average case took 7.2 hours. The reduction has been attributed to greater staff skill and a more focused emphasis on self-determination and problem-solving as opposed to family dynamics. Children are frequently involved with the mediation process as well as step-parents and relevant grandparents, etc.

If a mediation agreement is reached, the mediator notifies the attorneys of the terms of the agreement and one attorney enters the agreement with the court as an inter-party stipulation. If no agreement has been reached, the court is apprised of this and a hearing may be scheduled. More typically, the couple proceeds from an unsuccessful mediation to an evaluation. Until 1981, it was common practice to reassign an unsuccessful mediation case to a new counselor for a custody study. In 1981, it was decided to routinely assign counselors to perform both functions on a given case and thereby reduce duplicative efforts and the time required to perform both services. The Division has never had a formal policy assuring clients confidentiality in the mediation process and counselors have never been immune from subpoena. The 1981 change, however, represents a departure in practice and while some counselors feel uncomfortable with it, most feel that the custody study process is enhanced by the rapport developed and the information gained during mediation.

To be hired as a counselor, an individual must have a Master's degree in a behavioral science or a bachelor's degree along with two years of counseling experience. Qualified applicants take a test that covers counseling and social issues. An additional step in the hiring process is an

interview with the director, supervisor and one family counselor. Continued education is encouraged and many family counselors are working toward advanced degrees. In addition, there are bi-monthly staff training programs during which relevant professional members of the community are invited to make presentations.

Interviews with staff counselors reveal that most are very satisfied with their work and feel as though they are helping families in a constructive manner. They also appreciate being part of a program that is noted for its professionalism and quality. The staff is housed in one building and there is a great deal of interaction that fosters unity and communication. The only real concern expressed by staff members was the fear of program jeopardy through the actions of individual judges.

During its history, the Domestic Relations Division has generally enjoyed strong judicial support. During 1982, a presiding judge was appointed who had strong reservations about mediation and referrals for mediation dropped by two-thirds. That experience impressed the staff with the tenuousness of the program and although the current presiding judge is supportive of mediation and the referrals for this service have increased, many staff members favor the passage of legislation which would make mediation mandatory in cases of contested child custody and visitation and protect the program from the vicissitudes of individual judges.

The attorney population appears to be favorably impressed with the Division and provides speakers for the Division's Divorce Experience Program. The Bar Association also defended the Division when its utility was challenged in 1982 by the presiding judge.

The mental health community is most supportive of mediation and the

Domestic Relations counselors and many private counselors refer their clients to the Court for mediation. Many university professors in Social Work and Family Relations send students over to the Division for field work experiences. And in 1979-1981, the Domestic Relations Division was the site of a research project conducted by a sociology professor at the University of Minnesota with the support of a Minnesota foundation.

Despite the age and reputation of the Custody Resolution Program, in recent years, the Program has faced serious challenges and changes. One was the decision to introduce fees for mediation services. A second was to have the same counselor handle a case which moves from mediation to a case study. Perhaps the most dramatic change, however, was the experience of program vulnerability as a result of the actions of an unsympathetic judge. Clearly, one of the Division's objectives during the coming years will be to attempt to make the program more secure and immune from judicial changes.

Chapter 7. A Preliminary Portrait of Client Reactions to Three Court Mediation Programs

Our longitudinal surveys of clients at the three court-based mediation programs described above offers a portrait of the types of clients served in each location and their reactions to the experience of mediation.

The demographic characteristics of disputants across the sites are fairly similar, although, as in the general population, the client base in Los Angeles is the most racially heterogeneous and the client base in Minneapolis the most homogeneous. With respect to educational backgrounds, we find that the Minneapolis sample is least apt to have dropped out before completing high school, while individuals in the Los Angeles sample are more likely to have at least some college education.

About 70 to 80 percent of the samples at each site are employed full time. Occupational classifications are fairly similar across sites, tending to be bimodal divided between professionals and clerical workers. Mean incomes in Los Angeles and Minneapolis are roughly \$18,000. Mean incomes in Connecticut and Colorado average \$2,500 less.

The Connecticut court is equally likely to see pre- and post-divorce cases for mediation (50%), while the mediation services in Los Angeles and especially in Minneapolis serve mostly new divorce cases. Because so many Connecticut cases are post divorce, financial disputes are less likely to be a problem at this site compared to the programs at the other courts.

Minneapolis respondents appear to enjoy the best relationships with their former spouses. Only 30 percent here, versus 50 percent elsewhere, report that cooperation is impossible or something they no longer try. This difference appears to hold even after controlling for pre and post dissolution status. In addition, less than 10 percent of the Minneapolis respondents, but 15 to 20 percent at the other sites reported fairly frequent violence during the marriage.

Prior to mediation, visitation is sporadic in about 40-50 percent of the cases at each site. These children see their noncustodial parent infrequently and/or are unsure when this parent will visit. Yet, despite this, actual visitation averages between seven and nine days per month at each site.

One practical consideration with respect to visitation is the distance separating a child's parents. In Connecticut, spouses tend to live 16-17 miles apart. In Minneapolis the distance is 33 miles. On the average, parents in Los Angeles live 100 miles apart.

Other problems surround visitation in addition to distance. Approximately 40 percent to 50 percent of the respondents at each site are concerned about the child's wellbeing while s/he is with the other parent. A comparable percentage worry about the other parent verbally deriding or belittling them in front of the children, and 20 percent to 30 percent are concerned that visitation is spoiling the children. For example, one noncustodial mother in Connecticut worried about taking her children to dinner and the movies. As she puts it: "The kids are getting used to being dated. It's not a natural relationship."

Three months following mediation, respondents were asked to reflect back on the process. In doing so, they report some variations by site in the duration of the process. In Minnesota, mediation takes the most time. The average number of mediation sessions in Minnesota is 3.3. In Connecticut, the average number of mediation sessions is 1.5, and in Los Angeles the average case requires 1.7 sessions.

The mediation sites also differ with respect to the participation of children and attorneys. While most (75%) Los Angeles respondents report that their lawyers were seen by the mediators, this is noted by less than 20 percent in Minneapolis and Connecticut. By contrast, children are most likely to be seen by mediators in Minneapolis (66%), followed by Los Angeles (28%) and Connecticut (15%).

Agreement rates are fairly comparable across sites. About 40 percent at each site report reaching a permanent custody/visitation agreement. In addition, reactions to the mediation process were fairly similar at each location. Almost half of the respondents at each site report feeling defensive and angry during much of the session(s). On the other hand, most

respondents feel the mediator spent neither too little nor too much time on problems dealing with the marriage and most feel the session(s) focused on the children's needs and best interests.

Regardless of outcome, mediation users at all the sites would recommend the process to others. As expected, those who produced agreements on custody and visitation are most enthusiastic. However, a clear majority of those who failed to generate agreements would still encourage others to try.

Does mediation make a difference in the way former spouses relate to each other following the divorce? One way of assessing this is to ask respondents outright. Using this approach, we find that three months after mediation, respondents feel that when the process fails to produce any settlement, it also fails to result in improved spousal relations. On the bright side, relationship improvements are noted for almost a third of those who produced any type of settlement, even a partial or temporary one. About 10 to 20 percent of the respondents at all sites said the process worsened their relationship with an ex-spouse, regardless of the mediation outcome.

It appears that parents who successfully mediate are more likely to opt for joint custody but are no different than their less successful mediation or adversarial counterparts in their post-mediation assessments of child adjustment, their visitation patterns and their co-parenting behaviors. Approximately one-third to one-half of parents at each site maintain that their children have improved during the three months following the mediation. Visitation at each site and for all clients ranges from 6-8 days per month. Joint custody is the most common custodial arrangement of successful mediation clients in Los Angeles and Minnesota and is also most typical for unsuccessful mediation clients in Los Angeles. Mother-only custody awards

are most characteristic of disputants who fail to reach mediation agreements in Minnesota and among both successful and unsuccessful mediation clients in Connecticut. Lastly, using a shortened version of a co-parenting scale developed by Ahrons and Goldsmith (1978), we find that successful mediation clients in Minneapolis appear to be better able to co-parent than their unsuccessful counterparts but that this pattern does not hold at the other mediation sites.

Our survey of users reveals that court-based programs see a variety of disputes and clients, and that client differences at each program reflect the unique demographic profile of each geographic area. Despite the diversities in their delivery of services, the programs share comparable settlement rates and high degrees of user satisfaction. The respondents at each site feel mediation is a less detrimental approach than court hearings. However, mediation is unable to produce dramatic effects in terms of improved spousal cooperation, co-parenting and smooth visitations. These behaviors seem to be the result of long-standing relationship conflicts not easily altered or repaired by mediation interventions.

Chapter 8. Mediation Process Analysis: A Descriptive Coding System

Coding frameworks have been designed to study marital interactions, psychotherapy, crisis intervention and negotiations (Zechmeister and Druckman, 1973; Walcott and Hopman, 1975; Williams, 1980). Such frameworks allow researchers to observe or listen to these processes and to assign actions or statements of each participant to one of the codes in the system. Following such categorization, it is possible to analyze the data generated for various patterns: e.g., to identify professional styles or approaches,

to describe how impasse situations are typically and/or most appropriately handled, or discover what stages or steps exist in the process under study.

This small group empirical approach represents a new manner of analyzing the process of mediation and one designed to better understand the mediation process and the factors associated with its success or failure. As project consultants began exploring coding schemes, it was discovered that no framework existed which was entirely suited to the study of mediation. However, the Gottman marital interaction coding scheme (1979) seemed the closest approximation. Drawing from earlier systems developed by Hops et al (1972) and Olson and Ryder (1970), Gottman defines the unit of speech as the independent clause and codes each according to content and tone. The content categories consist of 27 behaviors grouped into eight general headings: 1. agreement (direct assent); 2. disagreement (direct dissent); 3. communication talk (clarifying, focusing and examining the discussion); 4. mindreading (assumptions about feelings, behaviors or opinions); 5. problem solving and information exchange (offering ideas or feelings); 6. summarizing self (rephrasing ideas); 7. summarizing other (paraphrasing statements made by another); and 8. expressing feelings about a problem.

In order to capture the problem solving nature of the mediation process, several categories were altered and a few new ones were added. The revised scheme is described below.

The first major category is "Process". This category captures the "what" and "how" of negotiation. Specifically it includes agenda statements that discuss which issues will be mediated, or redirect the discussion to these previously agreed upon topics. It also includes suggestions regarding negotiating behavior. Statements coded here would include recommendations

for a time-out or period of silence, role playing or role reversals, or requests that the parties speak directly to one another rather than through the mediator. Finally the "Process" category includes Corrections of Negotiating Behavior and Praise of Negotiating Behavior such as praising open communication and concessions or confronting someone with an unwillingness to bargain or to listen.

The second category, "Information", includes all proffered information as well as requests for the same. Subheadings include information about mediation and its alternatives, information about children, information about spouse and information about self. In each case only clear statements of fact are coded here, not opinions, feelings or assumptions.

The third category is "Summarize Other". One of the most frequently cited goals of mediation is the fostering of communication between the disputants. Summarizing what had been said helps to demonstrate an understanding of another's point of view. For this to happen the intent of each statement must be apparent. Further, by summarizing the statements made by parties who communicate poorly, mediators may teach communication skills and balance the power, at least partially, between members of a couple where only one party communicates well.

The fourth category, "Self-disclosure", codes statements regarding one's own opinions or feelings that are not properly considered facts. Subcategories include agree and disagree which indicate simple assent or denial of another's claims, such as:

Wife: She cried because you didn't come in the house with her [daughter].

Husband: That isn't true (disagree).

The feelings subcategory codes statements of or request for disclosure of

feelings rather than facts or ideas. The empathy category consists of behaviors indicating that the speaker sympathizes with another's feelings or wishes. Empathy moves a step beyond merely summarizing the other. The intent is not to indicate a literal understanding but to convey that the speaker appreciates the other person's feelings.

The fifth general category is "Attribution Statements", or mindreading, in Gottman's schema. Subcategories indicate whether the speaker is attributing ideas or behaviors and to whom the attributions are being made. Attributions may be in reference to past (e.g., "He came late to get the children just to keep me waiting"), present (e.g. "You're saying that so you can be sure I don't get any week-night visits") or future behaviors (e.g. "He'll never get them back on time.")

The sixth category of "Proposed Solutions" is used to code 'proposed solutions' focusing on husbands, wives or both parties. It is also used to code statements of problems with a solution or other non-specific solution talk.

The seventh heading, "Agreements" codes statements of substantive consensus. Mediations which begin with statements like "you already agree that you want joint custody" would be coded agreement--before mediation. Similar points of agreement during the session would be coded agreements--here and now. Final settlement statements reflect comments in reference to the final agreement; the future disputes subcategory codes statements such as:

Mediator: If you have problems...you're always welcome to come back here.

The final category "Interruptions" was added to allow for the systematic

coding of interruptions including who was interrupted and by whom.

Each behavior is not only assigned a behavior code, it is also coded as declarative or interrogative, originating from a given party, directed to a given party or parties and positive, negative or neutral in tone.

In using the coding system, each coder listened to a few minutes of the tape to identify the voices of the actors. The tape was then rewound and advanced to the two minute mark. Eight units of speech were coded and the tape was advanced to the four minute mark. This procedure was repeated until the tape(s) of the session(s) was concluded.

To test this system, a one hour long session was coded in its entirety and then recoded using the two-minute mark intervals. The correspondence between the results yielded by the two procedures was extremely high. Similarly when two individuals independently coded a taped session, the interrater reliability proved to be .91 on the individual behavior codes.

Chapter 9. Process and Outcome in Divorce Mediation

A total of 81 mediations were ultimately tape recorded and coded according to the system outlined above. Of these, 51 (64 percent) reached an agreement on custody, visitation or both. Another 22 did not reach any agreement. The remaining seven cases resulted in either a partial, temporary or inconclusive outcome and were therefore excluded from further analysis. The duration of the mediations ranged from 18 minutes to one slightly over three hours. The average length was 93 minutes.

Based on the frequency distribution of the speaker codes, speaker time appears to be fairly evenly divided among the parties in a mediation session. However, while mediators generally speak to both parties, husbands and wives typically address their remarks to the mediator. Mediators seem to be

sensitive to this fact and indicate in private interviews that they often point out to the speakers that they need to communicate directly.

Mediators are also responsible for most of the questioning. About a quarter of the mediators' comments are questions, while only about eight percent of the spouses' verbal behavior is questioning. Further, mediators' statements are generally (80%) neutral or positive in tone, while over half of the statements made by husbands and wives are negative.

Comparing speakers on the percentage of their statements coded under each of the eight major categories reveals few differences. About 25 percent of the mediators' comments are coded under the heading of "Process", i.e. informing clients about mediation, establishing the agenda, refocusing the conversation and guiding the spouse's negotiating. Mediators, as opposed to disputants, also do more rephrasing of statements made by another and offer more proposals about possible agreements. Spouses, by contrast, offer more statements of information, more statements self-disclosing ideas and feelings, and more attribution or "mindreading" about what others feel and do. In other words, it appears that mediators, as opposed to spouses, do play a very neutral role but not a particularly passive one. Mediators actively gather facts, solicit input and propose solutions.

The major categories used to categorize the individual behaviors proved to be an effective means of helping coders to choose behavior codes for statements. However, we found that an empirical examination of how the 32 individual behaviors related to one another did not particularly mirror the prior coding classification. Instead, a factor analysis of the individual behaviors produced eight factors when mediators' statements were analyzed and seven factors when spouses' statements were analyzed.

The factors that emerged for mediators included:

Fact-Finding: consisting of statements requesting information, and summarizing other, i.e. reviewing the information and self-disclosures to check its accuracy.

Coaching behavior: suggesting how to negotiate and correcting inappropriate negotiating behavior as well as providing information about the mediation process.

Child Advocacy: consisting of attribution statements about the behaviors or feelings of children.

Attribution Attitude: including an array of comments which have to do with what one spouse, both spouses or some other party thinks or feels.

Attribution Behavior: including mediators' attributions about spouse's past, present or future behavior.

Directing Process to a Solution: consisting of refocusing the discussion and suggesting solutions.

Reacting to Solution: agreeing with proposed solutions or identifying problems with them.

Consolidating Agreement: including statements regarding points of agreement, identifying items to be included in the final agreement, and offering positive reinforcement for constructive bargaining.

The spousal behaviors produce the following factors:

Cooperative Talk: rewarding one another for cooperative or helpful statements, offering summary or reflective statements about what another says and agreeing with what another says.

Children Talk: offering attributions of children's attitudes/feelings and behavior as well as requests for information about children.

Self-Disclosure: providing one's own feelings and making attributions about another's feelings.

Attributing-Disagreeing: including attributions of others' behaviors, or feelings and disagreement with another's statement.

Directing Negotiation: correcting negotiation behavior; refocusing the conversation, establishing the agenda and suggesting how to negotiate.

Solution Talk: including solutions regarding what either or both spouses might do and problems perceived with the particular solution.

Mediation Process: Now and Later: including statements/questions about

using mediation, both now and later should further problems arise.

We analyzed these composite scores of behaviors based on the empirical factors, as well as the individual behaviors, to determine if either approach could distinguish between those cases that settle and those that do not. Several differences at the level of individual behaviors emerged. Specifically, in cases that settle, mediators spend more time on the terms of the final agreement and more time discussing possible solutions in general terms. They also spend less time explaining mediation to clients and comparing and contrasting it with other settlement forums. Finally, they spend less time requesting or making disclosures of feelings and making attributions about others' ideas or behaviors.

With respect to spouses, we find that in successful cases, spouses do less attributing about behaviors and feelings and offer more empathetic statements, more statements of agreement and more offers of proposals.

When we move to the composite measures of behaviors based on the factor analysis, we find no differences in spouses' behaviors resulting in agreements and no agreements. However, among mediator behaviors, three of the eight composite measures show significant differences. In successful cases, mediators engage in more behaviors to consolidate agreements, spend less time coaching negotiating and make fewer attributions.

One plausible interpretation for these patterns is that parties who communicate poorly, even angrily, need more coaching in how to negotiate. Similarly, such couples may communicate so poorly that the mediator begins making assumptions and attributions. The data clearly underscores the importance of promoting empathy in mediation sessions.

Despite the problems in interpreting the results, the approach of

analyzing the mediation process by coding the content and tone of a representative sample of sentences from mediators and spouses is a novel and interesting means of studying the mediation process. This approach can provide insights into the format of the mediation session, the variety of roles played by each actor, and eventually may be used to test theories about the stages of the mediation process and the best techniques to deal with anger, imbalances of power, impasses and similar breakdowns in the process.

Chapter 10. Predicting Outcomes in Mediation: The Influence of People and Process

Another approach to the study of mediation outcomes compares the characteristics of disputes and disputants as well as mediator behaviors. To date, these variables have not been examined simultaneously. For example, one body of literature deals with mediator styles or roles (Simkin, 1971; Kressel, 1977; Kochan and Jick, 1978) or the principal events or stages of the mediation process (Black and Joffee, 1978; Coogler, 1978; Milne, 1978; Haynes, 1981). The underlying assumption is that mediator behaviors have a significant impact on the success of the session.

The second set of literature suggests that the outcome of mediation is largely dictated by pre-existing characteristics of the dispute and disputants. For example, according to some researchers, suitability for mediation is tied to the degree of ambivalence about the divorce, the level of anger and the couple's ability to communicate (Kressel, *et al.*, 1980). Others have discovered that the intensity of the dispute (Kochan & Jick, 1978) and the relative attractiveness of the alternatives to settling in mediation (Felstiner & Williams, 1980) are relevant in determining the

outcome of mediation.

In our longitudinal survey of clients in three court-based mediation programs, we collected background information about the dispute and the disputants prior to any mediation attempt. Three months following their placement in mediation, we asked respondents to indicate how well or how poorly they felt the mediators handled a variety of tasks cited in the literature as crucial to successful mediations. This enabled us to assess the relative importance of dispute, disputant and mediator characteristics in successful versus unsuccessful cases.

The analysis begins with a factor analysis of the variables pertaining to background characteristics of the dispute and disputants. This procedure yields six factors. These factors include: 1) nature of the relationship with an ex-spouse (e.g., level of violence, level of general cooperation, degree of cooperative parenting); 2) acceptance of the divorce (e.g., Kitson attachment to ex-spouse index, mutuality of the decision); 3) balance of power (e.g., ability to present one's position in a dispute, past history of unilateral decision making); 4) evaluation of one's chances using alternatives (e.g., chances of acceptable outcomes in mediation, chances of successful outcomes in court); 5) duration of the dispute; 6) perceived amount of disagreement over custody and visitation.

A similar factor analysis using 24 statements about the mediation process yields eight factors of which the first four accounted for the majority (72%) of the explained variance. The four factors used in subsequent analysis are: 1) communication facilitation (e.g., Mediation gave me a chance to express my point of view. Mediation brought issues, problems and feelings out into the open); 2) diffusion of anger (e.g., I felt angry during

much of the session, I felt I was always on the defensive); 3) setting the stage (I didn't really understand what was supposed to happen, mediation was rushed); 4) clarification and Insights (Mediation helped me better understand my own feelings and needs. Mediation helped me understand my ex-spouse's point of view.)

Our dependent variables include whether or not the respondent reported a temporary or partial settlement, a full settlement, or no settlement, and the user's willingness to recommend the process to others.

To determine how well the background factors and the mediator factors are able to predict the actual outcome in mediation, discriminant analysis was performed. Using all the preceding factors we were only able to predict settlements in about half of the cases. We were better able to predict full agreements and were able to correctly classify 67 percent of these cases. However, it proved to be far more difficult to predict the partial or temporary settlements. Only 15 percent were correctly classified, and the majority (61%) were incorrectly assigned to the successful mediation group.

Of the various factors used in the analysis, the one which aided most in outcome predictions was the mediator's ability to facilitate communication.

This was followed by:

- Providing clarification and insight
- Evaluation of chances using alternatives
- Magnitude of the dispute
- Duration of the dispute
- Relationship with an ex-spouse
- Balance of power
- Diffusion of anger
- Acceptance of the divorce
- Setting the stage

In a second discriminant analysis, we used the factors to predict respondents' willingness to recommend mediation. We correctly predicted

(93%) willingness to recommend the process, but were less successful (75%) in predicting unwillingness to recommend mediation. The following indicates the order in which the factors contributed to predicting respondents' willingness to recommend mediation:

- Facilitate communication
- Provide clarification and insights
- Diffuse anger
- Magnitude of the dispute
- Duration of the dispute
- Relationship with an ex-spouse
- Evaluations of chances of gaining custody

- Balance of power
- Acceptance of divorce
- Setting the stage

Overall, our ability to predict outcomes in mediation is both modest and limited largely to identifying those who succeed and are satisfied with the process. The reasons for this limited success are probably numerous. First, it is possible that we have not accurately measured, or perhaps not included, the characteristics of disputes, disputants or mediators, that would allow for greater predictions. Second, our limited prediction may be in part the result of relying on reports from only one member of the couple. It may be necessary to consider the nature of report from each party as well as the congruity or discrepancy between their responses. It may also be that the screening currently conducted by the courts and the ensuing diversion of cases involving severe pathology and abuse has eliminated from the sample those cases least suited to mediation, thus limiting our ability to predict which cases will not settle.

To the extent that we can predict outcomes, we find that the keys are users' perceptions of the mediator's ability to facilitate communication and provide them with a better understanding of their own feelings as well as

those of their children and ex-spouses. Though less important, the pre-existing characteristics of disputes and disputants which seem most relevant are the duration of the dispute, its intensity, and the quality of the relationship with the ex-spouse.

Chapter 11. Parental Reactions to Mediation and Adjudication Experiences

Evaluating the viability of custody mediation involves more than determining settlement rates, the nature of cases which settle, and immediate client reactions to the process. Considerations of user satisfaction and the durability of agreements over time are equally important.

Our longitudinal survey allowed us to gather respondents' reactions to court and, in three of our sites, their reactions to a mediation twelve to fifteen months after the initial interview. Our retrospective survey of clients of these court-based mediation programs in 1978, and those who had custody disputes in Colorado in 1978, provide the basis for an even longer-term evaluation.

One finding is clear: regardless of the year in which the sample was drawn, and regardless of whether or not mediation was attempted, a majority of all parties with a custody dispute do not perceive the legal system to be a satisfactory means of processing divorces. Of those exposed to a custody study, nearly as many were dissatisfied with this process. One basic source of the dissatisfaction with the courts stems from a fundamental dissatisfaction with resolving what are perceived to be personal, private issues in a public forum. Those who divorced without contesting custody (1981 sample) were slightly less critical of the courts, and this was perhaps due to less contact with and less dependence upon the court system.

When exposed to the alternative of mediation, most respondents, in 1978 and 1981, preferred this method of dispute resolution. The points perceived in its favor include 1) its ability to identify the real, sometimes underlying, issues in a dispute; 2) the fact that the mediation process seemed less rushed and superficial; 3) the tendency for mediation to focus on the needs of the children; 4) the opportunity it provided individuals to be heard and to voice opinions; and 5) the less tense and defensive atmosphere it affords.

Satisfaction with the mediation alternative was greatest in the 1981 sample. Respondents in the 1978 sample were less uniformly complimentary. There are several possible reasons for this finding. One possibility is, of course, that with greater distance, mediation is viewed with less enthusiasm. Conceivably those closer to the event are more impressed by the fact that they dealt rationally with their ex-spouse, are less likely to have experienced subsequent problems and are most apt to remember being pleased by the mediator's concern and attention. It is also possible that mediation has gained acceptance over time and has met with a more receptive client base in recent years. Another, and compelling, possibility is that the mediation services provided by the courts have improved over time. In 1978 the Connecticut program had been operating for less than a year, and the oldest program, in Los Angeles, was only five years old.

Among respondents from the 1981 sample, only 25 percent of the non-custodians who did not contest custody and 25 percent of those who contested but mediated their agreement reported they were dissatisfied with the arrangement. However, nearly 70 percent of the non-custodians who contested custody through the adversarial forum and 70 percent of those who did not

settle in mediation were dissatisfied. This test of the perceived fairness of each process suggests that successful mediation may promote greater satisfaction with the ultimate arrangement even if this arrangement is not the one for which users were probably hoping.

There are two aspects of long-term compliance we can consider. These include the regularity of visitation and the regularity of child support. Although the latter issue was not mediated, we might logically expect any conciliatory benefits of custody mediation to extend to this area as well.

In considering reports from those who are to be receiving support, we can safely assume that we are receiving conservative accounts of payment performance. The 1981 adversarial sample reported non-payment patterns in over a half of the cases, but far fewer of the non-contested cases and those who mediated, regardless of outcome, were remiss in their payment. However, this poorer performance in the adversarial sample does not hold for the 1978 sample. Among this population, non-payment is comparable for those who successfully mediated and the adversarial sample, and the individuals with the poorest performance pattern are those who mediated unsuccessfully.

Patterns regarding compliance with visitation patterns in the 1981 sample vary depending on whether custodians or non-custodians are reporting. Among custodians, the tendency is for about 30 percent of all the groups to report that visitation often does not occur. Reports from non-custodians, by contrast, indicate better visitation performance for those who reach agreements in mediation and poorer performances among those reaching no agreement in mediation and the adversarial sample. Once again, however, these patterns are reversed when we consider the non-custodial reports from the 1978 sample. The adversarial sample does the best job of visiting.

The sample exposed to mediation in 1981 was asked to evaluate whether the process had any long-term effect on their relationship with their ex-spouse. At the time of our final interview, about 12 months after mediation, about a third of the sample felt it had helped the relationship. However, successful mediation did not translate into fewer problems with visitation for this sample.

Those in the 1981 sample who settled in mediation were slightly less likely to have been back to court to modify custody or visitation or because of contempt citations, temporary restraining orders or modification of child support. Slightly over 30 percent of the unsuccessful mediation cases and adversarial cases had returned to court, but only 21 percent of those settling in mediation had returned. In the 1978 sample, about a quarter of every group had returned to court over custody or visitation.

In both the 1978 and 1981 samples, we do note modest savings in time and money associated with mediation cases resulting in agreements. Moreover, even when it is unsuccessful, mediation does not seem to create additional delays or expenses.

Final conclusions are difficult to draw, especially in light of the discrepant findings from the 1981 and 1978 samples. However, we can conclude that although mediation does not always fulfill the extravagant promises made on its behalf, we continue to observe differences between those who mediate and those who do not 12-15 months and even 4-5 years later. This is especially noteworthy given the fact that parties who are in the process of a divorce and/or custody dispute generally have long-standing and intense conflicts with one another and that mediation in our court based settings is typically a brief intervention lasting only one session.

Chapter 12. Children and the Mediation Process

It has been projected that if current patterns persist, over a third of the current generation of children will experience a parental divorce before the age of eighteen. The literature on children and divorce generally reports detrimental effects for the children of divorced families, including aggression and depression. There has been no literature to date, however, which directly addresses the consequences for children of various parental dispute resolution experiences including a non-contested divorce, versus those who formally contest custody in the courts and those who formally contest custody but attempt to resolve the problem in mediation.

Such a comparison was one of the goals in the Divorce Mediation Research Project. The data is drawn from the first (pre-mediation) survey with the 1981-1982 samples and the final interview with these parents 12-15 months later. In the present analyses we have eliminated reports from non-custodians and from those who produced partial or temporary agreements in mediation, such as agreements to seek counseling.

The dependent measures of child adjustment focuses on one child in the family. Whenever the family included a 6-11 year old child, this was the "target" child. Where there were no 6-11 year olds, parents were randomly directed to evaluate the oldest or youngest child, or, of course, the only child. The parental evaluations include modified versions of the Achenbach-Edelbrock child behavior checklist global index and subscales of aggression, depression, social withdrawal, somatic complaints and delinquency. Items developed by Olsen, et al (1979) and original items were also included. These single items were factor analyzed and reduced to create three indices:

1) quality of the child's relationship with the custodial parent; 2) acceptance of the divorce; and 3) problems with custody arrangement and the divorce.

At the time of the initial interview the non-contested cases clearly involved the most recent disputes and the cooperation level was greatest among parents in this group. Once we control for distances separating spouses, we find that those who ultimately succeeded in mediation had the most visitation at the initial interview. Similarly, parents in the adversarial group reported somewhat poorer initial child adjustments as measured by the social withdrawal, delinquency and somatic complaint subscales. Thus, although the differences are not statistically significant, some initial differences do exist across the groups prior to exposure to mediation.

However, there were similarities as well. For example, across all groups about 20 percent of the parents reported that the child was angry with his/her mother because of the divorce and about equal numbers were angry with his/her father. A belief that the child felt worried and pressured to take sides or a sense that the child had taken sides was another common concern for parents. Similarly, across the groups, parents were concerned about the fact that the child did not accept the divorce and the fact that the child would not discuss the divorce.

Our indepth interviews with a small number of children indicated that most children did not see the mediator and some were totally unaware that mediation occurred. Most of the children who did see the mediator enjoyed the opportunity to be heard and most parents indicated that they liked the idea of the mediator listening to and reassuring the child. The only

statistically significant long-term differences between children who saw the mediator and those who did not seemed to be that parents whose children were involved in the mediation process were, at the final interview, more apt to say that the child understood what the divorce and custody dispute was about and were more apt to report that their ex-spouse had a good relationship with the child.

Children who were seen by custody evaluators were also generally positive about the experience and appreciated the attention and concern. By contrast, most children who had been to court described the experience as scary and noted that they were nervous that the judge would make the wrong decision.

At the final interview, the child's unwillingness to accept and to discuss the divorce had declined slightly but continued to be mentioned by 20-30 percent of the parents in each group. Many parents also continue to report the need for greater routine and stability in the child's life. In all the groups, the child's anger had decreased but her/his worries about taking sides had not declined.

In other words, for many respondents, very real adjustment problems existed a year after the divorce. In an effort to determine what factors aid or hinder the adjustment, we performed multiple regression analyses using each of our dependent measures and those independent variables which are typically mentioned in the literature as influential in children's adjustment. These independent variables fall into the general categories: 1) background of the family, such as number of children; 2) dispute/divorce specific factors such as stage in the divorce; 3) child specific variables, including age and sex; 4) custody/visitation variables, such as the

regularity and frequency of visitation; and 5) characteristics of the parental relationship such as cooperation, violence during the marriage and differences in child-rearing philosophies.

Explaining the variance in the Achenbach measures proved to be exceedingly difficult. In part this was no doubt due to the small amount of variance present: all but one child rated in the lowest third of the scale prior to and following their parents' mediation and/or adjudication experiences. Predicting the variance in the indices of adjustment/acceptance of the divorce, problems with the divorce and quality of the relationship with the custodian was somewhat better. The adjusted r^2 ranged from 11 to 23 percent.

Looking across the regressions, we find eight variables that make a significant contribution to at least half of the regression analyses. These variables are 1) child's age; 2) level of physical violence during the marriage; 3) parental cooperation at the final interview; 4) changes in the child's life, e.g., moves, changing schools, held back a grade; 5) basic differences between parents in childrearing; 6) child's awareness of the anger between parents; 7) distance separating the child and the non-custodian; 8) frequency of visitation at the time of the first interview. These factors clearly deal with family dynamics, child characteristics and parent-child relationships. This suggests that these elements are more helpful in understanding children's adjustment than is the formal dispute status of the case or the parents' dispute resolution experience including whether the case is non-contested, adversarial or mediated. It is worth noting, however, that those who successfully mediated do have the best rating on all the Achenbach scales at the final interview with the exception of the

somatic complaints subscale.

There are a number of reasons why we may fail to see more significant differences in child adjustment across the various dispute status groups. First, we have not been able to precisely recreate the Achenbach-Edelbrock measures; to do so would require larger sample sizes so that subscales could be developed separately for three age groups and both sexes. In addition, 12-15 months may not be a long enough span of time in which to see differences emerge. Another possibility is that the measures are simply not sensitive to divorce adjustment patterns. Parents who use mediation report that the sessions focus on the children and aim at educating parents about children's needs in divorce. These are not comments typically proffered about court hearings or other adversarial interventions. Nevertheless, our findings suggest that the child's adjustment is more a factor of family dynamics and overall environment than a result of having parents who do not contest custody, mediate custody or pursue the issue through the courts.

Conclusions

The three court-based services we studied represent three diverse means of delivering custody mediation services in the public sector. The findings of our research indicate that all three formats are viable as measured by their ability to produce mediated agreements and satisfaction among professional staff and clients. In all three programs, settlement rates fluctuate around 50 percent and client satisfaction is high. Mediation is preferred over evaluations and court hearings as a method of resolving disputes over custody and visitation. Indeed, even clients who do not

settle in mediation are typically satisfied with the process and glad they attempted it. As a result, at all three sites clients are supportive of the idea of mandatory mediation in cases of contested custody or visitation.

The results of our research do not indicate a need for more extensive screening of clients. To the extent that client characteristics are influential in predicting outcomes in mediation, it appears that recent and less intense disputes are better suited to the process than are cases involving long-standing and bitter conflicts. This finding is consistent with the courts' current practice of screening cases that involve lengthy post-decree disputes, abuse or long histories of social agency intervention. On the other hand, our research does underline the importance of mediator skill and technique, at least as perceived by clients, in promoting successful resolutions. This suggests that continued training and opportunities for professional growth should remain court priorities for they will help produce high settlement rates and user satisfaction.

In the course of the Divorce Mediation Research Project we have also watched the services offered in all three courts change and evolve, and the number and variety of public and private sector programs increase dramatically. Given the increased interest in divorce mediation in the last three years, it was inevitable that even as we were generating answers, still more empirical questions regarding the process would emerge. While these questions were beyond the scope of our research, the data base we have compiled will be valuable in preliminary explorations of these issues and our findings can help to identify and clarify these future research needs.

For example, one model of service delivery that has gained popularity in court-based programs in recent years calls for an individual to move from the

role of mediator to the role of investigator in cases that do not settle during mediation. Hennepin County's adoption of this procedure post-dated our surveying in Minneapolis. As a result, we can offer no empirical evidence regarding how this affects settlement rates or user satisfaction. We can note that the practice is controversial, and in the eyes of some incongruent, with the concepts of self-determination and neutrality stressed by mediation. However, many practitioners with whom we spoke, who have first hand experience with the system, feel that it is preferred by families since it insures them that the evaluation will be done by someone they know and trust and can save time. Given its potential and the controversy surrounding its use, the mediation-arbitration approach warrants empirical research.

Another issue that has sparked controversy and that indirectly affects mediation services is that of joint custody. The viability of joint custody and the advisability of strong presumptive legislation favoring it has been the subject of considerable recent debate (Gardner, 1982; Carroll, 1982; Schulman, 1982). Because many mediated agreements call for joint custody, empirical information on the conditions under which joint custody does and does not result in parental satisfaction and child adjustment would be valuable information for mediators. However, as joint custody arrangements become more common, it will be essential to consider joint arrangements produced in mediation with those produced independently by the parties, with the assistance of their attorneys or by court ruling over the objection of one party. The joint custody arrangements produced in each of these procedures need to be compared for completeness, the presence of unenforceable clauses, parental satisfaction, child adjustment, compliance and relitigation.

Another subject deserving empirical attention is the mediation of the financial aspects of divorce. At present, most court-based mediation services limit the issues they consider to custody and visitation. However, it is probable that over time many court programs will begin to include the mediation of financial disputes and the practice has already been adopted in some courts. It is important to consider how financial settlements mediated in the public and private sector compare to each other as well as how they compare to those generated with independent legal counsel or by the parties themselves. It has been suggested by some that the party with greater financial expertise, in many families the husband, will be at an unfair advantage in producing the financial agreement without private legal counsel representing both parties. On the other hand, mediation proponents contend that the process inspires generosity in both parties and also improves subsequent compliance with these agreements. If this is the case, women might be expected to receive higher awards and to benefit from the more regular receipt of child or family support in mediated situations.

The last two issues, mediation and joint custody and mediation of financial issues, demonstrate the need for empirical research comparing the public and private sector divorce mediation experiences of men and women. Specifically, research needs to document whether women and men are in relatively equal bargaining positions on the issues of custody, visitation, child support, family support and the division of property. Further, if power is unequally distributed, research must address to what extent this inequality is balanced by a sensitive and skilled mediator. While balance of power issues have been recognized as important ones in mediation literature and research, they have recently risen to the fore and been recast

as basic questions regarding the relative power between the sexes and the fairness of the mediation process for women.

The concept of mediating divorce issues has clearly become more accepted and practiced in recent years. Nevertheless, its full potential and all the implications of its use are far from being known and accepted.

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Chapter 1

AN EVALUATION OF
✓ ALTERNATIVES TO COURT ADJUDICATION

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ABSTRACT

In the last decade, there has been a resurgence of interest in alternatives to adjudication. Numerous mediation and court-annexed arbitration programs have been initiated. Many goals have been posited for such programs, including the judicial objectives of reducing court backlog and achieving savings in time and money as well as increasing access to and the quality of justice experienced by disputants. This article reviews the most rigorous evaluation data available to date on the effectiveness of mediation and arbitration in achieving a broad range of objectives. To date, the studies show that while mediation and arbitration programs fail to achieve many of the performance goals related to court congestion and cost saving, they consistently rate very favorably on measures of user satisfaction, perceptions of fairness, compliance with outcomes and, in most cases, reduced levels of relitigation. Compared with their voluntary counterparts, mandatory mediation and arbitration programs come closer to succeeding (and in some cases do succeed) in reducing court congestion and achieving public cost savings too.

In the last decade, scholars, legal actors and policy makers who are concerned with the resolution of disputes have seriously questioned the appropriateness of formal adjudication. Echoing the litany of criticism directed at courts by Roscoe Pound and other progressive era reformers, they have variously noted the problems of cost and delay, the intimidating character of courts, the failure of courts to address the underlying causes of conflicts, the overriding concern with procedure, the tendency of adversarial interventions to increase trauma, divisiveness and conflict and the inability of court processes to increase the cooperative, communication and problem-solving skills of the parties. Still others fault the coercive nature of adjudication with low commitment to and compliance with court orders and agreements (Danzis, 1974; MacCaulay & Walster, 1977; American Bar Association, 1976; Bell, 1978, a,b; McGillis and Mullen, 1977; Kaufman, 1976). In the words of Roscoe Pound,

The effect of our exasperated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give the whole community a false notion of the purpose and end of law...If the law is a mere sham, neither the players who take part in it or the public who witness it can be expected to yield to its spirit when their interests are served by evading it...Thus, the courts, instituted to administer justice according to the law, are made agents or abettors of lawlessness (1906:406).

One result of the renewed interest in judicial reform has been the resurgence of informal dispute resolution programs, particularly arbitration and mediation. Commonly confused with one another, mediation and arbitration may be distinguished by the degree of external involvement they entail (Sander, 1976).

The Arbitration Alternative

Arbitration, like adjudication, involves a coercive third party who hears evidence and renders a written opinion that is rationalized by reference to general principles. The arbitration alternative was initially pursued by American businesses in 1880 who were frustrated by the delay, congestion and formality of court procedures (Harrington, 1982). In traditional arbitration, the award is final although the parties typically select the arbitrator, as well as the substantive legal rules that govern the process.

The modern arbitration movement has seen the extension of such techniques to the resolution of a great variety of issues (Alper and Nichols, 1981) as well as its widespread use in judicial settings where civil court cases are transferred to a volunteer attorney or panel of attorneys. In judicial settings, the parties have no authority to select the arbitrator(s) or the procedures although disputants may request a trial de novo (Heher, 1978). Court-annexed arbitration was first made compulsory in

Philadelphia in 1952 and has since been adopted by nine states (Hensler et al., 1981). An arbitration-like procedure is also available by supreme court rule in Michigan for civil matters (American Bar Association, 1982) and court-annexed arbitration has been the subject of experimentation in several federal district courts (Lind and Shepard, 1981). In some settings, arbitration is indistinguishable from agency adjudication although in other settings it is definitely more flexible and concerned with compromise and substantive justice (Fuller, 1979).

The Mediation Alternative

Mediation, on the other hand, involves a third party whose role is to facilitate the participation of the parties in generating a mutually agreeable settlement (Gulliver, 1973, 1979). Specifically, the mediator helps disputants to identify the issues, reduce misunderstandings, vent emotions, clarify priorities, find points of agreement, explore the new areas of compromise and negotiate an agreement (Rubin & Brown, 1975; Deutsch, 1973). Mediation stresses informality, open and direct communication, reinforcement of positive bonds, cooperation and avoidance of blame. The mediator possesses no authority to impose a settlement. The process is attentive to the underlying relationship between the parties and aims to:

reorient the parties toward each other not by imposing rules on them, but by helping them to achieve a new and shared

perception of their relationship, a perception that will direct their attention toward one another. (Fuller, 1971:305).

Unlike adjudication, mediation is believed to address the causes of disputes, reduce the alienation of litigants, inspire consensual agreements that are complied with and are durable over time and help disputants resume workable relationships. Mediation is also believed to be more expeditious and inexpensive (Danzis & Lowy, 1975; Witty, 1980; Mnookin & Kornhauser, 1979; Heher, 1978; Crastley, 1978).

Pioneering experiments involving the use of mediation techniques to resolve domestic disputes were conducted in the early twentieth century by legal aid societies, police departments and specialized domestic relations courts.

Conciliation procedures, including mediation or combinations of conciliation and arbitration were also instituted in small claims courts in the early part of the twentieth century (Harrington, 1982). With its avoidance of issues of guilt and innocence, its focus on social rather than legal roots of family problems, and its concern with treatment, conciliation was viewed as compatible with the rehabilitation of the family. In the words of one writer in 1919:

A litigious proceeding is destructive, it is calculated to embitter the contestants, and after a trial in open court husband and wife feel a real grievance toward each other where before there may have been only a temporary discontent. A conciliation proceeding gives the court its

only chance to repair, reunite and construct
(Smith, 1919:80).

Progressive era conciliation tribunals, however, were soon declared failures and fell into disuse because few parties would agree to submit their disputes to voluntary conciliation. They were also attacked for producing agreements that were frequently not enforceable and masking unchecked judicial discretion (Harrington, 1982).

Current interest in mediation and conciliation can be traced to the 1970s in the writings of theoreticians (Sander, 1979; Danzias, 1973; Fisher, 1975), the organization of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in 1976 to examine alternatives to judicial action (Levin and Wheeler, 1979), and the ensuing public actions of the Conference Task Force headed by Attorney General Griffin Bell, which included the initiation of the Neighborhood Justice Center's experiment (Bell, 1978, a&b).

Modern day projects have developed both within and outside of the judicial system although most operate within the courts, agencies connected with the courts or independent agencies that receive referrals from the courts and the criminal justice system (DeJong, Goolkasian & McGillis, 1982). Such programs handle misdemeanor disputes, felony disputes involving non-strangers, truancy and delinquency disputes between parents and children, small claims matters, landlord tenant disagreements, consumer issues and a variety of domestic relations matters including

contested child custody and visitation. Mediation procedures vary in projects but typically involve the voluntary participation of disputants in one or more sessions conducted by trained, volunteer, nonlawyer mediators who reside in the community, or by professional mediators with backgrounds in law, psychology or counseling. Successful mediations result in written agreements that are signed by both parties and may be filed with the court as an inter-party stipulation. Disputants who fail to produce agreements or comply with agreements may return the case to court to litigate (McGillis, 1982). With a few exceptions, the communities served by most programs tend to be lower middle class or poor, and disputants generally fall within lower income brackets and lack a college education (Hofrichter, 1982).

The Growth of Mediation and Arbitration Programs

Not surprisingly, there has been a tremendous growth in mediation and arbitration experiments in the last decade. A recently compiled directory lists 180 alternative dispute resolution programs in the United States today, many sponsored by local courts, local government, business and criminal justice agencies (American Bar Association, 1980). There are also more than 300 providers of divorce mediation services today in the public and private sector throughout the United States (Pearson, Thoennes, Milne, 1982). Mediation and arbitration programs have been established in

numerous states by statute, local court rule and administrative order (Comeaux, 1982; Freedman & Ray, 1982). And in 1979, Congress passed (but did not fund) the Minor Dispute Resolution Act (PL-190), which has yet to authorize a program within the Justice Department supporting local development of alternative dispute resolution mechanisms.

Despite the popularity of informal dispute processes, their growth and use was based on little more than speculation and faith. Were they satisfactory? Did they promote compliance? Did they reduce relitigation? Were they cost effective? Until recently, the literature on mediation and arbitration was descriptive or statistically unreliable and it was impossible to answer these types of questions.

In the past several years, however, a number of more reliable evaluations have accompanied mediation and arbitration experiments. Unlike their anecdotal predecessors, they employ operationally defined outcome measures, experimental designs and longitudinal perspectives. This article reviews the most substantial research available on mediation and arbitration and draws some conclusions as to whether these alternative dispute resolution procedures work and how they compare with adjudication (See also McEwen & Maiman, 1982).

Evaluation Criteria

In the late 1960s and early 1970s, policy makers and social scientists alike measured the success of informal dispute resolution alternatives exclusively in terms of caseloads and costs. The goals of such programs were simply to reduce court congestion and overload. Evaluations stressed the number of cases handled and the potential reduction of demands on the criminal and civil justice systems. The importance of caseloads, agreement rates and costs per hearings were underscored by the pressures of funding and program justification and acceptance. (Cook et al. 1980; Moriarty, 1977).

Recent writers, however, have criticized the "limited slice of goals" addressed by this perspective (Merry 1981). The narrow focus on judicial goals, they argue, ignores a rich array of non-judicial goals including increasing access to justice (Danzis, 1973; Cappelletti and Garth, 1978), improving the quality of justice (Singer, 1979), and strengthening local communities by decentralizing social control functions in neighborhood dispute resolution forums (Waharftis, 1981). Not insignificantly, writers have also noted that backlog, case processing times and other measures of court congestion may reflect local legal culture and the more basic work habits and attitudes of the attorneys and judges in any given locality at any given time. They argue that "quick fix" solutions like mediation and arbitration will have limited impact on case backlog without more basic

change in the work habits of the bench and the bar (Weller, Ruhnka, Martin, 1982).

This article reviews research findings on the effectiveness of mediation and arbitration in achieving a broad range of goals. These include the judicial objectives of reducing court congestion and trimming costs as well as the mandate to improve access to and the quality of justice. Specifically, I review data that considers the extent to which mediation and arbitration achieve the following: utilization by disputants; the successful disposition of cases; development of compromise outcomes; user satisfaction; improved compliance and reduced relitigation; savings in time and money and reductions in court backlog.

The Literature on Mediation and Arbitration Alternatives

Fortunately, a limited number of studies attempt to compare courts and mediation or arbitration alternatives in a comprehensive sense. In addition to noting case loads, elapsed times between filing and disposition, proportions of cases settled, proportions of cases requiring subsequent litigation, and the relief of docket pressures in the courts, these studies focus on the quality of mediated, arbitrated and adjudicated settlements, the extent to which they are perceived as fair and equitable, compliance and relitigation patterns, and user satisfaction.

Two of these studies have employed a quasi-experimental design which involves the random assignment of comparable

cases to mediation or adjudication although participation in mediation was voluntary. These are my own evaluations of the Denver Custody Mediation Project, an experimental program comparing the mediation and adjudication of contested custody and visitation matters (Pearson, 1979; Pearson, 1981; Pearson & Thoennes, 1982 a,b); and an evaluation of a program involving the mediation or criminal adjudication of felony cases between acquaintances conducted by the Vera Institute's Brooklyn Dispute Resolution Center (Davis, et. al. 1980).

Several other studies include thorough follow-up interviews with disputants in both mediated and adjudicated cases. This includes the evaluation of small claims mediation in Maine (McEwen and Maiman, 1981), the evaluation of the Rochester compulsory civil arbitration program (Weller, Ruhnka and Martin, 1981), the evaluation of a parent-child mediation project conducted by the New York City Children's Aid Society (Pins Mediation Project, 1982) and the evaluation of court-based programs offering child custody mediation services in Los Angeles, Minneapolis and Connecticut that I am currently conducting with the Association of Family Conciliation Courts (Pearson, Thoennes, Lyons, 1982c).

Still a third category of studies have involved interviews with mediation clients regarding their experiences and satisfaction with the process and the durability of their agreements. The most substantial study

of this type accompanied the implementation of Neighborhood Justice Centers in Atlanta, Kansas City and Venice Mar Vista, California (Cook, Roehl, and Sheppard, 1980; Cook, 1980).

Finally, there is research that has been restricted to the thorough analysis of caseload information regarding case volumes, dispositions and costs. Two major studies fall into this category. One is an evaluation of the Dorchester Urban Court--a program that substitutes lay mediation for criminal prosecution in cases where the victim and defendant are not strangers (Felstiner and Williams, 1979/80). The second is an evaluation of the first year of Judicial arbitration in the superior courts of six California counties (Hensler, et. al., 1981).

Basically, what these studies show is that mediation and arbitration fail to achieve many of the performance goals posited for them by those concerned with court congestion and cost savings. In particular, voluntary mediation and arbitration programs fail to attract sizeable numbers of disputants and have negligible impact on court caseloads. While mediation and arbitration program costs vary greatly with the size of caseload, most programs are generally more expensive per case than courts.

Looked at in terms of the quality of services provided, however, the mediation and arbitration picture is decidedly encouraging. Program evaluations repeatedly document impressive rates of user satisfaction, perceptions of

fairness, compliance with outcomes and reduced levels of relitigation. Clearly, mediation processes are more personalized, humane, and pleasant than adjudication. Disputants also think they are fairer and more just. While there is less information on user reactions to court-annexed arbitrations, such programs generally enjoy high ratings by attorneys and experience low rates of appeal for de novo trials.

The following considers the evaluation literature on mediation and arbitration, relative to adjudication, in a more systematic manner.

Participation by Disputants

With few exceptions, the participation of disputants in informal dispute resolution programs varies with the amount of program coercion. Programs with high participation by disputants tend to be compulsory, as in the case of most court-annexed arbitration programs (Weller, 1981; Heher, 1978; Hensler, 1981), mandatory custody mediation programs in California (McIsaac, 1981; Pearson, Thoennes, Lyon 1982), and criminal mediation programs that obtain cases from criminal justice agencies where the possibility of sanctions for defendants who do not attend mediation sessions is high (Davis, 1982; Drenstein, 1982).

The volume of cases handled in compulsory programs is impressive. For example, in its first year, 24,000 cases were processed in court-annexed arbitration in California's

13 participating courts (Hensler, 1981). In 1982, the conciliation court of Los Angeles handled 2,400 custody and visitation mediations. Moreover, there is persuasive evidence that most disputants opt to participate voluntarily in compulsory mediation and arbitration programs. In California, for example, one-half of all the 24,000 arbitration cases arrived voluntarily and the proportion of couples in Los Angeles who agree to mediate contested custody and visitation matters by stipulation rather than as a result of a judicial order has tripled in recent months (McIsaac, 1982).

Voluntary mediation and arbitration programs, on the other hand, typically fail to attract a substantial number of participants. For example, despite high levels of satisfaction with a voluntary arbitration program in Los Angeles, the program never handled more than 500 cases per year which was less than 1% of pending cases in Los Angeles Superior Court. This was attributed to the "wait and see" attitude that most lawyers adopt toward new programs and the expectations of most disputants for a judge or jury (Heher, 1978).

Voluntary mediation programs also suffer from refusals to participate, no-shows and other types of attrition. Fully half the disputants offered free mediation services to resolve contested child custody and visitation matters in the Denver Custody Mediation Project rejected the offer (Pearson and Thoennes, 1982a,b). Thirty percent of those

referred to the Brooklyn Dispute Resolution Center for the mediation of felony disputes between acquaintances failed to appear and another 12% refused mediation outright (Davis, 1979). The Neighborhood Justice Centers reported attrition rates as high as 60% (Cook, et. al., 1980). And during the 15-month evaluation of the NJCs, only 17% of referrals were "walk-ins" (Cook et. al., 1980:27).

Naturally, there is great concern about the slim participation found in voluntary mediation programs. One consequence is that such organizations must devote an inordinate amount of energy publicizing the mediation alternative and attempting to attract clients. Low case volumes also increase per client case costs and make it difficult for mediators to gain critical, on-the-job experience. For example, a recent survey of divorce mediation services in the public and private sector revealed that 93% of the private mediation services conducted fewer than 50 mediations in 1981 and 51.3 percent handled fewer than 10 cases (Pearson, Rins & Milne, 1982). Since mediation outcomes have been shown to track with the experience level of the mediator, (Pearson, Thoennes, Vanderkooi, 1982; Kochan & Jick, 1978), these patterns are particularly sobering.

The reasons why more disputants fail to be spontaneously attracted to informal dispute resolution procedures remains a matter of controversy. Since researchers find that mediation is no more attractive to

disputants with past or continuing ties than those interested in collecting money claims (McEwen & Maiman, 1981), the answer does not appear to lie in the types of disputes handled by mediation services.

According to some advocates, the problem is due to the lack of public education about alternatives to adjudication. Mediation remains an alien concept to the general population. Even if disputants do not expect to receive satisfaction in court, they continue to believe in their legal right to go to court and often regard conciliation as an invitation for abuse (Merry, 1982). Because mediation is not popularly understood, it does not inspire confidence and usage (Cook, 1980).

Other research ties the problem of low participation to the legal community. For example, a key reason why men and women choose to mediate child custody and visitation disputes is because their attorneys encourage them to try (Pearson, Thoennes and VanderKooi, 1982). To the extent that the legal community is ambivalent about informal dispute resolution procedures, disputants may be reluctant to try and program use will suffer.

Still another explanation asserts that many disputants use existing neighborhood-based dispute resolution forums or avoidance techniques to resolve their disputes, and that there is little need for Neighborhood Justice Center-like interventions. For example, one study of dispute processing in an urban section of Waterford found that residents were

reluctant to bring in outsiders, preferring to deal directly with adversaries. When third parties were invoked, it was as advocates and advisors, not as negotiators, and those called upon were most often people seen as part of the neighborhood (Buckle & Buckle, 1982, 79-80).

Finally, researchers contend that the high rate of refusals and no-shows is a function of the level of coercion to which the disputant is subject and that the "less the cost of rejecting mediation (the less unpleasant the alternative), the less likely the respondent will be to agree to mediation" (Felstiner and Williams, 1979/80). According to this argument, alternative dispute resolution programs will have to resort to a mandatory attempt in order to generate cases and overcome the lack of spontaneous enthusiasm for mediation and arbitration alternatives.

While compulsory mediation contradicts the emphasis placed on voluntariness in mediation ideology by some (Danzis, 1974), it is consistent with the reports of others that in actual practice, in both traditional (Merry, 1982) and contemporary settings, mediation involves a fair amount of manipulation and coercion (Felstiner, 1979/80; Tomasic, 1982). Mandatory mediation of custody and visitation disputes enjoys strong public support with 60%-70% of clients interviewed in my project who used court-based mediation services in Los Angeles, Minnesota and Connecticut in 1978 and 1979 favoring this approach. Finally, voluntariness does not appear to be a key to successful

mediation outcomes. Research on small claims mediation finds no differences in the likelihood of reaching settlement in cases where parties choose to mediate and cases in which they are directed to mediate (McEwen, 1981). A mandatory attempt to mediate does not necessarily affect the participatory nature of the mediation process and the voluntariness of mediated outcomes. (McEwen, 1982).

The Successful Disposition of Cases

Once disputants opt for mediation or arbitration, their prospects for reaching a successful resolution to their differences are promising. Obviously, not all arbitration cases are successfully concluded. A more compelling indicator of case disposition is the rate of appeals for a de novo trial. The research to date suggests that such appeals are rare. For example, in Rochester, only about 7% of the arbitration decisions were initially appealed and only about half of these resulted in new trials (Weller, 1981). In Philadelphia, the appeal rate for the compulsory civil arbitration program ranges from 8-12% with less than 5% actually going to trial (Heher, 1978). During the first year of compulsory civil arbitration in California, researchers reported an appeal rate of 40% but only few cases were actually pursued to trial (Hensler, 1981). In light of the fact that the pre-arbitration appeal rates for civil dispositions in California's superior court ranged from 11-14% in 1967-1968 (Heher, 1978) the appeal rates for

compulsory arbitration decisions are fully acceptable. And according to a comparison of trial rates with and without court-annexed arbitration in Federal District Courts in the Northern District of California and the Eastern District of Pennsylvania, arbitration programs reduce the incidence of trials by about one-half. While both districts achieved a trial rate of three percent with arbitration programs, trial rates stood at six or seven percent in the absence of arbitration (Shepard, 1982).

Agreement rates in mediation are more variable and difficult to interpret. Some programs dealing with the mediation of domestic disputes (Irving, 1981), parent-child disputes (Wixted, 1982), and domestic violence cases (Drenstein, 1982) report agreement rates of 70%, 80% and 85%, respectively.. However, many of these are agreements to seek further counseling or temporary agreements pending later court action.

More typically, mediation programs report reaching agreements in 40%-65% of the cases mediated. Approximately 40% of disputants who use court-based mediation services in Los Angeles, Minneapolis and Connecticut reach full agreements on custody and visitation and another 20-30% report reaching partial or temporary agreements (Pearson, Thoennes, Lyon, 1982). In McEwen's sample of small claims cases, 66.1% ended with an agreement (McEwen, 1981). And in the Neighborhood Justice Centers, 65-78% of the civil mediations and 81-95% of the interpersonal mediations

resulted in an agreement (Cook, et. al. 1980).

Of course, most civil and criminal complaints end in dismissal, default or negotiated settlement rather than trial (Cook, et. al., 1980; Davis, et. al., 1979; Felstiner & Williams, 1979/1980). This raises the question whether mediation is as effective as litigation in generating agreements and inter-party stipulations.

To answer this question in the Denver Custody Mediation Project, we compared the incidence of stipulation making among disputants exposed to mediation and those with comparable disputes who were randomly assigned to a control group, pursued their disagreements through the court and were denied an opportunity to mediate. Since half of the mediation candidates refused to mediate, the conclusions are only generalizable to those who opt to mediate. Nevertheless, for this population, mediation was more effective than adjudication. Fully 60% of couples who mediated reached an agreement and a majority of those who tried, but failed to produce an agreement in mediation, generated stipulations prior to their court hearings. By contrast, only half of the individuals in the adversarial samples stipulated before reaching court and half relied upon judicial determinations. Viewed from another angle, over 80% of those exposed to mediation produced their own custody and visitation agreement, either during or after the process. Less than 20% turned to the court for a solution. However, almost half of those never exposed to mediation

relied on the court for a decision (Pearson & Thoennes, 1982a,b).

Although some of the differences in the experiences of the mediation and control group in the Denver Custody Mediation Project can be attributed to the more favorable scores mediation clients achieve on certain pre-existing socio-economic and attitudinal measurements, we have determined, with a series of statistical manipulations, that the mediation and adversarial processes have important independent effects (Pearson & Thoennes, 1982). A more recent analyses of the characteristics of clients who are successful and unsuccessful in reaching agreements on custody and visitation in three court-based mediation programs in the United States fails to reveal a consistent set of favorable client or case characteristics (Thoennes, 1982). This suggests that mediation may be capable of successfully handling a greater volume and wider variety of cases than it currently does.

Types of Mediated and Adjudicated Agreements

Mediation theory alone would lead us to predict that mediation would be more accommodative and conducive to compromise. Not surprisingly, this appears to be the case. In the Denver Project, most couples who reach mediation agreements opt for joint legal custody, an arrangement rarely selected by those who are exposed only to the adversarial process. Among mediation couples who select

sole custody, non-custodians receive more visitation than is commonly found in non-mediated agreements (Pearson & Thoennes, 1982). Joint custody is also the most common arrangement reported by couples who reach agreements in mediation programs in Los Angeles and Minneapolis (but not Connecticut) (Pearson, Thoennes, Lyon, 1982). So though it is not uniformly the case, there is usually more give and take in custody mediation than custody adjudication.

According to McEwen, mediated agreements in Maine's small claims program also reflect greater compromise than adjudicated ones. While in nearly half of the cases that went to trial, the plaintiff was awarded all or nearly all of the claim, this occurred in only 16.9% of the mediated cases. Additionally, the plaintiff was more likely to win something in mediation than in adjudication (McEwen & Maiman, 1981). Although the "all or nothing" image of adjudication and "split the difference" image of mediation may be overdrawn at times, mediation agreements do appear to inspire more compromise than adjudicated ones.

User Satisfaction

Alternative dispute resolution programs generate a great deal of user satisfaction. Looking across program evaluations, we consistently find that individuals who mediate are extremely pleased with the process whether or not they are able to generate an agreement. This is true for studies that employ quasi-experimental designs as well

as those that utilize less rigorous procedures, although all evaluations conducted to date necessarily entail clients who opt to mediate and are thus contaminated by a variety of self-selection factors. In the Denver Custody Mediation Project, for example, a program that utilized a quasi-experimental design, 77% of all those who tried mediation said they were satisfied with the process in follow-up interviews. No more than 40% of respondents in any of the mediation or adversarial samples reported being satisfied with the court process (Pearson & Thoennes, 1982). In a similar vein, William Felstiner (1980) reports that 8 to 14 months after mediating issues of assault, battery and harassment in the Community Mediation Program in Dorchester, Massachusetts, most people are glad that they tried mediation (78%), think it helped their situation (50%) and feel that they had an opportunity to air their complaints (70%). An average of 88% of all respondents at the Neighborhood Justice Centers were enthusiastic about mediation (Cook et. al., 1980), and McEwen found that 66.6% of disputants were satisfied with small claims mediation (McEwen & Maiman, 1981). Additionally, Weller's survey of litigants who arbitrate and adjudicate also shows that disputants find arbitration hearings more understandable and fairer than court trials and prefer arbitration to litigation (Weller, 1981).

Not surprisingly, disputants who arbitrate and mediate are also more satisfied with their case outcomes than

disputants who litigate. In a long-term follow-up interview with clients who reached agreements in the Denver Custody Mediation Project and those who litigated, 69% of successful mediation clients reported satisfaction with their case outcomes compared with 53% of the adversarial control group. In the Brooklyn Dispute Resolution Project, a program that also utilized a quasi-experimental design, Davis finds that 73% of mediating respondents were satisfied with case outcomes compared with 54% of the court sample and that comparable proportions viewed their case outcomes as fair (Davis, et. al., 1979). And in Atlanta, the NJC evaluators report that only 33% of complainants felt pleased with an adjudicated sentence in contrast to 86% of complainants who said that they were satisfied with the terms of their mediation agreements (Cook, et. al., 1980).

There is less empirical evidence of user perceptions for arbitrated cases although attorneys in Weller's comparison of civil arbitrations and adjudications rated civil trial processes and the Rochester arbitration program equally with the single exception of viewing the quality of cases at arbitration hearings somewhat lower (Weller, 1981). Perhaps more compelling evidence of the even-handedness of civil arbitration programs comes from a 16-month study of the Philadelphia arbitration program conducted in 1971-72. According to that study, arbitration award patterns were virtually identical to verdicts rendered by judges and juries for similar cases on appeal both on questions of

liability and assessments of damage. Thus, of the 296 cases appealed to a verdict, 71% resulted in verdicts for the plaintiff and 29% for the defendant. Comparable figures for arbitration awards were 80% and 20% (Heher, 1978).

Lastly, mediation appears to improve relationships between disputants although pre-selection factors doubtlessly explain a portion of this phenomenon too. Davis finds that complainants had more positive perceptions of defendants in mediation cases than complainants whose cases were referred to courts for prosecution. Complainants in adjudication proceedings were nearly twice as likely to feel anger toward defendants at the end of the case and fearful that the defendant would seek revenge for reporting the crime in the first place (Davis et. al., 1980). In a similar vein, 82% of ex-spouses who mediated their custody and visitation disputes rated their relationship favorably. This evaluation was proffered by only 50% of couples who adjudicated (Pearson & Thoennes, 1982). And parties who used Maine's small claims mediation service were almost twice as likely to share their opponents view of the outcome than their adversarial counterparts (McEwen & Maiman, 1981).

On the other hand, mediation has limited impact on more basic relationship problems. Only about 20% of respondents using court mediation services in Los Angeles, Connecticut or Minneapolis reported that mediation helped them to understand their ex-spouse's point of view--and only about a third felt it had helped them to understand their own

feelings and needs (Pearson, Thoennes & Lyon, 1982). Like most brief interventions, mediation cannot address deep-rooted emotional and social problems and is clearly not a substitute for more sustained counseling and support services.

Compliance and Relitigation

Although the pre-existing characteristics of mediation clients may explain part of the phenomenon, there is general consensus that mediated agreements result in better compliance. There is no arbitration evidence on this point. In the Denver Custody Mediation Project, for example, at a long-term follow-up interview, 79% of successful mediation clients reported their spouse to be in compliance with the child and financial terms of the agreement and this was reported by 67% of adversarial respondents. While 33% of adversarial respondents reported that serious disagreements had arisen over the settlement, this was noted by only 6% of successful mediation clients (Pearson & Thoennes, 1982).

McEwen also finds impressive compliance patterns for disputants who reach mediation agreements. While 70.6% of the mediation agreements with a monetary settlement were reported to be paid in full in the Maine court's small claims mediation program, this was reported by only 33.8% of the adjudicated cases. According to McEwen, mediation clients who participate and consent in the agreement-making process perceive themselves to be obligated to comply.

Their adversarial counterparts do not experience comparable participation and consent.

The better compliance patterns noted in mediation cases may also be attributed to the detailed nature of mediation agreements. Compared to court orders, mediation agreements are more likely to have payment plans and other schedules regarding how and when payments will be made (McEwen & Maiman, 1981). In divorce settings, mediated agreements are more likely to specify detailed visitation schedules and holiday plans (Pearson, 1981). To the extent that mediation agreements are violated, it tends to occur in vague agreements that require broad changes in long-term behavior patterns (Felstiner & Williams, 1980) or among disputants who have established a long-term pattern of violence and harassment (Orenstein, 1982).

There is more debate on the capacity of mediation to reduce relitigation. At the very worst, relitigation appears to be comparable for disputes resolved through adversarial and informal dispute resolution forums. For example, a comparison of mediation and court families with truant, unmanageable, disobedient or incorrigible youths shows that both groups of families are equally likely to return to court and file a Persons in Need of Supervision petition at a 6-8 month interval (PINS Mediation Project, 1982). Similarly, in his study of mediated and adjudicated felony disputes between acquaintances, Davis notes no difference between the two groups in the rate of recurring

Problems and future demands on the police and the courts. Although both studies find that new interpersonal problems were relatively rare in both groups, they lead one to conclude that "there is little evidence that mediation is more effective than court adjudication in preventing recidivism" (Davis, et. al., 1980).

On the other hand, several studies find evidence of lower recidivism among mediation and arbitration clients. As has been previously noted, the incidence of trials de novo on appeal for arbitrated cases in most jurisdictions with judicial arbitration falls below the appeal rate observed for civil dispositions in trial courts (Heher, 1978). Similarly, the Denver Custody Mediation Project finds that relitigation for mediation clients is lower at a 2-year follow-up with 13% of successful mediation clients filing court modifications as opposed to 35% of their adversarial counterparts. Lastly, successful mediation clients appear to be more confident about their ability to work out future disagreements autonomously or with the assistance of a mediator and do not intend to return to court. Disputants who do not develop mediation agreements are more likely to believe that a future disagreement or modification will necessitate litigation (Pearson and Thoennes, 1982).

Savings in Time and Money

It is generally acknowledged that litigants can resolve their dispute more rapidly in arbitration and mediation proceedings than traditional court processes. As to arbitration, case delay dropped from 84 months in 1971 to 48 months in 1975 as a result of the mandatory civil arbitration program in Philadelphia with most cases resolved in 90 days (Heher, 1978). In Washington state, arbitration is credited with clearing-up grievances six times as quickly as the superior court with elapsed time averaging 60 days versus 1 year (Wexler, 1973). Hospitals using arbitration procedures to resolve malpractice claims over a 5-year period handled these matters 22% faster than their litigating counterparts (Heintz, 1979). Weller finds that even though total case time was not reduced by Rochester's arbitration program, attorneys viewed arbitration as a great time-saver and reported less waiting time, fewer court appearances, shorter trials, less case preparation, less discovery and less waiting for trials to be heard. According to this study, arbitration reduced the amount of time expended on the second half of civil cases but increased the amount of time for the earlier stages of discovery and preparation (Weller, 1981). Lastly, research on California's new mandatory arbitration program indicates that litigants experience the greatest time savings if they arbitrate voluntarily. Total case time from filing to disposition was only 7 months for litigants who arbitrated

voluntarily. Arbitrated cases that required a court order took 22 months to reach disposition (Hensler, 1981).

Mediation procedures also tend to translate into time savings for disputing parties although savings vary with program format and outcome. The NJCs held a hearing an average of 63 days between initial filings and final disposition (Cook, et. al., 1980). Since mediation is made available to Maine's small claims litigants near or on the trial date, that program did not affect delay for individual litigants (McEwen & Maiman, 1981). And in the Denver Custody Mediation Project, mediation translated into time savings only if it was successful. The average number of months between the initiation of proceedings and the promulgation of final orders was lowest for successful mediation respondents, 8.5 months. In the purely adversarial samples, the average number of months between filings and final orders was between 10 and 11 months. For unsuccessful mediation respondents, however, the average was 14.2 months. Since custody mediation often requires the postponement of an investigation and the continuation of a hearing, it is not surprising that cases moved faster for those who either mediated or litigated than for those who tried both (Pearson & Thoennes, 1982).

Similarly, mediation and arbitration appear to translate into savings in attorneys' fees, although such savings are neither consistent nor great. For example, the average legal fee paid by successful mediation-group

respondents in the Denver Custody Mediation Project was \$1,523. For unsuccessful mediation-group respondents, it was \$1,824. And for the purely adversarial respondents, it was approximately \$1,450.

In order for disputants to earn greater savings in mediation, they need to be diverted to it early in the dispute. For example, individuals who successfully mediated before receiving a final divorce decree paid an average of \$1,470 in legal fees--about \$800 less than the average \$2,290 paid by the control group (Pearson & Thoennes, 1982).

Arbitration cases appear to be cheaper for litigants if attorneys fees are based on hourly charges. However, all arbitration researchers have reported that contingency fee arrangements do not change upon the institution of mandatory civil arbitration programs, making savings for litigants non-existent (Weller, 1981; Hensler, 1981; Heher, 1978).

Public cost savings are even more difficult to calculate for informal dispute resolution programs. Because they lack large volume, often attract cases that would not otherwise be adjudicated and result in unsuccessful outcomes that may require additional court attention, mediation programs are generally more expensive than per case costs in courts. For example, case costs in the three NJCs ranged from \$62 per case referred in Atlanta to \$589 per case resolved in Los Angeles. The evaluators conclude that while the NJCs are more expensive than courts, they may become competitive with courts as caseloads grow (Cook, et. al.,

1980). Similarly, an analysis of case costs at the Dorchester Urban Court finds the ratio of mediation costs to court costs about 2-3 times as high. The authors contend that the ratio could be reduced to 1.7 if caseloads increased, follow-up contacts and research was minimized and intake procedures were more efficient (Felstiner & Williams, 1980).

Mandatory mediation and arbitration programs, on the other hand, appear to be decidedly cost effective. For example, in 1978, the Los Angeles Conciliation Court, the largest jurisdiction offering public sector mediation services handled 747 cases with an estimated net savings to the county of Los Angeles of \$175,004. The procedure was found to be so satisfactory and cost effective, it was made mandatory in 1981 with the enactment of S.B. 961. It is paid for by an earmarked increase of the divorce filing fee of \$15.00 and marriage license fee of \$5.00 and an assessment of a \$15.00 fee for any motion to modify or enforce a custody and visitation order (McIsaac, 1981).

In a similar vein, the Third Judicial Circuit Court in Wayne County, Michigan reports that its mandatory mediation program (actually an arbitration-like procedure involving a hearing before a panel of three attorneys who render a non-binding evaluation) is extremely cost effective. The mandatory mediation service is paid for by user fees of \$75 per litigant if the claimed settlement value is \$20,000 or less or \$105 if the claimed settlement value exceeds

\$20,000. Each panel attorney is paid \$600 per day with monies from the mediation fees. With each panel handling approximately ten cases per day, the program is economically self-sufficient and even generates excess funds which it donates to local bar association projects such as library or education programs (American Bar Association, 1982).

Finally, California's new mandatory civil arbitration program promises to translate into substantial public cost savings. Evaluators estimate that as a result of the program, there were 200-400 avoided civil jury trials per year. Depending upon the proclivities of judges to conduct settlement conferences in diverted cases, this could translate into an annual reduction of 26 judge years, no savings or a slight increase in bench time (Hensler, 1982).

Impact on Courts

Extrapolating from California data, it is estimated that 10 million new civil cases will be initiated each year in United States courts and criminal case loads will also continue to grow (Johnson et. al., 1977). For many practitioners in the justice system, a key goal of the informal dispute resolution movement is to reduce the burden on the courts and free the courts to attend to cases that involve matters of law.

Despite the expectations of many, mediation and arbitration appear to have negligible effect on civil trial calendars. Although accounts of several mandatory

arbitration programs find dramatic reductions in case processing time (Wexler, 1973; American Bar Association, 1982), others find evidence of little impact. Civil trial calendars in California are so closed that the diversion of a minority of the pending caseload is barely felt (Hensler, 1981). Weller found that the initiation of a mandatory civil arbitration program in Rochester increased caseload because the incidence of pre-trial settlements dropped from 83% in 1968 to 33% in 1977 with more litigants pursuing their claims to verdict albeit in an arbitration setting (Weller, 1981). The District of Connecticut recently abolished its court-annexed arbitration program because it had a limited impact on settlement-making and was a burden to administer. In its place, they chose to promote a "special masters" program (Shapard, 1982). Finally, researchers note that case backlog, case processing times and other measures of court congestion may reflect the more basic work habits and attitudes of the attorneys and judges in any given locality at any given time (Weller, Ruhnka, Martin, 1982).

Mediation programs also have limited impact on the court case loads and backlog they were presumably created to relieve. First, nearly all mediation programs suffer from underutilization and handle only a slim volume of cases. Second, many programs attract cases that would not have been filed in court in the first place (Sinsler, 1979). Still others attract cases that would have been dropped from

the courts soon after filing through dismissals, defaults or negotiated settlements rather than trials (Cook, Roehl and Sheppard, 1980; Felstiner and Williams, 1980). Finally, a substantial proportion of disputants refuse to settle in mediation and these cases may require additional court attention including time consuming trials (Davis, 1982).

On the other hand, mediation appears to remove from courts certain types of interpersonal cases that are particularly distressing and time-consuming for judges. For example, interviews with justice system personnel in the NJC cities revealed that while they did not perceive the centers to be reducing caseloads, they did feel as though the centers were handling vexing disputes among relatives, friends or acquaintances that would otherwise consume a great deal of judicial time (Cook, Roehl and Sheppard, 1980). McEwen and Maiman report that with few exceptions, judges in Maine saw the small claims mediation program operating in the court as useful because it removed inappropriate cases from the docket and allowed them to spend more time on other cases on the calendar. Attorneys who participated in that program reported that mediation was a good device to coax an unreasonable client into a reasonable settlement (McEwen & Maiman, 1981). And, evaluators who have studied court-annexed arbitration programs in three federal district courts find that while arbitration may have only a modest effect on the incidence of trials, it stimulates prehearing settlement and improves

the trial process for cases that fail to settle by providing an effective pre-trial device for clarifying issues. Among the recommendations of the study is the suggestion that the arbitrators role be expanded to advising counsel on the strengths and weaknesses of the case in order to maximize the possibility of achieving post-hearing settlements (Lind & Shepard, 1981).

Conclusions

In the past, many legal reform programs have been oversold. For example, recent evaluations of pre-trial diversion programs conclude that they have accomplished few, if any, of their original goals (Baker, Saad, 1979). Evaluators of small claims court reforms assert that these experiments have failed because they left intact the adversary process and merely offered litigants a simplified, streamlined version of conventional adjudication without due process protections (Ynavevsson and Hennessey, 1975). Lest the contemporary informal dispute resolution movement share the same fate of past delegalization programs, it is important to acknowledge the limitations as well as the strengths of mediation and arbitration alternatives.

This article shows that voluntary mediation and arbitration programs fail to attract large numbers of disputants and that this affects their ability to be cost effective, reduce the burden of case load on courts and promote the development of a cohort of experienced dispute

resolvers. Compulsory court-based mediation and arbitration programs, on the other hand, appear to satisfactorily handle a much larger volume of cases and in some settings have been found to be highly cost effective and helpful to courts. In point is the adoption of court-annexed arbitration in lower courts in nine states and in several federal district courts, the adoption of a statute making mediation mandatory in all cases of contested custody and visitation in California, and the development of a state-wide, compulsory, user-supported arbitration-type procedure, dubbed mediation, in Michigan for civil matters.

Looking beyond user participation, savings in time and money and impact on courts, however, mediation and arbitration procedures rate more favorably. Although all the evaluation literature to date, even those that employ a quasi-experimental design, document the experiences of those who opt to mediate and are necessarily affected by the selective, pre-existing characteristics and attitudes of mediation clients, the patterns for mediation are decidedly promising. In controlled research settings, mediation is shown to be more effective in generating stipulation-making than adjudication. Mediation clients also experience more user satisfaction than their adversarial counterparts. Disputants who successfully mediate generate compromise agreements that are perceived to be fair, equitable and better complied with over time. Although the evidence on relitigation is mixed, with some researchers finding

evidence of lower relitigation and others finding no differences between mediation and adversarial samples, mediation certainly does not generate excessive relitigation or simply defer inevitable litigation. Similarly, while mediation cannot address the deep rooted emotional and social causes of many disputes, it does permit a more complete airing of grievances and improve relationships between disputants.

While user reactions to arbitration programs have not been as thoroughly researched, the evidence suggests that litigants and attorneys experiencing arbitration are at least as satisfied as those experiencing adjudication with relatively few pursuing appeals for de novo trials. The limited attitudinal data shows that disputants who arbitrate also perceive these procedures to be more understandable and satisfactory.

Obviously, mediation and arbitration programs fall short of some of the more extravagant expectations of earlier reformers. There are also legitimate questions about whether the goals of program efficiency and program outcome are compatible. For example, many feel that mandatory mediation contradicts the ideology of mediation and requires disputants to submit to resolution procedures that lack adequate procedural and constitutional protections. Still others predict that programs that achieve large case volumes will inevitably devote less time to each case and that this will undermine the qualitative

program objectives of favorable and durable outcomes, user satisfaction and perceptions of equity.

On the positive side, however, the accomplishments of public sector, compulsory mediation and arbitration efforts appear to be considerable with high proportions of users who experience even brief interventions reporting favorable outcomes, impressive levels of user satisfaction and support for the continuation of mandatory services. Nor does a mandatory attempt to mediate or arbitrate necessarily compromise the voluntariness of the mediation outcome or the right to appeal arbitration decisions and have a de novo trial.

It will take additional experimentation and evaluation to identify the ideal format for implementing various alternative dispute resolution programs. For example, it would be interesting to study the reactions of disputants who utilize the highly cost effective mediation procedure in Wayne County, Michigan. In that program, mediation hearings are scheduled in half-hour time slots with each three member panel hearing an average of 10 cases per day and rendering a non-binding evaluation (American Bar Association, 1982). As more compulsory mediation and arbitration programs are established, it may also be possible to employ truly experimental designs and randomly assign disputants to adversarial and non-adversarial treatments. When this happens, we will be able to generate evaluation data that goes beyond the documentation of the experiences of those

who opt for mediation or the comparison of a randomly generated control group with a sample of self-selected mediation clients. Similarly, research is needed to document the differential impact of varying types of hearing officers such as lawyers, laypersons, social service professionals; alternative administrative arrangements such as court-based court-connected and independent agencies; different case referral sources and contrasting dispute settlement techniques. In the interim, we must rely on the evidence at hand. Based on that evidence, it is clear that mediation and arbitration make distinct contributions to the satisfactory administration of justice and complement court adjudication in important ways.

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Chapter 2

4 A Guide to Implementing Divorce Mediation Services
in the Public Sector

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Introduction

The problems of court delay, high costs and assembly line treatment have prompted renewed interest in ways of resolving disputes outside the courts. A variety of such alternatives to adjudication exist including arbitration, mediation and negotiation. These processes may be distinguished by the degree of "external involvement" they entail.

Adjudication, the most commonly known dispute resolution process, involves a formal procedure, the use of a third party with coercive power and a "win or lose" decision that is narrowly focused on the immediate matter in issue. The process does not attempt to deal with the underlying relationship between the parties. Similarly, arbitration involves a coercive third party who renders a written opinion that is rationalized by reference to general principles. Unlike judicial proceedings, however, the parties often select the arbitrator, as well as the substantive legal rules that govern the process.¹

Mediation, on the other hand, involves a third party whose role is to facilitate the participation of the parties in negotiating a mutually agreeable settlement. Specifically, the mediator helps disputants to identify the issues, reduce misunderstandings, vent emotions, clarify

¹Sander. Varieties of Dispute Processes, 70 E.R.D. 111-134.

Priorities, find points of agreement, explore the new areas of compromise and negotiate an agreement. Unlike adjudication or arbitration, mediation stresses informality, open and direct communication, reinforcement of positive bonds, cooperation and avoidance of blame.² It is attentive to the underlying relationship between the parties and aims to:

reorient the parties toward each other not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will direct their attention toward one another.³

There is growing sentiment among practitioners and scholars that mediation is best suited to "polycentric" problems not amenable to all-or-nothing solutions; for example, disputes between individuals in a long term relationship.⁴ Not surprisingly, both families and family service professionals are turning to mediation as a forum for family reorganization following divorce that is less destructive to relationships between ex-spouses and their children. According to critics, litigation escalates conflict and trauma without addressing the counseling and negotiating needs of most divorcing couples. Because it

²Gulliver, *Disputes and Negotiations: A Cross Cultural Perspective* (1979).

³Fuller, *Mediation--its Forms and Functions*, 44 S. Cal. L. Rev. 305, 325.

⁴Danzis, *Towards the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 Stanford L. Rev. 1-54.

pits one parent against the other, it undermines the communication and cooperation necessary for effective post divorce parenting. Finally, it results in stipulations and orders that are frequently resented and all too often violated.⁵

Mediation, on the other hand, is believed to address the causes of disputes, reduce the alienation of litigants, inspire consensual agreements that are durable over time, help divorcing couples resume workable relationships and jointly rear their children. Not insignificantly, it is also believed to be more expeditious and inexpensive.⁶

To date, courts in many states have established services offering mediation, and many lawyers and mental health professionals have opened private mediation practices. Numerous legislatures are considering bills to

5Bohannon, *Divorce and After* (1970); Herman, McHenry and Weber, *Mediation and Arbitration Applied to Family Conflict Resolution: The Divorce Settlement*, 34 *Arbitration Journal* 17-21; Felstiner, *Influences of Social Organization on Dispute Processing*, 9 *Law and Society Review* 63-94; Kallner, *Boundaries of the Divorce Lawyer's Role*, 10 *Family Law Quarterly* 289-398; Kaufman, *Judicial Reform in the Next Century*, 29 *Stanford Law Review* 1-26.

6McEwen and Maiman, *Small Claims Mediation in Maine: An Empirical Assessment* 33 *Maine Law Review* 237; McGillis, *Neighborhood Justice Centers* (1981); Cook, Roehl, Sheppard, *Neighborhood Justice Centers Field Test-Final Evaluation Report* (1980); Felstiner and Williams, *Community Mediation in Dorchester, Massachusetts* (1979/1980); Davis, Tichane and Grayson, *Mediation and Arbitration as Alternatives to Prosecution in Felony Arrest Cases--An Evaluation of the Brooklyn Dispute Resolution Center* (1979); Pearson and Thoennes, *The Mediation and Adjudication of Divorce Disputes: Some Costs and Benefits* 4 *The Family Advocate* 3-11; Mnookin and Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce* 88 *Yale Law Journal* 950-997.

establish public sector mediation services, and California recently enacted a bill making mediation mandatory in all cases of contested child custody and visitation.⁷

Although the number of public sector mediation services has increased rapidly, there has been very little consistency in the form they take. This is both understandable and desirable. Each program is shaped by a unique combination of legal and political issues and personalities. Moreover, creative experimentation can only help improve the quality of existing mediation programs and enlarge the range of options available to new jurisdictions contemplating such services.

The following identifies and analyzes the issues that must be addressed by any group or jurisdiction contemplating the initiation of divorce mediation services in the public sector. Broadly defined, these issues are: 1) the role of government mediation services; 2) the legal authority for the mediation service; 3) the service structure that maximizes administrative and cost efficiencies; and 4) the specific procedures that govern the mediation service.

I. The Role of the Government in Mediation Services

The government may assume one of several roles in the organization and operation of public sector mediation

⁷Cal. S.B. 961, (1980 Session) codified as Cal. Civ. Code sec. 4607(a)(West) Also see Cal. Civ. Proc. Code secs. 1740 et seq (West); Pearson, Rins, Milne, A Portrait of Divorce Mediation Services in the Public and Private Sector 21 Conciliation Courts Review.

services. The roles include: 1) facilitating; 2) encouraging; 3) providing; and 4) mandating services.

A. Facilitation

There are several ways a jurisdiction can permit mediation to occur without making a substantial public commitment. One possibility is to ignore mediation. In this model, the state merely refrains from enacting incompatible legislation. Another alternative is to facilitate and clarify the mediation process. For example, mediation may be defined and cited as an alternative in various procedural laws or rules.⁸ Such mention may include certain mandatory procedures to be followed when parties elect to mediate. Most importantly, jurisdictions can clarify and regulate such issues as confidentiality of mediation sessions, specifically whether or not mediators may be subpoenaed to testify in subsequent litigation.⁹ Typically, a jurisdiction which merely permits or facilitates mediation is not engaged in the actual provision of mediation services at public expense and would leave the performance of mediation to private professionals or to -----

8E.g., Colo. Rev. Stat. sec. 38-12-216 cites mediation as an alternative to litigation of disputes between a resident and the manager of a mobile home park and requires that any agreement reached be submitted to, and enforced by, the court as a stipulation. Conn. R. Civ. Proc. 481 cites, without defining, mediation as a duty of a domestic relations counselor.

9The theoretical and practical controversy concerning the propriety of mediators acting as evaluators or arbitrators is explored at notes 103-105 and 185-204, *infra*.

community dispute resolution centers utilizing volunteers.¹⁰

B. Encouragement

A jurisdiction which elects to encourage mediation goes beyond the actions cited above and offers incentives to mediate. Appropriate incentives might include lower fees for parties who mediate or present the court with a settlement agreement at the time a petition is filed,¹¹ an expedited calendar, simplified pleading forms, and perhaps assignment of non-contesting parties to a conciliation-conscious judge or commissioner;¹² and provisions for granting the decree on affidavit of the parties where a settlement agreement has been entered.¹³

¹⁰E.s., Wash. Rev. Code. sec. 26.12.220; Proposed Colo. H.B.1525 (1982-83 Session). Cf., Mont. Code Ann. sec. 40-3-124(1) (conciliation provision).

¹¹E.s., Mich. Act. No. 297 (effective July 1, 1983) (Judgement fee).

¹²Telephone conversation with Harriet Whitman Lee, Family Law Counseling Center, Berkeley, California, Jan. 31, 1983.

¹³Colo. Rev. Stat. sec. 14-10-120.3. C.E. Cal. Civ. Code secs. 4550 et seq (summary dissolution if no children or real estate and marriage duration less than five years).

C. Provision

A growing number of Jurisdictions provide divorce-related mediation services.¹⁴ These Jurisdictions are the most effective in generating mediation users and educating the public about the procedure. The routine exposure of large numbers of the divorcing population to the services of publicly employed mediators lends visibility and credibility to the mediation alternative. It also reduces the refusal rate common to many mediation programs as a result of public ignorance and professional skepticism about mediation. Finally, public sector mediation services may stimulate the development and use of private sector organizations. Once educated, many people will doubtlessly prefer to select a private mediator just as they now select a therapist or lawyer. Indeed, once the public is educated and the private sector is developed, it is possible that some government instituted, public sector mediation services could ultimately be phased out (except for services to indigents).

D. Mandatory Use

A small number of Jurisdictions require that mediation be attempted before the parties have access to the courtroom, at least when certain issues are in dispute.¹⁵

¹⁴E.g., California, Connecticut, Broward County, Florida; Dane County, Wisconsin. Note 7, *supra* and notes 34, 38, 47 and 49, *infra*.

¹⁵E.g., Cal. Civ. Code sec. 4607(a)(West); Proposed Wash. H.B. 905, 47th Sess. (1982). Referral of Visitation

This approach may be viewed alternately as a strong statement of public policy concerning the locus of responsibility for resolving family disputes, and/or as a means of conserving judicial resources.

Why do jurisdictions take such different approaches to divorce mediation? Philosophical factors are relevant. For example, one would expect greater support for mediation in no-fault jurisdictions¹⁶ than in more traditional states, where support may even be construed as facilitating divorce. Jurisdictions encouraging joint custody would also presumably be more sensitive to the potential of mediation for reducing interparental conflict and promoting post-divorce planning.¹⁷ Where widespread philosophical support for mediation exists, program differences may be traced to -----

Disputes to Mediation, Family Ct. 1st Cir., Hawaii (March 31, 1981) (hereinafter "Hawaii Procedure"); C.E. Ariz. Rev. Stat. Ann. sec. 25-381.08; Wash. Rev. Code sec. 26.12.200 (conciliation provisions).

¹⁶ According to a recent survey, 17 states have enacted "irretrievable breakdown" as the sole ground for divorce, and an additional 18 states have added "irretrievable breakdown" as an alternative ground. Freed and Foster, *Divorce in the Fifty States: An Overview as of August 1, 1981*, 7 *Em. Law. Rev.* 4049, 4052.

¹⁷ E.g., Cal. Civ. Code sec. 4600 (West); Conn. Gen. Stat. sec. 46b-56(a); Fla. S.B. 439 (effective July 1, 1982); Ala. Stat. Ann. secs. 61.13(2)(b) and (3) (West); Minn. Stat. sec. 518.003 subd 3(b); Nev. Rev. Stat. sec. 125.136.

the available legal bases of authority for a public mediation service, as well as the allocation of fiscal and administrative responsibility for the service. In the next two sections, we consider each of these issues, respectively.

II. Bases of Legal Authority For Mediation Services

There is much variety in the sources of legal authority for mediation services. Sometimes the program is created by an explicit statute or county ordinance. More often, statutory authority is implicit or absent. In the latter case, the judicial branch may provide the authority. This may take the form of a supreme court rule, a local judicial rule or administrative order, or an ad-hoc judicial order. Still other mediation programs may be activated by the executive branch. This would require an executive order or an agency policy or rule.

The Legislative Branch

1. Explicit Statutes

Statutes for court connected mediation services have been enacted in California, Michigan and Florida. Building on previously enacted conciliation court legislation, the California statute provides for marital and family counselors and custody investigators to function as mediators. ¹⁸

It also permits a self-funding mechanism through the use of an earmarked increase of \$15 in divorce filing fees, \$5 in marriage license fees, and a \$15 fee for any motion to modify or enforce a custody and visitation order.¹⁹ Since California's trial courts are funded at the county level, many program specifics vary from county to county.²⁰ However, the statute does set forth certain specific procedures, which are discussed in Section V *infra*.

In Michigan, a bill was enacted which explicitly authorizes the Friend of the Court in each judicial circuit to provide mediation services. The Friend of the Court previously housed custody investigators, domestic relations referees, bookkeepers for receipt and disbursement of all support payments, and officers to enforce support, custody and visitation orders. Mediation is now offered as an alternative to custody investigations and the judicial enforcement of violated orders.²¹ To fund the service, disputants pay a variable fee ranging from \$30 to \$70 depending on whether the dispute is uncontested, mediated or litigated. This independent fund supplements the state's

¹⁸ Cal. Civ. Code sec. 4607 (West).

¹⁹ Cal. Gov't. Code secs. 26840.3 and 26862 (West).

²⁰ Cal. Civ. Proc. Code sec. 1744 (West). See Conciliation Court Task Force Report to the Custody and Visitation Subcommittee of The State Bar Association of California (Dec. 15, 1981) (hereinafter "Cal. Task Force Rep.").

²¹ Mich. Act. No. 294, secs. 11(4), 13, and 31(4) (effective July 1, 1983).

usual revenues for enforcement activities. ²²⁻

Florida's recently enacted legislation explicitly authorizes counties to establish family mediation or conciliation services to assist parties in resolving "any controversy" involving the family.²³ The legislation also establishes a strong preference for continuing both parents' rights and responsibilities after divorce. In its definition of "Shared Parental Responsibility," the Florida bill requires "both parents to confer so that major decisions affecting the welfare of the child will be determined jointly."²⁴ The mediation service may be supported in one of two ways. The statute authorizes the board of county commissioners to appropriate monies from county revenues and/or levy a charge up to \$2 on any circuit court proceedings.²⁵

Since research accounts indicate that custody mediation typically results in an agreement of joint custody, the combination of joint custody and mediation innovations makes administrative and philosophical sense. The juxtaposition may be pragmatic too. Joint custody legislation has been enacted in 27 states.²⁶ By combining the concepts, public

²² Mich. Act. No. 297 (effective July 1, 1983); Mich. Stat. Ann. secs. 27.A2528 and .2529. By contrast, marital and family counselors (when provided in a circuit) are housed in the Circuit Court and funded by a \$15 surcharge on marriage license fees. Mich. Stat. Ann. sec. 25.123(2).

²³ Fla. S.B. 439 (effective July 1, 1982).

²⁴ Fla. Stat. Ann. sec. 61.13(2)(b)2.a(West).

²⁵ Id., sec. 61.21(4).

sector mediation may be able to ride into existence on the popular coattails of joint custody legislation.

Still another variety of mediation legislation has been introduced to the Colorado Legislature. If approved, this bill would create an office of Dispute Resolution in the Governor's Office to establish and administer dispute resolution programs throughout the state.

While the proposed bill does not limit its application to divorce-related issues, these issues could certainly be addressed. It is even possible that one or more specific programs could limit their focus to divorce-related issues.²⁷

2. Implicit Statutory Authority

While California, Michigan and Florida have led the way in drafting and/or enacting new legislation explicitly

²⁶At the end of 1981, California, Connecticut, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Texas, and Wisconsin had passed joint custody laws. Arizona had authorized joint custody awards by court rule. In Illinois, New Jersey and New York, court decisions broadly interpreted the language of existing custody statutes as giving the courts discretionary power to grant joint custody in appropriate cases. In 1982, Florida and Idaho enacted joint custody statutes, bringing the total number of states that have embraced the concept of joint custody to 27. 8 Fam. Law Rev. 2506.

²⁷The bill is available from the Colorado Bar Association Alternatives to Adversary Dispute Resolution Committee, Debra Halperin and David Griffith, Chairs, 200 W. 14th Avenue, Denver, Colorado, 80204.

establishing or authorizing a family mediation service in many more states, existing legislation implicitly authorizes such a service in the public sector. The best examples of implicit authorization are conciliation statutes whose stated purposes are to assist the parties not only in reconciling, but also in "the amicable settlement of disputes so as to avoid further litigation over the issues involved."²⁸ Implicit authorization may also be found in statutes that emphasize the goal of protecting the rights of children.²⁹ Finally, joint custody statutes may be another source of implicit authorization. For example, one of the criteria in awarding joint custody in the Minnesota statute is a consideration of the "methods for resolving disputes regarding any major decision concerning the life of the child, and the parents' willingness to use these methods."³⁰ The Montana provision directly authorizes the court to order the parents to seek appropriate assistance in formulating a joint custody plan.³¹ And the Nevada statute authorizing the court to order a joint custody plan has been relied upon as authority for a local court rule strongly encouraging

²⁸ E.s., Wash.Rev. Code sec. 26.12.100.

²⁹ E.s., Ariz. Rev. Stat. Ann. sec. 25-381.01; Ind. Code Ann. sec. 31-1-24-3 (Burns); Kan. Stat. Ann. sec. 60-1608(c); Mont. Code Ann. sec. 40-3-102; Neb. Rev. Stat. sec. 42-801; N.D. Cent. Code sec. 27-05.1-01; Utah Code Ann. sec. 30-3-11.1; Wisc. Stat. Ann. sec. 767.081 (West).

³⁰ Minn. Stat. sec. 518.17 subd. 2(b).

³¹ Mont. Code Ann. sec. 40-4-224(4). Also, Hawaii Rev. Stat. sec. 571-1 and -46.1.

mediation.³² In both instances, mediation would be an obvious vehicle to resolve disputes and ensue in Joint custody Plannins.

3. County Ordinances

The county ordinance is the local equivalent of the state statute. It may be an important mechanism for creating mediation services where trial courts or their support services are funded by the county. County mediation ordinances may be modest or more expansive. For example, if the mediation program is incorporated into an existing service such as marital and family counseling or probation supervision, then the county action usually consists of little more than approving additional expenditures for personnel and office space or approving a reallocation of funds among existing functions due to sub-function designations.³³ In some instances, however, the county, in cooperation with the trial court, has created an entirely new unit offering mediation.³⁴ It is even conceivable that if public demand existed, the county could institute a public sector divorce mediation program without even waiting

³² Nev. Rev. Stat. secs. 125.136 and 125.142; Procedure for Child Custody Mediation in Participating Departments, 2d Jud. Dist. Washoe County, Nev. (hereinafter "Nev. Proc.").

³³ E.g., Budget, Hennepin County, Minn., Dept. of Court Services, Program Code 4030 "Family Court Support Services" (1976 through 1982) (hereinafter "Henn. County Budget").

³⁴ E.g., Broward County, Fla. Ord., No.79-18 (March 21, 1979) (hereinafter "Broward County Ordinance").

For formalized Judicial support.

B. The Judicial Branch

1. Supreme Court Rules

In most states, the state supreme court has the power to adopt rules of practice and procedure that are effective in all trial courts of the state.³⁵ Although this mechanism has not yet been used to create a uniform, state-wide procedure for divorce and custody mediation, it has been used in Michigan to activate an effective pre-trial settlement procedure. According to General Court Rule 316, the parties or a Judge may submit for a pre-trial hearing any civil case in which the relief sought consists of money damages or division of property. Termed mediation, the 316 hearing actually involves an arbitration type procedure in which the attorneys for each party makes an oral presentation of 15 minutes per side before a panel of 3 lawyers who analyze the parties' positions and arrive at a decision. While the decision is not binding upon the parties, the Rule builds in strong incentives for the parties to accept the panel's decision.³⁶

³⁵ E.g., Cal. Const. art. VI, sec. 6; Mich. Const. of 1963, art. VI, sec. 5; Mich. Stat. Ann. sec. 27A.223.

³⁶ According to the Clerk of the Mediation Tribunal in Detroit, this procedure is not used in divorce since family mediators are available through the Friend of the Court office. See notes 21 and 22, *supra*.

In the domestic relations field, we find a Court rule in Connecticut which lists mediation as one duty of a domestic relations counselor.³⁷ It should be noted that this is the only mention of mediation in the whole compendium of statutes and rules on divorce in that state. Despite this rather sketchy reference, the administrator of the family counseling service for the State of Connecticut has developed a very comprehensive, public sector mediation program that is operative in every jurisdiction of the state.³⁸

Thus the Supreme Court has the capability of instituting a pre-trial settlement procedure like mediation by rule. The question is how to set a rule of this type initiated. Although the avenues for public input vary from jurisdiction to jurisdiction, there is generally some formal communication channel between the state bar and the supreme court.³⁹ In other jurisdictions, the Court's rulemaking body itself is composed of members representing the public as well as the Judiciary, or the Justices are advised by a committee partially comprised of members of the public.⁴⁰ Sometimes provisions are made for periodic meetings between

³⁷ Conn. R. Civ. Proc. 481.

³⁸ Conn. Superior Ct. Family Div., Ann. Rep. (1979-80), (hereinafter "Conn. Ann. Rep."). Cf. Conn. Gen. Stat. sec. 51 (state court administrator's authority).

³⁹ E.g., Conn. Gen. Stat. sec. 51-7; Fla. R. Jud. Admin. 2.130.

⁴⁰ E.g., Cal. Const. art. VI, sec. 6; Minn. Stat. sec. 480.052 and .053; Fla. R. Jud. Admin. 2.130(b)(1).

the representatives of the legislature and the rules committee of the Judiciary.⁴¹ Often, but not always, there are provisions for prior notice and publication of proposed rules and for a hearing prior to enactment, either routinely or upon petition.⁴² In a few jurisdictions, it is possible for the legislature to void a rule.⁴³

2. Local Court Rules and Administrative Orders

Local court rules and administrative orders that inspire mediation rely upon the principles of judicial efficiency and the power of a court to control the procedures by which judicial decision-making may occur.⁴⁴ Judicial rule making may also be justified by the purposes asserted in many statutes of "promot(ing) the amicable settlement of disputes and mitigat(ing) the potential harm to the spouses and their children caused by the process of legal dissolution of marriage."⁴⁵ And, indeed, research findings appear to demonstrate that mediation accomplishes

⁴¹ E.g., Conn. Gen. Stat. sec. 51-14(b).

⁴² E.g., Conn. Gen. Stat. sec. 51-14(b) and (c); Minn. Stat. sec. 480.054; Fla. R. Jud. Admin. 2.130(c)(4) and 2.130(e).

⁴³ E.g., Fla. Const. art. V, sec. 2(a); Conn. Gen. Stat. sec. 51-14(b).

⁴⁴ As a general distinction, rules govern practice and procedure in the trial court, whereas administrative orders govern the internal management of the judicial department. E.g., Fla. R. Jud. Admin. 2.020.

⁴⁵ E.g., Cal. Rev. Stat. sec. 14-10-102, Ky. Rev. Stat. sec. 403.110, Pa. Stat. Ann. tit. 23, sec. 102(a)(Purdon).

these purposes better than does adjudication.⁴⁶

To date, Judges in Fort Lauderdale, Florida and Reno, Nevada have designed local procedures which require that certain matters (such as contested custody disputes) be submitted to mediation prior to scheduling and court hearings.⁴⁷ Another variation on this type of court-implemented procedure is found in Honolulu, Hawaii where the family court judge refrains from ordering a social study until the parents have attempted mediation.⁴⁸ And in Dane County, Wisconsin, the judge simply refers all contested custody cases to the Family Court Counseling Service which is housed in the Family Court Commissioner's Office. At that point, the parents are given the choice between mediation and a more traditional custody study.⁴⁹

Finally, courts may adopt a number of unofficial procedures to encourage the use of mediation and the conservation of judicial time. Fast and slow dockets may be established for mediated and non-mediated cases, respectively. Pre-trial conferencing procedures may be made cumbersome in order to stimulate parties to settle.⁵⁰ Still

⁴⁶ See Wallerstein, J. and Kelly, J., *Surviving the Breakup* (1980); Pearson, J. and Thoennes, N., *The Benefits Outweigh the Costs*, 4 *Family Advocate* 26.

⁴⁷ Admin. Order No. 79-25, 17th Jud. Cir., Broward County Fla. (Oct. 5, 1979) (hereinafter "Fla. Admin. Order"); Nev. Proc., *supra* note 32.

⁴⁸ Hawaii Procedure, *supra*, n. 15.

⁴⁹ Wisc. Stat. Ann. sec. 767.081 (West); Family Court Counseling Service, brochure published by Dane County, Wisc. (hereinafter "Dane County Brochure").

other courts may adopt a variety of management techniques including a strict continuance policy to deter litigants and their attorneys from going to trial.

Local court rules and administrative orders have their advantages and disadvantages. Compared to legislation, they are faster and easier to implement. Usually, the three or four judges on the domestic relations bench either have the power to enact a rule themselves, or they have only to convince their colleagues on the local trial bench to do so.⁵¹

Although legislative lobbying is a better known procedure, there are several avenues for public input in the rule making process. The most efficient method of communicating with the judiciary is through local bar association committees.⁵² In states which elect trial court judges or consult the electorate to renew judicial terms, public sector mediation could also become a campaign issue.⁵³

⁵⁰ This practice is reported in certain jurisdictions in Massachusetts.

⁵¹ E.g., Cal. Gov't Code sec. 68070 (West); Cal. Rev. Stat. sec. 13-5-133; Conn. Gen. Stat. sec. 51-14; Fla. R. Jud. Admin. 2.020; Mich. Stat. Ann. sec. 27A.621; Minn. Stat. secs. 484.33 and .52; Ohio Rev. Code Ann. sec. 2301.04 (Pase); Pa. Stat. Ann. tit. 23, sec. 604 (Purdon).

⁵² E.g., Colo. Chief Justice Directive 79-6 (B)(2)(e); Fla. R. Jud. Admin. 2.050(e).

⁵³ Cal. Const. art. VI, sec. 16; Cal. Const. art. VI, sec. 25; Fla. Const. art. V, sec. 10(b); Mich. Const. of 1963 art. VI, secs. 11,12; Mich. Stat. Ann. sec. 6.1416; Minn. Stat. sec. 487.03 subd.2; Ohio Rev. Code Ann. secs. 2301.03 and 3117.02 (Pase).

The chief disadvantage with establishing a mediation program by local court rule is the problem of instability. Trial Judges often rotate rapidly through the domestic relations bench.⁵⁴ If an incoming Judge shares an incumbent Judge's commitment to mediation, this presents no problem. However, in at least one instance, a Judge rotating into domestic relations rescinded the support of a previous Judge for the mediation program.⁵⁵

3. Ad Hoc Judicial Orders

Finally, mediation may be authorized by an ad hoc judicial order. Legislation routinely authorizes Judges to order custody investigations or psychological evaluations to assist them in their determinations of the child's best interest.⁵⁶ It is possible that Judges could refer to their broader legislative authority to obtain professional assistance in order to refer parties to a mediator.⁵⁷ Indeed, it is likely that this authority base would be relied upon when only one domestic relations Judge in a court is convinced of the merits of mediation.

⁵⁴ E.g., Wash. Rev. Code sec. 26.12.020 (1 year).

⁵⁵ Reference is to Hennepin County, Minnesota (1982).

⁵⁶ E.g., Colo. Rev. Stat. sec. 14-10-127.

⁵⁷ E.g., Mich. Stat. Ann. sec. 25.312(7)(f); Caln. Rev. Stat. sec. 14-10-126(2).

C. The Executive Branch

1. Agency Policy and Rules

Numerous government agencies at the state, county and local level deal with adults and children in the process, or in the aftermath, of family reorganization. Such agencies include those dealing with the enforcement of child support, the resolution of post-decree visitation and custody disputes, and/or public education about divorce. To the extent that mediation may better accomplish the goals of such agencies, administrators may themselves implement mediation programs in one of several ways. The simplest is an informal policy tacitly approving staff experimentation with this procedure.⁵⁸ More forcefully, the administrator could issue a policy statement on mediation and possibly even arrange for in-service mediation trainings.⁵⁹ Most formally, where provided by the statute or authorizing ordinance, the agency could hold hearings for public input and promulgate rules instituting the mediation procedure.⁶⁰

The Court Services Department in Hennepin County, (Minneapolis) Minnesota is a good example of a mediation

⁵⁸ Such was the experience of at least one custody investigator in Dallas, Texas. Conversation with Diane Skafte, Boulder, Colorado (November, 1981).

⁵⁹ CE, Memo to Staff from Bob Wyckoff, Director, Domestic Relations Division, Hennepin County Dept. of Court Services (April 28, 1980) (hereinafter "Memo to Staff").

⁶⁰ E.s., Fla. Stat. Ann. sec. 394.457(5)(b)(West); Minn. Stat. sec. 480.055 subd. 2.

Program created by informal administrative action. With the support of the family court judge, the department director hired mediators under statutory authorization as probation supervisors, and developed detailed inter-departmental procedures for a sophisticated mediation program.⁶¹ The family mediation program of Dane County (Madison), Wisconsin also derives its authority from an administrator's decision to cross-utilize staff, in this instance, family court counselors.⁶² Similarly, a statewide welfare department with responsibility for conducting custody investigations could train its staff in mediation techniques and approve the use of mediation methodologies to assist in the resolution of child custody and visitation disputes.

3. Executive Orders

The possibility of creating a mediation service by Executive Order has not been fully explored. While the governor is not properly responsible for relieving congestion in the courts, s/he may be involved in the enforcement of support orders.⁶³ If mediation promotes

⁶¹ Memo to Staff, *supra* note 59; Open Competitive Announcement 631, Hennepin County Employment Opportunity, "Family Counselor (Senior Probation Officer)," (November 29, 1979); "Orientation Booklet," Hennepin County Dept. of Court Services.

⁶² Telephone conversation with Kathleen Jeffords, Director, Dane County Family Court Counseling Service, April, 1982.

⁶³ Uniform Reciprocal Enforcement of Support Act, sec. 5.

voluntary compliance with child support orders,⁶⁴ it would certainly be appropriate for the chief executive to order its utilization. It may even be appropriate, by executive order, to establish a citizens' volunteer mediation association to assist in the effort.⁶⁵

III. Alternative Methods of Administering Mediation Services

Public sector mediation programs may be administered in four basic ways. They may be administered by judicial departments or by any department offering support services to domestic relations courts such as: 1) marital and family counseling; 2) custody investigations; and 3) enforcement of support orders. A separate mediation unit could be established with its own state-wide administration system, reporting directly to the state's chief justice. Finally, the court or another public agency could contract for mediation services with private professionals or agencies.

Each of these administrative alternatives presents unique advantages and disadvantages with respect to funding and efficiency. Factors relevant in assessing these advantages and disadvantages include: the ease of mediation program implementation; self funding capability; opportunities and difficulties in personnel management; the

⁶⁴ See, generally, Pearson and Thoennes, *The Benefits Outweigh the Costs*, supra note 46.

⁶⁵ Cf. Caln. Rev. Stat. 24-1-109 (recognizing governor's common law power to create commissions).

extent to which mediation furthers the other goals of the agency with which it is housed; and long-range institutional planning.

A. The Judicial Department

The administrative and funding structure of the Judicial department affects the ease with which a mediation program of the Judicial department can be implemented.

Typically, the chief Justice presides over a state's Judicial department and is assisted by a state court administrator, under whom serves an administrator in each of the state trial courts. The state court administrator generally performs ministerial functions, for example, compiling statistical data regarding the expenditure of public funds, and developing personnel guidelines. More discretionary functions are usually performed by the chief Justice of the supreme court, with only partial delegation of responsibility to the state court administrator.⁶⁶

There are exceptions to these generalizations. In Connecticut, for example, the state court administrator has very broad and far-reaching authority.⁶⁷

Many Judicial services can be and are implemented on an -----

⁶⁶ E.g., Calif. Const. art. VI, sec. 6; Colo. Const. art. VI, sec. 5; Calif. Gov't Code secs. 68500, 68501 (West); Colo. Rev. Stat. sec. 13-3-101 et seq.

⁶⁷ Conn. Gen. Stat. secs. 51-1b, 51-1c, and 51-6; Cf. Minn. Stat. sec. 480.15, subds. 2, 9.

administrative rather than a legislative or a judicial rule-making basis. Thus, the state court administrator of Connecticut is ultimately responsible for adding mediators, however titled, to the budget request, for presenting and justifying it to the legislature, for hiring and training mediators and for developing internal procedures for mediation.⁶⁸ Clearly, this program model enjoys maximum organizational flexibility.

In other states there is less opportunity to implement statewide mediation programs through the action of a single administrator of the judicial department. In these instances, the judicial department may be administered by a large judicial council rather than a single administrator (e.g., California).⁶⁹ Or greater administrative authority may be vested in the local judiciary.⁷⁰ For example, in Broward County, Florida, a local mediation program was initiated by the chief judge of the superior court and subsequently ratified by the county legislative body.⁷¹

There are several advantages to housing a mediation program in the judicial department. First, it is usually possible to find some implicit statutory authority for the program so that legislative change can be avoided.⁷²

⁶⁸ Conn. Gen. Stat. secs. 51-1c, 51-9(n) and 51-10.

⁶⁹ Calif. Const. art. VI, sec. 6.

⁷⁰ Fla. Const. art. V, sec. 2; Fla. R. Jud. Admin. 2.050(e).

⁷¹ Fla. Admin. Order supra note 47; Broward County Ordinance, supra note 34.

Second, as a branch co-equal to the legislature, the judicial department wields more persuasive force in making budget requests than does a private lobbyist. There even exists considerable case authority for the proposition that judges can compel the expenditure of public funds reasonably necessary to perform the judicial function.⁷³

Third, funding options for mediation programs based in the judicial department are varied and include self funding. Docket fees already exist and in some jurisdictions may be increased by the judiciary.⁷⁴ More typically, the legislature must act to increase or earmark these fees.⁷⁵ For example, public sector mediation services in California are supported in part by the judiciary's statutory power to levy a \$30 increase in divorce filing fees (\$15 paid by each

⁷² Notes 28 through 32, supra.

⁷³ See generally, Annot., 59 A.L.R. 3d 569 (1982); The Inherent Power of the Courts to Appropriates Money for "Reasonably Necessary" Expenditures, 55 Marq. L. Rev. 392 (1972); National Conference of Court Administrators and Conference of Chief Justices, Declaration of Principles, 50 J. Am. Jud. Soc'y. 44 (1965).

⁷⁴ E.g., Conn. Gen. Stat. sec. 52-257.

⁷⁵ E.g., Cal. Rev. Stat. sec. 13-32-101; Mich. Stat. Ann. sec. 27A.2528-.2529; Proposed Tex. S.B. 759 (1982) and Proposed Oklahoma bill, both reported in State Legislation on Dispute Resolution, ABA Special Committee on Alternative Means of Dispute Resolution, Monograph Series No. 1 (June, 1982). Cf. authority to increase docket fees and earmark funds for other specific programs. Cal. Rev. Stat. sec. 14-10-120.5 (displaced homemakers); Fla. Stat. Ann. sec. 741-01(2)(West) (safe houses); N.D. Cent. Code sec. 14-06.1-15 (displaced homemakers); Ohio Rev. Code Ann. sec. 2303.201 (Pase) (computerized legal research services for court).

party) to support public sector mediation services⁷⁶ and a legislated \$15 fee for any motion to modify or enforce a custody and visitation order.⁷⁷ In Connecticut, the Judiciary has the power to increase docket fees to pay for mediation services it creates.⁷⁸ And in Florida, this can be accomplished by an action of the county's legislative body.⁷⁹ Other jurisdictions fund the service by earmarked increases in marriage license or certificate fees.⁸⁰ Alternatively, judicial departments that develop mediation services may charge a user fee⁸¹ or contract with professionals in the community and charge their fees to the parties as costs in the case.⁸²

⁷⁶ Cal. Gov't Code sec. 26840.3(a)(1) (West). Cf. Or. Rev. Stat. sec. 21-112 (Petitioner pays \$62.50 increase, earmarked for conciliation services).

⁷⁷ Cal. Gov't Code sec. 26862 (West).

⁷⁸ Conn. Gen. Stat. sec. 52-257.

⁷⁹ Fla. Stat. Ann. sec. 28.241 (West).

⁸⁰ Cal. Gov't Code sec. 26840.3(a)(2) and (3) (West) (maximum \$5 increase applicable to certificate as well as license). Cf. Or. Rev. Stat. sec. 107.615, Mich. Comp. Laws Ann. sec. 551-332; Wash. Rev. Code Ann. sec. 26.12.220(1) (giving county legislative bodies the authority to increase license fees an earmarked amount of \$8-\$15 to support conciliation units).

⁸¹ E.g., Mich. Stat. Ann. sec. 25.123(10), Utah Code Ann. sec. 30-3.16.5. See, Nev. Proc., supra note 32 relying on Nev. Rev. Stat. sec. 125.040(1) (power to mandate temporary support).

⁸² Ariz. Rev. Stat. Ann. sec. 25-381.24; Ill. Rev. Stat. ch. 40, sec. 604(b); Mich. Stat. Ann. secs. 25.312(7)(e) and (f) (charging as costs would require designation of mediator as guardian ad litem); Mont. Code Ann. sec. 40-3-125(3); Neb. Rev. Stat. sec. 42-819; N.D. Cent. Code sec. 27-05.1-11; Wash. Rev. Code sec. 26.12.170.

Fourth, as to personnel in some jurisdictions, there is a recognized custom for the judicial department to hire traditionally titled employees to perform a new function even though there may be no explicit legislation regarding the new function. For example, courts have hired bailiffs who are qualified to and in fact serve as law clerks.⁸³ Similarly, in those jurisdictions where the statutory duty of masters and referees is broad, a judge could direct that such an employee be qualified and serve as a mediator.⁸⁴ The same principle would be applied to professionals with whom judges may contract for assistance such as the guardian-ad-litem⁸⁵ and custody evaluator.

Fifth, court-based mediation programs enhance court efficiencies. Administration of the program through the court promotes adherence to the judicial timetable; quality control, creative use of judicial authority to assure participation and greater acceptance by the clients and the Bar.⁸⁶ Obviously, an important objective of the court is to

⁸³ Conversation with Prof. Larry Hyde, Pres. Association of Family Conciliation Courts, in Denver, Colorado on March 18, 1982.

⁸⁴ E.g., Del. Code Ann. tit. 13, sec. 1516(b); Ind. Code Ann. sec. 31-1-23-6(Burns); Minn. Stat. sec. 484.65 subds. 7-10; R.I. Gen. Laws sec. 8-10-3.

⁸⁵ E.g., Ariz. Rev. Stat. Ann. sec. 25-321, Colo. Rev. Stat. 19-1-103 (15.5); Minn. Stat. sec. 518.165; Ma. Ann. Stat. sec. 452.490(4) (Vernon); Utah Code Ann. sec. 30-3-11.2. In New Hampshire, the appointment of a G.A.L. is mandatory whenever custody or visitation is contested, and the G.A.L. has authority to "utilize the services of others to aid him in representing the child." N.H. Rev. Stat. Ann. sec. 458.17-a.

allocate departmental resources for maximum utilization of Judicial expertise. To the extent that mediation reduces bench time needed in domestic relations cases and frees courtroom resources for criminal and commercial matters, it enhances Judicial economies, and is appropriate for administration by the Judicial department.⁸⁷

Finally, court based mediation programs should make institutional planning easier to perform. For example, research on program effectiveness would be enhanced by subjecting mediation programs to the reporting procedures already implemented by the state court administrator.⁸⁸ Program experimentation could more easily occur under the direction of the state court administrative agent. Court based programs make it easier to coordinate mediation with litigation procedures and docketing. And the efficiencies observed and developed through court based divorce and custody mediation might more easily lead to the development of alternative dispute resolution programs in other substantive settings.⁸⁹

⁸⁶ Letter from Prof. Jay Folbers, Lewis and Clark College, Northwestern School of Law, to Jessica Pearson, Ph.D., Director, Divorce Mediation Research Project (February 2, 1983).

⁸⁷ See generally, Pearson and Thoennes, *supra* note 46.

⁸⁸ E.g., Conn. Gen. Stat. sec. 51-9(h); Minn. Stat. sec. 480.15.

⁸⁹ Sander, *supra* note 1.

B. Court Support Services

1. Marriage and Family Counseling Units

Mediation may be incorporated into existing marital and family counseling services. In eighteen states, legislation exists which requires or empowers the trial court to establish in-court marital and family counseling services.⁹⁰

The efficiencies associated with adding mediation to the counseling program of a judicial department include those previously discussed as well as several noted below.

First, in such settings, adequate funding mechanisms may already be in place. For example, there may be statutory authority to increase docket fees⁹¹ or marriage license fees⁹² or to levy a user fee to fund counseling

⁹⁰ Ariz. Rev. Stat. Ann. sec. 25.381.01 et seq; Calif. Civil Code sec. 1760 et seq (West); Conn. Gen. Stat. sec. 46b-53; Hawaii Rev. Stat. ch. 571; Ill. Rev. Stat. ch. 40 sec. 401 et seq; Ind. Code Ann. secs. 31-1-24(1-9)(Burns); Iowa Code sec. 598.16 et seq; Mich. Stat. Ann. secs. 25.133(1-14); Minn. Stat. secs. 484.64-484.70; Mont. Code Ann. secs. 40-3-101 through 127; Neb. Rev. Stat. secs. 42-360 through 42-823; N.D. Cent. Code sec. 27-05.1 (01-18); Ohio Rev. Code Ann. sec. 3117.03 (Pase); Or. Rev. Stat. sec. 107.510 et seq; R.I. Gen Laws sec. 8-10-7; Utah Code Ann. sec. 30-3-11.1 et seq, Wash. Rev. Code Ann. sec. 26.12.010 et seq; Wisc. Stat. Ann. sec. 767.081 et seq (West). The author is indebted to Janis K. Alton for this list and her helpful cataloging of statutory provisions. Conciliation Court Statutes in the United States, unpublished paper prepared for Professor Jay Folberg, Lewis and Clark College, Northwestern School of Law (March 31, 1980).

⁹¹ E.g., Calif. Gov't Code sec. 26840.3(a)(1); Ind. Code Ann. sec. 31-1-24-4(c)(Burns); Or. Rev. Stat. sec. 21-112; Utah Code Ann. sec. 30-3-16.5 (filing fee for petition for conciliation).

services.⁹³ Even if a court had chosen not to institute a counseling program, it could activate this self-funding capability for mediation services.

Second, there would be few, if any, increased personnel costs associated with this type of mediation service. Court counselors typically have social science training and experience that makes them particularly well-suited to be custody and visitation mediators.⁹⁴ The same personnel may be cross-trained and assigned mediation duties in addition to counseling. Indeed, in light of the decline in public demand for reconciliation counseling, this type of cross-training would be a way to keep existing court personnel usefully occupied.⁹⁵

Third, mediation may be a better way to achieve the original goals of the counseling unit, which include promoting reconciliations and the amicable settlement of family disputes.⁹⁶ Research findings show that mediation

⁹² E.s., Mich. Stat. Ann. sec. 25.123(2) (additional \$15); Wash. Rev. Code sec. 26.12.220 (additional \$8).

⁹³ E.s., Iowa Code sec. 598.16; Mich. Stat. Ann. sec. 25.123(2)(1); Penn. R. Civ. P. 1523; Utah Code Ann. sec. 30-3-16.5.

⁹⁴ E.s., Cal. Civ. Code sec. 4607(b)(West); Cal. Civ. Proc. Code sec. 1745(a)(1)(West).

⁹⁵ E.s., H. McIsaac, The Family Conciliation Court of Los Angeles County, Family Law Symposium: L.A. Superior Court, 55,59 (1981) (hereinafter "McIsaac Symposium Article").

⁹⁶ E.s., Ariz. Rev. Stat. Ann. sec. 25-381.01; Wash. Rev. Code sec. 26.12.100.

improves communication and understanding between ex-spouses. It also teaches couples problem-solving skills that they can use to resolve future disputes, improves compliance with court orders and inter-party stipulations and reduces the incidence of relitigation about family matters. Although mediation is not a substitute for counseling, it does involve therapy related approaches and may have therapeutic effects on participants.⁹⁷ In these respects, mediation may be viewed as a natural extension of the court's counseling program that will entail minimal additional costs.

2. Custody Investigation Services

In cases of contested child custody or visitation, state statutes frequently provide for an investigation or evaluation by an "expert" to assist the court in its determination of the child's best interests. These investigations may be performed by a number of agencies including the in-court marriage and family counseling service,⁹⁸ the probation department⁹⁹ the social service agency which investigates dependency and neglect cases¹⁰⁰ or the county mental health agency of the welfare department.¹⁰¹

Custody investigators housed with the court's counseling

⁹⁷ See, Pearson and Thoennes, *supra* note 46.

⁹⁸ E.g., Neb. Rev. Stat. sec. 42-808(2)(d); Utah Code Ann. sec. 30-3-15.2.

⁹⁹ E.g., Cal. Rev. Stat. sec. 14-10-127(1); Minn. Stat. sec. 260.311 subd. 3.

¹⁰⁰ E.g., Fla. Stat. Ann. secs. 61.20 and 20.19 (West).

service or its probation department are likely to be funded and controlled by the jurisdiction's court system.¹⁰² The efficiencies associated with adding mediation services to these agency's duties are identical to those already discussed in connection with the judicial department and its counseling unit.

If mediation were to be offered through the social service and/or the welfare department, the efficiency picture changes. Several new considerations emerge. First, since these are agencies of the state or county executive branch of government, rather than the judicial department, program decision-making and implementation would have to be coordinated through two branches of government, the judiciary and the executive. Program administration would thus be more cumbersome and time-consuming, as would the process of long range institutional planning.

Second, depending upon the jurisdiction, the executive branch agency may be required to follow formal rulemaking procedures before it develops a mediation service.¹⁰³ While public hearings may elicit useful input, rulemaking

¹⁰¹E.s., Colo. Rev. Stat. sec. 14-10-127(1).

¹⁰²E.s., Gen. Stat. Conn. sec. 46b-3; Conn. R. of Court sec. 481 (counseling service); Ohio Rev. Code Ann. sec. 2301.27 (Pase) (probation dept.). Even where custody investigation services are not administered through the judicial department, a degree of self-funding is sometimes provided in the form of user fees charged as costs of the case. E.s., Caln. Rev. Stat. sec. 14-10-127(1).

¹⁰³E.s., Fla. Stat. Ann. sec. 394.457(5)(b)(West).

Procedures themselves are quite tedious and distasteful to department heads. As a result, mediation programs may be rejected merely because of the inconvenience of a public hearing. In any event, agency rulemaking would add to the length of time required to consider, approve and implement the program.

Third, unlike judicial departments, executive branch agencies are often governed by a state or county personnel act which often entails a different system of hiring and firing, rights and grievances, pay scales and job descriptions.¹⁰⁴ To the extent that judicial departments offer higher pay and greater benefits, they would obviously attract better quality mediators.

As to personnel efficiencies, executive branch agency personnel are both attractive and troublesome. Custody investigators are invariably trained in the behavioral sciences and are sensitized to the issues facing divorcing parents. They are excellent candidates for cross training in divorce mediation.¹⁰⁵ On the other hand, custody investigators along with probation supervisors, dependency and neglect investigators and in some cases, welfare workers are typically obligated to report to the court and be cross-examined.¹⁰⁶ Unless some other legal authority protects the

¹⁰⁴E.g., Fla. Stat. Ann. sec. 402.35(West); Compare Cal. Rev. Stat. sec. 13-3-105 (Judicial department personnel system) with Cal. Rev. Stat. secs. 24-50-101 et seq (state personnel act).

¹⁰⁵See notes 94 and 95 supra.

confidentiality of mediation performed by these employees, cross-utilization may inadvertently jeopardize the intended confidentiality. Jurisdictions that wish to cross-train for mediation, personnel, who are subject by statute to cross-examination may be better off abandoning the notion of confidentiality. Indeed, several jurisdictions have found it very effective to have mediations conducted by custody investigators who proceed to make a custody recommendation to the court in the event that mediation fails and the couple is unable to generate their own agreement.¹⁰⁷

D. Child Support Enforcement Agencies

Support orders are enforced either by the district attorney,¹⁰⁸ the attorney general,¹⁰⁹ or by an attorney appointed to head an enforcement agency such as Michigan's

¹⁰⁶ E.g., Hawaii Rev. Stat. secs. 571-45, 571-46(4) and 571-46.1(a); Ohio Rev. Code sec. 3117.04 (Pase); Or. Rev. Stat. sec. 107.425(1); Wash. Rev. Code secs. 26.09.220 and 26.12.070.

¹⁰⁷ This is the approach followed in the San Francisco Conciliation Court. By contrast, the policy of the Los Angeles Conciliation Court is to strictly separate the functions of mediator and custody investigator. See notes 187-206, *infra*. In Fresno County, if there is an impasse, the parties choose whether to proceed with the mediator as an evaluator, or to begin anew with a different person as evaluator. Conversation with Harriet Whitman Lee of Family Law Counselors Center, Berkeley, Calif., Jan. 31, 1983.

¹⁰⁸ Caln. Rev. Stat. sec. 14-5-101; Tenn. Code Ann. sec. 36-918; N.C. Gen. Stat. sec. 110-138.1; Ohio Rev. Code Ann. sec. 2301.38 (Pase).

¹⁰⁹ Tenn. Code Ann. secs. 36-1009; Utah Code Ann. sec. 78-45-9(1).

Friend of the Court.¹¹⁰ Funding is provided by the state or county and sometimes adjusted, on a percentage basis, according to the dollar amount of support money collected by the unit.¹¹¹ Occasionally, the agency is funded, at least partially, by fees for enforcement services.¹¹²

A program limited to the mediation of post decree support and visitation disputes could logically and easily be implemented by the head of the investigative or enforcement agency. If the scope of the mediation is restricted to support matters,¹¹³ it might be possible to train existing employees (e.g., attorneys and investigators) to do the mediations. Since mediation might inspire voluntary compliance with child support orders, the mediation program may also further the enforcement objectives of the child support unit. Finally, long range institutional planning would only involve one agency and would be relatively easy to accomplish.

¹¹⁰E.g., Ky. Rev. Stat. sec. 403.090(2); Mich. Act. No. 294 secs. 9(3) and 11 (effective July 1, 1983). Cf. Fla. Stat. Ann. sec. 409.2554(7) (West) (program attorney for Dept. of Health and Rehab. Services).

¹¹¹E.g., Ohio Rev. Code Ann. sec. 2301.35 (Pase); Mich. Act. No. 298 (effective July 1, 1983).

¹¹²E.g., Ohio Rev. Code Ann. sec. 2301.35(D) (Pase); Wash. ch. 201 (Laws 1982).

¹¹³Note, however, the recurring linkage of support and visitation issues in negotiations. For example, the more time the child spends with one parent, the less support money the other parent may need. Conversely, one parent may resist sharing access to the child when there is insufficient sharing of financial responsibility for the child by the other parent. Harriet Whitman Lee, *supra* note 12.

If the scope of the mediation were expanded to include custody issues and pre-dissolution visitation, child support and property arrangements, however, the program would have to be coordinated with the judicial department.¹¹⁴ This would make program organization and planning more cumbersome. Since child support enforcement personnel tend not to have behavioral science training and experience, it would probably be necessary to retain additional personnel with this type of background. The net effect would be a large staff addition requiring a substantial commitment of funds.¹¹⁵

E. A Public Mediation Agency

It is conceivable that a state could establish a separate mediation unit with its own statewide administration system, reporting directly to the chief justice,¹¹⁶ or the governor.¹¹⁷ In most states this would

¹¹⁴This is the structure in Michigan, where the Friend of the Court, under the ultimate direction of the State Supreme Court, administers enforcement of support, custody and visitation orders, custody investigations, referee hearings and mediation. Mich. Act. No. 294, (effective July 1, 1983).

¹¹⁵Of course, the budgetary impact can always be reduced or eliminated by self-funding mechanisms. E.g., Mich. Act. No. 297, effective July 1, 1983. Moreover, budget savings should be experienced in other government agencies, e.g., Social Services. House Judiciary Subcommittee on Domestic Relations, Subcommittee Report on House Bills 4870 and 4871, p. 7 (Mich. 1982 Session) (hereinafter "Mich. Subcom. Rep.").

¹¹⁶E.g., N.Y. [Jud.] Law sec. 849-b (Consol.) (Community dispute resolution center program, administered by chief administrator of the courts); Prop. Caln. H.B. 1525 (1982).

require new legislation, as well as a new commitment of funds¹¹⁸ or statutory authorization for self-funding.¹¹⁹ The attractiveness of this approach is that the ensuing mediation program would not be governed by existing agency job descriptions or litigation procedures. The newly created mediation agency could be viewed as an alternative system of conflict resolution and shaped by broader theoretical principles.¹²⁰

F. Contracting with Private Agencies for Mediation Services

In several locations such as Honolulu, Hawaii, and Morristown, New Jersey, public mediation services have been provided by contracting with a private agency.¹²¹ This

¹¹⁷E.g., Proposed Colorado legislation, *supra* note 27.

¹¹⁸E.g., Rider to Minn. APPROP. Bill (1981) designated \$700,000 to State Supreme Court's Judicial Planning Office for a two-year study and grants for local programs for "accessible, cost-effective resolution of disputes, utilizing neighborhood, local and community resources (including volunteers and available space in public facilities)."

¹¹⁹E.g., Okla. Prop. H.B. 1441, sec. 5 (1981 Session); Tex. Prop. S.B. 259 sec. 2 (1982) (earmarked increase of approximately \$3.50 in all civil filing fees); Proposed Colorado legislation, *supra* note 27 (Director may solicit federal and private funds).

¹²⁰"We must now use the inventiveness, the ingenuity, and the resourcefulness that have long characterized the American business and legal community to shape new tools...We need to consider moving some cases from the adversary system to administrative processes...or to mediation..." Justice Warren E. Burger, "Isn't There a Better Way?" 68 ABA Journal 274,276 (March, 1982).

arrangement transfers the budgetary problems of initial start-up and staff development from government to the private sector, making at least the governmental side of program implementation much easier.¹²² All that is needed is the administrative order or rule of the local trial court and an available, private agency.

To the extent that mediation reduces the need for publicly funded counseling, custody investigations and support enforcement services, the public sector should actually experience savings by instituting mediation on a contract basis. Depending upon the responsiveness, as well as the stability of the private agency, the planning needs of the judicial department should not be significantly impaired, although this arrangement would entail multiple agency coordination. Unlike agencies in the co-equal, executive branch, the judicial branch could establish certain terms or conditions in the contract with the private agency performing mediation services. Lastly, a service staffed with private professionals might attract committed, trained and qualified personnel who seek to make family mediation their career.

¹²¹Hawaii Procedure, *supra* note 15;

¹²²See Mich. Act. No. 294, sec. 13(1) (effective July 1, 1983) (hereinafter referred to as "Friend of the Court Act") (domestic relations mediation shall be provided through private source unless court can demonstrate that providing the service within the Friend of the Court office is cost beneficial).

Summary

In sum, the administration of mediation services through the Judicial branch rather than the executive department, appears to have decided advantages when cost and administrative efficiencies are concerned. Even where decisions are required on the state and local levels of the Judiciary and must be ratified by the respective legislative authorities, program implementation is less complicated when only a single branch of government is involved. In rare instances where self-funding mechanisms are not in place, the Judiciary's influence in the legislature, or its inherent authority to compel appropriations for its reasonable purposes, provide effective options. Most important, mediation is a legitimate "diversion" procedure for a Judicial department. It helps to further that department's goal of conflict resolution while reserving the Judiciary for matters that require Judicial expertise.

IV. The Specific Procedures Governing the Mediation Service

Anyone drafting procedures for public sector mediation dealing with divorce will need to consider: the definition of mediation, eligibility guidelines, how mediation is initiated, the reciprocal effect of mediation and litigation timetables, confidentiality (including the question whether the mediator will serve as an evaluator of mediation is not successful), the role of attorneys for the parties, the

qualifications of mediators and their duties, and the role of the public agency in research and education.

This section provides an overview of typical procedures in mediation practice. The provisions that are discussed are generally in effect regardless of the organizational structure of the mediation service or its source of authority. ¹²³

A. Definitions of Mediation

Mediation has been variously defined in state statutes. The Subcommittee Report for Michigan's new legislation stresses that the mediator assumes the role of a "facilitator...who clarifies the issues, identifies alternatives, and helps disputants to come to a mutual agreement. The mediator does not make a decision for the parties..." (Emphasis in original). ¹²⁴

Looking to the legislative purpose of Florida's mediation legislation, we find a broad commitment to a nonadversary forum. While no specific policy is advocated, the legislation authorizes a county to establish a family mediation service "to assist parties in resolving any controversy involving the family." ¹²⁵

¹²³Some of the provisions are found in statutes which would authorize mediation services, though the word mediation is not defined or, indeed, found in the statute. E.g., Colo. Rev. Stat. sec. 14-10-120.3.

¹²⁴Subcommittee Report, *supra*, note 115, at 2. The legislative definition is found at sec. 31(4) of "Friend of the Court Act", *supra* note 122.

The purpose of custody and visitation mediation in California is "to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children close and continuing contact with both parents after the marriage is dissolved."¹²⁶ It combines therapeutic and task oriented methods with a strong statement of public policy in favor of continued parental involvement with children after divorce.

In Connecticut the enabling legislation for mediation services grants counselors authority to attempt to reconcile the spouses to each other, and to meet with the parties to "explore the possibility of resolving the emotional problems which might lead to continuing conflicts following a dissolution of the marriage."¹²⁷ This would suggest a therapeutic model of mediation.

By contrast, in Arizona, the purpose of counselors is stated as "amicable settlement of the controversy between the spouses or parents, so as to avoid further litigation over the issue involved."¹²⁸ This suggests that the emphasis

¹²⁵ Fla. S.B. 439, sec. 2 (Effective July 1, 1982); Fla. Stat. Ann. sec. 61.21(1)(West). Also see Prop. Wash. H.B. 905, 47th Legis (1982).

¹²⁶ Cal. Civ. Code sec. 4607 (West).

¹²⁷ Conn. Gen. Stat. sec. 46b-53.

¹²⁸ Mont. Code Ann. sec. 40-3-121. The Broward County, Florida, Family Conciliation Unit brochure articulates one simple, clarifying definition: Mediation is "an intervention between two disputing parties where the goal is to help them reach an amicable settlement."

of Arizona's mediation program is on reducing court overload.

Still another definitional slant is suggested by mediation programs that derive their legislative authority in the court's power to order a custody investigation (e.g. Hennepin County, Minnesota).¹²⁹ Looking at the process from this perspective, mediation is less of a neutral, confidential process; the mediator is implicitly charged with the responsibility of advocating for the best interest of the child.¹³⁰

Some conclusions may be drawn from this potpourri of definitional items. All encompass the notion of a nonadversarial forum for resolving conflict. The authority for decision making rests with the parties, although the "neutral" mediator is often charged with some type of responsibility for protecting the best interests of the children. The goal is for the parties to reach a voluntary agreement which may be reported back to attorneys and the

¹²⁹Minn. Stat. sec. 518.167.

¹³⁰E.g., Cal. Civ. Code secs. 4607(d) and (3) (West); Minn. Stat. sec. 518.167; But CE. definition of custody mediation process as "designed to give the family primary responsibility for determining custody," a process through which "alternative solutions are examined by the family, details are clarified, and a report outlining the areas of agreement is written to the court and attorneys." Domestic Relations Division Services, Hennepin County, Minn. Dept. of Court Services, D.R. Div. (Apr. 28, 1980) (hereinafter "Henn. County, Minn. D.R. Services Memo"). "This process is not an investigation but an effort to use the parents' knowledge of their children's needs, combined with the counselor's skill as a clinician and a mediator." Dane County Brochure, *supra* note 49.

court.

B. Eligibility for Mediation

Rules of eligibility for mediation may be incorporated into the statute or other authority creating the service,¹³¹ or the power to make such rules may be delegated in the county board or court.¹³² However they originate, these rules usually cover the following areas: mediable issues, client qualifications, the filing and litigation status of mediation clients, and the duration of mediation services.

Mediable issues in public sector programs include: custody disputes,¹³³ visitation disagreements,¹³⁴ child support matters,¹³⁵ joint custody plans,¹³⁶ domestic abuse,¹³⁷

¹³¹E.g., Cal. Civ. Code sec. 4607 (West); Friend of the Court Act, *supra* note 122, Conn. Ann. Rep., *supra* note 38. See Conn. Gen. Stat. secs. 51-1 through 6.

¹³²Cf. Or. Rev. Stat. secs. 107.580 and 107.615(3); Wash. Rev. Code sec. 26.12.220.

¹³³E.g., Cal. Civ. Code sec. 4607; Friend of the Court Act, *supra* note 122, sec. 13(1); Proposed Wash. H.B. 905, 47th Legis. sec. 10 (1982); Conn. Ann. Rep., *supra* note 38, at 2; Hennepin County, Minn. Program Budget Narrative, Budget Yr. 1982 at 1-2 (hereinafter "Henn. Program Budget Narrative"). Cf. Ariz. Rev. Stat. Ann. sec. 25-381.08 (conciliation provision).

¹³⁴*Id.*; Hawaii Procedure, *supra* note 15.

¹³⁵E.g., Cal. Civ. Proc. Code sec. 1760 (West); Cal. Civ. Code sec. 4600.5(f) (West); Conn. Ann. Rep., *supra* note 38, at 7-8; Henn. Proposed Budget Narrative, *supra* note 133, p. 1-2, 4 *Contra*, Friend of the Court Act, *supra* note 122, secs. 11(4) and (6)(b) (but see section 11(6)(a)). Cf. Proposed Wash. H.B. 1163, 47th Legis., sec. 302(b)(1982) (creating Special Commission on Child Support Guidelines to develop methods of arbitrating disputes between parties relating to child support to facilitate settlement out of court); Ariz. Rev. Stat. Ann. sec. 25-381.08 (conciliation

other matters involving a minor child's welfare,¹³⁸ spousal support,¹³⁹ property settlement,¹⁴⁰ and miscellaneous matters involving family relationships in dissolution or otherwise.¹⁴¹

Often, mediation resources are allocated first to custody and visitation disputes,¹⁴² and second to other disputes

provision).

¹³⁵ E.g., Cal. Civ. Code sec. 4600.5(f)(West); Fla. S.B. 439 (Effective July 1, 1982); Proposed Wash. H.B. 473 sec. 3(2) and H.B. 905 secs. 2(5), 4 and 7, 47th Lesis. (1982); Dane County Brochure, *supra* note 49. Cf. Ariz. Rev. Stat. Ann. sec. 25-381.08 (conciliation); N.H. Rev. Stat. Ann. sec. 458:17-a(II) (court may appoint G.A.L. who may utilize experts); Minn. Stat. sec. 518.17 subd. 2(b) (in determining whether joint custody is in child's best interest, court shall consider what methods exist for resolving disputes and parents' willingness to use those methods); Prop. Ariz. S.B. 1330, 35th Lesis. sec. 2 (1982) (conciliation of joint custody plans or disputes thereunder).

¹³⁷ E.g., Conn. Ann. Rep., *supra* note 38, at 7-8; Henn. Program Budget Narrative, *supra* note 133, at 4.

¹³⁸ E.g., Cal. Civ. Proc. Code sec. 1760(West); Proposed Wash. H.B. 905, 47th Lesis. sec. 15 (1982). Cf. Neb. Rev. Stat. sec. 42-811; Pa. Stat. Ann. tit. 23 sec. 202(c) (Purdon) (conciliation provisions).

¹³⁹ E.g., Cal. Civ. Proc. Code sec. 1772 (West); Conn. Ann. Rep., *supra* note 38, at 7-8. *Contra*, Friend of the Court Act, *supra* note 122, sec. 31(4).

¹⁴⁰ E.g., Cal. Civ. Proc. Code sec. 1772. Cf. Early Settlement Programs conducted on volunteer basis by members of New Jersey Bar (3-member panel gives opinion on ultimate resolution by court if matter goes to trial); Wash. Rev. Code sec. 26.12.210 (conciliation provision).

¹⁴¹ E.g., Friend of the Court Act, *supra* note 122, secs. 13(1) and 31 (paternity). Cf. Ariz. Rev. Stat. Ann. sec. 25-381.08 (disruption of household) (conciliation provision).

¹⁴² E.g., Cal. Civ. Code sec. 4607 (West); Or. Rev. Stat. sec. 107.580; Conn. Ann. Rep. *supra* note 38, at 2; Cf. Mich. Stat. Ann. sec. 25.123(G) (counseling priority

involving a minor child's welfare.¹⁴³ In these Jurisdictions, other issues are mediated only as staff schedules permit.¹⁴⁴

In some Jurisdictions, cases involving longstanding bitterness, physical abuse, or lengthy psychiatric histories, are inelible for mediation services.¹⁴⁵ Other Jurisdictions require some showings that there is a reasonable possibility of amicable settlement.¹⁴⁶ Provisions exist to insure that clients are not excluded for lack of marital status,¹⁴⁷ biological or legal parenthood,¹⁴⁸ or on

siven to parties who have already filed complaint or motion).

¹⁴³ E.g., Cal. Civ. Proc. Code sec. 1760 (West); Cal. Civ. Code sec. 4600.5(f)(West); Fla. Admin. Order, *supra* note 47, sec. II. CE. Ohio Rev. Code Ann. sec. 3117.08(B) (Pase) (conciliation provision).

¹⁴⁴ E.g., Cal. Civ. Proc. Code sec. 1772(West). CE. Or. Rev. Stat. sec. 107.580 (conciliation provision).

¹⁴⁵ E.g., Conn. Ann. Rep., *supra* note 38, at 3; Modification of Instructions issued March 31, 1981, Family Ct. 1st Cir., Hawaii (January 25, 1982) (hereinafter "Hawaii Mod. Instruction"). In still other Jurisdictions, parties may be deemed inelible on a case-by-case basis, in the discretion of the Judge, no standards given. CE. N.D. Cent. Code sec. 27-05.1-06 (conciliation provision).

¹⁴⁶ E.g., Cal. Civ. Proc. Code sec. 1771(West); Hawaii Mod. Instruction, *supra* note 145 (party may avoid referral to mediation by showing there is good cause to believe it can serve no useful purpose); Nev. Procedure, *supra* note 32, sec. I (may avoid referral by showing reasonable grounds why mediation not in the best interest of the child involved). Compare Ariz. Rev. Stat. Ann. sec. 25-381.19 (conciliation provision states standard set forth in text) with Ariz. Rev. Stat. Ann. sec. 25-381.20 (requiring that, where no minor child's welfare at issue, petitioners for conciliation must show that amicable adjustment of the controversy "can probably be achieved").

the basis of indigency¹⁴⁹ or geographic area of residence.¹⁵⁰

Mediation services are sometimes available only while litigation is actually pending.¹⁵¹ Other jurisdictions allow clients to mediate before filing the dissolution petition or motion to modify,¹⁵² or after the decree or order,¹⁵³ if

¹⁴⁷E.s., Cal. Civ. Proc. Code sec. 1760 (West).

¹⁴⁸E.s., Cal. Civ. Proc. Code sec. 1763 (West).

¹⁴⁹E.s., Cal. Civ. Proc. Code sec. 1765 (West); Conn. Gen. Stat. sec. 46b-53(d) (statutory prohibition on fee for services); Fla. Admin. Order, *supra* note 47, sec. III; Mich. Acts Nos. 294 and 297, (effective July 1, 1983) (apparent intent); Conciliation Court Task Force Report to the Custody and Visitation Subcommittee of the Family Law Section of the State Bar Association of California 7. (Dec. 15, 1981) (hereinafter, "Cal. Task Force Rep.") (in 74% of reporting counties, mediation is provided free to clients). Cf. conciliation provisions: Iowa Code sec. 598.16 (court may waive fee); Neb. Rev. Stat. sec. 42-819 (county may waive fee); N.D. Cent. Code sec. 27-05.1-08 (no fee). Cf. requirements that county provide, at no charge to clients, blank forms for petition for conciliation, as well as county employees to assist in preparing and presenting petition: Mont. Code Ann. sec. 40-3-122(3); Wash. Rev. Code sec. 26.12.130.

¹⁵⁰E.s., Cal. Civ. Code sec. 4607 (b) (West) (custody and visitation); Friend of the Court Act, *supra* note 122, secs. 3 & 13(1) (mediation services must be made available in each county or circuit); Conn. Ann. Rep., *supra* note 38, at 2 (reflecting same requirement, based not on statute but on internal administration of judicial department); McIsaac, Symposium Article, *supra* note 95, at 60 (describing branch offices of Los Angeles Family Conciliation Court). *Contra*, those jurisdictions in which mediation or conciliation services are authorized, but implemented only by local order or ordinance. E.s., Fla. S.B. 439 sec. 2 (Eff. July 1, 1982); Fla. Stat. Ann. 61.21 (West); Ind. Code Ann. sec. 31-1-24-1 (Burns).

¹⁵¹E.s., Cal. Task Force Rep., *supra* note 20, at 6 (20% of reporting counties); Henn. Program Budget Narrative, *supra* note 133, at 2 and 4.

¹⁵²E.s., Cal. Civ. Proc. Code sec. 1761 (West); Fla. Admin. Order, *supra* note 47, sec. IV.a.; Proposed Wash. H.B.

certain requirements are met. For example, a joint petition to mediate may be required,¹⁵⁴ or there must be a determination that mediation of priority cases--those already in litigation--will not be postponed to mediate a prelitigation case.¹⁵⁵ Still other jurisdictions routinely permit or even encourage clients to mediate before filing their litigation pleadings.¹⁵⁶ This reflects the commonly held view that mediation is more effective if it is begun before positions are shaped by trial logic.¹⁵⁷

905, 47th Legis. sec. 11 (1982).

¹⁵³ E.g., Cal. Task Force Rep., supra note 20, at 6 (77% of reporting counties); Henn. County, Minn. D.R. Services Memo, supra note 130, secs. I.D. and II.A; McIsaac Symposium Article, supra note 95, at 63. Cf. Proposed Wash. H.B. 905, 47th Legis. sec. 14 (1982) (in discretion of family court); Contra, Wash. Rev. Code sec. 26.12.190 (conciliation provision). D.R. Policies, Hennepin County, Minn. Dept. of Court Services, Domestic Relations Division (May 5, 1981) hereinafter "Henn. County D.R. Policies". These provisions are important, in view of statutory restrictions on frequency of motions to modify orders. E.g., Colo. Rev. Stat. sec. 14-10-131(1) (2 years); Friend of the Court Act, supra note 122, sec. 17(1)(c) (2 years restriction on support investigations).

¹⁵⁴ E.g., Fla. Admin. Order, supra note 47, sec. IV.a.

¹⁵⁵ Cf., Mich. Stat. Ann. sec. 25.123(6) (conciliation provision).

¹⁵⁶ E.g., Cal. Civ. Proc. Code sec. 1761(West). Cf. Ariz. Rev. Stat. Ann. sec. 25-381.09 and .188 (conciliation provisions).

¹⁵⁷ See generally Fisher and Ury, *Getting to Yes*, ch.1 (1981). An interesting counterpart to the text of the preceding six notes is the practice in Marin County, California, of requiring even those parties who have reached an agreement in private mediation sessions to undergo mediation through the public agency. Harriet Whitman Lee, supra note 12.

The maximum duration of the mediation sessions is sometimes established by statutes or orders.¹⁵⁸ More often, the administrator of the program institutes flexible guidelines.¹⁵⁹ In actual experience, the parties may mediate for a duration of one to ten sessions.¹⁶⁰

Additional mediation services are almost always available for clients who have reservations about a mediated agreement prior to its promulgation as a Court Order and wish to attempt to reach a new agreement.¹⁶¹

C. Initiating Mediation

Mediation is initiated both by mandatory and voluntary procedures. Mediation has been made mandatory in some jurisdictions for disputes dealing with custody and visitation, and sometimes for any dispute affecting a minor child's welfare.¹⁶² For other disputes, the judge may order

¹⁵⁸ E.g., Fla. Admin. Order *supra* note 47, sec. II (maximum 60 days). Cf. conciliation provision: Iowa Code sec. 598.16 (60 days); Pa. Stat. Ann. tit. 23 sec. 202 (Purdon) (maximum 3 sessions).

¹⁵⁹ E.g., Cal. Task Force Rep., *supra* note 20, at 6-7 (modal number of sessions available is 6; average length of sessions is 1.5 hours); Henn. County D.R. Policies, *supra* note 153 (mediation services limited to four months per case).

¹⁶⁰ E.g., Fla. Admin. Order, *supra* note 47, sec. IV.D (only one session is mandatory); Henn. County D.R. Policies, *supra* note 153 (limit one session where parties not subject to court order to mediate); McIsaac Symposium Article, *supra* note 95, at 63 (marathon model); Henn. Program Budget Narrative, *supra* note 133, at 1-2 (ten sessions maximum).

¹⁶¹ E.g., Staff Meetings Notes and Policies, Hennepin County, Minn., Dept. of Court Services, Dom. Rel. Div. (Oct. 1, 1980).

mediation upon the request of one party and thereby make it mandatory for the other party.¹⁶³ Finally, mediation may become mandatory because a Judge or referee, on his or her own motion, orders the procedure for particular parties.¹⁶⁴

In all other jurisdictions and situations, mediation is voluntary. Parties initiate mediation either by a Joint petition for conciliation¹⁶⁵ or simply by self-referral.¹⁶⁶ Where a petition is required, staff are available to assist the parties in filling out the form and presenting the petition in order to maintain the informality of the process.¹⁶⁷ Parties may also be referred to the mediation

¹⁶² E.g., Cal. Civ. Code sec. 4607(a)(West); Hawaii Procedure, *supra* note 15; Nev. Proposed Procedure, *supra* note , sec. 1; CE. Wash. Rev. Code sec. 26.12.200 (conciliation provision).

¹⁶³ E.g., Cal. Civ. Proc. Code secs. 1761, 1763 and 1766 (West); Fla. Admin. Order, *supra* note 47, sec. IV.C. and E.2; Proposed Wash. H.B. 905, 47th Legis. sec. 11 (1982). Cf. Iowa Code sec. 598.16 (G.A.L. may also request order); Wash. Rev. Code sec. 26.12.100 and 150 (conciliation provisions); Conn. Gen. Stat. sec. 46b-53.

¹⁶⁴ E.g., Conn. Gen. Stat. sec. 46b-10; Fla. Admin. Order, *supra* note 47, sec. IV B and C; Family Court Study of Custody Resolution Through Mediation, Family Court, First Cir., Hawaii (March 31, 1981) (hereinafter referred to as "Hawaii Study") (court assigns parties randomly to mediation, social investigation, or self-selection groups); Proposed Wash. H.B. 905, 47th Legis. sec. 15 (1982). Cf. Iowa Code sec. 598.16; Neb. Rev. Stat. sec. 42-822 (conciliation provisions).

¹⁶⁵ E.g., Cal. Civ. Proc. Code secs. 1761 and 1763; (West); Conn. Gen. Stat. sec. 46b-53. CE. Mont. Code Ann. sec. 40-3-121; Utah Code Ann. 30-3-16.2; (conciliation provisions).

¹⁶⁶ E.g., Henn. County D.R. Policies, *supra* note 153; Dane County Brochure, *supra* note 49.

services from other agencies required by statute to make such referrals.¹⁶⁸

Some jurisdictions take considerable care to reinforce the voluntary nature of their mediation service.¹⁶⁹ Others utilize strong incentives to encourage mediation.¹⁷⁰ These incentives range from postponing a hearing until the judge is satisfied that all reasonable attempts have been made to mediate a settlement, to requiring a court order before allowing parties to proceed without mediating.¹⁷¹ It has been suggested that court fees be skewed to penalize those who litigate when mediation is an available option.¹⁷² Others propose that mediation be offered as an alternative to proceedings with a custody investigation or a complaint under a support enforcement act.¹⁷³

¹⁶⁷ See statutes collected at note 90, *supra*.

¹⁶⁸ E.g., Cal. Civ. Proc. Code sec. 1746 (West); Henn. County D.R. Policies, *supra* note 153. Cf. Neb. Rev. Stat. sec. 42-815; (conciliation provision).

¹⁶⁹ E.g., Friend of the Court Act, *supra* note 122, sec. 13(1).

¹⁷⁰ E.g., requirement that attorneys file detailed briefs at pretrial conference. (Telephone conversation with Joseph Connelly, Director, Family Services Unit, Probate and Family Court, Middlesex County, Mass. March, 1982.

¹⁷¹ E.g., Hawaii Mod. Instruction *supra* note 145 Cf. Mont. Code Ann. sec. 40-4-104(1)(c); Neb. Rev. Stat. sec. 42-360; Nev. Proc., *supra* note 32, sec. 1; N.D. Cent. Code sec. 27-05.1-06 (conciliation provision).

¹⁷² E.g., Mich. Act No. 297 (effective July 1, 1983).

¹⁷³ E.g., Friend of the Court Act, *supra* note 122, sec. 5(b) and (c); Dane County Brochure, *supra* note 49.

D. Mediation and the Adversary Timetable

Family mediators tend to agree that the suspension of all litigation activities helps to foster the cooperative atmosphere conducive to agreement making.¹⁷⁴ One way to accomplish this is to refer to conciliation legislation which traditionally postpones litigation for a specific time period following the filing of a divorce petition in order to promote reconciliation.¹⁷⁵ (The court's jurisdiction to render temporary orders is not affected.)¹⁷⁶

To encourage agreement-making in Connecticut, the court may penalize parties who resist a court order to mediate by staying their litigation.¹⁷⁷ Other states cite the resisting party for contempt, but refrain from imposing penalties that interrupt the flow of litigation.¹⁷⁸ In Hawaii's first

¹⁷⁴ E.g., Comments during conference sessions at AFCC winter, 1981 conference in Ft. Lauderdale, Fla.

¹⁷⁵ E.g., Cal. Civ. Proc. Code sec. 1770 (West) (30 days); N.D. Cent. Code sec. 27-05.1-18 (90 days); Or. Rev. Stat. secs. 107.540 and Utah Code Ann. sec. 30-3-16.7 (60 days); Wash. Rev. Code sec. 26.12.190 (30 days); maximum 90 days unless both parties consent); McIsaac Symposium Article, supra note 95, at 63 (60 days for post-dissolution custody and visitation disputes in Los Angeles County). In Arizona, the 60-day stay is available to a party no more than once a year. Ariz. Rev. Stat. Ann. sec. 25-381.22. See also N.D. Cent. Code sec. 27-05.1-06; Wisc. Stat. Ann. sec. 767.083(1) (Judge decides duration of stay on a case-by-case basis).

¹⁷⁶ E.g., Fla. Admin. Order, supra note 47, sec. IV,c; Proposed Wash. H.B. 905, 47th Legis. sec. 14 (1982). Cf. Neb. Rev. Stat. sec. 42-821; (conciliation provision).

¹⁷⁷ Conn. Gen. Stat. sec. 46b-53.

¹⁷⁸ Cf., Wisc. Stat. Ann. sec. 767.083(1).

Circuit, the court interrupts litigation when the parties seek an order for a custody investigation and directs the parties to seek mediation.¹⁷⁹ It will not resume litigation or order an investigation unless good cause is shown to believe that mediation can serve no useful purpose or has been unsuccessfully attempted.¹⁸⁰

Clients who successfully mediate usually experience a shorter wait from filing the dissolution petition to obtaining a final decree than their litigating counterparts. Parties who fail to reach a mediation agreement, however, may travel through the court system more slowly because they have postponed custody evaluations and hearing dates.¹⁸¹ One remedy for this is for the mediator to conduct custody investigations when mediation fails and attempt to avoid duplication of effort.¹⁸² Of course, this would reduce the confidentiality of the mediation proceedings, which is discussed in the following sections.

¹⁷⁹ Hawaii Procedure, *supra* note 15.

¹⁸⁰ Hawaii Mod. Instruction, *supra* note 145. And in The South District of Los Angeles Superior Court, no motion or Order to Show Cause is set for hearings unless the pleadings are accompanied by a "Certification re Compliance with Civil Code sec. 4607." (newspaper clipping provided by Hush McIsaac; procedure began Oct. 1, 1981).

¹⁸¹ Pearson and Thoennes, *supra*, note 46.

¹⁸² E.g., Henn. County, Minn. D.R. Services Memo, *supra* note 130, sec. 1.A. This is the practice in 90% of reporting counties in California. Cal. Task Force Rep. *supra*, note 20, at 11. Cf. Ohio Rev. Code Ann. sec. 3117.03(A) (Pase).

E. Privacy

There is relative agreement that mediation should be a private process. Privacy, however, is defined differently in various jurisdictions. Most jurisdictions restrict the mediation session to disputing parties and the mediators. Others allow the parties' attorneys to attend, at least during part of the session.¹⁸³ Still others allow children, new spouses and other persons involved in the controversy to be included.¹⁸⁴ In general, the court's mediation files are only available for scrutiny by the parties,¹⁸⁵ and on occasion, their counsel and the court.¹⁸⁶

¹⁸³ Conn. R. Civ. Proc. 481; Conn. Ann. Rep., *supra* note 38, at 7-8. Cf. Ariz. Rev. Stat. Ann. sec. 25-381.16D (conciliation).

¹⁸⁴ Depending upon the mediator and the policy of the mediation agency, nonparties such as new partners, children, neighbors, employers, relatives, school teachers and private therapists may be included in one or more of the mediation sessions. E.g., Cal. Civ. Proc. Code secs. 1763(e) and 1766 (West); Conn. R. Civ. Proc. 484; Fla. Admin. Order, *supra* note 47, sec. IV.A.1(d) and E.3; Proposed Wash. H.B. 905, 47th Legis. sec. 12 (1982); Nev. Proc. *supra* note 32, sec. 2; Conn. Ann. Rep., *supra* note 38; Henn. Program Budget Narrative, *supra* note 133, at 1; Custody Mediation, Henn. County, Minn. Dom. Rel. Div., Dept. of Court Services 2 (Mar. 25, 1976); Cal. Task Force Rep., *supra* note 20, at 8-9; McIsaac Symposium Article, *supra* note 95, at 59-62. Cf. Mont. Code Ann. secs. 40-3-122(2)(e) and -125(1); (conciliation statute authorizing order to non-party to attend conciliation conference).

¹⁸⁵ Nev. Proc. *supra* note 32, sec. 2 (file closed to counsel unless both parties stipulate otherwise). Cf. Utah Code Ann. sec. 30-3-17.1 (conciliation provision).

¹⁸⁶ E.g. Id.; Fla. Admin. Order, *supra* note 47, sec. IV.e.3.; Staff Mts. Policies, Henn. County, Minn. (Oct. 1, 1980). *Contra*, Ariz. Rev. Stat. Ann. sec. 25-381.07(2); Wash. Rev. Code sec. 26.09.030 (conciliation provisions).

F. Confidentiality

There is less unanimity on the admissibility in subsequent litigation of information gleaned in mediation. Some Jurisdictions strive to protect mediation information. Others do not.

The arguments in favor of confidentiality emphasize its importance if mediation is to work. Without confidentiality, it is argued, parties will fail to make full and free disclosures of information. For example, where mediation is mandatory and the mediator is permitted to make a recommendation and be examined as to the reasons for the recommendation, the divorcing parents face the untenable choice of not being candid in mediation or revealing confidences that can be later used against their individual interests. ¹⁸⁷ Advocates also believe that attorneys are more willing to have their clients participate in mediation without counsel present where confidentiality is guaranteed. ¹⁸⁸ Jurisdictions that value confidentiality commonly prohibit personnel from serving as both mediator and investigator in the same case ¹⁸⁹ although in some Jurisdictions this provision may be waived if both parties

¹⁸⁷ Folbers, *Divorce Mediation - A Workable Alternative* in *ABA Alternative Means of Family Dispute Resolution* (1982).

¹⁸⁸ Cal. Task Force Rep., *supra* note 20, at 10-11.

¹⁸⁹ E.g., *Mediation Agreement form in use by Family Counseling Service, Dane County, Wisc.; Friend of the Court Act, supra* note 122, sec. 15.

consent.¹⁹⁰

At the opposite philosophical pole are jurisdictions that disavow confidentiality. In these jurisdictions, the mediator regularly serves as an investigator and makes a recommendation on custody and/or visitation to the court if the mediation procedure fails.¹⁹¹ According to the proponents of this approach, it avoids duplication of effort. Since so much information revealed to the mediator is directly relevant to the judicial resolution of child custody disputes, the mediator is in an excellent position to make a recommendation to the court that is in the best interests of the child. Supporters of this approach argue that the mediator-investigator having developed a relationship of trust with the parents, is better equipped to reduce the acrimony associated with a formal court hearing than his/her counterpart who serves solely as an investigator. Lastly, many argue that the mediator-turned-investigator is frequently able to resolve disputes during the investigation and that he/she continues to attempt to mediate even after the process has formally terminated.¹⁹²

Jurisdictions interested in maintaining the confidentiality of the mediation process rely on one of two theories to accomplish this. The first asserts that

¹⁹⁰ E.g., Conn. Gen. Stat. sec. 46b-10; Friend of the Court Act, *supra* note 120, sec. 2.

¹⁹¹ Note 107, *supra*.

¹⁹² Cal. Task Force Rep., *supra* note 20, at 10-11.

conversations with a mediator are confidential or privileged communications.¹⁹³ Privilege may be granted in mediation legislation¹⁹⁴ or more general provisions covering certain public officials or government employees.¹⁹⁵ It may include verbal and written communications with the mediator,¹⁹⁶ mediator notes and observations¹⁹⁷ and documents prepared by a third party for use in mediation.¹⁹⁸ Occasionally, the privilege is extended to communication between parties, and others who attend the mediation including but not limited to children, new partners, relatives, neighbors, consultants or stepparents.¹⁹⁹ Usually, there are certain statutory

193. See e.g., Colo. R. Evid. 501.

194 E.g., Cal. Civ. Code sec. 4607(c) (West); Cal. Civ. Proc. Code sec. 1747 (West).

195 E.g., Caln. Rev. Stat. sec. 13-90-107(1)(e).

196 E.g., Conn. Gen. Stat. sec. 46b-53(c); Fla. Admin. Order, supra note 47, sec. IV.e.5; Mich. Act No. 294 sec. 13(3) (effective July 1, 1983); Nev. Procedure, supra note 32, sec. 2. Cf. Ariz. Rev. Stat. Ann. sec. 25-381.16D; Caln. Rev. Stat. sec. 14-12-105; N.D. Cent. Code sec. 27-05.1-13; Mont. Code Ann. sec. 40-3-116(1); Utah Code Ann. sec. 30-3-17.1; Wisc. Stat. Ann. sec. 767.081 (conciliation provisions).

197 Cf. *Eaton v. Howard*, 118 Az. 119, 575 P.2d 318,320 (1978), interpreting Ariz. Rev. Stat. Ann. sec. 25-381.16; N.D. Cent. Code sec. 27-05.1-13 (conciliation provisions).

198 E.g., Fla. Admin. Order, supra note 47, sec. IV.E.3.

199 E.g., "All communications, verbal or written, between disputants and from disputants to counselors, the court, attorneys, doctors or others engaged in the conciliation proceedings, made in conciliation conferences, hearings, and other proceedings had pursuant to the conciliation authority shall be privileged and confidential." Fla. Admin. Order, supra note 47, sec. IV.E.5. Cf. Or. Rev. Stat. sec. 107.600 (conciliation).

exceptions to privileged communications including child abuse or the contemplation of other crime.²⁰⁰ Depending upon the jurisdiction, the privilege may,²⁰¹ or may not,²⁰² be waivable.

Jurisdictions lacking a statutory basis for privilege turn to other legal arguments for keeping statements made during mediation out of the court. This includes the rule that offers to compromise and settle are not admissible for the purpose of proving the validity or amount of any claim.²⁰³

If mediation is viewed as a type of settlement negotiation between the parties, statements made to facilitate the mediated settlement should be protected.

Unfortunately, this rule is best known to litigators for its exceptions rather than its protections. Evidence of offers to compromise are admissible for numerous other purposes including the demonstration of bias or prejudice or to impeach a witness. Moreover, the prohibition does not extend to evidence otherwise discoverable through such

²⁰⁰ E.g., Colo. Rev. Stat. secs. 19-10-112; 12-63.5-115. Contra, Prop. Or. H.B. 2362, sec. 5(2) (1983 Session).

²⁰¹ E.g., Conn. Gen. Stat. sec. 46b-10. Cf. Iowa Code sec. 598.16; Wisc. Stat. Ann. sec. 767.081 (conciliation provisions).

²⁰² E.g., *Eaton v. Howard*, supra note 195 (state's interest in preserving confidentiality may override interest of parties in seeking mutual waiver of privilege); Fla. Admin. Order, supra note 47, secs. I.B. and IV.E.5. Mich. Stat. Ann. sec. 25.123(9)(1).

²⁰³ The Mediation Agreement used by The Family Court Counseling Service, Dane County, Wisconsin, reflects this strategy.

devices as interrogatories, depositions, subpoena or requests for the production of documents.²⁰⁴

A third method of achieving confidentiality is by contract. To date, this has been pursued more often by private rather than by public sector mediators. Specifically, these mediators require their clients to sign an agreement for services whereby it is expressly provided that the mediation sessions will be confidential and that the mediator will not be called upon to testify about what is said or to give any professional opinion related to the case in court.²⁰⁵ Of course, a court is not bound to honor this private contract. However, at least one appellate opinion has held enforceable an express agreement that communications made during marriage counseling would be privileged and that neither spouse would call the counselor at a divorce trial, even though there was no direct statutory protection.²⁰⁶ Aside from the enforcement mechanisms afforded by contract confidentiality, the provision places considerable moral obligations on each party. Its suitability for use in the public sector should be explored.

²⁰⁴ See E.R.E. 408 and e.g., Wisc. Stat. sec. 904.08.

²⁰⁵ Friedman,
. Legal Issues in Dispute Resolution:
Confidentiality (April 15, 1982) (unpublished paper
available from ABA Alternatives to Adversary Dispute
Resolution Committee).

²⁰⁶ *Simrin v. Simrin*, 233 C.A. 2d 90, Cal. Repr.
P2d (1965).

G. Legal Representation of the Parties

There has been some understandable confusion within the legal profession regarding the proper roles of attorneys and mediators. Most mediating parties are encouraged to obtain separate counsel for legal advice and to review, comment upon and approve the final mediated agreement.²⁰⁷ In some jurisdictions, mediators have the authority to exclude counsel for the parties from the mediation conferences.²⁰⁸ In practice, however, the mediators often meet privately with counsel to discuss the mediation process, its confidentiality requirements and counsel's perception of the issues in dispute.²⁰⁹ Clients may consult with their attorneys during mediation as necessary. If the parties reach a mediation agreement, it is typically reviewed by counsel for each party and resubmitted to mediation if either counsel raises objections. The final agreement is drafted in proper legal form by one of the attorneys for approval by both and incorporation by the court into its order or decree.²¹⁰

²⁰⁷ E.g., I. Ricci, *Mom's House, Dad's House* 151 (1980). Also, conversation with Henry Ellson, California lawyer-mediator, at AFCC conference, Ft. Lauderdale, Fla., Dec. 4, 1981. But see O.J. Cozler, *Structured Mediation in Divorce Settlement* 127-28, 119-20 (1981) (advisory attorney acts as neither party's adversarial advocate).

²⁰⁸ E.g., Cal. Civ. Code sec. 4607(d)(West); Cal. Civ. Code sec. 4607(d)(West); Mont. Code Ann. sec. 40-3-116(1); (conciliation).

²⁰⁹ E.g., *Guidelines for Custody/Visitation Conferences*, Los Angeles Conciliation Court, 5.

Parties appearing without counsel during mediation are officially encouraged²¹¹ in some jurisdictions and discouraged²¹² in others.

H. Mediator Qualifications

Mediation is a non-regulated profession. Mediation training has not yet been systematized. Moreover, publicly employed mediators may be hired exclusively to do mediation or be available for assignment to other agency duties such as probation supervision, custody investigation and domestic relations counseling.²¹³ Some courts utilize professionals in the private sector including clergymen, marriage counselors and other mental health professionals.²¹⁴

²¹⁰ E.s., Fla. Admin. Order, supra note 47, sec. IV.E.7; Nev. Proc., supra note 32, sec. 3(a). An attorney-mediator may also prepare the agreement. Friend of the Court Act, supra note 122, sec. 13(2). In private practice, the mediator may prepare a Memorandum of Understanding for use by the parties' attorneys (Haynes model) or encourage the parties to draft their understandings in their own words (Ricci model). Haynes, J., *Divorce Mediation* (1981); Ricci, *Mom's House/Dad's House* (1980).

²¹¹ E.s., Cal. Civ. Proc. Code sec. 1764 (West); Fla. Admin. Order, supra note 47, sec. A.2. CE. Ariz. Rev. Stat. Ann. sec. 25-381.12 and .13 (conciliation provision); Supreme Court Committee on Matrimonial Litigation Phase Two, *Final Report, Supplement to N.J. Law J.1* (July 16, 1981) (recommending use of bar-staffed Early Settlement Program to assist and assist litigants in settling or narrowing issues for trial).

²¹² E.s., Minn. R. Proc. (Fam. Ct.) 1.02.

²¹³ E.s., Cal. Civ. Code sec. 4607(b)(West); Cal. Civ. Proc. Code sec. 1744(a),(d) and (f) (West); Fla. Admin. Order, supra note 47, sec. I.A.

Provisions also exist for the utilization of trained volunteers.²¹⁵

Statutory and administrative provisions dealing with the qualifications of custody and visitation mediators in the public sector usually require a masters degree in family counseling, social work or a related field ²¹⁶ and a substantial amount of work experience.²¹⁷ Some provisions permit education and experience requirements to be interchanged.²¹⁸ Since mediation is an evolving profession,

²¹⁴E.g., Cal. Civ. Code sec. 4607(b) (West); Conn. Gen. Stat. secs. 46b-10 and k-53; Hawaii Procedure, *supra* note 15; Directory: New Jersey Alternative Dispute Resolution Projects, Comp. by Elizabeth Broady, Asst. Dean, Rutgers Law School (Feb., 1982 Draft) (reporting practice of Judge Serpentelli of Ocean County District Court to refer to psychiatrist for mediation). Cf. Mont. Code Ann. sec. 40-3-124(1) and -125(3); R.I. Gen. Laws sec. 8-10-7; Wisc. Stat. Ann. sec. 767.081; (conciliation provisions).

²¹⁵E.g., Hawaii Procedure, *supra* note 15; Henn. County, Minn. Orientation Booklet, D.R. Div. Dept. of Court Services. Cf. Mont. Code Ann. sec. 40-3-124(1); Neb. Rev. Stat. sec. 42-360; Or. Rev. Stat. sec. 107.530; Wash. Rev. Code sec. 26.12.220 (conciliation provisions).

²¹⁶E.g., Cal. Civ. Code sec. 4607(b)(West); Cal. Civ. Proc. Code sec. 1745(a)(1) (West); Conn. Gen. Stat. secs. 46b-3 and -53; Nev. Procedure, *supra* note , sec.7(a) Cf. Or. Rev. Stat. sec. 107.610 (conciliation); R.I. Gen. Laws sec. 8-10-7 (court establishes counselor qualifications). In addition, Michigan accepts lawyers trained in mediation and knowledgeable in child development and custody research. Friend of the Court Act, *supra*, note 122, sec. 13(4).

²¹⁷E.g., Cal. Civ. Proc. Code sec. 1745(a)(2)(West) (two years); Nev. Procedure, *supra* note 32, sec. 7(b) (two years).

²¹⁸E.g., Cal. Civ. Proc. Code sec. 1745(b) (West); Henn. County, Minn. Position Description (may substitute bachelor's degree and three years experience for M.S.W.; Friend of the Court Act, *supra* note 122, sec. 13(4) (may substitute 5 years family counseling experience for master's

provisions are included for in-service trainings as well.²¹⁹

And because mediation is conducted by a male-female team in some Jurisdictions, sex may sometimes be a bona fide occupational qualification too.²²⁰

In some Jurisdictions, mediators have special statutory powers. For example, the mediator may recommend mutual restraining orders to protect the well-beings of the children.²²¹ Or the mediator may order a visitation schedule if the parties cannot develop one of their own.²²² He or she may be able to exclude counsel from the mediation sessions,²²³

or to certify to the court that further mediation would not be productive.²²⁴ The mediator may call other professionals into the mediation sessions to advise the parties.²²⁵ Finally, in some Jurisdictions, the mediator may

degree); Nev. Procedure, *supra* note 32, sec. 7; Cal. Task Force Rep., *supra* note 20, Fig. 3 (21% reporting counties employ bachelor's degree staff; 6% utilize lawyers with MFCC licensure or family law experience).

²¹⁹ E.s., Conn. Ann. Rep., *supra* note 38, at 2; McIsaac Symposium Article, *supra* note 95, at 57; Friend of the Court Act, *supra* note 122, sec. 19(3)(b) (requirement that state friend of the court administrative bureau provide mediator trainings).

²²⁰ E.s., Conn. Ann. Rep., *supra* note 38, at 2.

²²¹ E.s., Cal. Civ. Code sec. 4607(e) (West).

²²² E.s., Henn. County D.R. Services Memo, *supra* note 130, def. II. D. (ref. Minn. Stat. secs. 518.175).

²²³ Note 208, *supra*.

²²⁴ E.s., Nev. Proc., *supra*, note 32, sec. 3(c). Cf. Utah Code Ann. sec. 30-3-16-7 (conciliation provision). *Contra*, In re Marriage of Matthews, 101 C.A. 3d 811, 161 Cal Rptr. 879 (1980).

make a custody recommendation to the court. 226

Mediators are sometimes also charged with responsibility for fulfilling certain duties or obligations. Thus, a mediator may be required to assess the needs and interests of the child involved in the controversy.²²⁷ Similarly, he or she may have the obligation to use best efforts to effect a settlement of the controversy.²²⁸

Mediators may face certain liabilities for abuse of power, or for failure to fulfill their statutory obligations. This is rarely addressed in state statutes. Instead, mediators tend to be covered by the general provisions dealing with the liability of public servants.²²⁹ It should be noted, however, that some mediation legislation, not connected with divorce and custody, proposes to limit the potential liability of mediators to acts of gross negligence or bad faith.²³⁰

²²⁵ E.s., note 184, *supra*; Fla. Admin. Order, *supra* note 47, sec. IV.E.3.

²²⁶ Note 107, *supra*. Also, Fla. Admin. Order, *supra* note 47, sec. IV.E.2 (results only are reported). Cf. *Ariz. Rev. Stat. Ann.* sec. 25-381.16B (conciliation provision; results only).

²²⁷ E.s., Cal. Civ. Code sec. 4607(d) (West); Mediation Agreement form in use by Family Court Counseling Service, Dane County, Wisc.

²²⁸ E.s., Cal. Civ. Code sec. 4607(a) (West).

²²⁹ E.s., Colo. Rev. Stat. sec. 24-10-101 *et seq.* See generally, 81A. C.J.S. States sec. 126 (1977).

²³⁰ E.s., Fla. S.B. 7 sec. 6 (1981 Session).

The issues of professional ethics have not been addressed by statute or rule. Nevertheless, some agencies have developed in-house policies and regulations and mediators in some jurisdictions have adopted self-regulating mechanisms.²³¹ Still other writers and practitioners have urged mediators to withdraw from cases that result in an ethically offensive agreement and/or certify their non-approval with the court.²³²

I. Public Information

The distribution of public information is an important aspect of every public agency that provides a public service. In addition, some mediation programs are authorized or required by statute to engage in research, education, or other endeavors related to the purpose and policy of the legislation.²³³ These endeavors may first need to be approved by the trial court, county government or agency director.²³⁴

²³¹ E.g., Code of Ethics adopted by Colorado Council of Mediation Organizations (1982); Orientation Booklet, Hennepin County, Minn. Dept. of Court Services, Dom. Rel. Div.

²³² E.g., Marital Mediation Rules, Family Mediation Association, sec. 41, published in Coosler, *supra* note 207, at 120. See Cal. Civ. Code sec. 4607(e) (West).

²³³ E.g., Hawaii Study, *supra* note 164; Friend of the Court Act, *supra* note 122, secs. 5(a) and 19(3) (effective July 1, 1983). Cf. Hawaii Rev. Stat. sec. 571-5; Mich. Stat. Ann. sec. 25.123(11) (conciliation provisions).

²³⁴ E.g., Friend of the Court Act, *supra* note 122, sec. 5(a) and 19(3) (effective July 1, 1983).

Public information dissemination has frequently taken the form of periodic short programs on divorce. This includes presentations and films on mediation, court procedures, and the legal and financial and emotional issues of divorce.²³⁵ More recently, jurisdictions have begun to offer programs on the impact of divorce on children and the pros and cons of joint custody arrangements.²³⁶ Some jurisdictions have assembled advisory committees to prepare and distribute public information brochures about divorce, co-parenting, and mediation.²³⁷ In other instances, judges and administrators have engaged in public speaking to further educate the public.²³⁸

CONCLUSIONS

There is growing support for divorce mediation in the private sector among citizens and public officials. This paper delineates the various ways divorce mediation programs can be implemented in the public sector. The analysis reveals that a wide number of alternative approaches are -----

²³⁵ E.g., Conn. Ann. Rep., *supra* note 38, at 16; Henn. Program Budget Narrative, *supra* note 133, at 4; Los Angeles Conciliation Court Ann. Rep. 2 (1980).

²³⁶ Domestic Relations Division Services, Hennepin County, Minn.; sec. VI "The Divorce Experience" (April 28, 1980).

²³⁷ E.g., Los Angeles County Committee to Implement A.B. 1480, *Cooperative Parenting Following Dissolution: Your Child Needs Both of You* (Pamphlet available from L.A. Conciliation Court).

²³⁸ E.g., McIsaac Symposium Article, *supra* note 95, at 57.

feasible and that the route chosen by a jurisdiction should reflect its specific needs, statutory structure and fiscal resources.

To initiate a public-sector, divorce mediation service, there must first be some assessment of the degree of government support for the program. Part I describes the different levels of involvement and commitment to mediation services the government can make. Appearances can be deceptive. No-cost measures by the government, such as defining mediation and the nature of the confidentiality the parties can rely on, can effectively stimulate public use of mediation. Moreover, even the provision of a state-wide mandatory custody/visitation mediation service, may cost the state very little and accomplish vast savings in public expenditures for courtroom services.

Secondly, jurisdictions contemplating mediation services in the public sector should determine whether legal authority already exists for such a service. It is important to assess the degree to which the present statutory structure contains impediments to an effective mediation program. This may include ambiguous provisions about the nature of confidentiality in the mediation process. Indeed, if these problems are not resolved, the mediation process itself may generate disputes and litigation and deflect from the considerable advantages to be gained from public sector mediation. Jurisdictions lacking existing legal authority for mediation will have to

promulgate new statutes, court rules or administrative orders. Part II gives an overview of the different types of legal authority that might be relied upon to initiate mediation in the public sector as well as the limitations of each type of authority.

Similarly, it is important for jurisdictions to consider which agency or branch of government should house or administer the mediation service. In addition to agency interest and authority, the determination should include the issues of short and longer-term efficiency. Part III delineates relevant efficiency criteria and concludes that the judicial department is generally the most appropriate administrator of mediation programs in the public sector.

Finally, implementing a divorce mediation program at any level--from a local judge's ad hoc order to a statewide mandatory statute--will require some articulation of the procedures by which mediation is to occur. Part IV considers how other jurisdictions have addressed the classic issues of mediation definitions, eligibility and initiation; the relationship between mediation and the adversary timetable; privacy and confidentiality; legal representation of the parties; mediator qualifications; and public information about the mediation process and outcomes.

Hopefully the information gathered in this paper will stimulate mediation activity and assist the architects of future mediation services in the public sector for the divorcing population.

Chapter 3

A PORTRAIT OF DIVORCE MEDIATION SERVICES
IN THE PUBLIC AND PRIVATE SECTOR

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A Portrait of Divorce Mediation Services
in the Public and Private Sector

Introduction

This is an analysis of divorce mediation services in the public and private sectors. It is an effort to characterize the organization, operation and experience of these services in the United States. This study is one of several activities of the Divorce Mediation Research Project, a federally funded project concerned with the immediate and longer term effects of mediation and adjudication on individuals ensased in custody or visitation disputes.¹ The project principally focuses on users of court-based mediation programs in Los Anseles, California; Minneapolis, Minnesota and the State of Connecticut. In addition, we have compiled a directory of public and private mediation programs dealing with divorce.² The following traces the recent upsurse in mediation services, offers a closer characterization of these services and presents a comparison of programs in the public and private sector.

¹The project is funded by the Children's Bureau of the United States Department of Health and Human Services and it is administered by the Association of Family and Conciliation Courts.

²Pearson, Thoennes, Milne. The Directory of Mediation Services, The Association of Family Conciliation Courts, 1982.

Data and Methodology

The information for this study comes from questionnaires mailed to individuals and organizations who offer divorce mediation services and from visits to several services at a number of geographical locations. We obtained the questionnaire and field data during the summer and autumn of 1981. Initially, we mailed 200 questionnaires to court-connected family counseling services, members of the Association of Family and Conciliation Courts and others who had attended conferences on mediation sponsored by the Association of Family and Conciliation Courts.³ The initial questionnaire consisted of 80 questions about the program's organization, operation and characteristics. Using normal follow-up contacts and reminders, we were able to obtain 88 completed questionnaires of this type. This translates into a response rate of about 45 percent.

Our second mailing of questionnaires was to 800 members of the Family Mediation Association and to individuals who had failed to respond to the first mailing.⁴ This time we utilized a shortened version of the original questionnaire. The short questionnaire had 33 items dealing with service organization and operation. We received 227 questionnaires from this second mailing, about 28 percent of the 800

³The AFCC is an international association of Judges, court administrators, lawyers and mental health professionals established in 1963.

⁴The FMA was founded in 1974 by O.J. Coosler. It conducts training programs throughout the country.

mailed.

Taken together, we mailed 1000 questionnaires and received 315; 59 came from court-based programs and 256 were from private services. At first glance, the 31.5 percent response rate appears to be low. The possibility of sample bias appears to be pronounced. In fact, this is not the case. A compilation of mediators was not available when we mailed the questionnaires, so we chose to mail questionnaires to the members of the most popular professional associations for divorce mediators. Since these associations clearly attract non-mediator members, many non-practitioners also received the questionnaire. Understandably, non-practitioners did not respond to the questionnaire and this artificially depressed our response rate. Of course, this method of contacting mediators precluded the consideration of mediators who do not belong to the two professional associations we singled out for our survey. To the extent that there were practicing divorce mediators in 1981 who were not linked to the AFCC or the FMA, our survey is incomplete.

In addition to obtaining questionnaire responses, site visits were made to Boston/Cambridge, Massachusetts; Portland, Oregon; San Francisco and Los Angeles, California; and Atlanta, Georgia. At these sites, open-ended interviews were conducted with administrators, mediators and judges in court-based and private mediation programs.

The data gathered for this study were reviewed, a code book was developed, and the data were coded for computer tabulation and analysis. The quality of the responses to the questionnaires varies widely. Some private programs are fairly new and information on number of clients, hours spent in mediation and successful cases mediated is incomplete or unknown. Some respondents show knowledge and understanding of the subject they are addressing, while others are inexperienced and unaware of main issues. In most of the public and private services, the returned questionnaires were filled out by persons who serve as both mediator and administrator. This was the case for 59.4 percent of the private sector and 60.7 percent of the court-based respondents, respectively. The remaining respondents for both programs were either mediators or administrators.

We obtained responses from all regions of the United States. Private mediation activity appears to be most intense in the Middle Atlantic, South Atlantic and Pacific regions of the country. Public programs are mostly concentrated in the New England, East North Central, Mountain and Pacific regions.

Table 1 about here

Organization of Services

Mediation services have increased rapidly in the 1980s. The oldest mediation program in the private sector in our

survey began in 1960. The average year of origin reported by private sector program directors was 1979. In the public sector, the average year of origin was 1975. The Los Angeles Conciliation Court officially began offering mediation in 1973. This may be the most reliable data for the formal commencement of public mediation services. More recently, many public sector programs in California were begun as a result of the enactment of Senate Bill 961 in 1981, a provision making mediation mandatory in all cases of contested child custody and visitation.

According to both private and court-based practitioners, the upsurge in divorce mediation programs in recent years was motivated by growing disenchantment with adversarial resolutions of family disputes and the desire to handle these matters in an alternative fashion. Table 2 shows that 90.3 percent of the respondents in the private sector and 60.6 percent of those in the public sector identified this as the reason why their programs had been developed. Approximately 33.3 percent of respondents from court-based programs also cited the recent increase in the number of divorces and the need to alleviate crowded court dockets as another important reason for the development of mediation services. A Judge who supports court-based mediation programs puts the matter as follows:

The court system is over-used and the more people can be assisted in resolving their issues outside the court, the better off they will be. A court-connected service cuts down on contested matters and allows

individuals to determine their own agreements.

Typically, Judges who began court-based mediation programs simply added them to the array of counseling and investigation services previously offered by the court. Since many court counselors and investigators observed that families were often able to reach these agreements on their own with some staff facilitation, they too were motivated to extend their services to include mediation. In numerous states, programs were begun with the authority of existing conciliation statutes which seek to avoid domestic litigation and/or joint custody statutes that urge parents to resolve disputes in a non-adversarial fashion and/or engage in joint custody planning.⁵

Although some divorce mediators in Cambridge, Massachusetts and San Francisco, California reported in personal interviews that they had been motivated to organize divorce mediation services because of their own divorce experiences, this was not a common response. Only 4.9 percent of respondents in the private sector, and none of those in the public sector identified this as a reason for program development.

In the private sector, individuals organized 79.0 percent of the mediation programs. Community service groups

⁵For a discussion of the types of legal authority used to create divorce mediation services in the public sector, see "A Guide to Implementing Divorce Mediation Services in the Public Sector" by Elizabeth Comeaux, consultant to the Divorce Mediation Research Project, 1720 Emerson Street, Denver, Colorado 80218.

were responsible for the development of 14.0 percent of such services. In the public sector, Judges have been the prime movers in the organization of mediation programs. They have organized 46.9 percent of the existing programs. Private individuals have organized 25.0 percent of the court-based programs and court personnel and community service groups have organized 12.5 percent and 15.6 percent, respectively.

Table 2 about here

Evidence and Example

In the private sector, 35.4 percent of the mediation programs are conducted by sole practitioners; 35.4 percent by private, profit organizations and 20.1 percent by non-profit organizations. In the public sector, mediation services are offered overwhelmingly by government or court-connected organizations, with only 1.7 percent classified as private, profit and private, non-profit programs, respectively. Private mediation activity has surged in the past year. Approximately 45.6% of sole practitioners began their mediation practice in 1981. The next two groups that experienced large increases in 1981 were private, profit organizations (37.7%) and professional associations (37.8%). In the public sector, mediation activity grew during the years 1973-1981, with the incidence of new services increasing by 5.3

percent in 1973, 10.5 percent in 1977 and 14.0 percent in 1981. Thus, private mediation activity is more recent and has greatly expanded within the last year.

Not surprisingly, the two sectors differ in their source of funding. In the private sector, funds come primarily from clients' fees. About 63.6 percent of the organizations in the private sector obtain their funds from client fees. The bulk of the remaining private practitioners (27.2%) obtain fees from clients and insurance co-payments. A very small percentage of private programs are supported by the government or by grants.

Public sector programs, on the other hand, are chiefly supported by government monies. About 69.0 percent of public programs receive state or county funds and 13.8 percent derive their income from clients' fees. Many jurisdictions rely on earmarked marriage license and/or divorce filing fees to generate program revenue. For example, California's mandatory mediation program is supported by an earmarked increase of \$15.00 in the divorce filing fee, \$5.00 in the marriage license fee and a \$15.00 assessment for any motion to modify or enforce a custody and visitation order.

The cost of private mediation services ranges from \$20 per hour to \$180 per hour with the average reported hourly fee being \$56.38. Mediation fees vary with the professional background of the mediator. On the average, lawyer/mediators charge \$68 per hour while mediators with

professional backgrounds as family therapists charge \$52 per hour. The typical price of a mediated divorce reported by private sector respondents ranged from \$25 to \$1000 with the average being \$440.69.

By contrast, public mediation programs that levy a user fee charge an average of \$30.40 per hour; average case price comes to \$156.25. The differences between the two sectors in per hour and per case charges are statistically significant. This suggests that private and public programs service different socioeconomic populations with public programs seeing lower income couples.

Table 3 about here

Staff

Divorce mediation service providers have a variety of professional backgrounds. The majority are social workers, attorneys and mental health professionals, but there is a statistically significant difference between the public and private sectors. While the private sector is more likely than the public sector to attract attorneys and psychologists, the public sector relies almost exclusively on social workers and marriage and family therapists. This is not surprising since statutory and administrative provisions dealing with the qualifications of custody and visitation mediators usually specify a masters degree in family counseling, social work or a related field.

Approximately 80 percent of the mediators in each sector have a graduate level degree while 20 percent have an undergraduate degree only. This suggests that public and private sector mediators have substantially the same level of educational trainings.

Table 4 about here

Most mediation providers have also received trainings in the field of divorce mediation. About 75.5 percent of the private organizations reported that their mediators had been trained by organizations other than their own. For the public sector, this percentage is 70.2. Most of the trainings provided to the private and public sectors consists of lectures on techniques or the theory of mediation followed by lectures on legal aspects of divorce, role playing and lectures on child development, needs and custody. The major sources of trainings were courses provided by The Family Mediation Association, the Association of Family and Conciliation Courts (AFCC), the Conciliation or Domestic Relation Courts and other private individuals. About 45.0 percent of private and public mediation service providers were trained by Family Mediation Association trainers. In the private sector, 44.8 percent of providers were also trained by other private individuals. In the public sector, 41.4 percent of mediators received trainings from the AFCC and 10.4 percent from Conciliation or Domestic Relation Courts. Thus, most of the trainings

provided to private programs is conducted by private individuals while half of the public mediation programs receive their training from non-profit associations or the courts.

Table 5 about here

Although private and public mediation programs are interested in training their mediators, few require that their mediators be licensed. Licensing is a more important issue in the private sector although this is not a statistically significant pattern. Typically, those opposed to licensing feel that the mediation field is too new and eclectic and/or that certification in the more traditional fields of law or social work is sufficient protection for the consumer. In the words of one respondent:

I think mediation is one of many skills which a counselor might have. To require special licensing for each skilled area would be ludicrous. However, anyone who does practice mediation should be required to state what his/her degrees or training consist of. I believe the clients will tend to seek out mediators who have appropriate degrees or who can claim special mediation training or who have earned reputations as skilled mediators.

Licensing proponents believe it might foster uniformity of service and deter practitioners with "questionable training and experience".

A more noticeable and statistically significant difference between private and public programs is their use of malpractice insurance. About 66.7 percent of private

mediation services say that their mediators have malpractice insurance while this percentage is only 22.9 in the public sector. The need for malpractice insurance seems to be most felt by private mediators who do not have the protection of a "legal setting" in the courts. Typically, those who purchase malpractice insurance obtain it through a professional group or association. Few private insurance carriers have malpractice insurance for mediation activities, per se.

Operation of Mediation Programs

Private mediation programs devote approximately 35.3 percent of their time to divorce mediation. In public sector programs, mediation consumes 50.5 percent of agency time. This is a statistically significant difference between the sectors. Programs in the private sector offer a variety of services in addition to divorce mediation. This typically includes marriage and divorce counseling, general counseling, therapy with children, information workshops and other mediation or arbitration not related to divorce. Public mediation programs tend to conduct custody investigations in addition to providing mediation. Few are involved with non-divorce-related mediations and arbitrations.

Mediation training is also an activity offered by a sizeable proportion of public and private agencies. About 19.8 percent of the private services offer mediation

trainings to organizations other than their own and 18.1 percent offer in-house trainings. In the public sector, 15.3 percent of the programs offer trainings to external organizations and 13.6 percent offer in-house trainings.

Table 6 about here

Divorce mediation differs in the public and private sectors in a number of statistically significant respects. While most (68.5%) of the programs in the private sector mediate all divorce issues including custody, visitation, child support, maintenance and property division, this is done in only 19.0 percent of public sector programs. Indeed, while 63.8 percent of the programs in the public sector concentrate on custody and visitation mediation, only 21.1 percent of private sector programs focus on this. There are several explanations for these patterns. Doubtlessly, private sector programs mediate a wide array of divorce issues in order to provide more comprehensive services and attract clients. Since they are not connected to a court and do not need to relieve crowded dockets, they may deal with a larger spectrum of the financial and therapeutic issues of divorce. By contrast, court-based programs tend to concentrate on issues that bear directly on crowded dockets, particularly time-consuming custody and visitation disputes. Since public sector mediation is typically authorized by state statutes, court orders or rules from court administrators, the mediation of financial

issues might require formal action by the legislature or the Judiciary and generate opposition from the legal profession. Moreover, court-connected counseling services have traditionally handled the non-legal and non-financial aspects of divorce although this may change in coming years. For example, the Los Angeles Conciliation Court recently began to mediate divorce disputes dealing with the financial issues using panels of volunteer attorneys as mediators.

Public and private mediation service providers also view confidentiality issues in mediation differently. Although there is a fair amount of controversy about the issue among public agencies, about 62.2 percent of the organizations in the public sector believe that their mediators may investigate cases they previously tried to mediate. This percentage stands at 19.5 in the private sector. While 37.3 percent of the organizations contacted in the public sector report that their mediators do in fact conduct custody investigations in cases that were unsuccessfully mediated, only 2.1 percent of the programs in the private sector report that their mediators also conduct custody investigations.

In the eyes of many respondents in the public sector, mediation and investigation processes are frequently compatible. According to one court connected mediator, the combination is possible because "The clients develop a high degree of confidence, trust and communication with the mediator and have no desire to begin the process over again

with a second counselor." According to another court mediator, mediation and investigation by the same individual is compatible because while the process changes, the focus of both is on the best interest of the child. On the other hand, several court-connected mediation programs prohibit the mediator from making a recommendation to the court on custody and the recommendation-making role of the mediator in one California court is currently being challenged in an appellate court proceeding.⁶

In the private sector, respondents consistently see the two roles as highly incompatible. In the words of one private mediator:

We believe that mediation works best when people do not fear what they say will later be used against them. Mediators may have less trouble staying neutral when they are not trying to assess mediation data in terms of a later investigation.

Table 6 about here

Volume of Cases

According to our survey, there were 27,852 divorce mediations conducted in the United States during 1980. In 1981, there were a projected number of 34,424 mediations.

Although private divorce mediation services are about 5 times more numerous than public sector ones, the overwhelming majority of 1980 mediations were conducted in -----

⁶ McLaughlin vs. The Superior Court of the State of California for the County of San Mateo. Supreme Court of the State of California, #A018674.

the Public sector. The Public sector conducted an average of 500.3 cases per organization. In the private sector, average volume stood at 59.7 cases per organization.

Looking at the distribution of cases among providers, we find that nearly all (93%) of the private services handled less than 50 cases per year. About 51.2 percent of private services conducted less than 10 mediations in 1981, and 41.7 percent of the private programs conducted between 10 to 50 mediations in the same year. Although 29.8 percent of public sector services also conducted fewer than 10 mediations per year, 54.4 percent of the services conducted more than 100 mediations per year. In the private sector, only 2.4 percent of the services handled this many cases.

Table 7 about here

The disparity in case volume in the public and private sectors is related to the organization of public and private services and their sources of referral. In the public sector, 81.6 percent of mediation clients are referred by the courts. Only 15.8 percent are self-referred. Thus, approximately 86.8 percent of public services say that they do not have problems finding clients. Most public agencies attribute this to the numerous court referrals they receive (61.5%) or because mediation is mandated by law (18.2%).

The picture in the private sector, however, is much different. More than half the clients seen in the private

sector are self-referred. Another 18.6 percent are referred by attorneys. Nearly a third of all private sector services report difficulty finding clients, fewer than half (41.5%) say that obtaining clients is no problem. Most private mediation services attribute their low case volumes to the lack of public knowledge about mediation (82.8%). In an attempt to publicize their services, half of the private services reported that they had used the media, particularly newspaper articles and radio and television talk shows. These techniques were also used by about one-third of public sector services. Both public and private sector mediators think that more publicity and public education would be highly beneficial for their programs. In the words of one mediator in a court-based program "I do not think people have any idea why they are coming here. I think it would be immensely helpful if they did."

Mediation Sessions

Cases are mediated more rapidly in the public sector and they also involve fewer sessions. For example, the average case in the private sector is estimated to take 8.7

hours. Fifty-two percent require 9 hours or more. In the public sector, the average case requires 6.3 hours and 40 percent are handled in 4 hours or less. Cases in the private sector require an average of 6.2 sessions of mediation with 66 percent lasting 5 sessions or more. In the public sector, cases require 3.4 sessions with one-third disposed of in one or two sessions. These are all statistically significant differences.

Table 8 about here

Does the rapid treatment of cases in the public sector affect the quality of mediation services? One indicator of quality is the diversity of approaches used in mediation, and Table 9 shows that in this regard there are no major differences between the two sectors. When asked about the use of a variety of approaches in mediation sessions, a comparable proportion of respondents in both sectors indicated that they "suggested alternatives," "indicated how the courts would respond," "indicated how the children would respond," "pointed out uncooperative behavior," "suggested specific resolutions" and "shared their perceptions of hidden agendas."

There are, however, statistically significant differences between the public and private sectors as to the amount of time that mediators allocate to various mediation issues. Thus, because they tend to concentrate on visitation and custody disputes, public mediation services

spend less time than the private services "giving legal information" and "helping couples with financial planning and budgeting." Moreover, private mediation services spend more time "describing the mediation process" to their clients and "obtaining commitment to the process." In site visits, these differences between the public and private sectors could also be detected. Typically, public sector mediators did not attempt to elicit the explicit commitment of the parties to the process and would begin the session by moving directly to the issues in dispute. Clearly, differences in emphasis placed on commitment could lead to differences in the rates of agreements generated by each sector and will be further discussed in the section of this article concerning agreements .

Next, we consider the point at which unsuccessful mediation cases are terminated in the public and private sectors. According to our survey, respondents in both private and public mediation services spend between 2 to 8 hours before terminating an unsuccessful case. However, 25.0 percent of the private services report terminating unsuccessful cases within 2 hours or less while 12.0 percent of public mediation services terminate in this time frame. This is a statistically significant difference and suggests that unsuccessful cases are terminated slightly faster in the private sector.

Finally, we consider the issue of post-mediation follow-ups. The private sector is slightly more likely to

evaluate its services by contacting its successful mediation clients. The public sector tends to collect statistics on mediator outcomes in order to evaluate its services. These differences are statistically significant.

Table 9 about here

The Roles of Clients' Attorneys and of Children in Mediation

Although all mediation service providers say that it is important to involve the parties' private attorneys in mediation and to have talks with the attorneys before or after the mediation sessions, the public sector is more attentive to obtaining the attorney's consent than the private sector. In fact, Table 9 indicates that 11.1 percent of private mediation services report that they have no contact with the attorneys while only 5.3 percent of public sector services do not contact attorneys. Once contacted, mediators in the private sector are more likely than their public counterparts to talk to attorneys during the mediation process and have attorneys attend the mediation sessions. This probably reflects the greater variety of issues mediated in the private sector, including financial and property issues which may demand more frequent consultation with the clients' attorneys.

As for children's role in mediation, private services, more than the public ones, tend to meet with children when

custody or visitation is mediated. Nevertheless, this is not a statistically significant difference and even in the private sector the great majority of services, 57.4 percent report that they generally do not meet with the children. This was explained by several mediators as follows:

We do not see much of kids. But it cannot help but be beneficial. Mediation sets the kids out of a fighting situation much sooner than a study does. And mediation helps to dissipate some of the anger and hate.

Another mediator put the matter this way:

Most often [we talk to the children] if the parents together feel they want us to talk to the kids and that they would really consider the children's input and feelings.

When children are contacted, however, all mediators share the children's perspectives with the parents. This suggests that mediators in both sectors see mediation not as a means of directly evaluating the children's needs but rather as a process in which parents can solve their differences about custody and visitation of their children.

Table 10 about here

Agreements

Private mediation services report that about 65.1 percent of their clients reach an agreement. In the public sector, the percentage reaching an agreement is 55.6. Although this is a statistically significant difference, the findings must be viewed as tentative given the low volume of cases handled

in the private sector and the fact that agreement rates reflect an average for each organization rather than each individual mediator. To the extent that there is a reliable difference in agreement rates observed in the public and private sectors, it can probably be explained by a combination of factors. First, the private sector spends more time describing mediation and obtaining the commitment of clients to the process. This may enhance its chance for a successful mediation. Secondly, rates of agreements may be affected by the characteristics of the clients seen by both sectors. Private services tend to attract clients who want to mediate and can afford to pay. Typically, they are middle or upper class people, highly educated and better able to verbalize their problems. The public programs tend to see people from all strata of society including many who are unmotivated and not at all committed to mediation.

Table 11 about here

Most typically, mediation agreements are drafted by the clients and the mediators and then reviewed by the clients' private attorneys. Many agreements are also drafted by the clients and mediators without the help of an attorney. Because private mediation programs tend to deal with financial issues as well as custody and visitation, their agreements are more likely to be solely drafted by attorneys. Approximately 16.1 percent of the agreements in the private sector are drafted by advisory attorneys while

only 1.8 percent of them are drafted by advisory attorneys in the public sector. The couples' private attorneys also draft 9.9 percent of the agreements in the private sector and only 1.8 percent in the public sector. These differences between sectors are statistically significant.

Private sector respondents report that most of the revisions in agreements made by attorneys deal with financial matters. In the public sector, 50.0 percent of the revisions are related to custody and visitation matters. This reflects the focus on custody and financial matters in public and private agencies, respectively.

Mediation agreements in the public and private sector frequently contain clauses about the resolution of impasses and/or the treatment of future conflict. A public sector mediator noted the advantage of providing such clauses by saying that,

I think we run into skepticism a lot and one of the ways we try to address that is to write a supervision clause into the agreement, so that if there are problems we will be involved. We let them know that we still care about the situation.

About 10.8 percent of public sector services and 26.3 percent of private services report that their agreements typically include a provision for arbitration in cases of impasse. The private sector services report that 76.6 percent of their agreements discuss methods of resolving future conflicts. Meanwhile, in the public sector, this percentage is 55.0.

Despite the fact that future conflict clauses are significantly more frequent in the private sector, clients who use public programs appear to be more likely to return to mediation services to modify their agreement. This difference between sectors is statistically significant. Around 60.0 percent of the public programs reported that "a few" of their clients have come back for changes and 37.0 percent report that "several" of their clients have come back. In the private sector, only 33.3 percent of the programs indicate that "a few" of their clients have returned and 15.4 percent report "several" repeat mediations. Once again, this difference between the sectors appears to be related to the focus on custody and financial matters in public and private agencies, respectively. Custody and visitation tend to be modified time and again; financial matters are rarely re-mediated. These patterns hold for both public and private agencies when we compare issues mediated with agreement modifications. The higher relitigation rate in public agencies clearly reflects their focus on custody and visitation matters.

Mediators and Clients

Respondents were fairly uncertain about the types of disputes amenable to resolution in mediation. For example, when asked what issues should not be mediated, 58.8 percent of the respondents in private organizations said everything could be mediated. In the public sector, 41.1 percent of

the services supported this view. Among those who identified unsuitable mediation situations, most focused on cases involving abuse, neglect and drug or alcohol addiction. This was voiced by 17.6 percent of respondents in the private and public sectors, respectively.

Another area of uncertainty is the relationship between mediation and therapy. Certain mediators clearly adopt a mediation approach that incorporates marital and divorce therapy. For example, one individual described the process as follows:

I start at the beginning, setting a history of the marriage and the patterns of decision making, communication and conflict resolution which I then characterize for the couple. I also inquire closely about the divorce decision, who initiated it, how each side feels about it. We do marital therapy and divorce therapy when appropriate. We then move on to the issues and disputes.

Other practitioners, however, voiced concerns about mediators who try to help their clients solve their relationship problems. As one mediator put it:

[Mediation is different from counseling because of its problem-solving orientation.] It is tempting for us to try to do counseling with newly divorced people. You see so clearly how attached they are to each other and they need to learn how to detach. I have learned that I cannot help them with that. That maybe they need divorce counseling.

Such mediators favor a more focused problem-solving approach:

We begin with an opening statement by the mediator; the participants agree to mediate. The participants make a brief statement about the issues in dispute. We all prioritize the issues and begin to negotiate on these matters one by one. We write down proposals for settlement and review the agreement drafts prepared by the participants. Once the final wording of a contract is agreed upon, an advisory attorney is retained to explain the legal consequences of the agreement and/or distill a final draft of all relevant legal documents.

There are also different views on the order in which certain topics should be mediated. While some practitioners believe that the custody and visitation issues should be handled before economic and property issues are considered, others feel that the reverse is true. Still others try to work on the easiest issues first where there is the greatest potential for agreement-making and reserve the hardest ones for last.

More vagueness characterizes the responses to questions about the traits of an effective mediator. About 6.0 percent of the respondents in the private and public sectors could not identify the traits of a successful mediator. Similarly, in the course of the site visits, a number of mediators were unable to describe what they do to help couples reach an agreement. One mediator said: "I do not have [a particular approach]. I was a business major, so I am not familiar with the different schools of thought. I just take each case as it comes and try to respond to it." Another mediator, who had taken courses on Parent Effectiveness Training, General Counseling and Conflict

Management, said: "It is too mixed to say I am working from any one perspective.... I will use whatever works. I take the persons as I find them and try to set them to relate to concepts of their own level." To the extent that traits for successful mediation are identified, they tend to involve elusive personality variables including "objectivity," "credibility," and "experience." As one mediator said:

Successful mediators must be able to establish trusting relationships with the couple and must be seen by the parties as totally impartial. Rather than imposing his or her own values or solutions on the couple, a successful mediator must be able to assist them in working out an agreement that reflects their needs, values, perceptions and limitations. The mediators only provide guidance, direction and understanding.

As to the characteristics of successful mediation couples, mediators single out their prior communication patterns. As one mediator put it, "I guess it would have to be couples where decisions were not always unilateral...Sometimes it is just a matter of getting things back to that stage, where they could talk to each other." Another important factor for successful mediation is divorce adjustment. As one mediator explained: "...one of the big obstacles in mediation is parents adjusting to the divorce. In so many couples, there is one who wanted the divorce and one that did not."

When asked why couples try mediation, both public and private agency respondents reported that their clients want to avoid the court system, prefer self-determination, and

are easier to save money and time. The most important difference between public and private sectors is that 10.3 percent of public sector respondents believe their clients mediate because it is required by law. None of the private sector respondents said this. Indeed, this supports the argument that the public sector sees more clients who may be less committed to mediation.

Table 12 about here

Ethics and Mediation

Non-lawyer mediators run the risk of being challenged for the unauthorized practice of law and lawyer-mediators may be challenged for dual representation. Indeed, a majority of organizations in the private sector (53.2%) and nearly half of those in the public sector (44.7%) are worried about an unauthorized practice of law challenge (Table 12). Smaller, but sizeable proportions (25.5% private and 21.6% public) are concerned about dual representation challenges. In actual fact, however, few mediators have been so challenged. Of the 245 private and 58 public programs that answered the question about unauthorized practice of law challenges, only 3.3 percent of private sector and 3.4 of public sector respondents said that this had happened to them or someone in their agency. None reported dual representation challenges. Some organizations (14.9 in the private sector and 13.5 in the

public sector) advise the parties to have a private attorney look over the agreement in order to avoid a dual representation or unauthorized practice challenge.

Is mediation well received by the local Bar and Judiciary? The public and private sectors perceive this matter differently. According to public sector respondents, the local Judiciary and Bar association is very supportive of divorce mediation. The private sector reports more ambivalence. These differences are not surprising. Many public mediation programs were initiated by judges or other court personnel. They focus on custody and visitation disputes which are very troublesome, lengthy cases for judges and attorneys. As a result, public programs tend to enjoy support and credibility.

Private mediation services, on the other hand, may be easily viewed with suspicion. They are not directly established or controlled by the courts. Because they deal with financial and property disputes, they also potentially compete with the divorce attorney. As one private mediator said: "We are receiving growing support from the local Bar association. This seems to have taken place when we discontinued mediation of financial agreements."

These views tended to be corroborated in the site visits. Interviews with private attorneys whose clients use mediation revealed attitudes ranging from little to strong support. For example, while some attorneys were certain that mediation really "does good," others were less sure.

And some expressed concern that mediation was merely a "chic solution" or "this year's joint custody" or the new professional domain for a lot of "marginal social workers".

A last ethical issue is the manner in which mediators deal with unconscionable agreements. A mediator expressed the concern of many practitioners confronted with these agreements by saying: "I think if you have strong feelings about an agreement you do have to intervene. We have some standards here, unlike labor mediation."

It appears that when an agreement is perceived to be harmful to the children, to one of the parties or unconscionable, most mediators raise their concerns with the parties and offer an alternative solution. However, only 17.5 percent of services in the private sector and 13.2 percent in the public terminate mediation when confronted with such agreements.

Table 13 about here

Conclusion

This survey shows that the recent development of divorce mediation services was stimulated by a general conviction that adversarial forums are inappropriate for the resolution of family disputes and the need to alleviate crowded court dockets.

Mediation began in the public sector; however, the private sector has experienced extensive development since

1980. There are currently approximately 256 private and 53 public divorce mediation services. The private sector continues to have severe problems attracting a sufficient number of clients. About 93 percent of private sector mediation services handled fewer than 50 cases in 1980; 50 percent handled fewer than 10. In the public sector, however, 55 percent of the mediation services handled at least 100 cases in 1980. Few public sector programs reported difficulty attracting clients.

Mediation in the public sector utilizes less time and fewer sessions. Because they are funded by filing fees or other government revenues, public sector services are also less expensive. The agreement rate for public sector agencies is slightly lower than the rate observed in the private sector. This may be due to the fact that

public mediation clients are often referred by court personnel on a routine basis and may have little commitment to the process. In addition, mediators in the public sector tend to spend less time than their private sector counterparts gaining the commitment of their clients and explaining the process to them.

The public sector also sees more of its clients coming back to change agreements. This reflects the fact that public mediation programs concentrate on custody and visitation issues that are subject to frequent modification. Private programs mediate all issues that are related to divorce and financial matters are less routinely revised.

Because of their court connection and concentration on the narrower issues of custody and visitation, public mediation programs enjoy more social support and do not fear accusations of having violated the Bar association's ethical canons. The private sector not only perceives that it is viewed less favorably by the Judiciary and the Bar, but it is also more likely to purchase malpractice insurance.

Mediation remains a loosely defined process that encompasses counseling-like interventions as well as more focused, problem-solving approaches. Mediators exhibit a wide range of professional backgrounds including law, social work, psychology, theology and education. Typically, mediation in the private sector is offered along with numerous other services. This includes counseling, law and therapy for children. In the public sector, mediation is usually combined with custody evaluation services.

Finally, public and private sector mediation programs both identify similar needs. The principal one is public education about the mediation alternative. In the private sector, publicity about mediation is clearly needed to attract clients. Low case volume means that mediation organizations must devote a substantial portion of their time finding clients. Low case volume may also prevent mediators from acquiring the case experience they require to become proficient.

In the public sector, public education about mediation is required to better prepare clients to

participate in the process, enhance their commitment and improve mediation outcomes. Hopefully, in the months ahead, mediation will attract the media attention that is sorely needed to begin to set the message out to potential public and private sector clients.

Table 1

PRIVATE AND PUBLIC MEDIATION SERVICES
IN PERCENTAGES, BY REGION, 1981

Region	Services	
	Private	Public
	N = 254	N = 59
New England	11.8	13.6
Middle Atlantic	17.3	-
East North Central	12.2	15.3
West North Central	3.5	8.5
South Atlantic	22.4	8.5
East South Central	2.0	-
West South Central	5.1	3.4
Mountain	5.5	13.6
Pacific	20.2	37.1

NOTE: The above regions comprise the following states.
 New England: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut; Middle Atlantic: New York, New Jersey, Pennsylvania; East North Central: Ohio, Indiana, Illinois, Michigan, Wisconsin; West North Central: Minnesota, Missouri, Iowa, North Dakota, South Dakota, Nebraska, Kansas; South Atlantic: Delaware, Maryland, District of Columbia, Virginia, North Carolina, South Carolina, Georgia, Florida; East South Central: Kentucky, Tennessee, Alabama, Mississippi; West South Central: Arkansas, Louisiana, Oklahoma, Texas; Mountain: Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona; Pacific: Washington, Oregon, California, Alaska, Hawaii.

Table 2

ORGANIZATION OF PRIVATE AND PUBLIC MEDIATION SERVICES,
IN PERCENTAGES, 1981

ORGANIZATION OF SERVICES	SERVICES	
	PRIVATE	PUBLIC
WHY SERVICE WAS ORGANIZED	N = 41	N = 33
Own divorce experience	4.9	-
Need for alternative system	90.3	60.6
Increased number of divorces and need to alleviate court congestion	2.4	33.3
Mandatory by law	2.4	6.1
WHO ORGANIZED SERVICE	N = 43	N = 32
Judges	4.7	46.9
Court staff or administrators	2.3	12.5
Community service groups	14.0	15.6
Private individuals	79.0	25.0

Table 3

TYPE OF ORGANIZATION AND FUNDING
FOR PRIVATE AND PUBLIC MEDIATION
SERVICES, IN PERCENTAGES, 1981

TYPE OF ORGANIZATION, FUNDING AND FEES	SERVICES	
	PRIVATE	PUBLIC
TYPE OF ORGANIZATION	N = 254	N = 59
Private, profit	26.8	1.7
Private, non-profit	20.1	1.7
Professional association or partnership	17.7	-
Sole practitioner	35.4	-
Government or court-connected	--	96.6
FUNDING	N = 254	N = 58
Client's fees	63.6	13.8
Government	0.4	69.0
Clients' fees plus insurance	27.2	-
Clients' fees plus grant	4.0	-
Government plus grant	1.2	-
Other	3.6	17.2

Table 4

NUMBER OF PROFESSIONALS AND TYPES OF DEGREES
IN PRIVATE AND PUBLIC MEDIATION SERVICES,
IN PERCENTAGES, 1981

PROFESSIONALS	SERVICE	
	PRIVATE	PUBLIC
PROFESSION	N = 750	N = 352
Social Worker	41.9	71.9
Attorney	15.4	1.1
Marriage and Family Therapist	10.0	9.7
Psychologist	22.1	8.2
Psychiatrist	4.1	-
Theologian	2.5	0.3
Educator	0.5	2.3
Other	3.5	6.5
DEGREE	N = 811*	N = 352
Undergraduate	21.6	20.8
Graduate	78.4	79.2

* The total number of degree recipients in the private sector is inflated by 61 because a number of individuals hold two or more graduate level degrees and were counted twice in the coding process.

Table 5

TRAINING, LICENSE AND INSURANCE FOR PRIVATE
AND PUBLIC MEDIATION SERVICES,
IN PERCENTAGES, 1981

TRAINING, LICENSE AND INSURANCE	SERVICE	
	PRIVATE	PUBLIC
MEDIATORS TRAINED OUTSIDE THEIR ORGANIZATION	N = 208	N = 57
Yes	75.5	70.2
No	24.5	29.8
SOURCE OF TRAINING	N = 220	N = 29
John Haynes	4.5	3.4
O.J. Coogler	45.9	44.8
AFCC	4.5	41.4
Conciliation or Domestic Relation Courts	0.5	10.4
Other Private individuals	44.6	-
ORGANIZATION REQUIRES LICENSED MEDIATORS	N = 41	N = 38
Yes	46.3	34.2
No	53.7	65.8
MEDIATORS HAVE MALPRACTICE INSURANCE	N = 45	N = 35
Most do	66.7	22.9
Some do	11.1	14.2
Most do not	22.2	62.9
NATURE AND SOURCE OF INSURANCE	N = 38	N = 25
Individual	5.3	4.0
Through professional groups	81.6	60.0
Not applicable	13.1	36.0

NOTE: The N for the variable above refers to number of organizations. The only exception is "Source of Training". For this variable the N refers to number of answers given by the organizations and reflects multiple choice (up to two) in answering the question.

Table 6

ISSUES MEDIATED, INVESTIGATIONS
AND TRAINING PROVIDED BY
PRIVATE AND PUBLIC MEDIATION SERVICES,
IN PERCENTAGES, 1981

ISSUES MEDIATED, INVESTIGATIONS AND TRAINING	SERVICES	
	PRIVATE	PUBLIC
ISSUES MEDIATED	N = 251	N = 58
Custody and visitation	21.1	63.8
All issues	68.5	19.0
Custody, visitation and child support	5.2	17.2
Other issues	5.2	--
MEDIATORS CAN ACT AS INVESTIGATORS IN CASES THEY TRIED TO MEDIATE	N = 41	N = 37
Yes	19.5	62.2
No	80.5	37.8
MEDIATORS ALSO CONDUCT CUSTODY INVESTIGATIONS	N = 238	N = 59
Yes, but not in cases they tried to mediate	2.5	13.6
Yes, in cases they tried to mediate	2.1	37.3
Yes	16.4	16.9
No	79.0	32.2
DOES ORGANIZATION PROVIDE TRAINING	N = 243	N = 59
Yes, in-house only	18.1	13.6
Yes, presumably to other organizations or individuals	19.8	15.3
No	62.1	71.2
TRAINING PROVIDED	N = 256	N = 59
Lectures and group discussion	26.6	15.3
Role playing	2.7	-
Consultation	14.1	11.9
Internal supervision	6.3	15.3
No information	50.3	57.5

Table 7

NUMBER OF CASES MEDIATED,
REFERRAL SOURCES AND AVAILABILITY OF CLIENTS
FOR PRIVATE AND PUBLIC MEDIATION SERVICES,
IN PERCENTAGES, 1981

REFERRAL SOURCES AND AVAILABILITY OF CLIENTS	SERVICES	
	PRIVATE	PUBLIC
NUMBER OF CASES MEDIATED	N = 254	N = 57
Less than 10	51.2	29.8
10-50	41.7	12.3
51-100	4.7	3.5
101-500	1.6	31.6
500+	0.8	22.8
MAJOR REFERRAL SOURCES	N = 43	N = 38
Self-referred	55.8	15.8
Therapist	11.6	-
Attorney	18.6	2.6
Court	9.3	81.6
Other	4.7	-
HAVE PROBLEMS FINDING CLIENTS	N = 41	N = 38
Yes	31.7	10.6
Some	26.8	2.6
None	41.5	86.8
WHY FINDING CLIENTS IS OR IS NOT A PROBLEM	N = 35	N = 26
Lots of court referrals	11.3	61.5
Mediation is mandatory	2.9	19.2
Lack of public knowledge	62.9	7.7
Other	22.9	11.5
ATTEMPTS TO PUBLICIZE SERVICES	N = 42	N = 38
Word of mouth	9.5	10.5
Lectures, workshops	4.8	5.3
Through professionals in the field	9.5	13.2
Media	50.0	34.2
Not applicable	26.2	36.8

Table 8

DURATION OF MEDIATION IN TERMS
OF NUMBERS OF SESSIONS AND HOURS.
FOR PRIVATE AND PUBLIC
MEDIATION SERVICES, IN PERCENTAGES, 1981

DURATION OF MEDIATION IN TERMS OF NUMBERS OF SESSIONS & HOURS	SERVICES	
	PRIVATE	PUBLIC
HOURS DEVOTED TO MEDIATION CASES	N = 179	N = 52
1-2	8.4	13.5
3-4	5.6	26.9
5-6	14.5	25.0
7-8	19.0	17.3
9 +	52.5	17.3
NUMBER OF SESSIONS DEVOTED TO MEDIATION CASES	N = 184	N = 52
1-2	6.0	38.5
3-4	27.7	42.3
5 +	66.3	19.2

Table 9

APPROACHES USED BY MEDIATORS, TIME SPENT ON SELECTED SUBJECTS,
UNSUCCESSFUL MEDIATION AND EVALUATION OF SERVICES FOR
PRIVATE AND PUBLIC MEDIATION SERVICES,
IN PERCENTAGES, 1981

APPROACHES, TIME, UNSUCCESSFUL MEDIATION AND EVALUATION	SERVICES	
	PRIVATE	PUBLIC
DO MEDIATORS USE THE FOLLOWING APPROACHES		
Suggesting an obvious alternative	Yes 95.6 (45)	94.9 (39)
	No 4.4	5.1
Indicating how courts respond to issue	Yes 82.6 (46)	82.1 (39)
	No 17.4	17.9
Indicating effects of decision on children	Yes 97.7 (43)	97.4 (39)
	No 2.3	2.6
Pointing out parties' uncooperative behavior	Yes 82.2 (45)	81.6 (38)
	No 17.8	18.4
Suggesting specific resolution	Yes 83.3 (42)	76.3 (38)
	No 16.7	23.7
Sharing perception of hidden agendas or underlying motives	Yes 93.2 (44)	87.2 (39)
	No 6.8	12.8
MODERATE TO GREAT DEAL OF TIME SPENT BY MEDIATORS ON THE FOLLOWING		
Describing the mediation process	67.0 (46)	56.4 (39)
Obtaining commitment to process	72.7 (45)	55.2 (38)
Giving legal information	33.2 (44)	18.4 (38)
Helping couples financial planning and budgeting	58.8 (46)	5.6 (36)
HOURS PASSED BEFORE MEDIATION IS TERMINATED		
2 hours or less	N = 28 25.0	N = 25 12.0
2 to 8 hours	67.9	80.0
Over 8 hours	7.1	8.0
EVALUATION OF CASES		
No	N = 45 40.0	N = 39 48.7
Some phone calls	11.2	2.6
Yes, routine follow-up	33.3	15.4
Other follow-up	13.3	20.5
Keep track of mediators' statistics	2.2	12.8

NOTE: figures in parentheses refer to number of cases.

Table 10

ROLES IN MEDIATION OF CLIENTS' ATTORNEYS AND CHILDREN
FOR PRIVATE AND PUBLIC MEDIATION SERVICES,
IN PERCENTAGES, 1981

ROLES OF ATTORNEYS AND CHILDREN	SERVICES	
	PRIVATE	PUBLIC
ROLES IN MEDIATION OF CLIENTS' ATTORNEYS	N = 45	N = 38
Obtain attorneys' consent to begin mediation	31.2	44.7
Talk with attorneys before, between or after mediation sessions	44.4	42.1
Attorneys attend sessions	13.3	7.9
No contact with attorneys	11.1	5.3
FOR CHILD CUSTODY OR VISITATION DO YOU MEET WITH THE CHILDREN	N = 47	N = 40
Generally do	42.6	27.5
Generally do not	57.4	72.5
DO YOU SHARE CHILDREN'S PERSPECTIVES WITH PARENTS	N = 36	N = 36
Generally do	77.8	66.7
Generally do not	22.2	33.3

Table 11

AGREEMENTS: NUMBERS, DRAFT, REVISION, PROVISIONS AND CHANGES,
IN PERCENTAGES, FOR PRIVATE AND PUBLIC MEDIATION SERVICES, 1981

AGREEMENTS	SERVICES	
	PRIVATE	PUBLIC
AGREEMENT REACHED IN MEDIATION	N = 137	N = 66
	65.1	55.6
WHO DRAFTS THE AGREEMENT	N = 223	N = 57
Couple and/or mediator	25.6	38.6
Advisory attorney	16.1	1.8
Couple, private attorney	9.9	1.8
Couple/mediator reviewed by private attorney	44.8	54.2
No agreement routinely drafted	0.9	1.8
Other	2.7	1.8
AREAS OF AGREEMENTS MOST OFTEN REVISED BY ATTORNEYS	N = 22	N = 24
Custody or visitation matters	--	50.0
Financial matters	68.2	37.5
Custody, financial and visitation	4.5	4.2
Other	27.3	8.1
AGREEMENTS INCLUDE FUTURE CONFLICT RESOLUTION CLAUSE	N = 47	N = 40
Most do	76.6	55.0
Some do	17.0	25.0
Most do not	6.4	20.0
AGREEMENTS PROVIDE FOR ARBITRATION IN CASE OF IMPASSE	N = 38	N = 37
Most do	26.3	10.8
Some do	44.7	35.1
Most do not	29.0	54.1
CLIENTS WHO COME BACK TO CHANGE AGREEMENT	N = 39	N = 40
None	51.3	2.5
A few	33.3	60.0
Several	15.4	37.0

Table 12

SUCCESSFUL MEDIATORS AND MEDIATION COUPLES,
MOTIVATION TO MEDIATE, IN PERCENTAGES
FOR PRIVATE AND PUBLIC MEDIATION SERVICES, 1981

MEDIATORS AND MEDIATION COUPLES	SERVICES	
	PRIVATE	PUBLIC
SUCCESSFUL MEDIATORS	N = 288	N = 85
Personality traits	33.3	34.0
Objective, credibility	31.9	31.8
Experience, knowledgeable	28.1	27.1
Support of bar and bench	1.1	1.2
Do not know	5.6	5.9
SUCCESSFUL MEDIATION COUPLES	N = 235	N = 64
Socioeconomic characteristics	5.5	10.4
Capacity to address appropriate issues	3.4	1.5
Acceptance of divorce	34.9	28.4
Ability to cooperate, communicate	46.4	44.8
Concern for children	9.8	14.9
MOTIVATION TO TRY MEDIATION	N = 77	N = 68
Desire to avoid court	35.0	27.9
Save money and time	26.0	20.6
Attorney, judge pushed it	1.3	4.4
Law requires	-	10.3
Prefer self-determination, better for child	33.8	30.9
Other	3.9	5.9

NOTE: The N for the variables in this table refers to number of "answers" given by the organizations and reflects multiple choice (up to two) in answering the questions.

Table 13

OPINION OF PRIVATE AND PUBLIC MEDIATION SERVICES
ON UNAUTHORIZED PRACTICE OF LAW, DUAL REPRESENTATION, UNCONSCIONABLE AGREEMENTS,
THE ATTITUDES OF THE JUDICIARY AND THE BAR TO DIVORCE MEDIATION,
IN PERCENTAGES, 1981

VARIABLES	SERVICES	
	PRIVATE	PUBLIC
NON-LAWYER MEDIATORS RUN THE RISK OF UNAUTHORIZED PRACTICE OF LAW. WHAT ARE YOUR THOUGHTS ON THE ISSUE?	N = 47	N = 38
No opinion	8.5	21.1
No great risk	36.2	34.2
Concerned about it	53.2	44.7
Does not apply	2.1	-
WHAT ARE YOUR THOUGHTS ON LAWYER-MEDIATORS BEING CHALLENGED FOR DUAL REPRESENTATION?	N = 47	N = 37
No opinion	31.9	43.3
Have private attorney look agreement over	14.9	13.5
No great risk	27.7	21.6
Concerned	25.5	21.6
WHEN COUPLES REACH AGREEMENT THAT MEDIATOR THINKS TO BE HARMFUL TO CHILDREN OR UNCONSCIONABLE, WHAT DOES THE MEDIATOR DO?	N = 40	N = 38
Never happens	15.0	15.8
Stop mediation	17.5	13.2
Tell couple that mediator disagrees and offer other options	65.0	65.8
Other	2.5	5.2
WHAT IS THE ATTITUDE OF THE LOCAL JUDICIARY TO DIVORCE MEDIATION?	N = 253	N = 57
Favorable	32.4	68.3
Negative	3.6	1.8
Neutral	2.8	1.8
Mixed	7.9	8.8
Ambivalent, some reserves	12.3	8.8
Do not know their opinion	41.0	10.5
WHAT IS THE ATTITUDE OF THE LOCAL BAR?	N = 254	N = 57
Favorable	19.3	57.9
Negative	6.7	1.8
Neutral	2.0	3.5
Mixed	11.0	7.0
Ambivalent, some reserves	22.0	17.5
Do not know their opinion	39.0	12.3

Chapter 4

A CASE STUDY:

✓ The Custody Mediation Services of
The Los Angeles Conciliation Court

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Establishment of the Conciliation Court

The Los Angeles Conciliation Court was established by statute in 1939 to "protect the rights of children and to promote the public welfare by preserving, promoting and protecting family life and the institution of matrimony, and to provide means for the reconciliation of spouses and amicable settlement of domestic and family controversies." Although it was the first conciliation court to be established in California, it remained a small unit within the Domestic Relations Department and its staff consisted of only two workers, neither of whom was a licensed marriage or family counselor. The Court's evolution to its present stature can be traced to a series of changes initiated by its presiding judges. As a court publication readily acknowledged, "It cannot be overemphasized that the success of a conciliation program (depends upon) direct control of an interested and concerned judge."

The first series of changes in the Conciliation Court occurred in 1954 under the direction of Judge Louis Burk who recognized the Court's potential to aid couples with marital difficulties. He also recognized that the Conciliation Court needed upgrading if it was to realize its potential. As a result, he added an experienced, trained counselor with a Master's degree in psychiatric social work to the staff and encouraged the bar and bench to refer couples with an interest in reconciliation to the Conciliation Court.

In many respects, the counseling program that emerged foreshadowed the courts' later operating procedures in the delivery of mediation services. For example, in the original counseling program, a crisis intervention perspective was adopted. Couples were seen for a single session lasting one to two hours and had the option of scheduling a follow-up session. Although the director

of the program initially feared that this time frame would be inadequate to properly address complex marital problems, he quickly became convinced that a limited amount of time both helped to focus couples and to limit discussions to those issues of immediate concern to the bench. Another aspect of the program was that a reluctant party could, as a last resort, be subpoenaed to appear for marriage counseling if their spouse was interested in reconciliation. Finally, while counseling sessions were confidential, agreements generated in counseling became court orders with violators subject to contempt actions. Not surprisingly, citations were rarely ordered and were used chiefly as "psychological weapons".

In the ensuing fifteen years, the Conciliation Court grew and expanded its services. By 1957, it consisted of 10 counselors who handled 1500 cases per year. In 1967, it began offering services at branch courts located in the county outside downtown Los Angeles. Reconciliation rates increased from about 50 percent in the late 1950's to 70 percent and higher by the late 1960's. Even more impressive, the Court's in-house follow-up with reconciled couples indicated that three out of four marriages were still intact one year after contact with the Conciliation Court appearance. In addition, the staff felt certain that the process benefitted even those who failed to reconcile. As the director noted, the sessions may have helped "to close the book gently." A number of national magazines published articles about the program. By the end of the 1960's, nearly a third of California's counties offered conciliation court services.

Two pieces of legislation were enacted by the state in 1970 that generated new types of cases for the Los Angeles Conciliation Court. One

permitted the courts to require premarital counseling for minors. This remains one of the three primary activities of the Los Angeles Conciliation Court. The second influential piece of legislation, the California Family Law Act, eliminated the need to establish fault in cases of divorce. Reflecting changing societal attitudes towards divorce and the award of custody, the new law paved the way for custody mediation at the Conciliation Court.

In 1973, Judge Jack Ryburn began to send a limited number of couples who were already divorced to the Conciliation Court for counseling. The goal of the intervention was to help couples communicate, work out their own custody and visitation arrangements and avoid continued bitterness and conflict. These cases were new to the court staff. Indeed, at the time, there were virtually no public or private sector models to follow. In meetings, the staff discussed whether it was feasible to help couples who had been fighting for years to quickly reach a resolution to their dispute. It was decided that it was indeed possible to mediate custody modifications. In fact, the process was so successful that in 1977, presiding Judge Christian Markey established a local court rule requiring that all couples with custody or visitation disputes at either pre- or post-decree stages meet with counselors at the Conciliation Court. In that first year, counselors produced custody agreements reached in mediation in slightly less than half the cases referred for service. Simultaneously, the Conciliation Court's services began to be viewed as cost effective methods of relieving crowded dockets.

Despite its successes, the Conciliation Court's position was far from secure. Its wellbeing was tied to the presence of a supportive, presiding

judge as well as county funding. The first step in establishing a more secure financial base for the Court occurred in 1975, with the passage of legislation known as the Chel Bill. This bill increased divorce filing fees by \$2 and marriage license fees by \$5. The fees were to be matched by county money and used to support the Conciliation Court. Implementation of the bill was set for 1977. However, in 1976 the county cut its funding for the Conciliation Court dramatically, and this jeopardized implementation of the Chel Bill. The chief administrative officer of the Superior court did not favor the reduction but noted pragmatically, "it had to be done. We're a public agency, and if the public wants to reduce, we have to reduce" (Zolin, 1982). Funds from the Superior Court partially supported the mediation service through 1976 but six counselors were dismissed. In addition, two branches of the Conciliation Court were closed. These branches, referred to as Neighborhood Service Centers, served the largely Hispanic community of East Los Angeles and the predominantly Black community of South Central Los Angeles. These sites had been opened in late 1973 because it was felt that many minorities were not being served by the central court due to the difficulties and costs involved in transportation, and language barriers. In 1976, the East Los Angeles Center held 256 conferences and the South Central Center held 155. After the funding cutback in 1976, both centers closed and neither has operated since.

Implementation of the Chel Bill took place as scheduled in 1977 but the experience demonstrated the importance of obtaining a secure funding base and avoiding reliance on County funds. To accomplish this, a group of civic leaders and former Conciliation Court clients organized "The Friends of the Conciliation Court". After implementing the Chel Bill in 1977, the same group

went on to lobby extensively for Senate Bill 961 in 1978. This bill mandated that custody/visitation disputes be mediated and increased the marriage license, modification, and divorce filing fees by \$5, \$10 and \$15, respectively, to support the Conciliation Courts in California. The future of the Conciliation Court became secure in 1980 when Senate Bill 961 was passed and signed into law.

Today, the Los Angeles Conciliation Court remains housed within the Family Law Department. During the 1981 calendar year this Department processed over 45,000 divorce filings and nearly 15,000 modifications. It conducts its business in the Central Court, located in downtown Los Angeles, and in 8 full-time and one part-time branches.

The Mediation Process

Cases involving contested child custody and visitation are routinely flagged through Order to Show Cause proceedings and daily calendar calls. At the daily "call of the calendar", the judge informs couples and their attorneys that all custody and visitation disputants must proceed to the Conciliation Court. Attorneys obtain required forms from the clerk and accompany their clients to the Conciliation Court. Few cases escape a mediation attempt. In the words of a recent presiding family court judge, "No way, under this God's heaven, will they miss the conciliation process" (Mills 1982). Indeed, judges have been known to refer couples back to mediation after an unsuccessful attempt.

In recent months, greater proportions of litigants and attorneys have

voluntarily called the Conciliation Court to schedule an appointment with a counselor. Stipulations to mediate are commonly mailed to the court and the parties are sent an appointment date by return mail. Parties may also bring their stipulation to the court on the day they wish to be seen, although a counselor may not be available. Stipulations may translate into savings in time and money for litigants as well as the Conciliation Court. For the litigant, it may eliminate the need to wait to see a counselor. For the Conciliation Court, the procedure affords greater staff control over the flow and distribution of cases.

Despite this, the central court retains the philosophy that custody and visitation problems are best handled by immediate intervention, and that couples are psychologically ready to resolve problems on the day they go to court. Thus, the Conciliation Court offers services to families on the day they go to court as well as in advance by appointments.

The Mediation Session

At the Conciliation Court, clients or their attorneys complete a brief informational form which is collected and distributed to available counselors. When all counselors have been assigned cases, those couples who cannot be seen are scheduled for future appointments. Typically, all mediation clients attend a brief orientation program about mediation and its benefits for children while the counselors briefly meet with the attorneys to discuss the case and the mediation proceedings. A Conciliation Court document alerts counselors to the possibility that some attorneys may try to litigate the case during a meeting and it is the counselor's responsibility to recognize and prevent such activity. Counselors are also informed that they must never see

either attorney alone. Such an activity on the part of a "neutral" mediator may erode the counselor's credibility with the opposing counsel and jeopardize the integrity of the program. Finally, it is suggested that attorneys can provide useful insights into the case and may even be helpful later in the session when they may be called in to speak with an unrealistic client. Informally, counselors also recognize that such conferences can be used to gather sensitive information about substance abuse or medical history that would not be volunteered with clients present. Such meetings also give mediators an opportunity to see how well attorneys work together. After this initial meeting, attorneys usually leave and the counselor meets with the couple alone.

Typically, a mediation begins with a detailed explanation of the process. Although the counselors vary in their presentations, the explanations convey similar information. As one counselor puts it:

"My role is to try and work out an agreement with you for custody and visitation. Since your children are young, you are going to have to work together as parents for a long time. The court wants you to get to the point where you can work things out and detour the court process. Everything discussed here is confidential and, although I might share my opinions with you, I will not make a recommendation to the court. It's up to you to make a decision."

Following this introduction, the counselor will attempt to dispel some of the parties' anger and provide them with a chance to "be heard." Some counselors use individual conferences with each parent. As the official training manual notes, "It is essential to talk separately with each principal involved." Other counselors, however, favor joint sessions and feel that this approach enhances inter-party communication. Most counselors agree that a strong background in counseling is helpful in divorce mediation. The mediator

must be able to both elicit strong emotional issues and terminate unproductive debates. But counselors differ in the amount of time they devote to emotional issues dealing with the causes of the divorce. While some try to address underlying issues before discussing settlement options, others deal with underlying issues only if they are obstacles to agreement-making. As one counselor put it, "there may be (couples) who can reach an agreement after 10 sessions, but I don't do 10 sessions." Indeed, most counselors never approach the official Conciliation Court limit of six sessions with any one family. Not surprisingly, some counselors are frustrated by the short-term nature of mediation interventions. In the words of one mediator, "Sometimes that is unsatisfying, but other agencies have to pick up from there and go beyond."

If parents are able to transcend their anger and resentment, they can begin to explore settlement options. One counselor describes this state as the "negotiation and compromise" phase of mediation. This portion of the session involves educating parents about the legal process, possible custody and visitation arrangements, the developmental needs of children at various ages, and appropriate means of responding to an ex-spouse. The focus is on generating solutions and planning for the future of the children. Counselors help parties to express their concerns and opinions. Cases where parents make allegations of abuse or neglect are routinely referred for child custody investigations or psychiatric evaluations. Mediators do not attempt to verify the accuracy of such allegations themselves.

Although children are not routinely seen by most mediators, some counselors prefer to see children in mediation if the parents present dramatically different versions of the child's needs and preferences. A few

counselors routinely meet with the children in order to assess their adjustment to the divorce and to gain insights that can be shared with parents to help them reach a beneficial agreement.

In practice, the initial mediation session is unlikely to last more than 2 or 3 hours. Although the majority of cases are disposed of in a single session, a significant number of cases are scheduled for a second appointment. Cases deemed to be inappropriate for mediation include clients who are intent on litigating their dispute or those fail to show up for a mediation session. Other types of inappropriate cases involve parents who have a history of psychiatric hospitalizations, or cases involving serious allegations of violence, neglect or substance abuse. Exceedingly hostile couples with voluminous court files are also regarded as poor mediation candidates and only a limited amount of time is allotted to them. Equally difficult are cases in which only one person wants the divorce and the abandoned party seeks revenge. Counselors are aware that some of these cases should not be settled in mediation and usually won't hesitate to send these cases back to court. As one counselor puts it, "I would rather not write a plan when a family is not ready for it than to pretend to write one."

Typically, cases that are not resolved in mediation are referred to one of two separate, court-based agencies designed to provide information to facilitate judicial decision-making. These are the court's Child Custody Investigators or Psychiatrists. The investigators, like the Conciliation Court counselors, are employees of the court. The psychiatrists are independent contractors. The cost of an investigation averages about \$500, while a psychiatric evaluation averages \$75 to \$95 per interview for a total

cost of \$800 to \$900. Both investigators and psychiatrists conduct extensive investigations of family members and make recommendations to the court regarding the most appropriate custody/visitation arrangement.

Nothing discussed in the mediation session in the Los Angeles Conciliation Court is shared with the judicial officers, investigators or court psychiatrists. The rationale behind this strict confidentiality procedure is that it encourages parties to share information with the mediator and negotiate with their ex-spouses. It is also felt that information gathered in mediation is too subjective and incomplete to be used in generating an evaluation and recommendation. While there are some mediators in the Los Angeles program who regret the loss of information that ensues from a strict confidentiality system, confidentiality is favored by the program's director, most of its mediators and the organized bar. Although attempts have been made, the presiding judges have never allowed mediators to be subpoenaed, and most experienced family law attorneys seem supportive of this provision.

In 1981, 4,458 petitions concerning custody and visitation matters were processed by the Conciliation Court. Nearly half of these cases resulted in some sort of an amicable agreement, and were diverted from the judicial system. Many mediated agreements are drafted by the counselor on forms provided by the court, however, it is not uncommon for attorneys to write up agreements. Overall, counselors agree that they do not feel bound by any "judicial norms" and the agreements they draw up are diverse and tailored to the family.

After the agreement is completed, parents sign the form. Copies of the

draft are provided to the parents and the original is given to one of the court typists for final preparation. A principal family counselor checks over the agreement before it is sent to the bench. At the courtroom, a county clerk examines the agreement and compares it to previous orders. It is a rare occurrence when a clerk returns an agreement to the Conciliation Court for modification. Once the agreement passes the scrutiny of the clerk, it is stamped with the supervising judge's signature and is mailed to the parents and attorneys. If none of these parties registers an objection within the next 10 days, the agreement becomes an Order of the Court.

Although the exact percentage is unknown, a large percent of clients return to the Conciliation Court to either make formal legal modifications or receive help with a custody or visitation problem. Counselors are pleased that clients can reenter the system without difficulty and assume that many of these parents would litigate if the Conciliation Court could not be approached directly.

While Conciliation Court counselors do not officially discuss the financial aspects of the divorce, public sector mediation of these issues is now available through three experimental attorney mediation panels. The newest of these panels is in the Central Court, the two older programs are in outlying branches. The presiding judge invites attorneys to serve on the Central Court panel for six months. The selections are based on the judges' personal knowledge of the attorney's reputation and expertise in family law. There is no obligation to serve on the panels, and no financial compensation, but few attorneys turn down the judge's invitation.

The Staff of the Conciliation Court

The staff of the Los Angeles Conciliation Court consists of a director, two principal family counselors, seventeen senior family counselors or mediators, and nine clerks and secretaries. In addition, there are student interns who work at the court one day a week.

The current director was appointed to this position in 1977. He had been a counselor in the Conciliation Court since 1971, working in both a branch and the central court. He is a firm believer in mediation and feels strongly that custody/visitation mediation can provide families with a better resolution to their problem and that mandatory mediation successfully promotes utilization of a valuable service.

The two principal family counselors are responsible for daily operations of the court. Along with the director, these counselors handle inquiries about the program from other courts, professionals, and parents around the country. In addition, they distribute cases to counselors, set appointments, monitor the processing of written agreements through the judicial system, train new counselors and supervise interns. Interns are generally social work, counseling, or psychology students from the local universities assigned to the Court for a five month period. Typically, the interns work at the central court, although a few have been placed in branch courts.

The entire clerical, or support staff, is located at the central court. They process the paper work generated by the mediation and counseling sessions and maintain statistics regarding the number of agreements generated in mediation.

The mediation staff is comprised of seven women and eight men, most of

whom hold Master's degrees in social work. Six counselors are located at the central court while nine work in the outlying branches. On a weekly basis, central court staff meetings are held with the Director, the principal family counselors, the counselors and the supervisor of the support staff. In addition, smaller groups of central court counselors hold informal meetings to discuss issues and techniques of mediation. Once a month, counselors from the branch courts come to the central court for a joint staff meeting. This encourages a sense of community as well as the development of procedural uniformity.

Counselors at the Conciliation Court view mediation as a pragmatic goal-oriented process aimed at helping people to resolve disputes. Few, if any, would describe their work as "therapy." As one mediator puts it: "I tell people I am not interested in changing their feelings, but I am interested in changing their behavior." Of course, there is an element of therapy in mediation and counselors talk about helping families "to resolve pain and conflict" when they describe their work.

Despite general consensus about the goals of mediation, the counselors differ in the weight they assign to service delivery, their opinions regarding who ought to be routinely included in mediation sessions, the average length of their intervention, and the degree to which they specialize in particular types of cases. At one extreme, there are counselors who are extremely sensitive to the constraints of working in a high volume, public service setting. For these mediators, the priority is to provide services to as many families as possible with the least amount of delay. This type of counselor sees many clients and generally meets only with the parents and attorneys and less commonly sees the children or other third parties.

At the other end of the spectrum are those counselors who tend to view the role of mediator as that of a clinician working towards a specific client outcome. Their priority is to spend whatever amount of time is needed to help people cope with and solve a given problem. As a result, these counselors tend to hold lengthier mediation sessions, often schedule follow-up appointments, and interview the children and other family members, including new spouses. These counselors also conduct more mediations and fewer marriage or pre-marital counseling sessions than their counterparts with a more developed public servant perspective.

Naturally, there are positive and negative aspects to both approaches. Counselors who are concerned about the high volume of cases and who respond by accepting a heavy caseload are appreciated because they help to reduce the backlog. The Conciliation Court tries to provide prompt service, and budgeting constraints preclude hiring additional counselors. On the other hand, clinically oriented mediators achieve a slightly higher agreement rate and this is recognized to be essential and fortunately, the staff recognizes the contributions made by both types of counselors and evidence great respect for one another.

Sources of Job Satisfaction and Dissatisfaction

Although counselors operate under a great deal of stress, most are highly satisfied with their jobs. Part of the satisfaction is due to professional pride. One mediator, herself a Ph.D. level psychologist, describes the staff as "one of the best groups of public employees ever assembled." This evaluation is supported by external facts. For example, mediators at the Los Angeles Conciliation court are among the highest paid mental health employees in the county system. Competition for these positions is intense; over 200

applications were received for the most recent position. The administration reinforces a sense of self-worth by reminding the staff of their involvement in a novel and experimental program allowing counselors a great deal of autonomy in their work and promoting creativity in mediation. Recent presiding judges have also promoted high staff morale. Although judges have little routine contact with the counselors, they do attend professional forums sponsored by the Conciliation Court and use these occasions to publically praise the quality of the staff and the service they render.

Although the ability to produce agreements is valued and the terms "effective counselor" and "high agreement rate" are often used synonymously, mediators report that they feel little or no administrative pressure to generate agreements. The administration's main concern is that the overall agreement rate remain at an acceptable level, generally, 50% or above. One of the principal family counselors notes that "Newer counselors feel anxiety about falling below 50%. I tell them not to worry about it; it will average to at least 50%. The less they worry, the more effective they are." Another counselor commented, "I used to worry about it (his agreement rate). Now I don't even know what it is." However, he continued by saying that he would feel badly if it fell below 50%; "I'd feel I was ruining the team average or something." Although individual agreement rates are public information, the staff members seem relatively oblivious to them. They recognize that the failure to resolve a dispute may depend as much on the disputants as on the mediator and that some families are not appropriate candidates for mediation or are simply not ready to reach an agreement.

Perhaps another reason that staff members do not emphasize agreement rates is because mediation is rewarding in other ways. One mediator asserts

that "success is when I feel good about (what has occurred in mediation) not the outcome in terms of an agreement." And another mediator notes, "I see this as a little miracle place--a place to reduce pain and suffering." Counselors also enjoy aspects of doing crisis intervention work. As one counselor put it, "I am the kind of person who likes impact. (Crisis work) affords that kind of dynamic environment." Another finds it exciting "not knowing until the end who will agree and who won't."

On the other hand, counselors are often frustrated by the short-term nature of the mediation intervention. Time constraints can inhibit the potential for long-term, therapeutic effects. "It is unrealistic to expect changes in two hours," notes one. And another admitted: "Some weeks I get depressed. I feel I've had no impact. I invested a lot of time. Nothing happened, and that kid has to live with it."

The anger of parents in mediation is also a source of frustration to counselors. Some counselors report they tire of "all the yelling and screaming." They note that it is easy to "get caught up" in the anger. Counselors in outlying branches have the added pressure of having no duty counselor or clerical staff to serve as buffers. Not surprisingly, stress does seem to affect all counselors at one time or another, but that "stressed out" feeling, as it is commonly known, does seem to become more manageable with time.

The Reactions of Users

The reactions of users to the mediation process are best gleaned from a data collection effort conducted with clients at the Los Angeles Conciliation Court. During August-December, 1981, clients at the Central Office of the

Conciliation Court were asked to complete a questionnaire while waiting for mediation. Nearly 370 individuals agreed to complete a survey, although nearly as many, about 340, refused to participate. Refusals were generally due to the fact that clients were busy consulting with attorneys prior to mediation, or were anxious and could not concentrate on the task. A number of this later group asked to be included in follow-up interviews and nearly 30 of them were in fact interviewed at the second point in time. There was no evidence that those who agreed to participate did so because of either particularly positive or negative views of the Court.¹ Three months after mediation, a second interview was conducted by telephone with 276 clients. A final interview with 213 clients took place approximately 13-15 months after the initial contact.

Based upon this information collection effort, it was discovered that the Conciliation Court serves a heterogeneous population that resembles the population of Los Angeles County. About half are Anglos, another quarter are Black and another quarter are Hispanic. Asian-Americans and Native Americans

¹ Of those who agreed to participate, about half were not able to finish the entire questionnaire prior to being called in for mediation. This does not necessarily indicate a shorter waiting period for these cases, as these individuals may simply have had other issues (e.g., attorneys, children) to attend to while they were waiting. A subsequent interview specifically asked respondents whether they had to wait too long to get into mediation reveals no differences between the responses of those who completed only part of the questionnaire and those who completed all the items. Overall, we feel fairly certain that the individuals finishing all the questionnaire had not had a more frustrating and hence negative experience due to long waits to receive mediation. Therefore our follow-up interview, 3 months after mediation, focused on recontacting those individuals who completed the entire initial questionnaire. Many but not all of those completing merely a portion were recontacted. A total of 276 Phase II, post-mediation, interviews were conducted, generally by telephone. A final interview took place on the average 13-15 months after the initial contact: 213 individuals were interviewed at this final point in time.

made up less than 5 percent of the sample. The range in educational levels among respondents is also diverse. About 10 percent had not completed high school, 20 percent graduated from high school but did not continue, 40 percent received some college or trade school education, and a third of the sample had graduated from college.

The Conciliation Court mediates new custody and visitation disputes as well as modifications of existing orders. However, upon their arrival at the Conciliation Court, most couples were separated but not divorced. Only 14 percent were remarried. On the average, the pre-divorce couples had been separated for 11.9 months. The post-decree clients had been separated for an average of 2.8 years. About half the respondents had never been to court about a custody or visitation matter. Another third had appeared once or twice. Most of the marriages had lasted about 7 or 8 years, and about half of them involved only one child while 40 percent were families with two children. Custody and visitation disputes that come to the attention of the court most typically involved children between 4 and 10 years of age.

By the time they reached the Conciliation Court, most individuals reported that the issue of spousal support was settled, about half had already divided the property, and about 40 percent had resolved the issue of child support. Among those with a child support agreement, monthly payments averaged \$290. Among those without a child support agreement, almost half believed there was a great deal of disagreement on the issue. Upon arrival at the Conciliation Court, most (60%) respondents reported the children were living with their mothers, although a third (30%) reported that joint physical custody was in effect.

Immediately prior to mediation, almost 40 percent of the respondents described cooperation with their ex-spouse as "impossible" and 16 percent said they no longer made any attempt to communicate. As one husband notes, "We can't talk about the weather." Only four percent said that it was relatively easy to cooperate with an ex-spouse. Nearly 30 percent of the female respondents said there had been "quite a bit" or "a great deal" of physical violence during the relationship. Prior to mediation, about 40 percent of the individuals had been to a counselor.

In the first interview, most respondents approved of the job their attorney was doing, regarded their legal fees to be reasonable, and felt their attorney was supportive of mediation. Respondents were fairly evenly divided on the issue of judges discriminating against fathers in awarding custody. The split was clearly by gender. Seventy-five percent of the women thought judges were fair, while seventy percent of the men thought they were biased.

On the average, respondents gave themselves a 60/40 chance of receiving a favorable award in a court hearing. Chances in mediation were rated 40/60. Further, men and women evaluated their chances very comparably; women were not significantly more confident of receiving custody.

While most of the Los Angeles respondents reported that they only attended one mediation session, a substantial number (43%) received appointments to attend additional sessions. On the average, clients reported receiving three hours of mediation. Many parents were somewhat confused about the purpose of mediation as the session began. For example, a number seemed to feel that the goal was to produce a reconciliation. For other clients, the key problem was feeling uncomfortable and nervous about the idea

of dealing with their spouse. Some feared that their spouse would try to prove them unfit. Others were convinced their spouse would lie and try to manipulate the mediator. As might be expected, many found mediation a difficult experience. While almost half reported that they felt tense, angry and defensive during much of the mediation, most felt it was a less demanding experience than a court hearing. Most also noted that the mediator kept the discussion on track, gave them a chance to express their views, and provided options without pressuring couples to settle.

Respondents typically (75%) reported that the mediator spoke with their attorney. For some, it was reassuring to have a lawyer present, despite the fact that it created additional expense. Others felt it was a waste of money. As one woman observed, "I paid my attorney for reading the newspaper." About a third of the respondents noted that their children were seen by the mediator. A clear majority (71%) of the parents felt that mediation focused on the children and about half felt the process provided them with information about child development and children's needs in divorce.

When respondents were reinterviewed 3 months following the mediation session, the majority (over 80%) said they would recommend mediation to their friends, and nearly as many favored the mandatory mediation of custody disputes. These findings hold even among those who did not report reaching an agreement. About 60 percent of the respondents reported settling in mediation, and about 40 percent classified the settlement as a permanent agreement on custody or visitation. Most of those who produced agreements in mediation suspected that they would have been less pleased with a judicial award made after a court hearing. About a third of those who resolved their dispute in mediation also credited the process with improving their relation-

ship with an ex-spouse. This benefit did not carry over to those less successful in mediation. However, few actually felt that mediation made the relationship any worse.

At the time of the second interview almost 60 percent of those who reached an agreement in mediation, and almost half of those who did not, reported having joint custody. This high incidence of joint custody arrangements is a reflection of California's strong joint custody legislation. Judges are required to provide written explanations if they award sole custody in cases where one or both parents have requested joint custody. They also entertain petitions for modification from sole to joint custody without the customary waiting period following the promulgation of final orders.

At the final interview, generally 13 to 15 months after the initial contact, over half (57%) of the respondents had agreements calling for joint custody of the children; a third (32%) of the respondents reported custody was awarded to the mother. While joint custodians were less satisfied with the time they spent with their children than were full-time custodians (55% vs. 87%) they were more satisfied with the allotted time than were non-custodians (55% vs. 28%). By the final interview, 35 percent of the sample were remarried or cohabiting. Most ex-spouses lived in close proximity to one another with 70 percent lived within 30 miles and 40 percent no further than 10 miles apart. Over 40 percent of the respondents reported that visitation took place less often than at the second interview and 20 percent claimed it occurred with no particular regularity. Despite this, nearly 80 percent reported their children were accepting of the divorce and most (70%) acknowledged that the child had a good relationship with the other parent.

At the final interview nearly half the sample classified themselves as

"very dissatisfied" with the legal system in general, while less than 30 percent were either "somewhat" or "very" satisfied. Frequent complaints focused on the rushed and impersonal aspects of court. One woman said she now understands "why some people don't even bother to get a divorce." By contrast, nearly 70 percent were glad they tried mediation and less than 20 percent expressed any regret about the experience. A clear majority continued to favor mandatory mediation on child related issues and over half (57%) felt mediating financial issues would have been a good idea.

The Reactions of the Judicial and Legal Communities

Mediation of custody and visitation disputes is widely accepted in most of California as a positive alternative to litigation. Most of the questions surrounding mediation address the format and function of mediation rather than its appropriateness in resolving custody and visitation disputes.

Judicial support is evidenced by the attendance of a number of California's judges at conferences on mediation, and their testimony in favor of legislation making the process mandatory. In addition, a prominent California judge collaborated with a researcher who has studied the effects of divorce on children to create a video tape designed to educate parents on divorce and child custody. The tape has been utilized in both San Francisco and Los Angeles Courts to orient parents to the mediation process.

The attorneys who work within the legal system in the Los Angeles Superior court vary in their familiarity with the Conciliation Court processes. Attorneys who are at the Conciliation Court on a regular basis tend to be the most supportive and see mediation as a more appropriate forum for the resolution of custody and visitation disputes than the courtroom. As one attorney put it: "It sets societal expectations about a person's capacity to

resume control over his or her own life. Mediation is the least intrusive way to resolve a dispute."

At the other end of the spectrum are the system's critics. One experienced and prominent family law attorney stated that "The current system causes a great waste of time. The assumption is that people will settle rather than wait (for a court hearing) but that really doesn't happen. And cases should not be settled because people have to wait around or it takes too long or it is too expensive not to do so." Unsupportive attorneys often convey their skepticism to their clients. A few attorneys have attempted to avoid the process by arriving late at the Conciliation Court and insisting that an appointment for another day would constitute a hardship. Nonsupportive attorneys may advise their clients not to sign agreements reached in mediation. And a few have been known to turn the mediation process into an adversarial intervention by not informing opposing counsel that there is a custody dispute until the first court appearance, and forcing the other parent into mediation without any warning.

Still other attorneys are simply uninformed. Although these attorneys do not intentionally mislead clients, they do not know enough about the process to provide accurate information. For example, one attorney was overheard explaining the process as "an investigation" to be followed by a "counselor recommendation to the court." Attorneys have been known to tell a client that the Conciliation Court will try to effect a reconciliation, and since some attorneys do not realize that they have 10 days in which to nullify a mediated agreement, they may instruct clients not to sign any agreement generated in mediation.

Fortunately, most attorneys who are involved with the mediation process on a regular basis feel positive toward the staff and the service, and support the policy of confidentiality. The Conciliation Court provides them with assistance with emotional issues that they feel least adept at handling. As one attorney notes: "I do not enjoy dealing with clients' anger and failed expectations." And in the words of another: "Custody battles are horrible. I don't sleep at night."

Conclusions

The Los Angeles Conciliation Court remains unique in several respects. Its scale makes it the largest program in the nation. It also moves clients directly from a court appearance into mediation and adheres to the view that couples are psychologically prepared to resolve problems on the day they come to court. The Los Angeles Conciliation Court guarantees its clients' confidentiality. It also makes a mediation attempt mandatory in all cases of contested child custody and visitation and this is strictly adhered to by judges, referees and other judicial personnel. Lastly, the program continues to change and experiment. In point is the Court's recent move to establish a system whereby couples schedule their mediation sessions on an appointment basis and to organize panels of private attorneys to mediate financial disputes.

Appendix 1
Sample Mediation Cases

Case One

Mr. and Ms. H. arrive at the Conciliation court's central office at 8:30 a.m., and by 9:00 a.m. their case has been assigned to a mediator. The mediator begins by inviting both attorneys into her office to discuss the background of the case. The attorney for Ms. H. says that his client is not interested in joint custody but he is not sure why she dislikes the idea. Mr. H.'s attorney volunteers that his client wants joint legal custody, but agrees that his wife should retain physical custody. The mediator explains that she will discuss the emotional aspects of joint custody with the couple and will then ask the attorneys to come back to discuss the legal aspects. The attorneys leave the office; one remains nearby, the other goes to another hearing.

The mediator begins the session with Mr. and Ms. H. by reviewing the status of the marriage. Both parties are about thirty years of age. They have been married for seven years and have a seven year old daughter but have spent the last year apart. Ms. H. explains that she finally realized that the problems in the marriage could not be resolved and, so she has recently agreed to the divorce. The mediator notes that this past year has given them a chance to try out some visitation arrangements. She asks how the present schedule suits each parent. Ms. H. feels there are problems. She insists that Mr. H. does not respect her attempts at protecting and disciplining their daughter. She is angry that her husband "shows up when

it's convenient, just for a good time." The mediator acknowledges that this can cause hard feelings, but points out that there are also daily rewards in child rearing. Ms. H. agrees that this is true.

The second problem that is discussed is Mr. H.'s current living arrangement. He lives with his mother and her boyfriend. Ms. H. maintains that when their daughter visits she has nowhere to sleep except with her grandmother and the boyfriend. The mediator stresses the need for the child to have her own bed and a place she can call her own while staying with Mr. H. He agrees to see that his daughter gets her own bed and Ms. H. is satisfied.

The focus of the mediation session returns to the more pressing issue of the parents' differences in child rearing styles. Ms. H. finds it impossible to believe that she could deal with Mr. H. as a co-parent on a regular basis. The mediator reassures her that all parents have problems when they come to the Conciliation Court and most feel they can't possibly work it out. But, she adds, 60 percent do reach an agreement. She asks Ms. H. not to "throw the towel in yet."

Mr. H. would like visitation every other weekend and the mediator notes that this is a fairly common choice. Ms. H. agrees that this will work assuming that he will stop undermining her authority with the child. Next, the discussion turns to the holidays. It is agreed that their daughter will spend Christmas Eve and day with Ms. H. but will spend a portion of her Christmas vacation with her father. Mr. H. wants his daughter for several weeks during the summer and Ms. H. expresses concern over this because of previous threats he has made about leaving town with the child. They decide

that Mr. H. will provide written notification of any plans to vacation out of state with the child.

Having agreed on the daily living arrangements, the mediator introduces the topic of joint legal custody. She points out that having joint legal custody can help the non-custodial parent feel involved in the child's life and reassure the child of both parents' love, as well. Ms. H. expresses skepticism about her ability to make joint decisions with Mr. H. The mediator suggests that the attorneys return to the mediation session to answer questions about the legal requirements of a joint legal custody arrangement. Before leaving to find the lawyers, the mediator congratulates the couple on the work done thus far. "For two people who aren't getting along very well, you're doing a really good job."

Once the attorneys are assembled, the mediator observes that Ms. H. has some reservations about joint custody and invites her to ask questions. While the attorneys respond to questions, the mediator writes out the agreed upon visitation schedule. Joint legal custody is adopted with little reluctance from Ms. H. and none from her attorney.

The mediator now passes around the written visitation schedule she has prepared. The attorney for Mr. H. suggests some changes in the wording of the summer visitation arrangement. He also tells his client that it would be legally proper for him to receive more visitation time at Christmas, but Mr. H. stands by the agreement. The mediator makes the agreed upon changes in the wording of the document. Mr. and Ms. H. sign it and are given copies. If neither they, nor their attorneys, file an objection within ten days this agreement will become an Order of the Court. Three hours after the session

began the mediator wishes the couple well and they leave.

Case Two

Shortly before 9:00 a.m. Mr. B arrives at one of the 8 Los Angeles county branch courts for his scheduled mediation session. While he is in the hallway completing the information form provided by the mediator, Ms. B. arrives. The mediator speaks briefly with her and discovers that two months earlier they had attempted to mediate at the central office of the Conciliation Court but had reached no agreement. Ms. B. seems extremely nervous and admits to being afraid that her husband will be verbally abusive and much more adept at bargaining. The mediator offers to spend some time with each party individually and Ms. B. enthusiastically agrees.

The mediator asks Mr. B. to join his ex-wife and then begins the session with both parents present. He provides a brief introduction to the mediation process, noting that since both children are under three years of age, the parties will need to work together as parents for many years to come and must learn to bypass the court in resolving problems. He assures them that their comments will be confidential and although he might share his opinions with them, he will not make the decision, nor will he make recommendations to the court.

Next, the mediator asks what expectations each of them have about the mediation session. Mr. B. indicates that it will probably end the way their previous mediation session ended and nothing will be accomplished. Ms. B. says she simply isn't sure what the outcome will be. The mediator notes that a second mediation attempt is often successful and he urges each parent to be

open to new ideas and sensitive to the need for compromise. With both parents present, the mediator establishes that they have been separated for eight months, that the mother currently has custody and that Mr. B. sees the children on Saturdays.

The mediator then asks to meet with Mr. B. alone. Without his wife present, Mr. B. is asked to explain what kind of arrangement he would like. He says he is requesting every other weekend with his son, which he terms: "The regular, average plan." He would also like to see his younger child, an infant, but at present he is willing to let Ms. B. determine when that visitation takes place. When the baby is two years old, however, he would like to include her in the regularly scheduled visitation. He angrily insists that Ms. B. "just wants money. She wants me out of the kids' lives." The mediator explores whether he might be willing to start with one overnight, every other week and then increase to two nights. Mr. B. is willing but sounds extremely dubious that his wife will agree.

The mediator next meets with Ms. B. alone and again begins by asking what she would like and how she sees the problem. Ms. B. feels that their son is too young for overnight visits and is confused by the separation. She complains that her husband was never involved in parenting during the marriage, or in the early months of the separation. The mediator points out that there will have to be some overnight visits and that their son will adjust to them. He stresses that despite past problems or lack of involvement, it is important that their son have continued contact with his father. Ms. B. insists that her husband makes things more difficult with his fighting and insulting behavior. She angrily relates examples of his unwillingness to support the children, his lack of involvement with the

youngest child and the numerous problems they have encountered in carrying out visitation.

The mediator says that Mr. B. might be willing to accept a one month trial period in which overnights take place one evening every other weekend. She is hesitant and points out her past concessions and his irresponsibility. The mediator says he recognizes there have been problems in the past but "I'm saying 'How can they be resolved?'". Ms. B. insists that they ought to learn from the mistakes of the past instead of giving him another month. Instead, she suggests that there only be one overnight stay in the upcoming month and two daytime visits. She feels that overnights should take place on Friday evenings, not Saturday night, so that her son is able to go to mass with her on Sunday morning. The mediator questions the need to bring a two year old to mass every Sunday, but Ms. B. is adamant about this. The mediator agrees to discuss the proposal with Mr. B.

After calling both parents in, the mediator reviews the situation. Father wants overnights on Saturday every other weekend. Ms. B. offers Friday overnight twice a month. The mediator points out that this is the closest they have come to reaching an agreement. Mr. B. asks for a Saturday visitation in between the two weekends with overnights. Ms. B. says that since her Sundays are devoted to church, she wants some Saturday time with her son as well. Mr. B. offers to make the alternate visitation day a Sunday but Ms. B. feels strongly that her son needs to attend church. An hour and a half has now passed and another couple has arrived for their mediation session. The mediator praises the couple for their efforts and suggests that they try the plan for a month to establish some trust. He also mentions to Mr. B. that

he need not exercise his visitation options every weekend as long as he gives his wife advance notice and points out to Ms. B. that in the future she might be glad to have some weekends when she was not responsible for child care. He notes that the final choice is up to them. The next case is waiting so the mediator offers to send letters to the attorneys explaining that this is the closest they have come to an agreement and describing the points in agreement.

Chapter 5

A CASE STUDY:

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The Custody Mediation Services of
The Family Division,
Connecticut Superior Court

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DRAFT: NOT FOR CITATION OR CIRCULATION WITHOUT PERMISSION

The history of Connecticut's court-affiliated mediation program can be traced back to the creation of the Family Division in 1958. About this time the number of divorce filings began to increase and judges were confronted with the frustrating and time-consuming dilemma of determining custody and visitation arrangements when parents failed to agree. Judges began referring such cases to their Adult Probation Officers for a determination of facts. The traditional duties of probation officers included child support enforcement, probation supervision and pre-sentence investigations for the criminal court. As a result, they lacked special training in family dynamics or divorce. To develop staff expertise, the Judges of the Superior Court and the Director of Adult Probation agreed to create a Family Division that specialized in divorce matters, and a court rule was promulgated to this effect. The officers who comprised this Division were assigned divorce cases on a routine basis.

The Family Division initially consisted of a Director and one Family Relations Officer in courts located in Hartford, Bridgeport and New Haven. In the years following 1959, the number of divorces increased and the responsibilities of the officers expanded from support enforcement and custody studies to the investigation of visitation problems. A college degree and relevant experience were soon introduced as requirements for Domestic Relations Officers.

In 1963, the Divisions' operating procedures changed when an officer in the court in Stamford Connecticut developed a novel technique for resolving many non-support cases. Rather than conducting a "financial investigation,"

he chose to meet with the parties involved, or their attorneys, and attempt to work out an informal resolution. To everyone's surprise, the officer discovered that the informal negotiation approach was effective in 65-75 percent of the cases. Judges and attorneys became convinced that the "hallway" method was an effective way to resolve divorce disputes, and with time cases came to be routinely referred by the court for conference and the approach spread to other courts. Eventually, officers were given personal property division, post divorce contempt, modifications and visitation cases to be negotiated along with their traditional support duties.

By the close of 1966, the tradition of court conferences or negotiations were firmly established. More than 1300 "negotiations" were conducted in 1966 by domestic relations officers with some judges routinely referring all divorce related disputes, for negotiations. To accommodate the increased number of referrals for negotiations, domestic relations officers were assigned to attend court in order to conduct sessions on the same day the family appeared at the court.

In the early 1970s the format of the written court report was revised. Rather than following a traditional investigative approach that had been used in criminal cases, the domestic relations staff began to prepare "court studies" that focused on the parenting abilities of the parties rather than their marital history or reasons for divorce. The modifications of the court study procedure paralleled broader societal changes regarding divorce as reflected in Connecticut's enactment of no fault divorce legislation.

Gradually, Connecticut's negotiations or conferences dealing with custody or visitation issues began to evolve into a more formal process of

mediation. In 1974, a few staff members from the Family Division attended a conference of the Association of Family and Conciliation Courts to learn more about procedures for resolving divorce-related conflicts including custody mediation. The conference was followed by a trip to Minnesota to visit the mediation program in Hennepin County. Several staff members began to experiment with mediation and were encouraged by their results. Other staff members, however, resisted the trend toward mediation, were skeptical about the ability of disputing parents to make responsible decisions about their children, and remained convinced of the necessity of the custody study, and its more authoritarian attributes. A series of state-wide seminars was initiated to discuss mediation and enhance staff support for the process.

Despite some degree of staff disagreement, a pilot mediation program was initiated in the New London Court in 1977. At the conclusion of this trial period, a male-female team of mediators was utilized. To insure that a single mediator did not dominate the session, it was decided to expand the program to other offices in the state. It operated for six months without court rule or formal regulations. State-wide expansion was accomplished by selecting certain officers at various courts to participate in training in New London with the experimental team. The selections were made by the Director and the female mediator from the New London program on the basis of officers' formal education, counseling experience, and reactions to the concept of mediation.

The New London team provided introductory training for the state's new mediators. This included a review of a videotape of an actual mediation session, and a discussion of basic social work skills and family therapy

techniques. Most of the training, however, was experiential. One member of the New London team would co-mediate with a trainee, and would later offer feedback and suggestions. Gradually, training was offered throughout the state.

By 1980, all Family Division offices in Connecticut had at least one mediation team in operation. They also had a system in place for the regular conduct of negotiations or "hallway conferences".

Negotiations typically occur at each court location on the day per week designated as the "short calendar". On this day, the court hears brief items such as the promulgation of temporary orders. Short calendar days also yield many mediation referrals. It is common for one or two representatives of the local Family Relations office to attend court on these days in order to conduct brief negotiation sessions at the court and obtain mediation referrals. In Hartford, the negotiations process is most developed and one individual specializes in on-the-spot negotiations. Typically, negotiations are used to resolve financial disputes that arise in divorce, to set temporary orders, or to resolve minor problems regarding custody or visitation. In some instances, divorcing parties do not attend the short calendar sessions at court and only their attorneys participate in the negotiation.

Counselors have little problem distinguishing a negotiation from a mediation. The key element seems to be the degree of client participation and the amount of directiveness exercised by the counselor. In mediation, clients "own" the agreement. In negotiations, counselors share the ownership and overtly seek concessions and compromise. For example, one counselor was

observed to comment to an attorney during a negotiation, "Now, maybe what you want for your client is fair, but I have to give him something to take back to his client, too."

The negotiation process is used to resolve financial disputes, establish temporary divorce arrangements or resolve minor problems regarding custody or visitation. More basic custody and visitation disagreements and/or permanent custody/visitation arrangements are referred for mediation sessions or case studies.

The Mediation Process

Today, custody and visitation mediation services are offered in the 13 offices of Connecticut's Superior Court by some 37 Family Relations counselors. Although the process is theoretically available to all couples who have filed a divorce petition and have a custody or visitation dispute or those who have filed a motion to modify existing arrangements, the actual provision of mediation services varies from court site to court site. It is not the court's current intention to make a mediation attempt mandatory, and variations in referral practices can be attributed to the policies of each Family Relations office, the attitudes of the local bar and the proclivities of individual judges. In some courts, attorneys routinely seek out Family Relations counselors on short calendar days and refer cases for mediation. In other courts, a presiding judge will announce at the beginning of the short calendar call that all disputants must discuss their problems with a Family Relations representative prior to obtaining a court hearing. A few judges remain reluctant to refer cases to mediation.

After attorneys have approached the Family Relations representative,

either voluntarily or at the judge's order, they return to court to report the status of the case. At this appearance, the attorney may: 1) report that the matter is resolved and an agreement can be entered; 2) report that the parties wish a referral for mediation or a custody study; or 3) request that the judge schedule a hearing. Generally, once a case has been referred, the office supervisor determines whether or not to attempt mediation first. If mediation does not produce a resolution, the case is normally referred to an uninvolved counselor for a full study and evaluation.

To promote uniformity in the referral process, the Family Relations Division has promulgated a set of guidelines to be used in determining whether or not a case is appropriate for mediation. Cases are considered inappropriate when: a) there are allegations or evidence of child abuse or neglect; b) there have been multiple social agency or psychiatric contacts for the parents and/or children; c) the case is post-dissolution and has involved bitter conflict and frequent court appearances and d) one or more adults has "serious psychological problems or has demonstrated erratic, violent or severely anti-social modes of behavior." When these conditions exist, cases are referred for a custody study or court hearing to determine arrangements that will be in "the best interests of the child". Of course, it is often impossible for the representative to be aware that such conditions exist, but an attempt is made to divert unsuitable cases.

Cases that are referred to mediation and deemed to be appropriate are normally assigned to a team of mediators comprised of a male and female counselor within a week of their referral. Appointment letters and a brochure explaining mediation are sent to the parties. Sessions are commonly

scheduled for one to six weeks after the referral date; if one or both people cannot meet at the scheduled time, they may request a new appointment. In Hartford, referrals are collected and at the beginning of each month, cases are distributed and the month's schedule is set. If a couple cannot make an appointment, they are rescheduled for the following month, unless another cancellation allows them to be seen earlier.

The overriding goal of the mediation process used by Family Relations counselors is to help parents to communicate and compromise so that they can mutually agree on a custody and visitation arrangement. Most mediators feel the process is an educational one and they aim to teach parents to resolve their problems by providing them with information about children's needs and how these needs can be met. Many attempt to gain the commitment of the parties to the process and to the agreement it may generate by using a persuasive introduction. Parents are typically advised that "the purpose of the meeting is to assist you in reaching agreements relative to the best interests of your children. The idea is to leave parents in control of their own futures rather than placing control in the hands of a third party." Couples who are skeptical about the utility of attempting to mediate are reminded that parents need to interact until their children are grown, and it's better for the children if the contact is not hostile.

The initial portion of the session may also be used to alleviate clients' tensions and to establish the mediator as a concerned and neutral party. As one mediator put it:

"You must have that rapport if you are going to do anything...I ask them if they found parking alright. I try to deal with their anxiety in a light way. Talk about the weather. I try to let them see that I'm a normal person too, that I can joke around

once in awhile. You don't have to be 100 percent serious here. I think that helps a lot in mediation."

Following this introduction, some mediators move directly into a discussion of the immediate dispute and each party's proposals. These mediators feel that only issues directly related to parenting and the conflict are appropriate; they believe that spending time on the past fails to demonstrate that mediation is designed to focus on future actions, and cannot rectify past wrongs. Other mediators allow the parties to air grievances briefly or discuss marital problems. However, even these mediators cannot afford to let clients talk about such issues at length and they must ultimately refocus the conversation. According to one mediator, "I have to validate (the client's) anger and then dissipate it." This mediator will refocus the session on the issues by saying something like the following: "I can see that you're angry about that, but it's not really germane to the issues we're here to discuss. We're here to talk about the plans you two need to make for your children."

Not infrequently, there is an imbalance in the parties' abilities to articulate their positions. Mediators regard the team approach as particularly helpful in equalizing bargaining power and/or supporting a weaker individual. For example, to help equalize power, both counselors may align themselves temporarily with the less powerful individual. The mediator may move closer to, or put an arm around, the party needing support. It is sometimes constructive for a mediator to rephrase what the less powerful party has said to insure that his/her viewpoint is heard.

Mixed sex teams are also seen as helpful in dealing with clients who are, for example, intimidated or antagonized by a strong female. As one

female mediator says, "I have to put in a lot of energy restraining myself, acting calm and trying not to be threatening." She also made an explicit note to herself to have her male partner present ideas and proposals in such situations, and found: "That worked out much better. Sometimes it's just important to sit back." Similarly, mediators note that information about children's needs is often heard more clearly by men when it originates from a male mediator.

When mediation reaches a stalemate, mediators use a variety of techniques to break impasses. For example, one team will tell the parties to remain silent while the team members discuss the positive and negative aspects of the various options put forth in the session. They report that couples are able to constructively discuss alternatives after this exercise. Other teams simply break for a short period. Occasionally they return to the session only to discover that the parties have worked out problems on their own. Still other mediators find that clients are prompted to continue discussing alternatives if they are reminded about the time and expense of a custody study or a court hearing.

The decision to involve children in mediation is made by the mediators but varies with the age of the child, the wishes of the parents and the preferences of the mediators. Despite the fact that most children are not directly involved in mediation, most counselors still see the process as beneficial to children. As one mediator explained it, "It can't help but be beneficial. Mediation gets the kids out of a fighting situation much sooner than a study does. And mediation helps to dissipate some of the anger and hate". At a staff meeting in 1981, it was suggested that children of all

ages should be included in the process by having parents and mediators jointly explain the agreement to the children. This had in fact been the practice during the pilot stage of the program and had proved to be an effective way of obtaining the child's input. This procedure is currently used by most mediators when the parents feel they need some assistance in explaining the agreement to their children.

In most offices across the state, attorneys have no direct involvement in mediation. In some cases, the mediators may converse with attorneys about a case if there is a problem in reaching an agreement. Some mediators also speak with attorneys briefly in court at the time of the referral. However, attorney-mediator contact is quite limited, and attorneys are "never present for mediation--except in the heads of their clients".

Mediators rarely spend more than three sessions with a family; the majority of cases are handled in a single session. If any agreement is generated in mediation, it is reviewed by the parties' attorneys who are then instructed to submit it to the court as an inter-party stipulation. The mediation team also reviews the agreement with the couple to make sure that they understand it and to bolster confidence in its workability. If a couple fails to reach an agreement in mediation, the Family Relations counselor simply reports to the court that there was no settlement and a court hearing may be scheduled. In large Family Relations offices, cases which move from mediation to custody study are reassigned to a new counselor. Counselors in small offices co-mediate with counselors from a nearby office so that there is always a counselor in the original office who is not involved with the mediation of a case in the event it is reassigned for custody study. In rare

instances where co-mediation across offices is not possible, mediators may subsequently have to act as evaluators but every effort is made to maintain the confidential nature of the mediation process.

The appendix contains a description of one case mediated by counselors in the Family Relations Divisions and several cases that were negotiated by a counselor at the Hartford courthouse.

STAFF

The Mediators

The majority of the 37 mediators in the state are in their 20's and 30's. Most joined the Division in the early 1970's. About one-third of the counselors hold Master's level degrees, generally in social work, counseling or psychology. Another ten percent are currently enrolled in Master's programs. All mediators have taken advanced courses on child development, family therapy or counseling at local colleges or the criminal justice training academy. Current policy is to employ only counselors with graduate degrees and some experience.

New counselors receive mediation training from supervisors and experienced mediators in the office to which they have been assigned. They are given written policy statements about the process. Lastly, they observe mediation sessions, co-mediate with an experienced counselor, and attend state-wide training sessions organized by the Deputy Director of the Family Relations Division. These sessions may involve an explanation of the law and court procedures as well as guidelines in interviewing children. It is generally felt that the best way to learn mediation is to practice it with an

experienced counselor.

In addition to mediating, virtually all counselors also conduct custody studies and they may occasionally be appointed to serve as guardian ad litem in court cases involving minors. During 1981-1982, counselors in the Waterbury and New Britain offices mediated family disputes other than divorce, neighborhood and community conflicts as part of an experimental program. These new mediation duties are currently being "phased in" at all court locations.

Most mediators view themselves as facilitators. Their objective is to help couples make their own decisions. One mediator sums it up as follows:

Our goal is to help them reach solutions to their own problems...We keep things from getting out of hand...We make intelligent suggestions for compromise. We educate people about the various possibilities--what they can do--and maybe help them set up ideals to follow...The result, hopefully, is that they gain a better understanding of each other, and some ability to resolve their own problems after they leave the office.

Despite philosophical consensus, Connecticut's mediators differ in their mediation styles. At one end of the spectrum are the mediators who focus on problem-solving. At the opposite end are the mediators who are "counseling" oriented. "Problem-solvers" are pragmatic and do not refer to theory when describing what they do in mediation. As one counselor put it: "I'm not familiar with the different schools of thought. I just take each case as it comes and try to respond to it. I'll use whatever works. I take the people as I find them."

Counseling oriented mediators often apply a variety of theoretical approaches to the mediation setting. They speak of the clients' level of "pathology," their "ego-strengths" and whether or not they are well

"differentiated." However, these mediators also agree that mediation cannot be therapy and regard it as a task-oriented process with therapeutic overtones. "It's tempting for us to try to do counseling with newly divorced people. You see so clearly how attached they are to each other and they need to learn how to detach. I've learned I can't help them with that, that maybe they need divorce counseling."

Without exception, every counselor interviewed in Connecticut spoke enthusiastically about mediation. They enjoy the challenge and experience a sense of accomplishment even in cases which do not result in an agreement. Regardless of the outcome, most counselors feel that the sessions make a real difference in people's lives and demonstrates to disputing couples that they can deal rationally with one another. The process is also believed to help couples refocus on the children's future instead of the marital past.

Mediation is appreciated because it promotes client self-determination and relieves the counselor of the responsibility of making recommendations regarding custody disposition that have lifelong implications. One mediator described his personal discomfort with the custody study process as follows: "I think we were all getting pretty tired of imposing our standards on people". Another counselor compares custody studies and mediation this way:

"Mediation takes the pressure off--you don't have to make a recommendation afterward. It even takes away the role of being the authority figure. With a study you're both helping them to resolve their differences and laying the groundwork for making the decision yourself if you have to. With mediation you only have to focus on one thing--getting them to talk to one another, to resolve the conflict".

Mediator perceptions about the processes are supported by the feedback they receive from clients. Two counselors note that while it is not unusual to

receive a phone call from a mediation client to express appreciation, it is rare for counselors to receive compliments or thanks at the completion of a custody study.

Overall, mediators agree that mediation is more enjoyable, constructive and rewarding than the study process and is less time-consuming. Mediation sets "more of an atmosphere for cooperative parenting", and takes emphasis off of the parents explaining their own side of the story.

"Mediation is a lot more alive, interesting and rewarding work. In a way, it's almost fun to do. You can walk out of this room feeling exhilarated. It's more enjoyable than doing studies by a long shot".

Despite their preference for mediation, many counselors also like the variety of doing custody studies as well as mediations. As one counselor notes, "You can burn out on mediations as well as on custody studies."

Mediators express strong support for the use of male-female co-mediation teams among counselors as well as program administrators although there is no objective evidence that it is a more effective approach. As an administrative memo notes:

"No empirical evidence has yet been developed as to whether team mediation is more or less effective than a sole mediator and the model remains a matter of personal choice. There is no question that the costs of conducting mediation are increased with the use of two counselors. However, these costs remain significantly less than the costs associated with court trial or an evaluation study..."

Among the benefits attributed to the team approach is the appeal of a male mediator to male clients. According to some mediators, "about half" of the men they see would give up on mediation if they had only a female mediator-- and would assume that the system was biased against them. The team approach is also favored because it diminishes the possibility of serious personality clashes. As one counselor noted, "If one mediator clashes [with a client],

it's the responsibility of the other [mediator] to deflect that...that's why we have a team--to provide balance and avoid head-on conflict." In the same manner, the team method provides built-in checks and balances to prevent a mediator from pressuring a couple.

Mediators also enjoy the use of teams because it diffuses responsibility for resolving disputes. Proponents of the approach argue that with two mediators there are more ideas available. Mediators can take turns struggling with a sensitive or difficult issue. Finally, no mediator can perform equally well every day of the year and a team approach is believed to insure that clients receive higher quality services. A final aspect of the program that mediators appreciate is the emphasis on confidentiality. Without this guarantee, many fear that attorneys would coach their clients about what to do in mediation and undermine the process.

Although some counselors have been asked to testify about the content of a mediation session in a court hearing, this has never come to pass since attorneys and judges regard mediation as similar to a pre-trial conference and treat it as confidential.

Few counselors voiced serious complaints about their jobs. The problems they note are related to working conditions rather than the mediation process itself. Mediators in some offices complain about heavy case volume and the inability to hold multiple sessions without experiencing case backlogs. Others want more training and an opportunity to co-mediate with other counselors rather than working with the same partner all the time. Several attorneys expressed concerns that counselors are "overworked and underpaid" and would eventually become jaded. The dispersion of mediators in 13

different state offices sometimes makes it difficult to foster a sense of unity in the program and several mediators would like more opportunity to meet with their colleagues for training purposes and informal discussion. Finally, many mediators would like more public education about mediation so that clients better understand the goals of mediation.

Reactions of Mediation Clients

The reactions of clients of the Connecticut Family Court mediation service can be drawn from a survey conducted by the Divorce Mediation Research Project at Family Division offices in Hartford, New London and Waterbury. The interviewing was done by phone and mail, between August 1981 and January 1982. A total of 160 individuals completed questionnaires prior to the start of mediation. This comprised approximately 35-40 percent of the total cases processed during that time period. Respondents were recontacted 3 months after this initial contact and again at 12-15 months.

The sample was almost exclusively comprised of Anglos and this is confirmed by several counselors who note that relatively few minorities opt to mediate. The range of occupations and educational levels reported by respondents in the sample was wider. Nearly half (46%) of the sample had no more than a high school education. About a third (34%) had attended some college or a trade school, and 21 percent had completed college. Virtually all males (91%) and about half the females (54%) in the sample were working full-time prior to the start of mediation. Most of the remaining respondents worked part-time and only ten percent of the mothers classified themselves as full-time homemakers. About half of the sample could be classified as white collar workers, and half as blue collar. Within each category the respondents were fairly evenly divided between higher and lower level jobs.

The median age of respondents in the Connecticut sample was 34 years. On the average, couples had been married for ten years and most respondents (80%) reported having one or two children. Although all ages were represented, disputes most typically involved children between 7 and 14 years of age. Most parents (62%) reported that the children were living with mothers. Joint custody was noted by about a quarter (23%) of the sample.

At the time of the initial contact, half of the respondents reported they were already divorced and were seeking to modify an existing custody/visitation order. The remaining 50 percent were newly divorcing cases. New cases had been separated on the average 6.5 months. Post-decree cases involved separations averaging 3-4 years. About 60 percent of the sample reported that child support, spousal support and property matters had already been resolved. Among those without financial settlements, the most disputed matter was child support, with 40 percent reporting a great deal of disagreement over this issue. Clients are divided on the desirability of financial mediation. Several report that they appreciate the opportunity to separate financial issues from child-related ones. Others wanted an opportunity to "hammer out" the financial issues in the mediation forum.

The respondents contacted in this survey were far from communicative or cooperative. Immediately prior to mediation, about 45 percent reported that cooperation with an ex-spouse was either impossible or something they no longer tried to do. As one woman described it, "most of our phone conversations end with him hanging up on me." Another 26 percent said there was little cooperation and 22 percent felt that although the relationship was strained, cooperation was possible, at least on some matters. Only six percent described cooperation as "easy." Although attempts are made to

divert known cases of family violence to custody studies, it appears that some domestic violence cases were mediated. Approximately 20 percent of the women in the sample reported "quite a bit" or "a great deal of violence" during the relationship.

Respondents reported coming to court for a variety of reasons. In some instances, both parents demanded full custody of the children. Many couples were engaged in disputes over visitation. Almost 70 percent of the men but less than 20 percent of the women felt that judges are 'probably' or 'definitely' biased against fathers. Most (64%) respondents felt their attorneys' fees were reasonable and only 17 percent were dissatisfied with the performance of their attorney. Attorneys were perceived to be supportive of mediation, with 74 percent reporting that their lawyer encouraged them to try. Respondents gave themselves approximately a 60/40 chance of reaching an acceptable arrangement in court and a 50 percent chance of succeeding in mediation.

Prior to entering mediation, almost a third of the sample declined to respond to a question regarding the advisability of mandatory mediation, noting that they were uncertain whether they understood the process. A clear majority of those who did respond, 80 percent "definitely" or "probably" favored the idea of mandatory mediation for custody/visitation disputes.

Three months after mediation, 59 percent of respondents said they had reached an agreement of some type in mediation and 35 percent considered the agreement to be a full settlement on custody and visitation. Two-thirds attended a single mediation session with the remainder attending more than one. Regardless of outcome, most would recommend the process to others with similar disputes. Indeed, 90 percent of those who settled and 60 percent of

those who did not settle would encourage others to mediate. Most parents (63%) felt the sessions were centered around the children's needs and well-being, and a sizeable percentage (40%) felt that the mediators provided them with valuable information about child development and children's needs in divorce. Most respondents (70%) also felt that mediation afforded them an opportunity to express their opinions and voice their concerns: As one client stated: "I got a chance to present everything I wanted to present...It helped us to understand each other better." However, discussing the divorce and custody of the children was not an easy task, and most respondents agreed that they were often angry, tense and defensive during the session. One woman remembers being "very aggravated because of the lies (her husband) was telling. He was doing everything he could to make me look bad." However, most clients (71%) felt the mediators kept the discussion on track and prevented the session from lapsing into a series of arguments.

At the final interview, 12-15 months following the initial contact, a number of individuals reported their relationship with an ex-spouse had improved slightly since the initial contact. Although 43 percent continued to view cooperation as impossible or something they no longer attempted, over a third (36%) now reported that the relationship was "strained" but some cooperation was possible.

As to outcomes, half of the successful mediation clients and seven percent of those who did not settle in mediation reported that custody was awarded to the mother. Joint custody was reported by 27 percent of the successful and 16 percent of the unsuccessful clients. Joint custody parents were nearly as satisfied with the time they spent with their children as sole custodians, and were decidedly more satisfied than non-custodians. Some

visitation problems had arisen. However, those with mediated agreements often indicated an ability to solve the problems on their own. As one father noted, "I'm willing to live with it [mediated agreement] because I know if it were adjudicated, I'd wind up with a schedule anyway...maybe as [the mediator] pointed out, we'll get into some horse trading. You give me this day and I'll give you that day."

Respondent reactions to court experiences were far less sanguine. Although most respondents continued to express satisfaction with their attorneys, they were far less likely (26%) to express satisfaction with the legal system in general. A common complaint was the speed and impersonality of the process. As one respondent put it: "It happens so fast you can't believe it's over. They just hit a hammer say something and it's over with...Your feelings are not that important. They have other things to do." And in the words of several others: "...It felt like a dream...I was out of control." "Attorneys talk to attorneys...Some of them won't even give their clients the time of day." "All the deals were made in the hall and there was no concern about anyone's best interests."

Reflecting back on the experience, most (81%) of the respondents who developed a custody/visitation plan in mediation reported they were glad they tried the process. Half of those who reached no agreement were glad that they tried to mediate. Similarly, 78 percent of the successful and 49 percent of the unsuccessful respondents said they would recommend mediation to others and 88 and 56 percent, respectively, felt mediation should be mandatory in custody/visitation disputes.

Conclusion

The mediation program offered by the Family Division of the Connecticut

Superior court remains unique in several respects. First, it is state-wide with mediation services offered at 13 court locations. Second, the program also offers litigants an opportunity to participate in negotiation sessions designed to resolve disputes that need immediate attention on the day of an initial court appearance. Third, the program routinely uses mediator teams comprised of a male and a female, maintains the confidentiality of the mediation process and avoids the potential assignment of one individual as both mediator and evaluator on one case in small offices by creating teams comprised of counselors from two nearby offices. Lastly, the mediation of non-custody issues including non-divorce-related family and community disputes is gradually being added to the duties of mediators in the Family Relations Division at all its locations throughout the state.

Appendix

Sample Cases

A Mediation

The chairs are arranged so that the husband and wife face each other as do the mediators. The session begins with the male team member asking if the couple understands why they are there. They seem vague and the mediator explains:

"You have been asked to come here and talk with us about how you might like to arrange things between you for the custody of the children. We're here to help you do that. We've found the best solutions are those arranged by the parties involved, not the courts. This is an opportunity for you to discuss custody and what you think is best for your children...What we talk about here today is non-binding. We report nothing to the court except whether or not you reached an agreement. Again, we're here to talk about custody of your children. There may be other issues between you, but I'd like you to concentrate on the children's needs. Put aside your own disputes for now."

Dad is asked to explain the current arrangement, and why he has a motion before the court. He explains that there are two sons. One is 15 and living with his father. The twelve-year-old is with the mother. Dad explains that he's filed for custody of his youngest son at the child's request. As Dad sees it, the problem is that Mom has remarried. In fact, she left Dad to live with this other man, separated for nine months and ultimately married him. The male mediator asks about communication between Mom and Dad. Dad replies that the new spouse is a source of conflict. Since the new marriage, Mom and Dad haven't worked well together. The female mediator asks Mom whether the boys are having any problems. Mom says the boys used to fight a lot but that has not been a problem since the older son moved in with his father. The older son visits Mom 2 or 3 times a week.

Visitation is very flexible, both parents express satisfaction with this. Dad says he thinks the 12-year-old should be able to decide where to live. Mom says the boy has told her he can't choose. In tears, she also says she could not abide by his decision to live with his Dad even if he were able to choose.

The conversation turns briefly to a discussion of the new spouse. Dad says nothing could change his negative attitude towards this man. The male mediator says that unless he does change "it's going to make you a very bitter man...and...it affects your sons. They love their Mom too. For their sakes you two need to try to communicate and cooperate with one another, so they aren't torn apart even more in going back and forth between the two of you." Dad insists that he tries to cooperate but Mom doesn't. He relates an anecdote in which Mom changed the son's allergist without notifying the Dad. He expresses anger at wasting money by changing doctors. The female mediator observes that this is an area in which they have failed to communicate as parents and suggests that both parties talk with the new doctor to feel fully informed. After discussing the need for both parents to be involved in their sons' schools, as well, the mediators suggest meeting with the twelve-year-old who is waiting outside. Mom agrees that the mediators may speak with him, but will not commit to accepting her son's preferences. She says that she'll think about any requests he might make. Dad reiterates that it's up to the boy.

After excusing the parents, the mediators ask the boy if he understands why he's there. He shyly answers "yes." They tell him that his parents are having problems deciding where he should live and this must make things hard for him. They wonder how he's feeling about the problem now. He says he

asked to live with his Dad because his Mom and stepfather were fighting alot. He adds that there's a lot less arguing going on now. They inquire about how he's getting along with his brother. He says they are fighting less too. He still gets to see his brother when he visits his Dad, but they fight less. The female mediator says it sounds like he is pretty happy with the way things are now. He nods. She asks if he is afraid to tell his Dad this for fear of hurting his feelings. He nods again. The mediators ask if he would like them to tell his parents that he loves both of them, but would prefer to stay where he is for now. He nods again. They point out that if there is another fight at his Mom's, he can't simply ask to move in with Dad immediately. He would have to stay and try to work things out first (His mother and stepfather are in marriage counseling now). He agrees to this. They praise him for being concerned with his parents' feelings, and assure him that they love him alot too.

When the parents return, the female mediator begins by telling them that they have a lovely son. They explain how he is feeling, carefully watching Dad's reaction. He seems a bit hurt. They remind him of how worried his son is about his Dad's feelings and suggest that when he leaves he might talk to his son to reassure him that his Dad still loves him and wants to see him. Dad agrees to do this. The male team member reminds them that they need to work on their communication, otherwise everyone will suffer including their son. They agree to try. The female team member says she will write up the agreement and send it to their attorneys. An hour and a half after the session began the couple leave the office.

Negotiations

Negotiations take place in a room directly off the courtroom. The

negotiator sits at the table surrounded by referral forms for mediation, quick disposition forms to indicate the agreements which are negotiated and tax tables and other references to use in making recommendations.

The attorneys for the first case enter. The dispute centers around visitation but the attorneys are unclear on some of the details. One seems to think there has been some physical abuse of the wife, the other refers to a drinking problem and possible blackouts. The negotiator recommends greater financial support by the husband and on-site visitation only. The husband's attorney agrees that this seems fair but requests that the negotiator tell the couple directly since he suspects his client will be less than pleased. The couple is called in and each side is allowed to describe the situation. The husband does not deny that he told his wife that he was drinking again, and having blackouts. However, he now says that this was merely a story and is not in fact true. The negotiator tells him that such tales are an unwise tactic at this stage of the divorce proceedings. He stresses how serious the situation seems to be and how it might endanger the child. The negotiator says a period of supervised visitation would give his wife time to develop some trust. He also points out some of the tax advantages of the support he is proposing. The couple and the attorneys agree to the proposal as a temporary agreement.

The second case involves a newly separated couple with two children. The wife and her attorney are present. The husband is representing himself. The wife has been working two jobs while her sister does child care. The sister is now moving and the wife wants increased child support to help her obtain child care. She says she knows her husband is too far in debt to pay enough support to allow her to quit one of her jobs. The husband says he is

just starting in his own business, a move his wife has agreed to, and he cannot afford additional support. The negotiator says no judge will agree to a situation where a woman works 60 hours a week outside the home and is totally responsible for child care, given the present level of support. He writes up his recommendation and urges the husband to make his children and their support a higher priority.

Before the third case enters, an attorney stops in to ask whether a level of support he is requesting in a particular case seems fair to the negotiator. He is assured that it is quite equitable, and leaves.

The next pair of attorneys enter and report that this case involves disputes over financial arrangements. The negotiator goes over the financial situation with the attorneys and recommends that the clients file for bankruptcy before the companies they owe money to drag them into court. The attorneys haven't considered this but agree that it's probably advisable. The husband's attorney also agrees to have his client assume more of the bills in return for slightly lower spousal support.

The final case involves allegations of abuse. The woman's attorney says his client reported that the son returns from visitation with bruises, saying his father hit and kicked him. However, since he feels his client is somewhat unstable, the lawyer asked to see the child. As it turned out, the child was, in fact, bruised and claimed his father hit him. The attorney concludes the story saying he isn't sure if it's real or if the mother coached the child on what to say. He asks for advice on how to proceed. The negotiator recommends psychological evaluations for all family members. Both attorneys readily agree, but aren't sure who should pay. The negotiator notes that the father has the most to gain. The husband's attorney is

willing to have his client pay for his own evaluation and his son's but not the wife's. The negotiator wonders if her insurance might help pay for the service. The attorney isn't sure and a phone call to check with her is unsuccessful. They agree to suspend a decision until the next day.

Negotiations break off to allow for lunch. By the end of the day, a total of nine conferences have been held.

Chapter 6

✓ A Case Study:
Custody Resolution Counseling
in Hennepin County, Minnesota

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Establishment of the Custody Resolution Counseling Program

The mediation service offered in Hennepin County originated in the Hennepin County Probation Office. In 1935, Probation Officers began to conduct custody investigations as a result of judicial dissatisfaction with the report-making abilities of welfare workers at the Hennepin County Welfare Board. At first, a few custody investigations were informally referred to the Probation office but by the late 1940s, probation officers were overwhelmed with divorce cases as well as their traditional civil and criminal probation duties. Upon the recommendation of the judiciary, a legislative study committee was organized to study the processing of domestic relations cases and in 1951 the committee recommended that a Family Court be established and no-fault divorce laws be passed.

Although the legislature defeated the proposed bill, in a compromise move, it established a Domestic Relations Unit within the Adult Criminal Division of the Probation Department. This enhanced the status of domestic relations work. Traditionally, domestic relations had been regarded as a "professional Siberia" to which no probation officer wished assignment; however, it steadily became more attractive. The new unit began to hire case workers who were trained to help divorcing couples cope with their problems and a case supervisor was appointed to oversee the Domestic Relations referrals from the court. The quality of services provided by the unit also rose and in time, the services offered by the Unit came to approximate true counseling or therapy.

In 1956 and 1957, a specialized Domestic Relations Division was established. It was clear recognition that domestic relations work was an independent area of concern. Probation officers working within the Domestic

Relations Division became known as family counselors and the quality of the services provided by the specialized division improved even more. The number of family law cases increased dramatically and in their reluctance to hear custody and visitation cases, judges began to rely heavily upon custody study reports from the Domestic Relations Division. Eventually it became court policy that a study accompany all contested divorce cases.

By 1961, the Division staff consisted of 3 supervisors and 18 family counselors. Their duties consisted largely of performing custody study reports for the court in all contested divorces. These were investigative reports that essentially required fact finding skills. Newer services offered by the Division included marriage counseling, juvenile marriage studies and counseling for divorcing couples. The focus of the counseling was on parenting roles and responsibilities during the divorce process and it attracted a sizeable proportion of divorcing couples.

Another significant program innovation occurred in 1964 when the staff began experimenting with a new approach to custody study that emphasized family decision-making which was known as "Multiple Impact Therapy". Unlike the fact finding approach of conventional custody studies, the new approach required that a team of counselors work with families for several days. Although the approach was ultimately abandoned because it was too expensive, the philosophical seeds for mediation had definitely been planted and the staff never fully returned to a purely investigative custody study format.

Several other events during the early 1970s shaped the emergence of the current mediation service in Hennepin County. In 1973, no-fault divorce legislation was enacted with the support of the Domestic Relations staff. In 1974, a specialized family judge was appointed to hear domestic relations

matters. The position had been rotated among all District Court Judges but domestic relations attorneys eventually convinced the state legislature to appoint one presiding judge to the Family Court. Although the appointment was ultimately changed from a career appointment to a more limited one, the quality of judicial services in family law cases improved.

The mid-1970s also saw new program experimentation. For example, because the counselors were concerned with the general lack of information on divorce available to the public, they organized a Divorce Experience Program to disseminate this information. These workshops consisted of a series of three, ninety minute sessions to help clients understand the emotional and legal aspects of divorce, including children's needs and reactions. The Divorce Experience program became so popular that many agencies within the community began to start similar programs, and it has since been adopted in a variety of courts around the country.

In 1975, half of the Division's counselors travelled to Madison, Wisconsin to meet with family therapist, Carl Whitaker, to discuss self-determination for families and to visit an experimental program in Madison, Wisconsin offering litigants alternatives to custody investigations. Based upon these contacts, the Division began to provide mediation services in 1975 and in 1976 it formally adopted a policy to mediate contested custody cases. One-half of the staff viewed mediation as a task-oriented process to reach agreements. The other half viewed it as a therapeutic opportunity to deal with the emotional consequences of divorce. As a result, mediation was referred to as Custody Resolution Counseling to convey the notion that the process involved both problem-solving and counseling orientations.

Today, the Domestic Relations Division consists of a director, a

supervisor, 17 family counselors, one child psychologist, two case aides and five support staff. Prior to 1982, the service was provided without charge to litigants and funding was supplied by the county. In June 1982, a fee for service system was adopted. In cases referred for mediation, the first hour is provided free of charge and subsequent sessions are billed at \$25 per hour with a maximum total cost of \$250 per person, or \$500 per couple. There is some adjustment of fees in cases of need. Custody study services are also billed at \$25 per hour.

Many counselors did not approve of the decision to charge for mediation services. They feared that this would deter potential clients from mediating and that payment arrangements would become an issue in the mediation. Subsequent interviews with mediators reveal that these fears have not been realized. Moreover, mediation is regarded as the least expensive procedure for handling custody disputes. Based upon Domestic Relations Department calculations, it is estimated that the use of mediation rather than the automatic assignment of all cases for custody study saved the county approximately \$139,000 during 1982.^{1/} While the estimated cost to the county for cases needing only mediation treatment in 1982 totalled to \$26,721 with an average cost of \$238 per case, the cost of conducting custody studies totalled to \$177,681 with an average case cost of \$1,531.^{2/} Needless to say, cases requiring both mediation and evaluation were the most expensive and cost the county approximately \$74,047 with a per case cost of \$1,645,^{3/} however, only 16 percent of 1982 cases fell into this category.

The Mediation Process

Cases are flagged for mediation by the presiding judge or one of four

referees who hear domestic relations matters. Services are provided to litigants who are either newly separated or those who have previously divorced and have post decree disagreements. Case referrals for mediation versus custody study vary with the proclivities of individual judges or referees. A survey of referees conducted several years ago showed that studies were preferred in cases involving a good deal of post-decree litigation or where there were allegations of physical abuse. While counselors prefer that all cases be referred for mediation and a study initiated only when mediation proves to be inadequate, there is a great deal of variation in the referral habits of referees and judges. Indeed, during 1982, as a result of the directives of a presiding family court judge who was opposed to mediation, referrals for that service plunged dramatically.

Once referred to the Domestic Relations Division, an intake worker interviews clients and obtains background information. The supervisor assigns each case to a counselor. Counselors schedule appointments with clients usually 2-3 weeks following the intake interview.

Mediations are conducted by individuals or teams that are organized on an ad hoc basis. The staff shares a philosophical commitment to self determination and views mediation as a self-determination process. As one counselor notes: "The family should have the primary responsibility for resolving custody questions. Parents are in the best position to make the decisions as to where their children will live. Parents know their children best, the family circumstances and their own reasons for seeking custody."

Mediation is viewed as a learning process and an opportunity for family growth and change. One family counselor comments that "there is a beneficial sharing of information, even if the goal of custody resolution is not

reached." Of particular importance is information on the psychological, emotional and developmental needs of children. As one family counselor explains, "I am an educator, I work with the parents to help them understand their children's needs." Since most counselors subscribe to a family systems theory which views the family as an interrelated system and that behavior changes in one member produces changes in other members, they also believe that positive changes in the behavior of parents will benefit the children.

Despite the diversity in counselor styles, most identify three phases to the mediation process. Phase one involves eliciting commitment to the mediation process and establishing rapport. The counselor introduces the concept and describes the benefits of generating an agreement in mediation.

The second phase of the process involves identifying and discussing problems and disputes. The mediators view their primary role as a facilitator. Counselors must help parents to recognize their problems without feeling defeated by them. Although there is obvious attention to feelings and problems, the process remains task oriented. Counselors use a variety of techniques to keep the discussion moving, break stalemates, and remain neutral. As one counselor notes, "If at any point I am perceived to be taking the side of one parent against the other, the possibility of resolution can be lost."

In the third phase of mediation, couples select the alternatives they find most attractive and discuss the details and viability of their choices. For this phase to be successful, couples must thoroughly understand the agreement being produced and must feel strongly committed to the arrangement. If an agreement is not reached, the mediators devote time to pointing out the stalemate, helping parents not to feel defeated and explaining what will next

happen in their case.

Mediations last from one to six sessions, and the average number of hours spent on each case has declined over the years. For example, in 1979, the average case required 9.5 hours while in 1980 it took 7.2 hours. The director believes that nearly all cases capable of reaching a resolution are completed in four sessions or less. The director attributed the reduction in time devoted to each case to greater staff skill and a more focused emphasis on self-determination and problem-solving as opposed to family dynamics. Children are frequently involved in the mediation process as well as step-parents and other relevant third parties, but attorneys rarely attend the sessions.

If an agreement is reached in mediation the mediator notifies the attorneys of the terms of the agreement and one attorney enters the agreement with the court as an inter-party stipulation. If no agreement has been reached, the court will be apprised of this and a hearing may be scheduled. More typically, the couple will proceed from an unsuccessful mediation to an evaluation. Until 1981, it was common practice to reassign an unsuccessful mediation case to a new counselor for a custody study. In 1981, however, it was decided to routinely assign counselors to perform both functions on a given case and thereby reduce duplicative efforts and the time required to perform both services. The Division has never had a formal policy assuring clients confidentiality in the mediation process; counselors have never been immune from subpoena. The 1981 change, however, represents a departure in practice. While some counselors are uncomfortable with the new policy, most report that it has its advantages. They feel that the custody study process is enhanced by the rapport developed and the information gained during

mediation. As one counselor observes:

"For some reason, having been through the process of mediation the couple has greater trust that I have their best interests at heart. They also know I have a dislike for making decisions about a family, that I believe the family is more capable of doing that for themselves. This seems to make the couple more willing to accept my recommendations than when I only do the study. They just aren't as suspicious."

The Mediation Staff

To be hired as a counselor, an individual must have a Master's degree in a behavioral science or a bachelor's degree along with two years of counseling experience. Qualified applicants take a test that covers counseling and social work issues. An additional step in the hiring process is an interview with the director, supervisor and one family counselor. Continuing education is encouraged and many family counselors are working toward advanced degrees. In addition, there are bi-monthly staff training programs during which therapists, attorneys and researchers in the Minneapolis community are invited to make presentations.

In addition to conducting staff mediations, custody studies and counseling, staff members serve as "counselor of the day" on a rotating basis to provide crisis intervention services and handle walk-in business. Counselors are requested to keep such interventions brief. A recent memo from the director urges that non-court ordered counseling be limited to one session, with a request to the court for an extension if necessary. However, the director has also noted that some straight counseling is a reward he can offer his hard working staff: "I have no problem with closing my eyes to some of it." Staff clearly do value the chance to do some therapy. It is described by one mediator as "a means of maintaining sanity," and another counselor notes that she would do such work after hours rather than give it

up entirely.

The staff also offers public information workshops dealing with divorce and joint custody. They typically involve a variety of speakers including divorced parents, domestic relations counselors, judges, and referees. More recently, the staff has organized groups of families to discuss divorce related issues. This might include a children's divorce adjustment group consisting of youngsters whose parents are in the mediation process, or a workshop about joint custody.

Although the Domestic Relations Division has attempted to obtain permission to add attorneys to the staff to handle the mediation of financial issues, the judges have been unwilling to approve this proposal. Counselors admit that it is often difficult to separate child and financial issues but few are eager to mediate property or financial settlements and believe they lack the necessary training and experience to handle these issues. As one family counselor said, "I don't know tax implications of who gets what, I don't understand real estate law, and I feel inadequate to arrive at a settlement that would be equitable to both parties."

Interviews with staff counselors reveal that most are very satisfied with their work and feel as though they are helping families in a constructive manner. They also appreciate being part of a program that is noted for its professionalism and quality. The staff is housed in one building and there is a great deal of interaction that fosters unity and communication.

The only real concern expressed by staff members is that of program stability. Staff members fear that as a creature of the judiciary, individual judges may take actions that would imperil the program.

Indeed, their fears are not totally unfounded.

Although the Domestic Relations Division has generally enjoyed strong judicial support during 1982, a presiding judge was appointed who had reservations about mediation. As a result, referrals for mediation dropped by two-thirds. This has made staff aware of the tenuousness of the program. Despite the fact that the current presiding judge is supportive of mediation and the referrals for the service have increased, many staff members favor the passage of legislation which would make mediation mandatory in cases of contested child custody and visitation and protect the program from the vicissitudes of individual judges.

Reactions of Mediation Clients

User reactions to Custody Resolution Counseling can be drawn from data collected by the Divorce Mediation Research Project on 107 individuals who were clients of the service between July 1982 and January 1983. This represents nearly 90 percent of the clients served during this seven month period of time. Respondents were interviewed on three occasions by phone or mail. The first interview took place immediately prior to mediation, a second interview occurred approximately 2 months after the completion of mediation and a final interview was conducted approximately 15 months after the initial contact. The total attrition during the 15 month period was 23 percent.

The survey reveals that mediation clients served by the agency are highly educated, Anglo and newly separated. Only four percent could be classified as racial minorities. Virtually all clients reported holding a high school diploma, 37 percent had attended vocational school or some

college, and 18 percent had completed college. Most of the men (93%) and over half (58%) of the women were employed full-time prior to mediation with the majority of the sample (70%) falling into white collar classifications.

At the time they began mediation, only 15 percent of the respondents were divorced and a mere four percent were remarried. Indeed, 14 percent of the sample reported that they were still living in the same house with their estranged spouse. The average respondent had been separated only 6.6 months. Most respondents were in their early thirties and had been married about 9.7 years. Half the sample had only one child, and only 16 percent had three or more children. Most commonly the children were between the ages of seven and ten. Half the respondents reported the children were living with their mothers. A third of the sample reported joint custody at this initial stage.

The Domestic Relations Division's mediation clients appear to be decidedly amicable while very few (3%) clients felt it was "easy to cooperate" with their ex-spouse, many (38%) did feel that despite their problems some cooperation was possible. As one father noted: "It gets easier as it gets further (away)...time heals wounds so you can start talking to somebody instead of yelling at them." The screening attempts made by the court seem to be fairly effective in routing cases of violence into custody studies. Less than 10 percent of the women interviewed reported there was "quite a bit" or "a great deal" of violence during the marriage.

Few of the respondents entering mediation had resolved the financial aspects of their divorce. Indeed slightly over half suspected that there would be major problems surrounding the division of property, and about a third anticipated problems in establishing a child support level. At the time they entered mediation, about a third of the respondents had attended a

lecture or workshop on divorce, such as the court sponsored Divorce Experience Workshop.

Most of the interviewed clients rated their attorneys favorably and most (71%) felt their attorney was encouraging about the idea of mediation. Clients themselves were generally positive about the process and 80 percent said they "probably" or "definitely" favored mandatory mediation in cases of contested custody and visitation. Nevertheless, when assessing the odds for a favorable outcome, clients clearly believed both court hearings and mediation were a gamble. On the average they gave themselves a 50/50 chance of winning in court and 60/40 odds in reaching a helpful outcome in mediation.

The next contact with the sample took place about 3 months later which was typically 2 months after the completion of mediation. Interviews conducted at this time revealed that nearly all cases (80%) required two or more mediation sessions. The average number of sessions was 3.3; the average number of hours spent in mediation was 4.3. Only a few individuals (16%) reported that mediators met with their attorney. However, nearly 70 percent said the mediator did speak with the children and were pleased by this fact. There is a definite relationship between the age of the child and the likelihood that the child will be seen by the mediator.^{4/}

Seventy percent of the respondents reported reaching some type of agreement in mediation and 41 percent characterized the settlement as a permanent agreement on custody/visitation. Virtually all of those resolving their dispute in mediation would recommend the process to others. Nearly 70 percent of those unable to settle in mediation would still recommend it to others.

Clients agreed that mediators kept the discussion on track, focused on the children's needs, brought problems and issues out into the open, and provided an opportunity to voice opinions and concerns. One client noted that the mediator "tried very hard to get each of us to express our feelings. He left options open." Another mother expressed the belief that the full range of options and issues would never have emerged without mediation. Most clients also felt that mediation was preferable to court hearings and some respondents found the latter quite alienating. "I still don't understand how it works," and "I felt slighted and ignored," are some of the words used to describe court hearings.

On the other hand, mediation was not typically perceived to be an easy, pleasant process. Between 40 and 50 percent agreed that during the session(s) they often felt tense, angry and defensive. One woman recalled feeling distressed and running out of the session. Another remembered it as a "disaster because he (husband) wouldn't listen at all. He was trying to stop the divorce."

The third and final interview with clients took place an average of 15 months after the initial contact. At this point in time, most (86%) of those who produced an agreement in mediation and a majority (60%) of those who did not reported they were glad they tried the process. About 40 percent expressed an interest in mediating financial issues and felt that it might have been helpful.

Of those reaching an agreement in mediation, only three percent reported custody went to the father, six percent said custody was split, and 39 percent said custody was awarded to the mother. The remaining 53 percent of the cases resulted in joint custody.

Among respondents unable to settle in mediation, only half as many (24%) reported joint custody. There has been a dramatic increase in the incidence of joint custody in Minnesota, especially in contested cases. For example, among contested custody cases, joint custody has increased from two percent during 1975-1978 to 40 percent in 1979-80 and 54 percent in 1981. In non-contested cases, the incidence has risen from one percent in 1975-1978 to 15 percent in 1980-1981. A review of court files fails to reveal evidence that joint custody parents relitigate at rates above those in sole custody cases. Despite this, the staff feels strongly that joint custody does not work in many instances, and does not advocate for joint custody.

Reactions of Attorneys and Mental Health Professionals

The attorney population appears to be generally impressed with the Domestic Division and Custody Resolution Counseling process. An attorney notes that mediation is "the best form of family education that the courts have ever worked with." Another attorney states that, "The staff at Domestic Relations is professional with a deep concern for children, and can provide valuable information about the children's needs and the parents' abilities to meet them." The Bar Association provides speakers for the Division's Divorce Experience Program. The Bar Association also defended the Division when its utility was challenged in 1982 by the presiding judge.

The mental health community is most supportive of mediation and the Domestic Relations counselors and many private counselors refer their clients to the Court for mediation. Many university professors in Social Work and Family Relations send students over to the Division for field work experiences. And in 1979--1981, the Domestic Relations Division was the site of a research project conducted by a sociology professor at the University of

Minnesota with the support of a Minnesota foundation.

Conclusions

The Custody Resolution Counseling Summary Program of Hennepin County is certainly one of the best studied and most imitated. Its staff enjoys high ratings for performance and professionalism. Users are extremely satisfied with their experiences.

Nevertheless, in recent years, the Program has faced serious challenges and changes. One was the decision to introduce fees for mediation services. A second was to have the same counselor handle a case which moves from mediation to a case study. Perhaps the most dramatic change, however, was the near destruction of the Program by an unsympathetic judge. As a result, one of the Division's objectives has become an effort to make the program more secure and immune from judicial changes.

1/ In 1982, 112 mediations took place which either resulted in an agreement or did not lead to further court action including a custody evaluation. Court statistics indicate that such mediations averaged 8.2 hours per case. The cost of counselor time is estimated to be \$18.12/per hour.

$$(8.2 \times \$18.12) \times 112 = \$16,641$$

Clerks are estimated to spend 1 hour opening files, setting appointments and typing agreements for each mediation. This adds the following costs in clerical time and supplies:

$$(1 \times 10) \times 112 = \$1,120$$

In addition, all 112 cases probably had an initial hearing prior to the start of mediation which are estimated to each cost \$80.

$$\$80 \times 112 = \$8,960$$

Thus, the total cost to the county for all "mediation only" cases is:

$$\$16,641 + \$1,120 + \$8,960 = \$26,721$$

This represents an average of \$238 per case.

2/ During 1982 there were 116 custody studies conducted in cases for which no mediation was held. Each study consumed an average of 16.3 hours of counselors' time for a cost of:

$$(16.3 \times \$18.12) \times 116 = \$34,261$$

Clerical time is also higher for custody evaluations since it involves typing

and filing of reports. Based on an average of three hours per case, the costs become:

$$(3 \times \$10) \times 116 = \$3,480$$

Initial hearings also occurred in all cases in this group:

$$\$80 \times 116 = \$9,280$$

The Court estimates that while a few of these cases will settle without a full hearing, about 88% will go on to trial. Given an average of two days per trial, at \$640 per day, the costs incurred by the County are:

$$(\$640 \times 2) \times (.88 \times 116) = \$130,660$$

Combining the costs creates the following expenses for all 1982 evaluations:

$$\$34,261 + \$3,480 + \$9,280 + \$130,660 = \$177,681,$$

or \$1,531 per evaluation.

3/ Not all mediations result in an agreement. In most instances such cases proceed to an evaluation if necessary. In 1982, there were 45 cases that involved both mediation and custody study. Court statistics indicate that while these cases take longer to complete than mediations, they do not take as long to complete as pure custody evaluations since much of the necessary information gathering takes place in mediation and does not need to be repeated in an evaluation. Records indicate that transfer cases require approximately 14.1 hours of counselor time. The counselor costs in 1982 are:

$$(14.1 \times \$18.12) \times 45 = \$11,497$$

The clerical time involved is similar to that expended in a pure study, about three hours worth of scheduling, report typing and filing:

$$(3 \times \$10) \times 45 = \$1,350$$

Once again virtually all transfer cases involve a preliminary court hearing:

$$\$80 \times 45 = \$3,600$$

Finally, records indicate that very few cases which involve both a mediation and had a study go on to settle out of court and a full two day hearing, is necessary:

$$(\$640 \times 2) \times 45 = \$57,600$$

The combined costs for all transfer cases is:

$$\$11,497 + \$1,350 + \$3,600 + \$57,600 = \$74,047$$

This produces a per case average of \$1,645. If we assumed that 5% of the cases might stipulate before court the figure would drop.

4/ Percent of children between the following ages who spoke with mediators.

Age	Percent
1-3	20%
4-6	59%
7-10	83%
11-14	88%
15 and over	100%

Appendix

A Sample Mediation Case

Mr. and Ms. D. have been referred to Domestic Relations for Custody Resolution Counseling to be followed by a Custody Study if necessary. The case is being co-mediated by a male and female counselor. The entire family--husband, wife, four sons and two daughters--are present for the first session. It is a working class family. The parents are in their late forties. The children range from 25 to 12 years.

The first session begins with one of the counselors asking each family member about his/her understanding of what the session is about. The family is confused about the difference between custody resolution counseling and a custody study. The female mediator explains that they will try to help the parents solve their problems on their own, producing an agreement acceptable to everyone. If this is not possible the Court will make a decision but will elicit the counselors' recommendations before doing so. Each family member agrees to cooperate.

The counselors next begin to gather facts about the family's current living arrangements and the status of the case. The parents and offspring are still living in one home. Further, except for the two daughters, all family members work together at the family owned business. Slightly over one hour has passed and the counselors recommend breaking. They ask all family members to return for the second session.

The second session begins with the female team member requesting that each family member describe the custody dispute as they see it. In the course of the ensuing discussion, the mediators point out perceived areas of

disagreement that are not truly in dispute. After each family member has spoken, the mediators note that the only real issue seems to be the question of who is best able to physically care for the two youngest children. The counselors commend the family for their ability to agree and their mutual concern for the children's welfare. Another appointment is set for the following week and in the meantime everyone is asked to give some thought to possible arrangements for the care of the two youngest children.

The third session starts with a discussion of current child care arrangements. Both parents are asked to describe their current child care role and what they like and dislike about the current arrangement. Both Mr. and Ms. D. stress how difficult it is to care for the youngest boys while working. In gathering descriptions of child care arrangements it is discovered that the older sons and daughters are doing the bulk of the parenting. The older children reveal that one of the younger boys is using drugs. Neither parent seems to be aware of this situation. The family agrees to come back to discuss the problem further.

The fourth session begins with the counselors asking the family to set aside any decisions about custody for the time being in order to concentrate on two issues: their son's drug problem and the way parenting currently takes place. The family agrees to this idea. Together the counselors explain that they see the parenting roles as somewhat confused, with children caring for children. They also note that having two divorcing parents in the same home is a confusing and stressful situation. In the ensuing discussion of alternatives, the father agrees to look for an apartment and it is decided that the older sons may move in with him. At the counselors' urging the family also agrees to enroll the youngest boy in an outpatient program for

chemically abusive adolescents.

The fifth session does not include the entire family. The counselors have requested some time alone with Mr. and Ms. D. in order to help them improve their parenting skills. The counselors have also asked the father to spend some time with his younger children prior to the session. Mr. D. reports that he has carried through on this assignment and also states that the family has, as agreed, enrolled in the drug abuse program. They are congratulated for their efforts and concern. During most of the meeting the parents and counselors discuss the need for the adults in the family to resume parenting responsibilities and discuss how these tasks may be shared so that neither parent feels inordinately stressed. Towards the end of the session the female counselor reintroduces the original custody problem by asking where they feel the younger children should live. Both parents insist they are better capable of providing care. When the counselors feel the discussion has become circular and unproductive they propose an alternative: that the younger children remain living with their mother until the drug outpatient program is completed. If custody is still a problem when the outpatient program terminates, the family will return to mediation. However, if they are still at a stalemate following one session they will move to a custody study. The parents agree to this alternative and each agrees to assume responsibility for notifying his/her attorney of the decision. The younger children--who have been in the children's waiting room, join the session and the decision is explained to them.

Chapter 7

✓ A Preliminary Portrait of Client Reactions to
Three Court Mediation Programs

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Not for Citation Without Permission

In the past few years, the number of divorce mediation services in the United States in both the public and private sector has increased dramatically (Pearson, Rina, Milne, 1983). The trend appears to be due to at least two factors. One is the increased incidence of litigation over custody and visitation and a resulting backlog in court calendars (Foster & Freed, 1980; Mnookin and Kornhauser, 1979). The second is a growing disenchantment with adversarial methods of resolving family disputes (Bohannon, 1970; Bittenwieser, et al., 1966; Cavanaugh & Rhode, 1976; Sander, 1976). According to the critics, adversarial processes fail to promote the cooperation, communication and compliance behaviors that are necessary if individuals are to work together as parents after they cease to be spouses (Kaufman, 1976; Hermann, et al., 1979; Milne, 1978).

In mediation, an alternative and non-adversarial means of dispute resolution, a mutually acceptable third party helps disputants to identify the issues in contention, clarify individuals' needs and goals, establish the full range of possible solutions and the costs and benefits associated with each, and assists parties in making and accepting compromises to their original positions. In the words of one writer, the mediator's most basic role is "to persuade each party to accept the largest concession the other is willing to make" (Pruitt, 1971). Given the "polycentric" nature of most divorce disputes (Fuller, 1971) and the need for divorcing parties to maintain a parenting

relationship, mediation seems a natural means of achieving resolutions to custody or visitation differences.

Despite the upsurge in mediation services and the numerous claims regarding its benefits, there has been little empirical research on the subject to date. Evaluations have been largely descriptive and, as is inevitable in such exploratory research, more questions have been raised than answered. Moreover, the more substantial research to date focuses on divorce mediation activity in the private sector (Bahr, 1981; Pearson & Thoennes, 1982) although the greatest volume of cases is probably seen in court-based programs. Further, generalizations from the private to the public sector are ill-advised since there is reason to suspect that there are substantial differences in client characteristics in private and public programs (Pearson, Rins & Milne, 1983).

The following is a preliminary, empirical evaluation of three court programs offering mediation services to divorcing couples who contest child custody and visitation matters. It is the first step in a more comprehensive study of public sector divorce mediation and adjudication sponsored by the Children's Bureau of the United States Department of Health and Human Services.¹ In this first step, we compare the characteristics of clients seen at -----

¹Data are also being collected in Colorado on divorcing individuals who do not contest custody or visitation issues, as well as those who use the traditional adversarial system. These data are not pertinent to, and are not included in the present analyses. They will be treated in future analyses.

three court programs and assess client evaluations of the mediation experience and its immediate impact on case resolution, inter-spousal communications and parent-child relationships.

RESEARCH SETTINGS

The present research focuses on mediation programs at three locations. These are:

1. The Los Angeles Conciliation Court:

The oldest and largest conciliation court in the country, the Los Angeles Conciliation Court, began offering mediation on an experimental basis in 1973 to couples contesting custody and visitation. In 1980, a state-wide bill was passed which mandated mediation in all cases of contested child custody and visitation. The service is paid for by earmarked increases in marriage license and divorce filing fees. A staff of court employed mediators handles approximately 5,100 cases (McIsaac, 1983) per year. Most families enter mediation the same day they make their initial court appearance. However, in recent months, a rising proportion of cases have been set for later appointments. Couples who reach an agreement commit it to writing as an inter-party stipulation. Couples who fail to reach an agreement may return to court for a hearing and/or an investigation by a separate staff of court evaluators.

2. The Family Relations Division of the Connecticut Superior Court

Mediation services in Connecticut began on an experimental basis in 1977 in the New London Court. Mediation is now available to all couples throughout the state who have filed a divorce petition and are in dispute over custody or visitation, or those who have filed a motion to modify custody and visitation arrangements. In practice, however, how and whether a case actually reaches mediation varies somewhat by court location. Courts differ, for example, in the degree to which they use "negotiations", a process in which small disputes or non-child related matters, are discussed and often resolved by a Family Relations representative and/or the parties' attorneys at the time of a court appearance. A few Judges prefer to hear most contested matters; other courts make more extensive use of investigations.

Mediations in Connecticut are conducted by appointment and by teams comprised of a male and female. Agreements are sent to attorneys to be entered in court and promulgated as a court order. If no agreement is reached, the case is typically assigned for study by a counselor who did not participate in the mediation, although this latter provision may be waived by the parties.

3. The Domestic Relations Division of the Hennepin County Family Court

Mediation in Hennepin County is referred to as Custody Resolution Counselors. It began in 1975 and is one of several intervention programs introduced in the Domestic

Relations Division since its inception in 1957. Cases are principally referred to Domestic Relations by the Judge and four court referees who comprise the Family Court. Judges and referees employ subjective criterion in making Domestic Relations referrals. As a result, some prefer mediations and others favor evaluations. Clients are typically referred for investigation if they appear to be "committed to fighting," or in known cases of abuse or neglect.

Counselors notify attorneys and the court of all agreements reached in mediation. Unsuccessful mediation clients may be required by Court Order to submit to a custody investigation. Although it was generally not the case when the information presented herein was collected, investigations are currently performed by the mediating counselor.

METHODOLOGY

At each site, we identified a sample of clients who were to use the court's mediation services and administered a questionnaire prior to the initiation of mediation and again approximately 15 weeks after our first contact. A third questionnaire will be administered to all respondents approximately 12 months after the initial interview. Data collection conditions varied by location. As a result, at each site, we utilized different methods for identifying disputants and administering the Phase I and II questionnaires.

In California, for example, we distributed questionnaires to mediation clients in the Conciliation Court waiting room and obtained 256 useable Phase I questionnaires.² Phase II questionnaires were administered principally by telephone and occasionally were mailed.³ By this second interview, the attrition rate for those included in the sample at the Phase I questionnaire was 7 percent.

In Connecticut, Phase I interviews were completed by phone and mail.⁴ Using these two approaches, we obtained 163 Phase I questionnaires. Fifteen weeks later, all respondents were reinterviewed again, generally by telephone. We obtained 142 Phase II interviews; this represents an attrition rate of approximately 13 percent.

In Hennepin County, we mailed the Phase I questionnaire to all disputants who came to the attention of the court. This was typically followed by a telephone call to remind respondents to return the questionnaire prior to their first mediation session. Occasionally, telephone interviews were

²This procedure was necessary, but less than ideal. Due to time constraints, some respondents were able to complete less than one-half of the Phase I questionnaire. Others were unable to concentrate or were busy with their attorneys. Given the difficulty in identifying suitable cases, questionnaires were also occasionally distributed to inappropriate clients. Thus, 115 of the 371 individuals contacted are not included in the present analysis.

³Thirty-five individuals who did not complete a Phase I questionnaire agreed to be interviewed at the follow-up (Phase II).

⁴We interviewed individuals in 8 of the 13 courts in Connecticut. However, the majority of our respondents were from courts in Hartford, New London and Waterbury.

most mediation clients have had technical training or college, beyond high school. Between 20-30 percent at each site have completed college. The Minneapolis sample is, again, more homogeneous with fewer educational extremes, i.e. fewer high school dropouts and fewer college graduates. About 70 to 80 percent of the samples at each site are employed full time. Occupational classifications across sites are also quite comparable. About 20-30 percent at

With respect to educational backgrounds, we find that

also contains few minorities. of the Minneapolis sample is Anglo. The Connecticut sample proportion of racial and ethnic minorities, while 96 percent example, the Los Angeles sample contains the highest composition of the general population at each location. For is fairly similar across sites but also seems to reflect the mediate custody and visitation in court mediation programs

The demographic characteristics of respondents who

Background Characteristics of Users

DISPUTES

RESULTS: CHARACTERISTICS OF DISPUTANTS AND

questionnaires. The attrition rate totaled 18 percent. ultimately obtained 109 completed Phase I and 89 Phase II number of cases mediated each year. Nevertheless, we collection problem in Minnesota was the relatively low conducted at this time. As anticipated, our greatest data

each location are professional; about 15-20 percent are clerical workers, and another 10-20 percent are service workers.

The average income of respondents in Los Angeles and Minneapolis is roughly \$18,000; in Connecticut it is \$16,000. Respondents at all the sites are comparable in family size. About 80 percent have one or two children. Less than 10 percent at any site have more than three children. On the average, respondents at each site were married between 8 and 10 years.

(Table 1 about here)

The Characteristics of Cases at the Sites

Most court mediation programs treat newly separated couples as well as those seeking to modify custody and visitation arrangements. In our study there is some difference in the proportion of new divorces versus post-decree cases in our samples from each site. For example, our Connecticut sample contains the highest proportion of post-decree cases (50%). The mediation sample in Minneapolis, on the other hand, consists mostly of new divorces (85%). Like Connecticut, the Conciliation Court of Los Angeles sees a mixture of cases; 63 percent of the parties not yet divorced, and almost 40 percent are at the post-decree phase.

Despite these differences, prior to mediation, respondents at all sites describe the magnitude of the custody and/or visitation dispute in a comparable manner. Between 32 and 36 percent of the respondents at each site report being "very dissatisfied" with their custody arrangement. When we add the "somewhat" dissatisfied responses to the "very" dissatisfied responses, about half of each sample reports displeasure. Similar proportions report themselves to be "very" and "somewhat" dissatisfied with current visitation arrangements. As expected, satisfaction with current custody arrangements is highest among those who have custody of the children at the time of the interview and those with joint custody. Almost 80 percent of those who do not have custody say they are dissatisfied with custody or visitation; this is true for only about 10 percent of the custodians, and 20 percent of the joint custody respondents.

Relationships Between Ex-Spouses

Respondents at all three sites commonly report that communication problems existed during the marriage. Over a third of all respondents report that they disliked conversing with their spouse during the marriage, found such discussions awkward, and felt they had to "guard" what they said. Reconciliation was an issue for a minority of respondents. Nevertheless, mediators were faced with some ambivalent couples. In Los Angeles and Connecticut, about

everywhere. note that lectures and workshops were sparsely attended custody or joint parenting. However, it is important to satisfactory, and attended lectures or workshops on divorce, obtained counseling, found their counseling experiences Lastly, Minneapolis respondents are most likely to have

at the other sites. violence during the marriage as opposed to 15 to 20 percent respondents. Only 7 percent of this sample report frequent violence is also cited least frequently by Minneapolis talking to somebody instead of yelling at them." Physical sets farther (away)" "...time heals wounds, so you can start Connecticut or Los Angeles: "(the divorce) sets easier as it the following are more common in Minneapolis than in post-dissolution status of respondents. Comments such as These patterns hold even after controlling for the pre- and cooperation is "impossible" or something they no longer try. only 30 percent versus nearly 50 percent elsewhere report above, they are most willing to consider reconciling and relationships with their former spouses. As mentioned Minneapolis respondents appear to enjoy the best Minneapolis, the figure was higher--30 percent. "somewhat" or "very" interested in reconciling. In 15 percent of the respondents said they were "unsure about"

(Table 2 about here)

Initial Parenting Behaviors

Parents report many visitation problems at the time of the initial interview. One common problem is the lack of regular predictable visitation. Prior to mediation, about 30 to 40 percent of the respondents at each site report visitation is sporadic. Children see their non-custodial parent infrequently or on an uncertain schedule. Part of the problem may be due to the geographic distance separating ex-spouses. Excluding the extreme cases, spouses in Connecticut, Minneapolis and Los Angeles live an average of 20, 31 and 50 miles apart, respectively. Proximity, however, is not a reliable indicator of the regularity of visitation. Even among ex-spouses who live within 25 miles of one another, visitation is reported to be infrequent and/or irregular in approximately one-fourth of the cases at each site.

Frequency and regularity are not the only problems surrounding visitation. Between 40 and 50 percent of the respondents at each site are concerned about their child's well-being while in the care of the other parent. A comparable percentage worry about being verbally derided by their ex-spouse when s/he talks with the child(ren).

Roughly 20 to 30 percent of the respondents at each site are concerned about the children being spoiled as a result of the divorce. For example, a noncustodial mother

in Connecticut worries about taking her children to dinner and the movies. As she puts it, "the kids are getting used to being dated. It's not a natural relationship". In Los Angeles, a father reports that after he corrects his sons "I backtrack five minutes later because "I don't want the boys mad at me".

Another common visitation problem, voiced by 20 to 30 percent of the samples at each location is the belief that the children spend too much of their visitation time with the other parent's relatives. Finally, at all sites, about a third to a fourth of the respondents acknowledge that the children sometimes seem irritable or upset during visitation.

Many of these visitation concerns reflect basic problems in co-parenting. In fact, about half of our respondents report that hostility underlies parental discussions about the children. Another sizeable proportion report basic differences between parents regarding child rearing. When asked what they liked about their ex-spouse as a parent, many respondents were unable to cite anything positive. Only about 20 percent of the respondents at any site regard their ex-spouse as "a help in child rearing."

On the positive side, most parents feel that they relate well to their children and admit, sometimes grudgingly, that their ex-spouse also gets along well with the children. As one mother said, "he is crazy about the kid. He just has a strange way of showing it". In many

At all three sites, the mediation process is designed to deal with the issues of custody and visitation and not with the financial matters of child support, spousal support or property division. Only 4-6 percent of the mediation respondents report resolving a financial issue in mediation. More typically, mediation clients resolve spousal and child support issues in court and divide marital property on their

Mediation Format

RESULTS: EVALUATION OF THE MEDIATION PROCESS

Table 3 about here

Generally, parents report that their children do not feel responsible for the divorce, do not take sides, and do not express anger at either parent, or worry about treating both parents equally. However, these are problems for a sizeable minority, and for those who note such behaviors, parental concern is great and the child's distress is quite real. One mother recalled her son as saying, "I can't stand any more of this... I don't want the divorce and I don't want you back together."

Instances, noncustodians report being more involved with their children after the separation than during the marriage, and custodians often report greater confidence in their ability to parent. Nevertheless, sole parenting is commonly described as stressful.

own. It is important to note, however, that prior to mediation, about half the respondents at each site report the issues of child support and property to be unresolved. Of those without an agreement, about 40 percent report a great deal of disagreement over each issue. Thus, the absence of financial mediation services is not indicative of the absence of financial disputes.

The three sites differ on the average number of sessions and hours expended on a given case. In Minnesota, the process takes the greatest amount of time. Based on our samples, the average number of mediation sessions and hours in Minnesota are 3.3 and 4.3, respectively. Viewed somewhat differently, only 21 percent of the respondents in Minnesota report attending only a single mediation session, and only 15 percent said their mediation lasted one hour or less. At the Los Angeles Conciliation Court, cases average 1.7 sessions and 3.0 hours. Fifty-seven percent of the Los Angeles respondents report attending only a single session. In Connecticut, the average number of mediation sessions is 1.5 and 65 percent of the respondents report attending only one session. The average number of hours stands at 2.3.

The mediation sites also differ with respect to the participation of children and attorneys. While 75 percent of the Los Angeles respondents report that their lawyers were seen by the mediators, this is noted by only 16 percent of the Minneapolis and 11 percent of the Connecticut respondents. Children are most likely to have been seen by

mediators in Minneapolis (66%). Children are seen by mediators in only 28 percent and 15 percent of the Los Angeles and Connecticut cases, respectively.

Most parents whose children are seen by mediators, feel it is a good idea and only about 10 percent are actually opposed. Those who favor it generally like the idea of eliciting the child's input and obtaining an outside assessment of the child's well-being. Parents who are opposed to the idea focus on the nervousness and fright the children might feel when talking to a mediator. For example, one mother whose son wanted to attend the mediation session "to have his day in court", later reported that "it was the worst day in his life".

Similarly, respondents express mixed reactions to their attorney's participation in the mediation. One Los Angeles woman sums up the pros and cons by noting that while her attorney's presence at mediation made her feel more secure and willing to talk with her ex-spouse, she resented paying her attorney to sit in a waiting room at the Conciliation Court. As she put it, "I got a bill for his reading the newspaper."

(Table 4 about here)

Sources of User Satisfaction

The immediate reactions of users to mediation seems to be fairly similar across sites. At all locations, mediation

is associated with a high degree of user satisfaction. As expected, those who produce mediated agreements on custody or visitation are the most enthusiastic and would be most apt to recommend the process to friends. Nevertheless, a clear majority of those who fail to generate agreements would still encourage others to try. Often, these parties feel the process could be helpful in other kinds of disputes, or that the experience is useful even when it does not produce an agreement.

Respondents at each site frequently cite three factors when they praise mediation. First, 60 to 70 percent agree that mediation helped them to focus on the needs of the children and that the child-oriented focus was beneficial. In the words of one Connecticut mother, "it made me feel more considerate towards the kids and their feelings". Another felt mediation helped both parents to "see that using the children as weapons wasn't good." A number felt that the focus on the children properly stressed their new parental roles and the notion of shared responsibility.

A second benefit attributed to mediation by 70 to 80 percent of the respondents at each of the sites, is the opportunity to air grievances. These respondents agree with the statement, "mediation gave me a chance to express my own point of view". In the course of each party having their say, some clients feel they learned something about their ex-spouse's point of view. However, since 30-40 percent of the respondents also complain of not feeling heard and

understood in mediation, it will take further analysis to differentiate the segment of the sample that feels understood from the segment that feels misunderstood.

A third feature of mediation endorsed by 70 to 80 percent of the respondents at each site is keeping the discussion on track. For some, this means that the mediator prevented ex-spouses from arguing during the session. For others, keeping the discussion on track means focusing on the children. For example, one woman noted that the mediators kept the discussion on the children and thus she feels they "talked about what was most important," even though she would have liked to spend more time discussing the marriage.

Sources of User Dissatisfaction

Despite generally high levels of satisfaction, about half the respondents at each site agree "somewhat" or "strongly" with the statements: "The sessions were tension-filled and unpleasant" and "I felt angry during much of the session". About 45 percent of respondents at each location report feelings of defensiveness. There are several possible reasons for these reactions. For example, custody and visitation disputes may be so emotionally taxing that any method of dispute resolution will necessarily be unpleasant and evoke defensive reactions. On the other hand, some individuals blame the mediator for their discomfort. As one woman claimed, "they were all on his

(husband's) side... every time I tried to bring up something, they always went to another subject." Typically these clients feel that their point of view is either not understood or not respected by the mediator.

For other individuals, the sense of defensiveness may result from apprehensions about dealing with an untrustworthy but persuasive ex-spouse. As one Connecticut woman put it: "he's smart...he can do anything...I was afraid they (the mediators) would believe him." A Los Angeles woman noted that her husband "did a better job of selling himself". And a husband in Minneapolis believed that all his wife had to do "was cry and she'd get her way."

Still other respondents may well have felt tense, angry and displeased as a result of faulty pre-conceptions about the mediation process. At each site, 20-30 percent of the respondents agreed with the statement that "mediation was confusing", and in-depth interviews with respondents often revealed profound misconceptions about the goals of mediation. For example, a number of respondents were under the impression that the process was designed to save the marriage and as a result began the session feeling annoyed. Others, who were interested in reconciling were upset by the fact that the mediators never urged their partner to give the marriage another chance.

Still other respondents labored under the false impression that the mediators would make the final custody decision or that mediation was merely another variety of

For example, one woman who claimed that mediation was too hurried added that she never expected to produce an agreement through the process, and had no idea that this was its purpose. Her preference was for weekly counseling sessions. Needless to say, many other respondents who admitted having no idea why they were mediating may have felt understandable frustrations and anxiety.

Finally, between a quarter and a third of the respondents in each location felt that the process was rushed and should be given more time. For some, the short duration of mediation created anger and feelings of assembly in the words of one respondent: "they should not take people and grind them through". And according to another: "I was just another case. Case 62888-01 to be disposed of." On the other hand, it is not exactly clear how much time respondents feel they need. As mentioned above, one woman anticipated weekly meetings. Another respondent who felt pressured to resolve matters had attended four sessions before mediation was terminated. Still another woman felt more time should have been devoted so there could be "more counseling, and maybe more investigating..." Both are activities that are generally considered to be inappropriate in the mediation process.

(Table 5 about here)

User Evaluations of Mediation Outcomes

It is impossible to adequately assess the impact of mediation in a three-month follow-up. Instead, we merely focus on several immediate outcomes. One obvious relevant result is the proportion of clients who reach agreements in mediation. According to the respondents' reports, the rate is fairly comparable across sites. About 35-40 percent say they arrived at a "permanent custody or visitation" arrangement in mediation, another 20-30 percent report reaching some other type of agreement. The nature of these "other" agreements is hard to determine. Some are temporary custody/visitation agreements pending further court action. In other cases, "temporary agreement" may belie a more permanent arrangement.

Not surprisingly, at all the sites, clients who reach a final agreement in mediation are most apt to report making progress in their cases. The more intriguing finding is that approximately one-third of those clients who reach agreements still maintain that they have made "little" or "no" progress in their case. This suggests that an agreement is not synonymous with a solution and that individuals may feel continuing conflict or profound dissatisfaction with their agreement, regardless of where it is produced. In some cases the source of dissatisfaction is basic. For example, there can be no entirely satisfactory

agreement for the mother who complains that courts don't recognize that "there are a lot of mommies and daddies that kids would be better off without."

(Table 6 about here)

At the three-month follow-up, respondents' satisfaction with the amount of time they spend with children is greatest among custodians and significantly lower among non-custodians. While small numbers preclude definite conclusions, it seems that satisfaction levels for joint custody parents fall squarely between those reported by custodians and non-custodians. In two of our sites, Minneapolis and Connecticut, joint custody agreements are more common in mediated than in non-mediated agreements. Joint custody is relatively common in California regardless of where the agreement is produced.

(Table 7 about here)

Finally, those who reach agreements of any type in mediation generally credit the process with improving their relationship with an ex-spouse. These parties often report that mediation made them more cooperative, or impressed upon them the need for co-parenting. On the other hand, respondents who fail to reach an agreement of any kind in mediation typically report that the process had no impact on their relationship. Of those noting a change, most say that it made matters worse. As one woman put it: "mediation

showed me how stubborn he is and that I won't be able to talk to him".

(Table B about here)

SUMMARY

A preliminary analysis of mediation services offered at three court programs in the United States finds only modest differences in client types, program structures and user reactions. Specifically, we find that mediation clients include individuals of diverse educational and occupational backgrounds including racial and ethnic minorities. Additional analysis is needed to determine whether different income and/or racial and ethnic groups seem to have special needs or respond differently to specific mediation techniques.

Although we cannot explain why, it appears that the sites differ in the extent to which their clients are comprised of divorced couples seeking modifications as opposed to newly separated couples seeking divorces. Nevertheless, substantial, and comparable proportions of our samples at each site report serious disagreements regarding custody and/or visitation and long-standing spousal communication problems prior to mediation. Thus, court-based mediation programs do not treat only easy cases or minor disputes.

While none of the three mediation programs attempt to resolve financial issues, it is relevant to note that disputes of this nature are reported by up to 50 percent of their clients. This may be a logical new area of service for court mediation services, although it is one that would demand new skills and knowledge from its mediators.

The average number of mediation sessions and hours per case varies somewhat by site. Despite this, roughly comparable proportions of respondents report reaching some agreement on custody and/or visitation. User satisfaction levels are also quite similar and generally high across all sites. Substantial proportions of each sample appreciate the opportunity to express themselves, focus on the needs of the children and recognize the mediator's skill in keeping the discussion on track.

At the same time, roughly a third of the respondents in each sample who claim they reached "permanent" custody and/or visitation agreements in mediation also report a sense of continuing conflict at the follow-up interview and do not feel they have made much progress. In a similar vein, about half the respondents at each site characterize the mediation experience as tension-ridden and anger-filled. A substantial minority wanted more time in mediation and felt rushed. Still others seem frustrated that their experience in mediation did not more closely resemble some other type of intervention such as counseling or an investigation.

DISCUSSION

This analysis raises but does not resolve several policy considerations. One such issue deals with the pros and cons of restricting mediation to child-related issues, rather than including the financial aspects of divorce. Our data support the contention that mediation clients often have disputes over both sets of issues. Indeed, the presence of unresolved financial problems may contribute to respondents' feelings that little progress has been made even in presumably successfully mediated cases. Financial mediation may also help alleviate crowded court dockets. According to a recent study of mediation services in Clackamas County, Oregon, many mediation clients must also use the courts to solve financial disputes and this pattern contributes to making mediation less cost effective than judicial determinations (Cohen 1981). On the other hand, many mediators prefer to force couples to consider the child's best interests without regard to financial concerns, feel that financial mediation is beyond their present level of expertise, or fear that in financial mediation the parties' private attorney would play a more dominant role. As one mediator who had attempted to mediate these issues phrased it, "that was like opening a Pandora's box".

A second policy consideration deals with the duration and format of the mediation sessions. Although all of the courts officially permit a relatively large number of hours

and/or sessions to be expended per case, cases are usually terminated with or without a resolution before the upper limit is reached. Court programs face resource and personnel constraints and must use the hours they can offer to clients wisely. At present, we can only note that agreement rates and client reactions are quite comparable at all sites. Few differences can be noted for programs spending more time per case or utilizing mediation teams. Nevertheless, a sizeable minority at each site report feelings rushed or poorly understood.

A third issue is client education about the mediation process. Such education may eliminate erroneous client expectations of lengthy counseling or evaluations and enhance satisfaction. Goal clarification may also enhance client cooperation and eliminate the resistance shown by those who believe they are being asked to reconcile or are being judged. Client confusion is hardly unique to court mediation programs. Rather, it tends to be a common problem in all public service agencies. (Koss, 1946) In addition, since our data was collected at least two of the programs have expanded their orientation process and these efforts may have already begun to remedy the problem. Nevertheless, it is safe to conclude that additional education for the public and the legal community can only enhance program effectiveness and user satisfaction.

Finally, the research demonstrates that mediation is a complex process. Frequently, respondents report

We are also completing third interviews with our adversarial and non-contesting samples.

We are currently completing a third and final round of interviews with all our mediation respondents.⁵ This last interview will provide us with a 12-month perspective on the effects of custody mediation and will hopefully help clarify the patterns noted thus far, and sharpen their implications for policy makers.

contradictory attitudes and actions. For example, many who report having produced mediated agreements on custody or visitation also maintain that their problems have not been solved. Conversely, clients who fail to produce agreements in mediation are commonly satisfied with the process and would recommend it to others.

TABLE 1

BACKGROUND CHARACTERISTICS OF USERS AT EACH COURT SITE

	Los Angeles	Minneapolis	Connecticut
Race			
Anglo/White	48%	96%	94%
Black	25	1	4
Hispanic	22	2	2
Asian	3	1	-
Indian	.5	.9	-
Education			
less than high school	11	2	13
college graduate	27	18	21
Occupation (partial list)			
Professional	26	22	21
Managerial	15	20	11
Clerical	21	23	14
Service	17	11	19
Number of Children			
one	47	50	41
two	38	34	40
three or more	15	16	19
Total Sample Size	(256)	(109)	(165)

TABLE 2
 CHARACTERISTICS OF CASES DIVERTED TO MEDIATION
 AT EACH COURT SITE

	Los Angeles	Minneapolis	Connecticut
Marital Status			
still living together	10%	14%	7%
separated	53	71	44
divorced	38	15	50
Satisfaction with Custody			
very satisfied	22	38	38
somewhat satisfied	12	11	13
neutral	12	4	6
somewhat dissatisfied	14	8	10
very dissatisfied	38	36	33
Percent Reporting Themselves as 'somewhat' or 'very' Dissatisfied with Custody custodians		All Sites 9%	
joint custody parent		22	
non-custodians		58	
Cooperation with Ex-Spouse	L.A.	MPLS	CT
"easy" or "strained"	21%	41%	28%
"can't cooperate much"	25	30	26
"impossible" or "don't even try"	54	30	45
Have been to counseling, either individually or as a couple	44%	76%	61%
Of those attending counseling, percent reporting it as helpful	43	59	40
Total Sample Size	(256)	(109)	(163)

TABLE 3

INITIAL PARENTING BEHAVIORS AT EACH SITE

	Los Angeles	Minneapolis	Connecticut
Visitation is sporadic, takes place "when I can make it," "when ex-spouse allows it" or "irregularly".	40%	27%	27%
The following are concerns for respondent about visitation			
children being spoiled	29	19	31
spend too much time with ex-spouse's relatives	29	22	22
ex-spouse derides you to children	49	24	44
children's well-being	54	40	47
Percent Agreeing with Following Descriptions of Parenting			
in discussions of parenting, the atmosphere is hostile you and ex-spouse have basic child-rearing differences	49	39	53
your ex-spouse is a help in child-raising	50	29	55
your ex-spouse is a help in child-raising	18	24	19
Children's Reactions			
child feels s/he caused the divorce	20	29	5
sides with one parent	27	41	24
worries about treating parents equally	32	41	24
Total Sample Size	(256)	(109)	(163)

TABLE 4
SCOPE AND DURATION OF MEDIATION BY SITE

	Los Angeles	Minneapolis	Connecticut
The following issues were settled prior to mediation .			
property division	48%	22%	62%
child support	44	30	59
In those cases where financial issues were not resolved prior to mediation, percent reporting "a great deal of disagreement" over the following:			
property division	36%	54%	38%
child support	45	32	42

TABLE 5
SOURCES OF SATISFACTION AND DISSATISFACTION

	Los Angeles	Minneapolis	Connecticut
Would "definitely" or "probably" recommend mediation to others			
reached "final" agreement in mediation	85%	91%	91%
did not reach "final" agreement in mediation	79%	68%	62%
Percent agreeing with following:			
sessions focused on children's needs and welfare	71	73	63
mediation gave me a chance to express my own point of view	82	69	70
mediator kept the discussion on track	85	76	71
the sessions were tension-filled and unpleasant	57	46	51
I felt I was always on the defensive	47	44	46
I felt angry during much of the session	43	39	48
mediation was confusing	21	20	29
mediation was rushed	33	24	27
Total Sample Size	(273)	(89)	(142)

TABLE 6
 USER EVALUATIONS OF MEDIATION OUTCOMES

	Los Angeles	Minneapolis	Connecticut
Respondents Perceptions of Mediation Outcome			
Agreement of 'permanent' custody or visitation arrangement	41%	41%	35%
Agreed on other issues (e.g., temporary custody, visitation, seek counseling)	19	29	24
No agreement	40	30	41
Percent Who Perceived Little or No Progress in Case			
Final custody agreement in mediation	28	35	33
No agreement in mediation	60	64	70
Total Sample Size	(273)	(89)	(142)

TABLE 7
 MEDIATION AND TIME SPENT WITH CHILDREN

	Los Angeles	Minneapolis	Connecticut
Very or Somewhat Satisfied with the amount of time spent with children			
custodians	74%	83%	79%
joint custody parents	42	70	54
non-custodians	24	46	21
Total Sample Size	(273)	(89)	(163)

Custody Arrangement Following Mediation

	<u>Final Agreement in Mediation</u>			<u>No Issues Resolved in Mediation</u>		
	L.A.	MPLS	CT	L.A.	MPLS	CT
custody to mother	36%	39%	46%	41%	56%	77%
custody to father	4	3	23	10	20	4
joint custody	1	6	4	3	-	4
split custody	59	53	27	46	24	16

TABLE 8
 MEDIATION OUTCOME AND EFFECT OF PROCESS
 ON RELATIONSHIP WITH FORMER SPOUSE

	Final Agreement in Mediation			No Agreement in Mediation		
	L.A.	MPLS	CT	L.A.	MPLS	CT
Effect of Mediation on Relationship with Ex-Spouse						
made it better	28%	39%	31%	9%	4%	4%
made no difference	65	47	60	76	76	77
made it worse	7	15	8	14	20	18

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Chapter 8

✓
Mediation Process Analysis:
A Descriptive Coding System ✓

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Introduction

Mediation is an increasingly popular conflict resolution mechanism. It is widely used in traditional labor relations and international dispute settings as well as a variety of new contexts including but not limited to: misdemeanor disputes, felony disputes between non-strangers, small claims matters, landlord-tenant disagreements, consumer issues and a variety of domestic relations matters including disputes between parents and children and contested child custody and visitation.

The growing popularity of mediation has not been matched with research into the process and its techniques. In fact, there are very few interaction analyses of either negotiation or marital interaction (Cline, 1979). This is a serious omission. Although many persist in viewing mediation as an "art" and unsuited to systematic analysis (Meyer, 1960), the limited empirical literature that is available underscores the importance of mediator behaviors to explain process outcomes. For example, an empirical assessment of mediation outcomes in labor-management settings finds that successful outcomes are correlated with such mediator qualities as experience level and the use of aggressive tactics (Kochan and Jick, 1978) and an analysis of outcomes in divorce mediations dealing with contested child custody and visitation concludes that the disputant's perceptions of the mediator's skill and actions are as important in predicting outcomes as the characteristics of the disputant or the dispute (Thoennes & Pearson, 1985). Not surprisingly, a recent report released by the National Institute of Dispute Resolution concluded that there was a need for more extensive research on the nature of the mediation process in order to standardize and upgrade existing training programs for mediators (NIDR, 1983).

The Development of a Mediation Coding System

This paper describes an original system designed to allow interested parties to code the behaviors of custody/visitation mediators and disputants by listening to audio tapes generated in custody/visitation mediations. The system involves identifying small discernable segments of verbal behavior (unitizing); assigning them to one of several possible categories (categorizing); and designating the actor and target object for a given act (attributing). Developing the categories for use in the second step posed the greatest challenge. The categories needed to be mutually exclusive and exhaustive, detailed enough to capture the full range of mediation behaviors, but parsimonious enough to allow the system to be used with ease.

A number of coding frameworks have been developed to study marital interactions, psychotherapy, crisis intervention and negotiations. One approach views interactions as social exchange processes (Blau, 1964). The basic assumption is that each interaction presents certain costs and benefits for the participants and that the participants, motivated by self-interest, alter their behavior in light of their assessments of these rewards and costs and trade benefits of mutual value. The two gross types of exchange that may take place between people are social and economic. While the former involve intangible, image-oriented or emotional resources, the latter involve economic resources. Positive relationships develop with the favorable exchange of resources while negative relationships results from continually unfavorable exchanges.

Looked at from this perspective, the mediation situation is a process in which communication is used to negotiate the exchange of resources (Wall, 1984) although it is quite complex because of the multiplicity of mediator

and disputant relationships (Gulliver, 1979). Although he does not provide a formal coding system, Wall (1981) uses a social exchange perspective to generate a list of over 100 mediator tactics to influence the way disputants evaluate their relationships and the alternatives toward which they aspire (Wall 1984).

Another perspective represented in the coding literature emphasizes the phases of the negotiation process and the evolution of successful negotiations from competitive to cooperative orientations. The Conference Process Analysis (Morley & Stephenson, 1977) used to study labor management negotiations reveal three phases of negotiation characterized by the decline of argument. Landsberger's analysis (1955) of mediation and mediated-arbitration sessions using Bale's Interaction Process Analysis also reveals a phase movement in successful mediations. Specifically, he documents a progression from orientation of the dispute to evaluation of the dispute to control of the outcome.

Still other coding systems distinguish between procedural and substantive behaviors or subjective and objective ones. For example, Zechmeister and Druckman (1973) divide negotiation statements into two categories: cognitive and value statements. While the former describe events, conditions and objects without bias or preference, the latter express the speaker's feelings. A second coding system (Walcott & Hopmann, 1975) divides behaviors into those dealing directly with the subject under negotiation (substantive); behaviors designed to change opponents' behaviors, but not necessarily his/her position (strategic); behaviors to clarify the issues (task); expressions of emotions (affective); and behaviors designed to move the discussion (procedural). Williams (1980) distinguishes between

disputes over values versus interests, and codes the underlying causes of the dispute, as well as several mediator behaviors such as the use of coercion, humor and information-giving. Outcomes are coded as monetary or behavioral in nature.

Ultimately, however, reviews of the existing frameworks led to the conclusion that, they were insufficiently detailed to capture the full range of behaviors that occur in divorce mediation. A more promising approach seemed to be to adapt Gottman's marital interaction coding system, The Couple's Interaction Coding System (CISS), (1979) to the realm of mediation. Gottman's coding scheme, draws on earlier systems developed by Hops, Wills, Patterson and Weiss (1972) and Olson and Ryder (1970). It was developed as a result of an analysis of conversations of several hundred distressed and non-distressed marital couples engaged in the resolution of a marital dispute. It defines a unit of speech as the independent clause and codes each according to content and tone. Content categories include 27 behaviors grouped into eight general headings: agreement (direct assent); disagreement (direct dissent), communication talk (clarifying, focusing and examining the discussion), mindreading (assumptions about feelings, behaviors or opinions); problem solving and information exchange (offering ideas or feelings); summarizing self (rephrasing ideas) and summarizing other (paraphrasing statements made by another); and expressing feelings about a problem (specific to the problem). In addition, Gottman codes nonverbal affect in his research using three categories: positive, neutral, and negative nonverbal affect. These categories aid in identifying the function of verbal statements as well as the disputants' tension and emotional involvement (Gottman 1979).

Given the specific goals of mediation and the problem solving nature of the process, the authors of the present system determined that several categories needed to be altered and/or added. These changes were made following a review of the descriptive and theoretical literature on mediation and a review of a sample of transcripts of custody mediations conducted in three court based programs: the Los Angeles Conciliation Court, the Domestic Relations Division of the Hennepin County Court (serving the Minneapolis area) and the Domestic Relations Division of the Superior Court of Connecticut (See Pearson & Thoennes, 1984 for a description of these court programs and their clients). The result was an altered Gottman coding system, designed to code a complete range of both mediator and spouse verbal behaviors which might occur during any mediation session.

Mediation Process Analysis

The Mediation Process Analysis (MPA) is built on the following assumptions and criteria:

1. A coding system should be developed on the basis of a review of research concerning the nature of the topic and the context of interaction. Although mediation is similar to negotiation, they are substantively different processes. Thus, the mediation coding system should be developed from and tested against sample interactions in a mediation context.

2. A coding system should be finite, exhaustive and mutually exclusive (Morley & Stephenson, 1977). Every behavior in the interaction should be identified as belonging to a category in the coding system. At the same time, every behavior should fit into only one category.

3. A coding system should be able to identify changing patterns of behavior (Donahue, 1983). In a mediation context, the categories should

represent behaviors that are functionally significant and that can be grouped to represent general strategies or mediator styles. The category system should also be amenable to statistical analyses that determine the process nature of the interaction.

4. A coding system should be validated in some way. Validation of a coding system can be achieved through the establishment of high levels of interrater reliability, the favorable assessment of the coding system by scholars in the area of concern, and by testing the system on actual data.

5. A coding system should rely on quantifiable units of behavior taken from audio tapes or verbatim transcripts. Rating scales present greater problems in establishing interrater reliability. A divorce mediation coding system should utilize actual specific units of speech contributed by spouses, mediators and third parties such as attorneys and children.

The MPA samples units of speech or independent clauses during a mediation session, coding each on five dimensions: who is speaking; target of the message; whether the unit is a question or statement; the content of the message, and the tone of the message. Coders mark each as follows:

- | | |
|----------------------------|---|
| <u>Speaker:</u> | Mark whether the speaker is Mediator 1 or 2, Husband, Wife, Child 1, etc. |
| <u>Target:</u> | Same as above. |
| <u>Statement/Question:</u> | Circle as appropriate on the coding sheet, relying on both content and voice inflection in coding this dimension. |
| <u>Content:</u> | Select the appropriate category from the mediation behaviors list (See Coding Manual, Appendix 1). |
| <u>Tone:</u> | Coded as +, 0, - (positive, neutral, negative), |

Content Codes in the Mediation Process Analyses

Figure 1 gives a list of the 8 main classifications and the 32 specific mediation behaviors which are coded under the "content" dimension. - - - - -

- - - - -
Insert Figure 1 about here.
- - - - -

The main headings and specific content codes are described as follows:

1. Process

The overall goal of the "Process" category is to capture discussions of 'what' and 'how' to negotiate. It is similar to Gottman's metacommunication category, although the specific behaviors which are coded are slightly different.

The first behavior code of the "Process" category is referred to as agenda statements. It includes those comments that directly relate to the issues to be mediated. Thus, the agenda category includes statements or questions regarding what issues the mediation will cover, as well as observations that the discussion is straying from these issues and remarks aimed at redirecting the conversation to the relevant topics. We would expect to find mediators using agenda comments to identify items for discussion, and to help the parties return to the topic if conversation drifts away. Controlling the mediation session is frequently mentioned as a key mediation job in the mediation literature. It is offered as a means of establishing trust (AAA, 1980) and facilitating cooperation (Coogler, 1978). In the following exchange the mediator asserts control over the situation and refocuses the angry spouses with an agenda question:

Wife: I was at the store that day and I came home and you people [husband and friends] were in the den and you allowed them to smoke it [marijuana] in my home.

Husband: Yes, okay. Twist it around any way you want. It doesn't matter anymore.

Mediator: Can we return to the issue of the kids?

Another element of "Process" communications is coded under the heading suggestions regarding negotiating behavior. A number of authors have noted the need to teach parties negotiating skills during mediation. This need is important when, as in divorce cases, the disputants enter the process with little previous exposure to formal bargaining. Suggestions regarding negotiating behavior can also help establish the mediator's neutrality and concern and help set ground rules for the discussion:

Mediator: What I would like to see you do here is to listen carefully to each other. Listening doesn't mean that you are agreeing with what the other person says. You can still maintain your own position, but if you find that there are some good points...it might even make it better.

Other suggestions may include many of the techniques Kessler (1978) offers as a means of breaking an impasse; e.g. recommendations for a "time out" or period of silence. Other suggestions might call for role playing in which disputants exchange roles or rephrase what the other party has been saying, suggestions that the spouses address comments directly to one another instead of always speaking to the mediator, or a recommendation that each party meet separately with the mediator for a short while.

The final subcategories under the heading "Process" include Correction of Negotiation Behavior and Praise of Negotiating Behavior. Gold (1981) notes that effective mediation eliminates destructive and competitive communication patterns, and other authors (AAA,1980) caution that mediators

may easily lose control of mediation sessions if they fail to terminate unproductive communication patterns. Conversely, praising offers to make concessions, cooperate or, more modestly, a willingness to try resolving the problem, has been cited as a valuable means of gaining parties commitment to the process and fostering further cooperation (Coogler, 1978; VanderKooi & Pearson, 1983).

II. Information

Unlike Gottman's scheme, the present system separates the behaviors "Problem Solving and Information Exchange". The "information" category in the present system contains subheadings used to categorize all proffered information as well as requests for such information. The single exception to this statement involves self-disclosures which are differentiated from general information and discussed below. The behaviors subsumed under the "information" heading are varied and serve many functions which have been posited as essential for successful mediations. The first subheading, information about mediation and its alternatives, may be used to code any requests for, or information about, mediation, court hearings and custody studies. It has been suggested that a clear understanding of the operating procedures and the goals of each process will help mediators to establish rapport with the parties, gain their trust and a commitment to mediation (Felstiner and Williams, 1978; VanderKooi & Pearson, 1983). One mediator prefaced his information giving with the explanation "I think that the better you understand what it is we are about to do, the better use you can make of this process." Typically mediators begin the session with comments that fall into this category:

I don't listen to evidence on one side and evidence on the other side and make some decision about who is right or wrong...the purpose is only to work out a plan that can be satisfactory to everyone.

Clearly, more directive mediators may choose the facts they present so as to predispose clients towards a settlement, e.g., "I don't have to tell you that legal costs are high, so anytime you can avoid going to court it saves you money." Less directive mediators may make little mention of the alternatives to mediation.

Additional "information" subheadings include information about children, information about spouse, information about self, and information about any other party. In each case only clear statements of fact are coded here, not opinions, feelings or assumptions. Thus, the fact finding stage of mediation described by some writers would consist largely of statements in these categories. The information provided may give the mediator an idea of how power is balanced in the relationship, the resources for a settlement, and the potential obstacles:

Wife: He travels. He's out of town eight days month (information about spouse)

Mediator: How far do you live from the school where he attends? (request for information about self)

Husband: Two of them are six and seven [years]. The other three are eleven, twelve and fourteen (information about children)

III. Summarize Other

One of the most frequently cited goals of mediation is the fostering of communication between the disputants. In order for this communication to be effective, it is of course imperative that the intent of each statement be apparent. Not surprisingly, one of the most frequently mentioned techniques in mediation involves rephrasing statements made by another speaker in order

to clarify what is being conveyed and check the accuracy of interpretation (Jackson, 1952, Burton, 1969, Bartunek et al., 1975). While requests for either party to try restating what has just been said would fall into the category suggestions regarding negotiating behavior, the actual paraphrase would be coded here.

Mediator: Excuse me, excuse me. You seem to be saying that if you were to follow the existing plan then that would be your weekend.

Wife: That's right.

Rephrasing may offer the added benefit of forcing a party to look carefully at statements s/he has made. Similarly, when the poorly expressed ideas offered by one party are rephrased by the mediator, there may be the benefit of, at least partially, balancing the power between the parties.

IV. Self Disclosure

Unlike the "information" category, the "self-disclosure" category includes subheadings that allow for the coding of statements regarding one's own opinions or feelings that are not properly considered facts. Two subheadings agree and disagree are used to indicate simple assent or dissent to previous statements.

Wife: She was upset because you didn't come in the house with her [daughter].

Husband: That isn't true. (disagree)

The feelings subcategory is used to code statements or questions that provide or request disclosures not about ideas but about emotions. Many mediators feel it is necessary to bring feelings out into the open, and to validate the person's right to such emotions in order that undisclosed anger and fear not create obstacles to a resolution (Felstiner and Williams, 1981).

In the following examples the mediator, first directly and then indirectly, asks for a self disclosure of feelings:

Mediator: How do you feel about Lynn now?

Husband: I love her. And it's been very hard not having the feelings there at her end. It's just very sad.

Mediator: I don't know if you're talking about working out something in regard to custody or something regarding your marriage.

Wife: Both.

The amount of time the mediators allow the parties to spend expressing such feelings is one indicator of the mediators' orientation or preferred role. Those with counseling approaches may devote an entire session to an exploration of the feelings surrounding the divorce, while more directive, task-oriented mediators typically spend only moments discussing such issues (VanderKooi and Pearson, 1983).

The empathy subcategory is used to code statements or questions that indicate that the speaker understands and cares about another's feelings or needs. Empathy moves a step beyond merely summarizing other. The speaker does not merely restate what has been said in order to indicate a clear understanding of the literal meaning but rather indicates that s/he appreciates how the other party feels. Empathy statements made by mediators may be used to establish and maintain rapport with the parties.

Mediator: I can hear the emotional turmoil that you and Pat, are experiencing; this really must be a rough time for both of you.

In another instance the mediator empathizes with a wife who seems to feel defensive and in doing so reassures her of his neutrality and concern:

Mediator: You seem concerned that I'm taking Pete's side. Actually

what I'm trying to do is this--take the plan he's proposed, and which you find unacceptable, and modify it.

Empathy statements from one spouse to the other often help to alleviate fears and to create a sense of cooperation.

V. Attribution

Attribution statements, or "mindreading" in Gottman's schema (1979) assign ideas, emotions or behaviors to one's spouse or children, to the couple, or to another relevant actor. Subcategories specify whether attitudes or behaviors are being attributed and to whom the attributions are made. Attributions may be in reference to past, present or future conditions. In the following exchange the wife attributes a variety of negative attitudes to her husband, thus explaining why they cannot cooperate:

Mediator: How are you and Jerry getting along in view of this situation?

Wife: We're not. He's extremely angry, extremely hostile, very intent on controlling and manipulating.

In turn, her husband attributes to the children feelings of distress at the way their mother is taking care of them and is cautioned by the mediator not to "mindread":

Husband: The reason they [children] are so upset is that she [mother] is so disorganized--they never get to bed on time; the house is a mess...

Mediator: Excuse me, let me interrupt you; it's very difficult to know why they're upset. It could be a combination of things. It could be the realization, you know, that the two of you are separating.

In a second example, the husband makes an attribution about the causes of the divorce:

Husband: The only reason that my wife and I are splitting up is because she wants too much freedom; she's too selfish, and you can't keep a marriage together that way.

VI. Proposed Solutions

In the course of mediating disputes, a variety of settlement options are generally broached, discussed, and accepted or rejected. The five subcategories under this heading are used to code proposed solutions which focus on actions to be taken by either one or both parties.

Mediator: What do you think of the idea of her [wife] having custody from September to May and you having Jody [daughter] during the summer? (solution - involving action of both husband and wife).

Wife: I'd just have to plan my vacation during the month I have her [daughter]. (solution regarding wife's behavior).

Wife: We could put into the agreement that he would take her to church for Sunday School when he has her (solution regarding husband).

In addition to proposals for resolving issues, this category includes the topic problem with a solution which is used to note objections or potential problems with a proposal.

Mediator: You know, any time that either of you are not able to take the child, even though it's your time, why wouldn't it be better to call the other person and say, 'I've got something to do...I will get a babysitter unless you want to take the child.'

Wife: Now, something like that would work if it was because I needed to work. Say I had an opportunity to go skiing...if he knew I was going skiing he'd say, 'No, get a babysitter.' Just out of spite.

Felstiner and Williams (1978) note that mediators frequently provide a check on reality for the couple. Many of the problems with a solution offered by mediators may serve the purpose of helping the couple to recognize when their solutions are unrealistic. For example, when the couple agree to leave the time when the children return from visitation entirely open, the mediator cautions:

Mediator: That's fine. But where that runs into problems is if you have already made other plans...

The subcategory non-specific solution talk is used to code problem solving statements not codeable elsewhere.

VII. Agreements

This heading should not be confused with the more narrowly focused subcategory of Self-Disclosure which is labelled agree. Rather than indicating simple assent to prior statements on behalf of one of the parties, the present heading and its subcategories are used to denote substantive points of consensus between the disputants. For example, if the couple noted at the outset of the session that both parties agreed to joint custody and were now in mediation to set specific arrangements, the comment would be coded under agreement: before mediation.

Points of agreement noted throughout the session would be coded agreements: here and now. A number of authors have stressed the importance of noting all points of agreement as they emerge and responding immediately. This helps establish a pattern of success and helps to put closure on issues (Kessler, 1978; VanderKooi and Pearson, 1983). Felstiner and Williams suggest that the mediator may even put into words the agreement that is imminent (1978). Hearing a source of agreement pointed out by a neutral party may aid both sides in acknowledging a solution without 'losing face'.

The subcategory final settlement is used to capture summary statements about the final agreement:

Mediator: Okay, so every other weekend (of visitation) during the month the other parent has her (daughter).

Mediator (writing down agreement): So, you have agreed that either parent can have the child on the parent's own birthday if a notice is given two weeks in advance.

A final subcategory of Agreements deals with future disputes arising from the agreement. The thrust of such statements is to anticipate future areas of conflict and recommend measures to ameliorate the problem.

Mediator: So, we're always here (court mediation service) to help you with any changes. If you have problems and are not able to talk to each other, you're always welcome to come back here.

VIII. Interruptions

A major category was added to allow for the systematic recording of interruptions, including who was interrupted and who did the interrupting. Occasionally thoughts that are interrupted are resumed and completed following the interruption. When this happens the broken statement is coded as a single utterance. When the thought is not resumed, it is coded as an interruption.

Tone, Question and Target Codes in the Mediation Process Analysis

In addition to assigning each unit of speech to an appropriate content code, the MPA also designates that each unit be assigned to one of three tone codes also used by Gottman in his Couples Interaction Scoring System. Positively coded units of speech are those in which the tone of voice denotes warmth, understanding, humor, encouragement, enthusiasm or similar positive states. When the tone of voice indicates irritation, anger, sarcasm, or threats the tone is coded as negative. Statements given neutral codes convey no obvious pleasure or displeasure. Mediator tone codes are listed in Figure 2.

Insert Figure 2 about here

Each unit of speech is also coded as a declarative or interrogative

statement. Thus, a unit of speech made by a spouse such as "We moved there in 1980", would be an offering of fact if coded as declarative. If voice inflection indicated it was a request for confirmation from the other spouse, the unit of speech would be coded as a question.

Finally, each unit of speech is identified as originating from a specific individual, generally the mediator, husband or wife and less frequently attorneys or children. Each speech unit is also targeted or directed to a particular party.

Procedures for Using the MPA Coding System

The coder begins by listening to a few minutes of a taped mediation session in order to identify the different voices of those present, e.g., the mediator, husband, wife, attorneys, etc. Once the identities are clear, the coder rewinds the tape to the beginning and codes eight units of speech. The recorder is then advanced "fast forward" to the two minute mark and eight more units of speech are then coded.¹ The procedure is repeated until the tape of the session is concluded.

For coding purposes, a unit of speech is defined as an independent clause. Sentence fragments are excluded, but phrases with implied subjects are included (e.g., "sit down!"). Other unitizing rules are:

- A sentence that is interrupted by another person and then later continued by the original speaker is considered to be a single unit of speech.
- If a sentence contains a dependent and an independent clause, only the independent clause is coded.

¹A Dictaphone player has been used since it has both a foot pedal which facilitates moving the tape forward rapidly, and a digital clock which allows the coder to easily identify the appropriate coding interval, e.g., at two minutes, then at four minutes, then at six minutes, and so on to the end of the tape.

- Inaudible units are not counted as one of the eight units to be coded at each two minute interval.

For each unit, the coder marks the speaker, target, whether it is a statement or a question, the content code (from the coding manual), as well as the tone code. The following is a sample of an MPA coding sheet.

<u>Unit</u>	<u>Speaker</u>	<u>Target</u>	<u>Context</u>	<u>Tone</u>
1.				
2.				
3.				
4.				
etc.				

In preliminary tests of the system, two graduate students coded tapes of custody mediations generated in the Los Angeles Conciliation Court, Hennepin County (Minneapolis) Court Services, and the Connecticut Superior Court. In order to test the two minute sampling scheme, one hour long mediation session was coded in its entirety and then recoded using the two minute sampling intervals. The correspondence between the results yielded by the two procedures was extremely high (see Table 1), thereby supporting the procedure of sampling units from each session, instead of coding the entire tape.

Insert Table 1 about here.

Reliability of the coding scheme was determined by having two coders code the same tapes independently. Percentages of agreement were all above 90 percent. For example, on 283 independent codings, the coders agreed 96 out of 100 times on tone. Of the 283 units assigned content codes, i.e., assigned to one of the 32 specific categories, coders agreed 91 percent of

the time. When assigning units to one of the 8 major headings (Figure 1), they agreed 95 percent of the time. Thus, the results of these preliminary attempts to work with the MPA indicate that the content, tone, target, context and speaker categories are both detailed and unique enough to allow coders to reliably assign behaviors.

Appendix 1 consists of a detailed coding manual for the Mediation Process Analysis. It should be adhered to in future replications with the MPA (See Appendix 1).

Conclusions

A list of 32 behaviors that commonly occur in mediation was adapted from Gottman's Couple Interaction Scoring System (1979) as well as a review of the mediation literature and a review of a limited number of taped mediation sessions at three courts. These behaviors were linked in an a priori fashion to form seven broad categories which become the central focus of the Mediation Process Analysis. In addition to coding the content of verbal interactions during mediation, codes were developed to indicate tone, speaker, target, statement and question. Units of speech were coded at two-minute intervals. Interrater reliabilities using the MPA were extremely high.

The MPA promises to be of use in both process and outcome research. The system is designed to provide information concerning mediator behaviors and strategies, and their effects on the disputants' behaviors and on the outcome of the mediation. The literature on mediation techniques is replete with lists of mediator behaviors associated with successful versus unsuccessful mediation outcomes. Using the MPA, researchers can generate empirical evidence relating specific mediator behaviors to mediation outcomes. For example, researchers may explore whether mediators should take a facilitative as opposed to a directive stance in moving spouses toward

a facilitative as opposed to a directive stance in moving spouses toward agreements. A facilitative stance would be characterized by high percentages of Questions, and high percentages of Summarize Other units and Empathy units. A directive stance would be characterized by higher percentages of Statements, Suggestions on Negotiating Behavior and Proposed Solutions. Other mediator styles can be examined by creating combinations from the MPA content list and tone categories for mediators.

Similarly, since spousal behaviors are noted in the training literature as being associated with favorable mediation outcomes, one can empirically determine whether couples evidencing certain types of behaviors more frequently succeed in mediation.

By conducting sequential analyses it is also possible to utilize the MPA to examine ways in which mediators affect spouse behavior. For example, one can determine which mediator behaviors are associated with increases in spouse cooperative talk, solution talk and the like. The literature suggests that mediators' behaviors influence the integrative or distributive nature of the interaction between disputants (Hooker, 1958) and/or their perceptions of and/or valence congruence (Donahue et al, 1983). The MPA permits the observation of demonstrable effects between mediator behaviors and disputant behaviors.

A third type of investigation made possible by the MPA would focus on phases in the mediation process. Many writers identify specific phases in the mediation process. Kessler (1978), for example, identifies four stages of divorce mediation--orientation, defining the issues, processing the issues, and resolving the issues. Each of these phases is theoretically associated with one or more of the mediation content codes. For example, one would expect orientation to include high percentages of Information statements about the mediation process, as well as Process statements which

focus on Agenda. Kessler's second stage--defining the issues--would presumably include high percentages of Information statements (all types). Stage three--processing the issues--might be expected to include high percentages of Self-disclosure statements and Attribution statements on the part of spouses. Finally, one would expect that the fourth stage--resolving the issues--would be characterized by fewer negative Attribution statements by spouses and higher percentages of statements which Propose Solutions, and Summarize Agreements.

A stronger test of the stage theory of divorce mediation would be to break the mediation sessions themselves into temporal units to determine whether there are noticeable changes in spouse and mediator behavior from one time point to the next. This approach seems particularly promising in light of Gottman's finding that couples involved in negotiation show clear differences in their verbal behaviors during marital conflict interactions. In the beginning third of their discussions, Agenda Building behaviors prevailed. In the middle third, there was a preponderance of Arguing. The final phase of the process was characterized by Negotiation. Using these headings for the stages of discussion, we might expect that during the agenda building stage there would be high percentages of Agenda items, and Information about mediation. During the arguing phase, one would expect high percentages of negative Attribution statements and high percentages of Information units. During the final stage of negotiating, one would expect there to be increases in Summarize Other, Self-disclosure, Proposed Solution, and Agreement Statements, accompanied by reductions in negative Attributions.

The Mediation Process Analysis promises to be of value in developing a portrait of the mediation process. With the MPA, researchers can describe the contributions of mediators, spouses and others by noting the amount and nature of talk by mediators versus spouses. They can discern the target of

mediator and spousal interventions as well as the level of questions versus statements. Finally, the MPA promises to provide researchers and trainers with a systematic way of generating an elementary portrait of the mediation process and reliably discerning the effects of mediator and spouse behaviors on mediation outcomes.

Figure 1

Mediation Content Codes

1. Process:
 - a. Agenda
 - b. Suggestions re: negotiation behavior
 - c. Correction of negotiation behavior (punishment)
 - d. Praise of negotiating behavior (reward)
2. Information:
 - a. Mediation process and its alternatives
 - b. Children
 - c. Spouse or both
 - d. Self
 - e. Other
3. Summarize Other
4. Self Disclosure:
 - a. Agree
 - b. Disagree
 - c. Feeling
 - d. Empathy
 - e. Other
5. Attribution:
 - a. Spouse -- Attitudes
 - b. Spouse -- Behavior
 - c. Both spouses - Attitudes
 - d. Both spouses - Behavior
 - e. Children - Attitudes
 - f. Children - Behavior

Figure 1 (continued)

g. Other - Attitudes

h. Other - Behavior

6. Proposed Solution

a. Solution re: husband

b. Solution re: wife

c. Solution re: both husband and wife

d. Non-specific solution talk

e. Problem with solution

7. Agreement(s)

a. Before mediation

b. Here and now

c. Final settlement

d. Future disputes

Figure 2

Mediator Tone Code

Positive

Negative

caring

cold

warm

critical

soft

tense

tender

scared

relieved

impatient

empathic

hard

concerned

clipped

affectionate

staccato

loving

whining

satisfied

blaming

buoyant

sarcastic

bubbly

angry

cheerful

furious

chuckling

blaring

happy

hurt

joyful

depressed

laughter

accusing

optimistic

mocking laughter

Also: For spouse, any statement which indicates blatant cooperation on the part of the speaker.

Also: For spouse, any statement which indicates blatant uncooperativeness on the part of the speaker.

For mediators, any comment through which the speaker indicates that he/she believes the spouses are cooperating, working things out, moving toward agreement.

For mediators, any statement through which the mediator indicates that he/she believes the spouses are moving apart, not working together, not compromising, not negotiating properly.

Table 1
 Comparison of Two Minute Interval Sampling
 with Entire (one-hour) Mediation Session

Variable	Two Minute Intervals		Entire Session	
	Frequency	Percentage	Frequency	Percentage
Speaker				
Mediator	75	45%	186	43%
Husband	52	31%	152	35%
Wife	39	23%	91	21%
Statement/Question				
Statement	147	91%	383	92%
Question	15	9%	33	8%
Main Headings				
Process	2	1%	11	3%
Information	62	37%	167	39%
Summarize Other	2	1%	8	2%
Self-Disclosure	77	46%	167	39%
Attribution	13	8%	38	9%
Propose a Solution	1	1%	6	1%
Agreement	3	2%	11	3%
Uncodeable	7	4%	21	5%
Content Code				
1	1	1%	10	2%
5	34	20%	64	15%
6	4	2%	29	7%

Table 1 (continued)

Variable	Two Minute Intervals		Entire Session	
	Frequency	Percentage	Frequency	Percentage
Content Code (continued)				
7	9	5%	26	6%
8	13	8%	46	11%
9	2	1%	8	2%
10	24	14%	47	11%
11	3	2%	3	1%
12	7	4%	16	4%
13	1	1%	3	1%
14	44	27%	101	24%
15	3	2%	8	2%
16	4	2%	14	3%
19	3	2%	6	1%
21	3	2%	9	2%
25	11	1%	5	1%
26	7	4%	21	4%
Tone				
Positive	14	17%	35	16%
Neutral	64	82%	182	83%
Negative	0	0	1	5%

NOTE: The Spearman Rank Order Correlation Coefficient comparing the two minute interval with the entire session for main headings is $r = .97$, and for the content codes, $r = .92$.

Coding Content and Tone in the Mediation Process Analysis

Code each unit of speech independently. The selected code for each unit of speech does not depend on how the prior unit was coded, or on the code given to the unit which follows. Though listening to the content of a unit is usually helpful in understanding what the unit means, primary attention should be given to the unit itself in assigning a code. When sampling units at each two minute interval (or any other such interval sampling procedure), the coder will need to first listen to several minutes at the beginning of the tape to identify the participants' voices, e.g., mediator(s), spouses, attorney(s), children. In selecting a content code, the coder should listen to the unit of speech, and then determine which of the main headings the unit falls under, e.g., Process, Information, Self Disclosure, and so on. Having established the main heading, the coder should next select the best subheading for that particular unit of speech.

Mediation Content Codes:

1. Process. This category is intended to capture discussion of how the parties will talk with one another about various issues, including setting the agenda, negotiation strategies, and the like.

a. Agenda. These are comments about which topics will be discussed on that particular day, including comments about getting back to the agenda, straying from the topic, and the like. Code 1a any process comment which does not fit under 1b, 1c, or 1d.

b. Suggestions re: Negotiating Behavior. This includes a full range of ideas which often come from the mediator about how the couple should talk with one another. These might include: suggesting role reversal, paraphrasing the other person,

separating the negotiators, instructing the mediators not to communicate, or suggesting homework (e.g., budgets). To be coded as 1b the comment must be directed to both parties; i.e., if it is directed to a particular person it will be coded as 1c (below).

c. Correction of Negotiation Behavior. This is a more extreme form of directing or controlling the process. It includes direct confrontation of one party about something that he/she is doing that is incorrect or destructive to the process. As noted above, any process "suggestion" (see "b" above) directed to one person would be coded as "c", since it has a stronger thrust to it when it is directed to one person and not to both parties.

d. Praise of Negotiation Behavior (reward). This is essentially the same as "c" except that it is positive, in that it points to something a person is doing during mediation which is helpful to the process.

2. Information. This category includes all requests for information as well as offers to provide information (except self-disclosure, coded below).

a. About mediation process and its alternatives. These are statements/questions which orient the couple to mediation. Any statement that a mediator makes (or questions spouses ask) about what mediation is, and how it differs from other alternatives, including the specifics of custody studies, and court proceedings, are coded under this information category.

b. Children. This includes information which is given about the children and their situation, including ages, living conditions and the like.

c. Other Spouse. Information about the other spouse, including demographic characteristics, education, working situation, present living accommodations, and the like is coded here. Note, however, that statements about spouses' "attitudes" and "behavior" are not coded here, but are reserved for attribution (below).

d. Self. This is coded the same as "c" (above) except the information refers to the speaker's situation (e.g., spouse or mediator).

e. Other. Any other information which is offered or requested and which cannot be coded above.

3. Summarize Other. This category includes reflective, summarizing, or translating remarks made by the speaker about a statement made by another person in the room. Note that to be coded "Summarize Other" the statement must be the speaker's attempt to restate (which could be a translation, restatement, or clarification) something that had been previously said by another person. Requests for restatement, clarification, etc. are also coded here.

4. Self Disclosure. This category includes all statements by speakers in which they talk about how they react to something that is being discussed, or how they view the world. Self disclosures can take five forms: agreeing with what has just been said, disagreeing, expressing feelings about what has just been said, offering an empathic reaction to someone else's situation, or offering a general view, opinion, or position statement.

a. Agree. This includes simple assent to something that has just been said (e.g., "yes," "okay") or direct agreement with a statement. For example, "I can accept that." "Yes, I agree."

b. Disagree. This category includes objections ("No, that's not

right!"), or any other statement which says the speaker takes a different point of view. Note that "Yes, but..." statements would be coded as disagreement.

c. Feeling. This includes any statement about the speaker's feelings, or requests for a person to disclose his/her feelings. Feelings include words like angry, sad, hurt, upset, unhappy, and the like.

d. Empathy. This is the only self disclosure category which will not usually have "I" as the stated or implied subject of the sentence (if the unit is a sentence, as opposed to a question). To be coded as empathy the speaker must make a statement indicating understanding, caring, concern, appreciation, etc., for how another person feels, experiences, understands the matter. Empathy goes a step beyond "Summarize Other" in that the speaker does not simply translate or restate what has been said, but says that he/she understands, cares, about the other person's situation.

e. Other. This category is reserved for all other self disclosures, and it will usually include opinions, positions, statements of how the speaker views the world and other "I" statements. Note that some units which seem to be "Other" type self disclosures are actually "attribution" or "proposed solutions" (described below). If in doubt, code these units first as attribution or proposed solution, before relying on the other self disclosure category (see Specificity Rule at end of this manual).

5. Attribution. This is the category which Gottman (1979) has called "mind reading", and has to do with a speaker making statements about how

another person believes/thinks, or typically behaves. For each of the categories below two kinds of attributions are coded: attribution of attitudes/thoughts/feelings, and attribution of behavior.

- a. Spouse--Attitudes. This is any statement about how a spouse thinks, feels, or some other "internal state" about a spouse, whether past or present.
- b. Spouse--Behavior. This includes any statement about a spouse's past or future behavior. Example: "He never picked up the kids on time when we had it set up that way before." Or, "I don't think you will follow through on that."
- c. Both Spouses--Attitudes. Example: "We've never really trusted one another." Note that while this is a self-disclosure on the part of the speaker, since he/she includes the spouse it is coded as an attribution for both spouses.
- d. Both Spouses--Behavior. Example: "We left for work on time when we lived in Seattle."
- e. Children--Attitudes. Example: "They have always preferred staying in one house, instead of having to move back and forth all the time."
- f. Children--Behavior. Example: "They both came running up to me and threw their arms around me as soon as I got there."
- g. Other--Attitudes. This includes any attribution about some other person, whether attorney, family member, or neighbor.
- h. Other--Behavior. Same as "e", only regarding behavior.

6. Proposed Solution. This category is to include any alternative offered by the speaker, whether mediator, spouse, or someone else in the room

which is a solution to a problem being discussed. The solution need not be realistic or reasonable from a point of view of the coder, though it must involve a behavior, or even a change in attitude which would be in the service of solving a problem. The statement can be something the speaker offers to do, or a suggestion about what another person might do.

- a. Solution re: husband. These are solutions which concern the husband's behavior, wants, needs, compromises and the like.
- b. Solutions re: wife. Same as 6a, except applied to wife.
- c. Solutions re: both husband and wife. Same as 6a, except applied to both husband and wife.
- d. Nonspecific Solution talk. Any discussion of solutions which cannot be coded as 6a, 6b, 6c, or 6e (below).
- e. Problem with a solution. This includes any obstacle, objection, or difficulty with a solution being discussed.

7. Agreement(s). This category is intended to capture any agreement which is identified by the speaker at any time during mediation. It is set up to include agreements which are reported to have occurred before mediation began, as well as those reached during the session, and statements about final settlement and future dispute resolution.

- a. Before mediation. If the couple begins mediation with an agreement on custody, though no agreement on visitation, their statement about custody agreement would be coded as 7a, as would all other agreements reached outside the immediate session.
- b. Here and now. Any statement which basically has to do with "we agree" (when stated by spouses) or "you both agree" when stated by the mediator is included here. Note that this is to be

distinguished from "Self Disclosure" agree statements (4a) which have to do with the speaker's personal agreement with something said, though say nothing about how the other party feels. This category also includes statements about commonalities between the spouses, e.g., common concerns, wishes, aspirations, goals. Example: "You both want what is best for the children."

- c. Final settlement. This category is reserved for statements about agreements in the final settlement. It is intended to capture summary statements made by any party at the end of mediation.
- d. Future disputes. Any statement or question about how disputes will be handled in the future, after mediation is over, is coded here.

General Rules for Ties:

The preceding categories have been written so that by closely following the coding instructions a unit will usually fit in one and only one category. If in doubt, the coder should follow the "most specific category" rule, as follows: In case of a tie, code as the most specific category. The statement, "You both want what is best for the children," is an attribution about spouses' attitudes, but, more specifically, it is an attribution about something on which they are thought to have agreement. It is, therefore, coded as a "here and now" agreement (7c).

Interruptions:

Sometimes a speaker will begin talking and then be interrupted by another person. Instead of treating these phrases as uncodeable (i.e., because they are not independent clauses or complete sentences), they are coded as

"interruptions" and given a content code of "8". The interrupter's speech unit is then coded according to the normal rules above for: speaker, target, statement/question, content and tone.

This coding procedure yields data on the percentages of speech units for each speaker which are interrupted by another person, and the percentages for each person devoted to interrupting behavior. Content analysis will also provide information on what the interrupter characteristically says when engaging in interrupting behavior.

In some cases the interruptee will regain the floor to complete his/her utterance (i.e., a complete sentence or independent clause). When this occurs, the completed unit is coded as a full unit according to the instructions given in the manual. For example, if a mediator begins by saying "What I mean is..." and is interrupted by a spouse, but then later continues to complete the sentence, then the content is coded based on how the sentence is completed.

Mediation Tone Codes

The purpose of the tone code is to capture non-content aspects of mediators' and spouses' speech during each session. For spouses we are ultimately interested in recording the extent to which their voice tone indicates they are cooperating with one another in the mediation process. For mediators, we are interested in recording comments which indicate that the mediator believes that the spouses are either cooperating and moving together or not cooperating and moving away from one another. For the most part, the tone code is based on voice cues as indicated in the list below. In addition to the voice cues which have been taken from Gottman (1979), we have added specific criteria for positive and negative voice tone for both

mediators and spouses.

The coding procedure calls the coder to first listen to the unit of speech, and then review the spouse tone list (or the mediator tone list, depending upon who is speaking), looking first in the positive and then in the negative column. If the unit is represented in either the positive or negative columns, then it is coded accordingly. If it does not appear in either column, it is coded as neutral.

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Chapter 9

✓ Process and Outcome in Divorce Mediation

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Introduction

The widespread use of divorce mediation techniques has not been matched with the development of mediation theory or studies of the communication strategies and tactics that comprise the mediation process. Indeed, mediation has long been regarded as an art rather than a science; empirical research has been treated as a futile exercise or hopelessly complex. The words of two different writers convey these attitudes rather starkly.

Mediation being an art rather than a science, is essentially interpersonal...the only mediation that a mediator can really understand is his own (Meyer, 1960:161).

The variables are so many that it would be an exercise in futility to attempt to describe either typical mediator behavior with respect to sequence, timing, or the use or non-use of the various functions theoretically available (Simkin, 1971:118).

This paper describes mediator and spousal behaviors during mediation through a systematic analysis of audio tapes of custody/visitation mediations conducted at several court-based programs in the United States. The goal is to describe the mediator and spousal behaviors during mediation, to identify how these behaviors are related to one another, and to test whether any of these behaviors or clusters of behaviors are related to settlements in mediation. It is a first step in the needed analysis of communicative tactics and strategies associated with successful mediation outcomes.

Roles and Behaviors in the Mediation Literature

To date, the literature on mediation has been largely either anecdotal, descriptive and prescriptive (Haman, Brief and Peggnetter, 1978) or the focus of social psychological and anthropological investigation aimed at distinguishing mediation from other third party interventions (Rubin, 1981; Witty, 1980; Gulliver, 1979; Druckman, 1977) and the litigation process

(Bohannon, 1970; Gold, 1981; Coogler, Weber and McKenry, 1979).

The more limited literature on mediation behaviors has largely consisted of attempts by practitioners to identify and categorize the steps involved in the process. For example, Kessler (1978) identifies a four phase approach to mediation involving introductory behaviors of establishing ground rules and rapport, followed by the steps of issue definition, issue processing and settlement implementation. Haynes (1978, 1982) argues that the process of divorce mediation includes: 1) referral; 2) intake and orientation; 3) budget development; 4) reconciliation of budgetary needs; 5) identification of assets; 6) identification of potential goals; 7) clarification of issues; 8) rank order of issues; 9) identification of options; 10) bargaining; 11) drafting the memorandum of understanding; and 12) consultation with attorneys.

Most recently, Moore (1983) has identified 12 tasks which he feels the mediator must generally perform in a negotiation. They are: 1) making initial contacts with parties, which includes establishing credibility, rapport, and informed commitment to the process; 2) assisting the parties in assessing how well their needs will be met by various modes of conflict resolution; 3) gathering relevant information about the people, dynamics, and substance of a dispute; 4) identifying strategies that will help adversaries move toward agreement; 5) offsetting the impacts of strong emotions, misperceptions, and poor communication; 6) assisting parties to distinguish and focus on genuine issues in dispute; 7) narrowing the issues and establishing the order in which issues will be discussed; 8) shifting parties from positional bargaining to a problem-solving approach; 9) identifying a variety of substantive, procedural and psychological settlement options; 10)

applying evaluation criteria to potential settlement options; 11) aiding parties to reach final substantive and procedural agreements; and 12) designing procedures to implement decisions, monitor adherence and renegotiate problems.

Each of the authors cited above suggests that specific mediator behaviors or techniques are associated with the stages they outline. A slightly different approach to the study of mediator and disputant behaviors is Wall's (1981) Mediation Negotiation Paradigm . Focusing on interactions of the actors, he generates a list of more than 100 mediation techniques which facilitate the relationships necessary for effective conflict resolution, i.e. the internegotiator relationships, the mediator-negotiator relationships, the negotiator-constituency relationships, and the mediator-constituency relationships.

Based on labor-management situations, Kochan and Jick (1978) developed a model of the mediation situation which considers the effects of four determinants of mediation outcomes: sources of impasse; situational factors; mediator strategies; and mediator characteristics. Using data generated in interviews with union and management negotiators and mediators, they maintain that successful outcomes track with certain dispute and disputant characteristics as well as with mediator qualities such as experience level and the use of aggressive tactics. Ultimately they conclude that characteristics of the dispute, not the mediators, are instrumental in explaining outcomes, although they also note that the qualities and strategies of the mediator have a great impact in cases where the parties are somewhat less sophisticated regarding the bargaining process.

Most recently, Thoennes and Pearson (1985) explore the relative

importance of disputants' perceptions of mediator behaviors, and characteristics of disputes and disputants to explain outcomes in cases involving contested child custody. Based upon interviews with clients, the authors find that the users' perceptions of mediator's skill is closely tied to satisfaction with and settlement in mediation. Most important is the user's perception of the mediator's ability to facilitate communication and provide parties with a better understanding of their own feelings as well as those of their children and their ex-spouse. There is less evidence of the importance of dispute and disputant characteristics to explain mediation outcomes although the intensity and duration of the dispute, and the quality of the relationship between ex-spouses are relevant.

All the above cited literature on the behaviors of mediators and disputants relies on self reports by mediators or disputants, or observations and qualitative analysis by another party. The units of behavior studied have not been uniform and frequently the investigator is forced to make assumptions about the intent underlying observable behaviors. This paper represents a first attempt to quantitatively explore the verbal behavior of mediators and disputants using audio tapes generated in actual mediation sessions and to determine if and how these behaviors are related to the production of settlements in mediation.

Sample of Mediation Cases

Audio tapes of a sample of mediation cases were generated at three courts that offer divorce mediation services to litigants with custody or visitation disputes: the Los Angeles Conciliation Court, the Family Division of the Connecticut Superior Court (Hartford), and the Domestic Relations Division of Hennepin County (Minneapolis). In other papers we have

described the format of the mediation service at each court and the initial reactions of users (Pearson & Thoennes, 1984) as well as the more lasting effects of the mediation intervention (Pearson & Thoennes, 1984b).

Our sample of taped mediation sessions was made during May through July, 1982. Mediators at each court were asked to tape all mediation cases in their entirety. Confidentiality and anonymity was assured to both clients and mediators. Of the pool of 15 mediators in California, 17 in Minneapolis, and 37 in Connecticut, 36 (52%) ultimately took part in the taping. Of those participating, ten mediators were from California, 4 from Minneapolis and 22 from Connecticut. A comparison of mediators included in the study with general characteristics of the mediators at each site yielded no evidence of significant differences on age, sex, and experience levels.

In the data collection process, tapes were generated for 149 mediation cases. Fifty-one cases were subsequently found to be inaudible or otherwise unusable for coding purposes, 6 were used only to pretest the coding scheme and establish interrater reliabilities and 12 were completed too late to be included in this analysis. The final sample of taped mediation sessions that were coded and analyzed included 80 cases distributed across the sites as follows: 2 from Minneapolis; 23 from Connecticut and 55 from California where the annual volume of cases is greatest.

Of the cases taped and coded for analysis, 51 (64%) achieved some level of success through the mediation process. This success rate mirrors the settlement rate (approximately 60 percent) that was found in a survey of users at these three courts conducted during the same time period (Pearson and Thoennes, 1984a). Operationally, success in mediation was defined as reaching agreement on either child custody or visitation issues (or both).

Twenty-two couples did not reach a mediated agreement on either custody or visitation issues. The majority of these (18) chose litigation to resolve their differences while four chose or were ordered into a custody study. Because a custody study is often the first step in the litigation process, these two subgroups were combined and represent the condition for subsequent analyses which is dubbed "no settlement". Cases which resulted in a decision to seek various additional forms of counseling as well as those for which a clear determination of success and failure could not be made (N = 7) were excluded from the study.

The mediation sessions were of varying length, ranging from 18 minutes to over three hours (the longest was 196 minutes). The mean session length was 93 minutes or about 1 1/2 hours. Table 1 shows the length of the sessions cross-tabulated by successful versus unsuccessful outcomes. There was no significant difference between the means of the two success groups on this variable.

Insert Table 1 about here

Coding System

As tapes were collected from the three mediation sites, they were assigned identification numbers, and coded by two graduate assistants who were unaware of the settlement status of each case. The coding process and checks on its reliability are described in detail elsewhere (Slaikeu, et al., 1984). The Mediation Process Analysis (MPA) builds on Gottman's (1979) Couples Communication System, with some categories added or revised after a review of the mediation literature and a review of a pilot sample of taped

mediations. The MPA requires that at 2 minute intervals eight units of speech, defined as an independent clause, be coded along five different dimensions. These dimensions are: who is speaking (mediator, husband, wife); target of the message (mediator, husband, wife); whether this unit is a statement or a question; the tone of the message (positive, negative, neutral); and the content of the statement.

The content codes consist of 32 specific behaviors which are believed to capture the full range of statements made during mediation sessions (see Figure 1). To aid coders in identifying the appropriate category, the

Insert Figure 1 about here

behaviors were grouped under seven major headings which were developed a priori. These headings included "Process" (identifying the agenda, focusing the discussion and comments regarding the negotiating process); "Information" (requests for and offers of fact); "Summarize Other" (paraphrasing another speaker); "Self-disclosure" (requests for or offers of feelings, ideas and opinions); "Attribution" (statements about what another person feels or thinks and assumptions about behaviors and motives); "Proposed Solutions" (any proffered alternatives); and "Agreements" (discussions of the final settlement).

Description of Mediation Behaviors

The first analysis of the coded audio tapes involves calculations comparing mediator and spouse verbal behavior on several dimensions across the entire sample of taped sessions. As Table 2 indicates, speaker time is fairly evenly divided among the parties in a mediation session. About 40

Insert Table 2 about here.

percent of coded units originated with the mediator while husbands and wives each made about 30 percent of the statements. However, while the mediator typically addressed both parties, husbands and wives generally directed their remarks to the mediator.

Mediators at the court sites under investigation seem to be aware of this pattern. Observations of sessions and interviews with mediators reveal that they often request that one party speak directly to the other, rather than talking through the mediator. Another mediator voiced the hope that by speaking rationally and directly to both parties about the issues as well as the emotions, she might act as a role model and teach couples a few communication skills.

Mediators also appear to be responsible for most of the questioning in a mediation session. About a quarter of their speaking time is devoted to questions, while husbands and wives spend 91 and 92 percent of their time making declarative statements. Finally, 80 percent of the mediators' statements are offered in neutral or positive voice tones while, the bulk of the statements made by husbands (55%) and wives (60%) are negative in tone. Future research aimed at determining the causes and consequences of negative remarks by mediators might well prove that it serves constructive as well as destructive purposes. In interviews, some mediators note that they sometimes use confrontation or anger when parties need to be shocked out of old habits or unproductive interactions. However, as one mediator honestly observed, "confrontation can be risky. I've almost 'lost it' at times when I reacted

reacted to a client too personally". Another mediator observed that the advantage of mediating in a team is that it allows the team to use both negative and positive approaches while one mediator "plays the tough guy role", the partner is supportive and patient.

Total interruptions during which speakers are not allowed to finish their thoughts are relatively rare: fewer than 3 percent of the coded utterances fall into this category. More typically, a speaker's statements are interrupted by another's comments but are completed as soon as the interruption ends. Further, husbands and wives are equally likely to be interrupted, while this is somewhat less true of mediators.

A comparison of percentages of each speaker's statements that are devoted to the 32 behaviors coded reveals several patterns. First, almost 13 percent of the statements made by mediators serve the purpose of informing spouses about what mediation is and is not, and another 13 percent of the statements are devoted to "process" communications--establishing the agenda, returning the conversation to relevant topics, suggesting ways for the parties to negotiate and positively or negatively reinforcing the negotiating behavior of one or both spouses. Looked at from a different angle, slightly more than a quarter of the mediator's time, is devoted to these procedural issues while procedural issues consume less than 5 percent of the spouses' speaking time. Mediators are also more likely to spend time stopping or correcting negative negotiating behavior than to devote time to praising cooperative attempts. These patterns underscore the active role of the mediator in the process and distinguish it from less directive, therapy interventions.

Requests for information about oneself, children, spouse or other parties, and the provision of such information is slightly more common (about

24%) among spouses than mediators (13%). Compared to their husbands, wives offer more statements of fact regarding the children, a finding which may be explained by the greater likelihood that the children are residing with the mother at the time of the mediation.

Mediators, on the other hand, are more likely to offer statements summarizing what another party has said. This indicates that mediators may facilitate communication by paraphrasing the remarks of disputants and clarifying the issues in dispute.

In contrast to the neutral, facilitative remarks of the mediators, husbands and wives are more likely to offer statements revealing their opinions or attitudes. Indeed, slightly over 35 percent of the statements made by both husbands and wives were such self-disclosures. Mediators also differ from spouses in the proportion of empathetic statements they make. This suggests that mediators use such statements as a means of establishing rapport and encouraging the spouses to share their feelings. Indeed, interviews with mediators reveal that they recognize the importance of their ability to empathize with the parties, although few mediators phrase their role in this manner. One mediator notes at the outset of each session that he gives himself the task of finding something about each party that he likes. Another mediator says that she routinely reminds herself that while she doesn't "have to like the parties, have all the answers or solve everything, she does have to be kind."

About 20 percent of the statements made by both husbands and wives involve "mindreading" or making attributions about the attitudes, motives and behaviors of others--typically the other spouse. Mediators engage in only about half as many of these attribution statements.

Finally, mediators are responsible for making most of the proposed solutions. This conforms to previous research findings which stress the active role of mediators in generating options and proposing solutions (VanderKooi & Pearson, 1983). Typically proposals made by mediators include suggestions for action which involve both husbands and wives. In other words, mediators are likely to balance their suggestions by specifying how both parties can be involved in a solution to a dispute. By contrast, husbands' proposals usually specify what husbands can do and wives' proposals focus on what wives might do.

Overall, it appears that mediators, as opposed to spouses, do play a key role as a neutral. They offer suggestions that involve both spouses and address both parties in neutral or encouraging tones. However, mediators are far from passive actors. They engage in fact finding and are responsible for generating the bulk of the proposed solutions. This raises some questions about ownership of the mediated solution since one of the tenets of mediation is that the disputants generate solutions to their problems. On the other hand, it is clear that mediators work to achieve joint outcomes while spouses tend to operate as individual advocates. Spouses clearly propose solutions which relate to their own behaviors, offer their own attitudes and opinions, request little information from others and address their remarks to the neutral party rather than to one another. The mediator focuses on outcomes which transcend an individual perspective.

Factor Analysis of Behavior Categories

The seven headings under which the 32 individual behaviors were grouped proved to be effective in helping coders to categorize statements. However,

given that these categories were developed a priori, an empirical examination of how the specific behaviors were related was needed for subsequent analysis of mediation outcomes and for a more complete understanding what takes place during mediations. The data generated in the course of coding the 80 usable tapes were factor analyzed; spouses and mediators were analyzed separately. The factor analysis was based on the frequency of occurrence of each of the 32 behaviors noted in the content codes. The analysis yielded 8 mediator and 7 spouse behavior factors. As Tables 3 and 4 indicate, each of these factors is made up of two to five of the behaviors.

Insert Table 3 about here

The descriptive labels given to each of the factors represent an attempt to summarize the main theme emerging from each grouping of behaviors. The headings and component behaviors differ for spouses and mediators. They also differ from the headings and content items generated in an a priori fashion based on themes described in the mediation literature. Factor headings and component behaviors for mediator behavior factors are presented in Table 3 and summarized as follows:

Fact Finding consists of statements requesting information about each of the spouses, or about other matters relevant to mediation (e.g., property), and includes "playing back" the information (Summarize Other) to check its accuracy.

Coaching re: Behavior consists of mediator behaviors which suggest how to negotiate, as well as correcting negotiating behavior. It also includes descriptive information about the mediation process and its rules.

The Child Advocacy factor consists of attribution statements about the behaviors and attitudes or feelings of children.

The Attribution-Attitude factor includes an array of mediator

comments which have to do with what one spouse (husband or wife), both spouses, or some other party thinks or feels.

The Attribution-Behavior factor includes mediator attributions about either one or both spouses' past, present or future behavior.

Directing the Process Toward Solution includes a variety of relatively directive behaviors by the mediator. Specifically it includes statements regarding what items will be mediated and comments which move the discussion back to these items. It also includes suggestions regarding possible solutions directed at either one or both parties. In many ways this factor appears to relate closely to Fisher and Ury's (1981) "inventing options" during negotiation sessions, and includes solutions oriented toward husbands, wives, or both parties.

The Reacting to Solutions factor consists of statements agreeing with solutions on the table, and in identifying problems with solutions.

Consolidating Agreement includes statements by mediators regarding points of agreement in the discussion; items to be included in the final agreement; and positive reinforcement offered by the mediator to one or both spouses for cooperative, constructive bargaining.

The spouse factors, also comprised of items from the list of 32 mediation behaviors, include the following:

- Insert Table 4 about here

Mediation Process: Now and Later deals primarily with statements/questions about mediation as a way to resolve disputes, both now (discussing information about what mediation involves), and in the future (what spouses will do should they have a disagreement in the months and years after the settlement has been reached).

The Attributing-Disagreeing heading involves four items, three of which involve attributions of what the other spouse thinks, attributions or perceptions of the other spouse's behavior, attributions regarding what a third party thinks/feels, and one behavior which consists of a straightforward disagreement with another's statement.

Directing the Negotiation Process includes three behaviors: one correcting or criticizing a negotiating behavior, another dealing with the items to be mediated during the session, and a third consisting of suggestions on how to negotiate. Together these behaviors suggest that the spouse is taking an active role

in directing how the negotiation process will proceed.

Cooperative Talk includes five behaviors which are involved in the cooperative discussion of issues by spouses. These include rewarding one another for contributions to the process, providing information about oneself or about another party, making summarizing or reflective statements about what another person has said, and agreeing with what another party has said.

Children Talk includes three behaviors that involve attribution about the behavior, or attitudes/feelings of children, and offers of or requests for information about children.

The Self Disclosure: Me/Us factor includes two sets of behaviors: self disclosure of one's own feelings and attributions made by one spouse regarding what the couple thinks or feels.

Solution Talk involves four different kinds of solutions: those oriented toward wives, husbands, both spouses, or toward particular problems.

The results of the factor analysis suggest that there are differences between mediators' and spouses' verbal behaviors, although there are similarities as well. Overall, the analysis of mediator statements yields more task oriented and directive factors. The analysis of spousal statements produces more factors that deal with the expression of opinions and feelings. This is consistent with patterns noted in the preceding description of the sessions and the frequencies of individual mediator and spouse behaviors.

Insert Table 5 about here.

Patterns In Successful Versus Unsuccessful Mediations

As Table 5 indicates, analysis of variance reveals several differences in the behavior of mediators and spouses in cases that do and do not settle.

One difference is obvious: In cases that settle, mediators spend significantly more time discussing the terms to include in a final settlement. However, in successful cases mediators also spend more time discussing possible solutions in general terms as opposed to the more specific behavioral prescriptions required of one or both spouses. In successful cases, mediators also spend less time explaining the mediation process to clients and comparing and contrasting it to other settlement forums. They also spend less time making or requesting disclosures of feelings, and make fewer attributions about the attitudes of parties other than spouses or children.

Spousal behaviors that differentiate cases that settle from those that do not include the following. In unsuccessful cases spouses offer more statements of fact about their spouses or about themselves as a couple and do more attributing about past, present or future behaviors and the motives behind them. In successful cases, on the other hand, there are more empathetic statements between spouses, more statements of simple assent and more offers of proposals.

Insert Table 6 about here

As Table 6 indicates, none of the composite measures of spousal behaviors derived from the factor analysis distinguishes between cases that settle and those that do not. However, among mediator behaviors, three of the eight composite measures derived from the factor analysis show significant differences. In successful cases, mediators engage in more behaviors to consolidate agreements, spend less time coaching spouses on how

to negotiate and make fewer attributions about what others think or how they feel.

Interpreting these differences is difficult; cause and effect relationships cannot be reliably inferred. One plausible interpretation is that unsuccessful cases involve spouses with poor communication skills. It is possible that parties who communicate inefficiently, perhaps angrily, require more help in negotiating. If the parties present themselves in a verbal fashion very poorly, mediators may begin assuming or attributing behaviors. Given the limited time allotted for mediation, the fact that a disproportionate amount of time is spent on basic communication skills may mean that the session cannot progress to real problem solving and agreement making.

This scenario receives some tentative support from the differences in the individual behaviors noted for successful versus unsuccessful spouses. That is, in cases which do not result in settlement, spouses spend more time attributing ideas, feelings and behaviors to others, and offering facts about the other party or the couple rather than information that pertains to themselves. Non-settlement spouses also offer fewer statements indicating an ability to empathize with the other party, and generally offer fewer statements of agreement or assent, and fewer possible solutions. Thus, their communication behavior seems decidedly less than direct and indicates little ability to work cooperatively.

These patterns are also congruent with results obtained in a survey of clients at these same three court based programs at approximately the same time period (Thoennes & Pearson, 1985). The best predictors of success in mediation were: the clients' perceptions of the mediator's ability to

facilitate communication by bringing out relevant issues, allowing each side to be heard, and identifying solution options; and the clients' perceptions of the mediator's ability to aid parties in better understanding their own feelings as well as the feelings of the spouse and children (i.e. promote empathy). In addition, successful cases were those where spouses evidenced some prior ability to cooperate and where disputes were newer and less intense.

Discussion

A theme supported by the present investigation is that it is important for spouses to not only understand the other parties' point of view, but to have some appreciation for its reasonableness, or, according to the definition in our coding manual, to have some concern or caring about the other individual's situation and point of view. This element of caring or concern was the primary difference between simply reflective statements (summarizing other) and empathy statements in our coding system.

The implication of this finding is that spouses who bring a capacity to empathize to the mediation session will be more successful at the process. If couples lack this capacity, the job of the mediator is to do whatever he/she can to foster understanding and empathy. The bilateral focus technique of Rapoport (1964) is one such technique. This is actually a step beyond the active listening taught by Gordon (1970), and suggested by Fisher and Ury (1981). Since it is to be expected that many couples may well begin divorce mediation with a preoccupation with their own positions--a preoccupation imbedded in a range of emotional hurts, anger, or bitterness--this means that the mediator will need to take a proactive, even aggressive, stance in fostering understanding of the opposing parties' situation. For

example, instead of simply playing back or reflecting spouse statements to see that they are being understood, the mediator might look for ways to draw each spouse into the other spouse's word, so to speak, in order to understand the dilemmas faced by each spouse, all with a view to maximizing empathy.

Future Research

Future research on communication strategies in mediation should go beyond the sampling and analysis limitations contained in this effort. As to sampling, it should be noted that this study relies on a sample of tapes for which the chief criterion for inclusion is simply that the mediation session be completely taped and audible. This means that mediators at the three sites whose taping behavior was better than their colleagues stood a greater chance of being included in the study. Since taping of sessions was a new procedure for all mediators, it was necessary to motivate mediators to tape completely by stressing the fact that the research was important, that the findings would be beneficial to everyone, and that there was no attempt to evaluate the performance of any particular mediator. Some mediators responded more cooperatively than others to this proposal. It is probable that mediators who were more defensive about their work were reluctant to tape completely (i.e., make sure that the tape recorder was set up and ready to go, and turned on at the beginning of the session, and placed in the room in such a way that the verbal comments of all parties could be recorded). It is therefore possible that the present study draws not only the more cooperative, but also the more confident, and possibly more capable mediators, even though the mediators included in the sample were not significantly more or less experienced than those who were not included. In future research, a better approach might be to sample cases conducted by

mediators who have a strong record of success and compare them with a sample of cases by mediators who have a low record of success (matched on other variables such as age, sex, experience). It is possible that such a procedure might not only yield stronger, distinct patterns associated with successful versus unsuccessful outcomes, but also increase the strength of the differences found in the present study.

As to the limitations of the present analysis, we note the absence of any stochastic techniques which are sensitive to the sequencing of behaviors in interactions. Many writers have noted that there are distinct phases in the mediation process. Earlier mediator and spouse behaviors may give rise to distinct types of subsequent disputant behaviors. Certain clusters of behavior may occur in early, middle and late phases of the process and the phases of mediator interaction may differ in successful versus unsuccessful cases. To the extent that phase patterns are dominant and that they differ in successful and unsuccessful cases, analysis techniques that are sensitive to these patterns may increase the strength of the differences found in the audio tapes assembled for this study.

To some extent, these limitations are being addressed in several research efforts currently in progress. One such effort is a re-analysis of the sample of audio tapes to determine the language patterns used by mediators to create positive momentum in support of a proposition that produces a solution (Donahue, et al, 1983). According to this approach, the mediator decides on a viable solution and uses language that influences disputants to adopt this perception in order to achieve resolution of the conflict. Twenty of the audiotapes from the three courts are currently being reanalyzed to detect subtle linguistic patterns that are indicative of

valence development.

A second analysis (Jones, 1984) is being conducted with 18 successful and 18 unsuccessful mediation interactions utilizing a slightly modified version of the coding scheme used in the present analysis. In addition to coding all verbal statements made by all participants rather than a sample of utterances, Jones intends to analyze the data using several techniques sensitive to changes in patterns of interaction that occur over time. This includes log linear analyses to determine the effects of mediator and disputant behaviors on mediation outcomes, lag sequential analyses to determine the effects of specific mediation and disputant behaviors on subsequent disputant behaviors and phase analyses which permits the analysis of clusters of behaviors and their comparison with phase structures suggested in the literature. Hopefully, these studies will make the use of strategy and tactics in mediation less dependent upon intuition and more rooted in empirical evidence.

Table 1

Frequency of Length of Session by Mediation Outcome

	<u>No Settlement</u>	<u>Settlement</u>
Less than 1 hour	(8) 36%	(11) 21%
1-1/2 hour	(4) 18%	(10) 20%
1 1/2-2 hours	(6) 27%	(18) 35%
over 2 hours	(4) 18%	(12) 24%
TOTAL	22	51

Table 2

Percentage of Speaker Time Devoted to:

	<u>Speaker</u>		
	Mediator	Husband	Wife
Comments by these speakers:	39%	30%	31%
Comments in 'negative' tone:	19%	55%	60%
Questions	26%	7%	7%
Statements/questions about the mediation process:	13%	3%	2%
Statements/questions of information:	13%	23%	26%
Statements summarizing others:	8%	3%	2%
Statements/self-disclosures:	26%	37%	36%
Statements/attribution statements:	7%	18%	21%
Statements/proposed solutions:	15%	10%	10%
Statements/agreement:	4%	2%	2%

Table 3

Mediator Factors - Factor Loadings

<u>FACTOR</u>	<u>FACTOR ITEM</u>	<u>LOADING</u>
Fact Finding	Information: Self	.69
	Information: Other	.60
	Information: Spouses	.59
	Summarize Other	.57
Coaching re: Behavior	Process: Suggestions	.78
	Process: Punishment	.49
	Information: Mediation Process	.40
Child Advocacy	Attribution: Child Attitudes	.70
	Attribution: Children Behavior	.67
Attribution - Attitudes	Attribution: Spouses/Attitudes	.66
	Attribution: Other/Attitudes	.59
	Attribution: Spouse/Attitudes	.38
Attribution - Behavior	Attribution: Spouse/Behavior	.82
	Attribution: Spouses/Behavior	.48
Directing Process Towards Solution	Proposed solution: Both	.74
	Proposed solution: Wife	.65
	Process: Agenda	.65
	Proposed solution: Husband	.51
Reacting to Solutions	Proposed Solution: Problem	.84
	Self disclosure: Agree	.58
Consolidating Agreement	Agreement: Final Settlement	.73
	Process: Reward	.61
	Agreement: Here & Now	.59

Table 4

Spouse Factors - Factor Loadings

<u>FACTOR</u>	<u>FACTOR ITEM</u>	<u>LOADING</u>
Mediation Process: Now & Later	Agreement: Future Disputes	.83
	Information: Mediation Process	.47
Attributing - Disagreeing	Attribution: Other/Attitudes	.60
	Self Disclosure: Disagree	.54
	Attribution: Spouse/Attitudes	.54
	Attribution: Spouse/Behavior	.36
Directing the Negotiation Process	Process: Punishment	.82
	Process: Agenda	.45
	Process: Suggestions	.37
Self Disclosure: Me/Us	Self Disclosure: Feeling	.74
	Attribution: Spouses/Attitudes	.49
Cooperative Talk	Information: Other	.77
	Self Disclosure: Agree	.71
	Information: Self	.62
	Process: Reward	.59
	Summarize Other	.53
Children Talk	Attribution: Children/Attitude	.89
	Attribution: Children/Behavior	.89
	Information: Children	.54
Solution Talk	Proposed Solution: Both Spouses	.76
	Proposed Solution: Wife	.70
	Proposed Solution: Problem	.50
	Proposed Solution: Husband	.46

Table 5

ANOVA Results - Content Items

MEDIATOR ITEMS

<u>Variable</u>	<u>Failure</u>	<u>Success</u>	<u>F</u>	<u>p</u>
Information/Mediation Process	16.0	11.3	4.7	.034
Self Disclosure/Feeling	3.1	1.8	4.7	.033
Attribution/Other Attitudes	1.2	0.3	15.9	.0002
Proposed Solution/Non Specific	2.1	4.0	4.6	.035
Agreement/Final Settlement	0.5	2.6	6.0	.017

SPOUSE ITEMS

<u>Variable</u>	<u>Failure</u>	<u>Success</u>	<u>F</u>	<u>p</u>
Information/Spouse/Both	6.2	3.7	11.4	.001
Self Disclosure/Agree	7.2	11.2	8.0	.006
Self Disclosure/Empathy	0.0	0.6	8.6	.005
Attribution/Spouse Behavior	9.7	6.7	4.6	.036
Proposed Solution/Husband & Wife	0.5	1.4	4.5	.038
Proposed Solution/Non Specific	0.5	1.4	6.6	.012
Interruption	1.3	2.7	6.5	.013

Table 6

ANOVA Results on Mediator and Spouse Factors

MEDIATOR FACTORS

<u>Variable</u>	<u>Failure</u>	<u>Success</u>	<u>F</u>	<u>p</u>
* Consolidating Agreement	1.2	4.7	4.8	.031
Directing Process Towards Solution	11.4	13.11	0.4	.523
Fact Finding	15.8	14.3	0.4	.551
Child Advocacy	1.7	1.4	0.3	.597
* Coaching re: Behavior	17.7	10.8	8.3	.005
* Attribution - Attitudes	3.1	1.8	4.0	.048
Reacting to Solutions	7.5	9.4	0.9	.353
Attribution - Behavior	1.9	1.4	1.1	.302

SPOUSE FACTORS

<u>Variable</u>	<u>Failure</u>	<u>Success</u>	<u>F</u>	<u>p</u>
Cooperative Talk	35.7	39.2	0.4	.528
Children Talk	12.8	16.1	0.8	.360
Solution Talk	6.7	9.8	2.2	.145
Self Disclosure: Me/Us	11.3	10.8	0.0	.826
Directing the Negotiation Process	2.8	3.2	0.2	.694
Mediation Process: Now & Later	0.9	1.0	0.2	.657
Attributing/Disagreeing	15.8	15.4	0.0	.884

* - Significant

Figure 1

- I. Process
 - A. Agenda
 - B. Suggestions Regarding Negotiating Behavior
 - C. Correction of Negotiation Behavior
 - D. Praise of Negotiating Behavior
- II. Information
 - A. About Mediation and its Alternatives
 - B. About Children
 - C. About Other Spouse
 - D. About Self
 - E. About Other Party
- III. Summarize Other
- IV. Self-Disclosure
 - A. Agree
 - B. Disagree
 - C. Feelings
 - D. Empathy
 - E. Other Self-disclosure
- V. Attribution
 - A. Regarding Spouse's Attitudes
 - B. Regarding Spouse's Behavior
 - C. Regarding Both Spouses' Attitudes
 - D. Regarding Both Spouses' Behavior
 - E. Regarding Children's Attitudes
 - F. Regarding Children's Behaviors
 - G. Regarding Attitudes of Others
 - H. Regarding Behaviors of Others
- VI. Proposed Solution
 - A. Regarding Husband
 - B. Regarding Wife
 - C. Regarding Both Spouses
 - D. Non-specific
 - E. Problem with a Solution
- VII. Agreement
 - A. Before Mediation
 - B. "Here and Now"
 - C. Final Settlement
 - D. Future Dispute

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Chapter 10

✓ Predicting Outcomes in Mediation:
The Influence of People and Process

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This paper explores the relative importance of dispute characteristics versus perceptions of mediator skill and expertise in explaining successful resolutions in mediation. The disputants who participated in our longitudinal survey were mediating custody or visitation problems at one of three court-based mediation services: the Los Angeles Conciliation Court, Minnesota's Hennepin County Superior Court, the Family Division of the Connecticut Superior Court. Factor analysis was used to create composite indices from a variety of pre-existing characteristics suggested in the literature as instrumental in the outcome of mediation. Factor analysis was also employed to create indices of mediator effectiveness as perceived by clients. Discriminant analysis using these indices indicates that our ability to predict the outcome of mediation is limited. However, the three indices of pre-existing characteristics that contribute most to predicting outcomes are: the duration of the dispute, its intensity and the quality of the relationship with the ex-spouse. The two indices of mediator effectiveness that most improve predictions are the mediator's ability to promote communication and his/her ability to provide disputants with insights into the attitudes and behaviors of all the parties involved. Further, the indices of mediator behaviors are as effective as the indices of pre-existing characteristics in predicting outcomes.

In recent years, there has been a great deal of theoretical literature stressing the suitability of mediation for divorcing couples (Sander, 1976; Fuller, 1971) and a dramatic increase in the use of mediation services to resolve divorce disputes, especially those dealing with custody and visitation (Pearson, et al., 1982). Despite these trends, there is a dearth of empirical information on the factors associated with successful custody mediations. The conceptual and observational literature developed to date generally focus on one of two sets of factors. One body of literature deals with mediator styles or roles (Simkin, 1971; Kressel, 1977; Kochan and Jick, 1978) or the principal stages or events of the mediation process (Black and Joffe, 1978; Coogler, 1978; Milne, 1978; Haynes, 1981). These studies share an underlying assumption that mediator behaviors have a significant impact on outcomes and that mediators may significantly contribute toward successful outcomes through training, experience and heightened awareness of the influence of their activities. The second set of literature suggests that the outcome of mediation is largely dictated by pre-existing characteristics of the dispute and the disputants. These studies attempt to identify which characteristics of cases either encourage or impede a successful mediation. (Kochan and Jick, 1978; Kressel, 1980).

This paper is an initial attempt to gauge the relative importance for explaining mediation outcomes of mediator skills and behaviors versus the characteristics of disputes and disputants. The mediations we consider were aimed at resolving the issues of contested child custody and visitation following a parental divorce.

Client and Case Factors Influencing the Outcome of Mediation

In the past decade, judges, court administrators, social workers, and others who serve the divorcing population have begun to question the suitability of the adversarial process for resolving contested divorce issues, especially when children are involved (Buttenwiser, et al., 1966; Irving and Irving, 1974; Milne, 1978). Unlike traditional court proceedings, mediation promises to return the responsibility for children's well-being to the parents, while encouraging parents to communicate and compromise (Cavanaugh and Rhode, 1976; Mnookin and Kornhauser, 1979; Weiss and Collada, 1977). Yet, despite its growing popularity, there have been numerous claims that particular types of individuals are ill-suited to the process and require more traditional fact-finding procedures such as custody studies or judicial hearings. For example, the custody mediation programs of the Connecticut Superior Court and the Los Angeles Conciliation Court have outlined as their formal policy that certain cases are inappropriate for mediation including those involving child abuse and neglect, psychotic and anti-social behavior or multiple social agency contact. Even when both parents are perceived as 'capable' they may still be viewed as poor mediation candidates. Some mediators speak of individuals who "need to go to court," (Little, 1983).

According to some researchers, suitability for mediation is tied to the degree of ambivalence about the divorce, the level of anger and the couple's ability to communicate (Kressel, et al., 1980) Their research indicates that mediation is least successful when couples communicate frequently, but the tone is extremely angry and there is great ambivalence about the divorce ("enmeshed"); and when couples are also ambivalent about the divorce but

avoid discussing the issue and rarely communicate ("autistic").

Other researchers have discovered that the intensity of the dispute influences the outcome of mediation, although the nature of this influence seems to vary. Thus, in their study of labor disputes, Kochan and Jick (1978) conclude that intensity is negatively related to successful outcomes in mediation. On the other hand, a study of community dispute mediation conducted by Felstiner and Williams (1980) finds that while more intense disputes are more likely to result in a mediated agreement, such agreements are less likely to be kept.

Still another predictor of outcomes is the relative attractiveness of the alternatives to settling in mediation. If the failure to agree in mediation is perceived to lead to dire consequences, couples' should logically produce agreements. Felstiner and Williams (1980) recognize this possibility in explaining their finding that serious disputes were more likely to settle: compared to simple disputes, serious problems that proceed to court are likely to be dealt with more severely. In previous research, we have found that the assessment of a favorable settlement in court negatively influences individuals' willingness to use mediation (Pearson, et al., 1982). If this is viewed as an indicator of an individual's commitment to stipulate, it should help to predict the outcome once in mediation as well.

Mediator Factors Influencing the Outcome of Mediation

Despite the attention to client characteristics, there is a clear conviction that the best-suited cases will not succeed if the mediator conducts the session(s) poorly. Although many practitioners have difficulty describing the mediation approach which is most closely associated with successful outcomes and view mediation as an art form rather than a science

(Meyer, 1960), a number of researchers have described the activities and behaviors of mediators in a systematic fashion. For example, some focus on the major roles played by mediators including those ranging from "passive" to "leader" (Gulliver, 1979); others identify major behavior categories such as reflexive, non-directive and directive (Kressel, 1977); and contingent, non-contingent and aggressive (Kochan and Jick, 1978).

A slightly different approach to understanding the components of a successful mediation has been adopted by those who systematically describe the stages or tasks of mediation. This approach divides the mediation process into units of time during which the mediator concentrates on accomplishing specific goals. The stages are sometimes viewed as progressive or linear, each building on the previous stages; or stages may be "cyclical" as the disputants return to activities or stages several times as mediation progresses. The number of stages identified by each author varies greatly. For example, Black and Joffe (1978) refer to engagement, assessment and direction, negotiation and education. Kessler (1978) identifies four major stages: setting the stage, defining the issues, processing the issues, resolving the issues. Moore (1983) on the other hand, identifies twelve stages through which the mediator must move: entering the dispute, searching for an approach and arena, collecting and analyzing data, designing an intervention plan, conciliation, beginning negotiations, defining the issues, identifying interests, generating alternatives, assessing options, final bargaining, and formalizing the settlement.

Regardless of the absolute number of steps delineated, all these authors posit that in order for mediation to be successful, mediators must insure that certain intermediary goals or tasks are accomplished. Further, in the

stage frameworks developed by different theorists, many of the same intermediary goals reoccur. Some of the most frequently cited (Bienfeld, 1983; Moore, 1983; Haynes, 1981; Black and Joffee, 1978 and Kessler, 1978) tasks include:

- providing information about the purpose of mediation and ground rules of the process;
- gaining a commitment to mediation from the parties;
- establishing rapport with the disputants;
- maintaining control of the pace such that clients feel neither unduly rushed nor held back;

- identifying the full range of problems;
- clarifying issues for the parties;
- focusing on the relevant issues;
- promoting open, honest communication;
- leaving each party with a sense of having been listened to and understood;
- balancing the power between the parties;
- reducing the tension and anger levels;
- identifying resources for a solution;
- ensuring that parties feel responsible for and ready to accept the settlement.

The Model

The present study attempts to predict the outcome of the process by utilizing information gathered from mediation clients regarding the pre-existing characteristics of the disputants and the dispute, and the degree to which users perceive the necessary tasks of mediation to be accomplished. The outcome measure of primary concern is the production of an agreement regarding custody and visitation. In addition, we consider the respondents' satisfaction with the process as measured by their willingness to recommend the process to others.

This is not the first attempt at a multivariate analysis taking into account both pre-existing and process factors which may be influential in the outcome of mediation. Kochan and Jick (1978) considered the influence of

four sets of variables on the outcome of labor mediation: 1) the sources of impasse (intensity of the dispute and nature of the issue in dispute); 2) situational factors (pressures to settle); 3) mediator strategies (use of "non-contingent", "contingent" and "aggressive" strategies); and 4) mediator characteristics (experience and background, parties' perceptions of the quality of mediation). Thus, while not identical, our orientations are similar and allow us to compare the results of pre-existing and process factors on the outcome of two very different types of mediation: labor mediations involving experienced union and management negotiators and mediators, and divorce mediations involving parties generally inexperienced with the negotiation process.

Data Collection

The data employed in this study were collected from the clients of three court-based programs which offer mediation services to litigants with custody and/or visitation disputes. The programs represent three of the largest and oldest court-based services in existence: the Hennepin County Superior Court (Minneapolis), the Family Division of the Connecticut Superior Courts (focusing on those offices with the highest case volume--New London, Hartford and Waterbury), and the Central Office of the Los Angeles Conciliation Court.

In Los Angeles, and throughout California, mediation is mandated in all cases of contested child custody and visitation. In Minneapolis and Connecticut, mediation may be requested by the parties or their attorneys, or may be ordered by a judge or referee. Typically, cases are reassigned to a custody study if the parties fail to reach agreement in mediation. An earlier article (Pearson & Thoennes, 1984) contains a more complete discussion of each mediation program as well as a description of the users

sampled at each court. —

The initial questionnaire, which collected data on pre-existing characteristics was administered immediately prior to the start of mediation. A second questionnaire, which yields respondents' impressions of mediation as well as its outcome, was administered approximately three months later. A final interview, 12-15 months after the first contact, is not relevant for the present analysis since it did not include a complete reevaluation of the mediation process, focusing instead on compliance and cooperation patterns. Questionnaires were either self-administered or conducted by phone during the fall of 1981 and early 1982.

Attrition rates between the first and second interviews ranged from 15 to 30 percent across sites. Attrition was highest in Los Angeles where time limits and, of course, geographic mobility, made it difficult to recontact all of the more than 300 individuals who took part in the initial interview. In the present analyses the three sites have been merged. Since the majority of the sample consists of only one spouse from a couple, we decided not to limit the analysis to couples and have instead randomly eliminated one party when both husbands and wives were interviewed. Although this reduces the sample from 490 to 387, we feel that this approach provides the greatest consistency in the data. Our preliminary work with data from couples indicates that, at least with respect to evaluations of mediator behaviors, many couples (generally about 60 to 70 percent) rate items either the same, or within one point of each other. However, very little research addresses the issue of the degree of similarity or dissimilarity in couples' responses or offers guidance on the reliable construction of composite measures for couples and their use with individual responses.

Two additional aspects of the data collection deserve attention. First, all three courts currently practice some type of screening and eliminate those cases considered to be ethically and practically unsuited to mediation such as cases known to involve domestic violence, drug and alcohol abuse and psychological disorders. Thus, our sample may under-represent those cases least likely to settle in mediation, perhaps making prediction more difficult.

Second, most questionnaires contained missing information on one or more of the variables relevant to the present analyses. In the majority of cases (70% of the 387 individuals included) no more than four of the over thirty variables used in the multivariate analyses were missing. Thus, for cases with no more than four missing values, we have chosen to substitute group means for the missing variables when conducting multivariate analyses. This brings our sample size to 271 individuals. While it is always conceivable that cases eliminated due to incomplete data are in some manner systematically different from complete cases, it seems likely in the present study that questions were skipped largely because of the length of the questionnaire, the time pressures to complete it before mediation began and, in some cases, the rather distracting setting (e.g. waiting rooms at court) in which the questionnaire was administered.

Measurement

A variety of pre-tested and original items and indices were used to measure the pre-existing characteristics of the disputants and respondents' perceptions of their mediator's actions. In separate analyses, both sets of items were factor analyzed to determine what, if any, underlying dimensions exist.

The background characteristics of the disputants loaded on seven factors. Four of these factors appear to measure the following pre-existing characteristics: the nature of the relationship with one's ex-spouse, acceptance of and adjustment to the divorce, the balance of power in the relationship, and respondents' perceived likelihood of gaining custody. The four factors were reduced to indices using standardized scores and factor coefficients. On two of the remaining factors only a single item loaded; these items, duration and intensity of the dispute were treated as single measures. Two items loaded on the remaining factor: "Do you believe judges discriminate against fathers in awarding custody?" and "How supportive was your attorney of the idea of mediation?" Because the underlying communality of these items seems debatable, this factor was dropped from subsequent analysis. Figure 1 shows the items used as indices or single items and, where applicable, the factor loadings used to create the index.

Figure 1

Indices of Pre-existing Characteristics of the Disputants

<u>Index/Items</u>	<u>Factor Loading</u>
A. Relationship with Ex-Spouse	
- "What was the general level of physical violence between you and your ex-spouse during the last years of the marriage?"	.77
- Abbreviated Goldsmith and Ahrons (1979) index of inability to coparent.	.64
- "Taking all things together, how would you describe your relationship with your ex-spouse today?" (Choices range from (1) friends to (5) don't speak or try to cooperate).	.62

<u>Index/Items</u>	<u>Factor Loading</u>
B. Acceptance of the Divorce	
- "When the issue of divorce was first seriously discussed, who do you think wanted the divorce most?" (Choices (1) I did; (2) mutual decision; (3) spouse)	-.81
- Kitson (19) Index of Attachment	-.50
C. Balance of Power	
- "Compared to your ex-spouse, how well are you able to present your side of a disagreement?" (Choices (1) much less able to; (5) much better able)	.77
- Disputes over child support, spousal maintenance, or property.	.55
- "When the two of you were married and there was a disagreement, how often were you able to resolve things in your favor--that is, how often did you win or come out ahead?" (Choices (1) never to (5) always)	.38
D. Evaluation of Chances for Gaining Custody	
- "What chance do you think there is that mediation will produce the kind of custody/visitation arrangement you would like?" (Choices 0% to 100%)	.68
- "As of today, how satisfied are you with the job your lawyer is doing concerning the divorce and custody issues?" (Choices (1) very satisfied to (5) very dissatisfied)	-.67
- "How many years of education have you completed?"	.62
- "If you went to court right now, about what chance would you have of getting the kind of custody/visitation arrangement you would like?" (Choices range from 0% to 100%)	.57
E. "Approximately how many months have you and your ex-spouse been in dispute over custody and/or visitation?"	N/A single item
F. How much disagreement is there over custody/visitation? (Range (1) none to (4) a great deal)	N/A single item

A similar factor analysis was conducted using 24 statements about the mediation process which respondents were asked to rate between 1 ("not at all true") and 5 ("very true"). This analysis yielded a total of 8 factor, the first four of which accounted for the majority (72%) of the explained

variance. As a result, the last four factors were not employed in subsequent analysis. The factors labeled according to what we perceive to be the underlying construct, the individuals, items, and factor loadings are presented in Figure 2.

Figure 2
Indices of Mediation Evaluation

<u>Index/Items</u>	<u>Factor Loading</u>
A. Communication Facilitation	
- "Mediation gave me a chance to express my point of view."	.76
- "Mediation brought issues, problems and feelings out into the open."	.73
- "Mediator kept the discussion on track."	.69
- "The sessions focused on the children's needs and welfare."	.64
- "It was certainly better than going to court."	.64
- "Mediation helped to identify lots of ways to arrange custody and visitation."	.61
B. Diffusion of Anger	
- "I felt angry during much of the session."	.86
- "The session was very tension-filled and unpleasant."	.77
- "I felt I was always on the defensive."	.76
- "I felt fairly comfortable and relaxed."	-.76
C. Setting the Stage	
- "I expected and wanted more legal advice."	-.77
- "Mediation was rushed--it should have taken more time."	-.75
- "Mediation was confusing; I didn't really understand what was supposed to happen."	-.57
D. Clarification and Insights	
- "Mediation helped me better understand my own feelings and needs."	.79
- "Mediation helped me understand my ex-spouse's point of view."	.60
- "Mediation provided information on child development and children's needs."	.53

Our dependent measures are operationalized in the following manner. The production of a mediated settlement is based on responses to the question, "What issues were settled in mediation?" Those who reported reaching a final agreement on custody or visitation (38%) were classified as "final agreements". Those who said the mediation resulted in a temporary custody and/or visitation arrangement or an agreement to enter family counseling (25%) were classified as "partial agreements." Those who responded that no issues were resolved in mediation (37 %) were, obviously, treated as "no agreements". Respondents' reports of outcome are of course subjective. However, such reports are likely to yield more precise results than classifying people on the basis of court records. Mediators frequently only report whether the case was "successful" or "unsuccessful". Yet while some mediators view temporary agreements or the decision to seek counseling to be a "successful" resolution, others do not.

Our second dependent measure is the user's willingness to recommend mediation to others. On face value, this appears to be a valid indicator of satisfaction with the process.

Predicting Settlements

Discriminant analysis was used to determine how well the indices and measures of pre-existing disputant characteristics and the indices of users' perceptions of mediator behaviors were able to discriminate among those who produced full, partial or no agreement in mediation. Of the two discriminant functions produced in the present analysis, the first accounts for 87 percent of the explained variance. The standardized canonical discriminant function coefficients reveal the relative contribution of the independent variables to this factor. In order of descending importance they are:

<u>Item</u>	<u>Discriminant Coefficient</u>
1. Communication Facilitation.....	-.77
2. Providing Clarification and Insights.....	-.46
3. Evaluation of Chances for Gaining Custody..	.46
4. Magnitude of the Dispute.....	.32
5. Duration of the Dispute.....	.28
6. Relationship with Ex-Spouse.....	.25
7. Balance of Power.....	.14
8. Diffusion of Anger.....	.12
9. Acceptance of the Divorce.....	-.09
10. Setting the Stage.....	.05

Given these items, and the discriminant functions they yield, we can now predict for each individual whether mediation resulted in a partial, full or no settlement. By comparing predicted results with the actual case outcome we can determine how well the variables we have chosen are able to predict settlements in mediation. Table 1 summarizes the results. In each case the underlined figure represents the percentage of cases correctly identified.

Table 1

<u>Actual Outcome</u>	<u>No. of Cases</u>	<u>(%)</u>	<u>Predicted Outcome:</u>		
			<u>No Agreement</u>	<u>Partial Agreement</u>	<u>Full Agreement</u>
No Settlement	101	(37%)	51 (<u>51%</u>)	9 (9%)	41 (41%)
Partial	67	(25%)	16 (24%)	10 (<u>15%</u>)	41 (61%)
Full	103	(38%)	17 (17%)	17 (17%)	69 (<u>67%</u>)
TOTAL	271	(100%)			

Overall, only 48 percent of the cases were correctly classified. However, as Table 1 indicates, accurate predictions of full settlements stood at 67 percent, with only 17 percent mistakenly classified as reaching no settlement. The greater difficulty lies in categorizing individuals who are less than fully successful. Partial agreements were

nearly always incorrectly classified as full agreements. Those who reported no agreement were also frequently classified as full successes. Thus, knowledge about pre-existing factors, and to an even greater extent knowledge about the degree to which mediators were viewed as effective in facilitating communication, can help us predict who will reach a full agreement, but offers few clues as to who will produce a partial or no agreement.

Respondents' Willingness to Recommend Mediation

In the second discriminant analysis, the same indices of pre-existing characteristics and mediator behaviors are used to predict individual willingness to recommend mediation to others who are in disagreement over custody or visitation. As we see from the following, the two indices that contribute most to the present discriminant function are the mediator's perceived ability to facilitate communication and the mediator's perceived ability to provide disputants with insights into the feelings of all those involved in the dispute.

<u>Item</u>	<u>Discriminant Coefficient</u>
1. Facilitate Communication.....	.82
2. Provide Clarification and Insights.....	.68
3. Diffuse Anger.....	.28
4. Magnitude of the Dispute.....	.18
5. Duration of the Dispute.....	.17
6. Relationship with Ex-Spouse.....	.16
7. Evaluation of Chances of Gaining Custody.....	-.10
8. Balance of Power.....	.05
9. Acceptance of the Divorce.....	.05
10. Setting the Stage.....	.01

Table 3 indicates that given these items, we can predict with great accuracy individuals' willingness to recommend the process, but cannot correctly identify those who would not recommend it to others.

Table 3

Discriminant Analysis of Willingness to Recommend Mediation

Actual Outcome		Predicted Outcome	
		Would Recommend	Would Not Recommend
Would recommend mediation	208 (77%)	194 (93%)	14 (7%)
Would not recommend mediation	63 (23%)	47 (75%)	16 (25%)
TOTAL	271 (100%)	Correctly classified: 74%	

Discussion

Our ability to predict mediation outcomes is both modest and limited to identifying those who will succeed and be satisfied with the process. There are a variety of factors that may be relevant in understanding the absence of greater predictability. First, it is conceivable that we have not accurately measured or failed to include in the analysis the specific background characteristics or perceptions of mediators that would best predict settlements and willingness to recommend the process. Examples of potentially relevant variables which are not included are: communication patterns during the marriage; the negotiating style of clients' attorneys; time pressures and the existence of an impending trial, etc. Second, prediction may be impaired due to the fact that we rely on the reports of only one spouse from each couple. It is possible that we might gain accuracy in our predictions if couples were the unit of analysis. This is an approach that can be attempted in future analyses, although an exclusive focus on couples will result in a dramatic decrease in the number of cases. Third, it is possible that the screening currently conducted by the courts and the ensuing diversion of cases involving severe pathology and abuse has eliminated from the sample those cases least suited to mediation, thus

limiting our ability to predict which cases will produce no agreements.

To the extent that we are able to predict, we find the following patterns. The two indices that appear to be best able to predict both settlement and willingness to recommend the process are users' perceptions of the mediator's ability to facilitate communication and provide them with a better understanding of their own feelings as well as those of their children and ex-spouse. This underscores the importance of open communication and insights into oneself and others and is consistent with findings reached by other researchers. For example, Hochberg and Kressel (1983) conclude that couples who were apprehensive about communicating during the divorce and whose attorneys did not adopt a counseling orientation were subsequently more dissatisfied with the divorce experience and less cooperative with one another.

The pre-existing characteristics which appear to be best able to differentiate between those who settled and those who did not, and those who would recommend the process and those who would not, are the duration of the custody dispute, the intensity of the dispute and the quality of the relationship with the ex-spouse. Again, this parallels the findings of Hochberg & Kressel (1983) that post-divorce cooperation is associated, in part, with limited differences over the terms of the divorce agreement and a cooperative orientation during the divorce process.

The present study would certainly suggest that mediators' actions play a key role in determining the success of the process. A somewhat similar multivariate analysis of pre-existing and process variables conducted by Kochan and Jick (1978) resulted in the conclusion that the parties, not the mediators, are instrumental. However, our sample of disputants who are

unfamiliar with the bargaining process differs substantially from their sample of experienced union and management negotiators. And, Kochan and Jick noted that "the personal qualities and strategies of the mediator have the greatest impact on cases where the parties are somewhat less sophisticated "regarding the bargaining process" (Kochan & Jick, 1978:236).

In this study, we have assumed that clients are in a good position to determine whether the tasks necessary for effective mediation have been accomplished. Thus, if a client reported that the mediator did not understand the real issues, we felt that, regardless of the mediator's "true" level of understanding, a sense of trust and confidence in the mediator was not accomplished. However, it might be argued that the indices did not measure what took place during mediation but rather a retrospective rating of what the respondent feels must have occurred in light of the ultimate success or failure of the process. Nor is it clear how researchers' ratings of mediator behaviors, such as those derived from analysis of audio tapings or case studies, compare with clients' perceptions. The issue of consensus between measures becomes increasingly important if we are to compare the results of studies relying on different techniques. In addition, at present we know little about the degree of congruence between clients' perceptions of the process and mediators' perceptions. Understanding potential sources of difference between the two viewpoints and how they might be minimized would have important implications for future training.

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Chapter 11

✓ Parent Reactions to their Child Custody Mediation and Adjudication Experiences

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Those who have used mediation in an attempt to resolve their disputes have a unique vantage point from which to assess the contributions and limitations of the process, a vantage point distinct from that of mediators or students of the practice. During the course of the Divorce Mediation Research Project, we interviewed over 700 individuals who used court-based mediation services to attempt the resolution of a custody or visitation dispute. The Project also interviewed over 200 individuals who resolved their disputes, with the help of attorneys or through custody investigations and court hearings, and 100 individuals who resolved custody and visitation on their own without formally contesting these matters. This paper presents the insights these respondents have to offer on the following issues:

- 1) Mediation has been praised as a means of private ordering which allows users to "own" their agreements. In fact, are mediation clients, as opposed to those who use the courts, less likely to experience coercion and more likely to be satisfied with both the process and the settlement produced? How do mediation clients compare in these respects with those who resolve issues without formally contesting them?
- 2) A sense of ownership should logically lead to a sense of obligation that would in turn insure compliance with mediated agreements. In the long run, do mediated agreements result in better compliance?
- 3) Mediation has often been cited as the best means of promoting future peaceful coexistence. In this respect it has been cited as especially helpful in cases of disputes between individuals who face an ongoing relationship following the resolution of the dispute. Do our respondents confirm these claims?

- 4) Finally, based on reports by the disputants, are the savings in time and money significantly lower for the users of court based mediation services as opposed to those relying on adversarial forums?

Data Collection

Before considering each of these questions, we offer the following brief description of the data collection procedures employed in the Project. These procedures are described elsewhere in greater detail (Pearson & Thoennes, 1984).

The Divorce Mediation Research Project (DMRP) involved an evaluation of public mediation programs at the Los Angeles Conciliation Court, the Family Relations Division of the Connecticut Superior Court, and the Domestic Relations Division of Minnesota's Hennepin County Family Court. These are three of the nation's oldest and largest court-based custody//visitation mediation services. Their clients are a heterogeneous population who share in common conflicts about custody and/or visitation arising either prior to or following the divorce.

At each site we identified a sample of clients who used the court's mediation services in late 1981 and early 1982 and administered a questionnaire prior to the initiation of mediation, approximately 15 weeks after our first contact, and again approximately 13-15 months after the initial interview. Overall we conducted interviews at three points in time with slightly more than 450 mediation clients.

To provide a longer term perspective on the effects of mediation we conducted a single interview with a sample of individuals at each site who

had mediated child custody approximately five years earlier, in 1978 or 1979. This "retrospective sample" of mediation clients consists of approximately 300 individuals.

To compare the experiences of those who use mediation with those who have no access to such public sector programs in which to resolve their disputes, we developed a sample of 100 individuals with contested divorces in Colorado from 1981 and administered questionnaires to them at the same chronological time points used at the mediation research sites. A sample of individuals who had contested divorces in 1978 was also selected for a single retrospective interview. As a final comparison group, we drew a sample of 100 non-contested divorce cases from 1981 and interviewed these individuals at three points in time.

Evaluation of the Process

This much is clear: a majority of all divorcing parties do not perceive the court system to be a satisfactory means of processing divorces or settling disputes. Thus, regardless of the year in which the sample was drawn, and regardless of whether or not mediation was attempted, between 50 and 60 percent of those with a dispute over custody or visitation voiced dissatisfaction with the court experience. Of those who were exposed to a custody study, nearly as many (40-50%) were dissatisfied with the process. This study is an investigative and evaluative process conducted by court personnel and/or private mental health professionals designed to identify the preferred custodial parent. Those who divorced without contesting custody or visitation were slightly less critical of the courts, perhaps due to more limited contact and less dependence on the decisions made by the court. However, even in this group fully forty percent reported themselves to be dissatisfied.

These percentages are fairly comparable to those reported by the National Center for State Courts (1978) in their evaluation of the public image of the courts. They note that 40 to 50 percent of their respondents who had been to any court, as a defendant, plaintiff or witness, held an unfavorable view of their court experience.

While the reasons behind the dissatisfaction are numerous and complex, many respondents basically seemed to object to private issues being treated in a public forum. The perceived contrast between the nature of the dispute and the nature of the legal process was evident by the number of respondents voluntarily mentioning that a court appearance seemed to suggest criminal behavior. The impersonality of the experience and the degree of control exercised by the legal actors seemed shocking to many:

"It was impersonal and slipshod, all the deals were made in the halls and there was no concern about anyone's best interest."

"I felt low and common to be there. I expected a normal, dignified experience."

"Cold, very cold. I understand that the law is in black and white and not in color...I knew it was going to be in black and white."

For the majority of the respondents the dissatisfaction stemmed more from the nature of the process than from the performance of any particular actor. Indeed, most respondents (70% in 1981 and 60% in 1978) were satisfied with their attorneys. However, the presence of lawyers did create concerns for some people. Many of these individuals seemed again to be facing the dilemma of processing exceedingly emotional and intimate problems within the

context of an impersonal and adversarial institution. For example, a number of respondents were worried about their choice of counsel, noting that their attorneys were not as sympathetic or supportive as they might have hoped, while others voiced the opposite concern that their attorneys were not aggressive or flamboyant enough.

"Lawyers who do nothing but divorces don't have time to provide any emotional support."

"He (attorney) seems like a nice person, he says he hates divorce cases where the kids get torn apart...but he seems very weak. I'd rather have F. Lee Bailey."

Some respondents, while confident that their attorneys were performing properly, felt frustrated that as clients they were out of touch with what was happening and were by no means in control of the decision making process. A few respondents voiced the opinion that it was unfortunate that private decisions could not be made by the individuals involved, but added that once one party retained an attorney, both sides needed one to balance the power. One woman contesting custody through the court system summed up her feelings about the legal process:

"The only satisfaction I get out of this whole thing is that Nick is paying more than I am in attorneys fees, and so far I've spent \$1,700."

These reactions are consistent with the conclusions of researchers who conducted interviews with divorce lawyers and their clients in 21 cases in California. These researchers conclude that legal representation in divorce cases is perfunctory and that in addition to engaging in weak bargaining

behaviors, lawyers maintain control of the process chiefly by depersonalizing the client and paying selective inattention to the client. The client experiences the divorce as an individual problem that requires individual attention. As a result few clients receive the attention or experience the control they desire (Felstiner, 1984).

When exposed to the alternative of mediation, most respondents perceived it as a preferred method of resolving disputes. The points they perceive in its favor include: 1) its ability to identify the real, sometimes underlying, issues in a dispute, 2) the fact that the process is less rushed and superficial, 3) its tendency to focus on the needs of the children, 4) the opportunity it provides individuals to be heard and to voice their opinions, and 5) the less tense and defensive atmosphere it affords (See Table 1).

One woman in Connecticut noted that:

"My parents tried to tell me that Jim (ex-spouse) is sneaky and conniving and I shouldn't trust him. But the mediators made me realize that he should have some say too. I would like to have spent more time dealing with the marriage but we talked mostly about the kids, so I guess we talked about what was most important."

Another father summed up his experiences:

"The mediators brought up things...options regarding...(visitation) that I hadn't even considered. We ended up compromising...I got a chance to present everything that I wanted to present. It helped us understand each other".

Satisfaction with the alternative of mediation was greatest in the 1981 sample. Within this sample both those who produced agreements and those who did not were likely to say they were glad they tried the process (90% and 82%, respectively) and would recommend it to others (76% and 64%, respectively). The 1978 sample was less uniformly complimentary. Within this sample only about 66 percent of those producing an agreement and 40 percent of those who did not produce an agreement were satisfied with mediation.

There are several possible reasons why mediation is rated more favorably by users in 1981 versus those in 1978. One possibility, of course, is that in retrospect, mediation is viewed with less enthusiasm, while those nearer to the event are more likely to be impressed by the fact that they dealt rationally with an ex-spouse and felt listened to by the mediator. It is also possible that mediation has enjoyed more popularity and acceptance over time and has met with a more receptive client base in recent years. Certainly the profile of court clients has changed somewhat over the years and this may have some bearing on the perceived quality of the service. Most notably the respondents from the 1981 sample, compared to the 1978 sample, were younger couples with shorter marriages and younger children.

Still a third, and compelling, possibility is that the mediation services provided by the courts have improved over time. In 1978, the programs were new. Connecticut had been in operation less than one year, the Hennepin County program was about 3 years old, and in Los Angeles, the oldest conciliation court in the country, custody/visitation mediation was only five years old. It is possible that the quality of mediation offered by these courts improved over time. Some evidence for this pattern comes from the fact that there was a 15 percent increase in the number of respondents from 1978 to 1981 who expressed the belief that the mediator understood the

underlying problems and issues.

Evaluation of the Settlement

At the time of the final interview with the 1981 sample between 30 and 40 percent of all individuals who had been contesting custody or visitation--regardless of whether they tried, and regardless of whether they succeeded in mediation--reported they were dissatisfied with the settlement. Only 13 percent of the non-contesting respondents reported any dissatisfaction.

However, these percentages alone tell us little. The real test of the perceived fairness of and satisfaction with agreements generated in mediation versus court hearings, attorney negotiations or independent negotiations between the parties, is to compare responses from that portion of the group which is least likely to perceive the decision making process to be fair--those who do not receive custody.

Among those respondents who report their ex-spouse has custody, about 25 percent of those who did not contest custody and those who mediated this agreement were dissatisfied with the custody arrangement, but nearly 70 percent of the contested cases that were not mediated were dissatisfied. As one might anticipate, the greater satisfaction with mediated agreements expressed by non-custodians translates into greater satisfaction for fathers. Thus, about a quarter of the women in the adversarial group, the women who successfully mediated, and the men who successfully mediated expressed some dissatisfaction. However, nearly 50 percent of the men in the adversarial group were dissatisfied with their custody arrangement. This suggests that mediation is most appreciated by men, a group which has been particularly vocal in pressing for court reform, the adoption of mediation programs, joint

custody statutes and other measures to reduce the discretionary nature of judicial decision-making in custody matters.

Evaluation of Compliance

There are two major aspects of compliance upon which we may compare those who mediate and those who litigate their custody dispute: the regularity of visitation and the regularity of child support. Although the latter issue was not specifically mediated, one might logically expect any conciliatory benefits of custody mediation to extend to this area as well.

Not surprisingly, reports of the amount and regularity of child support vary systematically depending on whether the respondent is supposed to be paying or receiving support. By considering only reports from those who are supposed to receive support, we can safely assume that accounts of payment provide a conservative portrait.

At our final contact with the sample drawn in 1981, most respondents had had a child support arrangement in effect for no more than a year. Nevertheless, irregular or absent child support payments had already emerged as problems. This was true regardless of whether the individuals were initially contesting or non-contesting on the issue of custody, regardless of whether they tried mediation, and regardless of whether they succeeded in mediation. To this extent, non-payment of support appears to be a phenomenon that has its roots outside of the original custody dispute and the dispute resolution method used to establish custody. At the same time, it is true that irregular/absent payment is reported by slightly over a third of those who mediated, regardless of outcome, and a third of those who arranged custody on their own without formally contesting the issue. However, over half of those who contested custody without mediating were remiss in their

support payments.

Similarly, while reports of irregular payment increased for all groups between the second and final interviews, the increase was greatest (24%) in the adversarial group.

This pattern of poorer payments among the adversarial group does not hold for the 1978 sample. On the contrary, in this sample, the adversarial respondents do an equally good job of paying. Thus, based on the reports of recipient parents, a third of those who mediated permanent custody agreements in 1978 receive child support 'somewhat' or 'very' irregularly. This is also the case for the adversarial sample. Among those who tried but did not settle in mediation in 1978, over half were receiving support irregularly (See Table 2).

As to visitation in the 1981 sample, we find that about 30 percent of all those who tried mediation, 30 percent of the adversarial sample and half of the non-contesting group report that visitation rarely or never takes place on a regular, predictable basis by the final interview. However, when we compare reports from those who say they do not have custody, we can see other differences in the visitation patterns reported by groups. Thus, none of the non-custodians who resolved the dispute in mediation report that visitation is infrequent. But about 30 percent of the non-custodians reaching no agreement in mediation, and 30 percent of the non-custodians in the adversarial group report irregular visitation.

Once again, those who produced custody agreements in mediation in 1978 fare less well with respect to regularity of visitation when compared to those who adjudicated the dispute. Over 60 percent of the adversarial group in the 1978 sample report regular visitation as compared with only 46 percent

of those who produced final settlements in mediation in 1978. A comparison by non-custodians indicates that about 60 percent of the non-custodians who tried mediation, regardless of the outcome, were subsequently visiting regularly. Yet fully 80 percent of the non-custodians who used the adversarial system were visiting regularly.

Evaluation of Long-Term Cooperation

To what extent does exposure to mediation, or perhaps a successful experience in resolving disputes through mediation, promote peaceful or cooperative interaction between parties who must continue to interact following the resolution of a dispute? In part, the answer to this question seems to be that while mediation cannot produce cooperative couples, it is a less damaging intervention than court.

The 1981 sample was asked to assess whether or not mediation had made a difference in the way they interacted with their former spouse. They were also asked whether or not the involvement of judges, lawyers and other legal actors had had an affect on patterns of interspousal interaction.

At the interview conducted three months following the initial contact, a small proportion (15%) of the 1981 sample credited the court system with improving their relationship with an ex-spouse. About 40 percent indicated that court had had a detrimental effect on the relationship and the remainder felt it had no impact on their relationship. Asked the same questions about 12-15 months after the initial interview, respondents were slightly more positive about their court experience. About a fourth now said it had improved their relationship with their ex-spouse and only 25 percent, not 40 percent, claimed it had hurt the relationship.

Unfortunately, respondents were only asked to assess the impact of mediation 3 months following the initial contact. As a result, it is impossible to discern whether mediation might also have been more positively assessed over time. However, at this interview, mediation was credited with improving spousal relations by very few (7%) of those who produced no agreement in mediation. However, 30 percent of those producing an agreement felt it improved the relationship. Further, regardless of the outcome, less than 15 percent indicated that mediation hurt the relationship. Thus, compared to court, mediation is credited to be a less damaging intervention.

At each of the three interviews, the 1981 sample was asked to rate the degree to which they were able to cooperate and get along with their ex-spouse. In the mediation group, there was an 8 percent increase between the 3 month and the 15-month follow-up interviews in the number of respondents reporting that some cooperation was possible. This pattern held both for those who produced agreements as well as those who failed to produce an agreement in mediation. In the adversarial group, however, there was some decline in the proportion expressing cooperation between the second and third interview. Thus, by the time of the last interview, over 60 percent of those who successfully mediated and those who did not contest the divorce reported that some cooperation with an ex-spouse was possible. But only 10 percent of those who did not settle in mediation and 30 percent of the adversarial group reported cooperation to be possible.

Still another measure of the quality of the relationship with an ex-spouse is the number of problems surrounding visitation. An analysis of responses to questions about the incidence of problems with visitation reveals similar patterns for all respondents and shows no particular benefits for those in the mediation group. At each interview we asked respondents about the frequency of problems with: the children's safety/well-being; the

amount of time spent with an ex-spouse's family; lack of discipline/overindulgence; late return following visitation; a lack of activities during the visit; or one parent criticizing the other in the presence of the children. At the initial interview, prior to any intervention of an adversarial or nonadversarial nature, about 45 to 50 percent of all respondents who were contesting custody/visitation reported that three or more of these issues were sometimes or often a problem. Among respondents in the non-contesting category where custody/visitation was not in dispute, only about half this many (25%) reported problems with 3 or more of these issues. By the final interview, the number of respondents reporting 3 or more problems had declined to 30-40 percent for all mediation and adversarial group respondents and remained at about 25 percent in the non-contesting group.

A final measure of the degree to which mediation reduces future conflict is the degree to which parties return to court. Based on reports from the 1981 sample at the final interview, we observe statistically lower levels of relitigation by those who produce final arrangements in mediation versus all others. Thus, between the first and final interview, 21 percent of those who resolved the custody dispute in mediation had been back to court to file contempt citations, take out temporary restraining orders or to change custody, visitation or child support. Among those who reached no agreement in mediation, 31 percent had returned to court. Among the adversarial group, 36 percent had returned, and 13 percent had been back at least twice. Only 6 percent of those settling in mediation had returned to court that often.

Our survey of individuals who disputed custody/visitation in 1978 did not include questions about contempt citations or temporary restraining orders. However, based on self reports, a quarter of those who reached agreements, a quarter of those who did not reach agreements in mediation, and

about a quarter of the adversarial group had returned to court on custody/visitation matters within the last 4-5 years. Thus, although there is no evidence in the 1978 sample of mediating translating into reduced litigation, there is also no evidence of mediated agreements breaking down and necessitating an excessive number of returns to court.

Savings in Time and Money

Reports from the 1978 sample suggest that mediation may produce financial savings for users. For cases involving a custody dispute, whether prior to and following the promulgation of a divorce decree, only about 20 percent of the respondents who successfully mediated a final agreement reported attorney fees in excess of \$3,000. For the adversarial group, the percentage was approximately 45 percent. About 30 percent of those who did not produce a final agreement in mediation incurred attorney fees over \$3,000.

The 1981 sample reported very similar percentages. Thus, among those contesting custody, both prior to and following the divorce decree, about 35 percent of those who were unsuccessful in mediation and 35 percent of the adversarial group had legal fees in excess of \$3,000. By contrast, only 20 percent of those who successfully mediated final custody/visitation arrangements paid this much.

Based upon these figures, we can conclude that mediation translates into modest financial savings when it results in an agreement. Moreover, although mediation does not produce savings in attorneys fees when it is unsuccessful, it does not appear to result in higher legal fees either.

To gauge savings or delays in case processing time, we asked the 1981 samples in the first follow-up interview about postponed court hearings and general case progress. We find that those who failed to produce an agreement in mediation were no more likely to report having had a court hearing postponed than adversarial group respondents. Slightly over 40 percent in each group reported at least one such delay. Further, those who failed to stipulate in mediation were as likely (37% and 39% respectively) as the adversarial group to report that they had definitely made progress or achieved a settlement in their case. Thus, when it succeeds, mediation helps disputants reach stipulations and avoid some of the lengthy procedures of the legal system including hearings and custody investigations. Moreover, when mediation does not succeed, it does not appear to create additional delays.

Conclusions

The majority of the respondents we spoke to recognized and appreciated the fact that mediation allows for a more personal and private resolution of disputes between non-strangers than is afforded by normal court procedures. The formal and complex atmosphere of the legal system is perceived by many of our respondents to be a cold, indifferent and confusing setting in which to deal with a former spouse and their children. Further, the court setting is frequently perceived to undermine whatever degree of cooperation may exist between the spouses.

Creating agreements in a semi-private setting is perceived by users to be less detrimental to relationships between ex-spouses. To some degree the process also appears to foster a sense of commitment to abide by the agreement produced in mediation, to encourage continued cooperation and to produce savings in time and money for litigants. However, improvements in

compliance and cooperation are modest. In many respects, these findings are consistent with previous research comparing mediation and adjudication in a variety of substantive settings (Pearson, 1982, McEwen & Malman, 1982). While all studies seem to find evidence of strong user satisfaction with the mediation process, the patterns regarding compliance, relitigation and relationships between ex-disputants are more ambivalent with some studies finding evidence of improvements and others finding no differences.

There are several reasons why mediation appears to have an only modest ability to alter basic relationship patterns or promote cooperation between disputants with this sample of respondents.

First, mediation in court settings is a brief intervention. For example, in Minnesota where the process took the greatest amount of time, the average number of mediation sessions reported by respondents in our sample was 3.3 and the average number of hours was 4.3. More commonly, in California and Connecticut, cases were processed in an average of 1.6 sessions and 2-3 hours. There are clearly limits to the relationship changes that would be expected to ensue from a short-term intervention.

Second, divorce mediation differs dramatically from mediation between non-strangers in other civil settings. It involves parties with lengthy, intimate and problem-ridden histories and deeply established behavioral patterns. For example, our initial interview with the 1981 sample reveals that the contested as opposed to non-contested cases involved more anger between spouses, more violence during the marriage, less initial cooperation, and poorer communication patterns. Statements such as the following help to explain why respondents did not report their relationship with an ex-spouse to be more dramatically altered by mediation:

"We never talk. The last time I called him up was when I was having problems with my older son. The first thing he said after I explained the situation was 'what did you do to provoke him? You provoked me for 15 years.'"

"We can't even talk about the weather."

"I really don't know...some days he talks nicely to me, other days he sounds like he could kill me."

In addition, future interactions between divorcing parties are likely to be more frequent and involve complex and emotion-laden issues such as child support, visitation and child care. They are likely to afford many opportunities for non-compliance. For example, if one ex-spouse is perceived to be hostile or non-compliant, it may be possible for the other to violate the terms of the agreement without a sense of distress, perhaps cognitive dissonance, at failing to live up to an agreement entered into voluntarily. By comparison, mediations between non-strangers with continuing relationships, such as landlords and tenants, employers and employees, and neighbors, are simpler; the emotional and financial stakes are usually lower and the opportunities for continued contact and interaction are typically more limited.

In light of all these facts, it seems noteworthy that over the span of 12-15 months with the 1981 sample and even 4-5 years with the 1978 sample, we continue to observe differences between those who mediate and those who adjudicate. Further, like our previous research comparing those who mediate and adjudicate child custody (Pearson & Thoennes, 1984b), the differences noted herein continue to hold after statistically controlling for the initial level of cooperation reported by the respondents. Thus, the differences that

do exist between successful mediation clients and other respondents in our survey are not merely the result of the fact that cooperative individuals are likely both to succeed in mediation and later to cooperate and comply. Indeed, these patterns indicate that even brief mediation interventions with a troubled population have a salubrious effect that holds up over time.

Table 1

T-tests comparing mediation and court hearings by group:
1981 Sample **

	<u>Full Agreement¹ in mediation</u>		<u>No agreement in mediation</u>	
	Mean Response Evaluating:		Mean Response Evaluating:	
	<u>Mediation</u>	<u>Court</u>	<u>Mediation</u>	<u>Court</u>
process brings issues out into the open	3.9	2.9*	3.4	2.7*
helps you to understand your ex's point of view. . .	2.2	2.2	2.1	1.7*
puts you on the defensive. .	3.1	3.8*	3.2	3.7*
places focus on children . .	4.0	3.2*	3.7	3.0*
process tense and unpleasant	3.0	4.0*	3.6	4.3*
process is rushed	2.3	3.4*	2.2	3.5*
gives you a chance to express your views	4.2	2.7*	3.9	2.4*

¹Does not include individuals reporting agreements to seek counseling or temporary arrangements.

** high scores indicate agreement
* t-test significant at .05 or better

Table 2

Regularity of Child Support by Group as Reported
by Recipient Parents

A. 1981 Sample

Support Paid:	Final Agreement in Mediation	No Agreement in Mediation	Adversarial	Non-Contesting
very regularly	52%	52%	23%	58%
somewhat regularly	8%	15%	14%	7%
somewhat irregularly	7%	7%	12%	6%
very irregularly	34%	26%	51%	28%
(N)	(62)	(54)	(43)	(67)

B. 1978 Sample

Support Paid:	Final Agreement in Mediation	No Agreement in Mediation	Adversarial
very regularly	59%	35%	62%
somewhat regularly	10%	14%	12%
somewhat irregularly	7%	14%	8%
very irregularly	24%	37%	19%
(N)	(41)	(57)	(26)

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Chapter 12

✓ THE EFFECTS OF DIVORCE MEDIATION AND ADJUDICATION
PROCEDURES ON CHILDREN

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Introduction

Approximately 60 percent of all divorces involve children (Bane, 1979). When one projects current patterns into the remainder of the twentieth century, it is estimated that 33 percent of this generation of children will experience a parental divorce before they are 18 years old (Glick, 1979).

Although some writers note the positive opportunities of divorce for children and families, most literature identifies its pathological effects (Clingempeel and Repucci, 1982; Emery, 1982; Hetherington, 1979; Kurdek, 1981). Commonly, researchers find children of divorced families to be disobedient, aggressive and lacking in self control. Other writers also report evidence of internalized problems, particularly depression.

To date, there has been no research on the direct effects of various legal procedures associated with divorce on children. According to Wallerstein & Kelly (1980), legal proceedings pose potentially difficult stressors for children since they often increase parent conflict, raise uncertainties about future contact with both parents and affect the child's fantasies about reconciliation. Many divorcing parents report that contact with the legal system often exacerbates their problems (Spanier & Anderson, 1979). And several studies comparing reactions to divorce mediation with more conventional legal proceedings conclude that the former are preferred by parents and are associated with impressive levels of user satisfaction, improved rates of compliance and reduced levels of relitigation (Pearson and Thoennes, 1984a,b,c). Indeed, one of the hypothesized benefits of divorce mediation is superior adjustment for the children involved (Emery, 1982; Haynes, 1978; Coogler et al., 1979).

The purpose of the present study is to evaluate the degree to which

various legal and nonadversarial proceedings associated with divorce affect child adjustment. The superior adjustment patterns posited for children whose parents mediate have not been tested. Specifically, we compare the child adjustment outcomes for children whose parents successfully mediated the terms of their divorce with those who attempted to mediate but failed to reach an agreement as well as those who adjudicated and those who faced no divorce conflict in the eyes of the court and simply pursued a non-contested divorce. This analysis is part of a larger effort to evaluate many aspects of public sector divorce mediation programs known as the Divorce Mediation Research Project.

Method

The Divorce Mediation Research Project involved interviews with three sets of parents with varying divorce dispute characteristics. One group consisted of those parents who divorced without formally contesting the issues of custody or visitation. In this study, they are dubbed "non-contesting." A second group of parents formally disputed custody and/or visitation but were diverted from traditional legal channels and attended mediation sessions offered at court-based programs. They are termed the "mediation" category. The final set of parents were those who disputed custody/visitation issues but were not offered an opportunity to try mediation within the court system. These parents resolved their disputes with the aid of attorneys, custody evaluators and/or court hearings and comprise the "adversarial category".

The non-contesting and adversarial samples were drawn in Colorado where no court-based mediation services were available. The mediation samples were

drawn from the client population of three courts which offer in-house mediation services. These courts are the Los Angeles Superior Court, Hennepin County Court in Minneapolis and the Connecticut Superior Court. Although all three programs are unique in many respects, they also have many characteristics in common. For example, at all three sites, mediators tend to have an educational background in social work or another helping profession. All three programs are mature and have been in operation for at least five years. Finally, all programs treat mediation as a brief intervention aimed at achieving specific goals and distinguish the process from counseling and other therapy interventions. As a result, in the present analysis, we have combined mediation clients from all three sites.

Three interviews were conducted with respondents in all of the previously noted groups. The first interview took place immediately upon identification of the case, and prior to interventions such as mediation or final court hearings. The second interview followed the first at a three month interval and the final contact was 12-15 months after the initial interview. Questionnaires were either self administered or conducted over the phone by trained interviewers.

Since we are focusing on child behavior patterns during and after divorce, we restrict the present analysis to data gleaned in interviews with parents who have had the most contact with their children on a daily basis. Specifically, we rely only on reports from parents who were either sole custodians or joint residential custodians of the children at both the initial and the final interview. In cases of joint residential custody where both parents were interviewed, we have randomly eliminated one parent from the analysis. Not surprisingly, our sample is predominantly female. Only

about 15 percent of the non-contesting and successful mediation group were comprised of custodial fathers. In the successful mediation and adversarial group there were slightly more custodial men--about 30 percent.

In the present analysis, we have also excluded those mediation cases which resulted in temporary or partial agreements, such as agreements to seek counseling, or agreements that the children would remain with the father or mother until the results from a custody evaluation were available. Given the wide range of agreements that might be termed 'partial', or 'temporary'; it seemed more desirable to restrict the comparison to those cases resulting in either complete agreements or no agreements at all.

The interviews with parents included a wide variety of questions about the divorce experience as well as reactions to the mediation and/or adversarial process. With respect to child adjustment, parents were asked about the reactions of one of their children to the divorce as well as his/her custody/visitation arrangement and general well being. The target child in each family was a child between the ages of 6 and 11. If there were no 6-11 year olds, parents were randomly directed to discuss their oldest or youngest child.

To measure child adjustment, we relied on two parent report scales. Specifically, parents were asked to respond to 19 items that dealt with positive and negative aspects of the divorce or custody situation. Some of these items were original, others were developed by Olsen, et al (1979). To simplify the analysis, these 19 divorce specific items were factor analyzed. The procedure yielded five factors although one contained only one significant loading which was an item dealing with the child's relationship with the ex-spouse. Another factor included only 2 items which dealt with

the child's greater maturity and greater closeness to siblings. Given the large number of only-children in our study, this factor was eliminated. Of the remaining factors, one appeared to measure the child's acceptance of the divorce and included items such as: "Child accepts the divorce", "Child is satisfied with the custody arrangement". Another factor focused on problems with the divorce. A third factor focused on the quality of the custodial parent's relationship with the child and included items like: "It is easy for me to show this child affection" and "The child confides in me". The aforementioned factors and items that comprise each factor are noted in Figure 1.

Figure 1 about here

Our second major measure of child adjustment was a 119 item general behavior checklist developed by Achenbach and Edelbrock (1981). The Achenbach-Edelbrock checklist can be used to create a variety of subscales as well as yielding an overall measure of the child's well-being. The authors report separate subscales for ages 4-5, 6-11, and 12-16, and within each age group there are separate subscales for boys and girls. Given the size of our sample and the number of parent dispute resolution categories we were interested in comparing, we decided to restrict the present analysis to those subscales which are shared in common by all age groups. In addition, we chose to create those subscales by using only those items that appear across all age groups and both sexes. The specific subscales that met these criteria were those dealing with depression, aggression, delinquency, social withdrawal and somatic complaints. Figure 2 identifies each of these

subscales and lists the items that comprise each one.

Figure 2 about here.

In addition to these objective measures, in-depth, personal interviews were conducted with a small number of parents in each divorce dispute category. The interviews included questions about the marriage, the dispute, the dispute resolution mechanism, and their children's reactions and adjustment to the divorce. These in-depth interviews took place at approximately 3 and 12-months following the initial interview.

Finally, a small number of in-depth interviews with children were conducted by therapists experienced in working with children. These interviews also took place at the 3 and 12-month follow-up intervals. They were chiefly conducted with children aged 6 to 11 years old. The topics discussed included the child's affective and cognitive reactions to the divorce, the dispute, and the dispute resolution mechanism used by his/her parents. Eleven in-depth interviews were conducted with children whose parents pursued a non-contested divorce. Nine children were interviewed whose parents fell into the adversarial category. Forty-three children were interviewed whose parents used mediation or about 15 children per mediation site.

Description of the Sample Prior to Mediation and Final Hearings

After eliminating cases involving partial agreements reached in mediation and/or cases involving non-custodial respondents, our sample sizes were 78 non-contesting parents, 50 adversarial parents, 53 parents who were not able to reach agreements in mediation and 119 parents who produced full

agreements in mediation. Although the focus of this paper will be an analysis of child adjustment reports provided by these parents, the following is a brief description of responding parents and their dispute resolution experiences. In other manuscripts, we provide greater detail on the characteristics and experiences of clients of the court-based mediation services (Pearson & Thoennes, 1984 a,b).

In each of the groups (successful mediation, unsuccessful mediation, adversarial and non-contesting), the respondents are primarily white and no older than 35 years of age. In each group about half of the respondents had only one child and another 35 percent had two children. The groups were also similar on key educational measures.

A source of variation in the groups was the parent's stage in the divorce process at the initial interview and the length of parental separation that had transpired. All non-contested respondents were separated couples who had filed for divorce and were awaiting final orders. To contrast, about 35 percent of the cases involving custody disputes--whether in the adversarial group or the mediation group--entered our sample following the promulgation of a divorce decree. Ultimately, however, cases which were mediated before final orders were more likely to reach settlements. As a result, the successful mediation group tends to be comprised of respondents who were at earlier stages in the divorce process than their unsuccessful mediation counterparts. While post-divorce decree cases constituted 27 percent of the successful mediation sample, they comprised 43 percent of the unsuccessful mediation sample. The average length of time between the parental separation and the first interview was 14.5 months for those who successfully mediated, 22.8 months for those who unsuccessfully mediated,

21.7 months for those in the adversarial group and 12.5 months for those in the non-contested sample.

Another area of difference in the groups at the initial interview was spousal cooperation patterns. At the time of the first interview, the non-contested sample reported much greater spousal cooperation compared to the other groups. Nearly 80 percent of the non-contested respondents said their relationship with an ex-spouse was either "friendly" or only "strained" as opposed to "difficult" or "impossible". Among the successful mediation, unsuccessful mediation and adversarial samples, the comparable percentages were 35 percent, 32 percent and 43 percent, respectively.

At the initial interview over half of the parents in each group reported that they lived within 10 miles of their ex-spouse and roughly 80 percent in each group lived no more than 30 miles apart. Among those who lived no more than 30 miles from their ex-spouse, reports of visitation frequency were quite similar across the groups. However, those who ultimately succeeded in mediation had the most contact with their children at the initial interview. About 70 percent of this group reported that their ex-spouse visited the children at least once a week. In all other groups, only 50 to 60 percent reported that the ex-spouse visited this frequently. Table 1 summarizes selected characteristics of respondents in each divorce dispute category.

Initial Child Adjustment

At the time of the first interview, most families faced the typical upheavals that accompany a divorce: physical relocation of one or both parents, financial stresses and uncertainties about the future. Understandably, many parents found themselves utterly overwhelmed and this made it more difficult for them to assess what their children were

experiencing. In the words of one mother: "I didn't notice any immediate changes (in the children) but I might have been too busy trying to be competent and not fall apart myself, so I might not have noticed."

An analysis of the Achenbach scale by dispute category reveals no statistically significant differences among the groups at the initial interview on the composite measures of child adjustment. Nevertheless, there was a tendency for those parents in the adversarial group to report the most problems for their children. Parents in this divorce dispute category were likely to report that their children were the most socially withdrawn, and had the highest incidence of delinquency and somatic complaints. By contrast, those who successfully mediated scored best on the global Achenbach scale, and the Achenbach subscales of aggression and social withdrawal. Those who unsuccessfully mediated scored best on the initial measures of somatic complaints, delinquency, and depression.

Despite the fact that most parents in the study felt that they enjoyed a good relationship with the target child and that this child was making a satisfactory adjustment to the divorce and the new custody arrangement, a sizeable proportion of parents expressed various concerns about their children during the initial interview. Thus, in all the groups around 20 percent of the parents reported that the child seemed angry with his/her mother because of the divorce and about the same percentage reported that the child was angry with the father. Anger with parents is a theme that sometimes emerged in the indepth interviews with the children as well. In some cases the anger grew directly out of the divorce experience. For example, one eight year old boy admitted to being angry with his custodial father and expressed the wish that his father would "take some responsibility

instead of just being angry and upset all the time."

In other instances, the anger seemed to be the result of a long-standing family problem, including abuse. Although the mediation programs do not accept known cases of abuse, many violent families are not identified as such before the mediation, and go undetected during the process. Several children indicated fear as well as resentment towards an abusive parent. And many understood the cause of the divorce to be the violence and anger in the home.

In the words of one mother:

"The divorce was a relief [to my son]. He had a list of people to call if Dad beat Mom...It's not a normal responsibility for a little boy..."

Loyalty conflicts were another key concern of parents. A number of parents indicated that the child had taken sides with one parent or indicated that the child was worried or upset at the prospect of having to choose sides. These conflicts were of greatest concern to those who would ultimately try but not succeed in mediation. About 30 percent of these parents expressed such concerns. The non-contesting parents were least likely (10%) to express these concerns. Although most parents indicated that they tried to reassure the children that they would always have both parents, some children had good reason to be concerned about losing one parent. As one mother put it: "The attorney told the kids it was fine if they wanted to live with their father, but they should choose up sides."

Another problem mentioned by parents included the child's unwillingness to discuss the divorce. About 30 percent of the parents in all the groups indicated this was initially a problem. The in-depth interviews with children confirmed that for many children the primary coping mechanism was avoidance. In the words of several children:

"I feel nothing about the divorce...I know they fought once or twice because I'd hear them yelling at each other. The divorce is okay. I don't ever think about it." "I just didn't think of it (the divorce)--that's how I handle problems. I don't think about them and they go away."

Still another problem noted by parents was the child's unwillingness to accept the divorce. About 40 percent of the parents in all the groups cited this as a problem, with the exception of the successful mediation group where this figure was much lower (14%). In their interviews, children repeatedly expressed a wish for parental reconciliations. Although many noted that they were relieved not to be in the midst of fighting, others indicated that even the fighting was better than the divorce. Most children who wished for a reconciliation at least cognitively recognized the unlikelihood of this happening.

Finally, between 30 and 50 percent of the parents in each group indicated that they thought their child's life would benefit from more routine and stability. This is no doubt in large part a reaction to the stress of the divorce and to the changes--in residence, babysitters and daily routines--that accompanied the separation. For example, at the initial interview, 30 percent of the respondents reported that within the last year the child had changed schools. An equal number, about 30-40 percent, reported that the child, along with the custodian, had moved. Lastly, during the course of the study, about a third of the respondents reported that the custodian began working outside the home, or moved from part-time to full-time work.

Children and the Mediation Experience

Mediation at all three court sites is a brief intervention that typically does not require the direct participation of children. Thus,

nearly 60 percent of those who tried mediation reported that they attended one session; about 20 percent attended two and another 20 percent attended three or more sessions. Only a fourth of the parents who tried mediation reported that the mediator met with their children.

Although it is the official policy of each court mediation service to involve the children, the degree and manner in which this occurs is up to the discretion of individual mediators. Many factors come to play in making decisions about the child's participation. Indeed, the director of the Connecticut program acknowledges that "The introduction of children into the mediation process is the most flexible aspect of the process" (Salius, Maruzo & Hicks, n.d.). One obvious factor is simply whether children are brought to the mediation service by their parents on the scheduled mediation day. Although mediators can postpone the session or schedule additional sessions if children are not brought along, most mediators are reluctant to postpone an opportunity to attempt to reach an agreement.

In addition to this obvious factor, many mediators are influenced by such factors as the nature of the dispute or the child's age. While some mediators only see children who are old enough to be interviewed, others prefer to meet with the entire family, even infants. They feel that observations of family interaction patterns are helpful in understanding relationship dynamics. Some mediators use sessions with children to obtain a sense of the child's concerns and preferences. Others like the children to be present when the parents have reached an agreement so that it can be explained to all members of the family at the same time.

To the extent that mediators speak with children, they tend to meet with all the children in the family, although not necessarily at one time (87%).

These discussions are usually private (49%) and attended by only the children and the mediator. A number of mediators meet with the children privately and then meet jointly with parents and children (31%). Least common (20%) were instances in which mediators had no private time with the children and met with them only in the presence of both parents.

Most parents (61%) who reported that the mediators had met with their children also said that the mediators shared with them the insights provided by these meetings. According to mediators, the procedure is to ask the children permission to share their thoughts with their parents. Generally (77%) parents reported that they liked the idea of mediators including children in the proceedings although some were apprehensive about the procedure and worried about "putting the children through all that".

Since most children had not spoken with a mediator, it is not surprising that the in-depth interviews with children whose parents mediated revealed only a limited understanding of the process. In some cases children were completely unaware of the fact that mediation had occurred. Since public sector mediation often takes place in the courthouse, some children were confused about whether they had been to "court" versus "mediation".

Most children who spoke to the mediator described the experience favorably. Most typically, they liked the idea that someone cared enough to elicit their input. At its very best, the mediator helped the children to deal with their emotions and improved the family's ability to communicate. As one child explained:

"It helped. I got my feelings out. My Dad didn't know how I felt about him. I can talk to him now because of mediation. I couldn't before."

It is less easy to discern the measurable, quantitative effects of

children seeing the mediators. Moreover, a preliminary study comparing outcomes in mediation sessions which included children with those that did not finds no difference in the settlement rate for the two groups (Shoemaker, 1984).

Some differences in outcome, however, do appear to be associated with seeing the mediator. At the final interview, parents whose children saw the mediator, compared to those who did not, were more apt to say their children understood what the custody/visitation problem was about and were more apt to report that their child had a good relationship with the non-custodian. These differences were not apparent at the initial interview, prior to mediation.

Children who disliked their experiences with mediation complained about a variety of factors. For some, the session was simply perceived to be "boring". A few children who saw the mediator along with their siblings or parents, wanted more privacy and were inhibited about expressing their concerns or preferences. Some children who took part in the mediation sessions found them to be emotionally charged and unpleasant, however, most reported that the sessions were nevertheless informative and helpful. Fortunately, the children we interviewed very rarely indicated that they had been asked by a mediator to choose between their parents. Indeed, in a number of instances children said that speaking with a mediator had helped to convince them that they would not be asked to choose sides.

The Adversarial Experience

About 32 percent of the parents who were contesting custody reported that a custody evaluation had been conducted. In 80 percent of these cases the evaluator spoke with some or all of the children. Although parents

express a great deal of dissatisfaction with the evaluation process, our indepth interviews with children ages 6-11 indicated that children were generally neutral or positive about this contact. They appreciated the fact that everyone involved in the divorce was interviewed. Most evaluators appear to have been good listeners and sensitive to the child's concerns. Thus, while the evaluation process is typically loathed by parents, it did not incite such a reaction in children we interviewed.

Similarly, the children's impressions of court were also less negative than those held by their parents. In the few instances where children were seen by the judge in chambers, there was no indication that they felt forced to choose sides. Several children volunteered that they were glad to get a chance to express their opinions but added that they were glad that the judge had the difficult job of choosing.

On the other hand, indepth interviews with parents indicate that some of the parents whose children were seen in chambers were less positive about the experience.

"It's so uncalled for, so unnecessary to put little kids through something like that."

And other parents were angry that the children were not included:

"My wife and I asked for the children to be interviewed by the judge. He declined. He said the kids should not be involved. But the children were already involved!"

Overall, parents, more than their children, appear to evaluate court as an experience that causes anxiety and tension and view the power of judges as frightening.

Description of the Sample at the Final Interview

The final interview was administered 12-15 months after the original contact. At that time, the non-contesting respondents continued to report the best patterns of cooperation with their ex-spouse. Almost 40 percent of this group, but only 6-16 percent in the other groups, reported that the relationship was fairly friendly and that cooperation was easy. As a result, the non-contesting group was also least likely to report that their children were aware of anger between the parents.

Spousal cooperation, however, does not appear to translate into parent-child contact. At the final interview, the non-contesting group was also most likely to report that visitation is rarely or never regular and predictable. Over half (52%) of the non-contesting group reported irregular visitation patterns. This was a problem for only 34 percent of the successful and unsuccessful mediation group and 45 percent of the adversarial group. One explanation for this pattern is that respondents in the non-contesting group report living slightly further away from their ex-spouses than respondents in the other groups. Thus, while 86 percent of the respondents who successfully mediated reported living within 30 miles of their ex-spouse, only 64 percent in the non-contesting group lived this close. When we consider only those who live within 30 miles, the patterns of visitation regularity look fairly comparable across the groups. For those who live 30 miles apart or less, visitation was frequently irregular for 40 percent of the non-contesting and adversarial group, and 30 percent of those who mediated, successfully or unsuccessfully.

Child Adjustment at the Final Interview

At the final interview, fewer parents perceive their children to be

angry with either the mother or father due to the divorce. Only 10 to 15 percent of the parents in any group now perceive such anger. The relatively high (30%) proportion of the unsuccessful mediation group who in the first interview expressed worries about the children taking sides with one parent, dropped to less than 10 percent at the last interview. However, there was no corresponding decline in the percentage of parents who perceived the child to be worried about showing preferences for one parent over the other. Indeed, at this final interview, parents seem to express even more concern about loyalty conflicts.

Parental concerns about the child refusing to discuss the divorce, and the child's unwillingness to accept the divorce declined slightly between the initial and final interviews, but these matters were still mentioned by 20-30 percent of the parents in each group. At the second indepth interview, children continue to mention the idea of a reconciliation, although they have clearly received the message that it is an unlikely prospect. As one child phrased it:

"The odds are 1 to 1000--make that one million--that my mom and dad will get married again. It would be nice if they did, though."

Other children remain puzzled and displeased with the divorce:

"They can talk, why can't they live together?"

Nor have there been consistently large declines in the percentage of parents who feel that the child's life is lacking in routine and stability.

Finally, there has been no decline but something of an increase in the number of parents who indicate that the child is their confidant and listens to the custodians' worries and plans. This may be indicative of role reversal or having to "grow up in a hurry". To date, there is no consistent wisdom on

whether the accelerated responsibilities and maturity ensuing from a divorce is desirable for children.

In an effort to see which variables seem to be aiding or hindering the child's adjustment process, we used multiple regression techniques to identify the factors that best help to explain the variance in our objective measures of child adjustment at the final interview. Our list of possible predictors of child adjustment included 36 items that have been mentioned in the literature. The variables fall into five major categories. These are: 1) The general background of the family including the number of children, the age and educational levels of the parents and financial stress; 2) dispute/divorce specific variables including the length of time since the parental separation, the stage in the divorce, the number of times the parents have been to court, and their divorce dispute status defined as non-contesting or contesting, unsuccessful mediation or successful mediation; 3) child specific variables such as the age and sex of the child and the other stressors in the child's life such as whether the child changed schools, moved, was held back a grade, or whether the custodian began work outside the home following the separation; 4) variables related to custody and visitation including the regularity and frequency of visitation, distance from the non-custodian, remarriage of both parents and whether custody was awarded to the same or opposite sex parent; and 5) characteristics of the parental relationship including spousal cooperation levels, the presence of anger, basic differences in child rearing, demeaning the ex-spouse in front of the children and the incidence of violence during the marriage.

Using the backward model of regression, variables were entered simultaneously and removed step-by-step until the optimum set of variables

remained to explain the variance in the dependent variable. The upshot of the analysis was that it was exceedingly difficult to predict any of the Achenbach subscales or the global Achenbach measure. In each regression the adjusted r^2 ranged from .05 to .11; that is 5 to 11 percent of the explained variance. One reason for this lack of prediction is probably the limited amount of variance demonstrated by the Achenbach scores at both the initial and final interviews. Thus, across all the groups at both the first and last interviews, all but one of the respondents scored in the lower third of the global adjustment scale.

Prediction with multiple regression was somewhat better for the indices of quality of the custodian parent-child relationship, acceptance of the divorce, and problems with the divorce. The adjusted r^2 s were .11, .23 and .15, respectively. (Table 1) displays the variables contributing to each regression.

Looking across all the regressions, we find eight variables that make a significant contribution to over half of the regressions. These variables are: 1) the child's age, 2) the level of physical violence in the home during the marriage, 3) the level of parental cooperation at the final interview, 4) the number of changes in the child's life, including such stressors as changes in residence or schools or being held back a grade during the months immediately preceding the final interview, 5) the presence of basic differences between the parents with respect to childrearing, 6) parent's perception of the extent to which the child is aware of anger between the parents at the time of the final interview, 7) the distance separating the child from the non-custodian at the final interview, 8) the frequency of visitation at the time of the first interview.

In other words, variables dealing with family dynamics, child characteristics and parent-child relationships are more helpful in understanding children's adjustment than is the simple fact of the case being non-contested, adversarial, or mediated. It is worth noting, however, that those who successfully mediated have the best rating on all the Achenbach scales at the final interview with exception of the somatic complaints scale.

Discussion

Our study of child adjustment to divorce finds no consistent or statistically significant differences according to the formal dispute status of the parents or their exposure to mediation versus more traditional adjudicatory processes. Although mediators, mediation program administrators and advocates of alternatives to adversarial dispute resolution maintain that mediation has salubrious effects for children, we find no evidence of such effects when we rely on a variety of objective measures of child adjustment. Indeed, to the extent that there are differences in adjustment outcomes for children, they are best explained by a variety of basic family factors including parental cooperation, family violence, parent-child proximity and visitation, differences in parental philosophy with respect to childrearing as well as the child's age and the effect of cumulative stressors such as those dealing with other changes in the child's school and home life following separation and/or divorce.

There are several possible reasons why our research has failed to uncover differences in child adjustment that can be attributed to the dispute resolution experiences of the parents and more specifically, exposure to the mediation process.

One issue has to do with the duration of our study. We gauge child

adjustment over a 15-month period of time using a variety of parent-report items and scales including the Achenbach-Edelbrock Child Behavior checklist. Although previous research has documented that there is an increased risk for children of divorce to experience emotional difficulties with such children proportionally overrepresented in the outpatient psychiatric and psychological treatment populations (Zill, 1983), there is also evidence that psychological difficulties do not necessarily manifest themselves at the time of divorce or within a 15-month period of time. Indeed, according to one study, treatment referrals for children of divorced families are made an average of five years following the divorce (Kalter and Rembar, 1977). On the other hand, other studies find that children only experience short-term social and emotional difficulties as a result of a parental divorce and with few exceptions such problems fade within a two-year period of time (Hetherington, et al, 1982). Thus, while the duration of our study may simply be too short to allow differential child adjustment patterns to develop, it is not clear what study time period would have been optimal.

Measurement is also a problem in research on child adjustment to divorce and may help to explain why our research fails to identify differences in adjustment outcomes. Although we used an objective measure that has demonstrated reliability rather than relying exclusively on unstandardized interviews, it is important to note the Achenbach-Edelbrock Child Behavior Checklist was developed and tested with clinical and normal populations and not necessarily with a population of children who necessarily experienced a parental separation or divorce. An analysis of Achenbach scores in our sample at both the initial and final interviews reveals an overall lack of variance, with all but one of the respondents scoring in the lower third of

the global adjustment scale. This underscores the dangers of relying on a measure designed for use with clinical populations and the need to develop and test child adjustment measures with the non-clinical population that has experienced divorce. It should be noted that while some divorce specific measures have been developed since our data collection began in 1981, such as Berg's "Children's Attitudes Toward Parental Separation Inventory," and Warshak's projective stories, scores from these scales need "normative and developmental anchoring" if they are to be reliably used in assessments of children's adjustment (Kurdek, et al).

Another potential measurement problem is the fact that we have altered the scales specified in the Achenbach-Edelbrock instrument and reduced the number of behavioral items that comprise each subscale. Our sample size simply did not permit us to analyze the data according to the specified age and sex subdivisions along with the divisions by parental dispute status and the mediation and adversarial experience classifications under study. Instead, we considered patterns for children of all ages and both sexes and only retained classifications based upon parental dispute status and mediation versus adversarial experience. In order to control for the obvious differences in symptomology exhibited by children of different ages, we limited our analysis to subscales shared in common by children of all age groups. We also restricted each subscale to behavioral items that were also shared by children across all ages and both sexes. Thus, our subscales are only comprised of behavioral symptoms shared by preschoolers as well as adolescents.

Obviously, this procedure reduced the number of items that comprise each subscale substantially. It may also have reduced the potential variance in

subscale scores and contributed to the findings of no differences in child adjustment subscale scores across parental dispute resolution categories. On the other hand, it is relevant to reiterate that all but one of the respondents scored in the lower third of the global adjustment scale which is comprised of all 136 behavioral items and is identical for children of both sexes and all ages. In addition, when exploratory analyses were conducted with subscales for children aged 6-11 who comprise one of the target age categories specified by the designers of the instrument, no differences in adjustment outcomes by parental dispute category could be detected at the initial or final interview.

A third possible explanation for the lack of measurable differences in child adjustment is the possibility that the psychological problems associated with divorce have been overstated and that the designation of comparison groups based upon marital status or the formal dispute status of divorcing parents may simply be inappropriate. Although policy makers and researchers have identified children whose parents divorce, those who contest custody and visitation matters and in particular, those who adjudicate as high risk populations who are particularly susceptible to experiencing psychological difficulties, these distinctions do not appear to be appropriate.

Although divorced parents are two to three times as likely than parent intact families to report that their children have experienced psychological problems, data from a national sample of 1,747 U.S. households also indicate that over 85 percent of American children are seen by their parents as coping with divorce sufficiently well so as not to need psychological help (Zill, 1983). Indeed, data published from the New York Longitudinal Study revealed

that parental divorce or separation was not related to the child's level of adjustment as a young adult when the effects due to conflict were taken into account (Chess et al., 1983). Several investigators have found that children from happy single-parent homes are better adjusted in general than are children from conflict-ridden two-parent families (Hetherington et al., 1979; Emery, Hetherington & Fisher, 1983). Moreover, other researchers find that post-divorce socioeconomic factors are more important predictors of child adjustment outcomes than conflict or visitation (Blechman, 1982; Hodges, Wechsler & Ballantine, 1979).

There appears to be simply too much heterogeneity in conflict and functioning in both intact and divorcing families to reliably classify families according to legal labels regarding their marital status or their diversion to adjudication or formal mediation processes. There is also too much variation in the adversarial experience. For example, research shows that while some divorce attorneys are "litigators" who push their clients to a full court battle (Kressel et al., 1979, Mnookin, 1975), most are conciliatory and seek to minimize hostility.

Like other researchers, we find that the more compelling predictors of child adjustment deal with parental conflict, parent-child contact, other stressors in the child's life and general family dynamics rather than formal legal status classifications.

Finally, the absence of child adjustment outcomes by mediation versus adjudication category may simply be due to the format and scope of the mediation intervention. At all three court sites, mediation is a brief process and with the exception of Minnesota, it is a process that typically

does not require the child's direct participation. For example, based on our sample of mediation users in Connecticut, the average number of mediation sessions was 1.5, and the average number of hours was 2.3. Sixty-five percent of the respondents reported attending only one session and only fifteen percent of the respondents reported that their children were seen by the mediator.

At the Los Angeles Conciliation Court, cases averaged 1.7 sessions and 3.0 hours and 28 percent of the respondents reported that they were seen by the mediator. And in Minneapolis, where the process takes the longest and most typically involves the child, the average number of mediation sessions is 3.3 with 34 percent of respondents reporting that their children were not seen by the mediator.

Clearly, there are limits to the effects that can be expected to ensue from an intervention of this duration. Moreover, given the minimal contact that most children have with the mediator, it is probably more realistic to hypothesize that the effects of the process will be most felt by the parents and that children will benefit only indirectly through the enhanced well-being of parents. Obviously, if the goal of intervention is to enhance child adjustment, children's support groups and other direct interventions with children should be developed (Stolberg & Cullen, 1983).

Future Research and Service Delivery

Our experiences and findings lead to several recommendations regarding the direction of future research on child adjustment patterns following divorce. For example, there is a clear need for objective measures that are developed and tested with children who experience a parental divorce since those developed with clinical and normal populations may not be sensitive to

divorce outcomes. There is also a need for measurements that reflect growth and positive outcomes rather than focusing purely on the behavioral disorders and psychological problems reflected in traditional adjustment scales.

There is also a need to conduct research with extremely large samples and longer time perspectives. In order to control for the many social, familial, custodial factors that affect children's divorce adjustment as well as the differences that can be expected for children in different age categories and the two sexes, researchers need to work with extremely large samples. To trace how children adjust over time, there is a need for repeated measures over a long span of time. And to generalize about the divorcing population as a whole, research is needed with random samples of divorces involving minor children. These are costly and arduous research requirements but compromises on any one of these items will probably lead to ambiguous, tentative and ultimately disappointing results.

Our research also reveals the need for multi-method assessment procedures that involve both objective measures as well as direct observations and interviews with children. Once again, this is costly and difficult to accomplish. Our clinical staff and field researchers encountered significant resistance from parents when they attempted to schedule interviews with children aged 6-11. Research to date that has relied on clinical interviews has been conducted with small, self-selected and homogeneous samples. One strength of our study is that it includes the experience of a large, heterogeneous sample drawn from court populations. It is important to note, however, that it was extremely difficult to elicit parental permission for interviews with children in this population and that the sample of children ultimately interviewed did not reflect the

heterogeneity of the court population which is captured in the survey of parents.

As to policy considerations, it is important that mediators, program administrators and advocates alike be realistic about the outcomes of the mediation intervention and its potential benefits for children. Many extravagant benefits have been posited for mediation. Although numerous accounts document impressive levels of user satisfaction and there is some evidence of improved compliance and reduced relitigation, it has limited impact on relationships between disputants (Pearson & Thoennes, 1984 a,b). This study finds it has negligible measurable direct effects on children's adjustment following a parental divorce.

If more direct benefits to children are desired, mediation programs should be modified to routinely involve children in ways that are understandable and meaningful to them. Children's support groups and reenactments of the divorce process using puppets and informal visits to the courtroom are examples of interventions that are likely to produce more compelling effects on children. Arguably, these interventions are distinct from mediation and beyond the scope of public sector mediation services. In that event, mediation should be promoted as a process to aid parents make decisions about post-divorce considerations including living arrangements for their children rather than one aimed at enhancing the post divorce adjustment of children.

Children, however, remain very central to the process of mediation. Parents who are exposed to mediation are more likely to say that the process helped them to focus on their children's needs and this is significantly less frequently attributed to court hearings and other adversarial proceedings.

The child-oriented focus and the information parents receive about parenting and the needs of their children are aspects of mediation that parents appreciate the most (Pearson & Thoennes, 1984). And preliminary research findings indicate that while the child's attendance at the mediation session is not associated with successful outcomes, successful couples were more likely to make a change in focus from selfish goals to the future best interests of the child (Shoemaker, 1984). These patterns clearly suggest that mediation focuses attention on children at a time when parents tend to be self involved and experiencing a diminished parenting capacity.

Finally, children may realize a variety of indirect benefits that ensue from the greater parental satisfaction, compliance and reduced relitigation associated with mediation interventions. The evidence is strong that children mirror the wellbeing and adjustment patterns that their parents experience. Parent reactions to mediation are favorable and strong. Although the process may not produce direct measurable effects for children, it may reduce the upset and stress experienced by their parents and ultimately enhance their home environment.

Figure 1

Variables and Factor Loadings on Composite Indices
of Child Adjustment

- Factor 1 Quality of Parental-Child Relationship
Generally my relationship with this child is good (.88).
It is easy for me to show this child affection and sympathy (.85).
It is easy for me to talk to this child about his/her personal problems (.81).
This child feels s/he caused the divorce (.63).
This child does not confide in me, s/he seems distant and aloof (.59).
This child takes sides with one parent against the other (.54).
This child worries that s/he is taking sides with one parent (.49).
- Factor 2 Acceptance of the Divorce
This child is pretty satisfied with the present custody arrangement (.76).
This child accepts the divorce and separation (.75).
This child is pretty satisfied with the present visitation arrangement (.58).
- Factor 3 Problems with the Divorce and Separation
This child won't talk about the divorce (.80).
This child needs more routine and stability in his/her life (.58).

Figure 2

Items Composing Achenbach-Edelbrock Child Behavior Checklist Subscales*

Depression

fears s/he might do something bad
feels s/he has to be perfect
fears going to school
feels others are out to get
him/her
feels worthless or inferior
too fearful or anxious
self-conscious or easily embarrassed
sulks alot
unhappy, sad or depressed
worrying

Aggression

argues alot
cruelty, bullying, meanness
to others
demands alot of attention
disobedient at school
gets in many fights
stubborn, sullen, irritable
teases alot
temper tantrums or hot temper
threatens people
unusually loud

Social Withdrawal

withdrawn, doesn't get involved with
others
underactive, slow moving, lacks energy
stares blankly
secretive, keeps things to self
refuses to talk

Delinquency

steals outside home
steals at home
runs away from home
lying or cheating
hangs around with children who get in
trouble

Somatic Complaints

aches or pains
headaches
nausea, feels sick
stomachaches or cramps
vomiting, throwing up

*all items are scored "very or often true," "sometimes true," or "not true"

Table 1

Summary of Regression of Independent Variable
on Depression Subscale

Dependent Variable: Depression Subscale
Adjusted r^2 .11

<u>Variable</u>	<u>Beta</u>	<u>Significance of t</u>
number of changes in child's life at time of second interview	.09	.24
parental educational level	.09	.21
initial cooperation with ex-spouse	-.21	.01
custody awarded to same sex parent	-.09	.23
children aware of anger between parents	-.17	.03
initial interest in reconciliation	.20	.03
basic differences between parents on child-rearing in family	.16	.05
level of violence in family during the marriage	.13	.10
cooperation level between parents at final interview	.10	.21
attachment index score between parents at initial interview	.20	.02
age of child	.16	.04

Table 2

Summary of Regression of Independent Variable
in Aggression Subscale

Dependent Variable: Aggression Subscale
Adjusted r^2 = .10

<u>Variable</u>	<u>Beta</u>	<u>Significance of t</u>
adversarial group member	-.24	.01
number of children	.08	.28
length of separation	-.08	.31
initial cooperation level	-.14	.12
initial interest in reconciliation	.27	.00
basic differences between parents in childrearing	.11	.19
level of violence in the family during marriage	.10	.21
unsuccessful mediation group	-.16	.07
parental cooperation at final interview	.24	.01
sex of child	.12	.10
attachment to spouse index initial interview	.32	.00
successful mediation group	-.24	.01
geographic distance between parents at final interview	-.09	.23

Table 3

Summary of Regression of Independent Variables
on Social Withdrawal

Adjusted $r^2 = .05$

<u>Variable</u>	<u>Beta</u>	<u>Significance of t</u>
adversarial group member	-.09	.3
child placed with same sex parent	-.1	.24
number of changes in child's life at final interview	.09	.26
initial parental interest in reconciliation	.14	.16
mediator spoke with children	-.18	.04
parents have basic differences in childrearing	.11	.21
attachment to ex-spouse index at initial interview	.11	.28
age of child	.23	.01

Table 4

Summary of Regression of Independent Variables
on Delinquency Adjusted $r^2 = .08$

<u>Variable</u>	<u>Beta</u>	<u>Significance of t</u>
adversarial group	-.11	.17
parental education level	-.13	.10
number of court appearances on divorce	.12	.12
length of separation	-.11	.16
regularity of visitation initial interview	.29	.01
distance between ex-spouses initially	-.18	.11
parents denigrate one another in presence of child - final interview	.10	.17
stage in the divorce	-.12	.12
age of parents	.12	.20
male child	.16	.04
child's age	.17	.07
successful mediation	-.12	.14
distance between parents - final interview	.24	.03
frequency of visitation initially	-.21	.06

Table 5

Regression of Independent Variables in Somatic Complaints Subscale

Adjusted r^2 = .09

<u>Variable</u>	<u>Beta</u>	<u>Significance of t</u>
changes in child's life at second interview	.10	.25
changes in child's life at third interview	.14	.1
parental interest in reconciliation-initial interview	.12	.23
age of parents	.14	.17
attachment to ex-spouse index at initial interview	.15	.14
cooperation with ex-spouse at final interview	.11	.18
child's age	.32	.002
successful mediation group	.12	.14

Table 6

Regression of Independent Variables on Index
of Quality of Child-Custodian RelationshipAdjusted r^2 = .11

distance from ex-spouse at final interview	-.26	.04
parental education	.09	.27
frequency of visitation - final interview	.15	.10
children spend too much time with ex's new partner	.09	.29
changes in child's life at final interview	.12	.14
changes in child's life at initial interview	-.13	.11
unsuccessful mediation group	-.15	.07
distance from ex-spouse at initial interview	.28	.02
parent's denigrate each other in presence of children - final interview	.13	.18
stage in the divorce	.10	.20
cooperational level with ex-spouse - final interview	-.16	.10
parents denigrate each other - initial interview	.11	.27
child's age	-.12	.14
custodian believes ex-spouse is angry	-.29	.03
frequency of visitation - initially	-.11	.2

Table 7

Regression of Independent Variable on Index
of Problems with DivorceAdjusted $r^2 = .15$

<u>Variable</u>	<u>Beta</u>	<u>Significance of t</u>
changes in child's life - second interview	.12	.10
number of children	-.09	.24
financial stress initial interview	.15	.05
children spend too much time with ex's new partner	.18	.01
number of court appearances regarding divorce	.09	.20
parental cooperation initial interview	-.11	.20
non-custodian remarried	-.09	.25
children aware of parental anger - final interview	-.14	.08
custodian remarried	-.12	.12
parents have basic differences on childrearing	.20	.01
level of violence in home during marriage	-.11	.16
distances separating spouses - initial interview	.19	.07
stage in the divorce	-.15	.08
male child	.14	.06
distance separating spouse at final interview	-.20	.06
frequency of initial visitation	-.17	.04

Table 8

Regression of Independent Variables on Acceptance
of the Divorce IndexAdjusted $r^2 = .23$

<u>Variable</u>	<u>Beta</u>	<u>Significance of t</u>
parental attachment index at final interview	-.12	.07
financial stress initial interview	-.11	.10
children spend too much time with ex's new partner	-.13	.08
number of court appearances in divorce	-.10	.20
custodian remarried	-.13	.06
changes in child's life at final interview	-.19	.006
children aware of the anger between spouses	.13	.11
regularity of visitation initial interview	.14	.15
level of violence in home during marriage	.11	.14
regularity of visitation at final interview	.11	.16
spouses denigrate each other in presence of children	-.19	.02
cooperation between spouses at final interview	.08	.27
child's age	.22	.004
frequency of visitation initial interview	-.16	.12

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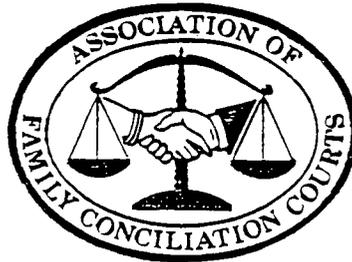
Appendix I

THE DIVORCE MEDIATION RESEARCH PROJECT

A Project Funded by
The Children's Bureau,
The Administration for Children,
Youth and Families
The Department of Health
And Human Services

Administered by the Association
of Family Conciliation Courts

1981-1983



Please Complete the Following:

NAME: _____

HOME PHONE: _____ OFFICE PHONE: _____

HOME ADDRESS: _____
street city state zip

NAME OF YOUR ATTORNEY: _____

NAME OF FIRM: _____

PHONE NUMBER: _____ ADDRESS: _____
street city state

Many people will move between the time of the first and last interview. We would appreciate the name and phone number of someone, perhaps a parent, who will always know how to reach you. This person need not live in your state. This person will not be contacted unless we are unable to locate you.

CONTACT: _____
name of person

RELATIONSHIP TO YOU: _____ PHONE: _____

ADDRESS: _____
street city state zip

THE DIVORCE MEDIATION RESEARCH PROJECT

INTERVIEW CONSENT FORM

Please read the following statements concerning participation in the Divorce Mediation Research Project. If you agree with the statements, please sign below.

ADULT PARTICIPATION

- * I agree that I am participating voluntarily in a project to study the experiences of families in divorce. The project is being administered by the Association of Family Conciliation Courts and is funded by the Administration For Children, Youth, and Families of the Department of Health and Human Services.
- * I understand that one purpose of the project is to evaluate the long and short term effects of adversarial and non-adversarial methods of dispute resolution. The study will help determine how custody and visitation disputes can be handled with the least negative effect on children and adults. My participation will involve being interviewed and filling out questionnaires.
- * I understand that I am free to decline to participate and may terminate my participation at any time without any consequence to me.
- * I understand that any information collected will be used for scientific and educational purposes only and in ways which will preserve my anonymity. My name will not appear in any public reports or documents. The project will not make my questionnaire available to my (ex-) spouse's attorney or the court and will make every reasonable effort to protect my confidentiality.
- * I understand and agree that no document or other material which is developed during the research process may be used as evidence in any litigation. I also waive my right to call any project personnel as witnesses in any current or future court proceeding.
- * I understand that I may be requested to permit my mediation sessions to be tape recorded for research purposes only, but that I am free to decline and prohibit such recordings from being made without any consequence to me.

Dated this _____ day of _____ 19_____

Signature

CHILD PARTICIPATION

Please sign below if you are willing to have your child's teacher contacted by the Divorce Mediation Project. This teacher will be asked to describe your child's adjustment and academic progress. This information will not be made available to any school personnel, nor will it be available to either parent.

Yes, you may contact my child's teacher: _____
Signature

It is important that you complete ALL the questions. Please circle only one answer, but feel free to write comments or notes explaining or qualifying your answers.

When we refer to your "(ex-)spouse", we mean the other party in this divorce, custody/visitation dispute or mediation.

THIS COLUMN FOR
OFFICE USE ONLY

Are You: 1...Male 2...Female	1:11
What year were you born? 19_____	1:12-13
What is your racial/ethnic group? 1...Black 2...White, Anglo 3...Hispanic, Chicano 4...Asian-American 5...American Indian (Native American) 8...Other: _____	1:14
How many years of school did you complete? 1...less than eight 2...8-11 years 3...12 years (finished high school) 4...technical school or job training 5...some college 6...finished college 7...graduate work	1:15
Within the last year has your employment situation changed? 1...no change 2...unemployed to part-time 3...part-time to full-time 4...unemployed to full-time 5...employed to unemployed 6...increased full-time hours 7...increased part-time hours 8...other (specify): _____	1:16
Which best describes your current employment situation? 1...full-time homemaker 2...employed full-time 3...employed part-time 4...unemployed, looking for work 5...student 8...other (specify): _____	1:17
If you are employed full or part-time, what kind of work do you do? _____	1:18-22
What is your relationship to your (ex-) spouse? 1...still living together, divorce not final 2...living apart, divorce not final 3...divorced, living apart 8...other (specify): _____	1:23
Are you currently: 1...not dating 2...dating, not seeing anyone special 3...dating, seeing someone special 4...remarried	1:24

2.

What year did you and your (ex-)spouse marry? 19 _____

1:25-26

Was this your first marriage? Yes _____ No _____

1:27

When did you separate? Month _____ Year _____ Haven't Separated _____

1:28-31

If divorced, when did your divorce become final? 19 _____

1:32-33

Have the following occurred in your divorce?

	No	Yes	Not Sure	
Custody investigation ordered or conducted.....	1	2	7	1:34
Custody mediation ordered or conducted.....	1	2	7	1:35
Temporary Restraining Order issued or received.....	1	2	7	1:36
Contempt Citations issued or received.....	1	2	7	1:37
Prior attempts to change custody or visitation in court.....	1	2	7	1:38

There are many issues to be resolved in a divorce. Do you and your (ex-)spouse have an understanding or agreement on the following?

	ISSUE IS SETTLED... Are you satisfied with settlement?		ISSUE IS NOT SETTLED... Is there disagreement on the issue?				
	Pretty Satisfied	Not very Satisfied	None	Some	A Lot		
Division of Property	1	2	3	4	5	7	1:39
Spouse Support/Alimony	1	2	3	4	5	7	1:40
Child Support	1	2	3	4	5	7	1:41

Are you presently:

- 1...paying child support...amount per month: \$ _____
- 2...receiving child support...amount per month: \$ _____
- 3...neither paying nor receiving child support
- 8...other (specify): _____

1:42-45

Do you make/receive these payments regularly?

- 1...very regularly
- 2...somewhat regularly
- 3...somewhat irregularly
- 4...very irregularly
- 9...does not apply

1:46

When the issue of divorce was first seriously discussed who do you think wanted the divorce most?

- 1...I did
- 2...my (ex-)spouse did
- 3...we both wanted it about equally
- 8...other (specify): _____

1:47

3.

How interested are you in getting back together with your (ex-)spouse?

- 1...very interested
- 2...somewhat interested
- 3...not sure
- 4...not very interested
- 5...not at all interested
- 8...other (specify): _____

1:48

Taking all things together, how would you describe your relationship with your (ex-)spouse today?

- 1...we're still friends and we can cooperate pretty easily
- 2...our relationship is strained, but we are able to cooperate
- 3...we have too many problems and hard feelings to cooperate much
- 4...cooperation is just about impossible
- 5...we haven't spoken or tried to cooperate in months
- 8...other (specify): _____

1:49

When the two of you were married and there was a disagreement, how often were things resolved in your favor -- that is, how often did you "come out ahead" or win?

- 1...never
- 2...rarely
- 3...sometimes
- 4...usually
- 5...always
- 8...other (specify): _____

1:50

Compared to your (ex-)spouse how well are you able to present your side of a disagreement?

- 1...much less able to present my side
- 2...somewhat less able to present my side
- 3...about equally able to present my side
- 4...somewhat better able to present my side
- 5...much better able to present my side
- 8...other (specify): _____

1:51

What was the general level of physical violence between you and your (ex-)spouse during the last years of your marriage?

- 1...no violence
- 2...very little violence
- 3...some violence
- 4...quite a bit of violence
- 5...a great deal of violence

1:52

How far away from you does your (ex-)spouse live?

- Less than a mile _____
Approximately _____ miles
Does not apply, we live in the same building _____
Don't know the distance _____
Don't know where my (ex-)spouse lives _____

1:53-55

During the marriage did you ever seek counseling, either as a couple or as an individual?

- 1...no
- 2...yes, went for 1 or 2 sessions
- 3...yes, went for several sessions
- 4...yes, attended for several months or more
- 8...other (specify): _____

1:56

If you sought counseling, how helpful was it (either to you as an individual or to the marriage)?

- 1...very helpful
- 2...somewhat helpful
- 3...a little helpful
- 4...not very helpful
- 5...not helpful
- 8...other (specify): _____
- 9...did not seek counseling

1:57

4.

Have you recently attended any lectures, workshops, or discussion groups related to divorce, single parents, or co-parenting?

1...no

2...yes.....Do you remember who offered the program or where it was presented? Please describe:

1:58

1:59-60

Thinking back on your marriage, how well do the following statements express the way you and your (ex-) spouse communicated?

	STRONGLY DISAGREE				STRONGLY AGREE	
Usually I tried to work out problems myself instead of talking them over with my (ex-) spouse	1	2	3	4	5	1:61
My thoughts became jumbled and confused when discussing important issues with my (ex-) spouse	1	2	3	4	5	1:62
Even in a casual conversation I felt I had to guard what I said	1	2	3	4	5	1:63
I looked forward to talks with my (ex-) spouse	1	2	3	4	5	1:64
I was comfortable in developing intimate conversations with my (ex-) spouse.....	1	2	3	4	5	1:65
I usually came right out and told my (ex-) spouse exactly what I meant	1	2	3	4	5	1:66

Circle the number which best describes the way you are feeling these days.

	NOT AT ALL. MY FEELINGS				VERY MUCH MY MY FEELINGS	
I find myself spending a lot of time thinking about my (ex-) spouse	1	2	3	4	5	1:67
Sometimes I just can't believe that we got a divorce (broke up)	1	2	3	4	5	1:68
I find myself wondering what my (ex-) spouse is doing	1	2	3	4	5	1:69
I'm angry at my (ex-) spouse	1	2	3	4	5	1:70
I feel I will <u>never</u> get over the divorce (break-up)	1	2	3	4	5	1:71

Besides the divorce and/or custody dispute, are there other things in your life today that have you worried or upset?

1...no, no other problems

2...yes, other minor problems

3...yes, other major problems

1:72

5.

Do you think mediation should be required of all couples who disagree on custody or visitation?

- 1...definitely should be
- 2...probably should be
- 3...neutral
- 4...probably should not be
- 5...definitely should not be
- 7...not sure, don't know what mediation is like
- 8...other (specify): _____

2:1

If you are using the mediation services of the court:

What chance do you think there is that mediation will produce the kind of custody/visitation arrangement you would like (e.g., do you give it a 90% chance of success, a 50-50 chance, a 0% chance, or what?)

_____ % chance of getting what I want
_____ not using mediation

2:2-3

If you went to court right now, about what percent chance would you have of getting the kind of custody/visitation arrangement you would like (a 0% chance, a 50-50 chance, a 90% chance, or what?)

_____ % chance of getting what I want

2:4-5

Do you believe that judges often discriminate against or are unfair to fathers in awarding custody?

- 1...definitely unfair
- 2...probably unfair
- 3...maybe unfair
- 4...probably fair
- 5...definitely fair
- 8...other (specify): _____

2:6

About how many times would you estimate you have appeared in court on matters related to custody and visitation?

_____ times

2:7-8

Have you had other experiences with the courts not related to your divorce? For example, as a defendant, jury member or witness; in small claims, juvenile or some other court? CIRCLE ALL THAT APPLY.

- 1...no, no other court experiences
- 2...yes, traffic court
- 3...yes, criminal court
- 4...yes, in other court
- 8...other (specify): _____

2:9

Briefly describe when the parent not living with the children is SUPPOSED to see the children (e.g., every other weekend, alternating Wednesday evenings, and 2 weeks in the summer):

Description: _____

2:10-13

OR:

Check here if visitation is to be "reasonable" _____
Check here if the children spend equal time with both parents _____
Check here if you and your (ex-) spouse live together _____

6.

Briefly describe when the parent not living with the children ACTUALLY sees the children:

Description: _____

2:14-17

OR:

Check here if the children spend equal time with both parents ____
Check here if you and your (ex-) spouse live together ____

How satisfied are you with the amount of time you spend with your children?

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied

2:18

What are your feelings about the present legal custody arrangement?

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied
- 8...other (specify): _____

2:19

How satisfied or dissatisfied are you with your present level of involvement with your children?

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied
- 8...other (specify): _____

2:20

Below is list of problems divorcing parents sometimes experience. We would like to know if each is currently a problem for you.

	NEVER	RARELY	SOMETIMES	OFTEN	DOESN'T APPLY	
Concerned about the children being spoiled by you or your (ex-) spouse	1	2	3	4	9	2:21
Children spend too much time with your (ex-) spouse's parents or relatives ..	1	2	3	4	9	2:22
Your (ex-) spouse says bad things about you to the children	1	2	3	4	9	2:23
Not getting the children back on time after a visit	1	2	3	4	9	2:24
Finding things to do or places to go with the children	1	2	3	4	9	2:25
Concerned about the child's well-being or safety in your (ex-) spouse's home (e.g., drugs, violence, neglect)	1	2	3	4	9	2:26

7.

If you have custody of ALL the children or the children spend EQUAL AMOUNTS OF TIME with each parent, GO ON TO THE NEXT SET OF QUESTIONS.

Otherwise, PLEASE ANSWER THE FOLLOWING:

	NEVER	RARELY	SOMETIMES	OFTEN	DOESN'T APPLY	
How often are you able to make it for scheduled visitations?	1	2	3	4	9	2:27
How often do you drop in to see your children outside of regular visitation times .	1	2	3	4	9	2:28
How often do your children drop in to see you	1	2	3	4	9	2:29
How often do you talk with your children on the telephone	1	2	3	4	9	2:30
How often do you feel awkward visiting with your children	1	2	3	4	9	2:31
Do you and your children feel free to telephone each other	1	2	3	4	9	2:32
How often do the children seem awkward or uncomfortable visiting with you	1	2	3	4	9	2:33
How often do the children seem angry, irritable, or upset during visitation	1	2	3	4	9	2:34

Now we'd like to know how you and your (ex-) spouse get along as PARENTS.

	NEVER	RARELY	SOMETIMES	OFTEN	DOESN'T APPLY	
When you and your (ex-) spouse discuss parenting, how often is the underlying atmosphere one of hostility or anger	1	2	3	4	7	2:35
Do you and your (ex-) spouse have basic differences of opinion about issues relating to childrearing	1	2	3	4	7	2:36
Would you say your (ex-) spouse is a help to you in raising the children	1	2	3	4	7	2:37

What is your own individual income today (before taxes). Do not include child support or your spouse's income, but do count maintenance (alimony), public assistance, interest, wages, etc.

\$ _____ per month / year (Circle which you are reporting) 2:38-2

Around the time you separated, approximately what percent of the family income were you contributing (for example, were you earning 10%, 50%, 90% or what?)

Approximately _____ % 2:43-44

8.

How much financial strain are you feeling these days?

- 1...no financial strain at all
- 2...very little financial strain
- 3...some financial strain
- 4...a lot of financial strain
- 8...other (specify): _____

2:45

Would you say your present lawyer's fees are:

- 1...outrageous for the amount of work done
- 2...too high for the amount of work done
- 3...reasonable for the amount of work done
- 8...other (specify): _____
- 9...do not have an attorney

2:46

As of today, how satisfied are you with the job your lawyer is doing concerning the divorce or custody issues?

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied
- 8...other (specify): _____
- 9...do not have an attorney

2:47

If you are going to use the mediation services of the court, how did your lawyer react to the idea of mediation?

- 1...my lawyer encouraged me to try
- 2...my lawyer was neutral; didn't encourage or discourage me
- 3...my lawyer did not like the idea
- 4...I didn't discuss it with my lawyer
- 7...I don't know what my lawyer thinks of mediation
- 9...I do not have an attorney
- Not mediating _____

2:48

Listed below are a number of statements. Read each item and decide to what extent you agree.

	STRONGLY DISAGREE				STRONGLY AGREE	
No matter who I'm talking to I'm always a good listener	1	2	3	4	5	2:49
I sometimes try to get even rather than forgive and forget	1	2	3	4	5	2:50
I sometimes have taken unfair advantage of another person	1	2	3	4	5	2:51
I am always courteous, even to people who are disagreeable	1	2	3	4	5	2:52
What young people need most of all is strong discipline by their parents	1	2	3	4	5	2:53
Most people who don't get ahead just don't have enough willpower.....	1	2	3	4	5	2:54
A few strong leaders could make this country better than all the talk and laws	1	2	3	4	5	2:55
People sometimes say that an insult to your honor should not be forgotten. Do you agree with that?	1	2	3	4	5	2:56

9.

PLEASE COMPLETE THE FOLLOWING FOR ALL CHILDREN UNDER 18 YEARS.

INCLUDE ONLY CHILDREN FROM YOUR MARRIAGE/RELATIONSHIP WITH YOUR (EX-) SPOUSE. DO NOT INCLUDE CHILDREN FROM OTHER RELATIONSHIPS.

IF YOU HAVE MORE THAN 5 CHILDREN PLEASE INCLUDE THE OLDEST, AND THE FOUR YOUNGEST CHILDREN.

Sex: 1...Male 2...Female

Child's First Name: _____ AGE: _____

Who has legal custody?
1...mother
2...father
3...joint legal custody
8...someone else has custody
(Who?) _____

Where does the child live?
1...mostly with me
2...mostly with my (ex-)spouse
3...spends equal time with both
of us.
8...mostly with some else
(Who?): _____

Is this arrangement satisfactory?
1...very satisfactory
2...somewhat satisfactory
3...neutral
4...somewhat unsatisfactory
5...very unsatisfactory

(Optional): Teacher's name _____
Name of School _____

Is there any disagreement over each of these issues?

CUSTODY	VISITATION
1...none	1...none
2...little	2...little
3...some	3...some
4...a lot	4...a lot
7...don't know	7...don't know

If there are disagreements, approximately how long have you and your (ex-)spouse been in dispute over the custody and/or visitation of the child?
_____ months/years
(Circle One)

2:57-67

Sex: 1...Male 2...Female

Child's First Name: _____ AGE: _____

Who has legal custody?
1...mother
2...father
3...joint legal custody
8...someone else has custody
(Who?) _____

Where does the child live?
1...mostly with me
2...mostly with my (ex-)spouse
3...spends equal time with both
of us.
8...mostly with some else
(Who?): _____

Is this arrangement satisfactory?
1...very satisfactory
2...somewhat satisfactory
3...neutral
4...somewhat unsatisfactory
5...very unsatisfactory

(Optional): Teacher's name _____
Name of School _____

Is there any disagreement over each of these issues?

CUSTODY	VISITATION
1...none	1...none
2...little	2...little
3...some	3...some
4...a lot	4...a lot
7...don't know	7...don't know

If there are disagreements, approximately how long have you and your (ex-)spouse been in dispute over the custody and/or visitation of the child?
_____ months/years
(Circle One)

3:1-11

Sex: 1...Male 2...Female

Child's First Name: _____ AGE: _____

Who has legal custody?
 1...mother
 2...father
 3...joint legal custody
 8...someone else has custody
 (Who?) _____

Where does the child live?
 1...mostly with me
 2...mostly with my (ex-)spouse
 3...spends equal time with both
 of us.
 8...mostly with some else
 (Who?): _____

Is this arrangement satisfactory?
 1...very satisfactory
 2...somewhat satisfactory
 3...neutral
 4...somewhat unsatisfactory
 5...very unsatisfactory

(Optional): Teacher's name _____
 Name of School _____

Is there any disagreement over each of these issues?

CUSTODY	VISITATION
1...none	1...none
2...little	2...little
3...some	3...some
4...a lot	4...a lot
7...don't know	7...don't know

If there are disagreements, approximately how long have you and your (ex-)spouse been in dispute over the custody and/or visitation of the child?
 _____ months/years
 (Circle One)

3:12-22

Sex: 1...Male 2...Female

Child's First Name: _____ AGE: _____

Who has legal custody?
 1...mother
 2...father
 3...joint legal custody
 8...someone else has custody
 (Who?) _____

Where does the child live?
 1...mostly with me
 2...mostly with my (ex-)spouse
 3...spends equal time with both
 of us.
 8...mostly with some else
 (Who?): _____

Is this arrangement satisfactory?
 1...very satisfactory
 2...somewhat satisfactory
 3...neutral
 4...somewhat unsatisfactory
 5...very unsatisfactory

(Optional): Teacher's name _____
 Name of School _____

Is there any disagreement over each of these issues?

CUSTODY	VISITATION
1...none	1...none
2...little	2...little
3...some	3...some
4...a lot	4...a lot
7...don't know	7...don't know

If there are disagreements, approximately how long have you and your (ex-)spouse been in dispute over the custody and/or visitation of the child?
 _____ months/years
 (Circle One)

3:23-33

Sex: 1...Male 2...Female

Child's First Name: _____ AGE: _____

<p>Who has legal custody?</p> <p>1...mother</p> <p>2...father</p> <p>3...joint legal custody</p> <p>8...someone else has custody (Who?) _____</p> <p>Where does the child live?</p> <p>1...mostly with me</p> <p>2...mostly with my (ex-)spouse</p> <p>3...spends equal time with both of us.</p> <p>8...mostly with some else (Who?): _____</p> <p>Is this arrangement satisfactory?</p> <p>1...very satisfactory</p> <p>2...somewhat satisfactory</p> <p>3...neutral</p> <p>4...somewhat unsatisfactory</p> <p>5...very unsatisfactory</p> <p>(Optional): Teacher's name _____</p> <p style="padding-left: 100px;">Name of School _____</p>	<p>Is there any disagreement over each of these issues?</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">CUSTODY</th> <th style="text-align: left;">VISITATION</th> </tr> </thead> <tbody> <tr> <td>1...none</td> <td>1...none</td> </tr> <tr> <td>2...little</td> <td>2...little</td> </tr> <tr> <td>3...some</td> <td>3...some</td> </tr> <tr> <td>4...a lot</td> <td>4...a lot</td> </tr> <tr> <td>7...don't know</td> <td>7...don't know</td> </tr> </tbody> </table> <p>If there are disagreements, approx- imately how long have you and your (ex-)spouse been in dispute over the custody and/or visitation of the child?</p> <p style="text-align: right;">_____ months/years (Circle One)</p>	CUSTODY	VISITATION	1...none	1...none	2...little	2...little	3...some	3...some	4...a lot	4...a lot	7...don't know	7...don't know
CUSTODY	VISITATION												
1...none	1...none												
2...little	2...little												
3...some	3...some												
4...a lot	4...a lot												
7...don't know	7...don't know												

3:30-44

Now, we would like some detailed information about ONE of the children.

Do you and your (ex-) spouse have any children aged 4-16?

- 1...YES
2...NO

Please enter the name of your
OLDEST / YOUNGEST (or ONLY)
child here and complete the
checklists on the next pages
for this child.

First name:

Please enter the name of your
OLDEST (or ONLY) child here and
complete checklists on the next
pages for this child.

First name:

CHILD CHECKLIST

	NOT AT ALL TRUE					VERY TRUE	DOESN'T APPLY OR DON'T KNOW	
This child is pretty satisfied with the present custody arrangement.....	1	2	3	4	5	9		3:45
She/he is pretty satisfied with the present visitation arrangement	1	2	3	4	5	9		3:46
It is easy for me to show this child affection or sympathy	1	2	3	4	5	9		3:47
This child won't talk about the divorce ...	1	2	3	4	5	9		3:48
She/he became more responsible and mature as a result of the separation	1	2	3	4	5	9		3:49
I think this child understands what the custody/visitation problem is about	1	2	3	4	5	9		3:50
This child is angry at father because of the divorce	1	2	3	4	5	9		3:51
It is easy for me to talk to this child about his/her personal problems	1	2	3	4	5	9		3:52
I find myself confiding a lot in this child. I share my personal problems, financial worries, future plans	1	2	3	4	5	9		3:53
This child worries that she/he is taking sides with one parent	1	2	3	4	5	9		3:54
Generally my relationship with this child is good	1	2	3	4	5	9		3:55
This child needs more routine or stability in her/his life	1	2	3	4	5	9		3:56
This child became closer to siblings as a result of the marital separation	1	2	3	4	5	9		3:57
This child is angry at mother because of the divorce	1	2	3	4	5	9		3:58
This child accepts the divorce or separation	1	2	3	4	5	9		3:59
This child does not confide in me, she/he seems distant and aloof	1	2	3	4	5	9		3:60
This child takes sides with one parent against the other	1	2	3	4	5	9		3:61
Generally my (ex-) spouse has a good relationship with this child	1	2	3	4	5	9		3:62
This child feels she/he caused the divorce .	1	2	3	4	5	9		3:63
Within the last year have the following occurred in this child's life?								
	No	Yes				Don't Know		
Changed Schools...	1	2				7		3:64
Moved from one parent's home to the other's...	1	2				7		3:65
Held back a grade in school...	1	2				7		3:66
Moved (along with parents)...	1	2				7		3:67

3.

Below is a list of items that describe children. How often has each item been true of this child in the last month or so?

NOT
SOMETIMES
VERY
TRUE

NOT
SOMETIMES
VERY
TRUE

- | | | | | | | | | | |
|---|---|---|-----|---|---|---|---|-----|--|
| 0 | 1 | 2 | 1. | Acts too young for his/her age | 0 | 1 | 2 | 31. | Fears he/she might think or do something bad |
| 0 | 1 | 2 | 2. | Allergy (describe): _____ | 0 | 1 | 2 | 32. | Feels he/she has to be perfect |
| | | | | _____ | 0 | 1 | 2 | 33. | Feels or complains that no one loves him/her |
| 0 | 1 | 2 | 3. | Argues a lot | 0 | 1 | 2 | 34. | Feels others are out to get him/her |
| 0 | 1 | 2 | 4. | Asthma | 0 | 1 | 2 | 35. | Feels worthless or inferior |
| 0 | 1 | 2 | 5. | Behaves like opposite sex | 0 | 1 | 2 | 36. | Gets hurt a lot, accident-prone |
| 0 | 1 | 2 | 6. | Bowel movements outside toilet | 0 | 1 | 2 | 37. | Gets in many fights |
| 0 | 1 | 2 | 7. | Bragging, boasting | 0 | 1 | 2 | 38. | Gets teased a lot |
| 0 | 1 | 2 | 8. | Can't concentrate, can't pay attention for long | 0 | 1 | 2 | 39. | Hangs around with children who get in trouble |
| 0 | 1 | 2 | 9. | Can't get his/her mind off certain thoughts; obsessions (describe): _____ | 0 | 1 | 2 | 40. | Hears things that aren't there (describe): _____ |
| | | | | _____ | | | | | |
| 0 | 1 | 2 | 10. | Can't sit still, restless, or hyperactive | 0 | 1 | 2 | 41. | Impulsive or acts without thinking |
| 0 | 1 | 2 | 11. | Clings to adults or too dependent | 0 | 1 | 2 | 42. | Likes to be alone |
| 0 | 1 | 2 | 12. | Complains of loneliness | 0 | 1 | 2 | 43. | Lying or cheating |
| 0 | 1 | 2 | 13. | Confused or seems to be in a fog | 0 | 1 | 2 | 44. | Bites fingernails |
| 0 | 1 | 2 | 14. | Cries a lot | 0 | 1 | 2 | 45. | Nervous, highstrung, or tense |
| 0 | 1 | 2 | 15. | Cruel to animals | 0 | 1 | 2 | 46. | Nervous movements or twitching (describe): _____ |
| 0 | 1 | 2 | 16. | Cruelty, bullying, or meanness to others | | | | | |
| 0 | 1 | 2 | 17. | Day-dreams or gets lost in his/her thoughts | | | | | |
| 0 | 1 | 2 | 18. | Deliberately harms self or attempts suicide | 0 | 1 | 2 | 47. | Nightmares |
| 0 | 1 | 2 | 19. | Demands a lot of attention | 0 | 1 | 2 | 48. | Not liked by other children |
| 0 | 1 | 2 | 20. | Destroys his/her own things | 0 | 1 | 2 | 49. | Constipated, doesn't move bowels |
| 0 | 1 | 2 | 21. | Destroys things belonging to his/her family or other children | 0 | 1 | 2 | 50. | Too fearful or anxious |
| 0 | 1 | 2 | 22. | Disobedient at home | 0 | 1 | 2 | 51. | Feels dizzy |
| 0 | 1 | 2 | 23. | Disobedient at school | 0 | 1 | 2 | 52. | Feels too guilty |
| 0 | 1 | 2 | 24. | Doesn't eat well | 0 | 1 | 2 | 53. | Overeating |
| 0 | 1 | 2 | 25. | Doesn't get along with other children | 0 | 1 | 2 | 54. | Overtired |
| 0 | 1 | 2 | 26. | Doesn't seem to feel guilty after misbehaving | 0 | 1 | 2 | 55. | Overweight |
| 0 | 1 | 2 | 27. | Easily jealous | | | | 56. | Physical problems without known medical cause: |
| 0 | 1 | 2 | 28. | Eats or drinks things that are not food (describe): _____ | 0 | 1 | 2 | a. | Aches or pains |
| | | | | _____ | 0 | 1 | 2 | b. | Headaches |
| | | | | | 0 | 1 | 2 | c. | Nausea, feels sick |
| | | | | | 0 | 1 | 2 | d. | Problems with eyes (describe): _____ |
| 0 | 1 | 2 | 29. | Fears certain animals, situations, or places, other than school (describe): _____ | 0 | 1 | 2 | e. | Rashes or other skin problems |
| | | | | _____ | 0 | 1 | 2 | f. | Stomachaches or cramps |
| | | | | | 0 | 1 | 2 | g. | Vomiting, throwing up |
| 0 | 1 | 2 | 30. | Fears going to school | 0 | 1 | 2 | h. | Other (describe): _____ |

NOT
SOMETIMES
VERY
TRUE

- 0 1 2 57. Physically attacks people
- 0 1 2 58. Picks nose, skin, or other parts of body
(describe): _____

- 0 1 2 59. Plays with own sex parts in public
- 0 1 2 60. Plays with own sex parts too much
- 0 1 2 61. Poor school work
- 0 1 2 62. Poorly coordinated or clumsy
- 0 1 2 63. Prefers playing with older children
- 0 1 2 64. Prefers playing with younger children
- 0 1 2 65. Refuses to talk
- 0 1 2 66. Repeats certain acts over and over;
compulsions (describe): _____

- 0 1 2 67. Runs away from home
- 0 1 2 68. Screams a lot
- 0 1 2 69. Secretive, keeps things to self
- 0 1 2 70. Sees things that aren't there (describe): _____

- 0 1 2 71. Self-conscious or easily embarrassed
- 0 1 2 72. Sets fires
- 0 1 2 73. Sexual problems (describe): _____

- 0 1 2 74. Showing off or clowning
- 0 1 2 75. Shy or timid
- 0 1 2 76. Sleeps less than most children
- 0 1 2 77. Sleeps more than most children during day
and/or night (describe): _____

- 0 1 2 78. Smears or plays with bowel movements
- 0 1 2 79. Speech problem (describe): _____

- 0 1 2 80. Stares blankly
- 0 1 2 81. Steals at home
- 0 1 2 82. Steals outside the home
- 0 1 2 83. Stores up things he/she doesn't need (describe): _____

NOT
SOMETIMES
VERY
TRUE

- 0 1 2 84. Strange behavior (describe): _____

- 0 1 2 85. Strange ideas (describe): _____

- 0 1 2 86. Stubborn, sullen, irritable
- 0 1 2 87. Sudden changes in mood or feelings
- 0 1 2 88. Sulks a lot
- 0 1 2 89. Suspicious
- 0 1 2 90. Swearing or obscene language
- 0 1 2 91. Talks about killing self
- 0 1 2 92. Talks or walks in sleep (describe): _____

- 0 1 2 93. Talks too much
- 0 1 2 94. Teases a lot
- 0 1 2 95. Temper tantrums or hot temper
- 0 1 2 96. Thinks about sex too much
- 0 1 2 97. Threatens people
- 0 1 2 98. Thumb-sucking
- 0 1 2 99. Too concerned with neatness or cleanliness
- 0 1 2 100. Trouble sleeping (describe): _____

- 0 1 2 101. Truancy, skips school
- 0 1 2 102. Underactive, slow moving, or lacks energy
- 0 1 2 103. Unhappy, sad, or depressed
- 0 1 2 104. Unusually loud
- 0 1 2 105. Uses alcohol or drugs (describe): _____

- 0 1 2 106. Vandalism
- 0 1 2 107. Wets self during the day
- 0 1 2 108. Wets the bed
- 0 1 2 109. Whining
- 0 1 2 110. Wishes to be of opposite sex
- 0 1 2 111. Withdrawn, doesn't get involved with others
- 0 1 2 112. Worrying
- 113. Please write in any problems your child has
that were not listed above:

THANK YOU FOR YOUR HELP!

In order to learn more about what divorce is like for parents and their children we would like to talk with you, at your convenience, about your experiences.

We would also like an interviewer, experienced in work with children, to talk with your son or daughter.

If you are willing to participate in this in-depth study our site researcher will contact you with more information.

Are you willing to participate?

YES

AGAIN, THANK YOU FOR YOUR TIME.

OFFICE USE ONLY

Interviewer:	Mode: On site	<input type="checkbox"/>
	Phone	<input type="checkbox"/>
Site :	In-person	<input type="checkbox"/>
Date:	Spouse: yes	<input type="checkbox"/>
	no	<input type="checkbox"/>
LA: immed	<input type="checkbox"/>	appt. <input type="checkbox"/>
		stip <input type="checkbox"/>
CONN: negot: yes	<input type="checkbox"/>	no <input type="checkbox"/>
		d.k. <input type="checkbox"/>

Divorce Mediation Research Project

<u>VARIABLE:</u>	<u>QUESTION</u>	<u>LOCATION</u> <u>(CARD: COLUMN)</u>	<u>SOURCE</u>
Mutuality of Divorce Decision	When the issue of divorce was first seriously discussed, who do you think wanted the divorce most?	1:47	
Ambivalence about the Divorce	How interested are you in getting back together with your (ex-) spouse	1:48	Denver Custody Mediation Project
Attitude towards spouse	Taking all things together, how would you describe your relationship with your (ex-)spouse today?	1:49	"
	I'm angry at my (ex-)spouse	1:70	Item from Gay-Kitson "Attachment Index"
Balance of power	When the two of you were married and there was a disagreement, how often were things resolved in your favor -- that is, how often did you "come out ahead" or win?	1:50	
	Compared to your (ex-)spouse, how well are you able to present your side of a disagreement?	1:51	
	Around the time you separated, approximately what percent of the family income were you contributing (for example, were you earning 10%, 50%, 90% or what?	2:43-44	
Communications	Compared to your (ex-)spouse how well are you able to present your side of a disagreement?	1:51	"The Measurement of Communication Apprehension in the Marriage" William Powers and Kevin Hutchinson, J. of Marriage and the Family, Feb. 1979

<u>VARIABLE</u>	<u>QUESTION</u>	<u>LOCATION</u> (CARD: COLUMN)	<u>SOURCE</u>
	Usually I tried to work out problems myself instead of talking them over with my (ex-)spouse	1:61	"The Measurement of Communication Apprehension in the Marriage" William Powers and Kevin Hutchinson, J. of Marriage and the Family, Feb. 1979, 89-95
	My thoughts become jumbled and confused when discussing important issues with my (ex-)spouse	1:62	"
	Even in a casual conversation I felt I had to guard what I said	1:63	"
	I looked forward to talks with my (ex-)spouse	1:64	"
	I was comfortable in developing intimate conversations with my (ex-)spouse	1:65	"
	I usually came right out and told my (ex-)spouse what I meant	1:66	"
Counseling Orientation	During the marriage did you ever seek counseling, either as a couple or as an individual?	1:56	Denver Custody Mediation Project
	If you sought counseling, how helpful was it (either to you as an individual or to the marriage)?	1:57	"
	Have you recently attended any lectures, workshops or discussion groups related to divorce, single parents or co-parenting?	1:58	

<u>VARIABLE</u>	<u>QUESTION</u>	<u>LOCATION (CARD: COLUMN)</u>	<u>SOURCE</u>
Adjustment	I find myself spending a lot of time thinking about my (ex-)spouse	1:67	"Index of Attachment, Gay Kitson
	Sometimes I just can't believe we got a divorce	1:68	
	I find myself wondering what my (ex-)spouse is doing	1:69	
	I feel I will <u>never</u> get over the divorce	1:71	
Pre-disposition to mediation	Do you think mediation should be required of <u>all</u> couples who disagree on custody or visitation?	2:1	
	What chance do you think there is that mediation will produce the kind of custody/visitation arrangement you would like (e.g., do you give it a 90% chance of success, a 0% chance, or what?)	2:2-3	
Experience in court	Is this a new divorce or modification?	1:32-33	
	How many times would you estimate you have appeared in court on matters related to custody and visitation?	2:7-8	
	Have you had other experiences with the courts not related to your divorce (e.g., as a defendant, jury member or witness; in small claims, juvenile or traffic court?)		

<u>VARIABLE</u>	<u>QUESTION</u>	<u>LOCATION (CARD: COLUMN)</u>	<u>SOURCE</u>
Pre-disposition to court	If you went to court right now, about what percent chance would you have of getting the kind of custody/visitation arrangement you would like (a 0% chance, a 50-50 chance, a 90% chance, or what?)	2:4-5	Denver Custody Mediation Project
	Do you believe that judges often discriminate against or are unfair to fathers in awarding custody?	2:6	
Amount of contact with children	Briefly describe when the parent not living with the children actually sees the children. How often are you able to make it for scheduled visitations?	2:14-17 2:27	
	How often do you drop in to see your children outside of regular visitation times?	2:28	
	How often do your children drop in to see you?	2:29	David Olsen's study of the Domestic Relations Division of Hennepin County
	How often do you talk with your children on the telephone?	2:30	
Visitation problems and concerns	Concerned about the children being spoiled by you or your (ex-)spouse	2:21	Denver Custody Mediation Project
	Children spend too much time with your (ex-)spouse's parents or relatives	2:22	
	Your (ex-)spouse says bad things about you to the children	2:23	"
	Not getting the children back on time after a visit	2:24	"

<u>VARIABLE</u>	<u>QUESTION</u>	<u>LOCATION (CARD: COLUMN)</u>	<u>SOURCE</u>
Visitation problems and concerns	Finding things to do or places to go with the children	2:25	Denver Custody Mediation Project
	Concerned about the children's well-being or safety in your (ex-)spouse's home (e.g., drugs, violence, neglect)	2:26	"
	How often do you feel awkward visiting with your children?	2:31	
	How often do the children seem awkward or uncomfortable visiting with you?	2:33	
	How often do the children seem angry, irritable, or upset during visitation?	2:34	
Flexibility of contact	How often do you drop in to see your children outside of regular visitation times?	2:28	
	How often do your children drop in to see you?	2:29	David Olsen's study of the Domestic Relations Division of Hennepin County, Minn.
	Do you and your children feel free to telephone each other?	2:32	
Co-parenting	When you and your (ex-)spouse discuss parenting, how often is the underlying atmosphere one of hostility and anger	2:35	Jean Goldsmith and Constance Ahrons "Divorced Family Systems" co-parenting scale, 1979
	Do you and your (ex-)spouse have basic differences of opinion about issues relating to childrearing?	2:36	

<u>VARIABLE</u>	<u>QUESTION</u>	<u>LOCATION (CARD: COLUMN)</u>	<u>SOURCE</u>
Co-parenting	Would you say your (ex-)spouse is a help to you in raising the children?	2:37	Jean Goldsmith and Constance Ahrons "Divorced Family Systems" co-parenting scale, 1979
Economic stress	What is your own individual income today (before taxes)?	2:38-42	"
	How much financial strain are you feeling these days?	2:45	Denver Custody Mediation Project
Evaluation of attorney	Would you say your present lawyer's fees are outrageous, too high, reasonable for the amount of work done?	2:46	"
	As of today, how satisfied are you with the job your lawyer is doing concerning the divorce or custody issues?	2:47	
Attorney's attitude to mediation	If you are going to use the mediation services of the court, how did your lawyer react to the idea of mediation?	2:48	"
Social Acquiescence	No matter who I'm talking to I'm always a good listener	2:49	"A Short Social Desirability Scale", Herbert J. Greenwald & Yoichi Satow, Psychological Reports, 1970.
	I sometimes try to get even rather than forgive and forget	2:50	"

<u>VARIABLE</u>	<u>QUESTION</u>	<u>LOCATION (CARD: COLUMN)</u>	<u>SOURCE</u>
Social Acquiescence	I sometimes have taken unfair advantage of another person	2:51	"A Short Social Desirability Scale" Herbert J. Greenwald & Yoichi Satow, Psychological Reports, 1970.
	I'm always courteous, even to people who are disagreeable	2:52	"
Authoritarianism	What young people need most of all is strong discipline by their parents	2:53	"Four Item F-Scale" from Political Personality and Electoral Choice, American Political Science Review, 49, 1955: 173-190
	Most people who don't get ahead just don't have enough will power	2:54	"
	A few strong leaders could make this country better than all the talk and laws	2:55	"
	People sometimes say an insult to your honor should not be forgotten. Do you agree with that?	2:56	"

VARIABLEQUESTIONLOCATION
(CARD: COLUMN)SOURCEIssues and degree of
disputeThere are many issues to be
resolved in a divorce. Do you
and your (ex-)spouse have an
understanding or agreement
on the following?

Division of property

1:39

Spouse Support/Alimony

1:40

Child support

1:41

How satisfied are you with the
amount of time you spend with
your children?

2:18

What are your feelings about the
present legal custody arrangement?

2:19

How satisfied or dissatisfied are
you with your present level of
involvement with your children?

2:20

Compliance with agreement

Do you make/receive these [child
support] payments regularly?

1:46

Denver Custody
Mediation ProjectWhen is the parent not living the
children SUPPOSED to see the
children - when does this parent
ACTUALLY see the children?

2:10-13

2:14-17

How often are you able to make it
for scheduled visitation?

2:27

David Olsen's
study of the
Hennepin County
Domestic Rela-
tions Division

VARIABLEQUESTIONLOCATION
(CARD: COLUMN)SOURCE

Child Adjustment

This child is pretty satisfied
with the present custody
arrangement

3:45

She/he is pretty satisfied with
the present visitation arrangement

3:46

It is easy for me to show this child
affection or sympathy.

3:47

This child won't talk about the
divorce

3:48*

She/he became more responsible and
mature as a result of the separation

3:49

I think that this child understands
what the custody/visitation problem
is about

3:50

This child is angry at father because
of the divorce

3:51*

It is easy for me to talk to this
child about his/her personal problems

3:52

I find myself confiding a lot in this
child. I share my personal problems,
financial worries, future plans

3:53

This child worries that she/he is taking
sides with one parent

3:54*

Generally my relationship with this
child is good

3:55

This child needs more routine or
stability in her/his life

3:56

This child became closer to siblings
as a result of the marital separation

3:57

Items marked with
a star adapted
from David
Olsen's study of
Hennepin County
Domestic Rela-
tions Division

VARIABLEQUESTIONLOCATION
(CARD: COLUMN)SOURCE

Child Adjustment

This child is angry at mother
because of the divorce

3:58

*

This child accepts the divorce
or separation

3:59

*

This child does not confide in me,
she/he seems distant and aloof

3:60

*

This child takes sides with one
parent against the other

3:61

Generally my (ex-)spouse has a
good relationship with this
child

3:62

This child feels she/he caused the
divorce

3:63

*

See Scale in Questionnaire

4:1-71
5:1-44"The Child
Behavior Check-
list and Child
Behavior Profile"
Thomas M. Achen-
bach

PLEASE COMPLETE ALL THE QUESTIONS. CIRCLE ONLY ONE ANSWER, BUT FEEL FREE TO WRITE NOTES EXPLAINING OR QUALIFYING YOUR ANSWERS.

WHEN WE REFER TO YOUR "(EX-) SPOUSE", WE MEAN THE OTHER PARTY IN THIS DIVORCE, CUSTODY/VISITATION DISPUTE OR MEDIATION.

1:1-10

What is your relationship to your (ex-) spouse?

- 1...still living together, divorce in progress
- 2...living apart, divorce not final
- 3...divorced and living apart
- 4...reconciled, back together
- 8...other (explain:)

1:11

Are you currently:

- 1...reconciled with (ex-) spouse
- 2...remarried (not to ex-spouse)
- 3...dating, seeing someone special
- 4...dating, not seeing anyone special
- 5...not dating
- 8...other (explain:)

1:12

Taking all things together, how would you describe your relationship with your (ex-) spouse today?

- 1...we're still friends and its easy to cooperate
- 2...our relationship is strained but we are able to cooperate
- 3...we have too many hard feelings and problems to cooperate much
- 4...cooperation is just about impossible
- 5...we haven't spoken or tried to cooperate in months
- 8...other (explain:)

1:13

How interested are you in getting back together with your (ex-) spouse?

- 1...very interested
- 2...somewhat interested
- 3...no sure
- 4...not very interested
- 5...not at all interested
- 8...other (explain:)
- 9...we are back together

1:14

Circle the number which best describes the way you are feeling these days.

	NOT AT ALL MY FEELINGS				VERY MUCH MY FEELINGS	
	1	2	3	4	5	
I find myself spending a lot of time thinking about my (ex-) spouse	1	2	3	4	5	1:15
Sometimes I just can't believe that we got a divorce (broke up)	1	2	3	4	5	1:16
I find myself wondering what my (ex-) spouse is doing	1	2	3	4	5	1:17
I'm angry at my (ex-) spouse	1	2	3	4	5	1:18
I feel I will never get over the divorce	1	2	3	4	5	1:19

Now we'd like to find out how you and your (ex-) spouse get along today as PARENTS. Circle the number that best describes your situation.

	NEVER	RARELY	SOMETIMES	USUALLY	ALWAYS	DON'T KNOW	
When you and your (ex-) spouse discuss parenting issues, how often is the underlying atmosphere one of hostility or anger?	1	2	3	4	5	9	1:20
Do you and your (ex-) spouse have basic differences of opinion about child rearing?	1	2	3	4	5	9	1:21
Would you say that your (ex-) spouse is a help to you in raising the children?	1	2	3	4	5	9	1:22

During the last three or four months have you seen a counselor or therapist?
 1...Yes
 2...No
 1:23

During the last 3 or 4 months have you attended any lectures, workshops or discussion groups related to divorce, joint custody, single parenting, or co-parenting?
 1...No
 2...Yes.....Do you remember who offered the program or where it was presented? Please describe:

 1:24

Within the last three months have you been to court on any issues NOT related to your divorce or custody and visitation?
 1...Yes
 2...No
 1:25

3.

Which phrase best describes the way you now feel about the custody/visitation dispute?

- 1...the dispute has been settled
- 2...I've definitely made progress
- 3...I've made a little progress
- 4...I've made no progress
- 8...other (explain:)
- 9...custody/visitation were never in dispute

1:26

Within the last three months has there been any court action on issues related to your divorce or custody/visitation?

- 1...Yes
- 2...No
- 7...Don't know

1:27

What was the nature of this action? (CIRCLE ALL THAT APPLY):

- 1...issued or received temporary restraining order
- 2...issued or received contempt citation
- 3...temporary custody hearing
- 4...hearing to award permanent or final custody
- 5...hearing to change custody or visitation
- 6...filed to change or arrange for child support
- 7...If these categories don't fit your experience, or you're uncertain which item to circle, please describe what has happened in your case:

1:28

1:29

1:30

1:31

Did you actually appear in court in the last 3 months or did only your attorney appear?

- 1...I appeared in court
- 2...Only my attorney appeared

1:32

Do you think being involved with attorneys, judges, and the legal system in general have made your relationship with your (ex-) spouse any different, either better or worse?

- 1...made our relationship much better
- 2...made our relationship a little better
- 3...our relationship has not changed
- 4...made our relationship a little worse
- 5...made our relationship much worse
- 8...other (explain:)

1:33

Within the last 3 or 4 months have you had a court hearing postponed?

- 1...Yes, more than once
- 2...Yes, once
- 3...No
- 7...Don't know
- 8...Other (explain:)

1:34

4.

Do you presently have a court hearing scheduled?

- 1...Yes
- 2...No, but we plan to schedule one
- 3...No, we do not plan to schedule one
- 7...Don't know
- 8...Other (explain:)

1:36

We would like your impressions of court hearings (not mediation or sessions with court counselors).

If you have had a hearing, use your own experiences to answer the following.

If you have NOT had a hearing, we would still like your impressions of what you think it will be like.

I think court hearings:	STRONGLY DISAGREE	1	2	3	4	5	9	
	STRONGLY AGREE						DON'T KNOW	
Help you understand your (ex-) spouse's point of view	1	2	3	4	5	9		1:37
Are biased against fathers	1	2	3	4	5	9		1:38
Make you feel very defensive	1	2	3	4	5	9		1:39
Focus on the children's needs	1	2	3	4	5	9		1:40
Bring issues, problems and feelings out into the open	1	2	3	4	5	9		1:41
Are tension-filled and unpleasant	1	2	3	4	5	9		1:42
Help you understand how the children feel .	1	2	3	4	5	9		1:43
Hearings are rushed, they are not given enough time	1	2	3	4	5	9		1:44
Hearings allow your point of view to be expressed	1	2	3	4	5	9		1:45

How satisfied are you with the job your attorney is doing or did in your divorce or custody/visitation dispute?

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied
- 7...don't know (too little contact, etc.)
- 9...do not have an attorney

1:46

5.

Would you recommend your attorney to a friend who was getting a divorce?

- 1...definitely would
- 2...probably would
- 3...not sure
- 4...probably would not
- 5...definitely would not
- 8...other (explain:)

1:47

Approximately how much have you spent in attorney's fees to date?

\$ _____

1:48-52

There are many issues to be settled in a divorce or custody dispute. Where do you and your (ex-) spouse stand on the following issues?

THE DIVISION OF MARITAL PROPERTY

Do you and your (ex-) spouse...

- 1...have a court order on this issue
- 2...have a written agreement, not yet a court order
- 3...have an unwritten (verbal) agreement
- 4...have no agreement yet.....How much disagreement is there over this issue?

1:53

- 1...none
- 2...a little
- 3...some
- 4...a great deal
- 7...don't know

1:54

IF YOU HAVE AN AGREEMENT:

Which best describes how you reached this agreement?

- 1...on our own, it was not contested
- 2...it was contested, but settled out of court
- 3...we settled in mediation (court counseling)
- 4...we settled after leaving mediation (counseling) but before our hearing
- 5...the issue was settled in a hearing
- 8...other (explain:)

How satisfied are you with this agreement?

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied

1:55

1:56

THE PAYMENT OF CHILD SUPPORT

Do you and your (ex-) spouse...

1:57

- 1...have a court order on this
- 2...have a written agreement, not yet a court order
- 3...have an unwritten (verbal) agreement
- 4...have no agreement yet

How much disagreement is there over this issue?

- 1...none
- 2...a little
- 3...some
- 4...a great deal
- 7...don't know

1:58

IF YOU HAVE AN AGREEMENT:

Which best describes how you reached this agreement?

How satisfied are you with this agreement?

- 1...on our own, it was not contested
- 2...it was contested but settled before we got to court
- 3...we settled in mediation (court counseling)
- 4...we settled after mediation (counseling) but before our hearing
- 5...it was settled in a court hearing
- 8...other (explain:)

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied
- 8...other (explain:)

1:59

1:60

THE PAYMENT OF SPOUSAL SUPPORT (ALIMONY)

Do you and your (ex-) spouse...

1:61

- 1...have a court order on this issue
- 2...have a written agreement, not yet a court order
- 3...have an unwritten (verbal) agreement
- 4...have no agreement yet
- 9...doesn't apply, spouse support not requested

How much disagreement is there over this?

- 1...none
- 2...a little
- 3...some
- 4...a great deal
- 7...don't know

1:62

IF YOU HAVE AN AGREEMENT:

Which best describes how you reached this agreement?

How satisfied are you with the agreement?

- 1...on our own, it was not contested
- 2...it was contested but settled before we got to court
- 3...settled in mediation (court counseling)
- 4...settled after mediation (counseling), but before our hearing
- 5...settled in a court hearing
- 8...other (explain:)

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied
- 8...other (explain:)

1:63

1:64

Which best describes you current employment situation?

- 1...full-time homemaker
- 2...employed full-time
- 3...employed part-time
- 4...unemployed, looking for work
- 5...student
- 8...other (explain:)

1:65

How much financial strain are you feeling these days?

- 1...no financial strain at all
- 2...very little financial strain
- 3...some financial strain
- 4...a lot of financial strain
- 8...other (explain:)

1:66

Are you presently...

- 1...paying child supportamount per month \$
- 2...receiving child supportamount per month \$
- 3...neither paying nor receiving child support
- 8...other (explain:)

1:67

1:68-72

1:73-80

Do you make/receive these payments regularly?

- 1...very regularly
- 2...somewhat regularly
- 3...somewhat irregularly
- 4...very irregularly
- 9...not paying or receiving child support

2:1

Has a custody investigation or study been ordered or conducted?

- 1...NO
- 2...Ordered, but not completed
- 3...Yes, has been conducted

GO TO NEXT PAGE

2:2

Approximately when was this study conducted?

month year

In your opinion how complete and thorough was this study?

- 1...very complete
- 2...somewhat complete
- 3...somewhat incomplete
- 4...very incomplete
- 7...don't know

Did the investigator talk with your children?

- 1...talked with all the children
- 2...talked with some children
- 3...did not talk to children
- 7...don't know

Who did the investigator recommend to receive custody?

- 1...mother
- 2...father
- 3...no recommendation
- 7...don't know
- 8...other (explain:)

How much did you pay for this service? \$

2:3-6

How fair and unbiased did the study seem?

- 1...very fair
- 2...somewhat fair
- 3...somewhat unfair
- 4...very unfair
- 7...don't know

2:7-10

2:11

2:12

Overall, how satisfied are you with the study?

- 1...very satisfied
- 2...somewhat satisfied
- 3...somewhat dissatisfied
- 4...very dissatisfied
- 7...don't know

2:13

2:14

How satisfied are you with the recommendation?

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied
- 7...don't know
- 9...no recommendation was made

2:15

2:16

HAVE YOU AND YOUR (EX-) SPOUSE DECIDED ON THE CUSTODY AND VISITATION OF

2:17

- 1...NO, there is no agreement
- 2...Don't know

- 3...YES, we have a written agreement
- 7...YES, we have a verbal agreement



How much disagreement is there over the custody and visitation of this child?

- 1...none
- 2...a little
- 3...some
- 4...a great deal
- 7...don't know

How do you think you will settle the issue of custody/visitation?

- 1...we will deal with it out of court
- 2...I am going to let my (ex-) spouse have his/her way
- 3...my (ex-) spouse has stopped fighting me
- 4...we will probably have a court hearing
- 8...other (explain:) _____

Who has legal custody?

- 1...I do
- 2...my (ex-) spouse does
- 3...we have joint legal custody
- 8...someone else has custody

(Who? _____)

Where did you produce your custody/visitation agreement?

- 1...in mediation or court counseling
- 2...out of court, with help from attorneys
- 3...entirely on our own
- 4...in a court hearing

Does your lawyer seem satisfied with your agreement?

- 1...very satisfied
- 2...fairly satisfied
- 3...neutral
- 4...fairly dissatisfied
- 5...very dissatisfied
- 7...don't know what s/he thinks
- 9...don't have an attorney

2:18
2:19
2:20
2:21
2:22

Where does this child live?

- 1...mostly with me
- 2...mostly with my (ex-)spouse
- 3...spends equal time with both parents
- 8...mostly with someone else

2:23

(Who? _____)

Is this where the child was living 3 or 4 months ago?

- 1...yes
- 2...no
- 7...don't know

2:24

How satisfied are you with this custody arrangement?

- 1...very satisfied
- 2...fairly satisfied
- 3...neutral
- 4...fairly dissatisfied
- 5...very dissatisfied
- 8...other (explain:) _____

2:25

9.

HAVE YOU AND YOUR (EX-) SPOUSE DECIDED ON THE CUSTODY AND VISITATION OF

- 1...NO, there is no agreement
2...Don't know

- 3...YES, we have a written agreement
7...YES, we have a verbal agreement

2:26



How much disagreement is there over the custody and visitation of this child?

1...none
2...a little
3...some
4...a great deal
7...don't know

How do you think you will settle the issue of custody/visitation?

1...we will deal with it out of court
2...I am going to let my (ex-) spouse have his/her way
3...my (ex-) spouse has stopped fighting me
4...we will probably have a court hearing
8...other (explain:) _____

Who has legal custody?

1...I do
2...my (ex-) spouse does
3...we have joint legal custody
8...someone else has custody
(Who? _____)

Where did you produce your custody/visitation agreement?

1...in mediation or court counseling
2...out of court, with help from attorneys
3...entirely on our own
4...in a court hearing

Does your lawyer seem satisfied with your agreement?

1...very satisfied
2...fairly satisfied
3...neutral
4...fairly dissatisfied
5...very dissatisfied
7...don't know what s/he thinks
9...don't have an attorney

2:27

2:28

2:29

2:30

2:31

Where does this child live?

- 1...mostly with me
2...mostly with my (ex-)spouse
3...spends equal time with both parents
8...mostly with someone else

(Who? _____)

2:32

Is this where the child was living 3 or 4 months ago?

- 1...yes
2...no
7...don't know

2:33

How satisfied are you with this custody arrangement?

- 1...very satisfied
2...fairly satisfied
3...neutral
4...fairly dissatisfied
5...very dissatisfied
8...other (explain:) _____

2:34

HAVE YOU AND YOUR (EX-) SPOUSE DECIDED ON THE CUSTODY AND VISITATION OF

2:35

- 1...NO, there is no agreement
2...Don't know

- 3...YES, we have a written agreement
7...YES, we have a verbal agreement



How much disagreement is there over the custody and visitation of this child?

- 1...none
2...a little
3...some
4...a great deal
7...don't know

How do you think you will settle the issue of custody/visitation?

- 1...we will deal with it out of court
2...I am going to let my (ex-) spouse have his/her way
3...my (ex-) spouse has stopped fighting me
4...we will probably have a court hearing
8...other (explain:) _____

Who has legal custody?

- 1...I do 2:36
2...my (ex-) spouse does 2:37
3...we have joint legal custody 2:38
8...someone else has custody 2:38
(Who? _____) 2:39

Where did you produce your custody/visitation agreement?

- 1...in mediation or court counseling 2:40
2...out of court, with help from attorneys
3...entirely on our own
4...in a court hearing

Does your lawyer seem satisfied with your agreement?

- 1...very satisfied
2...fairly satisfied
3...neutral
4...fairly dissatisfied
5...very dissatisfied
7...don't know what s/he thinks
9...don't have an attorney

Where does this child live?

- 1...mostly with me
2...mostly with my (ex-)spouse
3...spends equal time with both parents
8...mostly with someone else
(Who? _____)

2:41

Is this where the child was living 3 or 4 months ago?

- 1...yes
2...no
7...don't know

2:42

How satisfied are you with this custody arrangement?

- 1...very satisfied
2...fairly satisfied
3...neutral
4...fairly dissatisfied
5...very dissatisfied
8...other (explain:) _____

2:43

Below are a list of problems some people have with visitation.
How often are these a problem for you?

	NEVER	RARELY	SOMETIMES	OFTEN	DOESN'T APPLY	
Concerned that your children are being spoiled by you or your (ex-) spouse.....1	2	3	4	9		2:44
Children spend too much time with you (ex-) spouse's parents or other relatives.....1	2	3	4	9		2:45
Your (ex-) spouse says bad things about you to the children.....1	2	3	4	9		2:46
Not getting the children back on time after a visit.....1	2	3	4	9		2:47
Finding things to do or places to go with the children.....1	2	3	4	9		2:48
Concerned about the children's wellbeing in your (ex-) spouse's home (e.g., drugs, violence, or neglect).....1	2	3	4	9		2:49

IF YOU HAVE CUSTODY OF ALL THE CHILDREN, OR IF THE CHILDREN SPEND EQUAL AMOUNTS OF TIME WITH BOTH PARENTS, GO ON TO THE NEXT PAGE.

IF YOU DO NOT HAVE CUSTODY OF ALL THE CHILDREN, PLEASE ANSWER THE FOLLOWING QUESTIONS.

Which best describes your situation?

	NEVER	RARELY	SOMETIMES	OFTEN	DOESN'T APPLY	
How often are you able to make it for scheduled visitations?1	2	3	4	9		2:50
How often do you drop in to see your children outside of regular visitation times?1	2	3	4	9		2:51
How often do your children drop in to see you?1	2	3	4	9		2:52
Do you and your children feel free to telephone each other?1	2	3	4	9		2:53
How often do you feel uncomfortable, at least at first, when visiting your children? ..1	2	3	4	9		2:54
How often do the children seem uncomfortable visiting with you?1	2	3	4	9		2:55
How often do the children seem angry irritable or upset during visitation?1	2	3	4	9		2:56

About how many days per month is the parent not living with the children SUPPOSED to see the children?

_____ days per month

2:57-58

About how many days per month does the parent not living with the children ACTUALLY see the children?

_____ days per month

2:59-60

Compared to 3 months ago would you say the parent not living with the children sees the children more or less often today?

2:61-64

- 1...sees them much less
- 2...sees them somewhat less
- 3...sees them about the same
- 4...sees them somewhat more often
- 5...sees them much more often
- 7...don't know
- 8...other (explain:)

2:65

How satisfied are you with the visitation arrangement?

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied
- 8...other (explain:)

2:66

How satisfied are you with the amount of time you spend with your children?

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied
- 8...other (explain:)

2:67

Now we have a few questions specifically about _____.

Within the last 3 months have you noticed any changes in the way this child is adjusting to the custody/visitation arrangement or the divorce?

- 1...NO
- 2...YES Compared to 3 months ago is this child doing...
- 7...Don't know
 - 1...much better
 - 2...somewhat better
 - 3...somewhat worse
 - 4...much worse

2:68
2:69

Overall, how well is this child adjusting to the divorce and the custody/visitation arrangement?

- 1...very well
- 2...fairly well
- 3...not very well
- 4...not adjusting well

2:70

How true are the following statements
about this child?

	NOT AT ALL TRUE			VERY TRUE	DOESN'T APPLY	
This child is satisfied with the present custody arrangement	1	2	3	4	5	9 3:1
This child is satisfied with the present visitation arrangement	1	2	3	4	5	9 3:2
It is easy for me to show this child affection and sympathy	1	2	3	4	5	9 3:3
I find myself confiding a lot in this child. I share my personal problems, financial worries, future plans	1	2	3	4	5	9 3:4
This child became more responsible and mature as a result of the separation	1	2	3	4	5	9 3:5
I think this child understands what the custody/visitation problem is about	1	2	3	4	5	9 3:6
Generally, my relationship with this child is good	1	2	3	4	5	9 3:7
This child needs more routine and stability in his/her life	1	2	3	4	5	9 3:8
Generally, my (ex-) spouse has a good relationship with this child	1	2	3	4	5	9 3:9
This child became closer to brothers and sisters as a result of the marital separation ..	1	2	3	4	5	9 3:10
This child feels she/he caused the divorce	1	2	3	4	5	9 3:11
This child worries about taking sides with one parent	1	2	3	4	5	9 3:12
This child does not confide in me, seems distant and aloof	1	2	3	4	5	9 3:13
This child takes sides with one parent against the other	1	2	3	4	5	9 3:14
This child won't talk about the divorce	1	2	3	4	5	9 3:15
This child is angry at father because of the divorce	1	2	3	4	5	9 3:16
This child will not accept the divorce	1	2	3	4	5	9 3:17
This child is angry at mother because of the divorce	1	2	3	4	5	9 3:18
It is easy for me to talk to this child about his/her personal problems	1	2	3	4	5	9 3:19

Within the last 3 or 4 months have the following things happened in this child's life?

	Yes	No	Don't Know	
Changed schools	1	2	3	3:20
Moved from one parent's home to the other's	1	2	3	3:21
Held back a grade in school	1	2	3	3:22
Moved (along with parent)	1	2	3	3:23

Finally, we have some questions about mediation (you may know it better as THE CONCILIATION COURT or CUSTODY RESOLUTION COUNSELING).

Do you think mediation should be mandatory for couples who cannot agree on custody or visitation?

- 1...definitely should be
- 2...probably should be
- 3...neutral
- 4...probably should not be
- 5...definitely should not be
- 7...don't know
- 9...don't know what mediation is like

3:24

Have you completed mediation?

- 1...no
- 2...yesDo you remember about when your last mediation session was held?

3:25

3:26-27

Month

3:28-29

How many mediation sessions were held? _____ sessions

3:30-31

About how many hours were spent in mediation? _____ hours

3:32-33

How successful would you say your mediation was?

- 1...very successful
- 2...fairly successful
- 3...a little successful
- 4...not very successful
- 5...not at all successful
- 7...don't know
- 8...other (explain:) _____

3:34

What issues were settled? (CIRCLE ALL THAT APPLY):

- 1...temporary visitation arrangement
- 2...permanent or final visitation arrangement
- 3...temporary custody
- 4...permanent or final custody
- 5...no issues settled
- 8...other (explain) _____

3:35

Do you think mediation made a difference in the way you and your (ex-) spouse get along?

3:36

- 1...made it much better
- 2...made it somewhat better
- 3...made no difference
- 4...made it somewhat worse
- 5...made it much worse

Would you recommend mediation to your friends if they had a custody or visitation problem?

- 1...definitely would
- 2...probably would
- 3...probably would not
- 4...definitely would not
- 7...don't know

3:37

Would you recommend your mediator(s) to these friends?

- 1...definitely would
- 2...probably would
- 3...probably would not
- 4...definitely would not
- 7...don't know

3:38

BELOW ARE A SERIES OF STATEMENTS WHICH DESCRIBE SOME PEOPLE'S FEELINGS AND EXPERIENCES WITH MEDIATION (or Court Counseling). PLEASE INDICATE HOW TRUE THE STATEMENT IS FOR YOU.

	NOT AT ALL TRUE				VERY TRUE	DON'T KNOW	
Mediation helped me understand my (ex-) spouse's point of view	1	2	3	4	5	9	3:39
The sessions focused on the children's needs and welfare	1	2	3	4	5	9	3:40
I always felt I was on the defensive.....	1	2	3	4	5	9	3:41
Mediation spent too much time dealing with the past	1	2	3	4	5	9	3:42
Mediator(s) kept the discussion on the track	1	2	3	4	5	9	3:43
I had to wait too long to get into mediation	1	2	3	4	5	9	3:44
Mediation brought issues, problems, and feelings out into the open	1	2	3	4	5	9	3:45
Mediation didn't allow enough time to deal with the past (e.g., causes of the break-up)	1	2	3	4	5	9	3:46
My (ex-) spouse pressured me into an agreement ..	1	2	3	4	5	9	3:47
I never felt comfortable expressing how I really felt	1	2	3	4	5	9	3:48
It was certainly better than going to court	1	2	3	4	5	9	3:49
I expected and wanted more legal advice	1	2	3	4	5	9	3:50
Mediation helped identify lots of ways to arrange custody and visitation	1	2	3	4	5	9	3:51
Mediator(s) did not seem to understand the underlying or real issues and problems.....	1	2	3	4	5	9	3:52
Mediation gave me a chance to express my own point of view	1	2	3	4	5	9	3:53
The sessions(s) were very tension filled and unpleasant	1	2	3	4	5	9	3:54
The mediator(s) provided information on child development and children's needs.....	1	2	3	4	5	9	3:55
I felt angry during much of the session(s).....	1	2	3	4	5	9	3:56
The mediator(s) pressured me and/or my (ex-) spouse into an agreement	1	2	3	4	5	9	3:57
Mediation was confusing. I didn't really understand what was supposed to happen.....	1	2	3	4	5	9	3:58

16.

	NOT AT ALL TRUE	2	3	4	5	VERY TRUE	DON'T KNOW	
I felt fairly comfortable and relaxed	1	2	3	4	5	9		3:59
Mediation was rushed, it should have taken more time	1	2	3	4	5	9		3:60
Mediation helped me better understand my own feelings and needs	1	2	3	4	5	9		3:61
The mediator(s) presented to my (ex-) spouse and me the custody/visitation arrangement they felt would work best for us .	1	2	3	4	5	9		3:62

Did the mediator(s) talk to any of the following people about the custody or visitation problem? (CIRCLE ALL THAT APPLY):

mediator(s) spoke to:

- 1...only me (ex-) spouse and me
- 2...our attorneys
- 3...my mother and/or father
- 4...my (ex-) spouse's parents
- 5...my new spouse
- 6...my (ex-) spouse's new partner
- 7...our children
- 8...other (explain:)

3:63-69

3:70-80

IF THE MEDIATOR(S) SPOKE WITH YOUR CHILDREN, PLEASE ANSWER THE FOLLOWING:

Were all of the children seen? 4:1

1...yes 4:2-3

2...no..... What are the ages of the children who were seen?

_____ years _____ years

_____ years _____ years 4:3-4

4:5-6

4:7-8

How did you feel about having the mediator(s) speak with your children? 4:9

1...liked the idea very much

2...liked the idea somewhat

3...neutral

4...disliked the idea somewhat

5...disliked the idea very much

Did the mediator(s) talk to the children alone, or were you and your (ex-) spouse present? 4:10

1...one of us was present

2...we both were present

3...children were seen alone

4...children were seen alone and also with parents present

8...other (explain:)

Did the mediator(s) share with you and your (ex-) spouse what they learned from the children? 4:11

1...yes

2...no

** THANK YOU FOR YOUR HELP! **

OFFICE USE:

Site:

Date

Mode: 1..mail 2..phone 3..other

Sp at T₂: 1..yes 2..no

THE DIVORCE MEDIATION RESEARCH PROJECT

FOLLOW-UP I

VARIABLE LIST

VARIABLE	QUESTION	LOCATION (Card:Column)	SOURCE
Ambivalence About the Divorce	How interested are you in getting back together with your (ex-) spouse?	1:14	Denver Custody Mediation Project
Attitudes Towards Spouse	Taking all things together, how would you describe your relationship with your (ex-)spouse?	1:13	"
	I'm angry at my (ex-) spouse	1:18	Item from GAY-Kitson Attachment Index
Counseling Orientation	During the last 3 or 4 months have you seen a counselor or therapist?	1:23	
	During the last 3 or 4 months have you attended any lectures, workshops or discussion groups related to divorce, single parents or co-parenting?	1:24	

VARIABLE	QUESTION	LOCATION (Card:Column)	SOURCE
Adjustment	I find myself spending alot of time thinking about my (ex-) spouse	1:15	Index of Attachment Gay Kitson
	Sometimes I just can't believe we got a divorce	1:16	"
	I find myself wondering what my (ex-) spouse is doing	1:17	"
	I feel I will <u>never</u> get over the divorce	1:19	"
Experience in Court	Within the last 3 months have you been to court on any issues <u>not</u> related to your divorce or custody and visitation?	1:25	
	Within the last 3 months has there been any court action on issues related to your divorce or custody and visitation?	1:27	
	What was the nature of this action?	1:28-31	
Evaluation of Court	I think court hearings: Help you understand your (ex-) spouse's point of view	1:37	
	Are biased against fathers	1:38	
	Make you feel very defensive	1:39	
	Focus on the children's needs	1:40	

VARIABLE	QUESTION	LOCATION (Card:Column)	SOURCE
	Bring issues, problems and feelings out into the open	1:41	
	Are tension filled and unpleasant	1:42	
	Help you understand how the children feel	1:43	
	Hearings are rushed, they are not given enough time	1:44	
	Hearings allow your point of view to be expressed	1:45	
Amount of Interaction With Children	Compared to 3 months ago would you say that the parent not living with the children sees the children more less often today?	2:65	
	How many days per month is the parent not living with the children supposed to see the children?	2:57-58	Denver Custody Mediation Project
	How many days per month does the parent not living with the children actually see the children?	2:59-60	"
	How often do your children drop in to see you?	2:52	David Olsen's study of the Domestic Relations Division of Hennepin County
	Concerned about the children being spoiled by you or your (ex-) spouse	2:44	Denver Custody Mediation Project

VARIABLE	QUESTION	LOCATION (Card: Column)	SOURCE
	Children spend too much time with your (ex-) spouse's parents or relatives	2:45	
	Your (ex-) spouse says bad things about you to the children	2:46	"
	Not getting the children back on time after a visit	2:47	"
	Finding things to do or places to go with the children	2:48	"
	Concerned about the children's well-being or safety in your (ex-) spouse's home (e.g., drugs, violence, neglect)	2:49	"
	How often do you feel awkward visiting with your children?	2:54	
	How often do the children seem awkward or uncomfortable visiting with you ?	2:55	
	How often do the children seem angry, irritable, or upset during visitation?	2:56	
Flexibility of Contact	How often do your children drop in to see you?	2:52	Olsen's study of the Domestic Relations Division of Hennepin County
	How often do you drop in to see your children outside of regular visitation times?	2:51	"

VARIABLE	QUESTION	LOCATION (Card:Column)	SOURCE
	Do you and your children feel free to telephone each other?	2:53	"
Co-Parenting	When you and your (ex-) spouse discuss parenting, how often is the underlying atmosphere one of hostility and anger?	1:20	Jean Goldsmith and Constance Ahrons "Divorce Family Systems" Co-parenting scale, 1979
	Do you and your (ex-) spouse have basic differences of opinion about issues relating to childrearing?	1:21	"
	Would you say your (ex-) spouse is a help to you in raising the children	1:22	"
Economic Stress	How much financial strain are you feeling these days?	1:66	Denver Custody Mediation Project
Evaluation of Attorney	How satisfied are you with the job your lawyer is doing/or did concerning the divorce or custody issues?	1:46	
	How much have you spent in attorney's fees to date?	1:48-52	"
	Would you recommend your attorney to a friend who was getting a divorce?	1:47	

VARIABLE	QUESTION	LOCATION (Card:Column)	SOURCE
Evaluation of Studies	In your opinion, how complete and thorough was this study?	2:11	
	How fair and unbiased did the study seem?	2:12	
	Overall, how satisfied are you with the study?	2:13	
	How satisfied are you you with the recommendation?	2:14	
Issues and Degree of Dispute	There are many issues to be resolved in a divorce. Do you and your (ex-) spouse have an understanding or agreement on the following?		
	Division of Property	1:53	
	Spouse Support/Alimony	1:57	
	Child Support	1:61	
	How satisfied are you with this agreement?		
	Division of Property	1:54	
	Spouse Support/Alimony	1:58	
Child Support	1:62		
	How satisfied are you with the amount of time you spend with your children?	2:67	

VARIABLE	QUESTION	LOCATION (Card:Column)	SOURCE
	How satisfied are you with this custody arrangement?	2:34	
Compliance with Agreement	Do you make/receive these (child support) payments regularly?	2:1	Denver Custody Mediation Project
	When is the parent not living with the children SUPPOSED to see the children- when does this parent ACTUALLY see the children?	2:57-58,59-60	"
	How often are you able to make it for scheduled visitations?	2:50	Olsen's Study of the Domestic Relations Division Hennepin County
Child Adjustment	This child is pretty satisfied with the present custody arrangement	3:1	Items marked with a star (*) are adapted from Olsen's study of the Domestic Relations Division of Hennepin County Ct.
	S/he is pretty satisfied with the present visitation arrangement	3:2	
	It is easy for me to show this child affection or sympathy	3:3	
	This child won't talk about the divorce	3:4 *	
	S/he became more responsible as a result of the divorce	3:5	
	I think that this child understands what the custody/visitation problem is about	3:50	

VARIABLE	QUESTION	LOCATION (Card:Column)	SOURCE
	This child is angry at father because of the divorce	3:7 *	
	It is easy for me to talk to this child about his/her personal problems	3:8	
	I find myself confiding a lot in this child. I share my personal problems, financial worries, future plans	3:9	
	This child worries that s/he is taking sides with one parent	3:10 *	
	Generally my relationship with this child is good	3:11	
	This child needs more routine or stability in his/her life	3:12	
	This child became closer to siblings as a result of the marital separation	3:13	
	Within the last 3 months have you noticed any changes in the way this child is adjusting to the divorce or the custody/ visitation arrangement	2:68-69	
	Overall, how well is this child adjusting to the divorce and the custody arrangement	2:70	

VARIABLE	QUESTION	LOCATION (Card:Column)	SOURCE
Stressful events: child's life	Within the last 3 or 4 months	3:20	
	have the following things	3:21	
	happened in this child's life?	3:22	
		3:23	
	Changed schools		
	Moved from one parent's home to the other		
	Moved (along with parent)		
	Held back a grade in school		
Evaluation of mediation	Do you think mediation should be mandatory for couples who cannot agree on custody or visitation?	3:24	
	How successful would you say your mediation was?	3:34	Denver Custody Project
	Do you think mediation made a difference in the way you and your ex-spouse get along?	3:36	
	Would you recommend mediation to your friends if they had a custody or visitation problem?	3:37	Denver Custody Project
	Would you recommend your mediators to these friends?	3:38	
	I felt fairly comfortable and relaxed	3:39-3:62	
	Mediation was rushed, it should have taken more time		
Mediation helped me better understand my own feelings and needs			

VARIABLE

QUESTION

LOCATION
(Card:Column)

SOURCE

The mediator(s) presented to my (ex-) spouse and me the custody/visitation arrangement they felt would work best for us .

Mediation helped me understand my (ex-) spouse's point of view

The sessions focused on the children's needs and welfare

I always felt I was on the defensive.....

Mediation spent too much time dealing with the past

Mediator(s) kept the discussion on the track .

I had to wait too long to get into mediation .

Mediation brought issues, problems, and feelings out into the open

Mediation didn't allow enough time to deal with the past (e.g., causes of the break-up) .

My (ex-) spouse pressured me into an agreement

I never felt comfortable expressing how I really felt

It was certainly better than going to court ..

I expected and wanted more legal advice

VARIABLE	QUESTION	LOCATION (Card:Column)	SOURCE
	Mediation helped identify lots of ways to arrange custody and visitation		
	Mediator(s) did not seem to understand the underlying or real issues and problems....		
	Mediation gave me a chance to express my own point of view		
	The sessions(s) were very tension filled and unpleasant		
	The mediator(s) provided information on child development and children's needs.....		
	I felt angry during much of the session(s)....		
	The mediator(s) pressured me and/or my (ex-) spouse into an agreement		
	Mediation was confusing. I didn't really understand what was supposed to happen.....		

FINAL POST-TEST
(Phase III)
12-15 mos. following
mediation

THE DIVORCE MEDIATION RESEARCH PROJECT

A Project Funded by
The Children's Bureau,
The Administration for Children,
Youth and Families
The Department of Health
And Human Services

Administered By The Association
Of Family Conciliation Courts

1981-1983



Please Complete the Following:

NAME: _____

HOME PHONE: _____ OFFICE PHONE: _____

HOME ADDRESS: _____
street city state zip

CONTACT: _____
name of person

RELATIONSHIP TO YOU: _____ PHONE: _____

ADDRESS: _____
street city state zip

What is your relationship to your (ex-) spouse?

- 1...living together, divorce in progress
- 2...living apart, divorce in progress
- 3...divorced
- 4...reconciled, back together

1:1-11

1:12

How interested are you in getting back together with your (ex-) spouse?

- 1...very interested
- 2...somewhat interested
- 3...not sure
- 4...not very interested
- 5...not at all interested
- 9...we are back together

1:13

Are you currently remarried or in a marriage-like relationship?

1...yes..... Does your new partner have children from a former relationship?

1:14

1...no

2...yes.....About how much time per month do these children spend at your house?

1:15

1...most of their time

1:16

2...about half

3...less than half, maybe a third

4...a few days or less

2...no.....Are you currently dating?

1...no

2...yes

1:17

Is your (ex-) spouse remarried?

1...yes

2...no

7...don't know

1:18

Taking all things together, how would you describe your relationship with your (ex-) spouse today?

- 1...we're still friends and we can cooperate pretty easily
- 2...our relationship is strained, but we are able to cooperate
- 3...we have too many problems and hard feelings to cooperate much
- 4...cooperation is just about impossible
- 5...we haven't spoken or tried to cooperate in months
- 8...other (explain:)

1:19

How true are the following statements for you?

	VERY TRUE			NOT AT ALL TRUE		DON'T KNOW
	1	2	3	4	5	9
I'm angry at my (ex-) spouse	1	2	3	4	5	9
My (ex-) spouse is angry with me	1	2	3	4	5	9
The children are aware of the anger between my ex-spouse and me	1	2	3	4	5	9

1:20

1:21

1:22

Circle the number which best describes the way you are feeling these days.

	NOT AT ALL MY FEELINGS					VERY MUCH MY FEELINGS	
I find myself spending a lot of time thinking about my (ex-) spouse	1	2	3	4	5		1:23
Sometimes I just can't believe that we got a divorce (broke up)	1	2	3	4	5		1:24
I find myself wondering what my (ex-) spouse is doing	1	2	3	4	5		1:25
I feel I will never get over the divorce	1	2	3	4	5		1:26

Besides the divorce and/or custody dispute, are there other things in your life today that have you worried or upset?

- 1...no, no other problems
 - 2...yes, other minor problems
 - 3...yes, other major problems
- 1:27

How far away does your (ex-) spouse live?

- Less than a mile _____
 - Approximately _____ miles
 - Doesn't apply, we live in the same building _____
 - Don't know the distance _____
 - Don't know where my (ex-) spouse lives _____
- 1:28-30

Now we'd like to find out how you and your (ex-) spouse get along today as PARENTS. Circle the number that best describes your situation.

	NEVER	RARELY	SOMETIMES	USUALLY	ALWAYS	
When you and your (ex-) spouse discuss parenting issues, how often is the underlying atmosphere one of hostility or anger?	1	2	3	4	5	1:31
Do you and your (ex-) spouse have basic differences of opinion about issues relating to child rearing?	1	2	3	4	5	1:32
Would you say that your (ex-) spouse is a help to you in raising the children?	1	2	3	4	5	1:33

In the last 9 or 10 months have you attended any lectures or workshops on divorce, single parenting, joint custody or other issues related to divorce and custody?

- 1...yes
 - 2...no
 - 7...don't know
- 1:34

Which phrase best describes the way you now feel about the custody/visitation dispute?

- 1...custody/visitation never in dispute
 - 2...the dispute has been settled
 - 3...I've definitely made progress
 - 4...I've made a little progress
 - 5...I've made no progress
 - 8...other (explain:)
- 1:35

HAVE YOU AND YOUR (EX-) SPOUSE DECIDED ON THE CUSTODY AND VISITATION OF _____?

- 1...YES, we have a written agreement
- 2...YES, we have a verbal agreement
- 3...NO, we do not have an agreement
- 7...don't know

1:36

How much disagreement is there over the custody or visitation of this child?

- 1...none
- 2...a little
- 3...some
- 4...a great deal
- 7...don't know

How do you think you will settle the issue of custody/visitations?

- 1...my (ex-) spouse and I will deal with it out of court
- 2...I am going to let my (ex-) spouse have his/her way
- 3... my (ex-) spouse has stopped fighting me
- 4...we will probably go to court
- 8...other (explain): _____

Who has legal custody?

- 1...I do
- 2...my (ex-) spouse does
- 3...we have joint legal custody
- 8...someone else has custody

(Who? _____)

Where did you produce your custody/visitation agreement?

- 1...in mediation
- 2...in court
- 3...out of court, with help from attorneys
- 4...entirely on our own

Does your lawyer seem satisfied with your agreement?

- 1...very satisfied
- 2...fairly satisfied
- 3...neutral
- 4...fairly dissatisfied
- 5...very dissatisfied
- 7...don't know
- 9...don't have an attorney

1:37-38

1:39-41

Where does this child live?

- 1...mostly with me
 - 2...mostly with my (ex-) spouse
 - 3...spends equal time with both parents
 - 8...mostly with someone else
- (Who? _____)

1:42

Is this where the child lived last _____?

1:43

- 1...yes
- 2...no.....How did you work out this new arrangement?
- 7...don't know

- 1...informally with my (ex-) spouse
- 2...in mediation
- 3...through our attorneys
- 8...other (explain): _____

1:44

How satisfied are you with this custody arrangement?

- 1...very satisfied
- 2...fairly satisfied
- 3...neutral
- 4...fairly dissatisfied
- 5...very dissatisfied
- 8...other (explain): _____

1:45

HAVE YOU AND YOUR (EX-) SPOUSE DECIDED ON THE CUSTODY AND VISITATION OF _____?

1:46

- 1...YES, we have a written agreement
- 2...YES, we have a verbal agreement
- 3...NO, we do not have an agreement
- 7...don't know

How much disagreement is there over the custody or visitation of this child?

- 1...none
- 2...a little
- 3...some
- 4...a great deal
- 7...don't know

How do you think you will settle the issue of custody/visitations?

- 1...my (ex-) spouse and I will deal with it out of court
- 2...I am going to let my (ex-) spouse have his/her way
- 3... my (ex-) spouse has stopped fighting me
- 4...we will probably go to court
- 8...other (explain): _____

Who has legal custody?

- 1...I do
- 2...my (ex-) spouse does
- 3...we have joint legal custody
- 8...someone else has custody

(Who? _____)

Where did you produce your custody/visitation agreement?

- 1...in mediation
- 2...in court
- 3...out of court, with help from attorneys
- 4...entirely on our own

Does your lawyer seem satisfied with your agreement?

- 1...very satisfied
- 2...fairly satisfied
- 3...neutral
- 4...fairly dissatisfied
- 5...very dissatisfied
- 7...don't know
- 9...don't have an attorney

1:47-48

Where does this child live?

1:49-51

- 1...mostly with me
 - 2...mostly with my (ex-) spouse
 - 3...spends equal time with both parents
 - 8...mostly with someone else
- (Who? _____)

1:52

Is this where the child lived last _____?

1:53

- 1...yes
- 2...no.....How did you work out this new arrangement?
- 7...don't know

- 1...informally with my (ex-) spouse
- 2...in mediation
- 3...through our attorneys
- 8...other (explain:)

1:54

How satisfied are you with this custody arrangement?

- 1...very satisfied
- 2...fairly satisfied
- 3...neutral
- 4...fairly dissatisfied
- 5...very dissatisfied
- 8...other (explain): _____

1:55

HAVE YOU AND YOUR (EX-) SPOUSE DECIDED ON THE CUSTODY AND VISITATION OF _____?

1:56

- 1...YES, we have a written agreement
- 2...YES, we have a verbal agreement
- 3...NO, we do not have an agreement
- 7...don't know

How much disagreement is there over the custody or visitation of this child?

- 1...none
- 2...a little
- 3...some
- 4...a great deal
- 7...don't know

How do you think you will settle the issue of custody/visitations?

- 1...my (ex-) spouse and I will deal with it out of court
- 2...I am going to let my (ex-) spouse have his/her way
- 3... my (ex-) spouse has stopped fighting me
- 4...we will probably go to court
- 8...other (explain): _____

Who has legal custody?

- 1...I do
- 2...my (ex-) spouse does
- 3...we have joint legal custody
- 8...someone else has custody

(Who? _____)

Where did you produce your custody/visitation agreement?

- 1...in mediation
- 2...in court
- 3...out of court, with help from attorneys
- 4...entirely on our own

Does your lawyer seem satisfied with your agreement?

- 1...very satisfied
- 2...fairly satisfied
- 3...neutral
- 4...fairly dissatisfied
- 5...very dissatisfied
- 7...don't know
- 9...don't have an attorney

1:57-58

Where does this child live?

1:59-61

- 1...mostly with me
 - 2...mostly with my (ex-) spouse
 - 3...spends equal time with both parents
 - 8...mostly with someone else
- (Who? _____)

1:62

Is this where the child lived last _____?

1:63

- 1...yes
- 2...no.....How did you work out this new arrangement?
- 7...don't know

- 1...informally with my (ex-) spouse
- 2...in mediation
- 3...through our attorneys
- 8...other (explain): _____

1:64

How satisfied are you with this custody arrangement?

- 1...very satisfied
- 2...fairly satisfied
- 3...neutral
- 4...fairly dissatisfied
- 5...very dissatisfied
- 8...other (explain): _____

1:65

About how many days per month does the parent not living with the children ACTUALLY see the children?

- About _____ days per month
- Doesn't see them on a monthly basis, about _____ days a year
- No pattern, very erratic
- Doesn't apply, child spends equal time with both parents _____

1:66-67

1:68-70

Does visitation follow a regular pattern and take place at predictable times?

- 1...yes, almost always
- 2...yes, generally
- 3...no, often doesn't follow a regular pattern
- 4...no, almost never follows a regular pattern
- 8...other (explain) _____

1:71

Does the parent not living with the children actually see them more or less often than she/he did around last _____?

- 1...sees them much more often
- 2...sees them somewhat more often
- 3...sees them about the same
- 4...sees them somewhat less often
- 5...sees them much less often

1:72

1:73-78

1:79-80

10

How satisfied are you with the amount of time you spend with your children?

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied

2:1

Below are a list of problems some people have with visitation. How often are these a problem for you?

	NEVER	RARELY	SOMETIMES	OFTEN	DOESN'T APPLY/ DON'T KNOW	
Concerned that your children are being spoiled by you or your (ex-) spouse	1	2	3	4	9	2:2
Children spend too much time with your (ex-) spouse's parents or relatives	1	2	3	4	9	2:3
Your (ex-) spouse says bad things about you to the children	1	2	3	4	9	2:4
Not getting the children back on time after a visit	1	2	3	4	9	2:5
Finding things to do or places to go with the children	1	2	3	4	9	2:6
Concerned about the children's wellbeing in your (ex-) spouse's home (e.g., drugs, violence, neglect).....	1	2	3	4	9	2:7
Children spend too much time with your (ex-) spouse's new partner or girl/boyfriends.....	1	2	3	4	9	2:8

IF YOU HAVE CUSTODY OF ALL THE CHILDREN, OR THE CHILDREN SPEND EQUAL AMOUNTS OF TIME WITH BOTH PARENTS, SKIP THIS BOX.

IF YOU DO NOT HAVE CUSTODY OF ALL THE CHILDREN, PLEASE ANSWER THE FOLLOWING QUESTIONS:

Which best describes your situation?	NEVER	RARELY	SOMETIMES	OFTEN	DOESN'T APPLY	
How often are you able to make it for scheduled visitations?	1	2	3	4	9	2:9
How often do you drop in to see your children outside of regular visitation times?	1	2	3	4	9	2:10
How often do your children drop in to see you?	1	2	3	4	9	2:11
How often do you talk with your children on the telephone?	1	2	3	4	9	2:12
Do you and your children feel free to telephone each other?	1	2	3	4	9	2:13
How often do you feel uncomfortable or awkward, at least at first, when visiting your children?	1	2	3	4	9	2:14
How often do the children seem awkward or uncomfortable visiting with you?	1	2	3	4	9	2:15
How often do the children seem angry, irritable or upset during visitation?	1	2	3	4	9	2:16

Since last _____ has there been any court action on issues related to your divorce or the custody/visitation dispute? 2:17

- 1...no
- 2...don't know
- 3...yes.....What was the nature of this action? (Circle all that apply)

- 1...issued or received temporary restraining order
- 2...issued or received a contempt citation
- 3...temporary custody hearing
- 4...hearing to award final custody and visitation 2:18-
- 5...filed to change custody or visitation 20
- 6...filed to change or arrange for child support
- 7...If these categories don't seem to fit, please describe what has happened in your case: _____

During this same time period have you, or your children, gone for counseling?

- 1...yes
- 2...no
- 7...don't know 2:21

Has a custody investigation ever been ordered or conducted?		
1...NO.....		2:22
2...Ordered, but not completed.....	▶ SKIP THIS BOX	2:23-24
3...Investigation has been completed		2:25-26
Approximately when was this (or the last) investigation conducted?	How much did you pay for this investigation? \$ _____	
month _____ year 19 ____		2:27-28
In your opinion how complete and thorough was this investigation?	How fair or unbiased did the investigation seem?	2:29
1...very complete	1...very fair	2:30
2...somewhat complete	2...somewhat fair	
3...somewhat incomplete	3...somewhat unfair	
4...very incomplete	4...very unfair	2:31
7...don't know	7...don't know	
Did the investigator talk with your children?	Overall, how satisfied are you with the investigation?	2:32-35
1...talked with all children	1...very satisfied	2:36
2...talked with some children	2...somewhat satisfied	
3...did not talk to children	3...somewhat dissatisfied	
7...don't know	4...very dissatisfied	2:37
Who did the investigator recommend to receive custody?	How satisfied are you with the recommendation?	2:38
1...mother	1...very satisfied	
2...father	2...somewhat satisfied	
3...no recommendation	3...neutral	
7...don't know	4...somewhat dissatisfied	
8...other (explain): _____	5...very dissatisfied	
	7...don't know	
	8...other (explain): _____	
	9...There was no recommendation	

Has the issue of child support been settled? 2:39

1.....yes

2.....no

7.....don't know

Are you presently supposed to be: 2:40

1.....paying child support.....amount per month \$ _____

2.....receiving child support.....amount per month \$ _____

3.....neither paying nor receiving 2:41-44

9.....doesn't apply, joint custody

How regularly do you make/receive these payments?

1.....very regularly

2.....somewhat regularly

3.....somewhat irregularly 2:45

4.....very irregularly

9.....doesn't apply

How satisfied are you with the current arrangement?

1.....very satisfied

2.....somewhat satisfied

3.....neutral 2:46

4.....somewhat dissatisfied

5.....very dissatisfied

9.....doesn't apply

Has the issue of spousal support (alimony) been settled?

2:47

- 1...yes
- 2...no
- 7...don't know

Are you presently supposed to be paying or receiving spousal support (alimony)?

2:48

- 1...no
- 2...yes.....amount per month \$ _____

2:49-51

How regularly do you make/receive these payments?

- 1...very regularly
- 2...fairly regularly
- 3...somewhat irregularly
- 4...very irregularly
- 9...doesn't apply

2:52

How long is this support to be paid?

2:53-54

- _____ years
- ___ permanently

Have you decided on the division of property?

- 1...yes
- 2...no
- 7...don't know

2:55

Has the family home been sold?

- 1...yes
- 2...noWho currently lives in the home?
- 9...doesn't apply, no home
 - 1...mother
 - 2...father
 - 8...other

2:56

2:57

How satisfied are you with the division of property?

- 1...very satisfied
- 2...fairly satisfied
- 3...fairly dissatisfied
- 4...very dissatisfied
- 9...doesn't apply

2:58

How satisfied are you with the job your attorney did in the divorce and/or custody/visitation dispute?

2:59

- 1...very satisfied
- 2...fairly satisfied
- 3...fairly dissatisfied
- 4...very dissatisfied

Approximately how much have you been billed in attorney fees related to the divorce or custody problem?

\$ _____

2:60-64

Do you presently have a court hearing scheduled?

2:65

- 1...yes
- 2...no, but we do plan to schedule one
- 3...no, we don't plan to schedule one
- 7...don't know

How satisfied are you today with the legal system in general, that is with judges, attorneys, referees, etc.?

2:66

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied.
- 7...don't know, not enough contact with them to know

Do you think having lawyers and judges involved in your case has made any difference in the way you and your (ex-) spouse get along and cooperate?

2:67

- 1...made things much better
- 2...made things somewhat better
- 3...made no difference
- 4...made things somewhat worse
- 5...made things much worse
- 8...other (explain:)

We would like your impressions of the courts.
 If you have been to court, use your own experiences to answer the following.
 If you haven't been to court, we would still like to know your opinions.

I think court hearings:

	STRONGLY DISAGREE				STRONGLY AGREE	DON'T KNOW	
Help you understand your (ex-) spouse's point of view	1	2	3	4	5	9	2:68
Are biased against fathers	1	2	3	4	5	9	2:69
Make you feel very defensive	1	2	3	4	5	9	2:70
Focus on the children's needs	1	2	3	4	5	9	2:71
Bring issues, problems and feelings out into the open.....	1	2	3	4	5	9	2:72-78 11 2:79-80 3:1
Are tension-filled and unpleasant	1	2	3	4	5	9	3:2
Help you understand how the children feel	1	2	3	4	5	9	3:3
Hearings are rushed, they are not given enough time	1	2	3	4	5	9	3:4
Allow your point of view to be expressed	1	2	3	4	5	9	3:5

Do you think mediation should be mandatory for couples who cannot agree on custody and visitation?

3:6

- 1...definitely should be
- 2...probably should be
- 3...neutral
- 4...probably should not be
- 5...definitely should not be
- 7...don't know

IF YOU FILED FOR DIVORCE IN COLORADO,
GO TO THE NEXT PAGE,
OTHERWISE PLEASE ANSWER THE FOLLOWING

Looking back, what did you like most about mediation? _____

3:7-8

What did you like least? _____

3:9-10

Do you think you gave mediation a fair chance?

- 1...definitely did
- 2...probably did
- 3...not sure
- 4...probably did not
- 5...definitely did not

3:11

Are you glad you tried mediation?

- 1...very glad I tried it
- 2...somewhat glad I tried it
- 3...neutral
- 4...somewhat sorry I tried it
- 5...very sorry I tried it

3:12

Would you recommend mediation to friends who had a custody/visitation dispute?

- 1...definitely would
- 2...probably would
- 3...not sure
- 4...probably not
- 5...definitely not

3:13

Did you reach a decision about custody or visitation in mediation?

- 1...no
- 2...yes.....Do you think you would have fared better if a judge had made the decision?
 - 1...definitely would have fared better
 - 2...probably would have fared better
 - 3...would have been about the same
 - 4...probably would have been worse
 - 5...definitely would have been worse

3:14

3:15

Looking back, do you think it would have been a good idea to deal with financial issues, such as property and child support in mediation?

- 1...definitely would have been a good idea
- 2...probably would have been a good idea
- 3...not sure
- 4...probably would not have been a good idea
- 5...definitely would not have been a good idea

3:16

What financial issues would you like to see mediated?

- 1...child support
- 2...spousal support (alimony)
- 3...property
- 4...all of the above
- 5...none

3:17-18

Do you think you will want to change the present custody or visitation arrangement within the next year or two?

- 1...definitely will
- 2...probably will
- 3...not sure
- 4...probably not
- 5...definitely not

3:19

If you need to make changes in the custody visitation arrangement, how will you do this?

- 1...go directly back to mediation, call the mediator(s)
- 2...informally work it out with my (ex-) spouse
- 3...see if an attorney could help us settle it without going back to court
- 4...go back to court
- 8...other (explain): _____

3:20

If you had it to do over again, would you contest custody or visitation?

- 1...definitely would
- 2...probably would
- 3...not sure
- 4...probably would not
- 5...definitely would not

3:21

Within the last 9 or 10 months has your employment situation changed?

- 1...no change
- 2...unemployed to part-time
- 3...part-time to full-time
- 4...unemployed to full-time
- 5...employed to unemployed
- 6...increased full-time hours
- 7...increased part-time hours
- 8...other (explain): _____

3:22

Which best describes your current employment situation?

- 1...full-time homemaker
- 2...employed full-time
- 3...employed part-time
- 4...unemployed, looking for work
- 5...student
- 6...retire
- 8...other (explain): _____

3:23

Is there a religious group you identify with?

- 1...Catholic
- 2...Jewish
- 3...Protestant.....Any particular denomination? _____
- 4...none

3:24

3:25-26

Now we have a few questions specifically about _____

Since about last _____, have you noticed any changes in the way this child is adjusting to the custody/visitation arrangement or the divorce?

3:27

- 1...NO, no problems originally and none now
- 2...NO, there are still just as many problems
- 3...YES, doing much better
- 4...YES, doing somewhat better
- 5...YES, doing somewhat worse
- 6...YES, doing much worse
- 7...don't know
- 8...other (explain): _____

During this same time, have the following occurred in the child's life?

	No	Yes	Don't Know	
Changed schools.....	1	2	7	3:28
Moved from one parent's home to the other's...	1	2	7	3:29
Held back a grade in school.....	1	2	7	3:30
Moved (along with parent)	1	2	7	3:31

How old is this child today? _____ years 3:32-33

This child is: 1...male 2...female 3:34

How true are the following statements about this child?

	NOT AT ALL TRUE			VERY TRUE DOESN'T APPLY				
	1	2	3	4	5	9		
This child is satisfied with the present custody arrangement	1	2	3	4	5	9	3:35	
This child is satisfied with the present visitation arrangement	1	2	3	4	5	9	3:36	
It is easy for me to show this child affection or sympathy	1	2	3	4	5	9	3:37	
I find myself confiding a lot in this child. I share my personal problems, financial worries, future plans	1	2	3	4	5	9	3:38	
This child became more responsible and mature as a result of the separation	1	2	3	4	5	9	3:39	
I think this child understands what the custody/visitation problem is about	1	2	3	4	5	9	3:40	
Generally, my relationship with this child is good	1	2	3	4	5	9	3:41	
This child needs more routine and stability in her/his life	1	2	3	4	5	9	3:42	
Generally, my (ex-) spouse has a good relationship with this child	1	2	3	4	5	9	3:43	
This child became closer to brothers and sisters as a result of the marital separation ..	1	2	3	4	5	9	3:44	
This child feels she/he caused the divorce	1	2	3	4	5	9	3:45	
This child worries about taking sides with one parent	1	2	3	4	5	9	3:46	
This child does not confide in me, seems distant and aloof	1	2	3	4	5	9	3:47	
This child takes sides with one parent against the other	1	2	3	4	5	9	3:48	
This child won't talk about the divorce	1	2	3	4	5	9	3:49	
This child is angry at father because of the divorce	1	2	3	4	5	9	3:50	
This child accepts the divorce	1	2	3	4	5	9	3:51	
This child is angry at mother because of the divorce	1	2	3	4	5	9	3:52	
It is easy for me to talk to this child about his/her personal problems	1	2	3	4	5	9	3:53	

Below is a list of items that describe children. How often has each item been true of this child in the last month or so?

NOT SOMETIMES VERY TRUE

NOT SOMETIMES VERY TRUE

- | | | | | | | | | | |
|---|---|---|-----|---|---|---|---|-----|--|
| 0 | 1 | 2 | 1. | Acts too young for his/her age | 0 | 1 | 2 | 31. | Fears he/she might think or do something bad |
| 0 | 1 | 2 | 2. | Allergy (describe) _____ | 0 | 1 | 2 | 32. | Feels he/she has to be perfect |
| | | | | _____ | 0 | 1 | 2 | 33. | Feels or complains that no one loves him/her |
| 0 | 1 | 2 | 3. | Argues a lot | 0 | 1 | 2 | 34. | Feels others are out to get him/her |
| 0 | 1 | 2 | 4. | Asthma | 0 | 1 | 2 | 35. | Feels worthless or inferior |
| 0 | 1 | 2 | 5. | Behaves like opposite sex | 0 | 1 | 2 | 36. | Gets hurt a lot, accident-prone |
| 0 | 1 | 2 | 6. | Bowel movements outside toilet | 0 | 1 | 2 | 37. | Gets in many fights |
| 0 | 1 | 2 | 7. | Bragging, boasting | 0 | 1 | 2 | 38. | Gets teased a lot |
| 0 | 1 | 2 | 8. | Can't concentrate, can't pay attention for long | 0 | 1 | 2 | 39. | Hangs around with children who get in trouble |
| 0 | 1 | 2 | 9. | Can't get his/her mind off certain thoughts; obsessions (describe): _____ | 0 | 1 | 2 | 40. | Hears things that aren't there (describe): _____ |
| | | | | _____ | | | | | _____ |
| 0 | 1 | 2 | 10. | Can't sit still, restless, or hyperactive | 0 | 1 | 2 | 41. | Impulsive or acts without thinking |
| 0 | 1 | 2 | 11. | Clings to adults or too dependent | 0 | 1 | 2 | 42. | Likes to be alone |
| 0 | 1 | 2 | 12. | Complains of loneliness | 0 | 1 | 2 | 43. | Lying or cheating |
| 0 | 1 | 2 | 13. | Confused or seems to be in a fog | 0 | 1 | 2 | 44. | Bites fingernails |
| 0 | 1 | 2 | 14. | Cries a lot | 0 | 1 | 2 | 45. | Nervous, highstrung, or tense |
| 0 | 1 | 2 | 15. | Cruel to animals | 0 | 1 | 2 | 46. | Nervous movements or twitching (describe): _____ |
| 0 | 1 | 2 | 16. | Cruelty, bullying, or meanness to others | | | | | _____ |
| 0 | 1 | 2 | 17. | Day-dreams or gets lost in his/her thoughts | 0 | 1 | 2 | 47. | Nightmares |
| 0 | 1 | 2 | 18. | Deliberately harms self or attempts suicide | 0 | 1 | 2 | 48. | Not liked by other children |
| 0 | 1 | 2 | 19. | Demands a lot of attention | 0 | 1 | 2 | 49. | Constipated, doesn't move bowels |
| 0 | 1 | 2 | 20. | Destroys his/her own things | 0 | 1 | 2 | 50. | Too fearful or anxious |
| 0 | 1 | 2 | 21. | Destroys things belonging to his/her family or other children | 0 | 1 | 2 | 51. | Feels dizzy |
| 0 | 1 | 2 | 22. | Disobedient at home | 0 | 1 | 2 | 52. | Feels too guilty |
| 0 | 1 | 2 | 23. | Disobedient at school | 0 | 1 | 2 | 53. | Overeating |
| 0 | 1 | 2 | 24. | Doesn't eat well | 0 | 1 | 2 | 54. | Overtired |
| 0 | 1 | 2 | 25. | Doesn't get along with other children | 0 | 1 | 2 | 55. | Overweight |
| 0 | 1 | 2 | 26. | Doesn't seem to feel guilty after misbehaving | | | | 56. | Physical problems without known medical cause: |
| 0 | 1 | 2 | 27. | Easily jealous | 0 | 1 | 2 | a. | Aches or pains |
| 0 | 1 | 2 | 28. | Eats or drinks things that are not food (describe): _____ | 0 | 1 | 2 | b. | Headaches |
| | | | | _____ | 0 | 1 | 2 | c. | Nausea, feels sick |
| | | | | _____ | 0 | 1 | 2 | d. | Problems with eyes (describe): _____ |
| 0 | 1 | 2 | 29. | Fears certain animals, situations, or places, other than school (describe): _____ | 0 | 1 | 2 | e. | Rashes or other skin problems |
| | | | | _____ | 0 | 1 | 2 | f. | Stomachaches or cramps |
| 0 | 1 | 2 | 30. | Fears going to school | 0 | 1 | 2 | g. | Vomiting, throwing up |
| | | | | _____ | 0 | 1 | 2 | h. | Other (describe): _____ |
| | | | | _____ | | | | | _____ |

NOT
SOMETIMES
VERY
TRUE

- 0 1 2 57. Physically attacks people
- 0 1 2 58. Picks nose, skin, or other parts of body
(describe): _____
- 0 1 2 59. Plays with own sex parts in public
- 0 1 2 60. Plays with own sex parts too much
- 0 1 2 61. Poor school work
- 0 1 2 62. Poorly coordinated or clumsy
- 0 1 2 63. Prefers playing with older children
- 0 1 2 64. Prefers playing with younger children
- 0 1 2 65. Refuses to talk
- 0 1 2 66. Repeats certain acts over and over,
compulsions (describe): _____
- 0 1 2 67. Runs away from home
- 0 1 2 68. Screams a lot
- 0 1 2 69. Secretive, keeps things to self
- 0 1 2 70. Sees things that aren't there (describe):

- 0 1 2 71. Self-conscious or easily embarrassed
- 0 1 2 72. Sets fires
- 0 1 2 73. Sexual problems (describe):

- 0 1 2 74. Showing off or clowning
- 0 1 2 75. Shy or timid
- 0 1 2 76. Sleeps less than most children
- 0 1 2 77. Sleeps more than most children during day
and/or night (describe): _____
- 0 1 2 78. Smears or plays with bowel movements
- 0 1 2 79. Speech problem (describe): _____
- 0 1 2 80. Stares blankly
- 0 1 2 81. Steals at home
- 0 1 2 82. Steals outside the home
- 0 1 2 83. Stores up things he/she doesn't need (describe):

NOT
SOMETIMES
VERY
TRUE

- 0 1 2 84. Strange behavior (describe): _____
- 0 1 2 85. Strange ideas (describe):

- 0 1 2 86. Stubborn, sullen, irritable
- 0 1 2 87. Sudden changes in mood or feelings
- 0 1 2 88. Sulks a lot
- 0 1 2 89. Suspicious
- 0 1 2 90. Swearing or obscene language
- 0 1 2 91. Talks about killing self
- 0 1 2 92. Talks or walks in sleep (describe):

- 0 1 2 93. Talks too much
- 0 1 2 94. Teases a lot
- 0 1 2 95. Temper tantrums or hot temper
- 0 1 2 96. Thinks about sex too much
- 0 1 2 97. Threatens people
- 0 1 2 98. Thumb-sucking
- 0 1 2 99. Too concerned with neatness or cleanliness
- 0 1 2 100. Trouble sleeping (describe):

- 0 1 2 101. Truancy, skips school
- 0 1 2 102. Underactive, slow moving, or lacks energy
- 0 1 2 103. Unhappy, sad, or depressed
- 0 1 2 104. Unusually loud
- 0 1 2 105. Uses alcohol or drugs (describe):

- 0 1 2 106. Vandalism
- 0 1 2 107. Wets self during the day
- 0 1 2 108. Wets the bed
- 0 1 2 109. Whining
- 0 1 2 110. Wishes to be of opposite sex
- 0 1 2 111. Withdrawn, doesn't get involved with others
- 0 1 2 112. Worrying
- 113. Please write in any problems your child has
that were not listed above:

- 0 1 2
- 0 1 2
- 0 1 2

THE DIVORCE MEDIATION PROJECT
WOULD LIKE TO THANK YOU FOR YOUR PARTICIPATION
IN OUR RESEARCH DURING THE PAST YEAR

Our results will be shared with the courts
to help them better serve families in the future

Again, thank you.

POST TEST

THE DIVORCE MEDIATION RESEARCH PROJECT

Funded by the Children's Bureau
Administration for Children, Youth and Families
Department of Health and Human Services

1982

Administered by
The Association of Family Conciliation Courts

DOCKET NUMBER: _____	
NAME: _____	PHONE(S): _____
ADDRESS: _____	ATTORNEY: _____
ATTY PHONE _____	SPOUSE PHONE: _____
DATE OF MEDIATION/INVESTIGATION: _____	INTERVIEW DATE: _____
Site: 1...Los Angeles 2...Minneapolis 3...Connecticut 4...Colorado	City: _____ County: _____
Respondent sex: 1...male 2...female	

1:1
1:2-4
1:5

1:6-9
1:10-11
1:12

How many children did you and your (ex-) spouse have? _____

1:13

What are the current ages of these children? (start with the youngest)

1:14-15

#1: _____ yrs #2: _____ yrs #3: _____ yrs #4: _____ yrs
male _____ female _____ m _____ f _____ m _____ f _____

1:16-17

What month and year did you and your (ex-) spouse marry? _____
month year

1:18-19

1:20-21

What month and year did you finally separate? _____
month year

1:22-24

1:25-26

If you are divorced from your (ex-) spouse, what month and year did the divorce become final?

1:27-28

month year

1:29-30

1:31-32

Were you already divorced in 1978 when the mediation took place?

1:33-34

- 1...yes
- 2...no
- 7...don't know

1:35-36

1:37

Did the mediation/investigation in fact take place?

- 1...yes
- 2...no
- 7...don't know

1:38

What is your relationship to you (ex-) spouse today?

1:39

- 1...reconciled, living together (go to next page)
- 2...still living together, divorce in progress
- 3...living apart, divorce in progress
- 4...divorced, living apart
- 8...other

Have you remarried?

1:40

- 1...yes
- 2...no

Has your (ex-) spouse remarried?

1:41

- 1...yes
- 2...no
- 7...don't know

How far away does your (ex-) spouse live?

- Approximately _____ miles
- Doesn't apply, we live in the same building
- Don't know how far apart we live
- Don't know where my (ex-) spouse lives

1:42-44

How interested are you in getting back together with your (ex-)spouse?

1:45

- 1...very interested
- 2...somewhat interested
- 3...not sure
- 4...not very interested
- 5...not at all interested
- 6...we are back together
- 8...other. (explain:) _____

Are you presently supposed to be paying or receiving child support?

- 1...paying child supportamount per month = \$ _____
- 2...receiving child support.....amount per month = \$ _____
- 3...neither paying nor receiving
- 9...doesn't apply (e.g., joint custody)

1:46
1:47-50

If you are supposed to be paying or receiving child support:
How regularly do you make or receive the payments?

- 1...very regularly
- 2...somewhat regularly
- 3...somewhat irregularly
- 4...very irregularly
- 9...doesn't apply

1:51

How satisfied are you with the current child support arrangement?

- 1...very satisfied
- 2...somewhat satisfied
- 3...somewhat dissatisfied
- 4...very dissatisfied
- 9...not applicable (e.g., reconciled)

1:52

How satisfied are you with the property settlement you and your (ex-) spouse have?

- 1...very satisfied
- 2...somewhat satisfied
- 3...somewhat dissatisfied
- 4...very dissatisfied
- 9...not applicable (e.g., never divorced)

1:53

Are you, or did you ever, pay or receive spousal support (alimony)?

- 1...no
- 2...yes, paidHow much did you pay/receive per month?
- 3...yes, received \$ _____

1:54

How long was support to be paid?

- _____ years
- _____ permanently

1:55-57

1:58-59

How much financial strain are you feeling these days?

- 1...no financial strain
- 2...very little financial strain
- 3...some financial strain
- 4...a lot of financial strain
- 8...other (explain:)

1:60

How satisfied are you with the job your attorney is doing, or did, in your divorce or custody/visitation dispute?

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied
- 9...not applicable, never had an attorney

1:61

Based on your divorce experience, how satisfied are you with the legal system in general, e.g., judges, referees, attorneys, etc.?

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied
- 8...don't know, e.g., didn't see enough of these actors to have opinion

1:62

3.

Is there anything that you particularly liked or disliked about the legal system?

1:63-64

Approximately how much have you spent, or do you owe, in attorney fees related to the divorce and custody dispute?

Approximately \$ _____

1:65-69

Have you ever had a custody investigation conducted?

- 1...no
- 8...don't know
- 2...yesANSWER BELOW

1:70

How satisfied were you with the investigation?

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied
- 8 ..other (explain:) _____
- 9 ..not applicable

1:71

How well does the following describe your feelings?

	NOT AT ALL TRUE				VERY TRUE	NA
The investigator(s) did not seem to understand the real issues and problems.....	1	2	3	4	5	9

1:72

Do you think the investigation made a difference in the way you and your (ex-) spouse get along and cooperate?

- 1...made it much better
- 2...made it somewhat better
- 3...made no difference
- 4...made it somewhat worse
- 5...made it much worse
- 9...not applicable

1:73

SKIP 1:74-79
1 1:80

LOS ANGELES, MINNEAPOLIS, CONNECTICUT:
DENVER:

GO TO THE NEXT PAGE
GO TO PAGE 5

How did your attorney feel about you mediating?

- 1...encouraged me to try it
- 2...neutral
- 3...did not like the idea
- 4...didn't discuss the idea
- 7...don't know what my attorney thought
- 9...didn't have an attorney

4.
2:1

What issues were settled in mediation? (Circle all that apply)

- 1...temporary visitation arrangement
- 2...temporary custody
- 3...temporary custody and visitation
- 4...permanent custody
- 5...permanent visitation
- 6...permanent custody and visitation
- 7...financial issues
- 8...other (e.g., agreed to seek counseling)
- 9...nothing settled in mediation
- 0...don't know

2:2-4

Looking back, do you think it would have been a good idea or a bad idea for financial issues to have been mediated along with custody and visitation?

- 1...definitely a good idea
- 2...probably a good idea
- 3...neutral, doesn't matter
- 4...probably a bad idea
- 5...definitely a bad idea
- 7...don't know
- 8...other (explain) _____

2:5

What financial issues would you like to see mediated?

- 1...child support
- 2...property
- 3...spousal support (alimony)
- 4...all of the above
- 5...none
- 7...don't know
- 8...other (explain) _____

2:6-7

How well do the following describe your feelings?

	NOT AT ALL TRUE	1	2	3	4	5	VERY TRUE	NA
Mediator(s) did not seem to understand the real issues or problems.....	1	2	3	4	5	9		
I felt confident that nothing we said in mediation could later be used in court.	1	2	3	4	5	9		

2:8

2:9

Do you think mediation made a difference in the way you and your (ex-) spouse get along or cooperate?

- 1...made it much better
- 2...made it somewhat better
- 3...made no difference
- 4...made it somewhat worse
- 5...made it much worse
- 7...don't know
- 8...other (explain) _____
- 9...not applicable

2:10

How satisfied were you with your mediation?

- 1...very satisfied
- 2...somewhat satisfied
- 3...somewhat dissatisfied
- 4...very dissatisfied
- 9...not applicable

2:11

Anything you particularly liked or disliked about mediation? _____

Before the mediation/investigation took place, who had legal custody of the children?

- 1...I did
- 2...my (ex-) spouse did
- 3...it was split, I had some and my (ex-) spouse had some
- 4...it was joint legal custody
- 8...someone else (who?) _____

2:14

*** After the mediation/investigation took place, who had legal custody?

- 1...I did
- 2...my (ex-) spouse did
- 3...it was split, I had some and my ex- had some
- 4...we had joint legal
- 8...someone else (who?) _____

2:15

Did you feel pressured into this agreement (the one in effect after the mediation/investigation)?

- 1...not at all pressured
- 2...not very pressured
- 3...somewhat pressured
- 4...very pressured
- 8...other

2:16

----- Who pressured you? (Circle all applicable)

- 1...the mediator(s)
- 2...my (ex-) spouse
- 3...attorney(s)
- 4...judges
- 5...investigators
- 8...other (who?) _____

2:17

2:18

2:19

Who currently has legal custody of the children?

- 1...I do
- 2...my (ex-) spouse does
- 3...it was split, I have some, my ex- has some
- 4...we have joint legal custody
- 8...someone else (who?) _____
- 9...not applicable

2:20

If answer is different than item **starred** above, ask:
How did you arrive at this custody arrangement?

- 1...on our own
- 2...in mediation
- 3...in a court hearing
- 8...other (where?) _____
- 9...not applicable (no change)

2:21

How satisfied are you with the present legal custody arrangement?

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied
- 8...other _____
- 9...not applicable

2:22

Where do the children actually live?

- 1...mostly with me
- 2...mostly with my (ex-) spouse
- 3...some mostly with me, others mostly with my ex-
- 4...equal time with both of us
- 8...other _____
- 9...not applicable

2:23

How satisfied are you with this living arrangement?

- 1...very satisfied
- 2...somewhat satisfied
- 3...neutral
- 4...somewhat dissatisfied
- 5...very dissatisfied
- 8...other _____
- 9...not applicable

2:24

About how many days per month does the parent not living with the children actually see them?

- Approximately _____ days
- Doesn't see them monthly, about _____ days per year
- Joint residential custody _____
- Doesn't apply (e.g., no minor children)

2:25-26
2:27-29

How regular and predictable is this visitation?

- 1...visitation doesn't take place
- 2...visitation is very irregular (e.g., often cancelled, postponed, non-custodian drops by unexpectedly)
- 3...great variation in regularity (some months very regular, others not)
- 4...fairly regular (there is a schedule that is followed, but also some variation from this pattern)
- 5...very regular (the schedule is generally followed)
- 9...doesn't apply (e.g., no minor children, or reconciled)

2:30

How often do you have disagreements with your (ex-) spouse about visitation?

- 1...frequently
- 2...occasionally
- 3...rarely
- 4...never
- 5...no contact with ex-
- 9...doesn't apply

2:31

How often does the non-custodian talk with the children on the phone?

- 1...frequently
- 2...occasionally
- 3...rarely
- 4...never
- 9...doesn't apply (reconciled, no minor children)

2:32

Overall, how are your children doing these days?

- 1...very well
- 2...fairly well
- 3...not very well
- 4...not doing well
- 5...mixed, some doing well, others aren't
- 8...other _____

2:33

How often does your youngest/oldest child seem	All the time	Most the time	Some times	Rarely	Never	Don't know	
ANGRY	1	2	3	4	5	7	2:34
seem ANXIOUS	1	2	3	4	5	7	2:35
seem HAPPY.....	1	2	3	4	5	7	2:36
seem DEPRESSED/SAD.....	1	2	3	4	5	7	2:37

Since your divorce became final, have you or your attorney been back to court, or has your (ex-) spouse brought you back to court, to change the following?

Custody.....	1....no	2...yes....	Times before mediation/investigation _____	2:38-42
			Times after mediation/investigation _____	
Visitation..	1....no	2...yes....	Times before mediation/investigation _____	2:43-47
			Times after mediation/investigation _____	
Child Support.....	1....no	2...yes....	Times before mediation/investigation _____	2:48-52
			Times after mediation/investigation _____	

Do you think you will want to change the present custody or visitation arrangement within the next year?

- 1...definitely will
- 2...probably will
- 3...not sure
- 4...probably not
- 5...definitely not
- 9...doesn't apply (e.g., reconciled)

2:53

If you need to change the custody or visitation arrangement, how do you think you would do this? (Don't read answers)

- 1...go directly back to mediation, call mediators
- 2...informally with my (ex-) spouse
- 3...contact an attorney, go back to court
- 7...don't know
- 8...other
- 9...doesn't apply (e.g., no minor children)

2:54

Do you think mediation should be mandatory for couples who disagree on custody and visitation?

- 1...definitely should be
- 2...probably should be
- 3...neutral
- 4...probably should not be
- 5...definitely should not be
- 7...don't know

2:55

If you had it to do over again, would you contest custody or visitation?

- 1...definitely would
- 2...probably would
- 3...not sure
- 4...probably would not
- 5...definitely would not

2:56

Any particular reason you feel this way? _____

2:57-58

Finally, we'd like a little background information on you.

How old are you? _____ years

2:59-60

Is there a racial group you identify with?

- 1...White.....Do you identify with any particular ethnic group, e.g.,
- 2...Black e.g. Irish or Italian? 1...no 2...yes please specify:
- 3...Hispanic
- 4...Asian _____
- 5...Indian _____
- 8...other (specify): _____

2:61

2:62

2:63

Is there a religious group you identify with?

- 1...Catholic
- 2...Jewish
- 3...Protestant.....Any particular denomination? _____
- 8...other

2:64

2:65-66

What was the last year of school you completed?

- 1...less than high school
- 2...graduated from high school
- 3...some college
- 4...college graduate
- 5...attended or completed graduate school

2:67

What is your present occupation? _____

What category does your own individual income (yearly) fall into before taxes? (include spousal support, public assistance, wages, etc., but not child support)

- 1...under \$2,999
- 2...\$3000 - 4999
- 3...\$5000 - 9999
- 4...\$10,000 - 14,999
- 5...\$15,000 - 19,999
- 6...\$20,000 - 24,999
- 7...\$25,000 - 49,999
- 8...\$50,000 or more

1...male 2...female

SKIP

2

8.

2:63

2:69-71

2:72

2:73-74

2:75

2:76-79

2:80

Appendix II

Publications of the Divorce Mediation Research Project

Pearson, J., N. Thoennes and A. Milne

Directory of Mediation Services, 1982.

Pearson, J.

"An Evaluation of Alternatives to Court Adjudication," Justice System Journal, Vol. 7/3, 1982.

Comeaux, L.

"A Guide to Implementing Divorce Mediation Services in the Public Sector," Conciliation Courts Review, Vol. 21, No. 2, 1983.

Pearson, J. M. Ring & A. Milne

"A Portrait of Divorce Mediation Services in the Public and Private Sector," Conciliation Courts Review, Vol. 21, No. 1, 1983.

Pearson, J., and N. Thoennes

"A Preliminary Portrait of Client Reactions to Three Court Mediation Programs," Mediation Quarterly, no. 3, 1984.

Pearson, J. and N. Thoennes

"Divorce Mediation: An Overview of Research Results." Forthcoming in Folberg and Milne (eds), Divorce Mediation: Theory and Practice. Guilford Press, 1985 and The Ohio State Journal on Alternative Dispute Resolution, April, 1985.

Pearson, J. and N. Thoennes

"The Effectiveness of Divorce Mediation." Forthcoming in Fairshare, 1985.

Slaikue, K., J. Pearson, J. Lockett and F. Costin-Myers

"Mediation Process Analysis: A Descriptive Coding System." Forthcoming in Mediation Quarterly, 1985.

Slaikue, K. R. Culler, J. Pearson and N. Thoennes

"Process and Outcome in Divorce Mediation." Forthcoming in Mediation Quarterly, 1985.

Thoennes, N. and J. Pearson

"Predicting Outcomes in Mediation: The Influence of People and Process." Forthcoming in The Journal of Social Issues, 1985.

Pearson, J. and N. Thoennes

"Mediating Parent-Child Post-Divorce Arrangements." Forthcoming in Wolchik and Karoly (eds), Children of Divorce: Perspectives on Adjustment, 1985.

Pearson, J. and N. Thoennes

"Parent Reactions to their Child Custody Mediation and Adjudication Experiences." Submitted for publication.

Pearson, J., N. Thoennes and W. Hodges

"The Effects of Divorce Mediation and Adjudication Procedures on Children." Submitted for publication.

Little, M. N. Thoennes, J. Pearson and R. Appleford

"A Case Study: The Custody Mediation Services of the Los Angeles Conciliation Court." Submitted for publication.

Lyon, E., N. Thoennes, J. Pearson and R. Appleford

"A Case Study: The Custody Mediation Services of the Family Division of the Connecticut Superior Court." Submitted for publication.

Cauble, B., N. Thoennes, J. Pearson and R. Appleford

"A Case Study: Custody Resolution Counseling in Hennepin County, Minnesota." Submitted for publication.

Papers and Presentations of the
Divorce Mediation Research Project

May, 1981	Association of Family and Conciliation Courts Spring Meeting, Indianapolis, Indiana
June, 1981	The Law and Society Association Annual Meetings Amherst, Massachusetts
December, 1981	Association of Family and Conciliation Courts Winter Conference, Ft. Lauderdale, Fla.
January, 1982	Interdisciplinary Committee on Child Custody Denver, Colorado
February, 1982	Boulder Interdisciplinary Committee on Child Custody Boulder, Colorado
March, 1982	The American Orthopsychiatric Association, Institute on Mediation, San Francisco, California
June, 1982	The Law and Society Association Annual Meeting Toronto, Canada
June, 1982	The American Bar Association, National Conference on Alternative Family Dispute Resolution, Washington, D.C.
June, 1982	International Family Law Society, Fourth World Conference Cambridge, Massachusetts
October, 1982	Association of Marriage and Family Therapists Annual Conference, Dallas, Texas
October, 1982	Annual Child Custody Conference, Keystone, Colorado
January, 1983	The American Bar Association, National Conference on Consumer Dispute Resolution, Washington, D.C.
April, 1983	Harvard Law School Presentation and Presentation to the Cambridge Mediation Group, Massachusetts
May, 1983	Interdisciplinary Committee on Child Custody Boulder, Colorado
May, 1983	Association of Family and Conciliation Courts Spring Conference, Toronto, Canada
June, 1983	The Law and Society Association Annual Meeting Denver, Colorado

June, 1983 The National Conference on State Legislatures Conference
on Children's Rights: Support, Paternity, Custody
Denver, Colorado

September, 1983 The Annual Colorado Judicial Conference
Vail, Colorado

October, 1983 Issues in Family Law
The National College of Juvenile Justice, Reno, Nevada

May, 1984 Association of Family and Conciliation Courts Annual
Meeting, Denver, Colorado.
Presentation by Comeaux, Hodges, Pearson, Slaikeu and
Thoennes