A Research Agenda for Divorce Mediation: The Creation of Second Order Knowledge to Inform Legal Policy

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I. INTRODUCTION

Some years ago a diverse group of researchers and practitioners at The Ohio State University with interest in the field of alternative dispute resolution conducted a series of meetings to share ideas. One outcome of these meetings was that faculty members from Law, Nursing, Psychology, and Public Policy and Management applied for and received a grant from the University to develop a series of interdisciplinary research seminars focused on legal and social science research related to mediation. The Divorce Mediation Research Seminar, the focus of this paper, was one of those planned. The goals of the seminar were to address the questions: What existing social science and legal research could inform current practice and policy in the area of divorce mediation, and what research, if conducted, would have promise for improving the quality of divorce mediation and legal policies?[1]

The purpose of this paper is to describe the planning and outcomes of The Divorce Mediation Research Seminar. To effectively achieve this goal, we begin by briefly reviewing the literature in the area that formed the foundation upon which the seminar participants built. Following this review, we present a set of assumptions upon which both current legal policy and social research appear to be based. Finally, we describe the outcomes of the seminar and discuss a research agenda that could lead to the development of new kinds of knowledge about the practice of divorce mediation and, therefore, favorably influence policy.

II. REVIEW OF THE LITERATURE

A. Historical Background

The practice of divorce mediation is well rooted in labor-management history and in the dispute-resolution traditions of some

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1. 1993 Seminar on Divorce Mediation at The Ohio State University.

community, cultural, and ethnic groups.[2] Once the concept of divorce mediation was developed, its practice grew vigorously. Its growth during the 1970s and 1980s was nourished by the social changes and the *zeitgeist* of the times and was fostered by many factors that made it difficult for the courts to conduct "business as usual." These factors included the then increasing number of divorce cases, no-fault divorce laws, and the shift from use of the "tender years" doctrine (that suggested mothers should have custody of young children) to the "best interests" standard.[3] This shift in standards meant that in each case decisions had to be made about what specific arrangements would best serve the children.

Divorce mediation had advantages beyond helping to alleviate court congestion by diverting cases to conciliation services. For example, it promised to provide more detailed and structured custody and visitation agreements than were possible from overworked courts, which had only vague and subjective guidelines to make an ever-growing number of custody decisions. Perhaps more important, divorce mediation placed the major responsibility for determining the "best interests of the child" in the hands of the parents, who were most knowledgeable about the child and could be expected to carry out the decisions.

Finally, it was assumed that the use of mediation in custody disputes would benefit divorcing parties and help to lessen the negative impact of divorce on children. This assumption followed from the belief that involvement in mediation reduces animosity among the disputant parties, shortens the divorce adjustment process, focuses attention on the needs of children, and produces settlements for which the parties have a greater sense of psychological ownership.

Nearly two decades ago, the California courts developed conciliation and mediation services, while mediation was made mandatory for contested child custody and visitation cases by the California Legislature's implementation of section 4607 of the California Civil

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2. *See* Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1 MEDIATION Q., Sept. 1983, 3, 5; JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 1-7 (1984); Ann L. Milne, *Mediation or Therapy - Which is it?, in* DIVORCE AND FAMILY MEDIATION, THE FAMILY THERAPY COLLECTIONS 1, 3-5 (James C. Hansen & Sarah C. Grebe eds., 1985).

3. Robert E. Emery & Melissa M. Wyer, *Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents*, 55 J. CONSULTING & CLINICAL PSYCHOL. 179, 180 (1987) (stating the best interests standard is a vague directive that impels judges to award custody based on the best future interest of the child).

Code.[4] Other jurisdictions soon followed California's lead, providing mandatory or optional mediation services.[5] These changes in the law and in court practices further accelerated the growth in divorce mediation and programs were quickly planned and implemented to meet the demand. While the rapid growth of divorce mediation met pressing societal needs, it also meant limited opportunities for proactive attention to theory development and the establishment of a comprehensive, scientifically sound research agenda to study the process.

Although many investigations have been conducted to date, the conclusions drawn by the authors of this paper indicate that the findings are limited by the lack of theoretical concepts in the field and by the nature of the studies that have been conducted. This is expected with research on a process like divorce mediation. For example, the first research conducted about psychotherapy asked, "Does the process work?" In time, researchers in the area developed more sophisticated theories and asked more refined questions such as: How do different psychotherapy treatments compare in effectiveness when used with different clients who have particular problems, and what parts of a treatment bring about particular effects?

Similarly, the primary questions asked in the field of divorce mediation focus on questions of efficacy. The authors of this paper term the knowledge that has been generated to date, first order knowledge. We have observed that this kind of information tends to be atheoretical and focuses on matters most easily studied. First order knowledge is important in the case of divorce mediation because it has shown that the approach can have favorable outcomes for parties, children, and the public under appropriate circumstances.[6] However, the authors argue that there are major gaps in knowledge, as much of the research in the area has been reactive as opposed to proactive. These gaps can be filled through the execution of second order research aimed at building theory and more sophisticated understandings of questions like: What types of mediation programs and what circumstances produce the most effective results? What styles or models of mediation are appropriate with what client

4. CAL. CIV. CODE § 4607 (Deering 1993); *see* Folberg, *supra* note 2, at 6. *But cf.* Jessica Pearson et al., *A Portrait of Divorce Mediation Services in the Public and Private Sector*, CONCILIATION CTS. REV., June 1983, at 1, 2 (reporting that the Los Angeles conciliation court officially began offering mediation in 1973).

5. Jessica Pearson, *Family Mediation*, *in* STATE JUSTICE INSTITUTE 1 (October 1993) (a working paper for the National Symposium on Court Connected Dispute Resolution Research).

6. *Id.* at 5.

populations? What are the long term effects of mediation on the adjustment and development of children?

B. First Order Research Findings

The major focus of the research studies conducted to date was assessing the impact of the divorce mediation programs implemented since the 1970s. In their assessment, researchers have used case studies, matched groups of participants given different mediation interventions, and quasi-experimental designs to assess the outcomes of different mediation approaches and to compare them with traditional adversarial divorce procedures. Using these designs, first order research studies have shown that divorce mediation is effective under appropriate circumstances in producing favorable agreement rates, levels of party satisfaction, compliance and relitigation rates, post divorce spousal and parent-child relationships, and post divorce adjustment in parties and their children.

1. Parties' Satisfaction with Mediation

Case studies found that short and long-term satisfaction rates vary from eighty percent to one hundred percent, for parties who settle, and from fifty percent to eighty percent, for those who do not.[7] Pearson and Thoennes interviewed noncontesting parties and those who used mediation and adversarial dispute resolution procedures.[8] During three month, one year, and five year follow-ups, they found that most parties who had engaged in mediation were satisfied with that process.[9] In their quasi-experimental design study, Pearson and Thoennes also found satisfaction

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7. Margaret Little et al., *A Case Study: The Custody Mediation Sources of the Los Angeles Conciliation Court*, CONCILIATION CTS. REV., Dec. 1985, at 1, 9-10; *see also* A. Elizabeth Cauble et al., *A Case Study: Custody Resolution Counseling in Hennepin County, Minnesota*, CONCILIATION CTS. REV., Dec. 1985, at 23, 27-35; Eleanor Lyon et al., *A Case Study: The Custody Mediation Services of the Family Division, Connecticut Superior Court*, CONCILIATION CTS. REV., Dec. 1985, at 15, 23 [hereinafter Lyon, *Case Study Connecticut*] (reporting that 81% of parties surveyed who settled were glad they tried the process and half of those surveyed who did not reach a settlement were glad they tried mediation).

8. *See* Jessica Pearson & Nancy Thoennes, *A Preliminary Portrait of Client Reactions to Three Court Mediation Programs*, MEDIATION Q., March 1984, at 21, 24 [hereinafter Pearson & Thoennes, *Client Reactions to Court Mediation Programs*]; *see also* Jessica Pearson & Nancy Thoennes, *Mediation in Custody Disputes*, 4 BEHAVIOR SCI. & LAW 203, 205 (1986) [hereinafter Pearson & Thoennes, *Custody Disputes*].

9. *See* Pearson & Thoennes, *Client Reactions to Court Mediation Programs*, *supra* note 8, at 31-32 (survey results based only on interviews given prior to the initiation of mediation and fifteen weeks after the initial contact).

both in successful parties as well as in many of those who did not achieve agreement.[10]

Two other variables important to satisfaction levels are fairness and costs. Waldron found that eighty-six percent of their respondents felt that their mediator had been unbiased.[11] Other reports indicate that parties who engage in mediation are more likely than those who use litigation to rate the process and its outcomes as fair.[12] With regard to cost, mediation can be less expensive than litigation.[13] Mediation is less expensive especially when some work is done in groups.[14]

In summary, research shows that mediation can enhance the likelihood that parties will be satisfied with the process used to settle their divorce. Given that dissatisfaction in either parent might adversely affect the development of a healthy post divorce family adjustment, this finding is psychologically significant.[15]

2. *Agreement Rates and Compliance*

Mediation of custody and visitation issues has achieved agreement rates ranging from forty percent to seventy-five percent.[16] Moreover,

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10. Jessica Pearson & Nancy Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L. Q. 497, 505 (1984) [hereinafter Pearson & Thoennes, *Longitudinal Evaluation*].

11. Jane A. Waldron et al., *A Therapeutic Model for Child Custody Dispute Resolution*, 10 MEDIATION Q., March 1984, at 12.

12. Stephen J. Bahr, *Mediation is the Answer*, 3 FAM. ADVOC. 32, 34 (1981); Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, *in* MEDIATION RESEARCH, THE PROCESS AND EFFECTIVENESS OF THIRD PARTY INTERVENTION 396, 399-400 (Kenneth Kressel et al. eds., 1989); *see also* Pearson & Thoennes, *Custody Disputes*, *supra* note 8, at 207 (noting that in contrast to mediation, court systems appear to be consistently rated as an unsatisfactory means of settling disputes); Pearson & Thoennes, *Longitudinal Evaluation*, *supra* note 10, at 505.

13. Bahr, *supra* note 12, at 34; *see also* Pearson & Thoennes, *Longitudinal Evaluation*, *supra* note 10, at 507-08; Andrew I. Schwebel et al., *PMI-DM: A Divorce Mediation Approach that First Addresses Interpersonal Issues*, 4 J. OF FAM. PSYCHOTHERAPY 69, 70 (1993).

14. Linda E. G. Campbell & Janet R. Johnston, *Impasse-Directed Mediation with High Conflict Families in Custody Disputes*, 4 BEHAVIORAL SCI. & THE LAW 217, 238 (1986).

15. Andrew I. Schwebel et al., *Clinical Work with Divorced and Widowed Fathers: The Adjusting Family Model*, *in* FATHERHOOD TODAY: MEN'S CHANGING ROLE IN THE FAMILY 299, 312 (Phyllis Bronstein & Carolyn Pape Cowan, eds., 1988).

16. Campbell & Johnston, *Impasse-Directed Mediation with High Conflict Families in Custody Disputes*, *supra* note 14, at 221; A. Elizabeth Cauble et al., *A Case Study: Custody Resolution Counseling in Hennepin County, Minnesota*, *supra* note 7, at 33; Emery & Wyer, *Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of*

Pearson and Thoennes, using comparison group and quasi-experimental designs, found that nine and twelve months after settlement, families that had used mediation achieved greater compliance with child support payments.[17] The higher rate of compliance makes sense because participation in mediation produces a psychological sense of "ownership" of the agreement, not possible when decrees are "handed down" in court.[18]

3. Post Settlement Litigation

Divorce mediation reduces the amount of post settlement litigation in the short-term and over the course of one and two years by as much as thirty percent.[19] However, Pearson and Thoennes found that approximately twenty-five percent of both mediators and litigators had returned to court at least once within five years after the initial resolution.[20] This finding does not diminish the value of mediation because it reduces expressed conflict between the parties during the psychologically crucial, initial period of family transition.

4. Post Divorce Relationships

Across studies, thirty percent to sixty percent of those who used mediation credited the process with improving their post divorce spousal

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Parents, supra note 3, at 182-83; *cf.* Lyon, *Case Study Connecticut, supra* note 7, at 22 (reporting that 35% of the parties surveyed considered the agreement to be a full settlement on custody and visitation issues); Pearson & Thoennes, *Client Reactions to Court Mediation Programs, supra* note 8, at 35 (between 35-40% said they reached an agreement on custody and visitation issues); Pearson & Thoennes, *Custody Disputes, supra* note 8, at 209 (35-40% of clients at each location say they arrived at an agreement on custody and visitation issues).

17. *See* Pearson & Thoennes, *Longitudinal Evaluation, supra* note 10, at 510; Pearson & Thoennes, *Custody Disputes, supra* note 8, at 211.

18. Andrew I. Schwebel et al., *PMI-DM: A Divorce Mediation Approach that First Addresses Interpersonal Issues, supra* note 13, at 78.

19. *See* Campbell & Johnston, *Impasse-Directed Mediation with High Conflict Families in Custody Disputes, supra* note 14, at 238 (a six month follow-up to the authors' impasse model of mediation showed that 70-75% of families maintain their agreement and stayed out of court); *see also* Ann Milne, *Custody of Children in a Divorce Process: A Family Self-Determination Model*, CONCILIATION CTS. REV., Sept. 1978, at 1, 5 (indicating that 10.5% of self-determination families returned to court while 34.3% of traditional families returned to court over the course of two years).

20. Pearson & Thoennes, *Custody Disputes, supra* note 8, at 212.

relationship.[21] Successful parties stated that participation in divorce mediation favorably affected spousal communication (seventy-one percent), cooperation (seventy-four percent), understanding (fifty-two percent), and the level of anger experienced (fifty-two percent).[22] In comparison, only about twenty-seven percent of unsuccessful parties and about ten to twenty percent of those who used court procedures credited the settlement method with improving their relationship in any of these areas.[23] Finally, fewer than fifteen percent to twenty percent reported that mediation hurt the post divorce relationship, while close to half reported that the court procedure hurt the post divorce relationship.[24]

The literature also suggests that parties successful in mediation maintain higher levels of involvement in their children's lives through joint custody and frequent visitation. Case studies demonstrate that from fifty percent to sixty percent of successful mediation cases result in joint custody while about forty percent result in mother-only custody settlements.[25] In their comparison group and quasi-experimental studies, Koopman, Hunt, and Stafford, Pearson and Thoennes, and Emery and Wyer found that joint custody was more likely in families that mediated than in those who did not.[26] It should be noted, however, that Lyon's case study reported joint custody rates more in line with those obtained through litigation.[27]

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21. Little, *supra* note 7, at 9; *see also* Pearson & Thoennes, *Client Reactions to Court Mediation Programs, supra* note 8, at 37 (28% credited mediation with improving spousal relationships in the Los Angeles study, 39% in the Minnesota survey, and 31% in the Connecticut study); Pearson & Thoennes, *Custody Disputes, supra* note 8, at 210 (30% of those who settled in mediation say that the process improved the relationship).

22. Pearson & Thoennes, *Longitudinal Evaluation, supra* note 10, at 519.

23. *Id.*

24. *See* Pearson & Thoennes, *Client Reactions to Court Mediation Programs, supra* note 8, at 37 (7% reported mediation hurt the post divorce relationship in the Los Angeles survey, 15% in the Minnesota survey, and 8% in the Connecticut survey); *see also* Pearson & Thoennes, *Custody Disputes, supra* note 8, at 210 (fewer than 15% felt that mediation hurt the relationship).

25. Little, *supra* note 7, at 9.

26. Elizabeth J. Koopman et al., *Child Related Agreements in Mediated and Non-Mediated Divorce Settlements: A Preliminary Examination and Discussion of Implications,* CONCILIATION CTS. REV., June 1984, at 19, 20; Emery et al., *supra* note 3, at 185; Lyon, *Case Study, Connecticut, supra* note 7, at 23 (reporting outcomes of joint custody for 27% of surveyed successful mediation clients and for 16% of surveyed unsuccessful clients).

27. Lyon, *Case Study, Connecticut, supra* note 7, at 23 (reporting outcomes of joint custody for 27% surveyed successful mediation clients and for 16% of surveyed unsuccessful clients); *see* Frederick W. Ilfeld et al., *Does Joint Custody Work? A First Look at Outcome Data Relitigation,* AM. J. PSYCHOL., Jan. 1982, at 62, 64 (Table 1).

Quasi-experimental designs were also used to examine post-settlement visitation patterns. Margolin found that parents who mediated were more satisfied with visitation at four months, and that their children were better behaved during and after visitation.[28] Pearson and Thoennes found that three months after settlement, noncustodial parents who were successful in mediation visited their children a mean of four days more per month than those who were unsuccessful in, or never exposed to, mediation.[29] In many cases this difference in visitation frequency remained one year after the settlement.[30]

In sum, the research literature suggests that divorce mediation, as currently practiced, often fosters a cooperative post divorce spousal relationship and increases the children's access to both parents. However, there is limited ability to generalize across studies and to develop overarching concepts because of the lack of comparability in the design, instrumentation, and content of the programs that were evaluated during this time period.[31] It is possible that in the future divorce mediation may be able to benefit a higher percentage of parties and children more deeply and in more ways. In order for this to occur, the field will have to move one qualitative step forward into an era of second order knowledge in which research and practice are theory-driven and based on greater proactive planning.

III. SEMINAR PLANNING PROCESS AND DESIGN

The authors believe that the field is well positioned to move forward. With this belief as an organizing focus, we designed an agenda for the two-day interdisciplinary seminar that was held at The Ohio State University College of Law in April of 1993. The agenda was planned to allow seminar participants to assess current research and practice and to consider what conceptual and empirical work would facilitate further definition of the field and help move it to the next level of development.

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28. Frances M. Margolin, An Approach to Resolution of Visitation Disputes Post-Divorce: Short Term Counseling (1973) (unpublished Ph.D. dissertation, United States International University (San Diego)).

29. Pearson & Thoennes, *Longitudinal Evaluation, supra* note 10, at 510 (reporting that successful mediation parents who are noncustodial visit their children an average of eight to nine days per month, while other groups average five to seven days per month).

30. *Id.* at 510.

31. *See* Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research, in* MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD PARTY INTERVENTION 9, 16 (Kenneth Kressel et al. eds., 1989).

Seminar participants were chosen so as to encourage active discourse among researchers and practitioners in the field and others interested in dispute resolution. They included Michele Hermann, Carol King, Ken Kressel, Jessica Pearson, and Nancy Rogers, who each described their ongoing research, along with lawyers, mental health professionals, and court personnel from the practice arena. Faculty members and students from several disciplines at The Ohio State University and nearby institutions also attended. The attention paid to the selection of participants eliminated the necessity of taking time to provide background information and enabled the group to use the seminar time to focus on the task at hand.

The following assumptions, derived from the review of the mediation literature, and the questions raised by these assumptions, provided the backdrop for the seminar discussions:

Assumption 1: Custody arrangements developed during mediation manifest more positive outcomes for children than those achieved by litigation. Questions raised by this assumption include: Is this assumption valid? Is there child-to-child or family-to-family variation? (While the literature tends to support Assumption 1, little research has focused on the long term impact on children of litigated settlements.) What legal policies and court rules would ensure the availability of the range of dispute resolution services that would best meet the needs of children of divorcing couples?

Assumption 2: In mediation, the disputants are viewed as equal parties. Questions raised by this assumption include: Is it true, as some authors argue that women are at a disadvantage in the mediation process because of a power imbalance? Do other factors, such as education, occupation, and personal history of the parties, make a difference? Do mediator style, gender, and the context or setting in which the process takes place play roles in promoting or diminishing equality between parties? What social science and legal research is needed to foster the development of policies, rules, and processes that will ensure equality? Is neutrality on the part of mediators the most desirable approach, or is a bias toward advocacy for the children appropriate?

Assumption 3: Mediators are third parties who guide divorcing couples through a standard process. Questions raised by this assumption include: Is mediation a homogeneous process conducted in the same way by all mediators with all parties? If not, what attributes and styles of mediators are most effective, and under what circumstances? What characteristics of divorcing couples fit with what mediator styles and models of mediation? What research is needed to inform policy development to make available cost effective types of mediation that would

meet the needs of all parties, regardless of background or socioeconomic status?

With these assumptions and associated questions as a backdrop, the presenters described their current research and lead the ensuing discussion. This format allowed both presenters and participants to engage in creative and productive discourse that generally centered on the relationship between legal policy and what was known and what was needed to be known in the area of divorce mediation. The discussion presented in the next section attempts to capture the collective wisdom of the group and provide directions for future research and policy initiatives.

IV. OUTCOMES OF INTERDISCIPLINARY SEMINAR

Many second order research questions emerged from the seminar discussion. A number of these questions are organized into three general categories which are presented below, along with examples of associated second order research questions.

A. Category One: The Content of Mediation

Schwebel, Gately, Renner, and Milburn suggest that several models of mediation are currently practiced and that these models vary in the content they include in their sessions.[32] Several kinds of second order knowledge are needed with regard to the content of divorce mediation sessions. These include the optimal breadth of focus in sessions, the optimal degree of specificity and flexibility in custody and visitation agreements, and whether the mediation process, itself, tends to yield certain types of agreements with regard to custody and visitation.

1. Focus of the Mediation

Some jurisdictions limit mediation to custody and visitation issues.[33] Does this limit unfavorably affect the nature of agreements reached and their long term viability? An important second order research question in this category is: How does the long term efficacy of a mediation model that puts all relevant issues on the table compare with one which limits mediation to custody and visitation issues?

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32. Andrew Schwebel et al., *Divorce Mediation: Four Models and the Assumptions They Make about Fostering Change in Disputing Parties' Positions*, MEDIATION Q. (forthcoming Spring or Summer 1994).

33. Pearson, *Family Mediation*, *supra* note 5, at 1.

2. Specificity and Flexibility of the Agreement

First order knowledge suggests that settlements reached in mediation are more detailed with regard to custody and visitation arrangements than are adversarially derived settlements. Second order research questions are: What are the optimal amounts of specificity and flexibility in a settlement (amounts that would enable parties to fulfill their parental roles on a week to week basis and also to renegotiate if circumstances changed)? Do the optimal amounts of specificity and flexibility vary from case to case in specifiable ways? Under what circumstances does mediation produce higher quality agreements than adjudication and other types of dispute resolution programs?

3. Type of Custody

First order knowledge indicates that joint custody is a likely outcome of divorce mediation.[34] This fact suggests second order research questions such as: For what children is joint custody beneficial? What differences exist between mediation models that do and those that do not produce a higher percentage of joint, in contrast to single parent, custody?

B. Category Two: The Process of Mediation

Several kinds of second order research questions evolved from the seminar discussion with regard to the mediation process. These included questions about fairness and equity in mediation related to gender, culture, and context; questions about financial costs; and questions about mediation outcomes for children, parents, and society.

1. Fairness and Equity

a. Gender

Some feminists assert that mediation is unfair to women because of gender-related power imbalances in society, different socialization of the sexes, and dissimilar communication styles in women and men.[35] While data may not exist to support these arguments in instances when

34. *Id.* at 18.

35. *See* M. Laurie Leitch, *The Politics of Compromise: A Feminist Perspective on Mediation*, MEDIATION Q., Winter 1986/Spring 1987, at 163.

mediation is conducted by a skilled practitioner, concern about this type of inequity is raised by the finding that white women fare better in civil mediation, regardless of gender or race of the opposing party, than do white men.[36] In order to conduct second order research to address questions in this category, investigators will have to define fairness and develop instruments to measure it. Second order research questions can then be asked, such as: Is there evidence of gender bias in the process and outcome of sessions conducted by skilled, socially conscious divorce mediators? Does the goal of achieving fairness between parties ever come into conflict with the goal of seeking the best interests of the children? If so, to what extent, if at all, should mediators sacrifice the "best interests" of children in order to achieve settlements that yield equity for parents?

b. Cultural and Ethnic Issues

The authors' analysis of the literature suggests that little attention has been given to a systematic investigation of cultural and ethnic issues in the use of divorce mediation. Relevant second order questions in this connection are: In sessions conducted by skilled, socially-conscious individuals, is there evidence of ethnic, racial, or other biases in the process and outcome of divorce mediation? Do individuals from any cultural and ethnic group react differently from the model citizen to the role of mediators and the kind of authority they possess and, if so, how? What mediation models and mediator backgrounds are most effective with each minority or ethnic group?

c. Context in Which Mediation Takes Place

First order research has not demonstrated differences in settlement rates or party satisfaction between those who engage in divorce mediation in the courthouse and those who do so in other settings. However, second order research could search for any long term setting-related effects to determine for instance, whether those who used court mediation services are more likely than others to look to the court for settlement of future disputes than others.

36. 1993 Seminar on Divorce Mediation at The Ohio State University (Michele S.G. Hermann, Professor of Law, University of New Mexico).

2. *Cost/Benefit Analysis*

Pearson indicates that mediation is significantly less expensive in monetary terms than litigation.[37] Second order research questions are: Is mediation psychologically less costly for the parties and their children over the short and long term? Years after their parents' divorce, do individuals whose parents used mediation differ in their dating, marriage, and parenting behavior from those whose parents used litigation? What impact does participation in mediation have on the thirty to sixty percent of the parties and their children who try mediation but fail to reach agreements?

Furthermore, Pearson found no differences in settlement or satisfaction rates between parties who experienced mandated mediation and those who participated in voluntary mediation.[38] Second order research is needed to compare the long term effectiveness and costs of mandated mediation with those of traditional settlement means.

3. *Outcomes for Parents, Children, and Society*

One unstated goal of mediation is to teach skills to parties that will help them settle future disputes without assistance from the court. Second order research questions that follow from this are: Does mediation, as currently practiced, effectively teach parties problem-solving skills that they can, and do, later employ? If not, how can the practice of mediation be improved so that it will serve this purpose?

Some jurisdictions use group approaches to deliver both mediation and educational services. Second order research questions that follow are: Does group mediation work as or more effectively than individual mediation with some parties and, if so, with what parties? Can educational training programs be used to enhance the impact or efficacy of individual or group mediation for some parties and, if so, for whom?

4. *The Changing Societal and Legal Communities*

It makes sense to assume that societal norms, family courts, and domestic law will be strikingly different in twenty years. There is a tendency in social programs, once established, to "drift" from their original purposes as social changes take place. The authors have observed that sometimes this drift occurs for desirable reasons and results in

37. Pearson, *Family Mediation, supra* note 5, at 11-12.

38. 1993 Seminar on Divorce Mediation at The Ohio State University.

favorable outcomes for clients, such as better service. However, financial crises or other circumstances can often bring about changes that compromise services. Those who create settings that provide divorce mediation can conduct second order research. This work could include on-going monitoring of the quality of services that would call attention to any corrective action necessary to protect against program drift.

C. Category Three: Participants in Mediation

Several kinds of second order research questions emerged during seminar discussions with regard to the individuals who do, and those who should, participate in divorce mediation sessions.

1. Mediators

a. Role

Seminar participants differed in their views as to the most appropriate roles for mediators. Should mediators be neutral third parties, advocates for the children, or arbitrators of what is "fair or unfair?" Second order research investigations can study how, and in what ways, different mediator roles shape the short and long term outcomes of divorce mediation.

b. Mediator Perception of Satisfaction

Kressel explained that the practitioners in his group were dissatisfied in some way with fifty percent of the mediations they conducted that were not settled.[39] This was true of only one-third of those instances in which the parties came to an agreement. Furthermore, these practitioners tended to be more satisfied when they had used a problem solving style while mediating sessions. Many second order research questions follow from this work, including: Are there interactions among the satisfaction of mediators and clients, type and durability of agreements reached, and style of mediation used? Are certain mediation styles more effective, regardless of client characteristics?

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39. *Id.*

c. Training Issues

Mediation attracts people from different professional backgrounds. Second order research questions include: What training is necessary for individuals to be effective mediators? Is mediation a skill that paraprofessionals can learn, or does the seriousness of the work require specially trained, credentialed, and regulated professionals? What on-going supervision and continuing education requirements are essential to assure quality, cost-effective mediation?

2. Mediation Participants

a. Presence of Children

Some divorce mediators include children in sessions. Second order questions regarding this practice are: What effect does involvement have on children at different developmental levels? Can age guidelines or guidelines related to a child's maturity be developed for use by practitioners in deciding whether to involve children? How does the involvement of children impact the type of agreement reached, the adjustment of the parties, and the durability of the agreement?

b. Presence of Attorneys

Some seminar participants suggested that the presence of attorneys during mediation would insure the power balance between parties. This idea suggests second order research questions which include: What effect does the presence of the parties' lawyers have on the mediation process; the nature and durability of the agreement reached; the parties' level of satisfaction with the process; and the parties' long term adjustment?

c. Presence of Significant Others

Second order research might examine the effect of including mental health professionals, family members, or others in divorce mediation sessions.

3. Divorcing Parties

a. Stage of Divorce

Kressel, in *The Process of Divorce*, identified four stages of psychic divorce; predivorce decision period, decision period, period of

mourning, and re-equilibrium.[40] Parties may spend weeks, months, or years in the predivorce decision period before an actual decision is made to divorce. Second order research questions include: How is mediation affected if each party is in a different psychic stage? Is mediation affected by a predivorce history of separation and reconciliation? How is mediation affected if both parties are in the second, the third, or the fourth stage?

b. Expectations about Mediation

Individuals enter mediation with expectations about the other party, the process, the lawyers, the courts, and so forth. These expectations may have a favorable, neutral, or unfavorable impact on the process of mediation and the outcomes.[41] Second order research may examine the impact of these expectations and consider ways to bring these expectations into alignment with the reality of the mediation process.

c. Satisfaction with Mediation

The authors conclude that considerable research has focused on client satisfaction, under the assumption that satisfied parties are more likely to adhere to the agreements. Second order research might collect longitudinal data to assess the validity of this assumption and to determine what effect other factors such as the type of agreement, the degree of detail concerning custody, the equity of the economic agreement and so forth has on client satisfaction.

V. CONCLUSIONS AND RECOMMENDATIONS

In the best of circumstances, theory and well-designed legal and social science research will guide the future growth of divorce mediation and support the efforts of policy planners and practitioners. These studies would strengthen mediation programs which would benefit mediating parties, their children, and taxpayers who finance court-supported mediation services, and social programs that help individuals adjust to divorce, life in stepfamilies, and so forth.

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40. KENNETH KRESSEL, THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS 72-75 (1985).

41. *See* Robert Rosenthal & Lenore Jacobson, *Teacher's Expectancies: Determinants of Pupils' I.Q. Games*, 19 PSYCHOLOGICAL REPORTS 115, 115 (1966).

Researchers conducting second order studies will be challenged, however, in designing ethical, sound, and practical studies. For example, researchers who use self-selected groups to study outcomes in mediation services will have to take into account pretreatment differences between those who used or did not use mediation. Individuals who choose mediation may be more skilled at communicating problems than their peers who choose litigation. Differences between the comparison groups may also occur when judges or court personnel make referrals to mediation. Only the most cooperative parties or, perhaps, the most acrimonious ones may be referred for services.

One way to avoid problems with pretreatment differences between groups is to randomly assign parties to receive mediation, traditional court procedures, or other available dispute resolution mechanisms. Nevertheless, Pearson and Thoennes, who used this kind of approach, found that about half of those they had randomly assigned to the mediation condition rejected the intervention.[42] They also experienced a high rate of attrition across all their groups.

As second order research is conducted and new theoretical perspectives developed, these research design and methodology problems and others will undoubtedly be addressed. Although the seminar participants projected a lengthy agenda of research necessary for the development of the field, these tasks ahead may be more manageable. Specifically, the task of collecting the necessary second order knowledge can be expedited by the activities described below.

A. Learning from Other Intervention Literatures

Psychotherapy and crisis intervention, like divorce mediation, are practiced to help people deal with distressing problems. These two interventions emerged years before divorce mediation, thus the literature in these areas is better developed. Divorce mediation researchers and practitioners who study these literatures may find useful concepts and research that can be applied to divorce mediation. For example, crisis theory uses the concept of the "teachable moment," postulating that persons in crises are more motivated to learn new ways of behaving than those not in crises. Mediators may be able to apply this concept in their work. Similarly, it is reassuring to know that outcome researchers during certain periods in history found that psychotherapy seemingly had relatively little value. However, as researchers developed new

42. Pearson & Thoennes, *Longitudinal Evaluation, supra* note 10, at 502.

measurement techniques and asked new questions, the value of psychotherapy to clients became apparent.

B. Many Divorce Mediation Models

Researchers, practitioners, consumers, and members of the public tend to think that mediation is a single unified intervention. Despite these misconceptions, divorce mediation consists of many forms, each with a unique set of assumptions and corresponding interventions.[43] Work is needed to record and analyze the interchanges in each form of mediation. The approaches can then be categorized and tested in terms of outcomes. Once a divorce mediation model is found effective, dismantling research can be used to determine exactly which parts of mediation intervention are creating the desired changes: the context, the expectation of positive outcomes, the education the mediator provides, the time devoted to focussed problem solving, and the therapeutic experiences, etc.[44] This data can be used to refine the divorce mediation model. Further research with each model will serve to connect short term and long term outcomes. For instance, does the greater attention paid to children by parents in mediation produce more positive long term outcomes for children?[45]

C. Divorce Mediation "Clearinghouse"

If a center or clearinghouse for the field were established, researchers and practitioners nationally and internationally would benefit from having the convenient access to obtain and disseminate the most current available information.

D. Research Protocols and Instruments

Many courts and programs which conduct mediation now fail to collect information because they lack the knowledge about creating an instrument to analyze the collected data. The development, the availability, and the distribution of modern reliable and valid instruments to collect and analyze data would alleviate these hardships. If these such

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43. *See* Andrew I. Schwebel et al., *Divorce Mediation: Four Models and the Assumptions They Made about Fostering Change in Disputing Parties' Positions*, *supra* note 32.

44. *Id.*

45. Jeanne A. Clement et al., Descriptive Study of Children Whose Divorcing Parents are Participating in Voluntary, Mandatory or No Custody/Visitation Mediation (Jan. 17, 1990) (Interdisciplinary Research Grant Proposal 1989-90).

instruments were developed they could be distributed through the clearinghouse described earlier.

E. Collaborative Research Teams

Practitioners and researchers come to mediation from diverse disciplines and with varying expertise. Moreover, they are employed in varied settings and work with parties from different ethnic and economic backgrounds. This diversity presents challenges, yet offers great opportunities. The challenges involve the development of a "common language" that will promote interdisciplinary communication among researchers from different disciplines and promote communication between researchers and the practice community. A common language would accelerate the development of research rooted in the practical experience of practitioners. The opportunities presented by this diversity lie in the synergy of the experience of those who practice, those who develop court policy, and those who conduct research in law and other fields. Working together, diverse groups, such as those participating in the seminar, can raise the questions relevant to contemporary practice and provide the answers to them.