WHAT DO DUTCH LAWYERS ACTUALLY DO IN DIVORCE CASES?

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In view of the critical role of lawyers and the disparate functions they may perform, it is startling how little we know about how lawyers actually behave (Mnookin and Kornhauser, 1979: 987).

This paper summarizes the findings of a four-pronged research project concerning the behavior of Dutch divorce lawyers, in which lawyers, judges, and clients were interviewed and lawyer-client interaction directly observed. In the first part, some preliminary remarks are made on the practical and theoretical importance of the actual behavior of divorce lawyers and the existing body of research on lawyer behavior. These are followed by a thumbnail sketch of Dutch divorce law and procedure and the role of the lawyer. The second part gives an overview of our own research findings. In the third part, I present some reflections on the role of lawyers in divorce cases: (1) the character and special place of 'normative, conflict-oriented intervention' in divorce conflict; (2) lawyers' objective of a 'reasonable divorce' and the nonadversarial approach of lawyers to divorce litigation; (3) lawyers as two-way 'transformation agents' between the client and the law; and (4) what lawyers actually do and do not do.

I. INTRODUCTION

A. *Preliminary Remarks*

In this paper I want to address the question of what lawyers actually do in divorce cases. The research I will be discussing was carried out in the judicial district of Groningen, in the northernmost part of the Netherlands. But I will be dealing with the activities of lawyers from a comparative, theoretical

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The research discussed here has been carried out by M. Berends, J. Griffiths, E.G.A. Hekman and S. R. Spaak. The conclusions, however, are my own. Apart from my fellow researchers (whose contributions to this text are inseparable from mine), thanks for criticism and other help are owed to A. Heida and A. Klijn.

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perspective and with the ambition of making generalizations about their behavior and role that may be tested and applied in many different settings. In particular, since the small amount of research that does exist on lawyers and their behavior has largely been done in the United States and the most recent theoretical work on lawyers derives from the American setting, I will be continuously and more or less explicitly comparing the Dutch data with what is known about American lawyers.[1]

From the point of view of social policy, divorce and the way in which it is carried out are major problems. There were more than thirty thousand divorces in the Netherlands in 1982, over twice as many as ten years earlier (CBS, 1976). The divorce process consumes a major share of court facilities and legal services, at least partly because representation by a lawyer is mandatory. While only about six percent of all legal problems experienced by people concern divorce and divorce-related matters (Huls and Klijn, 1984; cf. Schuyt *et al.*, 1976: 141), more than 30 percent of all civil cases handled by the baseline court of general jurisdiction (CBS, 1981), over 20 percent of the caseload of lawyers (Klijn, 1981), almost 40 percent of all most recent contacts with a lawyer (Schuyt *et al.*, 1976: 109), and about 50 percent of the money spent on civil legal assistance (Klijn, 1983; n.d.; cf. Klijn, 1981: 10) are devoted to divorce and divorce-related litigation. Between 75 percent and 85 percent of the cost of legal assistance in divorce cases is borne by the state (Klijn, 1983: 653 n.3).

The question of whether a process that consumes so many

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cussed at an international workshop on lawyer-client interaction held at the Rijksuniversiteit, Groningen, on October 24–27, 1984. This workshop was made possible by a grant from the Netherlands Foundation for Pure Scientific Research, ZWO. Other papers presented at this workshop include M. Cain, "L'Analyse des professionnels du droit: Réflexions théoriques et méthodologiques," *Annales de Vaucresson* 23 (1985); A. Sarat and W. Felstiner, "The Client's Lessons: Law in the Divorce Lawyer's Office", a version of which is included in this issue of the *Review*.

[1] When making comparisons with other legal systems, several possible differences must be kept in mind. The role of welfare looms very large in Dutch divorce practice. Representation in divorce cases is financed largely by the appointment system. The Dutch bar is relatively unstratified. Divorce practice, while characteristically the specialty of women lawyers and lawyers in small firms, carries no pronounced stigma. The level of aggressiveness, especially in litigation, of American lawyers (cf. Cavanagh and Rhode, 1976: 148-149) may well be higher than in the Netherlands, where it seems to observers familiar with both legal cultures to be rather low.

When the findings of our research in Groningen were presented to the 1984 international workshop on lawyer-client interaction (referred to in the note beginning on page 135), it appeared that researchers in legal settings as disparate as Germany, Scotland, Massachusetts, and California are coming to generally comparable conclusions concerning the nature of lawyer behavior in divorce cases.

valuable resources and whose cost (to the state) is rising "explosively" (Klijn, 1983), is worth it—whether, for example, the role of lawyers in divorce could not safely be reduced—has become a prominent and controversial one in recent years, in the Netherlands as well as in many other countries. A conservative estimate of the proportion of unproblematic divorces is 20 percent, from which one could draw the conclusion that at least the *requirement* of legal representation should be eliminated (Klijn, 1983).[2] On the other hand, divorce-related problems are generally by far the most serious legal problems people experience. Roughly 80 percent of all those with a divorce-related legal problem feel the need for legal assistance (Huls and Klijn, 1984). In England elimination of mandatory representation has apparently had little influence on the demand for publicly financed legal services (Klijn, 1983). So the potential cost-saving of such an elimination may not be great. It seems clear that we need to know far more about what lawyers actually do for divorce clients and why people take their divorce-related problems to lawyers before the twin questions of the merits of required representation and subsidized legal assistance can be adequately addressed.

Another reason for being interested in what lawyers do—among other things, in divorce cases—has its source in social scientific theory rather than in questions of public policy. Two sorts of social scientific theory, in particular, have been productive of interest in lawyers and their work. One of these, the older and until recently the dominant perspective, is the sociology of the professions. The second, more recent one is 'litigation theory'.

To many sociologists the most interesting characteristic of lawyers has been their special social position as members of a profession. Questions such as how this profession acquires and maintains its privileged status (see, e.g., Larson, 1977; Abel, 1979); how its members are recruited and how it is internally stratified (e.g., Rueschemeyer, 1973; Ladinsky, 1963); what social functions it has (e.g., Parsons, 1954; Cain, 1979); and how it can be comparatively studied in widely varying social and legal settings (see, e.g., Rueschemeyer, 1973; *Law & Society Review*, 1968–69; Dias *et al.*, 1981) have traditionally attracted a great deal of social scientific attention (see Abel, 1985).

O'Gorman's study, *Lawyers in Matrimonial Cases* (1963), is

[2] Klijn's estimate derives from retrospective interviews with clients and from court files. As Klijn himself notes, all of his data are "contaminated" by the fact that it may be precisely the result of the lawyer's work that makes a divorce appear to court and client as unproblematic (1983: 654).

a good example of this approach applied to the special case of divorce. O'Gorman questioned a sample of New York lawyers about their background, their practice and the place of matrimonial cases within it, their attitudes, and their conception of their role in matrimonial cases. He was particularly interested in their professional attitudes toward their clients and toward matrimonial practice, and in their accommodation as a professional group to the normative stress induced by the gap between divorce law (which at that time in New York generally required proof of adultery) and their own ideas and general social norms, a situation that gave rise to what he called "institutionalized evasion of legal norms" (1963: 20). He also emphasized the "trained incapacity" (1963: 90) of lawyers to deal appropriately with marital distress. He did not, however, address the question of how lawyers actually contribute to the way in which divorce cases unfold, since his primary concern was to study a professional group and its conception of its role under conditions of normative, financial, and other stress.

A more recent development in sociological theory about law—'litigation theory' (see, generally, Griffiths, 1983)—deals with the way in which conflicts arise in social settings and with the various social processes that may come into play in case of conflict. Since a relatively 'legal' conflict (see Griffiths, 1984) frequently entails the involvement of specialized functionaries (lawyers), their behavior and its effects on the course of conflict are obvious subjects of interest. Galanter, for example, in his well known article "Why the 'Haves' Come Out Ahead" (1974), discusses the circumstances under which lawyers increase or decrease the strategic advantages of what he calls "repeat players" over "one-shotters" in litigation. Felstiner, Abel, and Sarat (1980–81), in their analysis of the social processes by which legal disputes emerge in a social setting and are made ripe for formal, legal treatment, regard the lawyer as a "transformation agent" who, for purposes of legal processing, changes a litigant's claim into something different from what it was in its natural, social setting. The impact of the way in which legal services are financed upon the litigation behavior of lawyers and thereby upon the progress and the fate of their cases has been analyzed by Johnson (1980–81) and studied empirically by Macaulay (1979) with reference to the handling of consumer complaints. It is from this litigation perspective, which focuses on a certain sort of social process, the structures within which it occurs, and the actors who take part in it, that we have approached the study of the behavior of lawyers in divorce cases.

B. *Existing Notions and Research*

There is, of course, no dearth of notions about what lawyers do in litigated cases. Most of what passes for social science in this regard, however, is based on preconception and speculation rather than on research and can comfortably be fitted onto the spectrum of folk beliefs about lawyers which has as its two poles the well-known extremes of popular ambivalence.

It comes as a surprise, when one considers how long these contradictory views of lawyers have been around and how much controversy they have generated, that there is almost no reliable information on what lawyers *do* as participants in litigation processes. What information there is derives mostly from interviews with lawyers or their clients (e.g., Macaulay, 1979; Rosenthal, 1974; but cf. Cain, 1979). In the specific case of divorce, there has been a handful of interview-studies (e.g. Murch, 1977–78; *Yale Law Journal*, 1978; Cavanagh and Rhode, 1976; Kressel *et al.*, 1978). These have contributed some information about what lawyers say they do. Cavanagh and Rhode's (1976) study of the lawyer's role in uncontested divorces in Connecticut makes clear, however, that what lawyers say they do and what their clients say they do may be dramatically different. Otherwise, Klijn's observation with respect to the Netherlands applies more or less to all other legal systems as well: "There has been no research which directly studies what the contribution of the lawyer is to the divorce procedure and to what extent the parties themselves contribute to solving the problems involved" (1983: 654; cf. Abel, 1980: 807).

C. *The Formal Role of the Lawyer in Dutch Divorce Law and Practice*

In a nutshell, Dutch divorce law and practice is as follows:[3] The only ground for divorce (with a minor exception not relevant here) is "lasting dislocation" of the relationship. In practice this means that divorce is readily available by mutual consent and that either party can get a divorce without having to prove 'fault'. There is very rarely any attempt to persuade the court that the required "lasting dislocation" is absent, and any such attempt is, for practical purposes, doomed ultimately to fail. If minor children are involved, custody is awarded by court decree to one of the parents (only after our research did

[3] For detailed, legally precise accounts, see Zeben (1983) and Asser-de Ruiter (1976). The statistics in the following paragraphs derive from earlier research in Groningen (Pot, 1979) and in another judicial district (Gisolf and Blankman, 1980).

joint custody become a legal option as a result of a decision of the highest Dutch court). There is no formally recognized right to visitation (although legislation to create such a right is pending in the Dutch parliament). However, the noncustodial parent may request the court to enter a visitation order, the granting of which is dependent on the best interests of the child. Visitation is in fact regarded as a right by the judges in the judicial district we studied, and an order is withheld only if there are strong reasons against it or if it is 'unfeasible' because of the uncompromising opposition of the custodial parent.

In practice, custody is determined by agreement between the parents (ratified by the court) in about 95 percent of all cases. An order specifying when and for how long visitation is to take place is entered in roughly 15 percent of all cases, but only about half of these are contested by the time the case reaches the court. (In an additional number of cases the court order registers the fact that the parties have agreed that visitation will take place pursuant to mutual consultation or according to the wishes of the children.)

The prominent role of welfare in Dutch divorce practice mitigates the financial consequences of divorce for many people but at the same time greatly increases the interest of the state in, and the role of the law and lawyers with regard to, the property settlement and especially the arrangements for alimony and child support.[4]

Divorced parents are required to contribute to the support of their minor children according to their "ability to pay" and the "needs of the child." In practice this means that the father is legally obliged to pay at least some child support if he earns more than a minimum income. The standards by which this support is computed by the court are clear and detailed. The amount to be paid is therefore usually easy to determine for an expert who knows these standards. If the mother receives welfare after the divorce, she cannot agree with the father to forgo child support, although, since it is deducted from her welfare income, child support generally will not improve her financial position. Child support is provided for in a judicial decree in about 70 percent of all cases, but in less than 5 percent is the judge ultimately required to decide the question.

Alimony for the former spouse (in practice this is almost always the wife) can be waived. Because it is subject to a priority for child support, in most cases there is little or no practical

[4] Cf. Cavanagh and Rhode (1976: 157-160) and Wallerstein and Kelly (1980) for the American situation.

possibility of its being paid. Alimony is in fact provided for in a decree in fewer than 20 percent of all cases (again, the question is contested less than 5 percent of the time) and, even when there is provision for alimony, the amount exceeds the welfare level in only a handful of cases. At least 65 percent of divorced mothers are dependent on welfare. Since alimony is deducted from welfare payments, it rarely would improve a woman's financial position. If the parties do not waive alimony at the time of divorce, the welfare authorities can recover from a former husband part or all of the welfare support paid to his former wife.

Most Dutch marriages fall under the general community property regime, so that all marital property (including everything brought into the marriage) and all debts are in principle to be equally divided at divorce. However, the parties have a great deal of bargaining freedom as far as a property settlement is concerned, and only a grossly unequal division is subject to subsequent reopening.

There are two procedural routes that can be followed for divorce. If the parties agree on the divorce and the ancillary issues, they can jointly petition the court. Otherwise the divorce procedure begins with a complaint and summons, which are served on the defendant by a quasi-public official. The decree in a petition-case generally includes provisions on custody, visitation, child support, alimony, and the property settlement, taken over by the court from an agreement between the parties. The decree in a complaint-case may or may not incorporate some parts of an agreement between the parties. If not, the various subsidiary issues can become the subjects of separate, subsequent hearings. Custody, visitation, child support, and alimony are subject to later revision by the court on grounds of changed circumstances.

There is in most cases very little difference in substance between a complaint-procedure in which the parties agree on custody, visitation, and some or all of the other issues, and a petition-procedure. Divorce cases reflect a continuous spectrum from fully consensual to completely contested, a spectrum only very imperfectly reflected in the choice of procedural form. Symbolic considerations that may be important to the spouses, practical considerations having to do with the financing of legal services, the desirability of taking care of a substantial property settlement in the divorce decree itself, and the (largely technical) professional preferences of lawyers determine the choice of procedural form. Nationally, about 6 percent of all divorces are by the petition-procedure; in the local judicial district the rate

is about double this (see Pot, 1979: 12; cf. Klijn, 1983: 656 and n.28).

Divorce proceedings take place in the baseline court of general jurisdiction, where a party may appear only if represented by a member of the court's bar.[5] In a petition-case, both parties are represented by one lawyer but the agreement between them, drafted with his or her help, is checked by another lawyer to make sure that the interests of both parties are fairly protected. In a complaint-case, the initiating party is always represented; if he or she wants to contest any issue, the other party must be represented as well. However, if the parties in a complaint-case are in agreement, one of them may retain a lawyer who in fact advises and assists the other party as well.[6]

Publicly financed legal assistance is of the judicare type in which private lawyers are paid fixed amounts for rendering defined sorts of services (see, generally, Schuyt *et al.*, 1976; Griffiths, 1977). The system has since been slightly changed, but at the time of our research publicly financed legal assistance was available to any person with an income below a level considerably above the welfare norm; approximately 60 percent of the Dutch population qualified (Schuyt, *et al.*, 1976). The value of the marital home is relevant only in determining eligibility for assistance if it is considerable. The effect of these provisions is

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[5] "Lawyer" as used in this article is a translation of the Dutch term *advocaat*, that is, a lawyer entitled to represent parties in court. These represent a far smaller fraction of the whole legal profession than is the case in the United States.

[6] In the local judicial district about 60% of all complainants in divorce cases involving minor children are women, according to the court roll of 1979. Which party initiates a case and thus necessarily retains a lawyer may be determined by many considerations. Two not-so-obvious factors are commonly mentioned in discussions between (potential) clients and lawyers: The initiating party must retain a lawyer, and it is often the case that the wife, but not the husband, qualifies for publicly financed legal assistance. Until very recently (after the completion of the research reported here) the initiating party (both parties in a petition-case) was required to appear at least once in court in addition to meeting one or more times with the lawyer; the fact that one party, generally the husband, has a job may make it handier for the other party to act as complainant.

It would, however, be a mistake to regard the fact that women are more likely than men to be the initiating party in divorce proceedings (cf. Goode, 1965) simply as a function of the legal system itself, such as the way in which legal services are financed. According to our respondents the wife first approached a lawyer almost four times as often as the husband (63% vs. 16%), and wives had also previously consulted a lawyer about their marriage problems about three times as frequently as their husbands (14% vs. 5%). The woman wants the divorce far more often than the man. Leaving aside the quarter of all cases in which both parties want the divorce, women say that it was they who wanted it six times as frequently as they say it was the man; men say it was the woman twice as frequently as that it was the man. In retrospect, at the time of the second interview, 6% of the women and 19% of the men regret the divorce.

that essentially all non-employed wives are eligible, together with many husbands, especially if they are unemployed. In divorce cases involving minor children in the local judicial district, about four-fifths of all mothers and half of all fathers are represented by appointed counsel, according to a study made a few years ago (Pot, 1979: 23). In our research all of the mothers and almost all of the fathers had had at least one contact with a lawyer,[7] but the divorce procedure cost over 90 percent of the mothers and over 60 percent of the fathers nothing.

Family cases make up about a fifth of all cases handled by Dutch lawyers, and about 80 percent of Dutch lawyers have some family practice; it is the single largest field of practice for about half of all Dutch lawyers. However, only about a quarter of the bar is specialized in family law, with practices consisting of 65 percent or more family cases. There is relatively little stratification within the Dutch bar, but a predominantly family practice is characteristic of women lawyers and lawyers in small firms (see Klijn, 1981). Although the fee scale for such work is quite low (averaging about $400 per divorce according to a study made several years ago [see Klijn, 1984: 13]), lawyers who specialize in appointed family cases can make a moderate but respectable living (cf. Manen, 1978: 204). Many lawyers in fact depend on such cases for a considerable part of their total income.

II. THE FINDINGS

Our research into what lawyers do as participants in divorce litigation has taken place within the context of a larger project addressed to the processes by which divorcing spouses deal with the issues of custody and visitation. Central to this larger project were extensive interviews with both parties to some one hundred divorces involving minor children. These cases were chosen to be as representative as possible of divorces in the judicial district.[8] Each parent was interviewed twice,

[7] To some extent this is a result of the way in which the population was generated (see n. 8 below).

[8] Seven law firms (including 19 lawyers with some family practice) were asked to secure permission from their new divorce clients for us to contact them for an interview. These firms were selected on the basis of characteristics of their divorce practice, as revealed by the court roll. They accounted for a substantial proportion of all divorces in the local judicial district and represented a variety of types of law practice (city and province; one-lawyer, intermediate, and large firms; commercial and noncommercial). None of the firms approached refused its assistance. Fewer than 10% of the clients declined to cooperate. Some lawyers 'forgot' to ask many or most of their clients to cooperate, and all lapsed from time to time. They also occasionally consciously decided not to ask a client. We kept track of all these missing cases by checking

once shortly after divorce litigation was initiated with a first visit to a lawyer, the second time about a year later.[9] Among other things, we questioned the divorcing parents extensively about the involvement of professional and nonprofessional third parties in their divorce process. Most prominent among their contacts were, of course, lawyers, and the interviews included a number of questions addressed to the role their lawyers had played in reaching decisions relating to their children.

We also interviewed representatives of a number of sorts of professionally involved third parties (clergy, school officials, neighborhood policemen, family doctors, social workers, and the like). Among these were six judges who handle most of the divorce litigation in this and one adjacent judicial district.[10]

Nine lawyers, chosen because of differences in personal characteristics (age and sex, for example) and professional practice (size, income, proportion of family matters and the

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the court roll, and later we asked the lawyers about them. Two categories of cases are probably underrepresented in our sample because the lawyers felt it unwise to ask the clients to cooperate: those involving very upset or unstable clients or very delicate allegations (in particular, incest), and those in which the clients' command of Dutch was limited. In addition, because our access to our population was via lawyers, the sample probably contains too few divorces in which only one party was represented. We were unable to trace any other systematic bias in the selection of our sample.

[9] This research was conducted by E.G.A. Hekman and S. R. Spaak; a full report is in Griffiths *et al.* (1985).

In the first round of interviews we spoke to 242 respondents, 128 women and 114 men. We managed to speak to both parties to 103 divorce proceedings and to one party to an additional 36 cases, so that we have information concerning 139 divorces. The total population in the second round of interviews was 205, 110 women and 95 men. This population consisted of 74 couples and 57 individuals, representing 131 divorces.

It is hard to conduct such interviews in less than about 2½ hours without being unacceptably rude, and on the whole those interviewed seem to appreciate the opportunity to tell their story in detail to an interested listener. Cf. Murch (1977–78) and Elston *et al.* (1975) on the length of interviews with divorce clients (average length: 2½ hours).

By the time of the second interviews the divorces of 90% of the couples were final, but in 30% of the divorces there remained legal issues outstanding—the most frequent being child support (16%) and the property settlement (18%). There were almost no appeals (we registered 3 appeals, all by fathers and all concerning child support—compare Snijders [1977] on the low rate of appeals in divorce cases—and two cases of request for reconsideration, both also involving child support, of which one, by a mother, also involved visitation). Most respondents accept most of the decisions that have been reached: only with respect to visitation and child support do slightly over 10% intend to seek changes.

[10] These interviews were conducted by J. Griffiths; a full report is in Griffiths *et al.* (1985).

The interviews lasted 2 to 3 hours. After each, a written report was presented to and discussed with the judge concerned, either by telephone or in a follow-up interview. On the basis of these confidential reports, a general account of the findings was prepared. The references to the views of the judges in this article are derived from the latter document.

like), were interviewed with regard to their divorce practice.[11] Because the role of lawyers in divorce is so central we also conducted an observation study of lawyer-client interaction. Six of the lawyers interviewed and some six others were observed during meetings with their divorce clients.[12]

In short, we gathered information from four sources—lawyers, clients, judges, and direct observations—about the way in

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[11] These interviews were conducted by J. Griffiths; a full report is in Griffiths *et al.* (1985).

The interviews generally lasted about 3 hours. After each, a tentative profile of the lawyer and his or her practice was written and discussed with the lawyer. These follow-up interviews lasted an hour or more. In a few cases a third exchange (usually by telephone) was necessary to answer all questions and clear up misinterpretations and other difficulties.

For reasons partly of a practical nature and partly because of the lack of adequate theoretical insight into law practice, it is impossible to select a 'representative' group of family law practitioners (cf. Macaulay, 1963; 1979). The 9 lawyers interviewed were chosen from the larger group of lawyers who cooperated in the overall research project (see n. 8 above) because they had referred the largest numbers of clients to us; there was therefore a considerable overlap with the interviews with divorcing parents. Together these lawyers were involved in about half of all divorce cases in the local judicial district. They varied in age from 30 to 64. Seven are women and 2 men. Six had extensive experience, 1 moderate experience, and 2 were beginners. Five worked full-time, 2 almost full-time, and 2 half-time. Three had, by standards of the Dutch legal profession (cf. Klijn, 1981), considerable incomes, 4 modest incomes, and 1 a low income. Their family practice varied from 35 to 135 cases per year and from virtually none to 25% paying clients. It constituted from 25% to over 90% of their entire practice. They worked in 2 large (by Dutch standards) law offices, 4 medium-sized offices, and 3 small ones; 6 offices were in the center of the city of Groningen, 1 in a peripheral neighborhood, and 2 in nearby provincial towns. We know of no reason to doubt that they are roughly representative of Dutch lawyers with a large family practice or at least of such lawyers outside large cities such as Amsterdam. The overrepresentation of women and of fairly young lawyers reflects the concentration of matrimonial practice within the Dutch bar (see Klijn, 1981).

Because the larger research project concerned custody and visitation, the interviews tended to focus on these aspects of divorce practice. More general research on divorce practice would undoubtedly distribute the emphasis differently, and it seems likely that the financial aspects of divorce would occupy a relatively greater place. For a variety of practical reasons, the interviews also tend to overemphasize first meetings between lawyer and client, divorces involving children under 12, and interaction with clients who are plaintiffs.

[12] The observation research was conducted by M. Berends (for a full report see Berends, 1984; see also Berends, 1981, for a description of the observation research and its theoretical and empirical background). A full methodological account of the research, including the way in which practical difficulties of the sort encountered by Danet *et al.* (1980) were overcome, is given by Berends (1984).

The observed lawyers were drawn from the group cooperating in the larger research project (see n. 8 above). For practical reasons a perfect overlap with the interview study was not feasible. The observed lawyers practiced in 5 law offices of different types and locations. The observer was present in each office for 4 to 6 weeks, during which time in principle all interactions in divorce cases were observed. A total of 72 observations were made, 28 of first meetings, 33 of later meetings during the divorce process, and 11 of interactions with respect to postdivorce matters such as child support. Only 6 clients refused permission for observation and 3 observations were missed for other reasons.

which a certain group of lawyers[13] behaves in divorce cases. This information concerns a varied group of lawyers practicing in and around a major Dutch provincial capital, a group that can be considered roughly typical of the greater part of the Dutch matrimonial bar. One limitation must be kept in mind, however: Our research deals only with divorces involving minor children and in particular with those aspects of divorce that bear on the children, especially custody and visitation. Our research has of necessity been exploratory in character, and the results can do no more than justify some tentative conclusions about the nature of lawyers' work in divorce cases, conclusions that require integration into a general theory of lawyer behavior which can be further tested in Groningen and elsewhere. In fact, testing of such theory is currently taking place in a number of different legal systems and so far the picture of lawyer behavior that emerges from our research seems to be confirmed.[14]

In light of the exploratory nature of our work, and in order to keep this article to a reasonable length, I shall limit the quantitative presentation and methodological discussion to a minimum. In general, what follows is based on the interviews with lawyers, supplemented and qualified with information from the other sources. If no inconsistency is mentioned, this is because the information from various sources is in agreement (often, of course, this is because we only have information from one or two sources). Information from sources other than the interviews with lawyers is so labeled.

A. The Extent of Interaction between Lawyers and Clients

The minimum number of office contacts between lawyer and client is one. Most lawyers say they usually see their clients considerably more than the minimum: about four office contacts seems to be average. One of the interviewed lawyers tries to limit such contacts to one very extensive first meeting. The maximum number of office contacts is very large, and cases that stretch out over a long period and in which the parties fight successively over various issues can involve well over ten.[15] Apart from the lawyer's office, personal contact can also

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[13] For reasons that appear in the methodological descriptions in nn. 9–12 above, not all of the information bears upon the same cases or lawyers, although the degree of overlap is considerable.

[14] See n. 1 above.

[15] These rates of contact correspond rather closely to those reported by Connecticut lawyers in uncontested divorces (see Cavanagh and Rhode, 1976: 143). Murch (1977–78: 634) reports a slightly higher average (6) for contacts with solicitors in English divorce proceedings, but these proceedings appar-

take place at the court. Almost all clients reported seeing their lawyer (or sometimes a replacement) in court, but rarely more than once or twice; many such contacts were the result of the recently repealed requirement of a 'conciliation' hearing.[16] In addition to personal contacts, all lawyers send a large number of letters to their clients. Ten seems to be about average (some of these, of course, are mere covering or otherwise purely formal letters). The estimated average number of telephone contacts varies from three to eight. The interviewed clients reported a level of contact with their lawyers that in general corresponds with the picture obtained from the lawyers.

Most lawyers estimate the length of a first meeting at about an hour and schedule such appointments once every hour or ninety minutes. Two lawyers schedule these meetings at half-hour intervals, and the one who tries to handle everything in a first meeting schedules them at two-hour intervals, for in her experience they usually last about that long. The findings of the observation-study correspond roughly to these estimates: The shortest first meeting was twenty-five minutes, the longest three hours. Most of them lasted from forty-five to seventy-five minutes. Not only the extremes per case but also the average length per lawyer varies considerably. The main factor that accounts for differences between lawyers in the average length of a first meeting is the extent to which the lawyer restricts him- or herself to the legally relevant issues or engages with the client in a more general discussion of the social and emotional aspects of the divorce.

The importance of contact with a lawyer is at least in part a function of available alternative sources of comparable advice and help. From the interviews with clients it appears that they have contact with a variety of persons other than their lawyer. The involvement of family, friends and new partners is high: Roughly half of those interviewed had discussed several aspects of their divorce intensively with family and friends. When asked from whom they had received the most support, family, friends, and new partners head the list, each being mentioned by about a fifth of all respondents.

The frequency of contact with other professionals is only substantial in the case of family doctors, who were mentioned in this connection by almost half of our respondents. Social workers, the child protection agency, and mental health agen-

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ently last far longer than those in the Netherlands or Connecticut.

[16] Since the elimination of this hearing, about half of all cases are disposed of without any court hearing.

cies (as a group) had contact with roughly a quarter of all divorcing parents. For almost half of all respondents, no professional (other than their lawyer) was an important source of support, and social workers and family doctors were the only sources of professional support mentioned by as much as a tenth of all respondents (cf. Huls and Klijn, 1984: 13). It appears furthermore, from interviews with divorcing parents and with representatives of the various sorts of professionals, that the involvement of most nonlegal professionals is largely limited to emotional and adjustment problems and takes place before or after the divorce proceedings. These professionals have little to do with decision making in the divorce process itself. On the whole, therefore, the role of lawyers, which, as we shall see, is more or less a mirror image of that of other professionals, is played against the background of a considerable vacuum of expert help and advice with respect to the various decisions which have to be taken.

B. The Relationship Between the Parties

Most divorce clients do not give an observer the impression of being well prepared for the divorce process. Once the decision to divorce has been made, they seem to be in a great hurry to 'get it over with'. This leads to a failure to think through even the more obvious consequences of their actions, to hastily made decisions, and thus to problems later on. The noninitiating party is sometimes caught unaware, being informed of the impending divorce only shortly (in one case only a few hours) before his or her spouse first visits the lawyer, and is thus often rather off balance at first. These are some fairly obvious reasons for the instability of the relationship between divorcing parties—a characteristic feature of divorce litigation, one which the judges particularly emphasized.

About 15 percent of the relationships between the divorcing parties appear to an observer to be generally peaceful. In another 15 percent there is conflict on essentially all fronts that probably will not be resolvable outside of court. In between these extremes is the approximately 70 percent of all cases in which there appear to be tensions that may or may not lead to overt conflict. In other words, the nature of the relationship between the parties is a potential source of legal problems in about 85 percent of all cases. These assessments of an observer correspond to rough estimates given by the lawyers themselves.

All lawyers agree that material issues, especially the division of the marital property and child support, most frequently

produce conflict but that such conflict can usually be solved out of court. Conflict over the children and especially over custody is far less common, and at a first meeting custody and visitation usually require relatively little time—five to ten minutes. If there *is* conflict over the children at the first meeting, however, it tends to be far more serious, and most of the meeting will have to be devoted to it.[17]

Conflict over the divorce itself occupies a special place in the lawyer's interaction with the client. Several lawyers commented that there is far more conflict over the divorce than one would infer from the rarity with which the limited legal possibilities for resisting divorce are in fact used. It seemed to the observer that in as many as a quarter of the cases, one party was opposed to the divorce. Lawyers explain to their clients that such resistance is useless and will only make it difficult to deal satisfactorily with the other issues. After the first meeting, almost all clients apparently have accepted this advice and the divorce itself usually disappears as a manifest subject of controversy. But several lawyers said that nasty conflicts over custody and visitation generally reflect the fact that one party has not really accepted the divorce. This view is shared by the judges interviewed and is reflected in our own findings concerning the importance of the relationship between the parents for conflict over visitation. Latent conflict over the divorce in a number of cases appeared to the observer to be responsible for all sorts of difficulties, such as delaying tactics and resistance on other issues. (On the other hand, reconciliation is also very common: 20 percent of the clients in new cases reconciled within a brief period. But considering the number of cases in which an earlier effort had failed, it seems a fair estimate that at best half of these reconciliations will prove lasting.)

C. The Arrangements Between the Parties

The extent to which divorcing parties have made arrangements between themselves prior to the first meeting with a lawyer varies greatly. Although lawyers say that this is nowadays rare, sometimes one party is not even aware that a divorce procedure is being started. In other cases the parties have arranged almost everything. About a quarter of the clients observed in first meetings appeared already to have considered all the aspects of their divorce and to have reached agreement

[17] Cf. Klijn (1983), reporting the results of a survey of divorced persons, from which it appears that the financial and property issues are most often responsible for difficulties in a divorce, custody and visitation far less often.

with their partners. Such agreement, however, often turns out to be incomplete or impractical, merely a one-sided announcement by one party, or otherwise unstable. Another third of the divorcing parties are agreed on at least some aspects. Almost half have not yet settled anything between themselves. Our interviews with lawyers confirmed these estimates.

Custody is the most frequent subject which the parties have dealt with by the time of a first meeting. In more than half of all the cases observed, they agreed that the children would stay with the mother. Somewhat under half had already agreed on visitation. Lawyers agree that in the vast majority of cases custody is not an issue from the beginning, and that about half of all parents are agreed about visitation before the first visit to a lawyer. In about half of all cases the parties have agreed on the distribution of the marital property (these agreements are more often than not patently inadequate). Fewer than a third have made any agreement about alimony and child support. What agreements there are generally amount only to the mutual understanding that because of the poor financial position of the man, no alimony and little child support will be possible. Finally, a few parties have thought about and reached agreement on the procedure itself, preferring to be represented by a single lawyer (usually they think this will avoid unnecessary polarization). In some of these cases, however, the initial agreement has already collapsed by the time of the first meeting, under the pressure of conflicts that the parties had not anticipated or had tried to suppress.

Arrangements that the parties have made, or are inclined to make, are not infrequently seen as unwise by the lawyer. Much of the lawyer's input in the interaction between lawyer and client consists of practical advice. Sometimes a client is inclined to make unreasonable demands or concessions: Most lawyers say, for example, that they occasionally have to warn against an agreement providing for visitation every weekend, since their experience suggests that this will usually prove impossible for the mother to live with. In the view of lawyers, clients tend to be inadequately aware of the long-term implications of their divorce decisions. A wife may, for instance, want to agree to forgo alimony because it would not improve her current welfare position, overlooking the possibility that later on it might be a welcome addition to her income should she get a job. Several lawyers observed that clients are usually unaware of the change in lifestyle that often follows upon divorce and can lead to unanticipated frictions in custody and visitation arrangements (e.g., if the eating habits of one of the former

spouses change dramatically). The view of lawyers that stable, practicable agreements reached by the parties themselves without legal or other assistance are rare, and that successful arrangements most often concern custody, is borne out by our observations. We estimate that there is legal work to be done on the property settlement in about 65 percent of all cases,[18] on child support in about 45 percent, on visitation in about 40 percent, and on custody in about 25 percent. The percentage of cases that from the beginning can be clearly identified as not needing the intervention of a lawyer (or some alternative source of legal assistance) is certainly not higher than 20 percent, and probably rather smaller than this.

D. The Lawyer-Client Interaction at a First Meeting

The first meeting with the client is the only form of interaction that is roughly comparable for all lawyers and clients.

There is a short list of topics that must be covered in a first meeting because the lawyer needs certain information to proceed further with the case. Apart from simple data (date of marriage, number of children, and so on), the substantive questions concern the future of the children, the division of marital property, and alimony and child support. Apart from possible administrative details relating to the financing of legal assistance, procedural questions concern the choice of procedural form and, if necessary, a request for provisional remedies. All but one of the interviewed lawyers say they also always raise the question of visitation, although this is not a mandatory part of a divorce case.

Most lawyers say they have a fairly standardized approach to a first meeting with clients. They begin by allowing the client to tell his or her story in his or her own way. Later the lawyer takes over the initiative and conducts the rest of the meeting by going over the required topics systematically. Two lawyers allow clients to determine the structure of the entire meeting and elicit the information they need during the course of this discussion. Three lawyers have a fairly tight routine for the entire meeting, from which they deviate only if the client so wishes. But whatever the lawyer's approach to the organization of the first interaction, our observations showed that the lawyers usually control the course of the discussion. They lead

[18] In about 40% of the cases observed, the parties own the marital home (this is about equal to the national rate of home ownership), which can give rise to difficult practical problems quite apart from the nature of their relationship.

it so as to cover all of the legal essentials and to avoid wasting time on legally irrelevant matters. The extent to which lawyers steer the discussion in the direction of definite decisions depends on the situation: A first meeting with an initiating party tends to be rather open, since it is unknown how the other party will react; in first meetings with defendants, and in subsequent meetings, lawyers tend to keep the discussion more tightly focused on specific points needing decision.

Clients often want to unburden themselves of the emotional and social side of their divorce, and most lawyers listen patiently to this, especially at a first meeting. They emphasize their role as lawyer not so much by cutting off the flow of legally irrelevant communication as by reacting to it with little more than social platitudes. If the client bursts into tears, a typical lawyer offers a cup of coffee or changes the subject. A client who tries to make the guilt of the other party a central issue, however, is firmly told that the law is not concerned with who is to blame.

All lawyers say that clients generally know very little about the legal and especially the procedural aspects of a divorce. Our observations confirm this. Nevertheless, most clients ask few questions during a first meeting[19] and not many more in subsequent meetings. The questions they do ask tend to concern the procedure itself (e.g., Who has to appear in court? Do the children have to appear at the custody hearing?, and, especially, How long will it take?). In a few cases, clients ask questions about practical matters such as their welfare status. Very rarely do they ask about legal terms they do not understand.

The initiative in providing the necessary information therefore usually lies with the lawyer who explains, as one lawyer put it, "What has to be arranged and what is going to happen." Lawyers consider their clients particularly in need of information about the division of marital property and the other financial consequences of a divorce. Clients frequently are unaware, for example, that marital debts and tax liabilities have to be dealt with as part of the property settlement. There are also a few technical legal matters (in particular, one that concerns the status and powers of the noncustodial parent) about which laymen often have incorrect notions. It appears, however, from the observations, that on the whole lawyers do not inform their

[19] A few clients come to a first meeting armed with a notebook full of questions. According to one of the lawyers, this is recommended by one of the major women's magazines.

clients fully or consistently about the various legal choices available unless the clients ask, in which case a full explanation is generally forthcoming.

Lawyers say they adapt the extent to which they inform their client about the legal aspects of divorce, and the dosages in which they do this, to the emotional and intellectual ability of the client to absorb such information. One, for example, has a printed sheet that sets forth the divorce procedure in some detail. She only gives this to intelligent, literate, and emotionally stable clients. Another says she tries not to give too much information about the procedure to her more "simple" clients because it makes them confused and upset. One lawyer told the observer that as a student he had worked in a 'law shop' and frequently heard complaints that lawyers never tell their clients anything. He resolved to do better himself. He explained everything in detail to his first divorce clients, who assured him that they understood it all. But within a few days they would phone him or come to his office with the wildest notions, making clear that they had actually understood almost nothing and were only terribly confused. Since then, he too gives his clients information in small, individually measured doses.

The client's view of the lawyer-client interaction is essentially similar to that of the lawyer and the observer.[20] Most clients recall discussing most of the essential elements of a divorce with their lawyer at the first meeting. Only alimony had not been discussed in about a third of the cases, presumably because the financial position of the man often makes it obvious to the lawyer that this subject is not relevant. Most respondents report that the various subjects (especially custody) were only briefly and superficially discussed. Fewer than 10 percent had discussed any subject intensively with the lawyer. Intensive discussion had occurred most frequently with respect to child support. Only visitation, child support, and the distribution of the marital property are discussed with much frequency in subsequent contacts, with the last subject standing out as the subject of the most intense interaction.

Clients have the impression that their lawyers do not often express an opinion concerning most of the subjects under discussion. Their recollection of their first meetings is that this very rarely happened concerning the divorce itself, in only about a quarter of the cases concerning the arrangements for

[20] On the whole the answers of men and of women to questions concerning their interaction with their lawyer are very similar.

the children, and in about a third of the cases concerning alimony. By contrast, they recall their lawyer having expressed an opinion concerning child support, usually suggesting a specific amount, in about two-thirds of all cases. The frequency with which clients recall their lawyers expressing opinions is far lower in subsequent contacts, which reflects the fact that most subjects are usually discussed only at the first meeting. Visitation is an interesting exception: It is the only subject on which lawyers are remembered as having expressed an opinion as frequently in later meetings as in the first meeting. (This probably reflects the practice of some lawyers to postpone discussing this matter, which, unlike the other issues, is not a mandatory part of the divorce procedure). In short, in the view of their clients, lawyers take a rather active part throughout the divorce process in the decision making in respect to child support, and are relatively more active with respect to visitation in the later stages of the process.

Lawyers are highly proactive with respect to child support since the applicable norms leave little leeway and they prefer to settle the issue outside of court if possible. As one client put it, "The lawyers take care of that between themselves, don't they?" On the other hand, all lawyers believe that the issues of custody, visitation, and the division of marital property *should* be settled between the parties themselves if at all possible, and they say that they encourage their clients to do this. As long as the legal requirements are met (e.g., debts must be included in a property settlement), most lawyers are not inclined to raise questions about an agreement between the parties. Visitation is a partial exception: Most lawyers say they are not satisfied with a simple statement by the client that the question of visitation has been taken care of. They want to know what the arrangement is and, if they consider it unwise, are not reluctant to intervene.[21] Others do not think they can assess such things better than their clients, and are inclined to accept almost any arrangement on which the parties are agreed.

The pictures of the lawyer's role, as seen by lawyers, clients, and the observer are consistent on most points. Clients have a rather extensive interaction with their lawyer during the divorce procedure, one involving a large number of contacts. They usually discuss all aspects of their divorce at a first meeting, but not very intensively except on the issue of child

[21] Several lawyers noted that divorcing parents are sometimes inclined to agree on a level of visitation that is much too high, and they strongly advise, for example, against visitation every weekend because their experience is that the custodial parent will soon find this intolerable.

support. Only visitation, child support, and the distribution of marital property are regularly discussed at subsequent meetings. The lawyer's role as seen by clients is rather passive: Except for child support, lawyers usually do not express distinct opinions. Lawyers themselves, however, stress that the initiative in providing the necessary legal information and in guiding the discussion toward the necessary decisions lies almost entirely with them—an impression confirmed by our own observations.

E. The Nature of the Client's Participation

In our observations, two aspects of client participation in the lawyer-client interaction stood out. First, clients make a fairly passive impression, asking few questions, showing little interest in the procedural and legal aspects of their divorce, and manifesting little inclination to use legal strategies in their conflict with their spouse. To the extent that they do look to their lawyer as an ally, this seems not to be done with the idea of using legal weapons but in largely the same way they seek moral support from friends, the family doctor, a new partner, and others.

In contrast with the passive impression clients give of their involvement in the *legal* divorce process, their effort to *explain* the divorce to their lawyer and to *justify* their own marital and divorce behavior is both frequent and intense. Without being asked, most clients begin first meetings by setting out the reasons for the divorce. About half lay the blame emphatically on the other party. Despite the fact that lawyers either do not react at all or even positively discourage such interjections, in later meetings clients continue to try to justify themselves, portraying themselves and the children positively and their spouses negatively.

This contrast suggests that lawyers and clients are in effect largely occupied with two different divorces: lawyers with a legal divorce, clients with a social and emotional divorce. The lawyers orient themselves toward legal norms and institutional practices, the clients toward the social norms of their environment. Clients go to lawyers because it is otherwise impossible to secure a divorce, not because they want to invoke the legal system as a regulatory and conflict-resolving institution. That the law concerns itself with the substance of their relationship is an adventitious circumstance for most divorcing couples, and they generally give the impression of being quite content to leave as much as possible of this aspect of the process in the

hands of their lawyer. The interviews with divorcing parents confirmed our observations that on the whole clients are quite satisfied with this state of affairs; we found little of the alienation that might be expected on the basis of the 'transformation' and 'legalization' literature.[22]

F. The Influence of the Lawyer

The respective influence of lawyer and client on the various decisions that must be taken in the course of a divorce case corresponds roughly to the difference between substantive and procedural, or formal, questions. Substantive decisions are in principle up to the client, although he or she may of course be influenced by considerations which the lawyer puts forth.

In the first round of interviews, we asked clients to estimate the influence of their lawyers on the various decisions that had been made to that point.[23] Approximately four-fifths felt that their lawyers had had no influence at all on any subject except child support. In the case of child support, about a third attributed a moderate or substantial influence to their lawyer. These results were confirmed by our second round of interviews.

The interviews and observations lead to a somewhat different assessment of the influence of lawyers on the substantive issues. Lawyers do leave their clients a great deal of freedom to work out their own solutions (except with respect to child support), but when necessary they point out omissions, give practical advice, mediate and negotiate, try to steer the parties toward a reasonable settlement, and if necessary they put pres-

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[22] In the second round of interviews we asked the respondents for their assessment of their lawyer. About a third of the clients were emphatically positive. About half had no particular judgment, often because they felt they lacked any basis for comparison. About a fifth were dissatisfied. The reasons most often given for dissatisfaction were general subjective characterizations: The lawyer was lazy, slow, indifferent, or insufficiently aggressive; the lawyer was unclear in giving information (generally, about what to expect in the procedure); the lawyer was too formal and bureaucratic and gave insufficient emotional support. In a few cases clients complained that they discovered later that the lawyer had not dealt with an important point. In a recent national survey (Huls and Klijn, 1984) about 80% of those who had had contact with a lawyer said they would return to the same lawyer if they had the same problem again (the question was not limited to divorce matters). Compare Murch's (1977–78) finding that the level of client satisfaction with English solicitors in divorce cases is very high; most English divorce clients think lawyers "should continue to have control over the adjudication of marriage breakdown . . ." (Elston *et al.*, 1975: 631).

[23] The respondents generally were not able to answer such a question and as a result our recording of their answers was inconsistent and incomplete. The same was true of all such questions about the amount of influence asked in the first round of interviews. In the second round the interviewers made their own estimates based on the respondents' descriptions of the interaction.

sure on their client and the opposing party (e.g., by threatening to let the court decide an issue or even, in extreme circumstances, to withdraw from the case).

By contrast with substantive questions, decisions on procedural or formal matters are in fact (and for some lawyers as a matter of principle) primarily their responsibility. One older lawyer insisted that he is *magister litis*: a client who wants to take over this role is firmly told to look for another lawyer. Not all the lawyers interviewed would be comfortable with the unabashedly authoritarian terms in which he expresses this standpoint, but in substance they all more or less agree.

The dominant role of the lawyer on procedural and formal matters appears especially clear in connection with two matters: the choice between a petition or a complaint procedure and the choice of the form in which an agreement on visitation is registered. With three exceptions, the lawyers interviewed are firmly opposed to the petition-procedure. In their experience, apparent harmony at the beginning of the process is often misleading and unstable. The possibility of latent conflict and the risk that one party may have put the other under undue pressure make it desirable that each party be independently represented; it is impossible for one lawyer to represent both parties to a potential conflict adequately. (Several lawyers said they prefer that the second party be unrepresented than that both be represented by one lawyer.) Lawyers who do not use the petition-procedure consider it an inappropriate context for negotiation of an agreement. They think that the procedural pressure to reach an agreement on the various issues leads to inappropriate trading-off of concessions and thereby unhappiness with and instability of the arrangements made. Most lawyers say they used to do more petition-procedures, and illustrate their objections to it with accounts of cases in which the procedure had to be broken off, causing delay, the need for both clients to seek new lawyers, and other untoward results. In other cases clients later told them they wished they had had separate lawyers. We have ourselves heard a few similar stories from clients.

All these objections are acknowledged by the three lawyers in the study who do use the petition-procedure with any frequency. They believe, however, more strongly in the value of a mediation-model divorce process if this is feasible. These three lawyers also try to deal with as many issues as possible in a formal contract between the parties, even in a complaint case; the other lawyers do this only sporadically if at all.

In the view of lawyers, it is their preferences that strongly

determine the choice of procedural form. As one said, "In principle it is the client who makes the procedural choice, but this is a coached choice and actually the client only chooses what *I* want." In the words of another, "If a client comes into my office and begins talking about the petition-procedure, he or she gets cured of the idea within a few minutes." Several lawyers who have a strong preference for the complaint-procedure said that they generally do not go out of their way to inform a client of the other possibility. The impression of lawyers that they dominate the interaction insofar as procedural questions are concerned is confirmed by our observations. Except for the hope that the case not take too long, only about a quarter of the clients expressed any wish on this subject, and this almost always amounted to wanting only one lawyer in the case.

From both the interviews and observations it appears that the other formal aspects of the divorce procedure are also largely determined by the lawyer. Most lawyers think it important, for example, to have agreements on the division of marital property reduced to writing, and they try hard to accomplish this. Lawyers differ on whether a visitation agreement should remain purely informal, be written down, or be confirmed by the judge. Again, their views tend to be determinative, and their clients are scarcely aware of the different ways in which an agreement could be registered.

The way in which the divorce procedure unfolds—the extent of negotiation with the other side, the decision to give up trying for an out-of-court settlement and to let the court deal with the case—is likewise largely determined by the lawyer. Clients rarely play an active part in these decisions, influencing them only indirectly by the impression they make on the lawyer.

Despite their dominance on procedural and formal matters, most lawyers are careful to keep clients informed of all developments in the case. They do not undertake any formal step without securing the client's approval. Most send drafts of written materials, such as pleadings and letters to the other party, to their clients for approval, and clients always receive a copy of the final versions. One lawyer carries the task of keeping the client informed to an extreme: she sends not only drafts of all pleadings and letters to the other side but also detailed minutes of all significant discussions with the client (including those over the telephone) and a written confirmation of all decisions.

G. *The Lawyer and the Transmission of Legal Information*

We have already seen that clients generally know very little concerning the legal aspects of divorce and that the initiative in providing information lies with the lawyer. The importance of the transmission of legal information, while in a sense obvious, needs to be stressed, since with the exception of Macaulay (1979), remarkably little attention has been paid to the central role of lawyers as transmission agents essential to the communication required if legal rules are to be brought to bear at all on social life (cf. Aubert, 1967).

A striking example of such transmission of legal information occurred during the course of our research. Until a decision of the highest Dutch court in 1984 (HR 4 May 1984, RvdW 1984, 98), custody of a child had to be awarded at divorce to one of the two parents. In that decision, however, the court held that on the request of both parties the divorce court can withhold any custody order, thus leaving the joint parental responsibility which obtains during marriage intact. Within little over a year, it seems that such requests are being made and honored in as many as a tenth of all cases in the local judicial district. Such dramatic implementation of a new rule depends entirely on the fact that lawyers, already involved in every divorce case, are in a position to transmit the new legal information very quickly and at no extra cost.

H. *'Transformation' and Other Interaction in the "Shadow of the Law"*

Transmission is, however, a misleading description of what lawyers do with legal information, as it suggests a neutral medium. Most lawyers emphasized at some point in the interview their role as interpreter between the client and the legal system. They describe this as "translating emotions into practical concepts" or "translating the arguments and wishes of the client into legal terms." This function is central in divorce practice. It is unmistakable, also, that such 'translation' often entails 'transformation' (Felstiner *et al.*, 1980–81).

As 'transformation agents' lawyers stand between their clients and the legal system, controlling the communication in *both* directions: They 'transform' the law every bit as much as they 'transform' their clients' problems into the form of a 'legal divorce'. Their interaction with clients takes place "in the shadow of the law" (Mnookin and Kornhauser, 1979; Galanter, 1981), but like most shadows, this one gives only a more or less distorted silhouette of its subject. Transformation of the law

often occurs subtly, as in the form of a suggestively posed question. A father who is asked, "Custody with the mother?" receives a different message than if he were asked, "Which of you two will have custody?" And a mother who is asked, "And have you worked out a visitation agreement?" receives a suggestion—that visitation is the legal norm—which is not quite the same as what the law provides. On the whole, lawyers present the way a legal provision is generally applied in practice rather than the provision itself. Thus we observed regularly the transformation of the legal proposition that the court should hear a child older than twelve into the rule drawn from practical experience that "children of that age decide for themselves." Lawyers probably effect the most important transformations in the 'law' simply by keeping clients uninformed. The existence of different procedural alternatives is the most obvious example; the new possibility of joint custody is another example—lawyers undoubtedly only tell some of their clients about this.

A striking feature of the interaction between lawyers and clients is the way in which lawyers minimize their own role. From our observations it became clear why clients attribute so little influence to their lawyers despite the lawyer's domination of the interaction: Lawyers rarely present something as their *own* opinion. Their steering of the discussion and persuading of clients are largely presented in terms of the formal and practical margins set by the legal system—by the law and more particularly by the decisions that can be expected from the local court. While lawyers in fact strongly influence the way the divorce process unfolds, this remains largely invisible to clients, who rarely have any basis for comparison and cannot know what sorts of transformations their lawyers may have practiced on the law, nor what the alternatives might have been for all the formal and informal procedural decisions taken more or less autonomously by the lawyer.

Lawyers' references to legal norms vary greatly in explicitness, often remaining implicit in advice presented in other terms. The extent to which norms are explicitly invoked differs, among other things, for the different subjects which are discussed. The greatest explicitness occurs in connection with alimony and child support and to a lesser extent with the property settlement. Legal norms are introduced into the discussion by lawyers to fix the legal margins within which further discussion must take place: Clients are regularly told, as we observed, that the law provides for support and that if they cannot agree on support payments or if they agree to something that deviates too far from the official norms, the judge will in-

tervene and set an amount. When alimony is an issue, the same applies: A wife who says, "I want half of his income," is told, "We have to know what the court will do." The desirability of settling the various issues by mutual agreement is often expressed by reference to the fact that the court will otherwise have to deal with the case: "You can arrange everything yourselves so long as you can manage to reach an agreement. . . . The judge only decides if you can't deal with the matter yourselves."[24]

There is far less explicit reference to statutory norms or to the norms of the local court when custody and visitation are being discussed. All lawyers say they will ultimately invoke these norms if their client stubbornly holds on to an impossible position. One says, for example, that she tells a custodial mother who does not want to permit visitation that the applicable statute provides for it and that the court generally orders it; then she asks the client, "Why not in your case?" Custodial clients are generally advised that since the court will probably order visitation, it is best to work out an agreement by mutual consent. Lawyers also sometimes refer explicitly to legal norms and practice when custody conflicts threaten: Their message is, in most such cases, that there is little chance of the court awarding custody to the father. This message is used to persuade a father to be realistic or to calm the fears of a mother. Similarly, they sometimes warn a client that leaving the children behind with the other parent in the marital home will, because of the importance attached to the 'continuity' norm, seriously diminish the client's chances of being awarded custody.

On the whole, however, lawyers say they at most refer only obliquely to legal norms in connection with custody and visitation. Few find it desirable to "wave the law" at their clients (although some do believe that a stronger legal 'right' to visitation would strengthen their bargaining position with custodial mothers unwilling to cooperate). Our observations confirmed the lawyers on this point. When visitation is problematic and lawyers are trying to establish and maintain contact between the children and the noncustodial parent, they do this primarily by invoking social norms such as the 'right' of the

[24] Our impression, explicitly confirmed by the lawyers themselves, is that in the Dutch situation out-of-court settlement of alimony and child-support issues is facilitated by the high predictability of the judge's decision. The relationship between predictability and a successful settlement strategy is not, however, a simple one. At the 1984 Groningen workshop on lawyer-client interaction (referred to in the note beginning on page 135), Felstiner and Sarat argued that California lawyers persuade their clients to settle by warning them of the *un*predictability of the judge's decision!

child to see the other parent and not to be made the victim of parental strife. The sort of considerations they propose to clients—the importance of continuity, the importance of not making the child a focus of strife, the importance to the child's development of continuing contact with both parents—correspond to professional opinion (cf. Wallerstein and Kelly, 1980; Goldstein *et al.*, 1973), and apparently also to folk psychology, since according to the lawyers interviewed their clients are generally quite receptive to such considerations. Lawyers sometimes also point out purely practical objections to a proposed arrangement. When legal norms are invoked, this is usually done obliquely, as by reacting to a visitation proposal in terms such as "that's the usual frequency" or "that does seem rather a lot." Such expressions refer implicitly (and as one of them comments, often not even consciously) to the norms of the local court. When they assess the standpoint of their client in terms of a general legal norm such as 'reasonableness', lawyers refer even more diffusely and implicitly to the law. Lawyers tend to give tactical reasons for their hesitance in invoking the law explicitly with respect to custody and visitation. But the absence of a clear legal solution to such conflicts undoubtedly plays a role too.

Whether the terms be direct and explicit or indirect and camouflaged, however, the shadow of the law remains unmistakable in the tenor of the advice lawyers give their clients and in the visitation arrangements that, under their supervision, are finally agreed upon in cases of conflict. Such out-of-court arrangements usually provide, they all say, for a day or weekend visit every two or three weeks—that is, precisely what the court would usually order if called upon to do so.

I. The Nonconflictual Approach of Lawyers

In dealing with the legal divorce process, the observed lawyers of course exhibit a great deal of variation, depending partly on the circumstances of the individual case and partly on the personal characteristics and different abilities of the lawyers themselves. In the sample we observed, the differences in approach are more or less randomly distributed and do not correspond to office organization, age, or sex.[25]

[25] Emotional lawyers are more easily tempted than their more reserved colleagues to respond to the client's interjections concerning the social-emotional divorce. Those who are motherly manage quickly to create a warm, comfortable atmosphere. An insecure young lawyer takes refuge in a rather aggressive approach to a distraught client. An authoritarian lawyer leads the discussion at a fast and disciplined pace that leaves little room for clients to discuss what really concerns them. Another lawyer is authoritarian in a dif-

The most striking differences among lawyers are in the amount and intensity of their interaction with clients and in the extent of 'proactivity' that they consider desirable. Some try to arrange as much as possible and to reduce the agreed-upon terms to writing. These are in general the lawyers who are also most receptive to the petition-procedure and who most actively test the wishes and agreements of their clients against their own conceptions of reasonableness and practicability. Others adopt a lower profile. They do not themselves raise an issue such as visitation; they do not probe behind a client's statement that a given matter has been dealt with; they prefer not to negotiate things in detail; and they reduce as little as possible to writing. Most lawyers fall somewhere between these extremes.

Beneath a certain amount of superficial variability, however, there is a common substratum of behavior that typifies the approach of lawyers to divorce practice. We find in both the interviews and the observations far less variation among lawyers than others have found. Kressel *et al.* (1978) claimed, for example, to be able to distinguish six basic approaches to divorce practice. All the lawyers we studied fall within Kressel's categories of "mechanic" and "mediator" (although the two most authoritarian lawyers also correspond in some respects to the types "undertaker" and "moral agent"). They all fit more or less comfortably into O'Gorman's (1963: 163–164) category "counselor" (lawyers who make their own judgments about what is in the best interests of the client, the other party, the children, and society as a whole, and try to achieve these goals). They fit far less into his category "advocate" (lawyers who accept the client's definition and proposed solution of the problem).

Working within the margins set by legal rules and institutional practices, the accepted norms governing legal practice, and more general social norms of 'reasonableness', 'fairness' and what is 'good for the children,' and taking account of the reasonable wishes of the client, lawyers try to achieve a mutually acceptable divorce settlement with which the parties and their children will be able to live. Their objective, in other words, is a 'reasonable divorce' in which the problems are dealt with outside of court, as much as possible directly by the parties themselves, but when necessary with the help and advice of their lawyers.

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ferent way, intruding her own values and concerns rather deeply into the client's decisions.

The most striking characteristic of divorce practice is the central place most lawyers give to conflict minimalization and a nonadversarial approach. Most of them try consciously to reduce the level of aggression in divorce cases—to exert, as one put it, a "neutralizing, regulating influence" on their clients and the process itself. One says her first rule is "not to increase the conflicts that already exist." Another formulates the most important aspect of her role as a lawyer as follows: "Even though you represent one party, you must all try together to keep the damage as limited as possible." A third considers a lawyer's greatest power in a divorce proceeding the power to "parry aggressive behavior." Yet another observes that although clients often expect aggressive behavior from their lawyer, it is precisely by not responding to such expectations and by using various techniques for giving the client time and room to cool off that a lawyer can help create a "decent" process in which "if at all possible the issues really do get resolved."

Lawyers do not differ very much in their ideas about how to deal with conflict. Most believe strongly in mediation and negotiation. However, the extent to which such intervention is possible depends on the issue at stake. All lawyers share the view that there is little room for mediation and negotiation in conflicts over custody (the new alternative of joint custody has presumably substantially increased the room for negotiation and compromise). Their role with respect to custody is usually active only when they represent the father, whom they generally try to persuade not to press his custody claim. This they do despite the fact that all of them profess to having no preference for one parent over the other. Our observations confirm what lawyers said when interviewed: They advise fathers not to seek custody (except in exceptional circumstances), often referring explicitly to the court's supposed bias in favor of mothers, and often emphasizing that by not seeking custody, the chances of a good visitation arrangement will be improved.

The lawyer's role in visitation conflicts is quite different. Here there is substantial room for negotiation and mediation, and most lawyers we questioned said they make active use of it. They are strong believers in the importance of continuing contact between the noncustodial parent and the children, and they do not hesitate to use their influence to bring the parties to some kind of arrangement. As they see it, their intervention puts the interests of the children first, above those of their client. They all consider it far better if visitation conflicts are dealt with in a nonadversarial manner outside of court—prefer-

ably by the parents themselves but if necessary with the help of their lawyers. They say that they usually succeed in realizing this objective, and from our interviews with divorcing parents it appears that a considerable amount of potential visitation conflict is effectively dealt with in the lawyer's office.

A nonadversarial strategy generally entails a close working relationship between the lawyers of each side, and divorce lawyers have a great deal of such contact. When the other party is represented, it is in cooperation with his or her lawyer that one negotiates a case to a reasonable solution. Most lawyers we interviewed are very active in this. They prefer to deal with practical problems and conflicts between the parties as informally as possible, telephoning the other lawyer or speaking to them at the courthouse while there on other business. Often the two lawyers reach a mutual understanding and operate almost as a team in trying to bring their respective clients to a reasonable settlement. The lawyers we interviewed on the whole would agree with Eisenberg that the two lawyers

> are likely to find themselves allied with each other as well as with the disputants, because of their relative emotional detachment, their interest in resolving the dispute, and . . . their shared professional values. Each . . . tends to take on a Janus-like role, facing the other as advocate of his principal, and facing his principal as an advocate of that which is reasonable in the other's position (1976: 638).

The approach of the other lawyer in the case is thus very important. If he or she adopts an adversarial approach or is not regarded as trustworthy, lawyers say they abandon their general preference for out-of-court negotiation and let the case go to the judge for decision. The importance of the relationship between the lawyers has been noted in other studies, but cooperation is sometimes reported as rare (see, e.g., Kressel *et al.*, 1978: 129). Our impression is that, on the contrary, a noncooperative relationship is exceptional.[26]

A reasonable relationship between the opposing lawyers is the most important condition of a successful strategy of conflict minimalization, but lawyers also have other means at their disposal. A lawyer representing a plaintiff, for example, usually sends a letter to the defendant announcing the imminent arrival of the process server. Lawyers do this because they believe that if the defendant is not forewarned, the adversarial style of

[26] So far as we can tell, the view lawyers have of certain colleagues is not purely subjective. Most lawyers seem to have the same, distinct group of colleagues in mind, and the judges interviewed appear to agree with them.

a complaint (which many laypeople associate with a criminal prosecution) and the confrontation with the process server could lead to unnecessary polarization. (Our interviews with divorcing couples support this view.) When the opposing party is not represented, all lawyers, while expressing the opinion that separate representation is preferable, will advise the unrepresented party and pay extra attention to the fairness of any agreements reached.

Lawyers' control over the legal procedure makes available various techniques for cooling off conflict. Simple delay is often used to this end. One technique dates from the time before the general availability of photocopiers. Instead of sending on a copy of a communication received from the other side that might unnecessarily upset a client, the lawyer can paraphrase it as diplomatically as possible in a letter. This sword can cut two ways, however: Polarizing lawyers on the other side can convey reasonable compromise proposals to their clients in such a way as to minimize the chance of reaching a mutually acceptable agreement. Some lawyers indicate that in such a situation they might try to reach the other party behind the back of the lawyer by asking their own client whether it would be possible to discuss the matter directly with his or her spouse.

Lawyers frequently exert considerable pressure on their own clients to be reasonable. When possible they cooperate with the lawyer for the other party in seeking to get their respective clients to agree to a reasonable settlement. They use all sorts of ad hoc tactics to try to bring about a 'reasonable divorce'. But the key to their role is a common strategy from which they seldom diverge: the maintenance of a stance of relative neutrality. They keep their professional distance from the client, letting the client understand that while they are there to offer certain kinds of professional help, they will not allow themselves to be coopted into the client's quarrels. Lawyers regard their neutral stance as an essential precondition of a successful conflict-minimalizing strategy. They believe that if they consider only the interests of their own client, the chances of reaching a satisfactory settlement out of court are small. We observed only two or three cases in which a lawyer seemed to have adopted the client's position more or less unreservedly, and in each of them this occurred because the lawyer had become convinced that the other party was unreasonable and uncooperative. But lawyers reach this judgment about their own client's behavior just about as frequently, and in two cases we observed went so far as to threaten to withdraw from the case

if the client did not act more reasonably.

The idea that lawyers polarize and escalate conflict finds little support in our observations or interviews. Very little polarization occurs at all. When it does, it seems to be largely a result of interaction processes between the parties themselves. It takes place despite the efforts of the lawyers to prevent it. Some clients expect their lawyers to be far more aggressive than they are willing to be and criticize them for failing to be "hard" enough.[27] We observed almost no cases in which the behavior of the lawyer could fairly be described as likely to raise the level of aggressiveness.

The oft-expressed idea that it is not the conscious behavior of lawyers but rather the adversarial structure of the legal process that tends to create polarization (cf. O'Gorman, 1963: 158; Kressel *et al.*, 1978) does, however, find some support in our research. The judges interviewed regard the participation of lawyers in hearings in disputed cases as a frequent obstacle to settlement, because in that setting many lawyers tend to adopt precisely the sort of adversarial stance that most of them avoid outside of court. Left to themselves, judges say, lawyers would often concentrate on the virtues of their client and the faults of the other party in a way that would tend to drive the two sides farther apart. The judges, on the other hand, consider the hearing a place to seek out the common ground necessary for agreement. Several judges said that they try to keep the participation of lawyers in hearings concerning the children to a minimum and as much as possible to talk directly with the parents. On the other hand, several lawyers complained that some judges force them into an adversarial stance, either by upsetting a carefully negotiated and delicately balanced settlement (of whose laborious prehistory the judge is unaware), or by trying to 'wish away' a real conflict of interest that requires adjudication after out-of-court settlement efforts have failed.

III. REFLECTIONS

The foregoing findings prompt a number of reflections concerning the role of lawyers in divorce litigation.

A. 'Normative Intervention' in Divorce Conflict

Several types of professional intervention in divorce conflict are possible. Analysis of our research suggests that these

[27] See n. 22 above. Cf., however, Murch (1977–78), who finds that clients generally want a *partisan* but not a *combative* lawyer, and sometimes think their lawyer unnecessarily exacerbated the conflict.

can usefully be arranged along two dimensions: Intervention may be primarily oriented toward an individual client or toward the existence of a conflict, and it may or may not, more or less, explicitly invoke and be guided by legal norms. These two dimensions define four types of intervention, as diagrammed below:

Intervention	Normative	Non-normative
Orientation		
Client	Advice, information	Individual support, therapy help with adjustment
Conflict	Supervision of the process, negotiation, mediation, conflict resolution	Relational therapy, divorce counseling

Normative, conflict-oriented intervention is primarily the preserve of lawyers, and to a lesser extent of the court and the child protection agency (which sees about a fifth of all cases). It has modest ambitions: It addresses not the underlying causes of divorce conflict but the state of conflict itself and the need for reaching decisions on a number of practical matters. Lawyers are quite aware that they are dealing only with symptoms. But this sort of intervention does usually seem to be successful in accomplishing its limited objective: Most divorce conflict does get 'resolved', at least in the sense that it disappears from the agenda of official agencies. From our interviews with divorcing parents we have the impression that, after their 'legal divorce,' any conflict soon disappears from their personal agendas as well, freeing them to go about setting their lives in order. Normative intervention thus effectively settles conflicts, at least those that are short-term. Presumably the underlying causes of divorce conflict dissipate of their own accord with the passage of time.

No other sort of intervention—and in particular not client-oriented, non-normative intervention such as is the preserve of social work and mental health agencies—appears from our research to play a significant role in dealing with divorce conflict.[28] Because non-normative, conflict-oriented intervention hardly exists as a practical matter in our judicial district, its

[28] In connection with the policy of the Ministry of Justice to reduce the mediating role of the child protection agency in custody and visitation disputes, several judges observed that in their view the alternative intervention proposed by the ministry—intervention by social work and mental health agencies—is no alternative at all. It tends, they think, to aggravate conflict rather than to help resolve it. Lacking the neutral stance backed by official norms that characterizes normative, conflict-oriented intervenors, these intervenors tend to identify themselves unreservedly with their clients.

possibilities could not be compared with those of normative intervention. Our observation of lawyers at work suggests, however, that the availability of norms, the standardized, generally approved solutions they afford, and the stance of detached and authoritative neutrality that they make possible are essential components of successful intervention in conflict (cf. Merry, 1982).

Divorcing parents have fairly little contact with any professionals other than lawyers, especially during the legal process itself. Lawyers apparently almost never refer a client to another professional. Only rarely do they themselves initiate any such contact. On the other hand, lawyers work closely together if possible, and the applicable legal norms—almost exclusively invoked by and the preserve of the lawyer—cast a heavy shadow on the process. 'Legal divorce' thus appears as a kind of lawyers' tête-à-tête, in which the lawyer's most important contact (other than the client) is with the opposing lawyer and the client's most important contact (other than his or her spouse) is with the lawyer. 'Legal divorce'[29] is apparently a very highly differentiated social process.[30]

B. The Objective of a 'Reasonable Divorce' and the Nonadversarial Approach

The objective of most lawyers is a 'reasonable divorce', a mutually acceptable settlement reached out of court. The 'best' divorce process, especially for decisions concerning the children and marital property, is one in which the spouses, appropriately advised and supervised by their lawyers, reach such a settlement themselves. Second best is a settlement reached with the active intervention, mediation, and negotiation of lawyers. The least desirable divorce process is one in which the court makes the decisions.

The attitudes and the actual behavior of most lawyers in

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[29] I emphasize 'legal' because our research shows that in the social and emotional process, divorcing parents have a great deal of contact with parents, family, friends, new partners, and neighbors.

[30] Paradoxically, the effectiveness of lawyers in handling divorce conflict may lie in their rather *un*differentiated approach to a highly differentiated problem. That 'legal divorce' is highly differentiated makes it less highly charged for the client than the social and emotional divorce. This inclines the client to give the lawyer a rather free hand as the 'expert'. That the approach of lawyers is fairly undifferentiated allows them to know more and to project their influence further than a more narrowly technical approach would allow. Murch (1977–78: 32–33) argues, for instance, that client satisfaction with divorce lawyers derives from the way their role as legal advisor is often combined with an ability to fulfill psychological needs. Compare Macaulay's (1979: 153) comments on the inseparability of the lawyer's "psychiatric" role from the role as lawyer; cf. also Eisenberg (1976: 664).

divorce cases are distinctly and emphatically nonadversarial. At least insofar as their out-of-court intervention is concerned, this seems in general to have the intended effect of reducing the level of polarization and promoting mutual settlements.

C. *The Lawyer as Intermediary Between the Client and the Law*

The position of lawyers is a double one: They represent the law to the client and the client before the law. As intermediaries, lawyers transform the communication in both directions: the law does not hear exactly what for clients is most important and clients do not hear exactly what the law supposes them to hear.

The social and psychological divorce process that occupies the thoughts of clients is transformed by lawyers into a legal divorce in which the clients' interests are limited. This explains why clients are generally so passive in the interaction with their lawyers. In the course of this transformation, the lawyer works the case up so that the decision of the judge can in most cases be a mere formality. A great deal of out-of-court 'adjudication' takes place, with the lawyer directly and authoritatively applying legal norms to the facts of the case to determine the sort of solution the client is urged to accept. "Gatekeeping" (Macaulay, 1979) is likewise an important part of this transformation process. Futile and trivial issues (such as dispute over the divorce itself) are filtered out of the subject matter that is to be dealt with in the 'legal divorce' procedure.

Transformation of the law is an equally striking feature of divorce practice. A great deal of legally relevant information is never given to clients. The practical consequences of rules are often presented as if they were the rules. In other cases legal and practical limitations on rules are not mentioned. The law casts a heavy shadow over clients' decision making, but it is a more or less distorted one depending on the way in which lawyers choose to project the law.

Mnookin and Kornhauser (1979) and Galanter (1981) have called attention to the importance of the *general* effects of legal rules: their impact on the outcome of conflict that is never brought to court. The rules of divorce law and procedure create "bargaining endowments" in terms of which the negotiations take place; in the majority of divorces these lead to at least some settlements outside of court. Our research supports Mnookin and Kornhauser's criticism of what they call the "regulatory perspective" (1979: 959), which focuses on the decisions

that judges should take in litigated cases and ignores the far larger group of cases in which a judge is never given an opportunity to render more than a formal decision. They argue persuasively, for instance, that adoption of the proposal of Goldstein *et al.* (1979)—that visitation orders should not be entered nor visitation agreements enforced—would substantially increase litigation over custody. Our research supports them in this: Fathers are in fact often persuaded to drop a custody claim by the promise of a good visitation arrangement.

However, Mnookin and Kornhauser's otherwise illuminating speculations suffer from one important, and false, assumption: that it is the *parties* who bargain "in the shadow of the law." To the extent the parties know much of anything about what the law provides, they have learned this from their lawyers. A great deal of the actual bargaining is done by lawyers, too. It is the lawyer, as the intermediary between the client and the legal system, who mediates the "centrifugal" flow of messages whose importance Galanter (1981) emphasizes. By steering, mediating, and negotiating with the help of the "bargaining endowments" made available by their knowledge of the law and legal practice, lawyers seek to accomplish their objective of a 'reasonable divorce' that takes account of the practicalities of the situation, and the legitimate concerns of the client as well as those of the other party. The image of a client who is an active participant in the 'legal divorce', which is implicit in Mnookin and Kornhauser's discussion, does not correspond to what we have heard from lawyers and observed ourselves.

D. Summary: What Lawyers Do and Why[31]

The lawyer's guiding objectives of bringing about a 'reasonable divorce' and of doing so as much as possible out of court determine the central features of divorce practice. On the one hand, there is the lawyer's relationship with the client, who has to be persuaded to settle for what is reasonable and realizable. The lawyer seeks to do this with a varied mix of practical advice, social norms, authoritative legal pronouncements and technical legal advice, control over the client's access to legal information, and procedural and formal control of the case. Oc-

[31] A number of activities in which lawyers in divorce cases might be expected to engage apparently rarely occur in practice or are regarded as unimportant by lawyers. Lawyers have little to do with whatever practical problems their clients may have in arranging for welfare, for example, or in securing new housing (in the Netherlands, this is a bureaucratically complicated affair). Interventions directed toward the prevention of violence by the spouse were only indirectly alluded to by a couple of lawyers. Lawyers very rarely refer clients to other sorts of professionals.

casionally 'client control' even takes the form of overt threats (for example, to withdraw from the case). On the other hand, the lawyer negotiates with the other side in an attempt to reach a mutually acceptable settlement. In short, divorce practice consists largely of two sorts of "bargaining in the shadow of the law:" that shadow covers the lawyer's relationships both with the client and with the other party.

A socio-psychological aspect is not a central part of most lawyers' conception of their role.[32] Only a few describe their function as consisting partly of providing the client with someone to talk to about the divorce and their willingness to spend much time on this is limited. Some lawyers mention the importance of giving the client moral support, but all consider it very important to maintain their distance from the client.

Lawyers do perform the necessary paperwork and handle the administrative side of the divorce. But these are the least important and time-consuming parts of what they do, and only sporadically (and then more often than not ironically) do lawyers mention them as part of their function. Moreover, this work is only artificially necessary, as it results largely from requirements imposed by the legal arrangement of the divorce procedure. Given another arrangement, such tasks would be either unnecessary or could be done in most cases by nonlawyers (cf. Cavanagh and Rhode, 1976).

While both our observations and the interviews with lawyers make clear that expert legal advice and assistance is important in most divorces, no lawyer emphasized dealing with technical legal problems as a major part of his or her work. In part this merely reflects the fact that in most cases legal aspects of a divorce that to a lawyer seem complex (for example, the tax aspects of alimony or a property settlement or a conflict of law problem) do not play a role. Not a single lawyer mentioned representing the client in court—the only aspect of the lawyer's role which is legally required and covered by the professional practice monopoly of the bar—as an important part of his or her role. In short, lawyers do not seem to see archetypically 'legal' activities as the most important aspects of divorce practice. Cavanagh and Rhode's findings for Connecticut lawyers (1976: 141) are strikingly similar on this point.

[32] Although our research was not focused on this question, it gives no support to the widespread notion that lawyers have a "trained incapacity" (O'Gorman, 1963: 159) for this aspect of their work in divorce cases, or that their behavior in this respect is "amateurish" (by implicit comparison with the advice to be obtained from other professionals) (Cavanagh and Rhode, 1976: 152–153). Our rather more positive impressions are similar to those in *Yale Law Journal*, 1978.

What the lawyer usually does in a divorce case may be summarized as follows:

- providing legal information and especially advice in which legal and practical elements are combined;
- setting out the legal margins within which the parties can make their own arrangements, and calling their attention to mandatory elements of an arrangement that they may be inclined to overlook, such as child support;
- steering the discussion with the client in the direction of decisions on the legally necessary questions and toward an out-of-court settlement of those questions;
- pointing out oversights in the parties' arrangements and giving advice on the legal and practical implications of these arrangements;
- mediating between the parties and suggesting possible compromises;
- negotiating with the other side, in particular with the lawyer for the other side; and
- using both nonlegal and more or less explicitly legal considerations (and sometimes overt threats) to persuade the other party, and more particularly his or her own client, to agree to a reasonable settlement.

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