LAW AND STRATEGY IN THE DIVORCE LAWYER'S OFFICE

AUSTIN SARAT
WILLIAM L. F. FELSTINER

In the research from which this paper is derived, we have observed and tape-recorded approximately 115 lawyer-client conferences. Our observations were made in two sites, one in California and one in Massachusetts. In this paper we take an in-depth look at the nature of lawyer-client discourse by focusing on one conference. We explore three of the most important themes in that discourse. First is the discussion and characterization of the legal system and its major actors. Next is the exploration of the advantages and disadvantages of disposing of disputed issues through negotiation or trial. Finally, the third theme involves the "legal construction of the client," where a lawyer and client discuss rules of relevance that govern the legal process as well as the aspects of the client's experience that are to be the subject of legal inquiry. The paper concludes by exploring the way each of these themes expresses or embodies prevailing legal ideologies and influences the way cases develop and are managed.

I. INTRODUCTION

Traditionally, the sociology of the legal profession has portrayed lawyers as important intermediaries between clients and the legal system (Brandeis, 1933; Parsons, 1954), many more people see lawyers than have direct contact with formal legal institutions (Curran, 1977; Miller and Sarat, 1981). Lawyers serve clients as important sources of information about legal rights, help clients relate legal rules to individual problems, and introduce clients to the way the legal process works. The information provided by lawyers shapes in large measure citizens' views of the legal order and their understanding of the relevance, responsiveness, and reliability of legal institutions.

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What lawyers say to their clients is not necessarily derived from statutes, rules, and cases and does not involve a literal translation of legal doctrine, nor could the legal system as it is presented in the lawyer's office be understood by clients from untutored observation.

More is at stake, however, in the interaction between lawyers and clients than a unidirectional movement of information and advice from lawyer to client. In addition, this interaction provides one important setting where law and society meet and where legal norms and folk norms come together to shape responses to grievances, injuries, and problems. In some instances those worlds may be complementary; in others there may be little fit between them.

Despite the importance of the discourse between lawyers and their clients, we know very little about what actually goes on in the lawyer's office. Our understanding of lawyer-client interaction has a very shallow basis in systematic empirical research (for an exception in the United States, see Hosticka, 1979; for examples in other countries, see Berends, 1981 [Holland]; Bogoch and Danet, 1984 [Israel]; Caesar-Wolf, 1984 [Germany]; Cain, 1979 [England]). Legal sociologists are, in this respect, far behind sociologists of medicine, who have over many years conducted numerous studies of doctors and patients (see, for example, McIntosh, 1974). Researchers have been frustrated by norms of confidentiality, the routines of busy professionals, and an inability to convince lawyers of the need for research on lawyer-client communications (see Danet *et al.*, 1980). Yet without direct knowledge of such communications, it is difficult to pose or answer major questions about the content, form, and effects of legal services, the nature of dispute transformation, and the transmission of legal ideology. Indeed it may be that we have ignored an important means of understanding the law itself: Perhaps social science should begin its "study of law with the proposition that law is not what judges say in the reports but what lawyers say—to one another and to clients—in their offices" (Shapiro, 1981: 1201).

II. THE RESEARCH, THE CASE, AND THE CONFERENCE

In the research from which this paper is derived, we developed an ethnographic account of lawyer-client interaction in divorce cases. We chose to examine divorce because it is a serious and growing social problem in which the involvement of lawyers is particularly salient and controversial. Concern among many divorce lawyers about their role suggested that field re-

search on lawyer-client interaction in this area would encounter less resistance than in other areas of legal practice.

We observed cases over a period of thirty-three months in two sites, one in Massachusetts and one in California. This effort consisted in following one side of forty divorce cases, ideally from the first lawyer-client interview until the divorce was final. We followed these cases by observing and tape-recording lawyer-client sessions, attending court and mediation hearings and trials, and interviewing both lawyers and clients about those events. Approximately 115 lawyer-client conferences were tape-recorded.[1]

Our major objectives were to describe the ways in which

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[1] Neither the lawyers nor the clients that we studied were randomly selected; nor could they have been, given the acknowledged difficulties in securing access to lawyer-client conferences (see Danet *et al.*, 1980; Felstiner and Sarat, 1985). We began the process of securing lawyer participation by asking judges, mediators, and lawyers to name the lawyers in each community who did a substantial amount of divorce work. In each instance, the list eventually contained about 40 names. We stopped trying to add names to the list when additional inquiries were not providing new names. We asked all lawyers on each list to cooperate in the research. Most agreed, but only slightly more than one-quarter in each site actually produced one or more clients willing to participate in the research. We left the choice of clients to the lawyers, except that we did ask them to focus on cases that promised to involve several lawyer-client meetings.

The lawyer samples have two obvious biases. In both sites they involve a higher proportion of women than exists either in the bar or among divorce lawyers generally. Nevertheless, the samples contain more men than women lawyers. More importantly, the samples appear not to include many lawyers high in income, experience, and status. We have come to this conclusion first because of the general clientele of our lawyers; very few doctors, lawyers, businessmen, and others with substantial income and assets are represented. Second, our lawyers are not generally talked about in these communities as the most prominent divorce practitioners. And third, the lawyers in our samples generally attended less prestigious law schools than did those usually considered to be at the top of local divorce practice. As a result, the findings of this project should not be considered representative of all divorce lawyers. However, other than their relative status within the local bar, we know of no other relevant trait on which these lawyers differ from the rest of the divorce bar, and consider it fair to say that the findings are based on samples that are characteristic of the lawyers that most people with ordinary financial resources are likely to consult.

There is, of course, the question of whether participation in the study suggests that the lawyers in our samples are in some important respects different from the others we contacted. They did not appear so; except as noted, they did not seem to have different kinds of clients, practices, or different orientations toward practice; to have a reputation for different ethical standards; to engage in different promotional practices; or to charge different fees. In fact, we believe that inclusion in the study was chiefly determined by the coincidence of who was able to find cooperative clients when the project was fresh in their minds. In all instances we asked participating lawyers about the grounds on which they had selected the clients who eventually became part of the study. Frequently they were simply those that had come to the lawyer's attention immediately or soon after we had finally persuaded the lawyer to participate in the research. From time to time we were told that clients had been selected because they appeared to be more interested in research or less emotionally upset than many others. We were also on occasion told that lawyers had tried to avoid choosing clients who were "crazy." However, we have

lawyers present the legal system and legal process to their clients, to identify the roles that lawyers adopt in divorce cases, to describe the actual content of legal work, to analyze the language and communication patterns through which lawyers carry out these functions, and to examine the ways that lawyer-client interaction affects the development and transformation of divorce disputes. In this paper we describe the interaction between one lawyer and one client in one conference. Not all of the themes of our research are represented here; rather, the paper is devoted to exploring the ways in which lawyers and clients negotiate their differing views of law and the legal process and how that negotiation influences decisions about preferred paths to disposition.

We have observed several patterns through which such decisions are made. Some result in a contested hearing on the main issues. Most, however, do not. In this paper we describe the most common pattern that we observed, namely an exchange in which the lawyer persuades a somewhat reluctant client to try to reach a negotiated settlement. This pattern involves three steps. First, the legal process itself is discussed and interpreted. Here we ask the following questions: What do lawyer and client say about the process? What information does the client seek? What kind of explanations does the lawyer provide? The description of the legal process prepares the way for a decision about settlement by providing the client with a sense of the values and operations inherent in formal adjudication. Second, there is a discussion of how best to dispose of the case. What issues should be settled? What issues, if any, should be fully litigated? What allocation of work does the client prefer? How does the lawyer respond to this preference? Third, there is a discussion of what the client will have to do and how she will have to behave if a settlement is to be reached. Here we examine what the legal process values in human character and what it wishes to ignore, what the process validates and what it leaves for others to reinforce. This discourse we call the "legal construction of the client."

In this lawyer-client conference these themes are interwoven so that an understanding of each is necessary to the full comprehension of the others. The discussion of the nature of the legal process serves to introduce and then justify the lawyer's argument about the best method of disposing of the case. Having reached agreement on method, he must decide how to

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no reason to believe that the clients in the samples differed in crucial respects from the clients of these lawyers generally.

produce satisfactory outcomes and encourage the client to think and act in a way appropriate to achieving them. Because each of these elements is developed as part of a dialogue that is shaped by client questions, expectations, and demands, discussions of these themes are neither linear nor free of contradiction.

In this paper we focus on one lawyer-client conference to provide the reader with the maximum opportunity to follow these themes and see them at work "on location." Only through such concentration are we able to convey the level of detail that we believe is necessary to convey the full social significance of the interplay between the lawyer and client.

This conference is typical of our sample of conferences. We made our choice after having reviewed the data twice, first as we observed the conferences in the lawyers' offices and then as we read the transcripts with the specific questions raised in this paper in mind. Although the behavior that we report is not, of course, universal and does not come anywhere close to exhausting the field, it is the most common pattern and appeared repeatedly in our cases.[2] We have noted in the paper when the behavior in this conference is not characteristic of a significant proportion of our sample.

The lawyer involved in this case graduated from one of the country's top-ranked law schools. He was forty years old at the time of the conference and had practiced for fourteen years. His father was a prominent physician in a neighboring city. The lawyer had spent four years as a public defender after law school and had been in private practice for ten years. He considers himself a trial lawyer and states that he was drawn to divorce work because of the opportunity it provides for trial work. He is married and has never been divorced.

The client and her husband were in their late thirties and had no children. Their marriage had been stormy, involving both substantial separations and infidelity by the husband. Both had graduate degrees and worked full-time; financial support was not an issue. They owned a house, bank stocks, several limited partnerships in real estate, his retirement benefits, and personal property. The house was their major asset. It was an unconventional building to which the husband was especially attached. Housing in the area is very expensive. This divorce was the client's second; there were no children in the

[2] Determining exactly how this pattern varies with standard demographic characteristics and other analytic variables depends on conventional coding of the transcripts, an operation that we have not yet completed.

first marriage either. She had received extensive psychological counseling prior to and during the case which we observed.

The parties in this divorce initially tried to dissolve their marriage by engaging a mediator and did not at that time individually consult lawyers. The mediator was an established divorce lawyer with substantial experience in divorce mediation. At the first substantive session, the mediator stated that he did not think that further progress could be made if both the spouses continued to live in the house. Although she considered it to be a major sacrifice, the wife said that she had moved out of the house to facilitate mediation after her husband absolutely refused to leave. Thereafter, she visited the house occasionally, primarily to check on plants and pets. The client reported that she was careful to warn her husband when she intended to visit.

Over time, however, this arrangement upset her husband. Rather than raise the problem at a mediation session, he hired a lawyer and secured an *ex parte* order restraining the client from entering the property at any time for any reason. The husband had previously characterized the lawyer that he hired as "the meanest son-of-a-bitch in town." The restraining order ended any prospects for mediation and the client, on the advice of the mediator and another lawyer, hired the lawyer involved in this conference.

Subsequently, a hearing about the propriety of the *ex parte* order was held by a second judge. The issues at this hearing were whether the order should be governed by a general or a divorce-specific injunction statute, what status quo the order was intended to maintain, and whether the husband's attempt to secure the order violated a moral obligation undertaken when the client agreed to move out of the house. The second judge decided against the client on the first two issues, but left consideration of the bad faith question open to further argument. The client's therapist attended the hearing and the lawyer-client conference that immediately followed. At that conference the therapist stressed that contesting the restraining order further might not be in the client's long-term interest even if it corrected the legal wrong.

The conference analyzed in this paper followed the meeting attended by the therapist and was the seventh of twelve that occurred during the course of the case. It took place in the lawyer's office five weeks after the first meeting between lawyer and client. Its two phases, interrupted for several hours at midday, lasted a total of about two hours.

The people referred to in this conference are:[3]

Lawyer	Peter Edmunds
Client	Jane Carroll
Spouse	Norb
Spouse's lawyer	Paul Foster
First judge	John Hancock
Second judge	Mike Cohen
Therapist	Irene
Financial consultant	Bob Archer

III. THE LEGAL PROCESS OF DIVORCE

Clients look to lawyers to explain how the legal system works and to interpret the actions and decisions of legal officials. Despite their lack of knowledge about and contact with the law, clients are likely to have some general notions that the law works as a formally rational legal order, one that is rule governed, impersonal, impartial, predictable, and relatively error free. How do lawyers respond to this picture? In this conference we are interested in the image of the legal process that the lawyer presents. Does he subscribe to the formalist image or does he present the kind of picture that would be drawn by a legal realist, one in which rules are of limited relevance, impersonality gives way to communities of interest shaped by the needs of ongoing relationships, routinization provides the only predictability, and errors are frequently made but seldom acknowledged? Or does he present some mix of the two images or a set of messages different from both?

In this conference the lawyer presents the legal process of divorce largely in response to questions or remarks by the client. In many conferences clients ask for an explanation of some aspect of the legal system's procedures or rules. In this conference the client repeatedly inquires about both. While most of her questions concern the details of her own case, several are general. Thus, she invites her lawyer to explain the way that the legal process operates as well as to justify its operation in her case. At no point does the lawyer deliver a monologue on how it works. Instead his comments are interspersed in the discussion of major substantive issues, particularly concerning what to do about the restraining order and how to proceed with settlement negotiations. Throughout the conference the client persists in focusing on the restraining order until finally she asks:

Client: How often does a case like this come along—a

[3] Fictional names have been assigned to all the participants and places.

restraining order of this nature?

Lawyer: Very common.

Client: It's a very common thing. So how many other people are getting the same kind of treatment I am? With what, I presume, is very sloppily handled orders that are passed out.

Lawyer: Yeah, you know, I talked, I did talk to someone in the know—I won't go any further than that—who said that this one could have been signed purely by accident. I mean, that the judge could have—if he looked at it now—said, I would not sign that, knowing what it was, and it could have been signed by accident, and I said, well, then how does that happen? And he said, well, you've got all this stuff going; you come back to your office, and there's a stack of documents that need signatures. He says, you can do one of two things: you can postpone signing them until you have time, but then it may be the end of the day; the clerk's office is closing, and people who really need this stuff aren't going to get the orders, because there's someone else that needs your attention, so you go through them, and one of the main things you look for is the law firm or lawyer who is proposing them. And you tend to rely on them.

The lawyer thus states that a legal order of immense consequence to this woman may have been handled in a way that in several respects is inconsistent with the formalist image of a rational system: It may have been signed by accident. Moreover, the lawyer claims that he has received this information from "someone in the know," someone he refuses to identify. By this refusal, he implies that the information was given improperly, in breach of confidence. Furthermore, the lawyer's description of how judges handle court orders suggests a high level of inattention and routinization. Judges sign orders without reading them to satisfy "people who really need this stuff." While the judge is said to ignore the substance of the order, he does pay attention to the lawyer or law firm who requests it. The legal process is thereby portrayed as responding more to reputation than to substantive merit. Thus, the client is introduced to a system that is hurried, routinized, personalistic, and accident prone.

Throughout this conference, the theme of the importance of insider status and access within the local legal system is reinforced by references to the lawyer's personal situation. The conference begins with a description of his close ties to the district attorney:

Observer: You're what? You're on a jury?

Lawyer: Well, no, I'm sitting there waiting to get questioned. It's a criminal case, and I think the chances of my being selected are rather remote, because I just came back from lunch with the District Attorney. And then the next question will be: How often does this happen? And I'll say, with some degree of regularity. And they'll say, with whom? Who else do you guys eat with when you meet? And I'll say, nobody.

Shortly afterward, he reminds the client that he serves on occasion as judge *pro tem* in divorce cases:

Lawyer: I mean, it's conceivable that I'll be back within the hour. The way they're going now, I think it's also unlikely. Let me do this. If I don't see you, I'll call you and we will . . . we'll just work. . . . You've got the day open and I have the evening open. This case is rather bizarre. Let's see. We've appeared in court and then I went to be a judge. Now I'm meeting with you, and . . .

The client responds by inquiring about a case that she had observed earlier:

Client: How did you decide the case of the overextended New Vista attorney?

Lawyer: Oh, he . . . No, New Verde attorney, New Beach. The other attorney, the overextended . . .

Client: I love the Perry Mason titles.

Lawyer: He was . . . Oh, let's see. There were four matters. He stipulated to the child custody. I gave the wife all the attorney's fees she asked for and made a notation that the request was less than I knew it cost to prosecute the action. I held him in contempt for not paying the doc-

tors, and . . . ah . . .

Client: You didn't put him in jail, I presume.

Lawyer: No, I didn't put him in jail. I would have if they had asked me to. And the fourth one was the child support. In chambers, they had asked for $275, and I gave them $300. So . . . And he wanted to pay what? $25 a month, or something.

Client: Hard-nosed judge. Whew.

The lawyer later claims that he knows one of the judges involved in this client's case well enough to tell him off in private ("I'll tell you when this is over, I'm going to take it to John Hancock and I don't think he'll ever do it again") and that he supported the other's campaign for office. These references suggest that a lawyer's capacity to protect his client's interests depends in part on his special access to the system's functionaries who will react to who he is rather than what he represents. We found this emphasis on insider status, reputation, and local connections repeatedly in the cases that we observed. The lawyer in this case and the other lawyers we studied generally presented themselves as well-connected insiders, valuable because they are known and respected rather than because they are expert legal technicians.[4]

The kind of familiarity with the way the system works that insiders possess is all the more important in divorce cases because the divorce process is extremely difficult to explain even to acute outsiders.

Client: Tell me just the mechanics of this, Peter. What exactly is an interlocutory?

Lawyer: You should know. It's your right to know. But whether or not I'm going to be able to explain this to you is questionable. . . . It's a very . . . It's sort of simple in practice, but it's very confusing to explain. I've got an awful lot of really smart people who've—who I haven't represented—who've asked me after the divorce is over, now what the hell was the interlocutory judgment?

[4] The view that courts honor and protect long-term continuing relations between legal actors and that a key service provided by lawyers is entry to that network has been best developed with respect to criminal courts (see Eisenstein and Jacob, 1977; Feeley, 1979; Heumann, 1977).

The communications that we have been discussing are, for the most part, explicit. The message is in the message. But there is also a way in which the language forms that the lawyer employs to describe the legal process communicate something about that process itself. Although this lawyer is articulate and knowledgeable, his reactions to many of the client's questions are nevertheless circuitous and confusing. Interviews with clients, as well as our observations, suggest that this failing is common. Instead of direct description, lawyers frequently use analogies that seem to obscure more than they reveal. This practice, of course, may be seen as a simple problem of communication. Yet it also suggests that law and legal process are themselves so dense and erratic that they pose a formidable barrier even to well educated and intelligent laypeople.

Another example of this impenetrability is seen when the lawyer is once again pressed to explain why the restraining order was imposed:

Lawyer: Ever since I've been practicing law in Pacificola, I've had—I like him; I respect him; he's a hard worker; and I think he's very, very honest; I supported him in his campaigns, so on and so forth—but I have had difficulty understanding how Mike Cohen thinks. It is—and I have an analogy that I thought of today. While my jury panel was on a break, I went in to watch him, and there was a district attorney that he was questioning. They were going to sentence some guy—it was a probation revocation—they were going to sentence him to county jail. The district attorney had earlier argued that he ought to be sent to the state prison. The judge turns to the district attorney and says, well, now, when I send him to county jail, I want to do this, this, this, this, this, but this is my problem; I don't know if I can do this, do this, do this. And the district attorney started to help him solve his problem, then said, wait a minute; I don't know what I'm doing. I don't want him to go to county jail; this guy belongs in state prison. . . . You just said you were going to think about sending him to county jail, and now you want me to tell you how to do it; I think you're wrong, and I'm not going to tell you how to do it wrong. Now those weren't his

> exact words, but then Cohen had some more chin music and then continued it for another day, so that he could think it over. And he had an excuse. He said, well, I need some more evidence on this, and I need some. . . . And I talked to the district attorney afterwards, and I said, it was so clear to me what was going on. It was as though you, as one side, say, judge, the way I see this case it's a matter of five plus five plus five divided by three equals five. Now, you have made a tentative ruling where you say, five plus five plus five equals fourteen. Now, you want me to tell you how you come up with a right answer after you've made the first false conclusion. And I can't do it. And that's what happened. He just . . .

At its clearest point this answer suggests that the restraining order, like the county jail sentence, rested on a "first false conclusion." What that conclusion is the lawyer never does say. But in the course of constructing the parallel narrative about the sentencing hearing, he suggests that the mind of the judge is unfathomable, that the judge did not know the limits of his own powers, that the district attorney, at least for a moment, did not know his own interests, and that in the end time had been wasted pursuing a course of action based upon a mistaken premise. Judges in particular do not fare well when divorce lawyers describe the legal process to their clients. Many of the lawyers in our sample stress the limited competence of judges and the ways that they can confuse even simple problems (see Sarat and Felstiner, 1985).

Moving from the restraining order to the question of how a settlement could be reached, the client asks why her lawyer did not acknowledge to the other side what he had shared with her, namely that a court battle might end in defeat. In response the lawyer might simply have said that it is poor strategy in a negotiation to tell the other side that you recognize that you may lose. Instead he says:

> *Lawyer:* Okay. I'll do it in my usual convoluted way, using lots of analogies and examples. When you write to . . . when a lawyer writes to an insurance company, representing a person who's been injured in an automobile accident, usually the first demand is somewhat higher than what

> we actually expect to get out of the case. I always explain that to clients. I explain it very, very carefully. I don't like to write letters of any substance without my client getting a copy of it, and inevitably, I will send a copy of it to my client with another letter explaining, "This is for settlement purposes. Please do not think that your case, which I evaluate at $10,000, is really worth $35,000." And then months later when I finally get the offer to settle for $10,000, I will convey it to my client, and they'll say, well, I've been thinking about this, and I think that you're right; it really was worth $35,000. I then am in a terrible position of having to talk my own client down from a number that I created in the first place and that I tried to support and convince them—of course, they wanted to be convinced, so it was easy—that's the difference between a letter that you send to your adversary and a letter that you, or than what you communicate to your client. They're two different kinds of communications. I truly, I mean, where I am is that I . . . The way I evaluate the case is the way I did when Irene was here. This is an objective evaluation for your use, and there is this tension and conflict in every representation. You have hired me to represent your interests. I do that in two fashions. One, I tell you the way I truly see the picture, and then I try to advance your cause as aggressively as I can. Sometimes—almost always—those are inconsistent. I mean, the actions, the words, and so forth are inconsistent.

Like the example of the county jail sentence the lawyer used earlier, this example is also drawn from an area of law unrelated to divorce. The lawyer's point is the hypocrisy of orthodox settlement negotiations. Even if warned, he claims, clients are likely to confuse demands and values. That is their error. In the legal process words and goals, expressed objectives and real objectives, are usually "inconsistent."

Not only is the legal process inconsistent, but it cannot be counted on to protect fundamental rights or deal in a principled way with the important matters that come before it. Thus, the lawyer validates the client's expressed belief that her rights are

neither absolute nor secure in the legal process.

Client: I just really cannot quite believe this, you know. Part of me is still incredulous. I'm . . . It's . . . It's nothing else than property rights. I don't even have the rights of a landlord, to go to a home that I own 50 percent of, to make sure it's not being destroyed. I don't understand that. [Long pause.] I always thought that, in some way or another, if one's human rights were not protected, one's property rights were.

Lawyer: No.

Moreover, as they continue to discuss how the legal system deals with property, the lawyer repeatedly uses the word "arbitrary" to describe the valuation process.

Lawyer: Okay, it's $9,500 to $10,200. So that's, once again, that would have been probably $1,000 less if the appraisal were 3 to 4 months ago, because the decline in interest rates has increased the value—the present value—of pensions on an actuarial basis. I'm not sure I truly understand why that's true, but it is. And so, in a way, that's an arbitrary value that's been placed, just like these appraisals are arbitrary.

. . . . . .

Lawyer: You may think of it in terms of $1,250, but if that's what it takes to settle this case, to give up that in an exchange for what are really illusory values on some of this other stuff—on three of the things, the values are really arbitrary: The value of the house, any real property appraisal, is arbitrary; the value on the retirement is definitely arbitrary; and the value on the limited partnerships is very definitely.

The lawyer reinforces this message when he expresses his sense that fairness may not even be a goal of the divorce process. As they discuss what they ought to demand in trying to negotiate a settlement, the client says:

Client: Sure. I mean, that's as much as can be expected, I believe. Am I right in that?

Lawyer: I think so, too. I think that that effects a good settlement. Well, it effects an equal division. I don't know—Is a legal settlement a fair settlement? It gets the legal aspects of the case over.

Later in the conference the relationship of law to values like fairness and justice is discussed more explicitly. At that point the client muses about her goals and hopes about the legal process of divorce.

Client: Well, I mean, I'm a liberal. Right? A liberal dream is that you will find social justice, and so here was this statement[5] that it was possible to fight injustice, and you were going to protect me from horrible things like judicial abuse. So that's, uh, it was really nice.

To the client, "justice" demands that the error of the restraining order be righted. For the lawyer that kind of justice simply gets in the way of what for him is the real business of divorce: to reach a property settlement, not to right wrongs or vindicate justice. There is, if you will, a particular kind of justice that the law provides, but it is not broad enough to include the kind that the client seeks. For her justice requires some compensation, or at least an acknowledgment that she has "been treated unjustly." When she finally gets the lawyer to speak in terms of justice, he admits that it cannot be secured through the legal process.

Client: But as you say, if you want justice in this society, you look somewhere other than the court. I believe that's what you were saying to Bob.

Lawyer: Yeah, that's what I said. Ultimate justice, that is.

Legal justice is thus juxtaposed to ultimate justice. The person seeking such a final accounting is clearly out of place in a system that focuses much more narrowly. To fit into the system the client must reduce her conception of justice to what the law can provide.[6] But perhaps the language of justice

[5] The "statement" is the lawyer's letter to the client's husband outlining their position on the restraining order.

[6] No-fault divorce law incorporates this conception of the role of the legal process by eliminating the kind of moral accounting that had been required as part of the divorce process. "Under no-fault both 'good' spouses and 'bad' spouses are treated equally when it comes to dividing marital property. . . . The implicit message of no-fault is that one's moral behavior during

serves, for this client, a purpose that is neither as abstract nor as disinterested as her language suggests. This client identifies justice solely with the vindication of her own position. She never refers to a more general standard. Thus the failure of law to provide justice is, for her, a failure to validate her position. The language of justice also serves to bolster her image of herself as an innocent, rather gracious, victim of an evil husband and his untrustworthy lawyer. Tendencies toward self-exculpation and blaming are quite common in the divorces in our sample, although the use of the language of justice toward such ends is not. This language also serves to exert moral pressure on this lawyer to validate the client's sense of herself even as he attempts to explain the limits of the legal process.

In total, the lawyer's description of the legal process involves an open acknowledgment of human frailties, contradictions between appearance and reality, carelessness, incoherence, accident, and built-in limitations. The picture presented is both cynical and probably considered by the lawyer to be realistic. Whereas others claim that legal actors, particularly appellate judges, present the law in highly formalistic terms and work to curtail inconsistencies and contradictions in legal doctrine (see, e.g., Kennedy, 1979; Tushnet, 1983), many of the lawyers that we observed engage in no such mystification. If critical scholars are right in arguing that mystification and the presentation of a formalist front are necessary to legitimate the legal order, then what we and others have seen in the legal process as it is experienced at the street level (see, e.g., Merry, 1985) suggests that one tier of the legal system, in this case divorce lawyers, may work to unwind the bases of legitimation that other levels work to create. Of course, it is possible, although unlikely (see Macaulay, 1984), that the legal order derives its legitimacy from its most remote and least accessible elements or that the legitimacy of law is not much affected by how it is presented by lawyers and perceived by clients in the lawyer's office.[7]

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marriage . . . [has] become a matter of choice—rather than a matter of law" (Weitzman, 1984: 12). There is thus no longer any need to force "the parties to label their behavior in moral terms" (ibid., p. 21). In fault divorce, lawyers were required to attend to the client's sense of injustice and even to encourage its expression. Under no-fault, the law retreats from moral issues and focuses instead on reaching agreements. Divorce settlements no longer lead to final vindication, the kind of official judgment of good and bad motives and behavior, that clients could once obtain through formal adjudication.

[7] There is not much doubt from the transcript that the client has come to accept the legal ideology presented by her lawyer. During the course of the conference, she describes a legal system that requires trust from people who have been badly betrayed, threatens judicial abuse, leaves human rights un-

IV. TO FIGHT OR TO SETTLE?

Given such a legal process, how should divorce disputes be managed? This concern is central in most of the cases that we observed, and it is an issue that may recur as lawyer and client discuss each of the major controversies in a divorce case. Generally the question is whether the client should attempt to negotiate a settlement or insist on resolution before a judge. This question is sometimes posed issue by issue and sometimes across many issues.

While many clients think of the legal process as an arena for a full adversarial contest, most divorce disputes are not resolved in this manner. Although not all lawyers are equally dedicated to reaching negotiated agreements, most of those we observed advised their clients to try to settle the full range of issues in the case. This is not to say that these divorces were free of conflict, for the negotiations themselves were often quite contentious. Although some of our lawyers occasionally advised clients to ask for more than the client had originally contemplated or to refuse to concede on a major issue when the client was inclined to do so, most seemed to believe that it is generally better to settle than contest divorce disputes. Thus, we are interested in the ways in which lawyers get their clients to see settlement as the preferred alternative.

The conference we are examining revolves around two major issues: (1) whether to ignore or contest the restraining order; and (2) what position to take concerning disposition of the family residence. Much of the conference is devoted to discussing the restraining order—its origins, morality, and legality; the prospects for dissolving it; the lawyer's stake in contesting it; and the client's emotional reaction to it. Substantively the order is not as important as the house itself, which received much less attention and generated much less controversy. Both issues, however, force the lawyer and client to decide whether they will retain control of the case by engaging in negotiations or cede control to the court for hearing and decision. The lawyer definitely favors negotiations.[8]

Lawyer: Okay. What I would like your permission to do

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protected, fails to provide true justice, is staffed in part by amateurs issuing sloppy orders, and is contaminated by hard lawyers manipulating weak clients. On the other hand, it is possible that clients do not project from their experience to the legal order generally, as in the case of Indian litigants who considered themselves victimized by the legal levels they have experienced yet continued to have faith in the next higher tier in the system (see Kidder, 1973).

[8] The lawyer's expressed preference for trial work means that this tilt toward negotiations may be at the cost of some professional fulfillment.

> then is to meet with Foster, see if I can come up with or negotiate a settlement with him that, before he leaves . . . I leave his office or he leaves my office, he says, we've got something here that I can recommend to my client, and I can say, I've got something here that I can recommend to my client. My feeling is, Jane, that if we reach that point, both lawyers are prepared to make a recommendation on settlement to their respective clients, if either of the clients, either you or Norb, find something terribly disagreeable with the proposal that we have, the lawyers have come to between themselves, then the case just either can't be settled or it's not ripe for settlement. But we would have given it the best shot. But I wouldn't . . . as you know, I'm very concerned about wasting a lot of time and energy trying to settle a case where two previous attempts have been dismally unsuccessful.

The major ingredient of this settlement system is the primacy of the lawyers. They produce the deals while the clients are limited to initial instructions and after-the-fact ratification. The phrase "we would have given it our best shot" is crucial. The "we" seems to refer to the lawyers. Indeed, their efforts could come to nothing if either client backs out at the last minute. The settlement process as described thus has two dimensions—a lawyer to lawyer phase, in which an arrangement is worked out, and a lawyers versus clients phase, in which the opposing lawyers join together to sell the deal to their clients (see Blumberg, 1967). If the clients do not accept the settlement as a package, the only alternative is to go to trial. Furthermore, if the professionals are content with the agreement they have devised, dissatisfied clients not only have nothing to contribute but also had perhaps better seek psychotherapy:

> *Lawyer:* And if we have to come down a little bit off the 10 percent to something that is obviously a real good loan—9 percent—a percentage point on a one-year, eighteen-month, $25,000 loan does not make that much difference to you. And that's worth settling the case, and I'll say, Jane, *if we're going to court over what turns out to be one percentage point, go talk to Irene some*

more. So that's the kind of a package that I see putting together.

The client in this case is reluctant to begin settlement negotiations until some attention is paid to the restraining order. While she acknowledges that she wants a reasonable property settlement, she reminds her lawyer that that is not her exclusive concern:

Client: Yes, there's no question in my mind that that [a property settlement] is my first goal. However, that doesn't mean it's my only goal. It's just my first one. And I have done a lot of thinking about this and so it's all this kind of running around in my head at this point. I've been looking very carefully at the parts of me that want to fight and the parts of me that don't want to fight. And I'm not sure that any of that ought to get messed up in the property settlement.

The lawyer responds by acknowledging that he considers the restraining order to be legally wrong and that he believes it could be litigated. Thus, he confirms his client's position and inclination on legal grounds. Yet he dissents from her position and opposes her inclination to fight on other grounds. First, he states that the restraining order, although legally wrong, is "not necessarily . . . completely wrong" because it might prevent violence between spouses. This complicated position is a clear example of a tactic frequently used by lawyers in divorce cases—the rhetorical "yes . . . but." The lawyers we observed often appeared to be endorsing the adversarial pursuit of one of the client's objectives only to remind the client of a variety of negative consequences associated with it. In this way lawyers present themselves as both an ally and an adviser embracing the wisdom of a long-term perspective.

Second, the lawyer is worried that an effort to fight the restraining order would interfere with the resolution of the case, that is, of the outstanding property issues. Although the lawyer considers the restraining order to be a legal mistake, its effect would end upon final disposition of the house. In the meantime, the client can either live with the order or pay for additional hearings. He believes that it would be unwise for her to fight further not only because the contest would be costly but also because it would postpone or derail entirely ne-

gotiations about the house and other tangible assets. Thus when the client asks whether the issue of the restraining order has been raised with her husband's lawyer, her lawyer says:

> *Lawyer:* Well, I've talked to him. My feelings are still the same. They're very strong feelings that what has been done is illegal, that I want to take it to the Supreme Court. I told Foster off. I basically told him the contents of the letter. I said that I think that Judge Cohen is dead wrong, and I would very much like to litigate the thing. On the other hand, I have to be mindful of what Irene said, which is absolutely correct, does that move us toward or away from the ultimate goal, which is the resolution of the case and what you told me when we started off now in very certain terms.

The lawyer's position in this case can be interpreted as a preference for negotiations over litigation based on his determination that this client has more to lose than gain by fighting the restraining order and for the house. In this view the lawyer is neutral about settlement in general and is swayed by the cost-benefit calculation of specific cases. Thus there is a conflict between the client's desire for vindication on what the lawyer perceives to be a peripheral issue and the lawyer's interest in reaching a satisfactory disposition on what for him is a much more important issue. Time and again in our study we observed lawyers attempting to focus their client's attention on the issues the lawyers thought to be major while the clients often concentrated on matters that the lawyers considered secondary. While the disposition of the house in this case will have long-term consequences for the client, the restraining order, as unjust as the lawyer understands it to be, is in his view a temporary nuisance. His sense of justice and of the long-term best interests of his client lead him to try to transform this dispute from a battle over the legality and morality of the restraining order to a negotiation over the more narrow and tangible issue of the ultimate disposition of the house and other assets, which he believes can and should be settled.

In attempting this transformation, the lawyer allies himself with the therapist:

> *Lawyer:* I agree with Irene that that [fighting the restraining order] is not the best way. . . . It's

> probably the worst way. This [negotiating] hopefully is the best way.

This reliance on the therapist is noteworthy because it is often assumed that a therapeutic orientation is antithetical to the adversarial inclination of law and the legal profession (see, e.g., Eckhoff, 1966). Yet in this case the lawyer uses the therapist to validate his own position. The legal ideology and the therapeutic ideology seem to him to be compatible; both stress settlement and disvalue legal struggles. Perhaps this reflects either a more general erosion of the distinctiveness of the legal form (Foucault, 1979) or a convergence of legal and therapeutic models of divorce. Thus the settlement preference of no-fault divorce corresponds to the movement in family therapy toward the "constructive divorce." It could well be that various professionals dealing with divorce have simultaneously registered and reinforced the emergence of new cultural mores concerning marriage and its dissolution.[9] However we interpret this observation, it is clear that this lawyer, and most of those we observed, construct an image of the appropriate mode of disposition of a case that is at odds with the conventional view in which lawyers are alleged to induce competition and hostility, transform noncontentious clients into combatants, and promulgate a "fight theory of justice" (Felstiner, Abel, and Sarat, 1981; Frank, 1950; Mather and Yngvesson, 1981; Simon, 1975).

The client's own ambivalence toward settlement continues throughout the conference. In discussing a letter that her lawyer had prepared to send to the other lawyer outlining their position on the restraining order, she says:

> *Client:* So it was an important letter, and I didn't realize how much I wanted to continue fighting until I read the first portion of this letter. . . . It kind of let me feel that finally . . . I'd found a knight in shining armor.

To which the lawyer responds:

> *Lawyer:* Ouch.

The transference reflected in her reference to a "knight in shining armour," a female client's substitution of her male law-

[9] We must make clear, however, that references to therapists were as rare in our Massachusetts cases as they were common in the California sample.

yer for her failed husband, may not be unusual in divorce cases, but nowhere in our sample is it as explicit as it is here. A minute later this client substitutes a different metaphor when she asks:

Client: Are you familiar with Chief Joseph?

Lawyer: No.

Client: He was a Nez Perce Indian, and he fought the troops of the U.S. government for years and finally he saw that his whole tribe would be killed off and the land devastated so he put down his weapons. And I think the full quote is something like: "From the time the moon sets, I will fight no more forever." I went away that day, that Monday, feeling that this fight had to end, and that's still what I feel.

Lawyer: Now, orient me as to . . .

Client: That went on Monday evening, the day of the hearing, to Norb.

Lawyer: Okay. After . . . It was after Irene and you and I spoke, but it was before the last conversation you and I had and it preceded . . .

Client: Your letter, your draft.

Lawyer: My draft, and it also preceded Norb's proposal.

Client: Yes.

Lawyer: So Norb's proposal is in response to this presumptively.

Client: That's right.

Lawyer: Okay.

Client: I think that's accurate. One of the thoughts I had that afternoon was that—probably it came a lot from what Irene had to say—that I've been arguing with this man for a good many years of my life. You know, first in the living room, then involving family and friends, then involving therapists, and now involving attorneys. How many forums am I going to spend arguing with this person? And I really want the war to end. So that's my basic conflict. I feel I've been treated unjustly. I feel there's a very good case here, but I don't want to fight any more. And that's what this really is about—a continuing war. So a part of me is

still very much with Chief Joseph—I don't want to fight any more. There are other and better things to do with this life.

However, as they move further into the discussion of whether to fight or settle, the client begins to interpret settlement as a capitulation and to reiterate her own ambivalence about how to proceed.

Client: And I think I feel some level of fear about this process of negotiation and how much more I'm going to have to give up. I don't feel tremen—, you know, there's a part of me that does not feel very satisfied with having capitulated repeatedly, and now we're simply doing it with a property settlement.

Lawyer: That's, yea, that's a . . .

Client: I mean, I don't want to fight and I do want to fight, right? That's exactly what it comes down to.

Lawyer: Yes, you're ambiguous.

Client: Oh, boy, am I ever. And I have to live with it.

She may have to live with her ambivalence, but her lawyer needs a resolution of this issue. The lawyer seeks this resolution by allying himself with the "don't fight" side of the struggle. Her advocate, her "knight," has thus become the enemy of adversariness. Through him the legal system becomes the champion of settlement. Ironically, the client's ambivalence serves to validate the lawyer's earlier suggestion that he might be wasting his time and her money trying to settle this case because she might refuse at the last minute to agree to a deal.

The conference reaches closure on the fight/settle issue when the lawyer again asks whether he has her authority to negotiate on the terms they had discussed and repeats his earlier warning that this is their last chance for a settlement:

Lawyer: Well, then I will make a . . . my best effort—we are now coming full circle to where we were this morning, which is fine, which is where we should be. I will make my best effort to effect a settlement with Foster along the lines that you and I have discussed and the specific terms of which I can say to you, Jane, I recommend that you sign this. The decision, of course, is

> yours. If you don't want to sign it, we're going to go ahead with the litigation on the restraining order and probably a trial. Things can change. We can effect a settlement before the restraining order, which is highly unlikely, or between the time the restraining order issue is resolved and the actual time of trial, maybe there will be another settlement. I'm not going to suggest or advise, after this attempt, that either one of us put any substantial energy in another try at settlement. I just think it's a waste of time and money.

The lawyer's reference to "coming full circle" reflects both the centrality of the dispositional question and the amount of time spent talking about issues the lawyer considers to be peripheral. Having invested that time the lawyer secures what he wanted, both an authorization to negotiate and an agreement on the goals that he will pursue. The client, on the other hand, has aired her ambivalence and resolved to try to end this dispute without a legal contest. Both her ambivalence and her eventual acceptance of settlement are typical of the clients we observed.

V. THE LEGAL CONSTRUCTION OF THE CLIENT

To get clients in divorce cases to move toward accepting settlement as well as to carry out the terms of such agreements, lawyers may have to try to cool them out when they are at least partially inclined toward contest. In divorce as in criminal cases, the lawyer must help redefine the client's orientation toward the legal process (Blumberg, 1967). In the criminal case this means that lawyers must help the client come to terms with dropping the pretense of innocence; in divorce work this means that lawyers must help their clients view the emotional process of dissolving an intimate relationship in instrumental terms. In both instances, lawyers and clients struggle, although rarely explicitly, with the issue of what part of the client's personality is relevant to the legal process. Thus, the discussion of whether to fight or settle is more than a conversation about the most appropriate way to dispose of the case. Contained within the discourse about negotiation is the construction of a legal picture of the client, a picture through which a self acceptable to the legal process is negotiated and validated (Gabel, 1980; Unger, 1975). This construction is necessary because the legal process will not or cannot deal with many aspects of the dis-

putes that are brought to it. Legal professionals behave as if it were natural and inevitable that a litigant's problems be divided up in the manner that the legal process prescribes (Unger, 1975). Lawyers thus legitimate some parts of human experience and deny the relevance of others, but they do not explicitly state what is required of the client. Rather, the approved form of the legal self is built up from a set of oppositions and priorities among these oppositions.

The negotiation of the legal self in this case begins by focusing on the relative importance of emotions engaged by the legal process and the symbolic aspects of the divorce as opposed to its financial and material dimensions. Throughout this conference the lawyer warns his client not to confuse the realms of emotion and finance and instructs her that she can expect the legal process to work well only if emotional material is excluded from her deliberations.[10]

This emotional material is rather complex and difficult for both lawyer and client to sort out. The client is, in the first instance, eager to let her lawyer know that she feels both anger and mistrust toward many participants in the legal process. This combination of feelings is clearly expressed as she talks about the restraining order and the manner in which it was issued:

Client: So I was a total ass. I moved out of the house and left myself vulnerable to that, which I was certainly not informed of by any attorney in the process of mediation. And I was setting myself up for that.

Lawyer: In my view, it would have been a rather extraordinary attorney that could have advised you of that, because, in my view, that's not the law. So I'm hard-pressed to see how a lawyer could have said, don't move out of the house or you may prejudice your situation by moving out of the house.

Client: But obviously, some attorney did, right? We have the case of Paul Foster, who interprets

[10] Although most lawyers we studied tried to avoid discussion of their clients' emotional problems, this conference is not characteristic of the sample in two respects. First, there is more explicit talk about emotions than one would typically find. For this client, the discussion of her emotions seems to satisfy a need in and of itself. Second, some lawyers clearly encourage clients to link their feelings to the divorce process, primarily when the lawyer feels that the client may otherwise be willing to surrender too much too quickly or when the lawyer seeks to use the client's "agitated state" as a bargaining ploy.

> the law in that fashion. Well, I'm angry about all that. However . . .

While her lawyer once again validates her sense of the legal error involved in issuing the restraining order, her anger is fueled by the failure of her husband's lawyer to accept this interpretation of the law.

The client continues to express her anger throughout the conference, especially when the conversation turns directly to her husband's lawyer:

> *Client:* The other option I see could have been that Norb would have gotten different legal advice from the beginning. So the thing, I suppose, that I'm concerned about, I'm concerned about Foster. I'm concerned about the kind of person he is. I distrust him as thoroughly as I do Norb, and I think you have been very measured in your statements about him. I think he's a son-of-a-bitch, and there's nothing I've seen that he's done that changed my mind about that. And I think that he has a client that can be manipulated.[11]

The client's mistrust is not reserved exclusively for the opposition. She is, to an extent, wary of her own lawyer as well:

> *Client:* But when I think of myself—you know, this is a very vulnerable time in my life, and one of the things that has happened is a major trust relationship has ended. And then suddenly in the space of what—six weeks or something—I'm supposed to entrust somebody else, not only with the intimate details of my life, but with the responsibility for representing me. And that's not easy for me under any circumstances. I really like to speak for myself.

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[11] This attitude toward the other lawyer is dangerous if a settlement is to be reached. A client's concern about, even anger toward, their spouse's lawyer is a frequent theme in the conferences we have observed. Lawyer responses are, in most cases, ambivalent. Blaming the intransigence or incompetence of the other lawyer is frequently used to explain problems or disappointments in the progress of the case (Sarat and Felstiner, 1985); however, this tactic often is balanced by the proposition that it is nevertheless possible for the opposing lawyers to work together to iron out the disputes in the case. Rarely does a lawyer refuse to concede that the other lawyer is, on a global level, somehow "reasonable."

The predicament in which the client finds herself—needing to trust a stranger when trust has just been betrayed by an intimate—is one that faces and perplexes divorce clients generally.

Given her concerns about her husband and the lawyers involved in the case, it is not surprising that the issue of trust is paramount when the client considers how to try to reach a negotiated agreement:

Client: One of the things I'm feeling is a tremendous discontent that some form of negotiation is going to now begin without any act from Norb that establishes trust.

. . . . . .

Client: Ahh. It doesn't seem that I have a lot of options. I simply will have to accept that, and I guess I will have to live with that pain. . . . I think it's dreadfully unfair. But it doesn't seem that I can get any satisfaction, so I'll have to . . .

Lawyer: That's not entirely true. You can litigate. Strongly we can litigate.

Client: Well, I think the only question then is whether or not an overture then is even possible before litigation. I'm not sure. I mean, yes, I have these things separated in my mind, but how can I trust this human being to do anything? I don't know if I can. I feel that pretty strongly.

Lawyer: I don't blame you. I don't blame you at all.

Because she feels betrayed by her husband, the client wants "some gesture from him" as a means of establishing the basis for negotiations. Moreover, she feels that she is already two points down vis-à-vis her husband. First, he has the house and has denied her any access to it, although her departure was an act of generosity done for the good of the marital community. Second, she "knows" that he is going to get the house and that she will at best get half its market value. She repeatedly asks the lawyer about gestures or concessions to even this score:

Client: So I wrote this as a draft to send to Norb. . . . And obviously I'm still waffling. . . . I mean, I don't know exactly how to give up this hearing. Part of me says, it's real clear and I ought to. But I want some gesture from him.

. . . . . .

Client: Okay. That's not going to be a problem for me, alright? I don't think that one percentage point is going to be a problem for me. This is the problem for me. I feel that, even to get to this point, I have given up a substantial amount. One thing that I've given up is the home in Pacificola. I don't give a fuck how much cash Norb gives me, I'm not going to be able to re-create that scene, and that's just a fact of real estate in Pacificola. I want the negotiation to begin there. I want some attention to be paid to what I have already conceded to even get to this point.

. . . . . .

Client: I just think that's a very, very big concession, and I think if I'm to take another kind of settlement, then that is the first thing that ought to be seen. Now, that's a very good faith negotiation thing for me to do, say, okay, Norb has this tremendous emotional investment in the house; I'm willing to let go of mine.

. . . . . .

How does the lawyer respond to the client's emotional agenda, to her efforts to define those parts of herself that are legally relevant? With respect to the problem of trust and the need for a gesture, the lawyer once says, "Ouch," once, "I don't blame you," and once he changes the subject. He does tell the client that her husband is unlikely to reestablish trust by giving up the restraining order. In addition, there is a brief exploration of whether she could buy the husband's share of the house, an alternative doomed by earlier recognition that it would involve an expensive and probably fruitless court battle. There is a joke about taking $25,000 to forget the restraining order. Otherwise nothing is said.

Why? Lawyer and client could have discussed the kind of gestures short of unconditional surrender that might have satisfied her and been tolerable to her husband. The lawyer could have explored the possibility that the husband might agree to his client's occasional, scheduled visits to the property or to $5,000 more than a 50/50 split in recognition of giving up the house. Perhaps he feared that further exploration might complicate his efforts to have his client focus on reaching an acceptable division of property. There can be little doubt that this objective governed his thinking.

Lawyer: Okay, Now, that disagreement—or, it wasn't even a disagreement—that—where we weren't on the same wave-length—was really a matter of style than of end result. Right?

Client: You mean, what part?

Lawyer: Where you said was that you wanted me to start these negotiations by making it clear that major concession was being made at the outset and it was being made by you.

Client: Yes.

Lawyer: Okay, I understand that now. Let's come back to the end of it. . . . What am I shooting for? Okay, I agree. That's the way it ought to be begun, and that point ought to—during my conversations, I ought to keep coming back to that, if I have to use it. Just make that strongly. But what am I shooting for? What's the end result? Is it what I was talking about initially?

Client: Sure. I mean, that's as much as can be expected, I believe. Am I right in that?

The lawyer proposes to turn the client's demand for concessions into an opening statement and implies that an equal division of assets is the only possible legal settlement. The client, on the other hand, appears to believe that it is dangerous to trade values with someone that you do not trust for both the chance that they will take advantage of you in making the deal and the probability that they will fail to do what they promise are increased. The lawyer is, and can afford to be, disinterested in trust. Protection of his client does not lie in fostering good will and mutual respect between the spouses but rather in the terms of the bargain and in its enforcement powers. His duty is to see that the settlement agreement is fair to his client, whatever the motives or morals of the other side may be, and that the structure of the agreement guarantees that his client gets what she bargained for or its substitute, or at least the best approximation available.

By playing down the question of trust the lawyer is telling the client that the emotional self must be separated from the legal self. Gestures and symbolic acknowledgment of wrongs suffered belong to some realm other than law. He is, in addition, defending himself against a kind of emotional transference. Much of the emotion talk in this conference involves the lawyer himself, directly or indirectly. In the discussion of trust

the client makes the lawyer into a kind of husband substitute ("a major trust relationship has ended. And then . . . I'm supposed to entrust somebody else . . ."). The client described him as her "knight in shining armor," an image of protection and romance; she acknowledges having sexual fantasies about him[12] and she speaks of her expectation that he would protect her from "judicial abuse." These demands on her lawyer typify the kind of environment in which divorce lawyers work. Moreover, the discussion of trust and its betrayal signals to her lawyer the need for an elevated watchfulness. He may, like her earlier source of protection and romance, not be fully trusted. The gesture implicitly demanded of him is an embrace of her sense of justice and of what that implies in practical terms.

By downplaying emotions and signaling the limited relevance of gestures, the lawyer defends himself against both the transference and the test.[13] He must find a way to be on his client's side (e.g., repeatedly acknowledging the legal error of the restraining order) and, at the same time, to keep some distance from her (e.g., responding "Ouch" to the image of the knight). Achieving this precarious balance is a peculiar, although not unique, difficulty of divorce practice (for a similar discussion in the criminal context, see Blumberg, 1967).

To maintain this balance the lawyer acknowledges the difficulty of separating emotional and property issues, but continually reminds the client of its necessity if they are going to reach what he calls a "satisfactory disposition" of the case:

> *Lawyer:* I mean, people have a very, very hard time of separating whatever it is—so I think for shorthand, we call it the emotional aspect of the case—from the financial aspect of the case. But if there is going to be a settlement, that's kind of what has to happen, or the emotional aspect of the case gets resolved and then the financial thing becomes a matter of dollars and cents and the client decides, I'm tired and I don't want to fight over the last $500 or the last $100.

The need to exclude emotional issues is thus linked to a warning that emotions can jeopardize satisfactory settlements.

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[12] *Client*: So the way I phrased it to Irene was, instead of sitting around mind-fucking my situation with Norb all the time, I began to have wonderful sexual fantasies about my attorney.

[13] We are unable at this point in our analysis to say whether transference by clients and protective measures by lawyers are common in other configurations of lawyer and client gender.

The notion of satisfactory disposition, however, is itself problematic. The lawyer's definition of "satisfactory" tends to exclude the part of the client's personality that is angry or frustrated. Satisfactory dispositions are financial. The question of who is satisfied is left unasked. For the client, no definition of the case that ignores her emotions seems right; to the lawyer, this is the only definition that seems acceptable. Moreover, the responsibility for finding ways to keep emotions under control is assigned to the client. The lawyer offers no help in this task even as he acknowledges its relevance for this client and for the practice of divorce law. If no settlement is reached it will, at least as far as their side is concerned, be because of a failure on the part of the client.

Throughout this conference the lawyer stresses the need for two parallel separations: the separation of the emotional issues from the legal and the separation of the client and her husband.

Client: I mean, I don't want to fight and I do want to fight, right? That's exactly what it comes down to.

Lawyer: Yea, you're ambiguous.

Client: Oh, boy, am I ever. And I have to live with it.

Lawyer: That's right. I'd say the ambiguity goes even deeper than the issue of fighting and not fighting. It's how . . . The ambiguity is what Irene talked about and that is—it's the real hard one—it's terminating the entire relationship. You do and you don't, and the termination . . . I mean, you're angry; you're pissed off. You've said that. And are you ready to call a halt to the anger and I'm not so sure that that's humanly possible. Can your rational mind say, okay, Jane, there has been enough anger expended on this; it is time to get on with your life. If you are able to do that, great. But I don't know.

As the lawyer sees it, the client will only be able to make an adequate arrangement with her husband when she can contemplate their relationship unemotionally. As the client sees it, the second separation seems impossible if the first is carried out. She cannot become free of her husband if she thinks about legal problems in material terms only—if she fails to take her feelings into account she will continue to be affected by them.

Thus, the program the lawyer presents to the client appropriates her marriage to the realm of property and defines her connection to her husband exclusively in those terms. She, on the other hand, sees property issues embedded in a broader context. The client speaks about the separation of the emotional and financial issues as being difficult to effect because it is unnatural. The market does not exhaust her realm of values, and she has difficulty assigning governing priority to it. Yet this is what the lawyer indicates the law requires.[14]

Nevertheless, the separation of emotional and economic matters may benefit the client. While it does exact an emotional toll, concentrating on the instrumental, tangible aspects of the divorce may produce a more satisfactory disposition than focusing on the emotional concerns. The lawyer may be trying to explain to his client that in the long run she is going to be more interested in the economics of the settlement than in the vindication of her immediate emotional needs. In his view, legal justice, although narrow, is justice nonetheless, and his job is to secure for her the best that can be achieved given the legal process as he knows it.

Putting emotional matters aside may also serve the interests of lawyers untrained in dealing with emotional problems and unwilling to find ways to cope with them. It allows lawyers to sidestep what is clearly one of the most difficult and least rewarding aspects of divorce practice. In so doing they are able to avoid assuming a sense of responsibility for the human consequences of being unresponsive to emotion. In this conference, for example, the lawyer suggests that the legal process works best for those who can control their emotions and concentrate on the instrumental, the calculating, the pecuniary. The client's uncertainty about the possibility of such a separation of issues is met by a certainty expressed by the lawyer. But the lawyer's certainty is not that the client can effect the required separation but rather that the separation is an imperative of the legal process without which the system cannot efficiently deliver its goods. Having expressed this imperative, the lawyer is thus relieved of any responsibility for helping his client come to terms with the anger and frustration that condition her feelings about property issues. Ultimately, it seems that

[14] If the intent of no-fault reforms was to reduce the tendency of legal process to encourage acrimony between otherwise friendly divorcing spouses (Weitzman, 1984), its effect may also be to make the legal process more alien for those whose divorce is angry and bitter and who confront a legal process inhospitable to those aspects of their divorce that may seem most important to them.

the client gets the message. As she says, "The extraneous factors, which are every bit as important as the rest of it, are not going to be paid attention to at all."

VI. CONCLUSION

Lawyer-client interaction involves attempts to negotiate acceptable resolutions of problems in which lawyers and clients usually have different agendas, expectations, and senses of justice. As in any negotiation, the parties possess different information and have different needs to fulfill. Clients know their histories and goals, lawyers must learn about them. Lawyers know the law and the legal process, clients must find out about them. Every conference is thus to some extent competitive: Each of the participants sets out to fulfill their own agenda and generally only provides what the other wants on demand (Griffiths, 1984).

Competition and accommodation between lawyer and client shape the course of divorce litigation—when negotiations are initiated, how they are conducted, what is asked for and offered, and whether a case is settled. Moreover, the manner in which the contest over agendas and expectations is resolved may also have a powerful effect on the way clients feel at the end of the process, on their levels of satisfaction, and on their views of the legitimacy of law. Interactions between lawyers and clients also provide one occasion for the construction and transmission of legal ideology (Gordon, 1983; Trubek, 1984). The dialogue between lawyers and clients reveals the sense of rights, actionable injuries, and justice that people bring to the legal process and that the process, through the words and actions of lawyers, is willing to recognize and act upon.

A. Lawyer-Client Interaction: The Lawyer's Perspective

Clients bring to their encounters with lawyers an expectation that the justice system will impartially sort the facts in dispute to provide a deductive reading of the "truth." They expect the legal process to take their problems seriously, and they usually seek vindication of the positions that they have adopted. They expect the legal process to follow its own rules, to proceed in an orderly manner, and to be fair and error free. As Merry (1985: 68) notes, most litigants begin with a fairly strong belief in "formal justice." By the time a problem has become serious enough to warrant bringing it to a lawyer and mobilizing the legal process, "the grievant wants vindication, protection of his or her rights, an advocate to help in the battle or a

third party who will uncover the 'truth' and declare the other party wrong. Observations suggest that courts rarely provide this . . . but inexperienced plaintiffs do not know this" (Merry and Silbey, 1984: 153; see also Engel, 1984).

To some extent, it is the job of lawyers to bring these expectations and images of law and legal justice closer to the reality that they have experienced. For them legal justice is situational and outcomes are often unpredictable. The legal process provides an arena where compromises are explored, settlements are reached, and, if money is at issue, assets are divided. Lawyers are intimately familiar with the human dimensions of the legal process. They know that in most instances the process is not rule governed, that there is widespread use of discretion, and that decisions are influenced by matters extraneous to legal doctrine. Moreover, they believe that most clients cannot afford or would not want to pay the cost of a full adversarial contest. They may conclude, therefore, based on experience, that the client who demands vindication today will want both a larger financial settlement and a smaller lawyer's bill tomorrow.

Because lawyers' experience is so much more extensive than that of clients, lawyers attempt to "teach" their clients about the requirements of the legal process and to socialize them into the role of the client.[15] Some of the client's problems and needs will be translated into legal categories (Cain, 1979) and many more will have legal labels attached to them. The client in contact with a lawyer and the legal process must frequently be talked into a frame of mind appropriate to the needs of legal business. Lawyers serve the legal system by helping clients "redefine . . . [their] situation and restructure . . . [their] perceptions" to facilitate a reconciliation between client objectives and the needs of legal institutions (Blumberg, 1967: 20). In the lawyer's office the client is likely to be introduced to a system of negotiations in which formal hearings are rare, rights are no guarantee of remedies, unfamiliar rules of relevance are asserted, and the nature of their own disputes and objectives are transformed (see Felstiner *et al.*, 1981; Macaulay, 1979; Mather and Yngvesson, 1981; but see Cain, 1979).

In fact, the range of client expectations with which lawyers must come to terms covers almost everything that is involved in a divorce—the distribution of property, the level of support, the rights to custody, the speed with which things are done, the wisdom of the rules and the judges, the roles that lawyers are

[15] For a similar discussion of doctor-patient relations, see Taylor, 1979.

willing to play, the times at which they are available, and the fees that they charge. Moreover, the clients that we studied expect their lawyers to tell them about their rights and obligations and to predict how they will fare in contests over houses, retirement benefits, visitation rights, support payments, and the like. Whatever their reservations about lawyers as a group and litigation as a means of resolving disputes, they expect their lawyers to navigate them through troubled waters. They want to believe that charts exist, that shoals are marked, and that channels to safe harbors are defined. But lawyers present a different picture: Where clients want predictions and certainty, lawyers introduce them to the frequently unpredictable reality of divorce. While not every client is mistaken about all of these matters, many divorce lawyers understandably feel that they must constantly be on their guard against clients who seek what cannot be delivered. A major professional function therefore is to attempt to limit clients' expectations to realistic levels.[16]

A heavy dose of cynicism helps lawyers accomplish this goal. The cynic chips away at the legal facade until the client realizes that she is enmeshed in a system ridden with hazards, surprises, and people who are out to get her. By focusing on the mistakes, irrationality, or intransigence of the other side, the lawyer creates an inventory of explanations that puts some distance between himself and responsibility for any eventual disappointment.[17] Yet at the same time that he creates doubts about the legal process, the lawyer must give the client some reason to rely on him. The lawyer's emphasis on his insider status is one means of doing this. Nothing is guaranteed, the lawyer acknowledges, but the best chance for success rests with those who are familiar with local practice and who have a working relationship with officials who wield local power. This formula is repeatedly presented to clients by the lawyers in our sample.

By stressing the importance of being an insider, the lawyer is not necessarily suggesting that the system is corrupt. He is

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[16] Divorce lawyers are not, of course, the only attorneys who must continually deal with clients' unreal expectations. The process of forcing a client to face reality in major commercial litigation has been described by one experienced trial lawyer as instilling "creeping pessimism." If a lawyer is too candid about a case's weaknesses at the outset, he may lose the client. As a result, he must frequently take the client on a long journey as a case moves from being one with "weak spots" to one with a "big hole" to one that can (or will) be lost.

[17] Similar behavior has been observed in legislators dealing with constituents (see Fenno, 1979: 167).

not promising that he has an illegal way to deal with an illegal system but rather creating an atmosphere in which the client will feel that she is being helped to attain a reachable goal despite being trapped in a system laced with uncertainties. The interests of the legal professional in this instance depart from the interests of the legal system. This lawyer constructs a picture of the legal process that fixes the client's dependency on him as it jeopardizes her trust in any other part of the system. The consequences of this for the client's view of law in general or participation in its legitimation rituals seems quite remote from his concerns. His talk, the image of the legal process that he constructs, is the talk of a cynical realist. The legal process he presents inspires neither respect nor allegiance.

Because lawyers and clients have different agendas as well as different initial understandings of law and justice, lawyer-client conferences involve complicated processes of negotiation in which each party attempts to hold firm to his or her agenda while conceding just enough to keep their business moving. Thus these conferences generally do not proceed on a straight intellectual line as does the examination of a witness at trial. Rather they skip around as each participant tries to take over and get what s/he wants from the conference.

The conference discussed in this paper exemplifies this process. It first consists of an effort by the lawyer to talk about the details of a settlement proposal, an effort that is frequently derailed by the client's attempts to discuss the origins and effects of the restraining order, her need to regain trust in her husband, her desire to secure some recognition of the sacrifices that she has already made, and her feelings about her husband's lawyer. Given this situation, much of the conference may be seen as an effort by the lawyer to determine whether his client really wants to settle, to identify the ingredients of a legitimate proposal, to put the issue of the restraining order in the background, and to regain control of the settlement process. If either the client was not committed to settlement or the behavior of the other side reflected anything other than an intention to settle, the lawyer wanted to close down negotiations to avoid useless expenditures and then to proceed to trial on the main issue.

From the lawyer's point of view, this case should have been easy to settle, except that the client's anger threatened to become a stumbling block to a reasonable property arrangement. The case was objectively easy because it involved no children, no support issues, and no assets that were unusually difficult to value, and the couple's debts were small in comparison to their

assets. Moreover, except for the husband's desire to keep the house, neither party seemed inextricably wedded to any particular property, the couple were living separately, and neither was suffering from acute emotional distress. However, the failure of mediation and the client's strong and persistent anger about the restraining order suggested the likelihood of emotional barriers to settlement.

The lawyer hoped that once the client understood the legal process she would be willing to adopt the strategic posture that he believed was appropriate for the case. He saw a settlement of property issues as the primary goal, hence his emphasis on the unpredictability of contested procedures. To this end he needed to get the client to agree to postpone any decision about contesting the restraining order, thus his emphasis on the need to keep her emotions under control. He also needed her to agree to a format for negotiations that excluded her direct participation, hence his focus on both the dangers posed by her emotions and the importance of his insider status. The lawyer's arguments thus stress the need to maintain control over the disposition of assets by preferring negotiations over hearings and emphasize that the client's repression of emotions and distance from the actual proceedings are to be preferred over expression and participation.

There are also suggestions in the conference that in the lawyer's view litigation is only appropriate for issues involving substantial property, a cost-benefit calculation that only takes money into account. To the lawyer the client's anger at the betrayal symbolized by the restraining order and the distrust of her husband that it engendered are obstacles to closure rather than legitimate client interests that might be satisfied through professional assistance.

B. Lawyer-Client Interaction: The Client's Perspective

Because divorce clients may not direct their litigation does not mean that they play no part in it. Because clients may acquiesce in the end to the lawyer's agenda does not mean that they do not make demands on their lawyer during the process. Clients may insist that lawyers attend to issues beyond those that are technically relevant and with which lawyers do not feel particularly comfortable; they may persist in bringing these matters into the conversation even after lawyers think that they have been settled. Clients may, in addition, resist recommendations that a lawyer believes are obviously in the client's interest. They may press lawyers to explain and justify advice

given, actions taken, and results produced. Finally, clients may insist that lawyers interpret and account for the actions of others, particularly their spouse, their spouse's lawyer, and judges, and that lawyers justify these actions in light of the client's sense of what is appropriate and fair. In these ways, clients transform the agendas of lawyers as well as their preferred professional style.

This conference allowed the client to express her frustrations with a legal process that refused to protect her "rights." In this respect, she typifies naive litigants who

> typically see themselves endowed with a broad set of legal rights, loosely defined, which shade into moral rights. These rights are part of the symbolic system by which obligations between neighbors, friends and family members are understood. Legal rights fall into two general categories: property and personal. . . . All persons have equal rights to property, to privacy and to a certain level of respect as a person. These rights are routinely enforced by the state through a system of police and courts which are accessible to all. The state takes seriously infractions of the legal rights of its citizens. . . . In this ideology, persons are legally defined as equals and enforcement is predictable (Merry, 1985: 69).

In addition, the conference provided the client with an opportunity to work through conflicting goals: She did not want to capitulate to her husband but she did want to put an end to the fighting between them. Like many of the clients we have observed, she is uncertain about what she really wants. The wisdom of a negotiated settlement is clear to the lawyer, but for her it is fraught with ambiguity and difficulty. She insists that her lawyer concede, at least to her, that her need for a symbolic "gesture" is comprehensible and legitimate. In so doing she secures some acknowledgment of her self-conceived victimization and some limited vindication. This drama, in which clients insist that their lawyers validate their partial and biased understandings, is a routine part of the divorce process. Lawyers, especially experienced divorce lawyers, understand this and provide such validation even when, as in this case, they attempt to discourage their clients from seeking it in the courtroom.

C. The Consequences of the Two Perspectives

The competing perspectives of lawyer and client and the manner in which they are articulated establish the boundaries within which the strategy and tactics of divorce litigation de-

velop. When the client feels betrayed and victimized, the lawyer may have to spend a significant amount of time and energy in selling negotiation as the means of resolving the case. This effort may affect the timing as well as the style and success of settlement efforts. Most of the lawyers we observed invest considerable effort in these client management activities. In our sample it is the exceptional lawyer who fans the flames of the client's anger or accepts uncritically the client's version of events without reminding the client of the difficulties and costs of acting out of emotion.

Moreover, when divorce clients demand to know about the legal rules that will be applied, the probabilities of achieving various results, the costs they will incur, the pace at which various things will happen, and the roles that different actors will play, there are no standard answers that lawyers can give. What the client is asking for is a distillation of the lawyer's experience as it is relevant to cases like hers. What the lawyer can provide is not a *corpus juris* learned in law school or available in any texts but rather a personal view of how the legal system actually works in the community in which he is practicing.

The lawyer's emphasis on the uncertain and personalistic nature of that process may have three effects. First, the extent to which the lawyer's picture of the legal system is at variance with the image that the client brings to her contact with the law may help to explain the common finding that experience with the legal process often results in dissatisfaction and a lower level of respect for law, regardless of substantive outcome (see Sarat, 1977). Clients are brought face-to-face with the law's shortcomings by the testimony of their own lawyers (Sarat and Felstiner, 1985) as well as by the results that they experience.

Second, this characterization of the legal process may increase the client's dependence on the lawyer. People in the midst of divorce frequently feel a reduced sense of control over their lives. Their former lover and friend has become an enemy. They cannot live where and as they did, they must relate to their children in new ways, they may face new jobs and major economic threats, and their relations with family and friends may be strained, sometimes to the breaking point. When lawyers then introduce clients to an uncontrollable and unpredictable legal system, their sense of reduced control over their lives may become even stronger. They are, in essence, further threatened by a system that they had expected would reintroduce structure and predictability into their lives. In this

situation, the lawyer's services become more essential and the lawyer himself more indispensable (see Illich, 1977).

Finally, the lawyer's emphasis on the client's need to separate emotional and instrumental issues may help to construct or reflect a vision of law in which particular parts of the self are valued while others are denied or left for others to validate. In the legal realm, lawyers insist that the rational and instrumental are to govern. While this lawyer clearly recognizes the human consequence of this opposition and hierarchy, he never questions it but instead treats it as both necessary and inevitable (Gabel, 1980; Gordon, 1982). Throughout this conference the lawyer encourages the client to be clear headed and to grant priority to monetary issues. By defining the ultimate goal as the resolution of the case and resolution in terms of the division of property, and by seeking to exclude the emotional focus that the client continues to provide, he expresses the indifference of the law to those parts of the self that might be most salient at the time of the divorce. The legal process of divorce becomes at best a distraction, at worst an additional trauma. By the end of the conference both lawyer and client speak in terms of a divided self, she, if only briefly, to fight against it or at least to express her ambivalence, he to do its bidding in the name of a system that is unchanging and unchangeable.

The conferences that we observed alert us to the divergence between the realities of divorce practice as experienced by lawyers, the range of client concerns that are forced onto the legal agenda, and the legitimation needs of the legal order. The linkage of a realist image of law and the divided self produced by the legal construction of the client is at odds with the ideas about law produced by the doctrinal activity of appellate judges. While both doctrine and behavior affect the lives of litigants, we, as a community of scholars, have until now paid too much attention to the doctrine and too little to the behavior. This paper is intended to reverse this misallocation of resources by suggesting the rich veins of data that can be mined by those who would pay attention to law as it is experienced as well as law as it is preached.

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