
Lawyers, Mediation, and the Management of Divorce Practice

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Despite a widespread assumption that divorce mediation and divorce lawyers are incompatible, lawyers do play active—if largely unexamined—roles in many mediation programs. This article reports on the work of lawyers in a state with mandatory mediation. We find that lawyers in Maine have generally embraced mediation because it helps them manage problems inherent in divorce practice. Mandated divorce mediation facilitates both settlement negotiation and trial preparation, permits client participation in decisionmaking without requiring lawyers to surrender control, provides a forum for resolving both legal and nonlegal issues, and promotes efficient case management.

Discussions of legal practice and dispute resolution are often dominated—and distorted—by the tendency to view the world in either-or terms (Nader 1984). Both the popular and academic literatures are preoccupied with contrasts between formal and informal processes, competitive and cooperative attorney styles, clients' rights and needs, lawyer and client control of decisionmaking, and so on. Whatever utility it may have for framing rhetorical questions about legal reform, such binary thinking does not accord with the more complex realities of legal practice, which are often located not at one end or another of such polarities but in the dynamic interplay between them.

The experiences and observations of divorce attorneys who participate in mediation with their clients provide a new angle of vision on some of these central realities of day-to-day law practice. They also offer fresh perspectives on the highly variable character of divorce mediation itself. In this article, we examine how lawyers in the state of Maine report understanding and par-

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ticipating in mandatory, court-sponsored divorce mediation. From the lawyers' descriptions of their work, we identify four central challenges of divorce practice. Although experienced attorneys may give them little conscious thought, these dimensions of practice require numerous and sometimes difficult decisions that lie at the heart of divorce lawyers' work: how to pursue both negotiation and trial preparation; how to encourage client participation in case preparation while retaining one's professional authority; how to provide clients with legal advice while addressing vitally important nonlegal issues; and how to structure and manage cases so that they can be moved predictably and expeditiously.

While viewing the practice of divorce law as organized around the decisions necessary to solve these problems, we also see—through the eyes of participating lawyers—a mediation process that is far more varied and complex than the simple models of many of its advocates and critics. This mediation, for example, permits talk about rights as well as problem-solving negotiation; encourages client involvement while providing opportunity to lawyers to advocate for and support clients; and structures negotiation at least as often as it substitutes for trial. Indeed, we believe that the wide acceptance of mediation by divorce lawyers in Maine can be understood in terms of its apparent capacity to expand the options and ease the choices for lawyers in dealing with the demands of their divorce practices.

These issues until now have been largely unexplored. Research about the day-to-day work of lawyers is limited (Abel 1985) and focuses largely on the tasks they perform rather than on the decisions that underlie those tasks. Research on lawyer-client interaction has yielded richer insights, particularly in emphasizing its nuanced and fluid character (Felstiner & Sarat 1992). Studies of divorce lawyers thus far have left their experience with mediation unexamined, even though much of that literature highlights attorneys' strong settlement orientation (see, e.g., O'Gorman 1963; Kressel 1985; Sarat & Felstiner 1986, 1988; Griffiths 1986; Erlanger, Chambliss, & Melli 1987; Ingleby 1991, 1992; Davis 1988). Finally, lawyers appear as little more than shadows in the literature on divorce mediation,¹ where research has focused largely on divorcing parties (Pearson & Thoennes 1985, 1989) or on the mediation process (Greatbatch & Dingwall 1989). Consequently, we know almost nothing about the roles that lawyers play in mediation and in advising their clients about it.

¹ Davis (1988) is a notable exception. In the commentary, both critics and champions of mediation assume that lawyers are largely absent from the divorce process (Rosenberg 1991; Hyman 1987; see also Riskin 1982). Many mediation opponents likewise assume—but deplore—the absence of lawyers, since without their advice divorcing parties, particularly women, are pressured in mediation to negotiate away their legal entitlements (Bryan 1992; Fineman 1991; Grillo 1991). The virtual absence of attorneys in discussions of divorce mediation rests on the assumption that there is a fundamental incompatibility between the mediation process and the work of lawyers.

This article begins to examine these issues with data collected from interviews with Maine divorce lawyers. In the sections that follow we describe our research methods; situate our analysis in a description of mediation in Maine; explore in detail the four dimensions of practice and the ways mediation assists lawyer in dealing with them; and reflect on the impact of mediation on divorce practice and the characteristics of mediation that produce that impact.

I. Data and Methods

This examination of the integration of divorce mediation into divorce law practice draws from data gathered in a larger study of the day-to-day work of divorce attorneys in Maine and New Hampshire. Here we focus on data from Maine, although occasional comparisons are made with New Hampshire divorce cases and lawyers. Our data come primarily from lengthy semi-structured interviews with 163 divorce lawyers, conducted by the authors in 1990–91. To select lawyers to interview, we sampled the 1989 divorce dockets of courts in three New Hampshire and four Maine counties that were roughly similar with regard to population size, urban concentration, and income.² In each court³ we recorded the names of the lawyers of record, developing a frequency distribution of their appearances. Then we sampled the list, taking all the lawyers with the most frequent representations, about half of those with moderate frequencies, and a few of those with lesser frequencies. In no case did we choose from the many lawyers who represented only one or two divorce clients a year. We supplemented this list of active divorce lawyers with names identified by other attorneys and by court clerks.

Through this process we identified 178 divorce lawyers and arranged and completed interviews with 92% of them. Our interviewees included 88 lawyers in Maine and 75 in New Hampshire. Of the total interviewed, 37% were female and 63% were male.⁴ Most of the lawyers worked as solo practitioners or in small law firms.

Our interviews averaged 90 minutes each and were taped and later transcribed. Only one part of the interview focused on the relationship between mediation and divorce practice. We asked questions about the nature and frequency of lawyers' participa-

² Initially we selected three counties in each state, but we later added one court in a fourth Maine county that bordered on New Hampshire in an effort to include divorce lawyers who practiced in both states.

³ Although the counties are comparable demographically across the two states, the court systems are not. In Maine each county has a superior court and one or more district courts in which divorce cases are filed. In New Hampshire the superior court for each county hears *all* divorce cases. As a result, we ended up with three courts in New Hampshire and seven in Maine.

⁴ For discussion of gender-based differences and similarities among these divorce lawyers, see Maiman, Mather, & McEwen 1992.

tion in mediation, the advantages and disadvantages of mediation in divorce cases, and the lawyers' perceptions of mediation in Maine.

In addition to the interviews, we gathered data from the docket records of a large sample of divorce cases from the same counties in Maine and New Hampshire. We systematically sampled divorce dockets in each court during several years in the period 1979–88, coding information about number and types of motions filed, court hearings and judicial orders, dates of filing and disposition, and lawyers' names.⁵ A total of 4,790 Maine divorce cases and 2,001 New Hampshire cases were thus coded.

Since the argument presented in this article rests primarily on our interview data, it is important to address their strengths and weaknesses. We view the interviews in two different ways. At one level, the lawyers interviewed were respondents whose answers can be analyzed both quantitatively and qualitatively for patterns and frequencies. We recognize, however, that the lawyers' reports of their behavior may not reflect their actual practices. Hence, wherever possible, we have used other sources of data for corroboration. The interviews can also be understood at another level, however. That is, the attorneys are informants about their own work and that of their colleagues. These women and men have typically handled hundreds of divorce cases over years and are thoughtful and critical—as well as self-interested—observers of the world in which they work (Schön 1983). As respondents, the attorneys are reporting their understandings, perceptions, and beliefs about mediation and the divorce process. As informants, they offer insights and observations that help to illuminate our understanding of a divorce lawyer's work and the place of mediation in it.

The specific form that divorce mediation takes influences significantly the response of attorneys to it. Thus, in the next section, we situate Maine's divorce mediation program within the national context of mediation alternatives. We also describe basic features of the Maine law and compare mediated and non-mediated divorce cases in Maine, particularly in terms of the role of lawyers.

II. Divorce Mediation in Maine

Divorce mediation differs widely across the United States, and thus statements about "divorce mediation" in general should be suspect. As examples of this variation, consider that in some

⁵ In Maine we coded cases from 1979, 1980, 1983, 1984, 1985, 1986, and 1988, while in New Hampshire we sampled cases only from 1980, 1984, and 1988. We drew samples from more years in Maine in order to cover the time period immediately surrounding the adoption of mandated mediation, and its temporary suspension in early 1986. Depending on the size of the court, we sampled one-fourth (large courts), one-third (medium-sized courts), or one-half (small courts) of the divorce docket.

areas mediation is purely voluntary, while in others it is mandated by the state or by the local court;⁶ mediation may address all issues of a divorce or be limited by law to child custody and visitation;⁷ and either public or private mediators can deliver mediation services. Some mediation programs exclude the parties' lawyers, while others encourage them to participate.⁸ Mediators themselves vary in their backgrounds, credentials, and training, so that some mediators see their roles largely as nondirective and facilitative, while others seek to be more active and judgmental. These and other critical variations in divorce mediation result from official state policies, and from program ideologies and training (Rogers & McEwen 1989). Moreover, mediation practices vary significantly even in mediation programs that share some of the same features. California, for example, permits county-by-county choice on such issues as lawyer presence, whether fees are to be charged for mediation, and whether mediators may be required to advise judges about how to decide cases that do not settle.⁹

Given this diversity in mediation policy and practice, our analysis of divorce mediation must be carefully contextualized. We are reporting on mediation in Maine, a state that has organized divorce mediation differently from many states. In July 1984, divorce mediation became mandatory in Maine prior to the scheduling of any contested hearing in all cases involving minor children (Maine Revised Statutes Annotated, title 19, § 752). Un-

⁶ The National Center for State Courts in Williamsburg, VA, maintains a State ADR Program Database that is based on responses to standardized forms by directors of about 1,100 U.S. court-annexed and court-referred dispute resolution programs. The Database is referred to hereinafter as "NCSC Database." The data from this database were supplied to us in fall 1981 by Kenneth Pankey of the NCSC, but all the summaries of the data are our own.

The NCSC Database indicates that of the 205 court-related divorce mediation programs for which it has data, 75 mandated participation categorically, 75 permitted case-by-case judicial (mandatory) referrals, and the remaining 55 were initiated by one or both parties.

⁷ The NCSC Database indicates that of the 205 court-related divorce mediation programs for which it has data, 109 focused exclusively on custody or visitation conflicts, while the other 96 included spousal support and or property division issues as well.

⁸ Even where prohibited from participation in custody mediation, lawyers are still likely to be engaged to deal with property matters and to advise clients regarding custody issues. Attorneys may serve as gatekeepers to the mediation process, advise clients about negotiation goals, and review potential agreements. In some mediation programs, however, lawyers play even more active and visible roles. According to information from the NCSC Database, lawyers regularly participate in mediation sessions in 14% of the 205 court-related domestic relations programs included in the data set; an additional 4% of programs report at least occasional lawyer participation in or observation of mediation sessions.

⁹ California superior courts vary considerably in their choices. Of 54 courts reporting, 33 indicated that mediators made recommendations to judges in at least some cases; 14 courts reported charging for mandated mediation, while 41 did not (Judicial Council of California 1990). Of the 34 California courts responding to the NCSC Database survey, 24 indicated that lawyers did not participate in mediation sessions, 5 indicated that they did so actively, and 5 that their participation occurred by agreement of the parties.

like most divorce mediation statutes, the Maine law allowed mediation to focus on *all* issues in divorce, not just on child custody and visitation. Also, the mandate means in practice that if parties with children have reached a settlement on their own or anticipate doing so, they need not schedule mediation. Only in those cases where one or both parties want mediation or where one or both anticipate the possibility of a contested hearing is a request made—by the parties, not the court—to schedule mediation. Generally, mediation in Maine is done by nonlawyer mediators who have limited formal training and who work for very modest wages from the state (Orbeton 1987). Divorce cases in Maine typically involve only one mediation session, held at the local courthouse, lasting on average between two and three hours.¹⁰

As a consequence of the 1984 mandate, the number of divorce mediation sessions increased precipitously, from 350 in 1983 (when mediation was voluntary and only available in parts of the state) to 4,918 in 1985 (Maine Judicial Department 1987). In 1985, the first full year of mandated mediation, close to 30% of the total divorces filed in Maine went to mediation, compared to about 4% in 1983.¹¹ In 1986 the state assessed a fee of \$60 per couple for the mediation service (Orbeton 1987). Thereafter, the percentage of divorces going to mediation declined to a rate of about 22% by 1990.

Maine lawyers have, from the start, actively assisted their clients in making strategic decisions about whether to enter mediation. Lawyers' recommendations about mediation depend, of course, on their having had prior involvement in the case. In Maine, lawyers typically represent fewer than half of divorcing parties, a figure that is consistent with other studies nationwide (Yale Law Journal 1976; Goerdt 1992). In our sample of Maine divorce cases from 1979 to 1988, neither party was represented in 16% of the cases, only the plaintiff was represented in another 44%, and the defendant only in less than 2%. Both parties had legal representation in 38% of the cases.¹²

¹⁰ The facts and characterizations reported here come from Maine Court Mediation Service 1982, 1988; and Orbeton 1987.

¹¹ The percentages for 1983 and 1985 are estimates. Until 1986 the Court Mediation Service only kept track of the number of "domestic relations mediation sessions held." Some cases involved more than one session, however, and not all domestic relations sessions focused directly on divorce; some dealt, for example, with postdivorce actions. Beginning in 1986, statistical reports included data both on numbers of sessions and on numbers of cases. These reports further differentiated divorce mediations from mediations on temporary orders or postdivorce matters. Proportions (cases/sessions; divorce/domestic relations) drawn from the more recent data were used to make estimates for 1983 and 1985 (Maine Judicial Department 1987, 1990).

¹² These percentages are weighted averages from the district court and the superior court reflecting the proportions of divorce cases filed in each court. Lawyers are much more likely to be present in superior court divorces (80.7% involved two lawyers), but less than 8% of Maine divorces occur in these courts. Lawyers described a wide range of reasons for choosing one court over the other for their cases—including quality of judges and scheduling.

The typical mediation case in Maine, however, usually involved two attorneys. In our sample of mediated cases since 1984 ($n=422$), 80% involved two lawyers, and another 17% had one lawyer, typically for the plaintiff. In only 3% of the cases did both mediating parties proceed without any lawyer. Mediated cases also had substantially more than the average level of legal contest. Analysis of our docket data shows that, on average, mediated cases took twice as long to dispose of as nonmediated cases in the same courts (355 days vs. 184 days);¹³ had more than three times as many temporary or discovery motions (1.82 motions per case vs. 0.5) and court actions such as motion hearings and issuance of temporary orders (.48 court actions per case vs. .14).¹⁴ In stark contrast to the assumption that mediation substitutes for an adversarial legal process, mediated cases in Maine since 1984 appear to have been more legally contested than nonmediated cases and *more* likely to have two attorneys involved. Clearly, the requirement in Maine that contested cases be mediated produced this result.

Not only were lawyers likely to represent parties in mediation, but they also regularly attended mediation sessions. Of the Maine lawyers we interviewed, 78% reported they “always” attended mediation sessions while another 17% “usually” attended.¹⁵ The partial exception was one Maine county, where only 48% of the respondents reported always attending mediation. However, there was general agreement among the lawyers in that county that their local practice was moving toward attorney attendance, the norm for much of the rest of the state.

Maine divorce lawyers have not only accepted mandated mediation as a fact of life but have with a few exceptions embraced it warmly. Of our Maine lawyers, 89% expressed unambiguous support for mediation, while 8% reported finding it useful for custody but not for financial issues, and 4% said they disliked mediation. Eighty-five percent of lawyers indicated that they voluntarily sought mediation, at least occasionally, in cases where there were no minor children. However, one-third of the lawyers voiced concerns about the uneven quality of divorce mediators or about the cost and time absorbed by mediation.

¹³ The greater length of mediated cases presumably was a function of the nature of the cases in mediation—i.e., those with greater complexity and conflict. The mediation proceeding itself may also have contributed to the length, similar to MacCoun’s (1991) finding that the introduction of mandatory arbitration in New Jersey led to a significant increase in the filing-to-termination time in automobile negligence cases.

¹⁴ These figures are based on our sample of 422 mediated and 1,758 nonmediated cases from 1985, 1986, and 1988. The length of each case was measured from the date of filing to date of final disposition. The average number of motions per case was based on a count of motions described below in note 36. The measure of court actions is the average number per case of hearings on motions and issuance of temporary orders or orders for protections from abuse.

¹⁵ The director of Maine’s Court Mediation Service similarly reports high rates of lawyer attendance and participation in divorce mediation sessions (Charbonneau 1993).

We are left to question, then, how and why Maine divorce lawyers have adapted to mediation so completely? The answer lies, we believe, in the character of divorce law practice and the capacity of mediation to assist lawyers in handling some of the key challenges in their day-to-day work.

III. Adaptation: Incorporating Mediation into Divorce Law Practice

The practices of divorce lawyers involve a range of different tasks and problems, each requiring skill and sensitivity. At times they may demand potentially inconsistent conduct such as sharing or not sharing information with the other party or making professional judgments on behalf of clients or leaving decisions open to clients. We believe that the willingness of Maine lawyers to accept divorce mediation and incorporate it into their practices stems from its capacity to assist attorneys in addressing such multiple and, at times, contradictory demands.

In particular, we have identified four dimensions of divorce practice, each involving its own particular challenges. These dimensions have been abstracted from our data, and thus they are analytic rather than “folk” categories. They are, however, firmly anchored in the literature about law practice—in empirical research, in the extensive commentary on practice, and in the normative literature prescribing codes of professional conduct. The four dimensions which we examine are (1) pursuing negotiated settlement and preparing for trial, (2) controlling clients while allowing their participation in decisionmaking, (3) handling nonlegal issues as well as legal issues in the divorce, and (4) directing the legal process through strong case management. In the next sections, we describe these dimensions in detail and draw on our interviews to show how divorce attorneys perceive mediation as a valuable resource in dealing with the challenges they pose.

A. Negotiation of Settlement and Preparation for Trial

Lawyers are often characterized as either adversarial or cooperative in their general approach to case resolution.¹⁶ Such a juxtaposition obscures the frequent necessity in law practice of moving between and combining approaches. Flexibility in approach is made difficult, however, by the fact that the formal legal process is organized around the steps to trial. Although most cases ultimately settle through negotiation, lawyers must orchestrate

¹⁶ In the substantial literature on lawyer negotiation, it is also common for contrasts to be drawn between distinctive approaches to settlement—the cooperative (or integrative, problem-solving, principled, value-creating) and the competitive (or distributive, adversarial, positional, value-claiming) styles (Menkel-Meadow 1993).

negotiation largely on their own, with the occasional help of court-initiated settlement conferences on the eve of trial.

The demands of trial preparation and of negotiation are not entirely consistent, despite Marc Galanter's (1984:268) useful characterization of them as a single process of "litigotiation." Lawyers must decide, for example, between aggressively using formal legal procedures such as discovery and embarking on cooperative, informal efforts at information sharing; between taking extreme positions and making "reasonable" offers; between being open and honest about underlying interests and goals or keeping them hidden; and between engaging in strategic behavior that imposes costs and pressures on the other party and minimizing posturing and costs for both parties. A key dimension of divorce law practice involves addressing such choices as these that are imposed, in part, by the "litigotiation process."

In his analysis of the role of divorce lawyers, Kressel (1985) identifies this as a "professional dilemma": "While the official code of conduct prescribes a zealous pursuit of the client's interests, the informal norms and the realities of professional life prompt compromise and cooperation. Unfortunately, clear guidelines for helping attorneys decide which path to take are nonexistent" (1985:59).¹⁷ Conclin (1992) concludes that the result of this dilemma is a pattern of negotiation between lawyers that is adversarial and stylized. That is, it consists of "aggressive communication maneuvers such as argument, challenge, and demand . . . carried out in a slightly exaggerated, somewhat predictable, and essentially impersonal fashion" (pp. 84-85). Nevertheless, there is substantial evidence from a variety of areas of practice that lawyers generally are settlement-oriented.¹⁸

The character of law practice compounds the challenges for lawyers of dealing with simultaneous demands for trial preparation and settlement activity—whether through competitive advocacy or cooperation. The press of handling many cases and clients typically prevents sustained attention to any single case until an official deadline forces it. As a consequence, lawyer-guided negotiation is likely to be episodic and drawn out, proceeding in fits and starts through exchanges of letters or phone calls, interspersed with consultation with clients. It is not surprising that empirical research on lawyer negotiation describes much of it as "low intensity" (Kritzer 1991; Genn 1987). On occasion, of course, lawyers—particularly those who know and trust each other—may arrange their own four-person conferences in order

¹⁷ The Model Code of Professional Responsibility acknowledges in its preamble the need for both zealous advocacy and "honest dealing" (Gillers & Simon 1992:6), while the rules themselves (see, e.g., Rules 3.4 and 4.1) demand at least some sharing of information (*ibid.*, pp. 161-62, 193).

¹⁸ See, e.g., Alexander 1992; Sarat & Felstiner 1986; Griffiths 1986; Erlanger et al. 1987.

to bring lawyers and clients together in sustained negotiation (Ryan 1992). In other instances, they may delegate to their clients a substantial role in negotiation, although these discussions may be as acrimonious as the marriage itself (Erlanger et al. 1987).

According to lawyers we interviewed, mandatory mediation changes the structure of the formal legal process, by adding an official settlement event that involves parties directly in the negotiation process. Attorneys thus report that mediation encourages a focus on settlement, in part by preparing their clients for it. The gathering of lawyers and clients together in the same place also improves the clarity and efficiency of communication. When attorneys participate in mediation, they find that the nature of communication is transformed as well, as mediators set normative restraints on overly aggressive conduct. At the same time, mediation does not preclude and may even enhance trial preparation. Lawyers especially appreciated mediation for the information it gave them about the other side and for the opportunity to test out arguments that might be used at trial.

The introduction of mandated mediation into the “litigation” process provides a short detour on a road leading to, but unlikely to reach, trial. It is a tangible event that can create a sense of urgency about settlement that otherwise may not occur until a firm trial date looms.¹⁹ One attorney described this as a key advantage of mediation:

The other thing that you can't do without mediation is have all four people in the same place at the same time with some time limits and the sense of an opportunity which if not taken will be missed.

The scheduling of a settlement event gives both lawyers and parties an opportunity to think seriously about their goals and encourages serious settlement discussions.

[M]ost lawyers tend not to get ready until they have to . . . [that is,] sitting down and focusing on what the issues are. And mediation helps to speed up that process because they've got to be prepared for that mediation.

The mediation event may also move indecisive clients to make decisions they have been reluctant to make.

And it also helps, I think, to get the parties ready in a sense, to be prepared for mediation they really have to give the matters some thought, think about what they truly want, what they expect out of the process, and it causes them to focus on the real issues that they might otherwise have been ignoring or just refusing to come to grips with.

¹⁹ Other court events may play a similar role to mediation in this regard. For example, preliminary hearings or hearings on temporary motions may lead to informal settlement conferences—typically involving the judge and lawyers but not the parties.

Nonetheless, not all lawyers are prepared for mediation when it occurs, thereby diminishing its value as a final settlement device. For example, 39% of Maine lawyers reported their colleagues to be well prepared only “sometimes” or “rarely” at time of mediation. One of the reasons for incomplete preparation is that attorneys also recognize that mediation provides opportunities to glean new twists about the case from their own client and the other party. For a few lawyers, that fact, along with the cost of substantial preparation, leads them to use mediation as something akin to a client interview. Even when one or both sides are incompletely prepared for mediation, however, the event itself focuses attention on settlement and helps launch—if not conclude—negotiation.

Lawyers also commented about how mediation often opens up communication in ways that facilitate settlement. Chain communication can distort messages as they are passed along from client to lawyer and lawyer to client (Rubin & Sander 1988). More than a third of the lawyers interviewed noted that traditional negotiation exchanges among lawyers suffer from inefficiency and miscommunication and praised mediation for the fact that it brings all four parties together for negotiations. For example,

If you're negotiating, and you're doing letters, which I hate to do already . . . and phone calls, and you're meeting with lawyers, the client's going to get the sense of “Wait, who's doing this anyway? I didn't say I would do that.” And so [mediation] is a way of covering your tail and involving your client and being efficient about getting a resolution.

I think . . . people regard [mediation] as a good place to do their negotiations and get them over with in one or two sessions. Everybody's there. You don't have to say, “Well, I've got to ask my client.” If there's any confusion, they're both there to talk about it. They're both there to disagree, so you don't lose. . . . Something isn't lost in the translation.

It gets them face to face with the other side. It eliminates all the rumors. They tell me what their spouse said their lawyer said; all that smoke is gone when we sit down in mediation.

A variety of kinds of “smoke” get cleared away in mediation sessions involving both clients and lawyers, cutting through information barriers that reduce the possibilities for settlement. In typical negotiations a lawyer has no contact with the other party and must communicate only through that person's attorney. As a result, lawyers often do not have good first-hand knowledge of the priorities and concerns of the party on the other side, important knowledge for effective negotiation.

[Mediation] gives me more of a chance to assess the other side, who that person is and what are the things [that are important to them]. If you're working through the attorney, you don't re-

ally get that feeling of contact until you get to court, which is a little late.

Lawyers hear their [client's] side of the story, and they start from that, and they believe in their side of the story, and they never really understand or fully accept the other side, the other view of the same situation. If you hear it from the other lawyer, you don't believe in it as thoroughly as if you're sitting there [in mediation], and the lawyer and client are spelling it out in a way that you have to . . . absolutely listen, and you can't interrupt, and it really gets spun out.

In an adversarial process, a lawyer learns to distrust the portrait of the other spouse painted by the opposing lawyer. At the same time, attorneys must remain skeptical of their own client's portrayal of the situation and of the other side (Kressel 1985:164). The information derived through a face-to-face meeting with both spouses and lawyers thus fills a vacuum that affects crucial assessments of the credibility of the other party and lawyer and, ultimately, of one's own client. With that information, the lawyer may feel better informed about how to approach settlement effectively as well as how to evaluate the prospects for trial.

The presence of the mediator, the relative formality of the mediation event, and the ideology of mediation can influence not only the organization and content but also the tone of discourse between parties and lawyers. Unlike lawyer-to-lawyer or party-to-party negotiation or even a four-way conference, mediation diminishes the temptation and—especially with mediators pushing each side to compromise—the ability to behave antagonistically rather than cooperatively.

[I]f I'm dealing with counsel that really wants to be pushy, wants to get as much as they possibly can and wants to treat the divorce as a true adversarial conflict in which they want to win, [mediation] sometimes can get them to come around a little bit.

And I think it's an atmosphere where people are for some reason or another, maybe it's because there's another person in the room who's neutral. The climate is there for compromise and if you get, sit in a room with two lawyers, I think, clients tend to think that they've got these two champions there and so that's the whole mode. It's just such a different dynamic when you get into the mediation room.

What it does is . . . bring in somebody who is not just another totem in the conflict game. It's somebody who is putting a whole different . . . or at least a place where the purpose is not to encourage conflict, but it is to encourage negotiation, resolution and reaching of common ground. . . . When you're sitting there with lawyers and clients, unless you've got a really good lawyer on the other side who's also a negotiator and dedicated to solving problems, you've got a situation which basically

is an exercise of one side trying to outwit or outdo the other. It's not, many times, a healthy situation. Mediation is the only place in the process, as far as I'm concerned, that has got a healthy opportunity to make people reach common ground.

Mediation thus can subtly change the dynamics of the negotiation enterprise, making adversarial tactics less acceptable and more difficult to mobilize because a third party can credibly call their use into question.

Although permitting expressions of anger, the norms of mediation also demand civility and a sense of decorum that may be lacking in the private interchanges between lawyers or their clients:

They're going to have to sit down across the table and face you and most of the time they may have been kind of ugly to you over the phone or the documents you've traded back and forth may have sounded very aggressive, but when you actually sit down across the table, it's rare that you get someone who's being [obnoxious].

[L]awyers never talk to each other face to face. It's easy to be Tarzan over the telephone, it really is. It's real hard to pull that garbage when the client [is present] . . . you can call my client a slut or a crook over the telephone, but it's real different to have the guts to do that when they're sitting across from you. A lot of lawyers who will do that nonsense over the telephone won't do it in person.

Mediators attempt to discourage lawyers' adversarial or hostile conduct, and the relative formality and presumed goals of the mediation session seem to dissuade participants from such behavior.

If mediation provides a settlement detour on the road to court, it is a scenic route with a clear view of trial. Through their participation in mediation, lawyers can assess the likely strengths and weaknesses of a case in court and gain information that may serve either for settlement or trial (Siemer 1991).

I want to meet the other side, size them up. I want to see what sort of witness they'd make for the judge. I want a chance to see how they'd hold up under my questioning. I want to make my own judgment about whether they're reasonable or unreasonable. I want to watch the other lawyer work with the client. . . . Essentially I get the same information from mediation I would at a deposition. . . . So I'm a big fan of mediation, but maybe not for all the right reasons.

Although few lawyers so clearly embraced mediation for these reasons, others referred to mediation as "poor man's discovery" or "cheap depositions," and most (62%) acknowledged that mediation serves "often" or "sometimes" as trial preparation.

Of course, if one lawyer can use the process for discovery, so can the other. Thus, several lawyers expressed concern about

protecting clients from the discovery efforts of other attorneys in mediation:

I mean, you don't want your client just sitting there baring their soul because they think that this is somehow something that's not admissible or that they want to impress the mediator of whatever emotionally is going on. This isn't the forum to do that [because the other side is listening].

Once you open your mouth and you say something, it's no longer confidential. They may not be able to introduce it and impeach you at a trial, but that doesn't mean they don't know it. If the other side knows something my client said, I want to know they said it. And the only way you can know it is you gotta be there.

Three or four lawyers described mediation as a place to try out their best trial arguments on a nonpartisan and reasonably experienced person.

[It is] a chance to see if I've got a salable case here." If the mediator says to me, "Oh, what a load of horseshit that is," then I rethink my trial strategy. But if the mediator seems to be sympathetic . . .

[Mediation is] an unofficial game that brings in an independent person who is qualified to deal with all the various factors of divorce cases . . . and it allows a person to . . . give both parties an unbiased kind of opinion as to any issues in the divorce case. I think it's the closest thing before going to court you can give to the parties to try to get a third party's independent opinion of what might happen.

Thus, even those lawyers most oriented toward trial work found participation in mandated mediation useful. At the same time, they, like others, were pressed to consider settlement seriously.

Lawyers' understandings of legal rights and predictions about likely outcomes at trials cast a strong shadow on the advice they reported giving about settlement before, during, and after mediation sessions (see Mnookin & Kornhauser 1979; but see Jacob 1992). Maine lawyers balanced their view of mediation as an advantageous place to reach settlement with an awareness that the mediation process could pressure parties into unwise agreements.

I also think I have an obligation to shield my client from a lot of that pressure. Mediation is like a crucible and bad decisions can be made.

I've had clients . . . who just say, "OK, fine." They agree to things that maybe they didn't really want to.

Numerous clients will sit down . . . and their position is somewhat unrealistic. And you get them to sit down across the table from somebody else who's talking reasonably and getting this person to edge in a little, and the process does work. They start

them down the road, and they do things. In those situations, before we get an agreement, . . . I want to talk to my client, and say, "Do you agree? Are you sure you don't feel pressured by this? These are the things you said you weren't going to concede; you've conceded some of them. Is this what you want to do? You're entitled to do it and I think it will work (if I do feel that way), but just make sure you're not being pressured.

I never send my client without me because I worry that the pressure of the mediation will make my client make an agreement without talking to me. And I sometimes want to take him or her out in the hall and go [slapping noise], "Straighten up! You've given something away we don't have to give away yet!"

Consistent with the concerns of critics of divorce mediation (e.g., Fineman 1991; Grillo 1991; Bryan 1992), Maine lawyers said they knew of clients who had experienced the pressure or "momentum" of mediation or "being browbeaten" by particular mediators who were too concerned with getting a settlement. But the lawyers saw themselves as playing the role of rights-oriented advocate, advising and protecting their clients during the mediation process.

Thus, attorneys in Maine have found that mandated mediation assists them in moving toward settlement while simultaneously advocating for rights and even preparing for trial. Most lawyers praised mediation for the useful focus it provides for settlement activity by diminishing some of the barriers to communication, information sharing, and understanding that often arise in unstructured negotiation. At the same time, the lawyers viewed mediation as good preparation for the eventuality of trial, allowing them to assess the strengths of the other side and to use the session for informal discovery purposes.

B. Controlling Decisionmaking

Another key dimension of legal practice lies in the complex relation between lawyer and client, in particular the balance that must be struck between lawyer and client control over decision-making. According to the Model Rules of Professional Conduct (Rule 1.4(b)), "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" (Gillers & Simon 1992:31).²⁰ Yet, according to Gordon (1988:10), "One often hears as well that to assure effective representation the lawyer must be able to

²⁰ However, the Comment that follows also notes that "a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail" and that "Practical exigency may also require a lawyer to act for a client without prior consultation" (Gillers & Simon 1992:31). According to one commentator, "The Model Rules of Professional Conduct, although ostensibly favoring client control, also are ambiguous, and do not resolve the question of decisionmaking authority" (Strauss 1987:319 n.25; see also Berger 1987: 1316).

'control' the client—to assert exclusive or final decision-making authority on strategic or tactical issues.”²¹ The traditional model of lawyer-client interaction presumes that lawyers direct decision-making and that clients play a fairly passive role, but concerns about problems created by lawyer dominance have led scholars recently to articulate a more “client-centered” model (e.g. Rosenthal 1974; Ellman 1987; Binder, Bergman, & Price 1991). Rather than seeing the lawyer-client interaction as an either/or matter, Felstiner and Sarat (1992) emphasize the fluidity inherent in the relationship. Thus, they argue that “power in lawyer client interactions is less stable, predictable, and clear-cut than the conventional view holds . . . [and that] it is continuously enacted and re-enacted” (p. 1454). We agree, and see the issue of lawyer-client control to be one of the most central in law practice.

Precisely because the professional expertise of the lawyer may make it difficult for clients to exercise decisionmaking authority (Ellmann 1987), attorneys must constantly demonstrate their identification with a client's interests and needs. Lawyers thus may build client trust by accepting and supporting a client's world-view. At the same time, however, lawyers must try to act as objective and skeptical advisors. The skeptic's role often means telling clients things they do not want to hear and urging compromise, thus placing in jeopardy the clients' trust in them as vigorous allies (Davis 1988). As one divorce lawyer put it, “I tell people, ‘you want me to tell you what you want to hear or you want me to tell you the truth?’ Sometimes it's hard to do [the latter].”²² Thus, issues of confidence, trust, and independence are closely related to the dimension of control in the lawyer-client relationship.

The problems of managing the balance between lawyer and client control are at least as great in negotiation as in formal legal proceedings.²³ When lawyers take on a major role in negoti-

²¹ Social scientists have documented some of the pressures toward, conditions for, and consequences of lawyer or client control (O'Gorman 1963; Rosenthal 1974; Heinz & Laumann 1982; Olson 1984; Kressel 1985; Sarat & Felstiner 1986, 1988; and Felstiner & Sarat 1992).

²² The Model Rules of Professional Conduct acknowledge this difficulty in the call to “render candid advice” (Rule 2.1). The comment notes that “a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client” (Gillers & Simon 1992:134).

Another discussion of this dilemma is found in the American Bar Association Section of Legal Education & Admissions to the Bar's (1992) summary of lawyering skills. That report notes that the skill of “counseling” involves “the lawyer's need to strike a proper balance between two conflicting considerations”—maintaining the lawyer's dispassion and objectivity while also communicating to the client a commitment to the client's goals and interests (pp. 177–78).

²³ Bundy (1992:47) notes: “For the client to exercise effective control in negotiation, however, either the client must be sufficiently motivated to bargain with her lawyer in order to obtain control, or her lawyer must adhere to a ‘client-control’ approach to practice. For clients who are not that effective or fortunate, negotiation may pose greater risks of loss of control than adjudication.” See also Condlin (1992), who points out that “the information and understanding necessary to make [the] determination [of a client's

ating a divorce, clients can easily lose track of where things are because they are not privy to phone exchanges between attorneys and may find it difficult to penetrate and interpret legal correspondence. Clients are distanced from settlement activities by the reliance on lawyers as intermediaries for exchange and interpretation of information. Frequently, in response to the sense of exclusion, clients demand the time and attention of their lawyers, wondering what has happened or, more likely, not happened and why.

Lawyers in Maine report that mandated mediation gives them new ways both to share information and decisionmaking with clients and to influence client decisions. In the lawyers' view, mediation is particularly useful because it supports their efforts to reshape client expectations. Further, lawyers recognize that mediation involves their clients directly in the actual settlement process but at the same time permits the attorney to supervise that participation.

The fact that lawyers use mediation to reinforce selectively the advice that clients resist hearing was remarked on by over half of the Maine lawyers with whom we spoke.

I can't force my client to do something the client is uncomfortable with. I'm not there to argue the other person's case. Whereas at mediation, it's an opportunity for my client to kind of expose his or her case to reality and the mediator many times is going to say, "Wait, is that what you really mean? Do you really think a judge is going to listen to this? Listen, I've just heard it for the first time and let me tell you what my reaction is." And you're kind of exposing . . . and many times when you say it to your attorney, it will be received, obviously, differently from just a completely disinterested person.

In other words, you can say [to a client], "You can't get that," and go to mediation, the mediation takes place, and this and that, and it shows that it's not only my ideas. Then I can come out and say, well, I told you. It gives them almost a second opinion.

What [mediators] do is lend sort of an objective ear before it gets to the court, the parties can try out their positions on the mediator, and even though the mediator isn't a judge and usually isn't that schooled in the law actually, they get a gut feeling, the client does, for how the mediator's reacting to whatever they're saying. And if the mediator is sort of leaning on them and saying "You're really taking an extreme position," or "I really don't think that's appropriate" or whatever, it's a lot easier to you as a lawyer to make that same observation to a client without a client feeling either that you're against them or somehow you're no longer their advocate.

bargaining interests] change constantly as bargaining proceeds" (p. 30). As a result, Condlin argues, lawyers who negotiate without their clients being present typically assume the client wants to maximize his or her tangible benefits.

Probably one of the biggest things is [mediation] puts the client in touch with reality in some instances. Where I'm not successful in driving home the point that the client is being unreasonable, where the client maybe suspects that I don't have his or her interests fully at heart.

I find if I'm telling the client something and they're not listening to me, they hear the same thing from somebody else, . . . sometimes it clicks.

One theme in these comments about mediation from lawyers is their concern with promoting reasonableness in their clients and their perception that the need to remain a credible advocate limits their own capacity to do so.²⁴ What mediators say—often presumably in the franker private sessions with one party and lawyer—can be mobilized selectively and effectively to guide clients toward positions the lawyer views as realistic. At the same time, lawyers reserve the right to advise their clients against “unreasonable” suggestions or pressures from mediators. In this way, mediation may actually enhance lawyer power and control over clients.

The potential for conflicts between the lawyer's role as client advocate and as reality tester is particularly great where there are children in a divorce. On the one hand, lawyers expressed almost universal appreciation of the recent child-support guidelines because they provided a clear guide to clients who resisted payment or wanted much more than allowed. By contrast, the law's “best interests of the child standard” for child custody casts a very weak shadow (Jacob 1992), leaving lawyers hard-pressed to counter their clients' “unreasonable expectations” with clear corrective guidance. The heavy emotional charge attached to children makes it especially hard for lawyers to challenge their clients on these issues, particularly without strong legal grounds. Mediation, however, may provide a context to broach these issues safely. As one lawyer noted, “A mediator . . . can talk about what's in the best interest of the child in a way that an attorney can't.” In Maine mediators have seen it as their responsibility to help parties reach agreements that are in the best interests of children, an objective reflected in the Court Mediation Service's recently issued statement of purpose. As a result, mediators ask parents to think carefully about whether the arrangements they propose advance the interests of children. Thus, it is not surpris-

²⁴ The law office talk reported by Sarat and Felstiner (1986) echoes with this role conflict and attempts to manage it by the lawyer. By questioning the certainty of law and the wisdom of judicial decisions and other legal actors in those conversations, the lawyer is trying to encourage “reasonable” expectations on the part of the client without jeopardizing his or her tenuous role as advocate and loyal ally. Blaming someone else proves a useful tool. Sarat and Felstiner interpret this pattern differently. In their interpretation, these efforts are aimed at encouraging a perception of lawyer power and influence because of their strategic ability to influence decisionmakers. In their recent work, Felstiner and Sarat (1992) present a more qualified view of lawyer power.

ing that, on custody and visitation issues especially, but on other matters as well, Maine lawyers identified mediators as useful allies in reality testing with their clients.

Although mediation may strengthen lawyer control in some ways through its reinforcement of attorney advice, it also can give parties greater opportunity to participate in what otherwise can be a fairly remote and mysterious process of seeking settlement. At the very least, it opens up the process to observation by clients.

I think it makes them feel like they're more in control of the situation because they're involved, they're not out there in left field while the attorneys are working on it. They're right there.

I just think it's really helpful for them to see the process, to see the give and take on both sides rather than having them always feel like, I'm giving again, I'm giving again.

Typically, according to Maine divorce lawyers, clients do far more than listen in mediation; indeed, attorneys reported encouraging clients to take an active role in the process.

I'm much more inclined to let the client talk in the mediation room. . . . My experience has been that sometimes that room is the first time [since the marital breakdown] that clients have been face to face, or it's one of the few times they have the opportunity to be face to face, and they need to get some stuff off their chest, and it can be done in that setting safely and usefully.

I want to sit back and listen, and I'm not going to interrupt unless I feel that you've misstated something or you're misinformed on an area or need some counseling.

I tell them ahead of time that I'm there to protect them if I think things are not being run fairly, and to watch out for their interest, but primarily it's them, the mediator, and the other spouse. And most of the attorneys I deal with apparently work the same way because everybody sits there, doesn't do all the talking, sits there and lets them work it out.

Although almost all the lawyers we interviewed permitted—and preferred—clients to play the lead role in mediation, there were four or five exceptions. These attorneys, for example, described their efforts to take over at each mediation session:

I tell the client that our first objective is to listen a lot, and to say very little; that I'll do most of the talking; that if the client is talking and I start to talk over him or her, I want him to stop in the middle of the word "of"; that anytime I'm going off in a direction they don't like, they should tell me that they want a caucus, and we'll go out in the hall and have a private session, and that I'll feel free to do the same thing. I mean basically, I want to be in absolute control of our side.

I dominate every mediation. . . . Some clients won't talk at all; some clients by choice want you to talk; some clients I don't

want them to talk; some clients, I'll say, you want to say something, go right ahead, but I don't defer to my client. If I have something to say, I say it, and I control the mediation almost all the time.

The conduct of these exceptional lawyers was not particularly admired by their colleagues.

My feelings about the role the attorney should play at mediation [is that it] should be a more passive one than an active one. . . . You know, I don't like it when I go and I've been to mediations where the attorney does all the talking.

In talking about the advantages of mediation, one-third of our sample mentioned its value in facilitating party involvement and the specific opportunity it provided for parties to meet and to talk with one another. At the same time, almost every Maine lawyer we interviewed conceded that he or she sometimes had to play the central role in mediation sessions because certain clients could not—or would not—play that role themselves. Unlike voluntary mediation, where more willing and articulate parties self-select into the process, mandatory mediation draws in quite diverse parties. For example,

It depends on the client, but I'll tell them, if you want to talk, feel free to talk. The mediator would rather have you talk, but if you prefer me to talk, that's fine.

If I've got a shrinking violet, I guess I do most of the talking. If I've got somebody that has some opinions and wants to say something, because sometimes in divorce cases somebody really wants to say something, what they think of a person because they've been stepping out behind their back for the past year, and my attitude is, say it in mediation. That's the safest place to say it.

Some lawyers differentiated cases not just by the needs or desires of their clients but by the identity of the mediator or the opposing counsel as well.

I like to play the role of adviser, supportive adviser, but that's not always possible—depends on who the mediator is, depends on what the tenor of the mediation is. There are some where I play negotiator, and I don't let my client speak.

In sum, Maine lawyers valued mediation because it involves their clients directly—but under supervision—in discussing settlement, hearing the other side, and weighing the reasonableness of each party's position. Yet, lawyers also recognized that the active role of mediators in challenging parties and their positions can also reinforce the lawyer's influence over the client. Thus, Maine's mandated mediation appears to assist attorneys in increasing client participation in negotiation while simultaneously reinforcing the lawyer's professional role as guide, adviser, and advocate.

C. Handling Nonlegal and Legal Issues

Divorce lawyers must repeatedly examine nonlegal issues at the same time that they work to frame problems in legal terms and give legal advice. That means that divorce practice demands both technical knowledge about legal rules and procedures and an ability to assist parties in dealing with issues for which the law and legal training provide little guidance. The turmoil of many divorces draws lawyers into the private lives of their clients, while the substantive issues of divorce often involve practical assessments of living arrangements and of children's needs. Although a primary task of lawyers is to translate personal troubles into legal issues,²⁵ lawyers also face demands to offer personal advice and to situate their legal advice in a broader context.²⁶ Thus, central to legal practice is a dimension that moves lawyers back and forth from dealing with technical legal issues to counseling clients about their problems of living.²⁷

These problems of living include a wide range of issues for which there is no clear-cut solution that would result from the application of legal rules. Such nonlegal issues include, for example, making future household arrangements, dividing up personal property, and arranging the details of child visitation schedules. The issues also include coping with the client's emotional distress over the broken relationship or fear of an insecure and uncertain future.

In divorce cases a failure to deal with these nonlegal issues may prevent the attorney from getting her legal work accomplished. For example, angry and upset clients can be "unreasonable" and may resist settlement or demand legal tactics that, in the lawyer's view, have no chance of success. Alternatively, a client may want to give up on some legal entitlements to speed resolution or to deal with guilt over ending a marriage. Divorce attorneys thus struggle to manage emotional clients and to find ways to work through that emotion, deflecting it, suppressing it, or venting and putting it behind. Squabbles over the details of property division or visitation schedules—issues not demanding the technical expertise of attorneys—may also prevent settlement of

²⁵ The literature about law as translation and dispute transformation emphasizes this theme. See, e.g., Cain 1979; Mather & Yngvesson 1980–81; Felstiner, Abel, & Sarat 1980–81; Cunningham 1989.

²⁶ Kressel (1985:89–92) and Davis (1988:89–92) both describe the difficulties lawyers face in dealing with nonlegal issues. Rule 2.1 of the Model Rules of Professional Conduct notes that in rendering candid legal advice, "a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation" (Gillers & Simon 1992:134). The Comment following this rule suggests also that "[m]atters that go beyond strictly legal questions may also be in the domain of another profession" (*ibid.*, p. 135).

²⁷ Similar descriptions of the open-ended and uncertain nature of problems in legal cases are found in Rosenthal's (1974) study of personal injury cases and, more recently, in Flood's (1991) study of business cases.

the divorce. Thus, divorce lawyers cannot easily confine their work to the technical questions about law and legal practice with which some may feel most comfortable.

Unfortunately, the processes of legal representation and of lawyer-guided negotiation leave little room or structure for parties to meet face to face to deal with emotional issues or to work through the details of property or visitation. In fact, when emotions run high, lawyers may be particularly prone to discourage contact between divorcing parties. Instead, clients' sessions with lawyers themselves may become the major outlet for pent-up emotions. Yet, few lawyers encourage their clients unendingly to pour out their feelings to them, and few clients have the resources to afford doing so.

Similarly, traditional legal representation and lawyer-guided negotiation do not provide a structure for direct meetings between clients to decide the "pots and pans" issues. Although many lawyers encourage clients to work through such problems on their own, not all couples can do so. In fact, the more troublesome these issues are and the stronger the anger felt at the divorce, the more volatile and unproductive the private negotiations between parties are likely to be (Erlanger et al. 1987).

In this context, mediation may provide a setting where anger and feelings about the other spouse can find an outlet. Roughly a quarter of the Maine lawyers we interviewed observed that mediation serves this role.²⁸

I guess it gives them a chance before [trial] to get their side out and hear the other side, maybe it's cathartic, I don't know.

And I think sometimes a mediator can be very helpful in getting the two sides to work out their anger, to talk *with* each other and not *at* each other.

[M]ore often, I think you can accomplish more by sitting down, letting the parties put some stuff on the table. Maybe they've got an issue that's totally unrelated to what's really got to be decided. And maybe you can get that out and get it out of the way. Maybe she's just upset because he's running around with another woman. Maybe we can get that sting out. Maybe we can address that.

Mediation can give the parties a chance to work through or even just to voice strong emotions to one another or to some official third party. Clients' opportunity to express these feelings in mediation may also relieve the lawyer of the burden of hearing them privately; and by relying on mediation to provide outlets for their expression, the lawyer can more easily focus attention on reaching settlement.

²⁸ Four lawyers we spoke to, however, tried instead to protect their clients against this aspect of mediation and counseled them to avoid emotional outbursts.

Mediation sessions also lend themselves to pursuing those issues that lawyers may view as trivial yet crucial to divorcing parties. Lawyers generally acknowledged the value of mediation in working through property division and visitation arrangements. The potential in mediation to work out these intricate problems leads to greater detail in mediated divorce agreements, according to 10 of the lawyers we interviewed. As a result, according to one lawyer,

You've got some real sausage-looking agreements, I'll tell you, some real strange looking beasts because of what was perceived to be a real concern of the parties, or one party even, but that they reached agreement on. . . . [V]isitation schedules . . . are often the bulk of a divorce judgment now.

Five lawyers expressed the frustration or impatience felt, we suspect by many, at having to be present when the parties worked on these nonlegal issues in mediation.

What's a lawyer going to do with pots and pans? Why should a lawyer get involved whether it's Friday at five or Sunday at six? That's ridiculous. I mean clients aren't babies, but the trend is more and more [lawyers] going [to mediation].

But then there are some things, if they're talking about visitation times, if they're talking about dividing up the personal property, I don't need to be there for that.

By becoming engaged in the mediation process, thus, lawyers have become involved in assisting their clients in discussions of nonlegal issues that at least some attorneys would prefer to delegate to the parties themselves.²⁹

Indeed, the primary role that attorneys saw for themselves in mediation was to advise their clients in dealing with legal issues such as property division and in guarding against loss of legal entitlements. As one lawyer put it, the role is that "of a watchdog."

I wouldn't let a mediator steamroll a client into the decision on a financial issue where everything hadn't been disclosed or certain issues needed to be explored.

If it is a mediator who I'm very comfortable with understanding the law and not strong-arming my client, I will sit back more. If it is a mediator who I'm not as comfortable with, I tend to be more involved. I am there to get my client out [of mediation] when I feel they need to talk to me or be advised and when they're either caving in or getting angry.

²⁹ In his study of English solicitors, Davis (1988) found in them the same distaste for issues where the law provided less guidance. It would appear that a common resolution of this conflict for many lawyers is to encourage clients to negotiate on their own the pots-and-pans issues as well as issues relating to children. To the extent that this occurs, it exposes clients to unmediated exchanges with spouses that may be particularly likely to reflect bargaining imbalances.

Lawyers thus saw mediation as another forum for advising clients about legal rights.

In unusual instances, a mediator initiates a discussion of legal issues or suggests alternatives that nudge an inexperienced lawyer into new areas. Given that a significant proportion of the lawyers in divorce cases do only a few such cases a year (McEwen, Maiman, & Mather 1991), one or both lawyers in a case may not know recent developments in domestic relations law. Mediation can, on occasion, provide an opportunity to learn about the law either from the other lawyer or, indirectly, from the mediator.

Mediation gives attorneys the chance to meet face to face and discuss interesting legal points. We really do, . . . like the last mediation I went to, quite frankly, the other attorney really didn't understand transmutation, so we get the chance to discuss that.

Mediators around here now are very knowledgeable, and they don't practice law, but in the mediation . . . there are lawyers who don't do a lot of divorce work, and when they come into the mediation process they really learn something from the mediators about fine-tuning. A mediator will say, "OK, well, we've agreed on alimony, but how are we going to insure the alimony?" And you can see that a lawyer who doesn't do much [divorce work] says, "Oh, hey, that's a good idea." And then the other lawyer isn't necessarily going to tell them that.

Thus, in mediation, Maine lawyers have an opportunity to guide their clients through the often intertwined legal and non-legal issues of a divorce. By giving an outlet for parties to meet one another and to express their feelings, mediation can assist attorneys in moving their clients beyond these emotional issues and toward "reasonable" settlement. At the same time, mediation may unite the discussions of children, of pots and pans issues, and of financial matters, and thus pressure those lawyers who prefer to concentrate only on "legal" issues to support clients in the "nonlegal" areas of controversy as well. Finally, far from precluding examination of legal issues—typically surrounding financial matters—mediation provides lawyers with another forum in which to discuss and examine them.

D. Directing the Legal Process

Legal cases move forward with varying degrees of direction by and attention from attorneys. The timing of cases, amount of contact with clients, extent of litigation activity, intensity of settlement effort, and cost vary from case to case and from lawyer to lawyer (Davis 1988). The ability of attorneys to manage a case closely is limited by the fact that they cannot control the behavior of the other party. Nor can they control the calendars of courts. Perhaps most important, each case competes for attention with

other cases on which a lawyer is working. Work on particular cases, therefore, may be concentrated in the periods just before official deadlines. A case may get a period of intense attention as an attorney takes charge to try to move it along before another case takes its place. Kressel (1985:105-9) notes the struggle of divorce lawyers to control the pace of litigation, while Kritzer (1991) portrays negotiation in general litigation as highly fractured activity as lawyers give particular cases attention and then turn to others. The Model Rules of Professional Conduct respond to this circumstance with Rule 1.3, which asserts: "A lawyer shall act with reasonable diligence and promptness in representing a client" (Gillers & Simon 1992:28). The Comment includes the observation that "Perhaps no professional shortcoming is more widely resented than procrastination" (*ibid.*, p. 28). Neglect is often cited as the most common violation of the rules.³⁰

Divorce cases are no exception to the pressures that work against close case management. The lawyers we interviewed reported that the efforts to keep control over the course of any single divorce can easily be overwhelmed by the press of handling many cases:

Any attorney worth his salt is probably right out straight and they're handling or juggling 100–200 cases at a time. And just by a matter of sheer time, unless they get focused in on a particular case, the case isn't going to get resolved.

The file goes in the drawer and nothing happens, unless one lawyer or the other keeps the ball rolling.

These uncertainties in case processing create significant headaches for both lawyers and their clients. Clients understandably see their divorce as of primary importance and may call regularly to find out what is happening. Their lawyers, faced with the crush of many cases, the unpredictable responses of opposing party and counsel, and the slowness of court scheduling, may delay or avoid responding because the answer is "nothing."

In the context of a struggle to manage and move cases, lawyers view mandated mediation as offering new opportunities for structure and control of cases. A mandated process would appear at first to diminish lawyer control of cases by giving it up to the court. But in practice, mediation in Maine typically takes place at the initiative of one (or both) lawyers in a case. The mandate applies in two ways: mediation must have been completed for the parties to have a contested hearing; and one party's request for mediation compels the participation of the other side. Thus, instead of being automatic, mandated mediation, as it operates in

³⁰ The recent American Bar Association report on legal education and professional development lists "organization and management of legal work" as one of the 10 fundamental lawyering skills and describes it as "an essential precondition for competent practice" (American Bar Association Section of Legal Education & Admissions to the Bar 1992:199–203).

Maine, opens up new strategic opportunities for lawyers that can diminish some of the uncertainty in case management.

Initiating mediation serves several strategic goals for Maine divorce lawyers. First, by requesting mediation, they get the attention of the other party and ensure that some sustained attention is given to settlement early in the case.

The problem cases were the ones where you couldn't get the other attorney's attention.

[Mediation] moves the process along because it, for the unprepared attorney, it forces the attorney to become prepared, or at least to come to face the fact, that, okay, we're going to have to deal with these issues in this divorce.

Sometimes, you cannot get the other lawyer to make a commitment, you can't, they just want to march right into court, and [mediation] gets the other side to see that, that their own lawyer is [blocking settlement].

When the other side does not return phone calls or respond to letters, mediation compels a response. In so doing, it gives one attorney some control over delays that result from simple nonresponsiveness or from strategic choice on the other side.³¹

A second strategy for lawyers is to employ mediation in an effort to rein in an attorney on the other side who is "out of control," behaving like a "pit bull" or a "mad dog litigator."³² By making "unreasonable" demands or by proceeding with burdensome and costly discovery and motions, one side can quickly drive up the costs and "temperature" of the case. A rapid move into mediation literally forces the other party to the bargaining table, where with a mediator's help, there is at least some modest prospect of deescalation:

If I am dealing with counsel that really wants to be pushy, wants to get as much as they possibly can and wants to treat the divorce as a true adversarial conflict in which they want to win, [mediation] sometimes can get them to come around a little bit.

If it's a case where I think it's important that the other party needs to be grabbed by the collar and shook a little bit, then I'll opt for mediation as soon as possible.

³¹ Such delays produce differential pressures on divorcing parties to reduce their demands and to settle. These pressures are exacerbated by a system in which one party can unilaterally put off serious discussion of settlement until the eve of the long-distant trial. As Erlanger et al. (1987:597) note, "As in other negotiation settings . . . a lack of cooperation often prompts more generous settlement offers or a reduction in demands from impatient negotiators."

³² Lawyers we interviewed in both states differentiated the divorce bar into those attorneys who were "reasonable" and those who were exceptions to that norm, such as those who acted to escalate conflict through their aggressive personalities or overemphasis on litigation. For detailed discussion of these different lawyer types among the New Hampshire bar, see Mather et al. 1991.

Selective use of mediation to assert some control over a case itself requires that an attorney be sufficiently familiar with cases to know when mediation should be requested. Such case-by-case use of mediation was quite common in one court we studied, but in several others, attorneys reported invoking the process almost automatically in cases that had even the slightest prospect of being contested. These lawyers thus effectively structured the divorce process, creating deadlines for themselves and their clients for production of information and the identification of negotiation goals. In contrast to arm's-length negotiation by letter or phone—which has no clear starting or ending point—mediation can create a sense of urgency. Once requested, it also does not require the initiative of either party, thus imposing a structure on the movement of the case.

About a quarter of the attorneys we interviewed complained that mediation was regularly invoked too early and produced “laziness”—a reluctance to negotiate seriously before entering mediation.

I think mediation is usually the introduction to negotiation. I very rarely find lawyers negotiating before mediation . . . [because of] laziness. You don't do anything you don't have to do. In my practice, I don't make unnecessary work for me. And for me to send out a proposal, when we're going to mediate and probably dash it on the rocks below, is worthless.

And something that we fall more and more back to is not negotiating until we get to mediation, not doing any serious negotiating until then. . . . I mean, it isn't done. I mean, it is done in certain cases, but . . . you know, whereas we used to sort of get together as lawyers and sit down and try to negotiate, I think the attitude is now, like, “Well, there's a mediator available to help us do that, we have to go through the mediation requirement anyway, let's use that as a forum. You know, why spend a client's money negotiating, not getting anywhere, and then having to mediate?”

But, increasingly, I'm finding that other attorneys use mediation as the first step. You kind of don't need to negotiate. You kind of don't need to share information. Just go to mediation, which is very frustrating for me.

The structure that mediation provides for exchanging information and discussing settlement helps lawyers to direct an otherwise haphazard and uncertain negotiation process. Not surprisingly, then, some lawyers are drawn to the practice of invoking it automatically and of employing mediation to replace as much as possible of the unstructured negotiation process.

At the same time that Maine's mandated mediation provides a mechanism to structure negotiation, it threatens a lawyer's control over the hours devoted to a case and its consequent cost to the client. The Maine lawyers we interviewed were about evenly

divided between those who thought that mediation raised the costs of divorce and those who thought it saved money. But, whatever the overall impact, it was clear that the mediation fee, and the time required to prepare for and attend mediation, *could* add substantially to the cost of an inexpensive divorce, although the impact might not be noticed on more complicated and expensive cases. As a result, lawyers with working- and middle-class clients, in particular, worried about using mediation unnecessarily or prematurely.

Two strategies permitted cost control in the face of the prospect of mediation. First, lawyers could work harder to settle the case on their own, prior to any mediation. The fact that the proportion of divorce cases mediated declined by about 25% in Maine after a \$60 fee for mediation was imposed suggests that lawyers (and their clients) do exercise some self-control in using mediation. Second, some attorneys appear to have solved the cost problem by cutting back on preparation and negotiation prior to mediation, knowing that the mediation process was relatively forgiving and, in fact, a good way of learning a considerable amount about the case.

The introduction of mandated mediation in Maine thus has opened up new opportunities for lawyers both to establish and to lose control over the management of divorce cases. The largely favorable views of mediation among the Maine divorce bar reflect the general sense that it improves case management while, at the same time, assisting lawyers in dealing simultaneously with trial preparation and settlement, client participation and professional direction, and legal and nonlegal issues. Moreover, by examining lawyers' perceptions of mediation and its utility to them, we understand better the fluid nature of divorce law practice.

IV. Law Practice Transformed?

Binary conceptions of lawyers' approaches to practice as either adversarial or problem-solving lead to dramatic questions about transformation and cooptation. Has the blending of mediation and the work of divorce lawyers in Maine "transformed" law practice or have attorneys simply "coopted" and "legalized" mediation (Menkel-Meadow 1991)? The degree to which new procedures change the way lawyers work is an important question. However, since we conceive of both divorce law practice and mediation as containing elements of adversariness *and* problem-solving, we think it appropriate to look not for radical transformation but for evidence of modest changes in the balance between these and other elements.

To address this question of change, we present longitudinal data from Maine court dockets, as well as retrospective assessments of Maine lawyers and comparative data from attorney in-

interviews and court dockets from neighboring New Hampshire. These data provide several points of comparison as we try to understand the impact of divorce mediation on the character of divorce law practice in Maine.

There were 63 Maine lawyers among our interviewees (72% of our sample) who had been in practice before the introduction of mandatory mediation in 1984. Over 90% of them believed that mandatory mediation had changed the practice of divorce law in Maine. They described changes both in their own attitudes and practices and in those of the divorce bar more generally. Many lawyers described movement from initial suspicion and resistance to eventual broad acceptance of mediation:

I remember when mandatory mediation first came and there was a huge crowd against it: "They're trying to do away with the lawyers." All that sort of stuff.

I think before mediation really became well accepted . . . there were lawyers in the beginning who walked out of mediation. . . . [E]very damn time my partner or I mediated with [—], he would leave. He would storm out of the room with this big flourish, and we never got anywhere. I mean that's just the way that some lawyers approached mediation. Thank God, we've gotten over that. It's accepted because it has to be, and really because people realize how useful and important it really is.

[I supported mediation when it was mandated] because I mediated a whole bunch of cases before that, and I found amazingly it worked. Amazingly it worked. But I will tell you a lot of lawyers in — who hated it have now come around and agree that it does make a difference.

Some lawyers noted that the conversion of the attorneys skeptical about mediation appeared to have been accompanied by a shift away from trial orientation and adversariness and toward settlement and cooperation.

When we first began mediating, I think there was a lot of resistance. Lawyers viewed it as, some lawyers viewed it as illegal. It was not in any way part of the adversarial process and required people to put down their guard, and lawyers will go to mediation and be advocates and be trial lawyers and you accomplish nothing. But I do think that over time we've all become acclimated to it.

I think it's made lawyers more humane. I think it's made lawyers see that they can get a good result for their client . . . through compromise and mediation. And I think that was important for lawyers to see that and feel okay about that. That they didn't give up their lawyering to this process. I think it's made us all better problem solvers which I think is what the practice of law is all about.

That such observations reflect more than wishful thinking is suggested by responses to one of the closed-ended questions in

our lawyer interviews. We sought to learn how lawyers balance the simultaneous demands for cooperative and adversarial approaches to settlement. We asked: "When you are negotiating a divorce case, would you say your primary goal is best described as reaching a settlement fair to both parties or getting as much as possible for your client?"³³ More than 40% of the lawyers (among both our Maine and New Hampshire interviewees) refused to accept the forced choice and found clever ways of combining the possibilities, for example, "reaching a settlement fair to my client." Such answers were coded as "mixed." As Table 1 indicates, however, Maine attorneys differed significantly in their answers to this question from a comparable group of New Hampshire lawyers we had also interviewed.³⁴ Maine lawyers were considerably more likely to select the fair settlement goal, while New Hampshire lawyers more often chose getting the most for the client. This cross-state difference holds up under a variety of controls for divorce specialization and gender of lawyer. Among the possible explanations for the cross-state difference is the fact that Maine divorce lawyers had nearly a decade of experience with divorce mediation, while New Hampshire attorneys had little direct contact with mediation.³⁵

In addition, the divorce dockets of the two states provide evidence of behavioral change consistent with this attitudinal pattern. We coded from the docket books the presence or absence of various kinds of legal activity by one or both parties suggesting legal disputation. These involved motions—for example, for temporary custody or support, for discovery, to compel discovery, for contempt, for temporary orders—and other actions such as filing of objections or submission of memoranda in support of arguments.³⁶ As Table 2 shows, in New Hampshire the average total

³³ This question was added after several interviews had been completed. In some interviews it was not asked because of the press of time. Several answers were uncodable. Thus, we have data for 136 of 163 interviews.

³⁴ Divorce law practices in Maine and New Hampshire are generally similar. Most divorce lawyers work as sole practitioners or in small firms, and do so in smaller towns or modest-sized urban centers. Their practices concentrate in courts where they meet the same attorneys repeatedly. The work of lawyers in both states varies from case to case and attorney to attorney along common dimensions. For example, practitioners with well-to-do clients behave somewhat differently from those with working-class clients; divorce specialists tend to view their work somewhat differently than do general practitioners for whom divorce work is far lower in volume (McEwen et al. 1991).

³⁵ New Hampshire lawyers' experience with divorce mediation was limited; 19% of those interviewed reported that they had never had a client who had been involved in divorce mediation, while 53% reported having only between one and five clients who had used mediation. This limited contact with mediation typically came at three points. A few lawyers referred people to mediation, often instead of taking the cases themselves. In other instances, lawyers reviewed for legal adequacy agreements that had been reached in mediation. Several lawyers also reported having represented clients whose mediation efforts had proved disastrous and who were seeking to undo the results.

³⁶ An inclusive list of the motions employed in at least one of the two states follows: motions to amend, for temporary custody, for temporary support, payment of attorney's fees, appointment of guardian ad litem, for protection from abuse, to compel discovery,

Table 1. Lawyer's Self-reported Negotiation Goal by State

	Maine	New Hampshire	Total
Fair settlement	39.5% (30)	28.3% (17)	34.6% (47)
Mixed	44.7% (34)	38.3% (23)	41.9% (57)
Most for client	15.8% (12)	33.3% (20)	23.5% (32)
Total	55.9% (76)	44.1% (60)	100.0% (136)

$\chi^2=5.92$ with 2 degrees of freedom, $p=.05$

Table 2. Average Number of "Adversarial" Divorce Motions per Case by State and Year

	1979	1980	1983	1984	1985	1986	1988
Maine	1.07	1.14	1.18	.95	.82	.89	.92
New Hampshire		.77		.87			1.06

frequency of such motions per case grew from 1980 to 1988. In Maine, by contrast, it fell significantly (averaging 20% lower after mediation took effect) with the advent of mandated mediation in 1984.³⁷ Although far from definitive, these data suggest that the introduction of mediation may have reduced the extent of formal legal contention in divorce in Maine.³⁸ Because the drop in such activity coincided with the mandate, it appears to be associated with the new procedures rather than being a product of changed lawyer attitudes. Those attitudes may in turn have been affected by the diminished reliance on formal court action to achieve client goals and to protect client interests.

At the same time, there is no evidence that the advent of mandated mediation diminished the role of lawyers in divorce cases in Maine. The proportion of divorce cases involving two lawyers has declined only slightly since 1980, although there has been a near-doubling in the proportion of cases with no lawyers over that time. During the same period in New Hampshire, the proportion of *pro se* cases also nearly doubled, and the percentage of cases with two lawyers also declined slightly. The parallel shifts in the two states suggest that other forces have affected the likelihood of employing lawyers in divorce cases but that the in-

for contempt, to reconsider, to modify, for findings of fact, for clarification, for counseling, for payment of child support through Human Services, for conditional default; and memoranda in support of arguments, requests for production of documents or interrogatories, objections filed, and answers to motions. We recognize that these motions are not necessarily indicative of formal legal contest in every instance, but they do provide a rough aggregate measure of formal adversarial actions.

³⁷ Although mandated mediation took effect in late July 1984, it applied to any case then within the system. Thus, most of the contested cases docketed in 1984 actually were subject to the mandate.

³⁸ We recognize, of course, that there might be other reasons for the apparent decline in "litigious" motions. For example, along with mandatory mediation, the language of custody was removed from the statute and replaced with "parental rights and responsibility."

roduction of mandatory mediation has had no discernible effect on attorney involvement in divorces in Maine.

Mandatory mediation thus has not “transformed” divorce law practice in Maine. Nor could it have been expected to given that law practice and mediation typically require both adversariness and problem-solving. The engagement of lawyers in divorce mediation appears, however, to have modestly shifted the mix among these elements both in the daily work of attorneys and in the mediation process itself.

V. Features of Divorce Mediation Promoting Acceptance by Lawyers

Divorce mediation programs vary substantially in organization, rationale, and implementation and in the legal policies that shape their relationship to the formal divorce process. How divorce lawyers respond to divorce mediation depends heavily on this variation. In our analysis of the integration of mandated mediation in Maine into divorce law practice, we have emphasized a variety of qualities of that program. The change of any of these features would, we believe, alter its consequences for law practice. Several characteristics of Maine mediation have contributed to its incorporation of divorce lawyers in the process: its provision by the court, its focus on all issues of the divorce, its reliance on “volunteer mediators,” and its mandatory character.

By starting as a court-provided service at no cost to parties, it was clear that mediation was not developing as a private practice in apparent competition with lawyers. The provision of mediation in the context of lawyered divorce thus promoted a perception that mediation and legal representation were not mutually exclusive.

By including all issues of divorce,³⁹ not just those some lawyers would gladly delegate to mediation, Maine’s mediation program implicitly encouraged the involvement of attorneys (although some individual mediators did not, especially in the northern part of the state). While they might not have attended mediation sessions dealing with visitation times, divorce attorneys certainly felt compelled to do so if major property issues were subject to discussion. Nor could mediators easily sustain efforts to shut lawyers out when the issues at stake included what were perceived to be basic legal issues.

The implicit expectation or encouragement of lawyer participation was reinforced by the lack of any distinctive professional credentials of what has remained in essence a volunteer corps of

³⁹ McCrory (1987:150–52), who surveyed selected state statutes and court rules on whether lawyers should participate in mediation, concludes that the answer may depend on the scope of the issues mediated, with more active participation of attorneys when mediation addresses property and financial issues.

nonattorney mediators paid token amounts for their services. Operating as lay people in a legal arena and lacking a shared professional identity (such as social work or counseling), these mediators posed little threat to the role of lawyers in the divorce process, and in fact were likely to want to draw on the expertise of divorce attorneys.

Finally, the mandatory character of mediation brought all divorce lawyers into the process, not just the few most receptive to it. As a result, over the years, it required the adaptation of all lawyers doing divorce cases and thus served to involve and to educate the divorce bar as a whole.⁴⁰

Unfortunately, because lawyers are largely ignored in studies of divorce mediation, we have virtually no comparative data on the nature of divorce law practice and its relationship to different kinds of mediation systems. Much needs to be learned, for example, about divorce lawyers in systems where mediation occurs (or is mandated) on custody and visitation only. That such comparative analysis might yield interesting results is suggested by data from the NCSC Database drawn from self-reports of directors of mediation services across the country. These data show that lawyers participate in mediation in only 38% of the mediation programs that mandate custody mediation but in fully 91% of mandatory divorce programs that include issues other than custody and visitation.⁴¹ Clearly, these characteristics play a part in shaping lawyers' responses to mediation and defining its role in their practices. Further research can enhance our understanding of variations in the ways that lawyers adapt to divorce mediation in all its forms.

VI. Conclusions

We have argued that the willingness of Maine divorce lawyers to embrace divorce mediation can best be understood by examining some of the central features of legal practice. At the core of divorce law practice are scores of decisions that must be made alongside the technical ones about the law or legal process. These decisions relate to managing cases and relationships both with clients and with opposing parties. To simplify, we have clustered these decisions into four dimensions: trial preparation and

⁴⁰ The context of law practice in Maine may also have influenced participation by divorce lawyers in mediation. That is, because Maine is a state with no large urban areas, relationships among lawyers tend to be more personal and thus perhaps more conducive to cooperation. However, we note that in at least some California and Florida jurisdictions, lawyers reportedly participate regularly in mediation. Thus, the Maine experience may not be so idiosyncratic (see note 9 for data on California, and Talcott 1989 for description of Florida practice).

⁴¹ Mandatory programs counted here in the NCSC Database include those where cases are sent categorically to mediation or where judges can mandate them on a case-by-case basis.

negotiation for settlement; lawyer and client control over decisionmaking; handling nonlegal and legal issues; and directing the legal process. Lawyers' decisions in each of these dimensions of practice may become routinized or patterned as they develop experience in divorce practice. Because lawyers differ in their patterns of decisions, they develop reputations—for example, as reasonable or unreasonable, directive or nondirective, counselors or legal technicians, responsive or procrastinating. Nonetheless, each lawyer must be prepared to make decisions suitable to the special circumstances of case, client and opponent. “Good lawyers” are the ones who not only have technical expertise but who also can make appropriate and variable decisions along these four dimensions.

In the context of dealing with such choices, lawyers in Maine perceive mediation as providing new options and resources for them. Recall that in Maine only about one in five divorces is handled by mediation. But for those cases, lawyers see mediation as providing an arena that encourages settlement while also aiding them in preparation for trial. The questions, challenges, and suggestions of fairly active mediators give lawyers valued leverage in leading clients toward “reasonable” positions without, lawyers believe, compromising their credibility as advocates and supporters. At the same time, they see mediation as permitting their clients a unique opportunity to voice feelings and to participate directly in shaping an agreement that suits their needs. Through joint lawyer-client participation in mediation, lawyers believe that they can take a strong role in drafting agreements on issues with legal ramifications such as division of pension benefits, while clients can with lawyer assistance address nonlegal issues such as setting visitation schedules and dividing personal property. The ability to invoke mediation within the framework of a mandatory system, lawyers feel, provides them with new opportunities to control the pace and direction of a case and to move it forward in the midst of a busy practice. As these examples suggest, lawyers have come to believe that they can facilitate the practice of divorce law through active participation in divorce mediation. Neither their incomes nor their engagement in the case are diminished. Thus, we have argued, by participating in mediation, lawyers view themselves as losing little and gaining much.

This interpretation is entirely consistent with the emerging empirical portrait of compromise-oriented attorneys. In the area of divorce law practice, in particular, Sarat and Felstiner (1986, 1988) highlight the lawyer's pivotal role in shaping client expectations and leading the way to a negotiated settlement, sometimes against the emotional resistance of an angry client. Erlanger et al. (1987), Griffiths (1986), and Ingleby (1988) similarly emphasize the lawyer's central role in making often contentious divorce negotiations produce agreements, for example, by

limiting the flow of information and advice to their clients in order to maneuver them toward settlements. This research depicts the divorce lawyer as a negotiator who works within and around the legal process. This view of divorce lawyering makes it appear far more compatible with the practice of mediation than does the popular view of litigious lawyering.

The question remains, however, how mediation might change the settlement work of attorneys. The reports of Maine lawyers suggest ways in which mediation alters the process for handling contested divorces in Maine. By providing an official settlement event, mediation can sharpen the focus on and make more efficient the process of divorce negotiation. By putting all the parties and lawyers together in one place at one time, it can increase party participation in, and knowledge about, the negotiation process. By permitting the airing of feelings and detailed face-to-face discussion of circumstances, mediation can permit a contextualization of negotiation that is less likely when it is carried out by lawyers alone. By formalizing and providing a normative frame for negotiation, mediation can constrain some adversarial conduct. Thus, divorce lawyers think that mediation has changed the nature of the negotiation process both for the parties and for the lawyers.

In sum, divorce mediation in Maine serves as a relatively formal and structured addition to a disjointed negotiation process that is carried out intermittently by parties or by their lawyers. Some of its most significant effects occur not through the magical skills of mediators but through the mere fact of an event involving both parties and lawyers. Other pretrial events or administrative checkpoints may perform some of these same functions.

As described by Maine lawyers, divorce mediation is a process that contrasts markedly with the model assumed by much of the commentary. Rather than being an alternative to litigation, mediation draws in divorce cases which are among the most heavily litigated. Rather than demanding that “[l]egal rights fade into the shadow of informality” (Bryan 1992:523), mediation makes legal rules and rights a key reference point through the participation of lawyers. Rather than being an informal substitute for trial, mediation serves as a relatively formal adjunct to negotiation (Galanter 1989:xiii). Rather than placing decisionmaking exclusively in the hands of parties, mediation permits, even strengthens, the ability of lawyers to influence decisions. And rather than leaving parties unassisted in the face of pressures of mediators and stronger parties, mediation interposes lawyers as advisors. Thus, the observations of Maine lawyers remind us again of the great variability of the proceedings called “mediation.”

This study of divorce mediation and the work of lawyers in one state leads to some broader observations about the ways that we think about law and dispute processing. It suggests that too

much of our theoretical and conceptual work has been grounded in idealized and polarized conceptions of how dispute processing and legal practice work. When we learn more about the day-to-day work of lawyers—which, to a large degree, is the day-to-day work of the law—these idealized conceptions prove inadequate for guiding empirical, theoretical, or policy debate.

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