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*The process of divorce : a study of solicitors and their clients*

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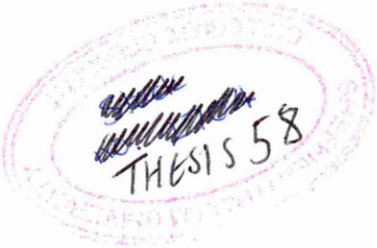
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**The Process of Divorce: A Study of Solicitors and  
their Clients**

Katherine M Wright

A thesis submitted in partial fulfilment of the requirements of

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# **The Process of Divorce: A Study of Solicitors and their Clients.**

Katherine M Wright

## **Abstract**

The central aim of this thesis is to explore how the service provided by solicitors is currently operating and meeting the needs of clients seeking a divorce. The impetus for this project was the growth and government promotion of family mediation in the 1990s as an alternative/adjunct to the services provided by a solicitor. This change to the divorce process was proposed without an adequate knowledge of the solicitor led service and appeared to be based on assumptions which were not supported by substantial evidence.

An ethnographic study was undertaken involving forty clients and ten solicitors. As divorce is a dynamic process rather than a single event each case was followed as far as possible from the first appointment between the solicitor and client until the conclusion of the case. A combination of observation of the solicitor-client meetings and interviews with both the solicitor and client after each meeting enabled the researcher to obtain a unique perspective on the interaction between solicitors and their clients.

The results from the study include, that the process was largely solicitor led, such that there was a degree of failure on the part of solicitors to listen to their clients with the result that issues such as domestic violence and the possibility of reconciliation were often not adequately explored; that clients had their own 'boundaries of fairness' regarding the appropriate resolution of their case, which were quite distinct from the solicitors' view of the appropriate outcome; that the solicitor-client interaction is often not dyadic, new partners of clients being observed to exert significant influence on the process and outcomes, and that the solicitors in this study appeared to have absorbed some of the ethos and values behind family mediation into their practice, working to goals of neutrality, objectivity and a desire to minimise any rise in spousal conflict. This latter goal sometimes led to the replication of spousal power imbalances, in terms of the final settlement.

The thesis concludes with a discussion of the results, including questioning whether solicitors should widen their remit in order adequately to deal with the wider needs of clients. It is also suggested that the current role of the family law solicitor is in a state of flux and that both solicitors and clients are unclear about the role that solicitors perform. The thesis closes with a number of questions which have emerged from this research that could usefully inform further research in this area.

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# Chapter One

## Introduction

Divorce is a very traumatic personal event and also a legal event involving parties who may have had little contact with lawyers previously. Parties going through divorce are experiencing family upsets. Problems faced by these men and women, at the time of marital breakdown, can be wide ranging and may include issues of domestic violence. Providing people with the best advice, including legal advice, is crucial both for the families involved and for social policy. This is one of the reasons there was so much discussion by the government on the divorce process during the 1990s. Yet, it could be argued that policy decisions at that time were not taken on sufficient evidence.

This study examines interaction between solicitors and clients during the process of obtaining a divorce and resolving related financial and property disputes. At the time of writing the majority of parties seeking a divorce employ a solicitor (see for example Davis et al 2000 b), who acting on their behalf, deals with the procedural aspects of obtaining the divorce and resolves the financial and property disputes, most often by a process of solicitor negotiation. An alternative, or adjunct, to the solicitor led service is provided by family mediation. Family mediation grew significantly during the 1980s, and during the 1990s, the Conservative

Government incorporated provisions, designed to increase the take up of mediation, into a major legislative reform, The Family Law Act 1996.

The government justified its support of family mediation by claiming that it would better meet the needs of the divorcing population than the traditional solicitor led service, in a number of respects<sup>1</sup>. Potential advantages cited in support of mediation included that parties had control over the process and outcome;<sup>2</sup> that spousal conflict would be reduced<sup>3</sup> and costs would be lower.<sup>4</sup> The traditional system of lawyer negotiation and adjudication was thought to be defective in these aspects.

In order to ensure that these potential benefits were more widely experienced, legislation was proposed in which changes to the divorce process would be complemented with provisions designed to increase the take up of mediation. A number of provisions were included in the legislation (the Family Law Act 1996) which would facilitate wider use of mediation during the divorce process. Arguably, the most significant of these were the amendments to the Legal Aid Act 1988, by which those wishing to claim public funding to assist them in resolving their disputes, would first be subjected to mandatory mediation assessment. Public funding for legal representation would not be provided, unless the case had been deemed to be unsuitable for resolution in mediation. There

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<sup>1</sup> These were made explicit in the White Paper, "Looking to the future: mediation and the ground for divorce." Cm 2799.

<sup>2</sup> Para 5.5 and 5.6.

<sup>3</sup> Para 5.11 and 5.24.

<sup>4</sup> Para 5.20.

was, therefore, a potential shift envisaged, as much of the work involved in the resolution of divorce disputes, particularly in relation to clients who were legally aided, could have moved from solicitors to family mediators.

As the reader will be aware, the changes to the divorce process were not in the event implemented. However, the provisions relating to the public funding of mediation, including the requirement for mediation assessment prior to being awarded legal aid, were put into effect.

Starting this research in 1995, the author was concerned that this potential transformation of the divorce process, particularly for those claiming legal aid, was being proposed without an adequate knowledge of how the current system of solicitor negotiation was meeting the needs of the divorcing population. The author also questioned whether the rather negative image of the traditional system, portrayed in policy documents, was supported by substantial evidence. Without an in-depth knowledge of the solicitor led service, the author also felt it would be difficult adequately to assess the benefits or otherwise of the proposed changes to the dispute resolution service. This proposed change to the divorce process, which did not appear to the author to be based on clear evidence, was the original impetus for this project.

The principal aim of the research, therefore, was to carry out a small in-depth exploratory study of the solicitor led service in order to discover how the service operated and met the needs of the clients. In light of the

government's assumptions regarding the advantages of family mediation over the solicitor led service, it was thought that knowledge as to how the service provided by solicitors performed in relation to those aspects, was of central importance to the debates regarding the most appropriate form of dispute resolution on divorce. An analytical framework was therefore devised which included the issues of party control and the effect of solicitors' involvement on spousal conflict.

In order to keep the project within manageable limits the focus of the study is on divorce and the resolution of the financial and property disputes. Consideration of the disputes regarding children and the process of judicial separation, as an alternative to divorce, have therefore not been included.

A review of the literature (see chapter two) revealed that the solicitor led service had not been subjected to the same degree of academic interest as had mediation. Moreover, much of the research in both methods of dispute resolution had been carried out in the US. Whilst this can provide very valuable insights, legal and cultural differences can limit applicability to practices in England and Wales. The evidence reviewed, although not extensive, did not appear to support the government's negative view of the solicitor service, although many areas had not been fully explored. Furthermore, the author felt that the methodology which had been adopted did not always lead to the insights that were required. For example, the reliance in much of the research on interviews leads

one to question whether the responses could have been influenced by self presentational issues. In order to surmount this, it was going to be necessary to undertake direct observation. It was also noted that social and contextual factors, such as social class and gender, had not been given sufficient consideration.

In light of the inadequacies identified in the existing research, it was decided that two elements needed to be included in the research design, which would go some way to addressing the deficit in knowledge. Firstly, it was considered crucial to observe the solicitor client appointments, in order to see what went on rather than rely solely on the accounts of the participants. Secondly, the researcher, aware that divorce is a dynamic process, rather than a single event, decided to undertake a longitudinal study in which clients were followed from their first appointment until the conclusion of their case, whatever that might be. Though interviews are inadequate as a sole source of information, they can provide very useful data on the perceptions and expectations of both solicitors and clients and so they were also used in this study. Each participant (solicitors and clients) was interviewed after each solicitor client meeting. Final interviews were carried out with the clients whose cases completed during the research, and with solicitors on conclusion of the fieldwork. It was envisaged that by using a combination of methods and undertaking a study over a long period of time (during which time a trusting relationship should be built up between the researcher and the research participants), a rich picture of the realities of the divorce process, as

experienced by the solicitors and clients involved in this study, might be obtained.

This thesis, therefore, reports on the experiences of forty clients and their solicitors as they progressed through the process of divorce, whether the outcome was divorce or withdrawal from the process. Ten solicitors were involved in the project from four solicitors' firms in a northern city. In order to consider the impact of social class a number of both working and middle class clients were recruited. An advantage of the location selected, beyond the pragmatic advantages for the researcher, was that as a large city it had a number of solicitors' firms of different sizes including practices which dealt principally with a legal aid clientele.

### **1.1 The Structure of the thesis**

The background to the study is provided in chapter two. The chapter begins by outlining the legal and policy context in which the research was carried out and includes reference to subsequent developments which are relevant to this topic. Information is then provided on the key empirical studies which informed this research. The literature on both family mediation and lawyer negotiation (in relation to divorce) is reviewed before concluding with the resulting research questions.

The methodology selected to answer the research questions is detailed in chapter three. A detailed discussion of the ethnographic approach adopted in this study is provided, alongside consideration of the potential

problems which could be encountered by using this approach and the strategies adopted to minimise these difficulties. Consideration of the many legal and ethical issues arising from this study is also reported and the method of analysis is outlined.

The results of the research are reported in chapters four, five, six and seven. Chapter four outlines the findings in relation to the initial appointment between the solicitor and the client. Chapter five informs the reader how each of the cases in the study progressed, including the number of cases which did not progress after the first meeting; the duration of the cases, and the nature of the subsequent solicitor client meetings.

Chapter six contains the findings in relation to the exercise of control in solicitor client interaction, and chapter seven considers the results relating to the solicitors' contributions to resolving the disputes arising on divorce. This latter chapter includes the findings in relation to the clients' perceptions of their needs; the effectiveness of solicitors in imparting information to the client; the partisanship or other forms of support provided by the solicitors, the effect of solicitor negotiation on spousal conflict, the impact of clients' feelings of guilt or innocence on the solicitors' actions and the contributions made by both the clients and the solicitors towards resolving the disputes.

The conclusion in chapter eight draws together the findings from the results chapters and discusses their significance in light of the existing knowledge and recent policy debates. The chapter closes with a number of questions which have emerged from the study and which could provide further opportunities for research.



# Chapter Two

## Background to the Study

### 2.1 Introduction

“The main ‘story’ of private family law since 1980s has been the emergence of mediation as an alternative to the traditional (and still dominant) mode of dispute resolution on relationship breakdown, which is that of lawyer negotiation.” (Davis and Bevan 2002 p 175)

When individuals seek a divorce it is, in the main, solicitors to whom they turn. Mediation has become increasingly prominent firstly as an alternative and later as an adjunct to the services provided by solicitors. At the time that this present project was conceived it was envisaged that the law relating to divorce would change and mediation would be more widely used to resolve the disputes arising on divorce. In the event the law relating to divorce did not change, although provisions relating to the public funding of mediation were enacted.

This is a study of the ‘traditional’ mode of dispute resolution on divorce, that is, solicitor negotiation. The impetus for this study coming from, in part, the rise in mediation (see above), and this study will, therefore, review both the literatures relating to family mediation and lawyers, concerning the resolution of the disputes arising on divorce.

## 2.2 Changes to the law: a lesser role for solicitors in divorce?

This project began in 1995, at which time persons wishing to obtain a divorce and reallocate the various assets and/or debt arising from the marriage followed the procedures contained within the Matrimonial Causes Act 1973. This Act requires that in order to obtain a divorce a petitioner will have to satisfy a court that their marriage has irretrievably broken down and this is evidenced by proving one or more of the five 'facts' set out in S.1(2).<sup>1</sup> Part two of the Act contains the orders and guidelines regarding the redistribution of any marital property or finances that a court can make on divorce. Most cases however, are resolved by a process of negotiation undertaken by the parties' solicitors. Under the special procedure<sup>2</sup> the time taken to obtain a divorce could be as little as four months,<sup>3</sup> although the financial and property disputes could last much longer. Legal aid was provided to those satisfying the criteria under the 'green form' advice and assistance scheme and under a legal aid certificate were appropriate.<sup>4</sup>

The process of obtaining a divorce under the provisions contained within the Matrimonial Causes Act 1973 had been subject to a number of criticisms,

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<sup>1</sup> The facts are, (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted; (e) that the parties to the marriage have lived apart for a continuous period of at least five year immediately preceding the presentation of the petition.

<sup>2</sup> Introduced in 1973, the special procedure simplified the process, allowing the granting of a divorce after a petition has been scrutinized by a District Judge sitting in chambers, the decree being announced in open court. The majority of divorces now follow this procedure.

<sup>3</sup> Fourth Annual Report of the Advisory Board on Family Law 2000-2001 Para 3.4

<sup>4</sup> In 1996/7 60% of the legal aid expenditure was reported to be on matrimonial and child related cases (Cretney 2003 b)

consideration of which is outside the scope of this thesis.<sup>5</sup> For the purposes of this present work the key areas of censure, acknowledged in the consultation paper of 1993,<sup>6</sup> were that divorce could be obtained too quickly, allowing the parties little time to consider the consequences of a divorce; that the law did nothing to save the marriage; and that the process exacerbated bitterness and hostility.<sup>7</sup> After extensive consultation and consideration of proposals for reform published by the Law Commission,<sup>8</sup> the government published a White Paper in April 1995.<sup>9</sup> The paper emphasised the need to support marriage and promote reconciliation and, should the marriage be beyond saving, use of family mediation was to be encouraged as a means of resolving the financial/property and child disputes. In November 1995 a bill outlining a new process for divorce was introduced into Parliament. Strong opposition led to the introduction of a number of amendments. The Family Law Act was finally passed in 1996. Implementation, however, was to be delayed until two research projects had been carried out; one examining the most effective way of carrying out the information meetings<sup>10</sup> and other to assess the effectiveness of publicly mediation.<sup>11</sup>

In order to obtain a divorce under the Family Law Act 1996,<sup>12</sup> parties would have to go through a process which, briefly, involved attendance at an

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<sup>5</sup> For a detailed consideration of the evolution of the law relating to divorce and an account of the various criticisms levelled at the divorce process contained within the Matrimonial Causes Act 1973 the reader is directed to Cretney (2003) Family Law in the Twentieth Century: A History.

<sup>6</sup> Looking to the Future. Mediation and the Ground for Divorce (Cm. 2424)

<sup>7</sup> Ibid para 5.1-24.

<sup>8</sup> The Ground for Divorce, Law Com. No. 192 (1990)

<sup>9</sup> Looking to the Future: Mediation and the Ground for Divorce. Cm2799

<sup>10</sup> Walker (2001)

<sup>11</sup> Davis et al (2000 (b))

<sup>12</sup> The provisions relating to the divorce process were contained within part two of the Act.

information meeting; filing of a statement of marital breakdown; and expiration of a period of reflection and consideration (originally nine months in length but extended where there were children under sixteen, or where one party had applied for an extension) during which time the parties had to both consider if the marriage could be saved whilst also making arrangements (resolving the financial/property and child disputes) for their post divorce life. Finally, once arrangements for the future had been made, an application could be made for the divorce order. The preferred means by which any financial/property and child disputes were to be resolved was through mediation.<sup>13</sup>

In order to facilitate the shift from lawyer negotiation to mediation the Family Law Act 1996 contained specific measures intended to promote greater use of this alternative form of dispute resolution. Firstly, the information meeting that a party (except in prescribed circumstances) initiating the divorce was required to attend,<sup>14</sup> was to include, *inter alia*, information on the advantages of mediation.<sup>15</sup> Secondly, courts were given the power, once the statement of marital breakdown had been filed, to direct each party to a meeting for the purpose, “of enabling an explanation to be given of the facilities available to the parties for mediation in relation to disputes between them; and of providing an opportunity for each party to agree to take advantage of those facilities.”<sup>16</sup>

Further, part 3 of the Family Law Act 1996 amended the Legal Aid Act 1988 to

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<sup>13</sup> The Family Law Act has been criticised for the apparent tension between autonomy and coercion present. On the one hand the law sought to encourage certain forms of behaviour (that is not to divorce or failing that, to behave in a particular way throughout the divorce process), whilst also allowing a degree of autonomy over the financial and property resolution as lawyers were replaced by mediators. (Dewar 1998)

<sup>14</sup> Section 8 part two.

<sup>15</sup> In the Lord Chancellors Department explanatory notes, “Marriage and the Family Law Act (1997) it is specifically stated that the information sessions are to include information on “the availability and *advantages* of mediation” (emphasis added) (p 2).

<sup>16</sup> Section 13. (1) – part two

provide for the public funding of mediation in family matters. Of particular importance was S. 29 of the Act which provides,

“A person shall not be granted representation for the purposes of proceedings relating to family matters, unless he has attended a meeting with a mediator to determine –

- (a) (i) whether mediation appears suitable to the dispute and the parties and all the circumstances, and,
  - (ii) in particular, whether mediation could take place without either party being influenced by fear of violence or other harm; and
- (b) if mediation does appear suitable, to help the person applying for representation to decide whether instead to apply for mediation.<sup>17</sup>

It could be argued, therefore, that these measures designed to promote greater use of mediation would have the greatest impact on those parties wishing to apply for legal aid in order to resolve the financial and property disputes arising on divorce.

The goals of encouraging reconciliation and promoting a more conciliatory mode of dispute resolution are reflected in the principles of the Family Law Act which are contained within part one:

- (a) that the institution of marriage is to be supported;
- (b) that the parties to a marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage;
- (c) that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end-
  - (i) with minimum distress to the parties and to the children affected;
  - (ii) with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances; and
- (d) that any risk to one of the parties to a marriage, and to any children, of violence from the other party should, so far as reasonably practicable, be removed or diminished.

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<sup>17</sup> Now Community Legal Service Funding Code C27-29.

The procedure introduced by the Family Law Act differed in a number of respects from the scheme envisaged by the Law Commission.<sup>18</sup> For the purposes of this present work a crucial difference concerned the emphasis on mediation. The Law Commission, in their report foreshadowing the Act, although generally positive about mediation, also expressed a cautionary note warning that there were, “dangers ... in relying too heavily on conciliation or mediation instead of the more traditional methods of negotiation and adjudication.”<sup>19</sup>

The government's support for mediation in divorce can be seen as part of a wider trend of incorporating private ordering into the substantive law, apparent in the principles of non-intervention<sup>20</sup> and parental responsibility<sup>21</sup> in the Children Act 1989 and in the reforms to civil justice introduced by Lord Woolf.<sup>22</sup> Commentators have suggested a number of motives for the growth of private ordering: cost cutting, welfare paternalism, encouragement of individual responsibility and self reliant dispute resolution (Eekelaar and Dingwall 1988, Day-Sclater 1995(b), Roberts 1995 (a)). The last of these objectives links in with the liberal ideology of individual rights and freedom from interference by the state (Mnookin 1985), which was so apparent in much of the Conservative government's (1979 – 1997) rhetoric.

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<sup>18</sup> The Ground for Divorce, Law Com No. 192 (1990). For a discussion of some of these differences see Hale (2000).

<sup>19</sup> Law Commission, The Ground for Divorce, paras 5.34 - 5

<sup>20</sup> S.1.(5)

<sup>21</sup> S.3

<sup>22</sup> Woolf (1995) and Woolf (1996).

The government justified its support for mediation, as a form of private ordering, in the White Paper<sup>23</sup> by stating that mediation is purported to be: better equipped to promote reconciliation;<sup>24</sup> able to effect a reduction in conflict between the parties; thus lessening the trauma for children<sup>25</sup> and further allowing couples to reach their own agreements, whilst improving communication between them.<sup>26</sup> Of the existing system, whereby disputes are resolved by the parties' solicitors, the White Paper states "Litigation and arms length negotiation can heighten conflict, reduce communication and exacerbate the stress and hostility arising from marriage breakdown."<sup>27</sup>

Commentators have criticised the government's espousal of such polarized views of the two methods of marital dispute resolution (Cretney 1995(a), Day-Sclater 1995(b), Piper 1996(a), Roberts 1995(a)). As Eekelaar observes, "Loaded language contrast an image of the legal process as being inherently hostile with an uncritically laudatory presentation of the non-legal alternative. No evidence is cited to support this negative image of the legal process." (1995 p192).

In the event, part two of the Family Law Act, which contains the provisions relating to divorce, was abandoned. On 17 June 1999 the Lord Chancellor's Department announced that implementation was to be delayed. The reasons for the delay were given in the following press release.

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<sup>23</sup> Looking to the Future: Mediation and the Ground for Divorce. Cm 2799.

<sup>24</sup> Para 5.4

<sup>25</sup> Para 5.11

<sup>26</sup> Para 5.6

<sup>27</sup> Para 2.20

“Reiterating the Government’s commitment to reducing conflict in divorce and supporting families, the Lord Chancellor said that before implementing part II the government must be satisfied that these objectives are fulfilled. However, the interim results of the extensive pilots testing information meetings had been disappointing: only 7% of those attending the pilots, for example, had been diverted into mediation and 39% of those attending had reported they were more likely than before to go to a solicitor.”<sup>28</sup>

A later announcement on 16 January 2001 confirmed that the new divorce process would not be implemented and part two of The Family Law Act 1996 would be repealed. The research into the information meetings was once again cited, as this had shown that the information meetings were not meeting the government’s objectives of helping people save their marriages. It, has, however also been suggested that the unwillingness of parties to use mediation instead of solicitors was influential.<sup>29</sup>

Although it has been decided that part two of the Family Law Act will not be implemented, there are a number of elements contained within the Act which remain. Part three of the Act which provides for the public funding of mediation was implemented. The provisions within s.29 of the Act (see above), which directs those wishing to claim legal aid to fund legal assistance to first meet with a mediator, are now contained within the Community Legal Service Funding Code<sup>30</sup> and are a part of the divorce process, although, the operation of the s. 29 provision is now different from that originally envisaged.<sup>31</sup>

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<sup>28</sup> Lord Chancellors Department Press Notice 17 June 1999.

<sup>29</sup> Fourth Annual Report of the Advisory Board on Family Law 2000-2001 para 3.19.

<sup>30</sup> C27-29.

<sup>31</sup> Under the “Willingness test” in the Community Legal Service Funding Code an applicant for legal representation or for general legal help will only be required to attend an assessment meeting once the mediation service has contacted the other party involved in the dispute and received confirmation that they are willing to attend mediation. If this confirmation is not received the original applicant will not have to attend the meeting with a mediator prior to receiving public funding.



Mediation then remains, although the means to encourage greater take up of this means of dispute resolution, such as the compulsory information meetings and the s.13 directions, have been lost.<sup>32</sup> As the pilots of the information meetings revealed that clients were generally very positive about the service,<sup>33</sup> it is possible that a very similar provision may be provided. Towards this end the government is currently piloting an alternative information service, Family Advice and Information Service (FAInS).<sup>34</sup> Finally, the principles contained within part one of the Act, some of which arguably support the general ethos of mediation, also remain in force.

At the time the fieldwork for this project began the majority of people wishing to obtain a divorce would seek the services of a solicitor. This can be verified by Genn's (1999) Paths to Justice Study, in which it was reported that divorce or separation were the "justiciable"<sup>35</sup> problems which were most likely to lead people to seek advice from a solicitor or law centre.<sup>36</sup> Solicitors dealing with divorce would arrange legal aid<sup>37</sup> if appropriate, draft the divorce petition and supporting documentation, communicate with the court, apply for any

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<sup>32</sup> Davis and Bevan (2002) present an argument for the retention of a measure similar to s 13, whereby a District Judge will operate as a 'gatekeeper' directing parties to mediation where appropriate.

<sup>33</sup> A summary of the results from the pilots can be found in Annex C of the Fourth Annual Report of the Advisory Board on Family Law, 2001-2002.

<sup>34</sup> This initiative, announced by the Lord Chancellor in 2001, aims to provide people facing relationship difficulties with information regarding a range of services to assist in resolving their disputes or help those who are trying to save their relationship (Legal Services Commission).

<sup>35</sup> Genn defines the term 'justiciable' as a "matter experienced by a respondent which raised legal issues, whether or not it was recognised by the respondent as being 'legal' and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system" (p12).

<sup>36</sup> p 89.

<sup>37</sup> Assessment for "Green form" Legal Advice and Assistance was carried out very early in the process and if eligible would provide funding for three hours work involving preparation of the petition. Applications for Assistance by Way of Representation (ABWOR) are carried out prior to the negotiations concerning the ancillary relief.

emergency orders required (for example an injunction in the case of domestic violence), and take action towards resolution of the financial and property disputes (ancillary relief). This latter action was likely to consist of a process of negotiation by solicitors cumulating in a consent order<sup>38</sup> verifiable by a court. Adjudication by the court was rare. Davis et al (2000(a)) in their study of ancillary relief applications carried out in four county courts during 1999 found that only 4.6% of the applications were adjudicated; furthermore 70% of ancillary relief applications in their sample were consent applications (p50). The fact that so few cases are adjudicated has attracted some academic comment and this is considered later in this chapter.<sup>39</sup>

Solicitors dealing with divorce and conducting the financial and property negotiations may belong to the Solicitors Family Law Association (SFLA),<sup>40</sup> a professional body for family lawyers, which operates a code of practice advocating a particular conciliatory approach to family work and negotiations.<sup>41</sup> It is also worthy of note that at the time of the research there was a gender and age bias in family law practice. Maclean et al (1998) examining the family law workforce, found that female solicitors were more likely than their male peers to be family law specialists (66 % compared to 12%), and younger solicitors were more likely to be family law specialists than older solicitors (of solicitors aged under 35, 43% were family law specialists this dropped to 22% for the age range 45 -54) (p676).

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<sup>38</sup> s. 33A Matrimonial Causes Act 1973.

<sup>39</sup> See section 2.53.

<sup>40</sup> In 1999 the Solicitors Family Law Association claimed to have over 4,000 members (Jackson 1999 p 118). Coincidentally this figure of 4,000 is the same figure arrived at by Maclean et al (1998) for the number of family law specialists; that is solicitors who spend more than half their time on family law work.

<sup>41</sup> See appendix nine for the Solicitors Family Law Association's Code of Practice.

At the time that the fieldwork began, s.29 of the Family Law Act, which provides for mandatory mediation assessment, was not in operation. Therefore, there was no requirement on solicitors to refer clients to mediation, although some might do so if they felt it to be appropriate.

Since the fieldwork began, there have been a number of changes to the divorce process. The s.29 mandatory mediation assessment has already been referred to, as has the piloting of the Family Advice and Information Service (FAInS). In addition, in 2000, there was the introduction of a new ancillary relief procedure,<sup>42</sup> a protocol relating to the pre-application stage in ancillary relief cases,<sup>43</sup> a best practice protocol published by the Law Society (2002) which covers all areas of family work, and the introduction of specialist accreditation schemes administered by both the Law Society and the Solicitors Family Law Association.

The new ancillary relief procedure and, the pre-application protocol are designed both to increase the efficiency of solicitors working practices and to promote settlement (Douglas and Murch 2002 p 58). The aims of the pre – application protocol are that,

- (a) pre- application disclosure and negotiation takes place in appropriate cases;
- (b) where there is pre-application disclosure and negotiation, it is dealt with:
  - (i) cost-effectively;
  - (ii) in line with the overriding objectives of the Family Proceedings (Amendments) Rules 1999;

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<sup>42</sup> Family Proceedings Rules 1991. S1 1991/1247.

<sup>43</sup> Practice Direction (ancillary relief procedure) [2000] 1 FLR 997.

(c) the parties are in a position to settle the case fairly and early without litigation.”<sup>44</sup>

Under the ancillary relief scheme a timetable is imposed for early exchange of information. An initial appointment with a district judge will clarify any further information needed and an appointment will be made for a Financial Dispute Resolution hearing (FDR). The FDR meeting is settlement seeking and conciliatory; the judge can make a consent order at this time. These measures are intended to promote settlement and divert clients from a formal hearing. Should a hearing be required this will be carried out by a different judge to the one involved in the FDR.

The Law Society’s protocol is wider in scope, covering all of family law practice.

The aims are,

1. to encourage a constructive and conciliatory approach to the resolution of family disputes;
2. to encourage the narrowing of the issues in dispute and the effective and timely resolution of disputes;
3. to endeavour to minimise any risks to the parties and/or the children and to alert the client to treat safety as a primary concern;
4. to have regard to the interests of the children and long-term family relationships;
5. to endeavour to ensure that costs are not unreasonably incurred (p xii).

Part VII of the Law Society’s protocol is concerned solely with mediation, including the benefits of mediation, supporting clients in mediation and the role of solicitors in mediation (p86-87). Solicitors are reminded throughout the protocol of the existence of mediation as a means to resolve the disputes arising in family law.

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<sup>44</sup> Ibid para 1.2

The measures outlined above reflect in many ways the ethos and values behind the Family Law Act 1996. The aims of the protocols are similar to the principles incorporated into part one of the Family Law Act. Adjudication of disputes is discouraged, in line with other areas of civil law; settlement is encouraged; and the emphasis is on a conciliatory approach. Solicitors are encouraged to consider mediation as a means of resolving disputes.

In 1999 new family and child law accreditation schemes were introduced by the Law Society and the Solicitors Family Law Association. The Law Society justified the introduction of their schemes, in part, by referring to the pace of change in family law and "...the government's belief in the use of mediation as a means of resolving disputes by agreement rather than costly conflict and the changes envisaged in the Family Law Act 1996"(Stowe 1999 p 38). Although these schemes have a role as marketing tool, the Solicitors Family Law Association scheme in particular can be seen to encourage specialisms within particular areas of family law. A declared aim is, "to identify and encourage specific areas of specialism within family law itself" (Jackson 1999 p 118).

In sum, the reforms contained within the Family Law Act 1996 were intended to promote much greater use of mediation as a means of resolving the disputes arising on divorce. Part two of the Family Law Act, which contained the new divorce process, has been abandoned, but mediation and an emphasis on a conciliatory approach to resolving disputes remains. When the measures to encourage greater use of mediation as an alternative to the services provided by solicitors were initially proposed, it was anticipated by some that solicitors

would lose their monopoly on divorce (Roberts 1994). This did not happen; mediation is still a minority pursuit (Davis et al 2000 (b)), although the use of mediation is still being encouraged, not only in the sphere of divorce but also within other areas of family law.<sup>45</sup>

The promotion of mediation, as a preferred means of resolving the disputes arising on divorce, which has not been a reflection of consumer demand, suggests that the scheme in place prior to the reforms was perceived to be defective in some way. It has been argued, however, that the promotion of mediation was not solely about resolving disputes, but also a way of pressuring people to behave in a responsible manner (Eekelaar 1999 p 391). The Supporting Families policy document from the Home Office (1998) contained very similar references to mediation to those contained in the White Paper, stating that when marriages do break down, "government should ensure that the divorce process does not make the situation worse for the family as a whole... This is why it is important to reduce conflict on divorce and strengthen mediation as an alternative to 'arms length' negotiation through lawyers on divorce proceedings."<sup>46</sup> The implication is, that lawyers were not providing the appropriate service in relation to divorce. Lewis (2000) examined the government's reform proposals and policy documents and identified the following assumptions regarding role of lawyers in divorce,

1. Arms length negotiation through lawyers often reduces communication;
2. A translation problem between client and lawyer causes misunderstanding and anger in the other client about what is said, and how it is said;

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<sup>45</sup> On 19 March 2004 Margaret Hodge, the Minister for Children and Lord Filkin, a Family Justice Minister announced a programme of mediation to resolve disputes over child contact.

<sup>46</sup> Para 4.41

3. Arms length negotiation through lawyers often increases tension and conflict;
4. Negotiating through lawyers is associated with getting the 'best deal' at the other's expense;
5. Lawyers give only legal advice, that is, an explanation of how the law applies to the facts of a particular case and the recommendation of a course of action;
6. Negotiation is dyadic; only the parties are involved;
7. Lawyers cannot be trained to recognise signs of uncertainty. (p9-10)

Lewis then reviews the existing research on the role of lawyers in divorce, to question whether there is any evidence to support these assumptions. Lewis, although acknowledging that the research is restricted, both because of its age and its being geographically limited (p10), concludes that the research did support some of the government's assumptions, but highlights the point that marital breakdown itself causes many of the difficulties linked to spousal conflict and lack of communication. Crucially, the assumptions informing the policy change ignore the fact that parties to a divorce will often be experiencing such difficulties. When parties are failing to communicate, Lewis notes parties "need help in going forward" and "in such cases negotiation through solicitors on financial matters facilitated, but did not improve communication between the parties." Lewis concludes, " I am left by reading this research with a sense that its authors see many matrimonial solicitors, perhaps a majority of them, as having done a good job in difficult circumstances; some, however, could have been doing appreciably more." (p16) This current project was carried out prior to the publication of Lewis's report; however the assumptions identified by Lewis are relevant to the findings in this project.

As the above discussion has indicated, this current study was conceived at a time when the divorce process had been heavily criticised. Some of the faults

identified with the process had been linked to the service provided by lawyers. Mediation which, was (and continues to be), viewed very positively by the government, was proposed as a preferable means of resolving the disputing arising on divorce. The author of this current work did not believe that the evidence which existed at the time that the proposals were made did support the government's conviction that mediation would be a better way to resolve the disputes arising on divorce. Moreover, it appeared to the author that there were a number of shortfalls and inadequacies in the existing research which the current study aims to resolve. The empirical studies relating to the resolution of disputes arising on divorce will now be outlined and the findings reviewed.

### **2.3 The progress of empirical research on dispute resolution on divorce**

This section outlines the key empirical studies which have examined the dispute resolution process on divorce. The section is structured chronologically and will consider research into both family mediation and solicitor negotiation concurrently. The detailed findings which have informed the current work are reported in the sections relating to the specific areas of inquiry which this study is to follow. So, for example, detailed findings relating to the effect of solicitor involvement on spousal conflict can be found in section 2.52. This section is merely intended to provide the reader with a general chronological resume of the empirical studies which have informed this current work.



An early study which looked at the role of lawyers in negotiating divorce settlements was that by Griffiths (1986) and was carried out in the Netherlands. Griffiths' focus was to discover how lawyers and clients contributed to the process. The methodology adopted in this exploratory work consisted of interviews with both parties to a divorce. Each party was interviewed twice, once at the start of the process, and once about a year later. One hundred and three couples were included this way; in addition, in a further thirty six cases, one party to the divorce was interviewed. Griffiths also interviewed nine lawyers and a number of individuals who dealt with divorce on a professional basis (for example judges, clergy, school officials, policeman, family doctors). Crucially, in this study, observations of lawyer-client interaction were also carried out. This was important, according to Griffiths, as earlier research was over-reliant on interview data which Griffiths acknowledges contributes information about, "what lawyers say they do" (p139), but which may differ from the client's perception of what the lawyer does. Twelve lawyers were included in the observational element of the research. The case sample was confined to those couples with children and the focus was on "those aspects of divorce that bear on the children, especially custody and visitation" (p 146). Griffiths provides an interesting account of the interaction between lawyers and their clients, and the participants' impressions of such. An important finding was that clients and lawyers may be working to different agendas in communicating with each other. As Griffiths states, "lawyers and clients are in effect largely occupied with two different divorces: lawyers with a legal divorce, clients with a social and emotional divorce" (p155). Griffiths also found the lawyers in the study to be

settlement orientated, seeking a 'reasonable divorce,' to be achieved if at all possible without invoking the court.

Two years later in 1988, Davis published his Partisans and Mediators book. This work combines the results of five separate research projects examining the resolution of disputes arising on divorce and includes, as the title suggests, an exploration of the work of lawyers and mediators. Fieldwork was carried out between 1978-1985. The methods employed in the five projects include, examination of court records and mediation case files; postal surveys; interviews with solicitors and observation of mediation sessions. The work, however, relies most heavily on interviews carried out with 299 divorcing couples. Davis aimed to "discover the parties' reaction to every aspect of the legal process" (p170). But he categorically states that the parties themselves are not the subject of inquiry. The subject is "the way in which law and legal procedure both define and respond to family conflict" (p18). Davis found that people undergoing divorce did exhibit a strong need for partisan support and this in turn did lead to a loss of control. Davis also notes (as was also found by Griffiths above) a preoccupation amongst lawyers with avoidance of court trials. Davis comments, "the accent is not on the service being offered to the parties: the objective, on the contrary, is to restrict access to a service, the service in question being that of judicial determination" (p203).

This preference for settlement was not confined to lawyers working in the UK. In 1987, Erlanger, Chambliss and Melli published a study in the US of lawyers' resolution of divorce disputes and focused on the predominance of settlement

and informality apparent in the resolution of these disputes. Erlanger et al carried out in-depth interviews with parties and lawyers in 25 informally settled divorce cases, during 1982. In addition, they examined the court records relating to each of these settlements. All cases involved children. Four family court judges were also interviewed. Erlanger et al report that although the majority of cases do settle (as Griffiths and Davis above also found), settlement does not equal agreement and in only a minority of cases that were settled was there co-operation between the parties, "... instead of reflecting the parties' interests, settlements more typically reflect the parties' relative stamina and vulnerability to the pressures of a prolonged dispute" (p592). Erlanger et al in their article question the value of informality. Informality is not only a characteristic of lawyers' negotiation of divorce disputes but is a defining feature of mediation. It is to this we now turn, as during the late eighties and early nineties there was a proliferation of academic research in this area.

Much work was carried out in the US at this time, for example Kelly and Gigy (1989) report on the Divorce Mediation project which began in 1983. This study was designed to assess the effectiveness of comprehensive mediation in comparison to the traditional attorney/adversarial approach. The sample consisted of 212 individuals (106 couples) who were undertaking mediation, and 225 individuals (47 couples) who were following the traditional lawyer route. Kelly and Gigy, although acknowledging that the mediation sample was "voluntary, self-selected, predominantly white, middle to upper-middle class, and well educated," (p 280) reported that clients undertaking mediation were not experiencing "easier or friendlier" (p 280) divorces than their peers who had

proceeded via the lawyer route and also highlighted the complexities of the various outcomes achieved in mediation.

Other examples of US research from this period are the two longitudinal studies carried out by Pearson and Thoennes (1988), the Denver Custody Mediation Project (began in 1979) and the Divorce Mediation Research Project (began in 1981). Methods adopted in these studies included interviews with parents who were in dispute relating to child issues, reviews of court files, taping of mediation sessions and interviews with lawyers, judges, and mediators (p 12). The research questions included who chooses mediation, how effective is the mediation process and how the users of mediation reacted to the service. Pearson and Thoennes report a number of findings, including clients who chose to mediate were more likely to belong to a higher socio-economic class than those who rejected mediation, that mediation did not reduce animosity between the parties, and that there was a high level of user satisfaction with child issue mediation.

The most extensive empirical study in the UK in the late eighties was the "Report of the Conciliation Project Unit University of Newcastle upon Tyne to the Lord Chancellor on the Costs and Effectiveness of Conciliation in England and Wales." (1989). The questions regarding costs concerned both what conciliation costs to provide and whether the presence of conciliation reduced other associated legal costs. Effectiveness was measured by recording the duration and satisfaction with the agreements reached, reduction in conflict, and the impact on health and well-being of the parties. Four categories of

conciliation provider were included in the study: (a) court-based with high judicial control, (b) court -based with low judicial control, (c) independent with probation control and (d) independent with no probation control. The research took three years and included 1,392 families, all in dispute about arrangements for children. The report concluded that conciliation generated important social benefits, though as concerns costs the research found no evidence that wider provision of conciliation would result in significant savings.

Published in the same year as the Conciliation Project Unit research was the influential work by Greatbatch and Dingwall (1989). This study focussed on one of the central tenets of mediation, that is the neutrality of the mediator. Greatbatch and Dingwall questioned whether mediators' influence was restricted to facilitating communication between the parties, or whether such influence was also being used to guide parties towards outcomes favoured by the mediator. Greatbatch and Dingwall tape recorded 45 mediation sessions in the UK, which involved three mediators and fifteen cases. Using a method of conversational analysis Greatbatch and Dingwall examined the communications between the parties and the mediators. They found that there was evidence of mediators exerting pressure on the parties towards the mediators' preferred outcomes. This was accomplished by the mediator managing communication between the parties in a way that the authors refer to as "selective facilitation." Greatbatch and Dingwall conclude their discussion by recommending the use of conversational analysis as a methodological tool and suggest that the debate moves on to "more concrete issues of policy and practice" (p 639).

Ingleby, writing in 1992, did consider issues of practice, although the focus of Ingleby's study is on the role of solicitors in resolving the disputes on divorce. Ingleby, however, acknowledges that his research was carried out at a time when mediation was becoming increasingly important to policy makers, academics and practitioners. In particular, Ingleby was interested in the activity of solicitors in regard to resolving disputes and the strategies employed in the out of court negotiations. Ingleby continuously monitored 60 cases by examining the solicitor's files. The files had been obtained from five solicitors from various types and size of practice in Britain and were examined at quarterly intervals. Ingleby found that settlement was preferred by solicitors (a pervading theme of the literature) and that most solicitor activity took place at the bottom end of the litigation scale,

The activity of solicitors in relation to negotiating financial settlements on divorce was further examined in detail in a study by Jackson, Wasoff, Maclean and Dobash (1993). Jackson et al looked in detail as to how solicitors construct financial settlements so that they adequately provide for lone parent families. They aimed to discover how the legislation and underlying principles were working in practice. The research was carried out in Scotland and England and involved 68 solicitors. The methodology included use of a 'simulated client' (a researcher), who participated in a typical solicitor client interview. The solicitor was then asked to assess the eventual outcome of the case. The simulated client methodology was used in the Scottish sample of 58 cases. In the smaller English sample, ten solicitors were interviewed. They were presented with two vignettes and asked how they would advise the clients and what they would

expect a court might decide (p242). The findings once again showed that solicitors were reluctant to go to trial, preferring to settle out of court, as an adjudicated outcome was seen as both uncertain and extensive. The factors that the solicitors rated as most important to each case were, firstly access to housing, secondly income and thirdly a clean break if possible. Finally Jackson et al noted "we found a universal concern for the position of the other side and a strong desire for compromise" (p 253). and conclude by raising the question of whether solicitors are "assuming the position of mediators," (p 253) a question which they leave unanswered.

The role performed by solicitors in divorce was further explored in the study by Davis, Cretney and Collins (1994). Davis et al focussed their research on the parties' approach to financial disputes; the family law solicitors' relationship with their clients going through a divorce, and the solicitors' case management and negotiating strategies (p1). Davis et al's starting point is that most cases are resolved (as earlier research has indicated) by a process of negotiation by the parties' solicitors rather than through adjudication and therefore, they argue, it is important to study solicitors' case handling and general strategies of negotiation, as it is this that largely determines the eventual outcome for the majority of persons undergoing divorce. The fieldwork consisted of the continuous monitoring of 80 ancillary relief cases. The majority of cases were drawn from ancillary relief applications to the court and this may, the authors acknowledge, have resulted in a sample bias, as cases concluded without any application to court may have been under-represented. The cases selected were from the lower end of the socio-economic scale. Preliminary interviews

were carried out with both husband and wife in 18 cases, wives only in 48 cases and husbands only in 14 cases. The solicitors involved were also interviewed. Interviews continued throughout the process. Additional data were obtained from court files and notes from any court hearings. Davis et al found that settlement was not any quicker than adjudication, that the court was more likely to be invoked in legal aid cases and that, possibly as a result of being over-burdened, some solicitors adopted a “responsive” approach rather than a proactive approach to their work. “The system,” Davis et al argue, “is characterised by settlement, but not necessarily by purposeful settlement-seeking; instead it is characterized by delay.” (p257) As Davis et al state at the beginning of their work, outcomes in divorce cases are influenced to a great degree by the strategies adopted by and the skills employed by the solicitor. The settlement culture so apparent in divorce, the authors maintain, may lead to the tolerance of inequality in divorce settlements, as so much can depend on the individual skill of the legal practitioner. Davis et al move on to question why the settlement culture is so persuasive and suggest a number of reasons, which space precludes discussion here, but interestingly also note that women in their study did better or felt they did better when their case went to trial ( p 262).

The same year that Davis et al published their findings looking at solicitors, the results of a major study into mediation were released. “Mediation: the Making and Remaking of Co-operative Relationships” (Walker et al 1994) was a project which built on the earlier Conciliation Project Unit research (1989) (see above) and was funded by the Joseph Rowntree Foundation and so is referred to in much of the literature as the Rowntree study. The Rowntree research aimed to



evaluate the effectiveness of a range of different approaches to comprehensive mediation. The views of the consumers of this service were to be sought and the benefits of mediation assessed regarding the issues that arise on separation and divorce. The research was carried out exclusively on mediation provided by National Family Mediation; the research project director was an experienced mediator. The perspective of the client was considered to be a central component of the research and data regarding clients were obtained via three routes: examination of referral records (102 comprehensive mediation cases and 298 child focussed mediation cases); a two stage postal survey of clients (179 initial questionnaires and 134 second questionnaires were received by the research team); and a small number of in-depth interviews with the clients of mediation (47 clients). Fifteen mediators were interviewed regarding their views on comprehensive mediation and concerning cases in which a client had been interviewed. Walker et al found comprehensive mediation to be more effective in helping couples reduce the hostility and bitterness present and to communicate better than child centred mediation, but it did not address the parties' needs for reflecting on the causes of the end of marriage (p 163-4). The findings from the Rowntree research were relied upon in the White Paper,<sup>47</sup> which proposed increased use of mediation as a means of resolving the disputes arising from divorce.

Two final pieces of research were published prior to the fieldwork and were influential regarding this present work. Both were carried out in the US and both concerned the role of lawyers in resolving the disputes arising on divorce.

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<sup>47</sup> Looking to the Future Mediation and the Ground for Divorce Cm 2799. Particular reference was made to the ability of mediation to reduce bitterness and tension; improve communication between couples; and help couples reach agreement on a wide range of issues (para 5.15).

The first work was by Sarat and Felstiner (1995). Sarat and Felstiner's study examines solicitor client interaction, from both the perspective of the lawyer and that of the client, the client's perspective, they argue being insufficiently considered in past research. The central theme of inquiry concerned the negotiation of power between the client and lawyer. Forty divorce cases were continuously monitored for Sarat and Felstiner's study. The methods included observation, interviews with both lawyers and clients, and attendance at court and mediation sessions. Cases were followed from the first client meeting with the lawyer until the conclusion of the case. The cases included in the research were selected by the lawyers, the lawyers being recruited after recommendation from other legal practitioners (lawyers, mediators or judges). Sarat and Felstiner admit that their lawyer sample does not include many lawyers from the high status, high income end of the scale. Sarat and Felstiner conclude from their analysis of solicitor-client interactions that the perception that lawyers dominate lawyer client interaction is misleading. They argue instead that power is fluid and open to negotiation and renegotiation throughout the divorce process.

The second piece of research concerns a article published by Mather, Mainman and McEwen (1995), which was part of a larger study published in 2001. Like Sarat and Felstiner this study considers the issues of power and control within lawyer client interaction. It relies on interviews with 163 lawyers conducted between 1990-1991. Mather et al found that lawyers in their study did assert a degree of control over their clients' decisions, and this was accomplished by the lawyers employing a variety of tactics, which Mather et al outline.

The above empirical studies were published prior to the fieldwork for this current project. Subsequently a number of empirical studies have been published which, although not influential in the design of this project, have informed the discussion regarding the results.

1999 saw the publication of Genn's Paths to Justice study. This was not a project on divorce but is included as it examined legal need in the population as a whole. Moreover as Genn notes, "the growing emphasis on the desirability of diverting civil cases away from the public courts and towards private resolution processes (ADR) begs some important questions" (p 12). The study aimed to understand how people currently dealt with any 'justiciable'<sup>48</sup> problems they might face. A survey was carried out with a random sample of 4,125 individuals and follow-up interviews with 1,134 persons who had been identified as having experienced a non-trivial justiciable problem during the last five years. Finally in-depth qualitative interviews were conducted with 40 respondents who had experienced a justiciable problem. The survey findings relevant to this work include that those experiencing divorce or separation were more likely to seek legal help than those experiencing any other problem, and that justiciable problems tend to occur in clusters. In the context of divorce, for example, individuals will often face associated justiciable problems such as domestic violence or child disputes. Genn's study formed the basis for a later survey looking at individuals' experience of justiciable problems (Pleasence et al 2004).

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<sup>48</sup> Justiciable is defined as "a matter experienced by a respondent which raised legal issues, whether or not it was recognised by the respondent as being 'legal' and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system" ( p12).

This study, carried out for the Legal Service Research Centre, involved 5,611 adults. In relation to family problems Pleasance et al (2003) report that 34% of people experiencing divorce were also experiencing an associated dispute over finance/property or children. Notably 20% of the people who reported divorce also reported domestic violence (P499/500).

The research published by Walker (1999), like the Genn study above, is also a little different from the other works cited in this section, as it is not a study into the actions of lawyers or mediators in divorce. This research has already been referred to in the previous section and concerns evaluation of the information meetings which were to be part of the new divorce process under the Family Law Act 1996. The 1999 publication was an interim report of the research in progress. The final report was published in 2001. The finding that persons attending information meetings were more likely to seek the services of a solicitor was influential in the abandonment of the Act, however, as also referred to above, attendees at the information meetings were generally positive about the provision and this informed the decision to pilot the Family Advice and Information Networks. A follow up study to that into the information meetings was commissioned by the Lord Chancellor's Department/Department for Constitutional Affairs and has recently reported (Walker et al 2004). The research team contacted people from the original information research project. A notable finding was that 19% of people who had at the time of the earlier study been "seriously contemplating divorce had managed to save their marriage" (p 6). In addition, after reviewing the progress of cases since the initial research, the authors' comment, "It is abundantly clear that even when

divorce seems inevitable, it is not the outcome that many of those involved in it actually want.” (p 11). Concerning professional assistance, although the authors note that parties expressed a higher satisfaction rate for solicitors than for mediators (counsellors were rated higher than both groups), they related the view that “it was not uncommon to hear complaints that solicitors had appeared to ignore the stressful, emotional issues surrounding the divorce process” (p 11). Of those parties who had attended mediation, it was reported that mediation had not assisted in improving co-operation, reducing spousal conflict or avoiding going to court (p12).

The other major piece of research that was commissioned in line with the introduction of the Family Law Act was that by Davis et al (2000 (b)) “Monitoring Publicly Funded Family Mediation.”<sup>49</sup> This research, commissioned by the Legal Aid Board, was designed to answer questions relating to cost-effectiveness, procedural efficiency and the relationship between mediation and legal processes. The methods employed included, monthly monitoring of mediation suppliers; case monitoring of individual mediation cases; telephone interviews with a panel of couples who had experienced mediation and lawyer service and where possible the person’s solicitor (interviews with 1,055 individuals and 646 solicitors were carried out in the first wave of the research and 477 individuals and 310 solicitors in the second wave); multivariate analysis was used to discover whether use of mediation could lessen the number of legal aid certificates awarded and whether mediation could reduce expenditure on lawyers’ services; a comparison of mediation and lawyer costs was carried out;

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<sup>49</sup> As well as Davis this work contains chapters by Davis, Fitzgerald and Finch; Davis Fitzgerald, Finch and Bevan; Fenn; Bevan and Davis; Davis, Pearce and Goldie; Greatbatch and Dingwall; James, Clisby and Cumming; and, Bevan, Davis and Pearce.

conversational analysis of 148 tape mediation sessions (89 cases) was conducted, and an extended series of interviews was carried out with practitioners.<sup>50</sup> Findings of interest to this current work include, that parties to a divorce did not trust their former partners and questioned their partner's commitment to the dispute resolution process; all solicitors said they adopted a conciliatory approach to family disputes; parties were positive about their mediation experience but were even more positive about the service received from their solicitors; and partisanship was highly valued by solicitor's clients. Davis argues that there is very little prospect of mediators replacing lawyers, the two services being quite distinct. Mediation is according to Davis, "better understood as a lubricant to private negotiation" (p 271). On the work of family lawyers the following comment is made,

"One important observation, reflected also in other academic research, is that the work of family lawyers has tended to be misdescribed in official circles. Separating couples rely on lawyers because they feel they lack the resources, the knowledge or the authority to achieve what they believe to be a fair outcome. It is not by and large that they reject the option of a reasoned negotiation with a fair-minded person – it is, rather, that they do not believe that those conditions exist. Some people pursue their objective through lying, evasion or threat. Lawyers, and the authority of the court, provide a means of countering such strategies. Mediation may not be able to respond effectively to conflict on this level – or at least, that may be the perception of the parties. To conceive of all this as 'litigation' is to miss the point. It is about support, advice, and protection against all manner of unreasonableness." (p 270-271)

A study which looked in depth at the divorce work of solicitors was published by Eekelaar, Maclean and Beinart in 2000. Eekelaar et al's research was conceived, like this thesis, from the belief that the shift from lawyers to mediators was based on insufficient evidence of the way in which solicitors do

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<sup>50</sup> This list is not exhaustive; for a full account of the methods employed the reader is referred to pages ii-1v in the final report.

divorce work. Interested in the relationship between solicitor and client, Eekelaar et al widened this aspect to include how solicitors organise and carry out their work in relation to divorce. The methods employed involved the direct observation of a working day of ten family law specialists (identified using Law Society and Legal Aid Board Statistics). All the solicitors were partners aged between 35-55 (junior staff were not included in the research, as the authors argue it would have subjected them to stress, therefore the authors concede that the solicitors can not be described as a representative sample) and were from different locations around the UK. A second aspect to the study was the case study. For this element 40 in-depth interviews with solicitors, concerning a pre-selected case, were carried out (for this element of the research a representative sample of solicitors was sought). The case file was not seen by the researchers. The information received was thus the lawyer's own account. Clients were not interviewed. Eekelaar et al relate their findings to the policy assumptions identified by Lewis (2000) and note, for example, that they found no evidence of misunderstanding created by lawyers translating clients' problems into legal issues (although without the client's perspective it is unclear how clear this evidence can be). Instead they found lawyers repeating information, giving advice, reassurance and support to clients and taking action to reduce spousal tension. They comment,

"The picture of family lawyers' work in a variety of settings which emerges from our observational data is one of informed guidance, support, and expert facilitation through the divorce transition process within the legal frame."(p 187)

They conclude,

"... the perception of the work of family solicitors entertained and encouraged by policy-makers bears little relation to reality." (p 196)

A further US study into the role of lawyers in divorce was published in 2001. This work, in common with the Eekelaar study above, had a focus on the divorce work of lawyers, and employed the concept of professionalism as an analytical framework. A preliminary paper from this research by Mather, McEwen and Maiman is referred to above. Mather et al sought to explore how different legal procedures, operational in some states (for example mandatory mediation) affect the practice of divorce lawyers. One hundred and sixty three divorce lawyers were interviewed during 1990-1991 and a number of court records were examined (the bulk court document analysis relies on 2,958 cases in Maine and 1,294 in New Hampshire). There was no direct evidence, in the study, of how lawyers acted towards each other or towards their clients (p 199). Mather et al found that a number of social and legal changes have had an impact on divorce law practice, an example being the gender composition of legal communities which affects organisation of legal work and the formal and informal norms of practice (p188).

The final study which has been incorporated into the discussion of this current work is that by Douglas and Murch (2002) and was carried out in the UK. This project examined solicitors' practice and views regarding the introduction of initiatives intended to improve legal practice on divorce and to encourage solicitors actively to consider the needs of children. Sixteen solicitors were interviewed; all were members of the Solicitors Family Law Association. Douglas and Murch found that most solicitors were not happy with widening their remit to include offering advice to clients on emotional issues, such as how



to talk to children about divorce. Most solicitors in Douglas and Murch's study expressed a preference for work which relied on their legal skills.

The results from the studies existing at the time that the research questions were chosen will now be reviewed. There are many other important studies which were published subsequently, the details of which are provided in the list above. The findings from these later studies, has been incorporated into the discussions regarding the results from this current work. We will firstly look at the literature in relation to family mediation before moving on to consider the findings in relation to the service provided by lawyers.

## **2.4 Family mediation**

### 2.41 The history of family mediation

Mediation, as an accepted form of dispute resolution, has a long history in many cultures (Griffiths 1988, Parkinson 1995). In the United Kingdom the development of mediation within divorce has been heavily influenced by The Finer Report published in 1974.<sup>51</sup> However there is evidence that a form of conciliation (the two terms, mediation and conciliation, are used interchangeably throughout much of the literature) was widely practiced in the magistrates' court prior to the Second World War, although the prime aim was to save the marriage and discourage wives from pursuing legal claims against

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<sup>51</sup> Finer Committee (1974) Report of the Committee on One-Parent Families Cmnd 5629

their husbands (Manchester and Whetton 1974). In 1947 the Denning Committee report<sup>52</sup> contained a suggestion from Lord Merriman that all undefended divorces be referred to a conciliation tribunal. The main aim of the tribunal would be to explore the possibility of reconciliation, but if this failed, it was proposed that the tribunal could then move on to consider issues to do with post separation life such as custody of the children and spousal maintenance.<sup>53</sup> The proposal was rejected by the Denning committee whose overriding concern was with reconciliation.<sup>54</sup> Eekelaar and Dingwall (1988), claim that "Part of the impetus behind the independent conciliation movement of the nineteen seventies can, then, be seen as a modernization of reconciliation."(p15).

The Finer report did, however, clarify the distinction between conciliation and reconciliation:-

"By 'reconciliation,' we mean reuniting of the spouses. By 'conciliation' we mean assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in divorce or separation, by reaching agreements or giving consent or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers' fees, and every other matter arising out from the breakdown which calls for a decision on future arrangements (Finer Committee Report 1974 Para 4.288)

The report gave public recognition to the idea of conciliation in family disputes and was influential in the establishment, in Bristol, of the first independent conciliation service, the service accepting its first cases in 1978. In this early period conciliation services focused on mitigating the effects of divorce upon the

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<sup>52</sup> Denning Committee (1947) final Report of the Committee on Procedure in Matrimonial Causes Cmnd 7024.

<sup>53</sup> Para .23

<sup>54</sup> Cretney (1995 b) reconsiders the Denning Committee Report in light of the reforms proposed in the Government White Paper. Looking to the Future: mediation and the Ground for Divorce. Cm2799

children of the marriage, conciliation sessions being limited to discussions of child related issues such as custody and access. Throughout the eighties the practice expanded and in 1989 a "Comprehensive Mediation" (now referred to as All Issues Mediation, or A.I.M.) service was established, offering mediation on post divorce financial and property settlement as well as issues around contact and residence.

The proponents of mediation were so successful in lobbying for their cause, that despite the fact that only a minority of the divorcing population mediated their post divorce settlements,<sup>55</sup> it was incorporated into a major reform of family law, the Family Law Act 1996. Low take up may have been as a result of parties to a divorce being unwilling to negotiate face to face, or being ignorant as to the availability and goals of mediation. In Piper's sample of parents who had attended mediation "about a third felt they had been 'sent' to mediation and had no clear idea of what it might entail" (Piper 1996 (a) p66).

In January 1996, the three main providers of independent family mediation, National Family Mediation (N.F.M) Family Mediation Association (F.M.A) and Family Mediation Scotland (F.M.S), jointly established a central regulatory body, the U.K. College of Family Mediators. The potential growth in family mediation attracted interest from many professional groups particularly family law solicitors (Fisher, 1995 (a)). A number of solicitors were already involved in the independent mediation services, working as lawyer/mediators who worked alongside mediators from other professional backgrounds, most notably social

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<sup>55</sup> Maclean (2000) reports that in the mid-eighties the not for profit mediation services were working on approximately 2,000-3,000 divorce mediations a year, in a period when there were 150,000. Divorces each year (p540).

work and counselling. Reports from the Beldam Committee (1991)<sup>56</sup> and the Committee of the Council of H.M. Circuit Judges (1994)<sup>57</sup> identified family lawyers as the profession most suitable to mediate family disputes. The Solicitors Family Law Association (S.F.L.A.) provided training to enable solicitors to practice as sole mediators. Such a system was already in force in Scotland, lawyer/mediators operating under a code of practice regulated by the organization Comprehensive Accredited Lawyer Mediators (C.A.L.M). However the rhetoric of the White Paper<sup>58</sup> appeared to endorse the creation of a separate profession of mediators, with the two professions providing a complementary service. This implied a change in the role of family law solicitor from a central managerial role to a more auxiliary advisory position (Roberts 1995(a)).

Having provided a brief history of the development of family mediation, it is now appropriate to examine the academic literature surrounding this area. In order to focus the discussion a working definition of mediation as supplied by the providers of mediation may be appropriate. The definition below is taken from a pamphlet handed out to potential clients of National Family Mediation;

"Family mediation is a process in which an impartial third person, the mediator, assists those involved in family breakdown to make arrangements following separation or divorce, to communicate better and to reach their own agreed joint decisions. The issues to be decided may concern the divorce, the separation, the children, finance and property. The mediator has no stake in the dispute, is not identified with any of the competing interests and has no power to impose a

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<sup>56</sup> The General Council of the Bar, Committee on Alternative Dispute Resolution Report. Chairman Rt Hon Lord Justice Beldam. Bar Council Meeting 2 November 1991.

<sup>57</sup> Committee of the Council of Her Majesty's Circuit Judges (1994) Mediation and the Ground for Divorce - Answers to the Questions in the full green paper.

<sup>58</sup> Looking to the Future: Mediation and the Ground for Divorce. Cm2799.

settlement on the participants, who retain authority to make their own decisions."

It is possible to unpick this definition to reveal the central principles of mediation. These could be stated as; giving the parties control to make their own agreements (client control), as the mediator is neutral and merely facilitates discussion; and encouraging better communication between the parties (reducing conflict), and thus mitigating the effects of parental divorce upon the children. The current research is focussing on the divorce process and resolution of the financial and property disputes and is not intended to include child issues. The existing literature will therefore be considered in relation to client control and reduction in conflict. There will also be reference to the limited findings regarding the costs and effectiveness of mediated settlements as these have been influential in the debate regarding the Government's promotion of mediation.

#### 2.42 Client control within mediation

A central tenet of mediation and criticism of the traditional system concerns party control. In mediation the parties are perceived to have control over the process. The agreements are their agreements, not those of their legal representatives. Mediators are thus seen as neutral, operating as facilitators of communication. Evidence suggests, however, that mediators do in fact exert a not insignificant element of control over the mediation process. Greatbatch and Dingwall in their 1989 research, observed mediators operating what they

referred to as "selective facilitation," a process by which the mediator can effectively influence the outcomes by focussing communication in a direction perceived as desirable by the mediator (Greatbatch and Dingwall 1989). The uncertainty of a court decision may be used as a threat (Ingleby 1993) and in the US it was found that pressure is applied to settle, the source of most proposals originating from the mediators (Kressel and Pruitt 1989, Pearson and Thoennes 1989). Bottomley states, "What is actually a blend of informal adjudication with an element of party control is legitimated by the appearance of greater party control than is evident in practice" (Bottomley 1985 p175).

Mediator styles have been classified according to the level of intervention. Roberts, S (1988) describes three models of family mediation: Minimal Intervention, Directive Intervention and Therapeutic Intervention. Although U.S. authors have also described a number of mediation models (for example Silbey and Merry, 1988<sup>59</sup>), the models Roberts describes appear most appropriate to the situation in Britain. The Minimal Intervention model refers to mediation intended merely to facilitate communication. Implicit in this is that parties are assumed competent to negotiate for the future. This is the model favoured by Roberts, although he does acknowledge that such a model would do little to address power imbalances (see discussion below); moreover the empirical research carried out for the Rowntree project (Walker et al 1994) revealed that such neutrality was not always valued by clients who perceived it more as a lack of guidance. The Directive model does contain more advice and guidance

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<sup>59</sup> Silbey and Merry describe two models of mediation style, bargaining and therapeutic. Mediators adopting the bargaining style are perceived as principally settlement orientated, emotional issues are ignored. Therapeutic mediators on the other hand allow emotional expression and explore past relationships.

but could also be much more coercive. Roberts' final model, Therapeutic Intervention, describes the practice of some mediators who subscribe to the Family Systems Theory, who use therapeutic techniques to reveal and correct pathological elements in the parties' relationship. Roberts points out that such counselling may be valuable, but warns that such intervention must be kept distinct from joint decision making to avoid the danger of covert manipulation. Mediators have their own values and beliefs which they may seek to impose on mediation sessions (Teitelbaum and Dupaix 1994). The point is that such power needs to be acknowledged and regulated. This may be difficult in mediation where the source of power may become blurred (Dingwall 1988).

Thus it appears that mediators do exercise a varying degree of control over the process. A difficulty with neutrality in its pure form, is that any existing inequality between the parties would not be addressed, leading to disparities in the negotiating process. In 1982 Abel criticised the growth of informality and suggested that the position of the disadvantaged litigants is seldom improved and typically worsened, when state sponsored informal procedures replace formal adjudication. Mnookin noted that freedom in negotiations may not be appropriate for all parties in divorce, citing such problems as incapacity of one party to negotiate effectively, due to the psychological impact of divorce. Such problems Mnookin argues could lead to a degree of exploitation within the negotiations (Mnookin 1985). Haynes, responsible for much of the family mediator training both in the UK and the US, remarked that, in situations of social, economic or psychological inequality, neutrality may allow exploitation, real negotiations only being possible if the mediator deliberately intervenes and

enhances the power of the weaker party (Haynes 1981). Greatbatch and Dingwall remark, "The tension between the professed commitment to self-determination and the imposition of an overriding ethical code remains unresolved by the mediation movement." (Greatbatch and Dingwall 1989 p 615)<sup>60</sup>

Of particular concern to feminist writers is the position of women in the mediation process. Bottomley states:-

"Private ordering can only be detrimental to women; economic, social and psychological vulnerability all militates against the image of equal bargaining situation which is presumed to be present in mediation for it to be a truly mutual agreement. (Bottomley 1985 p 179)

More recently, Deech similarly remarked that women "are more likely to be inarticulate and ill-informed about their rights, more likely to be timid, suffering from depression and possibly in fear of their husbands" (Deech 1995 p12)<sup>61</sup>. Roberts maintains that such views are based on two mistaken assumptions, firstly that "women do not know what they want and cannot speak for themselves," and secondly, "when women do make demands these are mistaken, reactionary, or contradictory" (Roberts 1996 p8). Roberts further contends inequality of bargaining power is more complex than at first it might appear, arguing that the decision to separate may bring about a radical shift in the balance of power, giving the example of a mother of dependant children who, upon divorce is often in a stronger position than the husband regarding remaining in the marital home (also noted by Davis 1988). Mediators are trained to be aware of, and address such power imbalances, though how effective they

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<sup>60</sup> A brief discussion of the debate regarding the regulation of Alternative Methods of Dispute Resolution is provided by Clarke and Mays (1996).

<sup>61</sup> See also Grillo (1991)



are is disputable. Pearson and Thoennes found women more likely to feel pressurised to reach agreement (Pearson and Thoennes 1989) and the Rowntree 1994 study reported that women were more intimidated by the mediation process than men, and were also more likely to compromise (Walker et al 1994). Bottomley (1985) further highlights how a welfarist concern with the best interests of the children, which is apparent in mediation, may override the mother's view and interest and as such, have a further negative effect on the mother's bargaining power. As Ross (1980) states, "Dealings between two parties, one of whom is completely powerless, could not meaningfully be called negotiation" (p142). Emery and Wyer discovered a higher level of post settlement depression in women who reach agreements through mediation than from women who had used the traditional system (Emery and Wyer 1987).

The problem of power imbalance becomes acute when dealing with victims of domestic violence. Kaganas and Piper (1994) point out that the four basic elements of mediation (voluntary participation, equality or parity of bargaining, neutrality of mediator and confidentiality) are incompatible with protecting the victims of abuse (p 266). The voluntary nature of mediation in situations of domestic abuse may be undermined; mediation in such circumstances further empowering the abuser. Furthermore,

"The concern of mediators to remain neutral and to avoid allocating blame not only leads to a failure to confront problems of power and domination, it can have the effect of exacerbating them. The absence of any challenge to the abuser's conduct can be interpreted as condoning it." (p 267)

Confidentiality, the final element, Kaganas and Piper allege, could allow a criminal act to be obscured by a "veil of secrecy"(p 268). The adequacy of

mediation to deal with situations of domestic violence requires serious consideration. Kaganas and Piper contend that domestic violence is involved in one in three divorces; they further maintain that much abuse is hidden by both the victims and the perpetrators. Although mediation may not be suitable for most divorces where abuse is involved, that may not be true of all cases and depends on the dynamics of the particular relationship. The White Paper on divorce reform suggests that whether mediation was appropriate in such circumstances would depend on the “nature of the violence and the dynamics of the relationship between a particular couple.”<sup>62</sup> And “decisions on whether mediation might be suitable for a particular case or couple are best made in consultation with professionally trained mediators.”<sup>63</sup> In order to carry out this consultation it was envisaged that for the idea of more widely used mediation in the Family Law Act 1996 the appropriate screening methods would be developed.

#### 2.43 Reducing conflict

By diverting clients from solicitors and towards the alternative service provided by mediators, the government, prior to the Family Law Act 1996 may have anticipated that, as Roberts (1995a) puts it succinctly, clients would “escape what is seen as a conflict-rising dependency inherent in resort to lawyers and litigation” (p158). The White Paper referring to the results of the earlier consultation stage claimed: “Advantages emphasized (of mediation) included

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<sup>62</sup> Looking to the Future: mediation and the Ground for Divorce Cm 2799 Para 5.29.

<sup>63</sup> Ibid Para 5.30

the reduction of conflict between the couple leading to a reduction of trauma for the children."<sup>64</sup> The evidence as to whether mediation is able in fact to reduce conflict is far from clear. Kressel and Pruitt conclude that mediation is usually "unable to alter dysfunctional pattern of relating" (Kressel and Pruitt 1989 p399). They further note that the higher the conflict between the couple, the dimmer the prospect of mediation succeeding (Kressel and Pruitt 1989). Pearson and Thoennes (1988), however, found that of those who settled 30 percent said their relationship had improved. Such improvements may be short lived; Kelly's studies carried out in the mid eighties and early nineties found that although there was evidence of a reduction in conflict for up to one year after the divorce, this effect had disappeared after one to two years, and some parties became more bitter than they had been before the mediation had commenced (Kelly 1991).

The Rowntree study (Walker et al 1994) reported that many couples undergoing mediation would have appreciated more focus on the problems of their past relationship, but the paper indicated that this would not be provided, claiming that mediators would likely to share the conviction that "Divorce mediation is essentially a task-orientated number-crunching affair, it is a very different experience from therapy" (Stanley-Stevens and Stanley-Stevens 1992 cited in Walker et al 1994 p86). Day-Sclater (1995a) similarly comments that the hope expressed in the White Paper that couples will be able to address what is wrong with their relationship<sup>65</sup> is a forlorn one, as the U.K. mediation services are, "not of the therapeutic variety; on the contrary, their focus is on the

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<sup>64</sup> Ibid Para 5.11

<sup>65</sup> Ibid Para 2.17

concrete issues and planning for the future, rather than dwelling on the past.” (p495) Day-Sclater further maintains that “The abolition of fault and an increased use of mediation will not necessarily remove or even reduce the expression of these negative emotions and neither would it be desirable to try simply to remove them or pretend they do not exist.”(p 495) Such feelings Day-Sclater argues, “...may be a necessary aspects of the uncoupling process, enabling the person to deal with the trauma of loss and to begin to rebuild the self.” (p495)<sup>66</sup>

#### 2.44 Costs

Although it is believed that the government's support for private ordering was linked to a concern for increasing legal aid expenditure,<sup>67</sup> there is a lack of decisive evidence indicating that expenses incurred whilst mediating are substantially less than those incurred through lawyer negotiations. The Newcastle C.P.U. study concluded that mediation did not save money. The later Rowntree study (Walker et al 1994) failed to conclude whether mediation reduced costs. Moreover, the mediators, who came from a variety of professional backgrounds, were paid at a much reduced sessional basis. It would be naive to expect to be able to continue to encroach on the goodwill of these professional groups, should mediation expand and be used by the majority of the divorcing population.

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<sup>66</sup> For further discussion on the psychological aspects of divorce see Day-Sclater and Richards (1995) and Vaughan (1987)

<sup>67</sup> The view was expressed in the White Paper that mediation would be more cost effective than negotiating through lawyers. (para 5.20)

## 2.45 Effectiveness and durability of settlements

“The success of any intervention can only be measured against, what it sets out to achieve , and in this respect mediation has set itself a hard and intricate task ...The purpose of mediation in its purest form, is the resolution of disputes, hence the measure most commonly used to determine success has been the settlement rate.” (Walker et al 1994 p71)

The settlement rates given in the Rowntree study for comprehensive mediation are 39 percent reached agreement on all issues, 41 percent reached agreement on some of the issues and 20 percent did not reach agreement on any issue. Measuring the success of mediation on the number of agreements reached is problematic, as such a focus ignores some of the wider benefits claimed for mediation. Kressel and Pruitt, in their review of mediation research, suggest there “has probably been an over emphasis on settlement rates as an indicator of success” (Kressel and Pruitt 1989 p397). Some couples who did not reach settlement, still valued the mediation process as it assisted in other areas, for example, improved communication (Kelly and Gigy 1989). As regards satisfaction with the process of mediation, just over half of the Rowntree study (Walker et al 1994) sample stated they were satisfied, and eighteen percent were dissatisfied.

A true test of the success of mediation could be in the durability of settlements (Davis 1988). Research findings indicate that agreements may be short lived (Kressel and Pruitt 1985), but no studies reveal a less favourable rate of compliance than that with the traditional system (Kressel and Pruitt 1989, Pearson and Thoennes 1988).

A number of factors have been suggested as predictors of failure in mediation. They include a high of level of conflict (Kressel and Pruitt 1989), a lack of resources (Doyle and Caron 1979, Kressel et al 1980, Pearson and Thoennes and Vanderkooi 1982), views of dispute resolution which render mediation inappropriate (for example, a retributive view of justice (Eekelaar 1994), and beliefs about conflict, justice and morals differing both between the parties and the mediator (Littlejohn, Shailor and Pearce 1994).

Evidence from the Rowntree study (Walker et al 1994) suggests that mediation works best when backed up by legal advice i.e. that it becomes an additional service. Clients in this project reportedly found lawyers, including clients' own solicitors and lawyer/mediators, the most helpful professionals involved in the mediation process. It was suggested that clients valued the reassurance and protection provided by lawyers and that the presence of lawyer/mediators gave the process greater validity (Walker et al 1994). Pearson and Thoennes (1988), in their longitudinal studies of mediation carried out in the US, also found that lawyer involvement was highly valued.

The involvement of lawyers may address some of the concerns that have been expressed about mediation as a sole resolution process in divorce. Ingleby (1992) has expressed some anxiety about how effectively mediators will manage financial disclosure, and also notes that mediation is inappropriate when settlement concerns a third party, for example social security. Cretney (1995(a)) points to the irony of any government discouraging legal advice in

divorce, whilst the House of Lords are actively encouraging wives to seek independent legal guidance, to minimize the dangers of emotional involvement leading to unwise financial decisions (*Barclays Bank plc v O'Brien* [1994] 1 FLR 1, HL).

#### 2.46 Inadequacies of mediation research

Perhaps the most notable criticism of mediation research, particularly in relation to studies carried out in the UK, is the use of self-selecting couples. Parties who choose to mediate their disputes, are arguably in a conciliatory frame of mind, and are thus more pre-disposed to reach agreement (Ingleby 1993, Teitelbaum and Dupaix 1994). Rates of settlement from such research must be viewed with this shortcoming in mind. For example, the fact that 20 per cent of the Rowntree sample (Walker et al 1994) failed to reach any agreement at all, can be read as predicting a higher failure rate, when parties are directed into mediation less willingly (Day-Sclater 1995a).

Linked to the above, is the under representation of 'high conflict couples' in divorce mediation research (Parkinson 1995, Kressel and Pruitt 1989). Kressel and Pruitt note that in comparative work, "the more co-operatively oriented and less severely disturbed people end up in the mediation group, while the more conflictual cases are found in the comparison or 'control' conditions" (Kressel and Pruitt 1989 p400).

A further difficulty is the failure to consider the impact of class or other contextual factors. In the Rowntree study (Walker et al 1994), where the occupations were known, 56 per cent came from social class A and B, and only 9 per cent from classes D and E. Similar shortcomings are apparent in research carried out in the US.<sup>68</sup> As such, research on mediation can be said to be neither representative nor generalizable (Teitelbaum and Dupaix 1994). The working class, are however, over represented in the divorcing population (Gibson 1996, Haskey 1984). Yet there is no research examining how the experience of divorce, which may be very different from the middle class experience, could be affected by the move from lawyer representation to mediation. Davis comments, "The truth, as far as mediation is concerned, is that such reliable evidence as exists point to its having appeal, and utility, for a minority of the divorcing population" (Davis 1995 p565).

Mediation research has an added difficulty in that there has been a lack of uniformity about procedures and mediation, both across jurisdictions and even within individual practices. In addition much of the research, with the exclusion of the Rowntree study, has concerned child focussed mediation which arguably raises distinct issues to those which may arise in financial and property disputes. It is arguable that findings from these studies can only have a limited value in assessing the effectiveness of mediation a whole (Day-Sclater 1995(a)).

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<sup>68</sup> In the US such demographic differences may be recorded as differing levels of educational attainment rather than social class, for example see Kelly and Gigy (1989).



As regards methodology, Kressel and Pruitt note the “absence of control for placebo effect” arguing that “people often draw merit from a novel, intriguing, and enthusiastically administered form of treatment when the treatment itself has no inherent merit.” This placebo effect, Kressel and Pruitt maintain, is particularly likely to, “contaminate attitudinal measures, such as general satisfaction” which are often used to gauge the value of mediation (Kressel and Pruitt 1989 p 400). Much of the research also relies on retrospective interviews. Such an approach is open to a number of criticisms; retrospective data rely on the subjective recollections of the research participants, which may have a weak relationship to what actually happened (Kressel and Pruitt 1989). Interview behaviour is also open to influence from interactional and self-presentational considerations (Dingwall and Greatbatch 1993 p 379). Kressel and Pruitt maintain that there is a need for more observational research and case studies, which could convey “the richness, headaches and complexities of the process of dispute resolution.”(p 431)

Finally Kressel and Pruitt highlight, what the researcher believes to be a very important shortcoming;-

“It is also worth noting that research on mediation, for all its shortcomings, is much further along than research on the inadequately labelled, 'adversary system.' As we begin to have more systematic evidence on the roles that lawyers and the courts play in the resolution, we will have a more adequate context by which to judge mediations strengths and weakness.” (Kressel and Pruitt 1989 p 402)

## **2.5 Solicitor negotiation**

For all the political and academic interest in mediation, the majority of couples still seek the services of a solicitor when considering a divorce. Divorce law is perceived to be different from other areas of litigation by practitioners, being characterized by uncertain rules and high level of discretion (Ingleby 1992, Fricker 1995, Smart 1984); and involving clients who are; highly emotionally charged (Felstiner and Sarat 1992), often ambivalent about the divorce (Davis 1988, Sarat and Felstiner 1995), unprepared (Griffiths 1986), and with unrealistic expectations about what the system can offer (Davis, et al 1994, Mather 1995, Griffiths 1986). The focus of this review is on lawyers and divorce. The literature will be examined firstly from the perspective of two of the claims made for mediation, that is client control and reduction of conflict and will then move on to consider the specific issues which have emerged from the literature concerning the role of lawyers in divorce.

### 2.51 Client control

Mediation has been argued to be beneficial because parties retain control over the dispute resolution process and outcome. To what extent, however, does negotiation by lawyers appear to be different?

Sarat and Felstiner considered the question of power in solicitor client interactions (Sarat and Felstiner 1995). Sarat and Felstiner's US study followed

one side of forty divorces from the initial lawyer client meeting until the case concluded. The lawyer client sessions in the sample were observed and tape recorded and interviews were carried out with both the lawyers and clients involved. In an article drawing on findings from this study, Felstiner and Sarat criticise the conventional view of “lawyer dominance and client passivity” (p1451), arguing instead that power is fluid and subject to negotiation and re-negotiation by the participants. Felstiner and Sarat describe the lawyer/client relationship as one of “mutual dependency and suspicion” (p1456) and continue,

“Both lawyers and clients are sometimes frustrated by feelings of powerlessness in dealing with the other ... often no one may be in charge. Interactions between lawyers and clients involve as much drift and uncertainty as they do direction and clarity of purpose.” (Felstiner and Sarat p1456)

However Felstiner and Sarat also acknowledge that divorce lawyers are in a stronger position than their clients,

“In divorce, lawyer and client negotiate power, but they do so on uneven terms ... The entrenched position of lawyers - their turf, their rules, their vernacular - and enhanced vulnerability of their clients. ... the relationship between lawyer and client is hierarchically complex; that although it is not symmetrical, it is two-sided. The lawyers' position reflects professional power, but clients have two sources of structural power of their own - they pay the bills and they make the ultimate decisions to settle or fight, to accept the deal or not.” (Felstiner and Sarat 1992 p 1497).

Thus Felstiner and Sarat, despite rejecting the conventional view of lawyer domination, still accept that lawyers hold most of the power and are, therefore, able to exercise control. Two points from the above quote deserve further comment; as concerns ‘paying the bill’ Felstiner and Sarat themselves remark that clients “almost never say, I am the client, I am paying the bill now do this” (p1468). Mather also noted that lawyers can match this particular source of

power, as they set the bill (Mather 1995). Secondly, although Felstiner and Sarat claim that clients do make the ultimate decisions, they only do this after having been guided and advised by the solicitor; it has been suggested that clients acting on this basis may not always be making fully informed decisions (Griffiths 1986).

Many studies have shown how lawyers control the 'talk' in solicitor client conferences, with discussion of emotional areas often being actively discouraged, lawyers preferring to focus on the legal issues (Mather et al 1995, Griffiths 1986, Hositka 1979). Griffiths suggests that in the case of divorce, "lawyers and their clients are in effect largely occupied with two different divorces: lawyers with a legal divorce, clients with a social and emotional divorce" (Griffiths 1986 p155). Whilst clients may wish to dwell on past hurts and questions of fault and blame, lawyers may prefer to concentrate on future needs and legal entitlements (Davis et al 1994, Sarat and Felstiner 1995, Mather et al 1995, Griffiths 1986). However, it should not be supposed that a focus on the future is a characteristic solely of lawyers, as this limitation is also apparent in mediation (Piper 1996 (a)). Studies of both methods of dispute resolution have indicated that although the majority of participants miss the chance to address issues in the past, 'guilty' parties (clients own perception) may be more at ease with such a limitation (Walker 1994, Davis et al 1994).

According to Heinz (1983), evidence of lawyer power over the client is whether they are able to modify their client's goals. In the case of divorce, research has indicated that there may be a clear need to modify clients' goals, as clients'

initial goals and expectations may be ill-thought out and unrealistic. Davis et al (1994) report how clients bring with them 'folk myths,' that is expectations that the financial settlement will reflect elements of justice. Felstiner and Sarat remark that clients tend to "reason up from needs rather than down from resources" (p1461). Griffiths (1986) found that clients often came to their lawyers with some areas of agreement with their spouse; such agreements were often found by the lawyers to be unrealistic and offering only short term solutions. Divorce lawyers may therefore take action towards reorienting clients as to the reality of the law and, as Heinz suggests, exercising control over the client by successfully getting the client to modify their initial goals to something more in line with the perception of the lawyer. Mather et al (1995) observed lawyers employing a variety of tactics to this end, ranging from client education through advice and persuasion up to an ultimate threat to withdraw from the case. Mather reports that most clients will have conceded by the time this latter point is reached, and concludes that although some lawyers will allow their client some limited control, ultimately the lawyer is invariably in charge of both the process and outcome.

A further factor concerning the issue of power and control in lawyer client interaction relates to the provision of information by the lawyer to the client. In order for clients to fully participate and make a decision, they need to be kept fully informed and understand the process. Existing research has indicated that clients may not be fully informed and as such lose a degree of control over both the process and outcome. Davis writes of the clients in his 1988 *Partisans and Mediators* study,

“An issue which they (the clients) regard as essentially straight forward is transformed into a highly technical and inaccessible legal matter. The result is that they do not understand what is going on, and secondly they are not allowed to contribute directly to the resolution of their quarrel.” (Davis 1988 p126)

Griffiths similarly observed in his study that in general lawyers did not keep their clients fully informed of all the various choices available to them. Information was given to clients depending on the lawyer’s assessment of the client’s ability to understand, given the client’s emotional as well as intellectual state (Griffiths 1986). Furthermore Griffiths noted that lawyers simplified matters by presenting the practical consequences of rules as if they were the rules.

Studies into lawyer client interaction on divorce have also indicated that clients maintain a fairly passive role in lawyer – client conferences. Clients rarely seem either question the lawyer or ask for further clarification (Sarat and Felstiner 1995, Griffiths 1986, Hostika 1979). In Hostika's observation of solicitor client conferences, only seven percent of “client utterances were questions directed to the lawyer; less than one percent could be coded as instruction” (Hostika 1979 p 606). The rare assertive clients were perceived by the lawyers to be hostile and difficult, “failing to conform to expected norms of passivity” but, “Lawyers did, however, devote more effort to the persistent client's case.” (Hostika 1979 p 607). Davis et al (1994) noted that lawyers sometimes needed such assertive clients in order to urge them in to action at all.

The overall picture after reviewing the research is that of lawyer dominance, although this may not always be apparent to the client as Griffiths notes,

“The lawyer's role as seen by the clients is rather passive: ... lawyers usually do not express distinct opinion. Lawyers themselves, however, stress that the initiative in providing the necessary legal information and in guiding the discussion toward the necessary decision lies almost entirely with them.” (Griffiths 1986 p155)

Griffiths continues

“Lawyers in fact strongly influence the way the divorce process unfolds, this remains largely invisible to clients.” (p160)

By assuming that clients do not know what is in their best interests lawyers are able to justify such control, as ‘lawyers know best’ (Davis 1988, Mather et al 1994), though, as Mather notes, such control over clients’ decisions may be crucial to the lawyer, in maintaining credibility with colleagues and ensuring profession survival (Mather et al 1995, see also Smart 1984, Griffiths 1986, Davis 1988, Galanter 1974).

Ingleby cautions against interpreting the fact that a lawyer may not pursue the client’s chosen outcomes as a negative aspect of client’s loss of control, pointing out that the clients’ desired outcome may not have been legally attainable. A lawyer who vigorously pursues a case doomed to failure, because it is what the client wants, could not be said, according to Ingleby, to be acting in the client’s best interests. Moreover Ingleby argues that rather than taking control away, lawyers actually empower their clients, and gives three ways in which lawyers ‘empower’ parties to a divorce, enhancing their ability to resolve their dispute themselves: “(1) providing a forum which enables claims to be made more effectively than if the parties were not represented (2) making

clients aware of their rights against each other; and (3) making clients aware of their rights against the state” (Ingleby 1992 p139).

For all the focus on client control, in both literatures, there is little to suggest that parties to a divorce actually want a high degree of control. As has already been referred to in the Rowntree study of mediation (Walker et al 1994) clients were reported to regret the lack of guidance and direction supplied by the mediator. Similarly, Davis writes that in his Partisans and Mediators study clients complained solicitors had been insufficiently controlling, refusing to make choices for them (Davis 1988 p94-96). The seminal work by Thibaut and Walker (1975) questions the assumption that disputants want to create their own solutions. Thibaut and Walker divided the disputes into two stages; a process stage and a decision stage. Their findings show that, particularly when conflict is high, the parties, whilst wishing to retain control over the process, prefer that control over the ultimate decision is taken by a third party; as only when an authoritative decision is taken for them, can conflict end. It is possible to argue that as divorce can often be highly conflictual and the rationality of the parties can be contaminated by feelings of hurt, anger, guilt and betrayal, clients may, as Thibault and Walker suggest, prefer to relinquish control over the outcome, rather than acquiring more, as in mediation.



## 2.52 Spousal conflict: the effect of lawyer involvement

By definition the parties to a divorce will often experience a degree of spousal conflict regardless of which form of dispute resolution process they embark upon. Day-Sclater and Richards (1995) provide a useful discussion of the psychological processes couples will experience during a divorce, arguing that feelings such as loss and anger are inevitable for many divorcing individuals. These strong emotions, they maintain, do serve in the long term healing process, and should not be denied, but inevitably pose a considerable barrier to rational negotiation (Day-Sclater and Richards 1995). Erlanger, Chambliss and Melli reason, "The informal divorce process is arguably unique in its vulnerability to the idiosyncrasies of interpersonal conflict" (p594). Davis, after interviewing 299 parties to divorce, commented, "many couples had no sense of there being a 'middle ground' which might be tapped by a skilled mediator; they saw their divorce in terms of unashamed conflict of interest" (Davis 1988 p26). Griffiths' observations led him to conclude that in 85 percent of all cases conflict between the parties was at a level to create potential legal problems (Griffiths 1986 p148).

Negotiations concerning divorce often focus around three distinct, but overlapping, areas; children (residence and contact), spousal support and disposition of property. Research indicates that the lowest level of conflict is to be found in the first of these categories, child issues, and the highest level in the final factor, disposal of property (Davis 1988, Griffiths 1986, Maccoby and Mnookin 1994, Mather et al 1995). It may be that wide publicity about the

suffering caused to children by fights over custody (prior to The Children Act 1989); and the accepted wisdom of the importance of retaining contact with both parents; has seeped into the public consciousness: parties no longer seek to battle on such grounds (see Maccoby and Mnookin 1994). Further, empirical studies have revealed that lawyers are reluctant to get involved in bitter battles over children (Griffiths 1986 Mather et al 1995). Mather writes,

"It seems to be the case that, for these lawyers at least, to bow to the wishes of a greedy client where children are involved is to violate either personal ethics or a broader professional obligation to justice for children." (Mather et al 1995)

Spousal support does not attract high levels of conflict over the divorcing population as a whole; simply because to pursue such claims would be futile (Maccoby and Mnookin 1994) (Child Support Act calculation does contain an element for the parent with care). In the majority of divorce cases spousal maintenance orders are not made, Davis et al (2000 (a)) reporting that the decline in spousal maintenance is one of the recent trends apparent in ancillary relief outcomes.<sup>69</sup>

Although clients may often enter the divorce process angry and seeking revenge, there are also those who, perhaps as a result of intimidation or feelings of guilt or exhaustion, simply want to conclude the whole process as quickly as is feasible, possibly forgoing rights or assets to which they are entitled. Mather et al suggest that gender may be a relevant factor, as they report some lawyers in their study, "had to encourage their female clients to be

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<sup>69</sup> Davis et al (2000 (a)), cites the Lord Chancellor's Department Judicial Statistics Annual Report 1998, whose figures reveal that 29,617 spousal maintenance orders were made in 1985 but only 9056 in 1998.

assertive of their legal rights, but that frequently they had to persuade their male client to accept a compromise" (p298). Other lawyers in Mather et al's study felt such unwillingness to pursue legal entitlements was more likely caused by feelings of guilt (Mather et al 1995 p 298).

It is suggested then that in the case of divorce clients may enter the process in various emotional states and with levels of spousal conflict which may affect the client's ability to resolve the dispute. It is important now to move on to consider the literature with regard to the lawyer's approach to the divorce process, in particular whether the approach of the lawyer has a negative affect on the relationship between the spouses.

#### 2.52 (j) Lawyers' approach - adversarial or conciliatory?

"The tendency for lawyers to promote increased conflict between spouses and to prohibit them from seeking non adversarial solutions is now well known" (Irving and Benjamin 1987 cited in Neilson 1990).

The above is an example of a sometimes commonly held belief that lawyers will amplify hostility between parties to a divorce. Although this may have been the case in the past, commentators have suggested that, partly as a result of the growth of alternative methods of dispute resolution (ADRs), and the development of an ideology of welfarism, lawyers have modified their behaviour, adopting a less aggressive and more pacifactory approach (Roberts 1993, 1995 (a), Davis 1988). This was particularly apparent in the formation of

the Solicitors Family Law Association (SFLA) in 1982. The stated aim of the association is,

“To encourage solicitors to represent their clients in a manner which promotes the sensitive, efficient and economic handling of family disputes and assists individuals to reconcile their differences and to seek solutions fair to all members of the family and to children in particular.” (The Law Society Gazette 12 January 1983 p66 cited in Davis 1988 p119).

Research studies carried out in the U.K. (Davis 1988, Davis et al 1994, Ingleby 1992, Neilson 1990), The Netherlands, (Griffiths 1986) and the U.S., (Sarat and Felstiner 1986, 1995, Maccoby and Mnookin 1994, Mather et al 1995) indicate that the majority of solicitors do not act in an adversarial manner, their goal being the obtaining of a reasonable and 'fair' settlement. Sarat and Felstiner remark,

“Most of those (lawyers) 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.” (1986 p113).

Studies carried out in the U.S. also found lawyer's roles were seen as "cooling out" clients not to expect too much from the legal system, in terms of legal and economic entitlements as well as social, emotional and moral satisfaction (Menkel-Meadow 1993 p370, Erlanger, Chambliss and Melli 1987). Neilson reported that solicitors in her study would pressurise clients to be reasonable (see also Griffiths 1986). The evidence, therefore, does not support the view that lawyers increase spousal hostility by encouraging their client to pursue inflated claims.

Griffiths makes the interesting point that the most important factor in conflict minimalisation is that a reasonable relationship exists between the opposing lawyers on the case (Griffith's 1986 p165). Similarly, a conciliatory approach and the seeking of a reasonable and fair settlement are said to be vital in order that a solicitor maintains an amicable relationship with his legal peers. (Smart 1984, Davis 1988, Mather et al 1995, Galanter 1974).

On the other hand, an overly conciliatory approach may also cause difficulties for lawyers. McEwen et al (1994) acknowledge the evidence that lawyers are settlement orientated, but point out that characterizing lawyers as either 'adversarial or co-operative' is unhelpful. Lawyers may frequently need to move between approaches, as, although the majority of cases settle, this often involves preparation for trial. McEwen et al remark, "Lawyers must decide, between aggressively using formal legal procedure such as discovery and embarking on co-operative, informal efforts at information sharing" (McEwen et al 1994 p157). Thus although the overall approach may be described as conciliatory, there may well be examples within each case, of a more adversarial position.

Davis (1988) suggests that clients may not always appreciate a conciliatory stance, reporting that in his 1988 study many clients felt such an approach led to their case being weakened. In Davis' research only seven percent of the sample felt their solicitor had been particularly aggressive, in most cases this had been most apparent in the written communication (for example letters and affidavits). Davis commented that occasionally, in these cases parties would

communicate directly to limit any damage caused to their relationship. Conversely Davis also observed parties using their solicitors as scapegoats enabling to them pursue hostile claims, whilst continuing to maintain a reasonable relationship with their spouse (Davis 1988 p122- 123).

It has also been suggested that what characterises divorce settlement negotiations is neither an adversarial or conciliatory approach, but rather action on a 'responsive mode' (Davis et al 1994) and drift (Sarat and Felstiner 1995), as family law practitioner at the low-status, low remuneration end of their profession, have to manage increasingly heavy workloads.

### 2.53 The goal of settlement

Evidence of the successful management of disputes by lawyers is often given as the fact 'most cases settle' that is do not go to trial. Having a case proceed to trial is now often perceived as a personal failure by the lawyers involved (Davis et al 1994). As the conciliation movement expanded, lawyers modified their approach, moving from a "lamentable disinclination to engage in constructive negotiation," to pursuing "settlement in virtually all cases" (Davis 1988 p118-119). Adjudication may thus become, "so much a last resort that it is stigmatized as the refuge of the obsessive and the intransigent" (Davis 1988 p 205). In fact there is no clear evidence that parties benefit from trial avoidance. Costs may be just as high, as if the case went to court, particularly when considering a 'door of the court' settlement, or even higher if there is prolonged

negotiation, (Davis et al 1994). Justice may be denied (Fiss 1984, Eekelaar 1996, Dingwall and Eekelaar 1988 (b)), and the vulnerable not protected as such settlements are the "product of fatigue and domination" (Davis et al 1994 p260, see also Erlanger, Chambliss and Melli 1987). Erlanger, Chambliss and Melli's research revealed that settlement was often achieved after contentious negotiations involving threats, intimidation, and pressure from attorneys, those able to withstand delay being able to obtain more favourable terms. Settlement was imposed as much as adjudicated decisions. (see also Davis et al 1994 for similar findings in the U.K.). They comment:

"Settlement and agreement are not synonymous term. There is settlement but not agreement when contentions parties sign unsatisfactory stipulation out of impatience, frustration, or emotional distress." (Erlanger, Chambliss and Melli 1987 p602)

If settlement does not, necessarily, benefit the client, it could be questioned as to why it is so extensive. Judges themselves have been found to be very active in promoting pre-trial settlement (Galanter and Cahill 1994, Davis et al 1994). Such settlement may be beneficial for the management of the court; in assisting lawyers to cope with heavy workloads, and for maintaining reasonable reputations of lawyers amongst their peers (Smart 1984, Galanter and Cahill 1994, Davis et al 1994, Mather 1995). According to Davis et al (1994) the primary motive behind the development of such a strong settlement culture, is economic, enabling more efficient case management, but is justified with reference to concepts such as fairness and conflict reduction (Davis et al 1994 p260).

The settlement ethos has permeated legal ideology to the extent that such expectations are being recognised in legal developments, most apparently in the Family Law Act 1996 and the Woolf report on civil justice, both of which anticipate greater use of alternative methods of dispute resolution. Galanter and Cahill (1994) provide an excellent analysis of the arguments in favour of settlement and evaluate the existing evidence, concluding, "Settlement is neither intrinsically good or bad, any more than adjudication is good or bad," (p1388) but later caution:

"Once we recognise that all components of the intricate ecology of disputing are linked in complex and sometimes paradoxical ways to what courts, it is manifest that the obligation of seeing that justice is done is not discharged by uncritical celebration of settlement."(Galanter and Cahill 1994 p 1391)

#### 2.54 The shadow of the law

Negotiation via solicitors, as opposed to mediation conducted outside of the legal system, can have some advantages for participants. Parties are arguably protected from totally unfair settlements, as negotiation occurs in 'the Shadow of the Law' (Mnookin and Kornhauser 1979). Mnookin and Kornhauser write,

"The legal rules governing alimony, child support, marital property, and custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips - an endowment of sorts."(p968)



Recently commentators have questioned how clear the shadow of the law is. Griffiths (1986) refers to the shadow of the law as a "distorted silhouette" (p 159), arguing that lawyers transform the law into practical concepts when informing the client of their legal entitlements; but more importantly "lawyers probably effect the most important transformations in the law simply by keeping client uninformed" (p160). Ingleby (1992) and Mather et al, (1995) similarly noted a failure of lawyers to fully inform clients of the law.

In the U.K., where the courts enjoy a very high level of discretion, a different 'shadow' may exist depending on the personal preferences of the district judge. Lawyers' negotiations have been found to have been heavily influenced by their expectations of what the particular district judge views as appropriate (Davis et al 1994). Possibly the strongest argument limiting the applicability of the 'shadow of the law,' thesis is the acknowledged (see above) overriding professional obsession with settlement (Erlanger, Chambliss and Melli 1987, Davis 1988, Davis et al 1994 Mather et al 1995, Sarat and Felstiner 1986). Davis et al (1994) write, "in the compromise driven system, endowments conferred by statute and the case law may be overridden" (p117). It would appear that the 'shadow' may be far from clear and may not create such definite bargaining endowments as Mnookin and Kornhauser suggest.

## 2.55 Gender

Existing evidence suggests that the gender of both the solicitor and client may significantly affect the negotiation process. Writers have suggested that female clients may be disadvantaged in mediation (see above). However, this may also be the case in the tradition method of dispute resolution. Mossman points out that mere lack of resources, which is more common amongst female clients, could lead to wives being less well represented than their husbands, "a woman in a family law dispute may have to face her affluent husband's well-prepared and well-paid private practice lawyer." (Mossman 1994 p366). Further, the whole settlement ethos (see above) is more likely to disadvantage women who are often in need of a speedy settlement and unable to tolerate delay (Davis et al 1994).

An area where being legally represented has been held to benefit women concerns property rights. Many female clients can be unaware of their claims to a property, believing that such rights are linked solely to financial input. As Deech (1996) cautions;

"In a system where mediation is widespread, it is quite likely that women will not be made aware of the strength of their claim to transfer of the home or a share in its value, as they tend to believe that they can leave the marriage with only what is theirs in strict property terms. It is only by the intervention of lawyers that property claims have been realized and developed by wives in recent years."(p103, see also Davis 1988)

Mather et al report that clients, who needed encouragement from their lawyer to be more assertive, were more likely to be female (Mather et al 1995). Female clients were judged by lawyers to be more reasonable, less demanding, and therefore more likely to follow their lawyer's advice (Maiman et al 1992).

Family law is an area where female lawyers are over represented (Abel 1988, Mossman 1994, Maiman et al 1992). Maiman et al (1992) report that female lawyers differ in their approach to matrimonial work from their male peers. Female lawyers were found to be more likely to be 'client orientated,' that is, more likely to see "their work in terms of helping people solve their problems, to focus on their clients rather than on the law per se, and to see their most satisfying result in terms of their contact with their clients" (Maiman et al 1992 p56).

Concerning lawyer's views of their clients' gender, Maiman et al (1992) asked lawyers if they had any preference for representing male or female clients. Two thirds of the lawyers stated they had no preference, but of those who had a preference, three quarters of both female and male lawyers preferred to represent women. The reason that female clients were preferred differed according to the gender of the lawyers; male lawyers preferred women because they were more reasonable and more likely to be guided by their lawyer, whereas female lawyers preferred female clients because of the issues involved, for example the development of self reliance (p48). On a similar note, Davis (1988) recounts that some male clients were uneasy with a female solicitor, whom they suspected of being a campaigner for women's rights.

## 2.56 Inadequacies of research into lawyer's negotiations of divorce settlements

As has been suggested research into lawyers' negotiations of divorce settlements, is not as well developed as that into mediation (see for example Kressel and Pruitt 1989). Much of the work cited above originates in the U.S. and although this can provide valuable insights it must be read in the knowledge that cultural differences will impinge on the negotiation process. Further, the U.K. law in this area is still highly discretionary (apart from child support which is now subject to formalistic assessment by the Child Support Agency); particularly in comparison to some U.S. states where there is an assumption of a 50/50 split.

Sarat and Felstiner's work provides a valuable focus on the 'law in action,' that is examining the law as it is experienced by the lawyers and clients involved. Ross (1980) remarks, "an understanding of the law in action can best proceed from an analysis of the personalities of and pressures upon the personnel who administer the law" (p18). Law as experienced by the clients needs to be understood more as a result of how lawyers behave towards each other and their clients, than what judge's state in reported cases (see Shapiro 1980 p1201).

However, an important criticism of the Sarat and Felsinter study and much of the other research is their failure to situate interactions between lawyers and clients within the social context. Constraining factors such as class or gender are ignored. McEwen (1995) comments on this omission;

“Clearly, interpretivists struggle against what they view as excessive emphasis on such structural concerns, but in their success in limiting attention to them, they also constrain their analysis and understanding of the social interaction and ‘meaning making’ they study.” ( McEwen1995 p234).

McEwen further notes that Sarat and Felstiner’s study gives little information about the clients, but the transcripts indicate that they are generally well educated and articulate, a criticism also made of mediation research (see above). The 1994 Simple Quarrels study (Davis et al 1994) provides a valuable insight into how solicitors actually work in Britain, and includes predominantly working class clients, but does not consider class per se (for example values, ideology), as a separate variable beyond the inevitable constraints of lack of finances and legal aid administration. A further discussion of the importance of class is provided below.

Methodologically it would appear that there is a need for more observational studies, the bulk of the existing research relying on retrospective self reports (Menkel-Meadow 1993) notable exceptions being Sarat and Felstiner in the U.S., Griffiths in the Netherlands and of course the recent research published after the fieldwork of the current study began by Eekelaar et al (2000). In the U.K Davis et al (1994) used interviews, Neilson postal questionnaires, Ingleby (1992) solicitors own records; and Jackson et al (1993) presented solicitors with vignettes, and asked for their views on the expected outcome. Reliance on self-report may actually bear little relation to what actually happens in practice. Both Griffiths (1986) and Sarat and Felstiner (1986) found that what lawyers

espoused did not necessarily happen in practice.<sup>70</sup> It is important to know what actually goes in solicitor client conferences. As Sarat and Felstiner state,

"...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." (Sarat and Felstiner 1986 p94)

It would be beneficial for a further observational study to be carried out in Britain. If there is insufficient knowledge of what actually goes on in solicitor client conferences, it is not possible to assess the effects, beneficial or otherwise, of any intended change of procedure, and shift towards greater use of mediation.

## **2.6 Social class**

Social class has generally not been included as a variable in research into either mediation or lawyer negotiations. Little is known about how the working class currently experience divorce, yet it is this group of the population which is the most likely to experience a change in the divorce process via the amendments to the Legal Aid Act 1988, contained in the Family Law Act 1996<sup>71</sup>. The research into mediation has largely been confined to middle class couples (see above) whose beliefs and values about appropriate methods of dispute resolution are arguably more in line with the goals and rhetoric of mediation (Day-Sclater 1995 (a)).

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<sup>70</sup> For an in-depth consideration of methodological issues see chapter three.

<sup>71</sup> S.29 of The Family Law Act now contained in the Community Service Funding Code C27-29

There is clear evidence that working class couples are more at risk of divorce (Haskey 1983, Gibson 1994, 1996). Gibson (1994), reviewing a number of surveys, concludes that marriages within the Registrars General's social class five grouping, (unskilled manual) face the highest risk of divorce. Gibson comments;

"Social categorisation is a powerful stratifying factor within divorce. Class is strongly associated with such significant lifestyle factors and experiences such as education, employment, health, housing and income, as well as being linked with such demographic patterns as age at marriage and size of family."(Gibson 1994 p13)

The link between a high rate of divorce and unemployment is particularly strong. A study by the Economic and Social Research Council in 1990 found that an unemployed person is 130 percent more likely to suffer separation in the following year, compared with those who have never been unemployed (See also Maclean and Eekelaar 1986 p97). Thornes and Collard (1979) link divorce rate to marital stress which they maintain varies with social class, level of education and religion, those in the lower social groupings being exposed to higher levels of stress, for example, fewer job opportunities, low financial reward, and marriage at a younger age.

Negotiations in a working class divorce settlement may be quite distinct from that of their middle class counterparts. Studies have revealed a positive correlation between resource scarcity and difficulty of negotiations (Davis et al 1994, Doyle and Caron 1979, Kressel et al 1980, Pearson, Thoeness and Vanerkooi, 1982). Further there is more likely to be the added complication of the involvement of the welfare state (Ingleby 1992).

## **2.7 Conclusion and resulting research focus**

The existing evidence concerning mediation and solicitor negotiation as methods of marital dispute resolution have been reviewed, chiefly in relation to the perspectives of two of the central tenets of mediation, that is, party control and reduction in conflict.

It appears, from the evidence reviewed, that parties may exercise more control in mediation than in lawyer negotiations. However, there are three issues to address before applauding such a finding. Firstly, research indicates that parties may not exercise as much control as may be outwardly apparent, as mediators can influence the direction of discussions. Secondly, there is the problem of power imbalances between the parties, which may not be addressed by a 'neutral' mediator. A paradox of mediation is how to allow people to reach their own decisions, whilst ensuring that such agreements would be viewed by society as morally correct; might not self-determinism promote self(ish) interest? Thirdly, the question was raised as to how much control the parties desired over the process and outcome. Parties to a divorce are not usually in the optimum emotional state to be able rationally to negotiate realistic, fair, long term settlements. The evidence reviewed, although not extensive, appears to suggest that parties may prefer that the ultimate decision is made for them, or at least that they receive sufficient decisive advice to make the final choice an obvious one. Therefore, the limited amount of party control, available to parties



mediating a dispute may not always be as advantageous as originally postulated.

The second area considered was that of conflict reduction. Various writers have emphasized the inherent nature of conflict in divorce; some arguing that feelings such as hurt and anger play a vital part in the readjustment to the non-married state. The claims that mediation will effect a reduction in conflict, and that lawyer negotiations will amplify such feelings, is not supported by the evidence so far. Both methods of dispute resolution focus on the future, and do little to address feelings of injustice from marital experiences in the past. Overall, to date, the evidence suggests lawyers may be relatively conciliatory, rather than adversarial, committed more to reaching an out of court settlement than pursuing a fight. Such an approach may not always being appreciated by clients, who may feel that the lawyers' partisan stance has been weakened. Other commentators have questioned whether the overriding pursuance of settlements, common to both methods of dispute resolution, is to be applauded or regretted as parties may ultimately be denied justice.

Commentators have claimed that mediation and lawyer negotiation are not 'radical alternatives:' each focuses on the future ignoring the past; each avoids litigation (Piper 1996 (a), Eekelaar 1995). Although they may not be radically different, there are important distinctive features characterising each method. Face to face negotiation with an element of party control may be appreciated by some couples, but rejected by others who feel they need the partisan support that a lawyer can provide. At the time this study was conceived, clients seeking

divorce had a choice (depending on local provision) over whether to mediate their disputes or enlist the support of a solicitor. Present evidence reveals that the majority choose the latter course of action (Davis et al 2000 (b)). The author believes that, particularly in the light of policy debates regarding the role of solicitors in divorce, and the promotion of mediation, there is a need for greater knowledge of how the system of lawyer negotiation currently operates in England.

This study therefore focuses on lawyer negotiations, the less researched area of marital dispute resolution. As a result of reviewing the literature a number of questions have been devised, which are particularly relevant to the current debate and which the author believes can be addressed by the methods proposed. For example, questions concerning who controls the solicitor client conferences can only be adequately answered by observation.

The topics for inquiry have been divided into three separate (but overlapping) areas: the exercise of control between the solicitor and client; the management of spousal conflict; and client expectations and understanding throughout the process.

The findings on control by the parties in lawyer negotiations are somewhat conflictual and further observational work could provide some clarification. In such work there are three issues to address. Firstly, who influences the direction of discussions? Secondly, how is control exercised regarding the outcomes pursued? And thirdly, how much control do the parties actually want?

When examining the management of spousal conflict the study will explore firstly, what the inherent level of spousal conflict (participant's perception) is prior to any intervention by the solicitor; secondly, whether spousal conflict is exacerbated by action taken by the solicitor in resolving the disputes; and thirdly, how the approach of the solicitor could be described (for example adversarial, partisan, conciliatory).

The final field of inquiry (clients' expectations and understanding throughout the process) examines, client's prior expectations; whether they have areas of agreement with their spouse prior to legal intervention, and how realistic such agreements were perceived to be by the solicitors; how information regarding the divorce process is given to clients by solicitors, and whether clients fully understand the information they have been given; whether any feelings of guilt or innocence held by the parties in relation to the marital breakdown, have an impact on the process and outcome; and finally, the views of client's in relation to the gender of their solicitor will be sought.

After reviewing the methodology the research areas above were refined into more specific questions (see chapter three).

The research sample will contain middle as well as working class clients, and the areas of inquiry identified above will be examined for class differences.

The research briefly described above considers lawyer negotiations of divorce in light of the goals and rhetoric of mediation. The use of observational methods within a longitudinal format and the consideration of social class, are intended to fill a gap in the present state of knowledge.

# Chapter Three

## Methodology

### 3.1 Introduction

This chapter outlines the strategies employed to discover how solicitors' negotiation of divorce settlements is currently meeting the needs of the divorcing population. In each section the major considerations determining the choice of methods are portrayed and the implications on the research of such considerations fully discussed.

This thesis describes an empirical study of a type not previously undertaken in the UK.<sup>1</sup> The issues concerning research methods and methodology were, therefore, many and varied, as a result of which this chapter may appear longer than would normally be expected in a PhD thesis. In order to assist the reader the author will provide a brief guide to the structure of the chapter. The chapter begins with a discussion of the theoretical considerations which directed the general methodological approach. A discussion of the actual methods employed is provided in section 3.3 on the research design. Section 3.4 discusses the issues which arose as a result of the 'impact of the researcher's presence before

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<sup>1</sup> At the time that fieldwork commenced this was undoubtedly the case: no observational studies had been undertaken into solicitor client interaction in the UK. However, more recently Eekelaar, Maclean and Beinart have undertaken a study which involved observing family lawyers at work, the findings were published in 2000. Eekelaar et al's research differs from this project in that it does not include any examination of the client's perspective, or follow cases throughout the process of divorce.

moving on to the research questions in section 3.5. Section 3.6 outlines the strategies developed to secure access, and 3.7 describes the pilot stage of the research process. Information regarding the sample used can be found in 3.8. The chapter continues with a discussion of the many legal and ethical concerns which arose before moving on to report on the methods of analysis, and closes by providing the reader with detailed information on the number of observations and interviews which were carried out. The reader may be aware of a degree of repetition as she reads this chapter; this is a deliberate strategy to enable the reader to obtain an understanding of each aspect, without having to read the whole chapter.

### **3.2 General approach to the study, and ascertainment of the most appropriate methodology**

This research is conducted from a 'law in action' perspective, that is, examining the 'law' as it is experienced and understood by the people directly involved. In the 'real world,' divorce can be a messy process, not controlled or confined by neat legal rules, and any investigation into the process of dispute resolution on divorce needs to take account of this. Socio-legal research has a tradition of not confining research to analysis of strict legal procedures,

“... in both topic and locus of study, socio-legal research moves beyond legal text to investigate law-in-society. Consequently, traditional legal reasoning and the focus on codes and cases of

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law are not the primary concerns of socio-legal study” (Bradshaw 1997, p99).

Law in action research, by extending the focus of study beyond strict legal rules, reveals much about the actual operation of law. An early example of such an approach is Garfinkel's study on Chicago juries, in which it was discovered that jurors develop their own set of rules when deliberating, rules which were distinct from the official guidance given by the court (Garfinkel, 1967). A later example is Baldwin and McConville's (1977) study of plea bargaining in a British court. This study revealed that not only was the practice of plea bargaining much more common than had previously been assumed to be the case, but also reported that some defendants were advised to plead guilty, even when a conviction would have been unlikely (Baldwin & McConville 1977). It can be argued that an adequate understanding of the law can only be obtained by including these studies which focus primarily on the processes and operation of the law. Further, any analysis of the workings of the law needs to be broad enough to encompass non-legal factors, as it has been suggested that the legal system, and the practices of lawyers, are to a degree dependent on non-legal activities (Sacks, 1997). In the field of divorce the influence of non-legal factors such as the emotional concerns of the client, may be particularly powerful (Davis et al 1994, Dewar, 1998, Ingleby 1992, Fricker 1995, Piper 1999, Smart 1984).

As with all research it is of vital importance that the appropriate methodological tools are utilised in order to reveal the information that is being sought. At the most basic level this will involve a consideration as

to whether qualitative or quantitative methods are the most appropriate,<sup>2</sup> although some commentators suggest that such a simplistic division is neither helpful or realistic, as many research studies carry aspects of both categories (Robson 1993, p303; Bradshaw 1997 p120). Hammersley and Atkinson (1995) note that it was only when positivism became particularly influential that a dichotomy became apparent. Previously both qualitative and quantitative techniques had been seen as complementary, with even scholars in the Chicago School, famous for their exposition of participant observation, also utilising statistical methods (p 21).

Qualitative research is often accused of lacking the scientific rigour of the positivist methods, but is able to provide data which is rich, if subjective. Qualitative methods are associated with the phenomenological school of thought. Phenomenologists argue that man is an active participant in his world. Man does not simply react to external stimuli; man has consciousness; he rather reacts in terms of the interpretation and meanings he has ascribed to that which is going on around him (the social context). Furthermore, these interpretations, which guide his actions, will be continually revised and moreover, the same stimuli may be interpreted in different ways by different individuals. Therefore objective measurement of human behaviour is neither possible or meaningful. Whereas positivists emphasise universal laws and cause

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<sup>2</sup> A very brief outline is provided to illustrate which method was chosen. There are many excellent texts available should the reader wish to pursue this subject further.



and effect relationships, phenomenologists stress empathy, interpretation and interaction.

Naturalism, a doctrine adopted by ethnographers, influenced by phenomenology, symbolic interactionism and hermeneutics promotes study of social phenomena in its natural setting. The researcher should remain sensitive and respectful of the social world she is observing and her primary aim should be to describe what is happening, how the people involved perceive their actions and the action of those around them, in the context in which it occurs (Hammersley and Atkinson 1995 p6). This research, focusing as it does on solicitors' and clients' experience of the divorce process, belongs in the realm of discovery (Reichenbach 1938, 1951). This is exploratory research seeking the participants' own accounts of the divorce process.

Denzin (1989 p10) argues that qualitative methods can be particularly valuable for examining policy responses to private distress.

“The *assumptions*, often belied by the facts of experience, that are held by various interested parties - policymakers, clients, welfare workers, on-line professionals - can be shown located and shown to be correct or incorrect.”<sup>3</sup>

(Becker 1967, cited in Denzin 1989 p 11.emphasis added)

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<sup>3</sup> The quote from Becker is used to illustrate the point that qualitative methods can be particularly appropriate when examining the assumptions behind policy responses, and as such is relevant to this current study which aims to examine the assumptions behind the Family Law Act 1996. The words correct or incorrect are perhaps not appropriate in the context of this research where the focus is on perspectives and understanding.

### 3.2 (i) Ethnography

Qualitative research is reported to be diversified into a number of competing perspectives (Hammersley and Atkinson 1995 p1). The form of qualitative methodology appropriate to revealing the form of knowledge the researcher sought is ethnography. Fielding (1993) notes how successful ethnography can be in the realm of discovery, "As a means of gaining a first insight into a culture or social process, as a source of hypotheses for detailed investigation using other methods, it is unparalleled."(p155) Accordingly, an ethnographic approach was adopted in this study. A useful definition of ethnography is provided by Hammersley and Atkinson;

"...it involves the ethnographer participating, overtly or covertly, in people's daily lives for an extended period of time, watching what happens, listening to what is said, asking questions - in fact, collecting whatever data are available to throw light on the issues that are the focus of the research." Hammersley and Atkinson 1995, p1)

It can be seen from this quote that the ethnographic approach is far away from the standardisation of data and control of all variables approach of the positivists.<sup>4</sup> The emphasis instead is on richness and depth. Ethnography is not a method in itself but rather a particular approach which includes a wide variety of methods. Most often this will include observation and unstructured interviews, but may include virtually any

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appropriate in the context of this research where the focus is on perspectives and understanding.

<sup>4</sup> The role adopted by the researcher, and the effects of the researchers presence are discussed fully later in this chapter.

evidence that the researcher can get access to.<sup>5</sup> The research focus in an ethnographic project may evolve as the study reveals interesting and unanticipated facets (Fielding 1993 p154). Such an unrestricted approach is particularly suitable for studying the actions and beliefs of human beings. Relating these comments to this current research, the author notes that some of the areas of inquiry she pursued, she had not even considered until she was actually deeply involved in the fieldwork. An example is the 'Guilty Husband Syndrome' in which, as will be further discussed in chapter seven,<sup>6</sup> the actions of the solicitors were to a degree influenced by clients' perceptions of themselves as a guilty or innocent spouse. Conversely, there were areas, which although on the face of it seemed initially interesting, were found when actually engaging in fieldwork, not actually to arise often enough to merit exploration. Such was the case for clients' prior agreements before visits to the solicitor. In fact very few clients came to the solicitor with any agreement with their spouse at all.<sup>7</sup>

In order to obtain a clearer understanding as possible of human action, ethnographic researchers study subjects in their own environment wherever possible:

"The primary aim should be to describe what happens in the setting, how the people involved see their actions and those of

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<sup>5</sup> A detailed discussion of the methods used can be found under the headings, observation, and interview.

<sup>6</sup> See section 7.6.

<sup>7</sup> Although the researcher therefore had little material on prior agreements to examine, the very fact that prior agreements were so rare was in itself significant, providing an indication of how prepared parties are for the divorce process prior to obtaining legal advice.

others, and the contexts in which the actions take place.”  
(Hammersley and Atkinson 1995, p6)

The researcher believed that by actually being present as the solicitor and client met and discussed the case, she would be more able to obtain an accurate and valid description of what is going on. A true understanding, according to followers of this approach, can only be obtained by developing an empathy with the people under study. A goal of such research is to achieve an understanding of how the subjects themselves see their world. This is the process referred to by Weber as ‘*verstehen*.’

Regarding studies of the law, ethnographic approaches are “...well-equipped, and in fact best-equipped among approaches to such study, to address how legal work is *done*. This is because ‘law’ consists, in the first place, of concerted work by real persons in real time.” (Travers and Manzo 1997 p10)

### 3.2 (ii) Credibility of ethnographic research.

In order to be able to claim credibility for qualitative research it is essential to follow a rigorous systematic approach. As Fielding (1993) comments,

“Good qualitative analysis is able to document its claim to reflect some of the truth of a phenomenon by reference to systematically gathered data. Poor qualitative analysis is anecdotal, unreflective, descriptive without being focused on a coherent line of inquiry.”  
(p168)

It is, therefore, important to devise strategies to ensure that the findings cannot be criticised in the way Fielding notes. Truly objective research is by definition not possible in ethnographic research, the researcher being greatly involved with the people in the research. However a number of steps can be taken to ensure a degree of validity. Fielding (1993) proposes a test of 'congruence.' Congruence is achieved when the researcher has such a high level of understanding of the setting under observation, that she is able to inform others of the rules and norms operating in that setting, to such a accurate degree, that these others will be able to be absorbed into the setting and thus have similar experiences to the original researcher, thus confirming the adequacy of the researchers description. Fielding (1993) acknowledges that although the above test of congruence may provide an "ideal check on the validity of observations...it has to be recognised that many consumers of research do not have time to perform it." (p166) Fielding, as an alternative, suggests that ethnographers be guided by Lofland and Lofland (1984) who list seven means of assessing research for adherence to acceptable levels of validity.

"First is the directness of the report: direct observation is more reliable than second-hand observation. Second is the spatial location of the observer. Proximity may be social as well as spatial. Third, problems arise from the skewing of reported views by the informants' social location. Informants may not have said the same to other members of the setting. Fourth, one needs to guard against self-serving error in describing events by asking whether observations fit rather too neatly into one's analytic schema. Fifth, are plain error in description of events; one may not be an accurate observer. Sixth and seventh are problems of internal and external consistency. One's analysis needs to cohere around the themes identified, while external consistency is evaluated by checking agreement of key aspects against independent studies." (Lofland and Lofland 1984, cited in Fielding 1993 p 166)

The above guidance provided an invaluable tool with which the researcher was able to continuously review and assess the fieldwork. Specific tactics adopted to overcome some of the possible difficulties will be discussed fully under the headings of each individual method used. Generally, as regards Lofland's first two points, by observing and recording the solicitor and client interaction herself, the researcher was close to the situation of analysis and all data were first hand. As regards social location, Lofland's third point, as the researcher dealt with neither upper middle class clients or very senior solicitors there did not seem to be any very significant social difference.<sup>8</sup> However the researcher did adopt a number of strategies designed to minimise social difference, for example great care was taken over dress, this is discussed further under the section headed, the Pilot Study. On the fourth and fifth point one needs to be constantly vigilant and aware of such dangers, always questioning the findings which do perhaps too neatly support your evolving hypotheses. On the sixth and seventh point, the researcher undertook a final interview with the solicitors involved in the study in which the findings of the research were discussed. This provided a degree of member corroboration. Externally, it is vital to be aware of ongoing research in the same field. The researcher was fortunate to meet some colleagues who were undertaking work of a similar nature. When comparing findings a number of striking similarities were found<sup>9</sup>.

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<sup>8</sup> The researcher herself did not feel there was a significant social difference; however this was solely the researcher's perception. It is possible, as has been pointed out to the author, that junior solicitors' might feel there was some difference between themselves and an individual undertaking research for a PhD.

<sup>9</sup> See Archbold (1988), and Eekelaar et al (2000).

Despite all these strategies, and extensive planning, fieldwork is carried out in the 'real world' and it is not always possible to follow the idealized accounts contained within the methodological textbooks. The quote from Becker below makes this point succinctly:

As every researcher knows, there is more to doing research than is dreamt of in philosophies of science, and texts in methodology offer answers to only a fraction of the problems one encounters. The best laid research plans run up against unforeseen contingencies in the collection and analysis of data; the data one collects may prove to have little to do with the hypotheses one sets out to test; unexpected findings inspire new ideas. No matter how carefully one plans in advance, research is designed in the course of its execution. The finished monograph is the result of hundreds of decisions, large and small, made while the research is underway and our standard texts do not give us procedure and techniques for making these decisions." (Becker 1965, cited in Shaffir and Stebbins, 1991 p22)

This quotation reflects the experience in this study very closely. The many decisions the researcher was called upon to make will be discussed in the following sections.

### **3.3 Research design**

Kirk and Miller (1986) contend that there are four discrete phases in qualitative research; invention (research design), discovery (data collection), interpretation (analysis) and explanation. Kirk and Miller maintain that completing each phase in turn provides a structure and direction to the research. This section will outline the 'invention' phase of the project, that is the research design.

### 3.31 Case study

Robson (1993 p40) maintains there are three traditional research strategies, experiment, survey and case study. Robson provides an accessible definition of a case study.

“Case study is a strategy for doing research which involves an empirical investigation of a particular contemporary phenomenon within its real life context using multiple sources of evidence.” (Robson 1993, p52)

To relate Robson’s quote to this current research, the study was designed as an empirical investigation, aiming to discover what actually ‘goes on’ in the process of solicitors’ negotiation of divorce settlements (a contemporary phenomenon); by observing the solicitors and clients’ interaction as it occurred (its real life context); as opposed to relying on retrospective interviews. The methods employed consisting principally of observation and informal interview (multiple sources of evidence).

By adopting a case study strategy, the researcher felt she would be able to obtain a deeper and more accurate understanding of how solicitors’ negotiation of divorce settlements is experienced by the participants involved. Yin surmises, “the case study allows an investigation to retain the holistic and meaningful characteristics of real-life events.” (Yin 1989, p14).

It was decided that this research should comprise a multiple-case study. The rationale for this was that “the evidence from multiple cases is often considered more compelling.” (Yin 1989 p52). This is not to suggest that



statistical generalisation would be achieved by adhering to a multiple case study strategy; it may however be possible to achieve a level of theoretical generalisability. A difficulty with using a multiple case study is the sheer volume of data generated (Yin 1989 p53). A balance therefore, has to be achieved, between being able to adequately manage and analyse sufficient cases to provide convincing evidence, without jeopardising the depth of information obtainable. After much thought and advice it was decided to limit the research to four solicitors firms, but aim for ten clients per firm.<sup>10</sup> These numbers are similar to those utilised by the two other major observational studies in the field of divorce negotiations. Sarat and Felstiner (1995) in their U.S. study, observed forty cases and Griffiths (1986) carried out observations with six lawyers practising in the Netherlands.

### 3.31 (i) Justifications for undertaking a longitudinal case study

The study was to be longitudinal, that is as many cases as possible were to be followed through to their conclusion. There are three justifications for continuously monitoring the cases in this research. Firstly, divorce negotiation is a dynamic process (Maccoby and Mnookin 1994), the cases may alter quite significantly as the process continues. Sometimes such change is a result of the legal process itself, at other times other 'real life' factors intervene. For example, the most appropriate outcome

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<sup>10</sup> This figure of ten clients per firm varied a little due to other factors for example the size of the firms and the number of solicitors participating. Further detail is provided in 3.8, 'The Sample.'

for one client altered almost beyond recognition from that sought at the initial meeting with the solicitor. The client, who was in part time temporary work at the time of her first appointment with the solicitor, later obtained full time permanent employment, at the same time incurring significant childcare costs. This obviously had an impact on the claim for spousal maintenance. Later on in the process, the serious and terminal illness of a family member, led to difficulties for both parties. The ensuing emotional problems affected each of the parties' ability to negotiate effectively. In addition there were practical difficulties compounding the issues, namely the loss of childcare. Thus a resolution which would have been appropriate in the early period of the dispute would not provide a 'just and fair' solution to either party at the conclusion.

A second justification for following cases throughout the process, was that it would enable a rapport to develop between the researcher, and the research participants. As the researcher became a familiar figure, both solicitors and clients became more relaxed and open. Over time, it was possible to develop a reasonably close and trusting relationship with many of the clients<sup>11</sup>. This led to the acquisition of much rich data.

Thirdly, monitoring the process to conclusion would be the only way to assess as much as possible of the impact of the solicitor's intervention. The author of this thesis argues that only by following such a strategy is it

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<sup>11</sup> See also, 3.4 'Impact of Researchers Presence' and 3.9 'Legal and Ethical Issues.'

possible to question the Government's assumptions regarding the impact of solicitors' actions on the divorce process.

3.31(ii) The reasons for ensuring that all cases were monitored from the first appointment

Monitoring cases from the initial meeting between the solicitor and client was considered essential. The first client appointment could be crucial, both in terms of information gathering and the establishment of an effective working relationship (Greenslade, 1993, Sherr, 1999). Further, recruiting clients right at the beginning of the process would prevent solicitors from choosing the cases to follow. Fahey and Lyas (1995), remarked of their research into marital breakdown in Northern Ireland, "One important concern was not to allow the solicitor to decide which cases should be picked (for example so as to pick good ones or easy ones)" (p144). Sarat and Felstiner in their U. S. study paradoxically state that the cases in their study were followed, "ideally from the first interview," (Sarat and Felstiner 1995 p8) but that the lawyers themselves selected the clients who would participate. Lawyers were asked to suggest clients that, "promised to involve several lawyer-client meetings." (p9) Sarat and Felstiner do not inform us how lawyers could have such knowledge, prior to their first meeting with the client. Furthermore, Sarat and Felstiner, after asking the lawyers, how clients had been selected, acknowledge;

“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*.” (Sarat and Felstiner 1995, p10) (Emphasis added)

This suggests that the lawyers did indeed have at least some prior knowledge of the cases. Whether this was obtained in a preliminary conversation between the lawyer and client, or perhaps, information gleaned by the legal secretaries, we are not told. However, the author feels the exclusion, albeit a small number, of the more emotional clients introduces a serious bias, particularly in the light of the fact that emotional factors may have a significant influence over the divorce process. The researcher was thus keen to avoid such bias, and accordingly, curtailed the solicitor’s ability to select the cases for study.

### 3.31 (iii) Characteristics of case studies

One advantage of a case study is that it allows a degree of flexibility. The methods and focus of the study can be modified as the research develops. Flexibility can be particularly useful when dealing with the ‘unknowns’ of personal perceptions. However, it is important to have some degree of structure guiding the research, as Miles and Huberman (1984) declare, “a loose highly inductive design, is a waste of time. Months of field-work and voluminous case studies will yield a few banalities.” (p27). Thus this research was designed to be guided, but not unduly constrained by the research questions referred to above.

The fact that the research design is not fixed at the onset, means that methodological aspects are constantly under review. This can be seen as a disadvantage, in that it makes the process more 'arduous' (Robson 1993, p 150) but more positively, encourages a more rigorous approach, as the selected methods are constantly being re-assessed for their effectiveness.

The most crucial research instrument in a case study is arguably the researcher herself. The researcher, by following the proper approach, can do much to enhance the trustworthiness of the study. Robson states that, "Personal qualities such as having an open and enquiring mind, being a 'good listener', general sensitivity and responsiveness to contradictory evidence are needed." (1993, p162). Having an enquiring mind is perhaps an obvious characteristic for a researcher; however, one must also be open to possible new directions in which the research might profitably go, whilst also remaining willing to acknowledge the validity of contrary findings. Good listening, refers to the wider observational powers, that is recording what is said, without bias, and crucially, being aware of the less tangible, but influential, aspects such as mood and context.

The presence of the above skills in the researcher can do much to enhance the validity of the research. However, in research which is collated for a PhD thesis, the problem of human fallibility becomes particularly acute. Miles and Huberman (1984) although not referring to

PhD research explicitly, make the point succinctly, “Each is a one-person research machine: collecting the information, reducing the information, analysing it, interpreting it, writing it up.” (p230) Unlike a funded research project when research may be carried out amongst a number of colleagues, PhD students are on their own. Thus, the author would argue, the role of the research supervisor assumes crucial importance, and that it is vital to discuss, in some detail, the work as it progresses. Talking through the ongoing fieldwork, not only provides clarification but, possibly of more value, deep scrutiny and constructive criticism. This research benefited immeasurably from such support.

#### 3.31 (iv) Credibility of research employing a case study strategy

When undertaking any research there are certain criteria to be met if the research is to attain any degree of recognition. With the research strategies of experiment and survey, these will often be validity, reliability and generalisability. These criteria are, on the whole, based on drawing statistical inferences and as such, cannot be of much relevance to a qualitative approach where the unit of analysis consists of ‘meanings rather than numbers.’ Lincoln and Guba (1985) put forward the alternative criteria of credibility, transferability, dependability and confirmability. (cited in Robson 1993 p 403) as a more appropriate means of assessing qualitative case study.

Credibility is closest to the concept of validity, that is that the research instruments measure or describe accurately what they were designed to measure. Robson (1993, p404) lists four tactics designed to enhance credibility; prolonged involvement, persistent observation, triangulation and peer debriefing.

Prolonged involvement refers to “the investment of sufficient time to learn the ‘culture’ test for misinformation, build trust, and generally go through the iterative procedure central to case study design.” (p404) A great deal of time was expended in the fieldwork in this study; (the author has already referred to the value of a longitudinal approach to the establishment of a trusting relationship with the clients).<sup>12</sup> Similarly, continuously observing solicitors’ meetings with clients enabled an understanding to be gained of the procedures followed.<sup>13</sup> Robson’s second tactic, persistent observation, is similar to the first, in that it concerns observing “over a sufficient time period,” but on this occasion, relates to allowing ample time, in which to identify those aspects relevant to the study. In the early stages of the fieldwork, when only a few observations of solicitors and clients had been undertaken, it was not possible to state with certainty the direction of the research. However, as the study progressed certain aspects assumed prominence, thus the focus of the study was developed and refined over time. Robson’s third tactic, triangulation, was only available in this research in a limited form.

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<sup>12</sup> See section 3.31 (i) in this chapter.

<sup>13</sup> An understanding gained from the current textbooks is no substitute for observing how procedures are actually followed in practice. See earlier discussion on ‘law in action’ section 3.2.

The researcher did collate the evidence using different data collection methods, in this case, observation and interview, but as a sole researcher, was unable to use a number of 'different investigators.' Finally, in peer debriefing, Robson alludes to the importance of allowing ones' peers to examine aspects of the research and analysis throughout the process. There is the value of having research scrutinised by the research supervisor; in addition the presentation of papers at academic conferences<sup>14</sup> and at universities' staff seminars, enabled the researcher to discuss the study with the leading academics in the field, and benefit from their valuable informed advice. Further assistance was obtained by discussing certain aspects of the study with others, not necessarily confined to academia. Robson (1993) also suggests that it may be possible to obtain checks on the credibility of the findings, by referring back to the subjects in the study. The researcher did discuss the findings of the research in a closing interview with the solicitors, but there is an important caveat to consider: the participants in the study may have an interest in promoting a biased or misleading picture. The researcher felt this could be a real danger in this study, as solicitors were wishing to protect their share of the 'divorce market' against the emergent profession of family mediators. Thus, solicitors could have an interest in ensuring that a research study reveals them in the best possible light. As concerns the clients, the loosely structured interviews did allow for an ongoing degree of clarification to be obtained.

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<sup>14</sup> Papers were presented at the Socio-Legal Studies Association annual conference in April 1998 in Manchester, at the Society of Public Teachers of Law conference in September 1998 in Manchester and at the Socio-Legal Studies Association conference in September 2001 in Bristol. Staff seminars were presented at the University of Nottingham in June 2000 and at Sheffield Hallam University October 2000.



The second criterion on which Lincoln and Guba (1985) state it is possible to evaluate qualitative research is transferability, which is similar to generalisability. Statistical generalisability is not obtainable in qualitative research; however, by providing sufficient information about the study, it may be possible for others to decide whether the cases can be transferred to other similar settings.

Dependability, Lincoln and Guba's (1985) third criterion, is akin to the sociological concept of reliability. Robson (1993) advises the research process and ultimate product should be examined by an 'auditor,' (most obviously in the case of this study this would be the research supervisor) and maintains that "if the processes followed are clear, systematic, well-documented, providing safeguard against bias and so on, this constitutes a dependability test." (p406) Finally, confirmability, which Robson defines as being, "told enough about the study not only to judge the adequacy of the process, but also to assess whether the findings flow from the data?" (p406) This involves allowing all the data utilised in the study, that is raw and processed, to be open to examination. As a precaution, the researcher kept all the raw and processed data. In each observation she took copious notes, these were later fully transcribed. All the original notes were kept in the files for each client or solicitor, and thus were available for re-examination to ensure that the findings as reported flowed from the data obtained.

### 3.32 Observation

The researcher felt that there was a clear need for an observational study to be carried out in this area. Self report may not be an accurate reflection of what actually occurs<sup>15</sup> ( Dingwall, 1997, Robson, 1993). Both Griffiths (1986) and Sarat and Felstiner (1986) found that what lawyers espoused did not necessarily happen in practice. Sherr (1991) in a project undertaken for the Law Society, assessing the viability of different research methods for examining solicitors' skills, found significant discrepancies between an observation record, and solicitors' own recollections, on how their time was spent. Sherr comments on observation,

“... its reliability in terms of anything beyond a broad distinction is undoubted, and its reliability with major categories also seems much more certain than the subjects' own assessment.” (p12)

In observation, the evidence available to the researcher is wider than that obtainable in interview. Aspects such as body language, nuances in speech, and general atmosphere can be noted and form part of the data. These more subtle aspects do have an effect on the process, but their impact could too easily be omitted from analysis, by reliance solely on other research methods such as interviews. Dingwall (1997) comments on the value of observation,

“...the fundamental virtue of observation, whether direct or via the proxies of audio- or video-recording, is that it enables us to document members accounting to each other in natural settings. It is the difference between the experiment on the laboratory animal and the animal in the wild.” (p60)

The case of client Mrs Egan can be used to illustrate some of the advantages of observation as a research tool. This case was one on which there had been a high number of observations, nine at the close of fieldwork/conclusion of the case. In the early appointments the relationship between the solicitor and client appeared cordial and productive. However as the case progressed, the relationship between the solicitor and client disintegrated. In the observation of the later appointments, the increasing level of hostility between the client and her solicitor, was most apparent through observation of the less tangible aspects of interaction, such as the avoidance of eye contact, and general atmosphere. Such detail would be unlikely to be revealed in either interviews or the reading of a transcript of a tape recording.

On the issue of accuracy, there were some apparent discrepancies between the interview data and the observational record. For example, in the interviews following the later appointments, the solicitor criticised the client for insisting on pursuing a certain course of action. However, examination of the transcripts from the early meetings, revealed that the solicitor had in fact encouraged the very action of which she was now complaining. Reliance on interview data therefore, could have created a misleading account. It is possible to claim, as in this case, that observation enables greater understanding on both an objective and subjective level. Objective, as claims made by the participants as to what was said in the observed meetings between solicitor and client can be verified or falsified. Subjective, as it is feasible, using observation, to

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<sup>15</sup> A discussion of the criticisms of interviews is provided in the following section.

perceive and record the existence of the more subjective aspects, such as mood and atmosphere. An appreciation of the subjective experiences of the participants in the research is central to the ethos of a qualitative methodology. As Jorgensen (1989) declares, "Gaining access to the *subjective* reality of everyday life - the world as it is experienced and defined by insiders - is required for accurate and truthful findings." (p27).

Although observation can be argued to supply 'highly valid' data (Jorgensen, 1989 p36) the method does have a number of disadvantages. Paramount amongst these is the issue of the 'Hawthorne effect'<sup>16</sup>, whereby the behaviour of the research subjects is influenced and altered by the presence of the observer. The data obtained, therefore, pertain to how the participants behave whilst being observed, and not necessarily how they behave in normal everyday interactions. There are various strategies to adopt in order to minimise the effects of the researcher's presence and this is discussed fully in section 3. 4, 'Impact of researcher's presence.' A difficulty is that it is not possible to access the success of such strategies, as it cannot be known what the participants' behaviour would have been had they not been observed. However, if a behaviour is still very much apparent in observation, despite it being in that group's interest that such behaviour should not be seen to exist, the observation merely provides even more compelling evidence of the behaviour. An example from this research would be if

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<sup>16</sup> The term Hawthorne effect was coined after pioneering research carried out by E Mayo in the 'Hawthorne' plant between 1927 -1932, revealed that, the reactions of research subjects was influenced by the presence of the researcher, thus, introducing an extraneous variable.

solicitors were observed to be encouraging hostility between the parties, despite being aware of the need to present themselves as conciliatory, this might suggest that they may adopt an even more adversarial stance when not observed.

A second disadvantage with observation is that it is resource intensive. Sitting in, observing many meetings between solicitors and clients takes much time and writing up the narrative accounts takes even longer, not to mention the time wasted when clients do not turn up at the appointment. Although this limits the number of observations which can be undertaken, the depth of data obtained in my view more than compensates for the low number of observations. Generalisability is not, in any case, a goal of this research.

Finally, observation is criticised for its high level of subjectivity and reliance on the observer, as the main research instrument. The researcher needs to be constantly aware of the issue of subjectivity, and strategies need to be developed to ensure that the study meets certain standards, hence the attention given to the concepts of credibility and dependability discussed earlier in this chapter.<sup>17</sup> The problem of the observer as the sole research instrument, and the particular personal skills required to address the issue, has also been touched upon,<sup>18</sup> and will be further explored throughout this section.<sup>19</sup> However, two aspects

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<sup>17</sup> See section 3.2 (ii).

<sup>18</sup> See section 3.2(ii).

<sup>19</sup> See also section 3.33 The Interviews, and 3.4 Impact of Researcher's Presence, in this chapter.

which are not covered elsewhere require note. Firstly, there is the risk of 'going native' and secondly, related to this, the danger of, 'missing things,' due to over familiarity.

'Going native' or 'becoming the phenomenon' occurs when the researcher becomes so involved in the group, or with the subjects of the research, that she becomes part of the phenomenon under study. The research is thus at risk of becoming contaminated with, "subjectivity and personal feelings; and the scientific identity of the researcher may be spoiled." (Jorgenson 1989 p 62) Conversely, there is the opposing hazard of, as Fielding (1993) notes, 'not getting close enough' whereby, the researcher adopts "an approach which is too superficial and which merely provides a veneer of plausibility for an analysis to which the researcher is already committed." (p158). The risk of 'going native' is obviously more acute in the anthropological studies where the researcher participates fully in the phenomena under study. This study did not require such immersion, therefore 'going native' was not, as commonly understood, a danger. However the researcher was concerned to ensure that she did not identify too closely with the needs of either of the two groups of research subjects in this study, the solicitors or clients.

The research plan necessitated more contact time with each of the solicitors than with individual clients. There was a danger, therefore, of over identification with the solicitors. However, the interviews with the clients were in greater depth and on a more personal level. Solicitors were questioned about their work, clients about something much more

personal and emotional. Thus, although more time was spent with each solicitor, conversations with clients were more intimate and this tended to negate any risk of over-identification with the solicitors.

As regards 'missing things,' due to over familiarity, the strategy to overcome this is constant vigilance. It is important to question the findings and indications throughout the fieldwork. On a more practical level, spacing out the observations, and coming 'out of the field' for a time (for example to teach) enabled the researcher to enter each observation 'fresh,' and therefore open to the wealth of information available.

3.32 (i) The method of undertaking observation – the degree of participation

This section describes how the actual observations were undertaken. One of the first decisions to be resolved concerned the function of the researcher. Method texts delineate observation according to the degree of involvement of observer into the phenomenon under study. For example Robson (1993) refers to four variants of observation: the complete participant, the participant as observer, the marginal participant and the observer as participant. These separate terms relate to the differing emphasis of participation, or observation. Thus at the participation end of the dichotomy there is the complete participant who, concealing her role as a researcher, becomes a full member of the group under study. At the opposing end of the spectrum is the observer as participant, whereby the observer's participation is minimal and the

research conducted openly. Complete participation is criticised as the high level of involvement of the researcher into the phenomena under study is said to risk findings which are highly subjective. At the other end of the dichotomy, the observer as participant, the observer is argued to be too remote to be able to obtain a true understanding of what is going on. Thus, following this notion leads one to conclude that the goals of participation and observation are not complementary, greater participation leads to less reliable observations and vice versa. Jorgensen (1989) criticises this view of participant observation, maintaining that the conflict between observation and participation has been overstated, and that the human instrument is used to multi-tasking, and therefore able to undertake participation and observation concurrently. Furthermore,

“accurate (objective and truthful) findings are more rather than less likely as the researcher becomes involved directly, personally, and existentially with people in daily life. Objectivity suffers when the researcher, due to a narrowing vantage point fails to apprehend the meanings people attach to their existence.” (p56)

Thus Jorgensen argues that a degree of personal involvement can be desirable and that participation and observation should not be viewed as alternatives. The role adopted in this study combined strong elements of both participation and observation, the emphasis shifting on different occasions. In the meetings between solicitors and clients, the researcher would sit as unobtrusively as possible, out of the direct line of vision, and take copious notes. Thus participation would seem to be marginal, the researcher made no verbal comments, avoided eye contact, in short took



steps to minimise the effect of her presence.<sup>20</sup> In a cursory review it would appear that the researcher adopted a role at the observation end of the dichotomy, criticised by Jorgensen; however, although overt participation did not occur in the observation of solicitors and clients, there was a high level of involvement on a personal level, as the interviews following each observation were informal and conversational in nature, and thus encouraged the development of a confiding relationship between the researcher and the participants in the study. It is possible to argue, therefore, that there was a high level of both participation and observation. It was not participation in the obvious sense, as there was no direct participation in the meetings observed, but, it was participation in the sense of not being detached, of there being a degree of personal involvement with the participants. The close personal conversations with both the solicitors and clients enabled a greater understanding of the personal perspectives of those involved to emerge.

The role undertaken in the first observation, prior to any meeting with the clients,<sup>21</sup> can be more accurately described as that of an observer, an 'outsider.' The researcher's role was clear and defined. It was explained that research was being conducted and I would observe what occurred, but would not intervene in any way.<sup>22</sup> A difficulty with this strategy relates back to the 'Hawthorne effect' referred to earlier. The research subjects

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<sup>20</sup> See further discussion in section 3.4 Impact of researcher's presence.

<sup>21</sup> The researcher was not of course perceived as an outsider by the solicitors as she met them before either in other observations or with the first interview prior to the observations beginning.

<sup>22</sup> More information about the consents obtained can be found in the section 3.9 Legal and Ethical Issues.

may react to the observer, as a 'researcher,' or as Jorgensen (1989) more alarmingly puts it, "... as an alien who under more normal circumstances would not be part of their environment." (p58) This may lead to a number of reactions, according to Jorgensen, ranging from contempt and suspicion to friendliness and deference. The problem can be effectively addressed by using a longitudinal approach, as in this study, whereby the research subjects, through the continuing presence of the observer, become accustomed and at ease with the researcher's presence. An indication that the observer has been accepted, according to Jorgensen (1989), is when the research subjects attempt to include and involve the researcher in the activities under study, "Participant involvement, in turn, suggests that what you are able to observe increasingly is what people normally say and do even when an outside observer is not present." (p59). In this study there was evidence of both clients and solicitors attempting to include the researcher in the activities under study (for example, drawing the observer into the conversation in the solicitor client conference). Although such occurrences may provide valuable reassurance to the observer of her acceptance, there is a risk of contaminating the research, for example, if the researcher's comments influence the proceeding action. Thus attempts by the research subjects to include the researcher had to be dealt with with great care. A balance had to be achieved whereby responses to attempts to involve the researcher neither alienated the research subjects, or unduly influenced the phenomenon under study.<sup>23</sup>

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<sup>23</sup> The strategies employed in this study regarding this issue are more fully explore in section 3.4 'Impact of researchers' presence.'

### 3.32 (ii) The researcher's role

Having decided on the level of participation and observation, careful consideration needed to be given to the role adopted by the observer in the meetings between the solicitors and clients. Solicitors participating in the study had remarked that trainee solicitors sat in and observed meetings as part of their training and so it was suggested that the researcher adopt a similar role, albeit that clients would be aware that the researcher was from the university and not a trainee solicitor.<sup>24</sup> It was important to ensure that clients understood that the person observing their meeting was independent from the solicitors.<sup>25</sup> This was achieved by regular reaffirmation in the interviews, and on a more practical level paying close attention to dress.

In an ethnographic study, dress merits careful consideration. This is most obviously the case in covert research, where a researcher may wish to present herself as one of the group under scrutiny. However, even in an overt study, such as this research, the most appropriate dress is an important consideration. Hammersley and Atkinson (1993) make the point clearly,

“In overt participant observation, then, where an explicit research role must be constructed, forms of dress, can ‘give off’ the message that the ethnographer seeks to maintain the position of

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<sup>24</sup> Although all clients were told of the researcher's true role some did still assume that the researcher was a trainee solicitor and that the research was part of some additional legal qualification, a misunderstanding which the researcher rectified at the first interview.

<sup>25</sup> Clients would possibly have felt constrained in their responses in interview had they understood the researcher to be aligned with the solicitor.

an acceptable marginal member, perhaps in relation to several audiences. They may declare affinity between researcher and hosts, and/or they may distance the ethnographic from constraining identities.” (p87)

The impression the researcher wished to create was that of an ‘acceptable marginal member’ but without a suggestion of an ‘affinity’ with the solicitors. The dress code adopted could be described as professional but informal. A balance had to be achieved whereby the outfit created an appropriately professional image, particularly in light of the confidential nature of the research, but an image which did not too closely mirror that of the solicitors. The aim was thus to create an impression of a separate professional. At the same time, dress was also used as an aid to minimising the social differences between the researcher and the clients. In the firms which dealt principally with working class clients, dress was slightly more informal than that deemed appropriate for the firms dealing with middle class clients. On a more pragmatic level neutral colours were worn in order to assist the researcher in ‘melting into the background.’

Careful consideration to dress is just one tactic which can be employed to facilitate an open and productive relationship with the participants of the research. Hammersley and Atkinson (1993) state that people, “will often be more concerned with what kind of person the researcher is than with the research itself. They will try to gauge how far the ethnographer can be trusted” (p83). Thus the ability to establish a trusting and co-operative relationship with the research participants can be central to the success of the project. Inter-personal skills, such as the ability to empathise and

develop relationships, can be invaluable (Jorgenson 1989, p8). Conversations with both clients and solicitors were thus not limited to the research. To confine talk in such a way would have appeared artificial, constraining communication and inhibiting the development of a trusting relationship. Hammersley and Atkinson (1993) emphasise the point,

“The value of pure sociability should not be underestimated as a means of building trust. Indeed, the researcher must often try to find ways in which ‘normal’ social intercourse can be established.”  
(p89)

Being able to converse with the participants in the study in a relaxed and natural manner, is held to be particularly beneficial in the early stages of the fieldwork, in order for the researcher to establish her identity as a ‘normal’ and ‘decent’ person (Hammersley and Atkinson 1995, p89).

As this research was dealing with people undergoing a divorce, a traumatic process for many, it was felt that more than mere commonplace conversation would be appropriate. Day-Sclater (1999), in a project exploring the impact of the psychological aspects of divorce on the dispute resolution process, advocated a particular approach when interviewing persons undergoing a divorce. According to Day-Sclater, researchers should adopt a sympathetic and supportive manner, acknowledging the validity of personal experiences and prepared to provide a neutral base for persons to off load. It was decided that a similar approach to the one advocated by Day-Sclater be adopted in this

study.<sup>26</sup> Such a supportive approach is commendable both on the grounds of ethics<sup>27</sup> and depth of data available. Although opportunity to express sympathy and support are most apparent in the individual interviews, there are also occasions in the observations, when an appropriate facial expression can convey a degree of sensitivity.

### 3.32 (iii) Recording of the observational data

The researcher's aim was to ensure that her presence in the meetings between solicitors and clients was as unobtrusive as possible, therefore it was decided that use of video equipment would not be appropriate. Recording of the meetings between solicitors and clients with an audio tape recorder was also excluded, this time at the specific request of the solicitors. Indeed, the solicitors would not agree to participate in a study which audio taped confidential and sensitive communications of the type which characterises meetings with clients wishing to end their marriages. Of course it is also possible to suggest that the solicitors, who are always aware of the risks of being sued for negligence, were unwilling for a taped record to be kept, which could perhaps provide clear evidence of any failing.

The question then arises as to whether this research lost anything by not being able to audio tape the meetings between solicitors and clients.

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<sup>26</sup> The supportive role adopted by the researcher is discussed further in the section on interviews.

Jorgensen (1989) claims that, "There is no better way at the present time to record verbal interaction, especially interviews, than audio cassette recorders." (p101) This researcher would disagree with Jorgensen's view. Although audio recording may, providing the equipment is reliable, provide an accurate account of the narrative, visual clues cannot be recorded. Similarly, when one is transcribing a recorded account one listens to small 'bite sized' chunks, thus 'meanings' can become obscured. An additional aspect in the tape versus writing debate is the obtrusiveness of tape recording. Clients seeking a divorce attending a solicitors possibly for the first time, may be both nervous and emotional. The presence of a tape recorder, recording the sometimes intimate details of their marital life, could possibly increase their distress. Therefore ethical considerations would also outlaw use of a cassette recorder. Furthermore, data obtained in audio recordings could be contaminated, as research participants may 'perform for a recorder' (Jorgensen 1989, p102), or conversely feel more constrained.

A final, and crucial advantage of physically writing notes as opposed to tape recording is highlighted by Fielding (1993) who writes, "While recording speeds things up, it has the disadvantage of leading to a less reflective approach. Being slower, writing often leads to a better yield of analytic themes." (p162). This researcher supports Fielding's view, finding the time taken in writing up fieldwork was most productive in terms of recognising emerging themes and connections. In sum it was felt that

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<sup>27</sup> See also section 3.9 Legal and Ethical Issues.

the unavailability of audio recording facilities would not devalue this research in any way.

### 3.32 (iv) Note-taking

“A research project can be as well organised and as theoretically sophisticated as you like, but with inadequate note-taking the exercise will be like using an expensive camera with poor-quality film. In both cases, the resolution will prove unsatisfactory, and the results will be poor. Only foggy pictures result.” (Hammersley and Atkinson 1995, p175)

Attention to note-taking is vital if the research is to have any value. Jorgensen (1989) warns of the danger of neglecting note-taking and record keeping as one becomes immersed in the setting (p96). Fielding (1993) similarly notes, “The production of fieldnotes is the observer’s *raison d’être*: if you do not record what happens you might as well not be in the setting.” (p161) Although the attention of the novice researcher is drawn to the importance of maintaining a clear record of what occurs in the setting being observed, “there is remarkably little explicit advice available” (Hammersley and Atkinson 1995, p176).<sup>28</sup> The researcher embarking on her first major project thus has to resolve the issues as what to record, and when and how to actually carry out the note-taking. The following provides an outline of the considerations involved when resolving what to record, followed by a description of when and how the note-taking was in reality accomplished.

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<sup>28</sup> Hammersley and Atkinson maintain that this is a result, in part, of the ‘invisibility’ of anthropological fieldnotes. Notes from anthropological field studies are said to be



### 3.32 (v) 'What' should the observer note?

Jorgensen (1989) advises beginning by describing the “mundane facts of a setting” (p97) which would include such things as the physical and social environment. Not only does recording such detail provide useful practice in the method of note-taking (as Jorgensen suggests) but aspects such as the physical surroundings do have an impact on peoples’ actions. For example, Carlen (1976) in her book ‘Magistrates’ Justice,’ reported on how the physical location of offenders in Magistrates Courts affected their ability to communicate, “the spacing and placing of people on public occasions is strategic to their ability effectively to participate in them.” (p21). In this research, the physical appearance of the waiting room and the size and orderliness of the solicitor’s desk are examples of the physical environment which could have influenced clients’ feelings of ease, and thus their capability of communicating with the solicitor.

The first occasion the researcher visited the offices of the participating solicitors provided an opportunity to record a description of the physical environment. One could assume that the decor of the legal firms might indicate something about their client base, or the group of society that their practice is designed to attract. Thus in the large ‘working class - green form’ practice, the waiting room was sparse, the furniture slightly tatty. The medium sized firm, which according to the solicitors had a

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regarded as “highly personal and private documents...rarely shared with other scholars.” (p176)

predominately middle class client base, had furniture which was of good quality, 'plush' almost. Most striking however was the largest firm in the study. This office had two separate waiting rooms; on enquiry, the researcher was told that only the clients who were 'well dressed and respectable' were shown to the upstairs waiting room, where the better furniture was, the downstairs waiting room was kept for the "green form and criminal types." (Emily). However, whether or not many solicitors do consider decor in this light, it was important to note, not least because the physical appearance of the office will be part of the client's (often first) experience of visiting the solicitor.

Thus in the file collated for each of the solicitors' firms in the study, a description was provided of the physical surroundings, for example, the waiting room, including details of the furniture, carpet, any pictures, provision of toys (or not), plants, reading material (in particular if newspapers were provided, which papers) and lighting. Also recorded were some personal impressions of the reception staff, as the 'front line' staff can be crucial in creating a favourable impression to potential users of the service. On the initial visit receptionists were not aware that the researcher was not a 'client,' and so it can be assumed that the greeting was similar to that which would meet the clients.

Further 'mundane facts' which require noting are contextual factors such as, the date, who was present, what was their role (for example some clients were accompanied by members of their family, on other occasions there was an additional representative from the legal firm was present),

where were people placed physically, and how long did the meeting last? The inclusion of such contextual details may be critical at the time of analysis (Hammersley and Atkinson 1995, p185).

More substantial notes were taken during the actual meetings between solicitors and clients. An aim of note-taking in observation is to provide as close as possible a description of “events people and conversation” (Fielding 1993, p162). Notes concentrated principally on the conversations between the participants but also recorded peripheral activities, for example handling documents and elements of non-verbal behaviour. It is not possible for one researcher to obtain a complete account of every single incident within an observation; a degree of focus is required and this is provided by the research questions (Robson 1993, p193). Thus, in this project the focus was centred around the areas identified below,<sup>29</sup> that is client control, conflict management and clients’ understanding throughout the process.

### 3.32 (vi) Note-taking specifically related to the research questions

One of the aims of this study was closely to examine the issue of control in the meetings between solicitors and clients. An early paper by Hosticka (1979) provides guidance on how to approach questions of client control in observation. Hosticka’s research concerned the exercise of control in lawyer and client conferences, and involved the observation

of the initial interviews between lawyers and clients. During the observations notes were taken on control over conversational time (floor control) and control over the subject matter (topic control) (p600):

“Asking questions, changing topics, continuation of topic initiated by one’s self, asking leading questions, explanations and instructions were all taken as evidence of the exercise of topic control. Answering questions and continuation of topic previously initiated by the other were taken as evidence of compliance with the other’s exercise of topic control. How often the participants engaged in attempts to control the flow or topic of conversation along with their compliance with others’ exercise of such control indicate the degree of influence each has on the process of negotiation.” (Hosticka 1979, p601)

Hosticka’s list of indicators of control was adopted in this research. Thus in the observations of solicitors and clients, particular note was taken of such things as asking or answering questions, introducing new topics, ignoring the introduction of new topics, interrupting the others speech, the source of proposals and the reaction of solicitors and clients to an assertion of control.

The narrative transcripts were also to be analysed for an indication of the current level of spousal conflict. Therefore this was an issue to be alert for when taking notes, the researcher’s subjective view of the apparent conflict being just one component of the measure of conflict, with other indicators being the client’s own perception and the solicitor’s impression. The dialogue between the solicitor and clients was examined for open references to conflict, descriptions of the current relationship between the parties and other indications, such as type of action sought by the client.

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<sup>29</sup> See section 3.5 in this chapter.

In subsequent appointments the focus was on any changes to the level of conflict and the effect of the level of conflict on the dispute resolution process and vice versa.

Other aspects to be particularly noted in observation included how solicitors informed their clients of the law and the progress of the case; whether perceptions of guilt or innocence on behalf of the client impacted on the process, and a subjective view of how the solicitors approach could be classified, for example adversarial or conciliatory.

Finally, the researcher was indebted to her supervisor for advice on keeping a fieldwork notebook. In this book were entered details of personal feelings, hunches, difficulties encountered, ideas and any comments which did not arise in the observational fieldnotes. Notes were added to the book as soon as they occurred, for example, on a bus returning from an observation, in the street just after leaving the client, on a train after conversations with academic peers, and even in the middle of the night, when awoken by sudden clarity of thought. Such a notebook can be extremely valuable in identifying and developing themes, aiding reflection, and making sense of all the data collected. (Jorgensen 1989, p100). Furthermore, Hammersley and Atkinson (1995), referring to what they term a fieldwork journal, remark, "...feelings of personal comfort, anxiety, surprise, shock or revulsion are of analytical significance." and continue, "Private response should be transformed, by reflection and analysis, into potential public knowledge. The fieldwork journal is the vehicle for such transformation." The value of a fieldwork notebook or journal cannot be overstated. It provides an aid to the refining of the

research, and further, as Hammersley and Atkinson comment, is a source of data in its own right.

### 3.32 (vii) When and how note-taking was accomplished

The researcher was fortunate in that she was able to follow an overt strategy and take notes throughout the observations of solicitor and client meetings. As the solicitor also compiled notes throughout the appointments, the researcher's note-taking did not appear out of place.<sup>30</sup> Furthermore, as the researcher took care to place herself, wherever possible, out of the direct line of vision of the participants, the disruption caused was minimal. A reporter's notebook was used for the observation notes. The conversations between the solicitors and clients were recorded verbatim, wherever possible. A decision was made to record what people actually said, as the "actual words can be of considerable analytic importance." (Hammersley and Atkinson 1995, p182). As recording was in a written form and not audio taped, it was not possible to note every single comment. A form of shorthand was used to enable as much of the conversations to be recorded as possible. Where gaps arose the notes were annotated 'MI' to indicate missing information; any paraphrasing in the text was similarly annotated.

There were occasions where the researcher felt it appropriate to be seen not to be taking notes, for example, where clients entered a dialogue

containing intimate and emotionally distressing details. The purpose of this research was not to explore the reasons for the marital breakdown; moreover it was important not to appear voyeuristic or 'cold and unsympathetic.' On a more mundane level, address and phone numbers were not noted, despite forming part of the dialogue between the solicitor and client; it was thought to be more appropriate, from an ethical standpoint, to obtain these details only after specific consent had been obtained in the client interviews which immediately followed their appointments with the solicitor.<sup>31</sup> Similarly, care had to be taken when noting down financial information; it was anticipated that some clients might object to such records being kept. In the event financial information was recorded at a basic level, enough to be able to monitor the case, but no objections were raised to any aspects of the note-taking by any of the clients.<sup>32</sup>

Fielding (1993) also cautions the ethnographer against including inferences in the text of fieldnotes. "Fieldnotes should stay at the lowest level of inference...Fieldnotes should be directed to the concrete, and resist the urge to use abstractions." (p162). Although ideas do occur whilst taking notes, it is advisable to limited oneself to putting a note in the margin, one does not have time to fully consider analytical

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<sup>30</sup> Hammersley and Atkinson (1993, p177) argue that 'conduct of the note-taking must be broadly congruent with the social setting under scrutiny.' Thus as the solicitor was already taking notes, the activity of the observer merely mirrored that of the solicitor.

<sup>31</sup> See section 3.9 Legal and Ethical Issues, for further discussion of this aspect of consent.

<sup>32</sup> It is possible that as confidentiality was guaranteed by the solicitor, clients felt greater reassurance than would have been the case had the reassurance come solely from the researcher.

considerations whilst actually involved in the note-taking, and to attempt such could lead to missing important data.

### 3.32 (viii) Transcription of fieldnotes

After each observation fieldnotes were fully written up as soon as possible after the event. This researcher began fully transcribing the fieldnotes within less than two hours of the observation in most cases. Fielding (1993) warns that “detailed recall of conversation sufficient to enable quotation is lost within a couple of hours.” Beginning the transcribing process within two hours is ideal, before 24 hours have elapsed is essential. More crucially, according to Fielding (1993), one must also ensure that one observation is fully written up before undertaking further fieldwork, “Erosion of memory is not related to time so strongly as it is to new input; that is, the more stimuli to which you are subjected during a day the more detail is forced out.” (p161) In the early stages of this study, there were two occasions on which clients had appointments on the same day. This resulted in the researcher experiencing a degree of difficulty in the accurate recalling of events, and the writing up of the fieldnotes was subsequently marred. A note was made in the files concerned of the resulting shortfall in adequate material. Similarly, it was felt to be expedient to limit the number of observations to three a week. Any more than this, and clarity could be lost and the individual details may have begun to merge.



The process of writing up fieldnotes is time consuming. In this researcher's experience one hour's observation would take three or four hours to write up.<sup>33</sup> Much time is expended as notes are not just written up, they are reflected on and analysed. Robson (1993) comments, "With participant observation it is difficult to separate out the data collection and analysis phases of an enquiry. Analysis takes place in the middle of data collection and is used to help shape its development." (p195) Undertaking analysis at an early stage, whilst collecting material, allows a degree of flexibility should new and promising areas of inquiry emerge. According to Robson (1993) "This flexibility helps to explain why many case studies have some form of participant observation as the primary method of data collection; and why many observers use the case study strategy." (p195)

The process of transcribing and analysing concurrently was extremely valuable in exposing the more subtle aspects of the interaction between the solicitor and client. For example, it was only when writing up fieldnotes from one particular observation that the researcher became aware how many times the solicitor had mentioned one specific course of action. The conversation would drift and then the solicitor would mention the proposal again casually linked to other concerns of the client. The pressure from the solicitor was real but subtle, a point reinforced in the

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<sup>33</sup> Fielding (1993, p162) warns that writing up fieldnotes takes as much time as the observation. Jorgensen (1989, p98) holds that one can expect to spend twice or three times as much time on the writing up as on the observation. Jorgensen's view accords with this researcher's own experience.

interview with the client, in which she stated that the solicitor had not offered specific guidance.

Transcribing was all undertaken by hand, word processing was not possible, as computers in the university all printed out to a single printer in a communal staff room, so confidentiality would have been at risk had the university computers been used.<sup>34</sup> However the researcher found that the time taken to hand write the transcripts aided reflection and so was a beneficial if time consuming process.<sup>35</sup> When writing up the fieldnotes, shorthand was converted to longhand, annotations were included to indicate missing data, quotes, and any paraphrasing; the most pertinent passages of text were highlighted, notes of were made in the margins of emergent themes and particular issues. Writing up the observations in this way was found to be a most productive process.

### 3.32 (ix) The combination of observation and interview

As has already been stated, a characteristic of case study research is the reliance on multiple sources of evidence.<sup>36</sup> It is common for observational data to be supported by that gathered through the various forms of interviews (Jorgensen 1989, p22). Interviews can allow the voice of the research subject to be heard. Insiders' own accounts can provide information that will not be obtainable through observational techniques

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<sup>34</sup> See Section 3.9 Legal and Ethical Issues.

<sup>35</sup> See comment by Fielding, in the section 3.32 (iii) Recording of Observation Data.

(Hammersley and Atkinson 1995, p125). For example, in this study the researcher aimed to gain an understanding of solicitors' and clients' own perspectives. This knowledge would be difficult to secure purely through the use of observation. A more effective strategy would be to ask the participants themselves about their experiences. Robson (1993) comments,

“In a self-report situation, the respondent is effectively acting as an observer of her own behaviour. Direct observation reduces potential biases and distortions arising from this process, but it is obviously limited to those things that can be directly observed. Thoughts and feelings, beliefs and attitudes need self-report.”  
(p267)

Furthermore, interviews can be used to clarify the inferences drawn from observation (Hammersley and Atkinson 1995, p125). Therefore, for example, if the researcher felt that the solicitor had been particularly directive or dominating in a meeting with a client, it was, with careful questioning,<sup>37</sup> possible to discover whether the client also held this view.

Observational data was therefore to be complemented and supported by information derived from interviews with the research participants. Any differences between the information obtained in interviews and the observational record became valuable data in its own right. Inferences could be drawn from such discrepancies which, as this was a longitudinal study, could be more fully explored in the follow up observations and interviews.

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<sup>36</sup> See section 3.31, Case Study.

<sup>37</sup> Avoiding the use of leading questions.

### 3.33 Interviews

Interviews are one of the most widely used methods of social inquiry<sup>38</sup> (Fielding 1993 p135, Holstein and Gubrium 1997 p113, Robson 1993 p228). This method of eliciting information from the research subjects can take a number of forms. According to Hammersley and Atkinson (1995),

“Interviews in ethnographic research range from spontaneous, informal conversations in places that are being used for other purposes, to formally arranged meetings in bounded settings out of earshot of other people. In the case of the former the dividing line between participant observation and interviewing is hard to discern.” (p139)

In this project both solicitors and clients were subjected to recognisable interviews on a number of occasions. Interviews are often differentiated in methods texts according to the degree of structure present. In a highly structured interview, the interviewer has no discretion to deviate from a set text of largely closed questions. A semi-structured format allows the interviewer more freedom. The same questions will be asked in each interview, but the sequence may alter and additional ground may be covered as the interviewer probes for further information (Fielding 1993 p136). Finally, there is the unstructured or ‘focused’ interview. This approach is more akin to that of a conversation, although the interviewer will have a number of topics she wishes the ‘respondent to talk about’ (Fielding 1993, p136). Lofland (1971) refers to this type of research interview as ‘guided conversations’ (cited in Fielding 1993, p136). An advantage of being less constrained and adopting a loose structure is

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<sup>38</sup> Briggs (1986) estimates that interviews are used in 90 per cent of social science investigations (cited in Holstein and Gubrium 1997, p113)

that the researcher thereby retains a degree of flexibility, a key aspect of an ethnographic approach.

This study included interviews of both the semi-structured and unstructured formats. Interviews carried out early in the process were semi-structured. There were three prominent reasons for this; firstly, to enable the collection of contextual information, for example the solicitor's professional background; secondly, to allow comparisons to be made, as every participant in the study had provided answers to certain questions; and thirdly, by providing a degree of structure, a discipline was imposed on the researcher to keep the project within the original research aims.

In the middle period of the fieldwork, as relationships were established with the research participants and a rapport developed, the interviews became less structured and more tailored to the individual's circumstances. These later interviews were more conversational in style. Topics discussed were those which were of importance to that particular person, as respondents were encouraged to digress and direct the conversation. Thus the real feelings of the participants were allowed to emerge. Lofland (1971) declares that the purpose behind the unstructured format is,

“...to elicit rich, detailed materials that can be used in qualitative analysis. Its object is to find out what kinds of things are happening rather than to determine the frequency of predetermined kinds of things that the researcher already believes can happen.” (cited in Fielding 1993 p137)

An unstructured approach is also said to be particularly appropriate for dealing with sensitive and complex material (Fielding 1993, p138). As this study entailed interviewing people about their experience of going through the often painful process of divorce, it was inevitable that issues arose which were of a very sensitive nature, therefore this was another justification for employing a more fluid interviewing style.

At the later stages in the fieldwork, in addition to the unstructured interviews, semi-structured interviews were also carried out to ensure that the central research questions had been adequately addressed. The combination of semi and unstructured interview served a dual purpose. Subjects own accounts were allowed to emerge unconstrained by the imposition of any pre-ordained categories, whilst at the same time, sufficient contextual information had been obtained and a degree of focus within the research was maintained.

### 3.33 (i) Advantages and disadvantages of interviews

As stated above, there are some data which can only be obtained in interviews, personal feelings, perceptions and beliefs being prime examples of such data. As an aim of this study was to obtain an understanding of the feelings and perceptions of those undergoing divorce, interviewing was an essential part of the research programme. Similarly, adopting a less directive approach to interviewing allowed research participants to tell their own stories. Some extremely valuable material was collated when the research participants talked at length of

their own concerns in the interviews. Thus interviewing, carried out effectively, can provide some very worthwhile data, a view reflected by Robson (1993) who writes that interviews have, "...the potential of providing rich and highly illuminating material."(p229)

There are however a number of striking disadvantages attached to interviewing, and in this research that was an important consideration in the decision to undertake observation. Paramount amongst these difficulties is the questionable accuracy of subject's self-reported accounts, as Robson (1993) states,

"Interview and questionnaire responses are notorious for discrepancies between what people say that they have done, or will do, and what they actually did or will do." (p191)

Such discrepancies may arise as a result of self presentational concerns, or faulty recall on behalf of the respondent. Overstatement, understatement and misrepresentation are all possible distortions. Respondents may be keen to create a certain impression of themselves as individuals, or as representatives of their professional group. Similarly bias may be introduced as a result of the interaction between the interviewer and the respondent. As Holstein and Gubrium (1997) state,

"The narratives that are produced may be as truncated as forced-choice survey answers or as elaborate as oral life histories, but they are all constructed *in situ*, as a product of the talk between the interview participants." (p113, author's emphasis)

Traditional methodological texts advise the potential interviewer on strategies to minimise bias, thus leading questions are to be avoided, more problematically the interviewer has to strive for a neutral

interviewing manner to avoid any influence on the responses. Holstein and Gubrium (1997) summarise the conventional criticisms of interviewing, "The interview conversation is thus framed as a potential source of bias, error, misunderstanding or misdirection, a persistent set of problems to be controlled." (p113)

Some of the above difficulties can be addressed. Faulty recall by respondents can be minimised by ensuring there is only a short time between the event occurring which is the subject of the inquiry, and the interviewing being conducted. Self-presentation concerns may be reduced, although not entirely eradicated, over the passage of time, if a reasonably close and trusting relationship can be developed between the researcher and the researched. The establishment of a trusting relationship can be encouraged if the interviewer is willing to share her own thoughts and feelings with the respondent. This should create an atmosphere of mutual disclosure and therefore encourage the respondent to feel at ease and less constrained (Holstein and Gubrium 1997). Ethnographers dispute the view that interview data, being a product of the interaction between the interviewer and the respondent, devalues the research. Interviews are seen as a,

"... social encounter in which knowledge is constructed... the interview is not merely a neutral conduit or source of distortion, but is instead a site of, and occasion for, producing reportable knowledge itself."

and therefore,

"any technical attempts to strip interviews of their interactional ingredients will be futile. Instead of refining the long list of methodological constraints under which 'standardised' interviews



should be conducted, we suggest that researchers take a more 'active' perspective, begin to acknowledge, and capitalise upon, interviewers' and respondents' constitutive contributions to the production of interview data." (Holstein and Gubrium 1997 p114)

Holstein and Gubrium's view of interviewing, as a mutual and active pursuit, supports the notion of interviews as a form of conversation, both the respondent and the interviewer participating fully in the process. Similarly, trying to minimise the personal effect of the researcher may create an impression of artificiality and thus be less likely to lead to 'truthful' responses. In the present study, interviews were undertaken using a conversational style, neutrality of the interviewer was neither attained nor aspired to.

### 3.33 (ii) The interview process

This section outlines the actual process of gathering the interview data and covers the 'when' 'where' and 'how' questions. We begin with the question of when were interviews conducted.

The first interviews to be undertaken were with the solicitors. Each of the solicitors participating in the study was interviewed prior to any observations of their practice being conducted. The format for these interviews was semi-structured, each solicitor being questioned about

their professional background and personal beliefs concerning family law practice<sup>39</sup>.

Clients were interviewed immediately after their meeting with the solicitor. The first interview with the client was again a semi-structured format, each client again being asked the same questions. As the case progressed, however, the interview structure became fluid and individualised.

After each observation, the solicitor involved was also interviewed. A decision was made, mainly on pragmatic grounds, to carry out the client interviews first. Solicitors would be easier to re-contact than the clients, who would return to various locations where interviewing might not be appropriate. Accordingly, immediately after each observation the client was interviewed, followed by an interview with the solicitor. Due to the sometimes very busy schedules of the solicitors, occasionally these had to be 'fitted in' later in the day, but most often, particularly after the first observation of a new client, the interview with the solicitor took place within an hour of the observation. A semi-structured format was again employed, each solicitor being subjected to the same questions after each new client. A consequence of this repeated exposure was that solicitors became familiar with, and began to anticipate the questions. One solicitor admitted to the researcher that she considered her responses to the interview, whilst still in the meeting with the client. Although the researcher was concerned that this might result in certain

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<sup>39</sup> The content of the interviews will be dealt with more fully in the section below.

issues being given a stronger focus by the solicitor, the overall effect was felt to be beneficial, in that the solicitors provided a more analytic and reflective account than may otherwise have been the case.<sup>40</sup>

In the cases that progressed, after each follow up appointment, both the solicitor and client were interviewed. These interviews were of a looser structure than the initial interviews. A final interview was also conducted when the case concluded. This was less fluid than the earlier interviews as the researcher wished to ensure that the central research questions were adequately addressed.

At the conclusion of the fieldwork, a final interview with the participating solicitors was undertaken. Solicitors' comments were sought on the general and specific findings of the study. Furthermore the interviews were used by the researcher as an opportunity to seek 'member validation' of the research.

A brief comment needs to be made at this point as to the location for the interviewing, the 'where' question. Solicitors were always interviewed in their office; this was the only practical option. For the clients however, it was thought that a more open and relaxed interview would be possible if it were carried out away from the solicitor's office. Moreover, removing from the legal practice also emphasised the independence of the researcher from the solicitor. Therefore, wherever possible clients were

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<sup>40</sup> Robson (1993) similarly notes that using key informants in observation can be of positive benefit due to the quality of data obtained (p197).

invited for a coffee at a near by café bar. This strategy was found to be extremely valuable, clients were more open and relaxed, a rapport between the researcher and the client was established and most importantly much rich and detailed data were revealed this way.

Unfortunately, it was not always feasible to take the client to a café. Occasionally, other factors precluded a café visit, for example, in the city centre, parking meters only allow for one hour's parking, clients who had parked their cars in these bays did not have sufficient time to go to the café. A particular difficulty was encountered in the large 'legal aid practice,' which, being situated in one of the poorer city suburbs, had no cafés in the immediate locality. In both the instances described above, the researcher was grateful for the co-operation of the solicitors' firms concerned, as they agreed to let the researcher have the use of a small interview room. Thus the interviews with the clients were undertaken in a separate room within the legal practice. Having considered the 'when' and 'where' questions, this section will now outline 'how' the interviews were conducted.

The majority of interviews were carried out 'face to face.' Telephone interviewing was not thought to be appropriate when dealing with such a sensitive topic as marital breakdown. Proponents of telephone interviewing argue that there are certain advantages to be obtained from carrying out interviews over the telephone. These include; lower resource costs, lessened interviewer effects, reduced risk of contamination by self-presentation issues, and finally a safer environment for the interviewer to

work (Robson 1993, p241). Against this, there are number of clear disadvantages to using a telephone to conduct interviews; it is not appropriate for sensitive topics, rapport may be harder to develop, it is more difficult to keep the full attention of the respondent, and non-verbal behaviour is excluded from the analysis (Newell 1993, p98).

However, the researcher did find a use for the occasional telephone interview in the follow up appointments. These took place when the researcher had not been informed, until too late, that a client had a follow up appointment. On such occasions a telephone interview was an effective method of retrieving some data from the lost observation. As these were all follow up appointments, all occurred after the researcher had already talked at some length with the clients, and a degree of rapport had been established. Solicitors were also occasionally interviewed over the telephone, in the same circumstances described above, and also because of their busy schedules, it was sometimes the only way to obtain an interview between their appointments.

### 3.33 (iii) Style of interviewing

At this point it would be helpful to provide a little more information on the interviewing style adopted. In both observation and interview it is important that a rapport be established with the research subjects (Hammersley and Atkinson 1995, p141). Building a rapport with persons who are perhaps highly emotional demands a great deal of care and

empathy. Consequently, the approach adopted in this research, was of a supportive style. Clients appeared grateful for the opportunity to 'off load' to someone who was completely unaligned to their family or friends, and moreover did not charge. Adopting such an approach leaves one vulnerable to the charge of collating an amount of 'redundant information.' This researcher would dispute this notion. Although some of the information revealed to the researcher in this way, cannot be used in the study, most often because of ethical concerns, other material can provide an indication of the issues which are important to the respondent, and hence the real feelings and perceptions of the interviewee are more likely to emerge. For example, one client talked at length in the interviews of the need for her ex-husband to be made aware of the difficulty in bringing up three small children alone. This appeared to be a significant motivational factor for the client, in pursuing her case for increased spousal maintenance. Thus the interview revealed that clients non-legal agenda may led to action being taken in the guise of legal issues.

Relationships are built on mutual feelings of trust and respect, thus the researcher had to be willing to reveal certain facts about herself. Accordingly, the researcher would exchange a degree of 'confidences' with the respondent, provided she felt safe to do so<sup>41</sup>. Such mutuality is also a necessarily component of normal conversational rules, therefore an interview style which purports to adopt a conversational style, should

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<sup>41</sup> The identification of the researcher or her family were not revealed to the clients. Care had to be taken, the researcher did not want to get drawn into the spousal conflict, additionally one could be at personal risk from associating with certain individuals, not all family clients are law abiding, two of the clients in the project had been involved in criminal activities in relation to illegal drug use.

contain some aspects of mutual disclosure. Holstein and Gubrium (1997) write,

“The interview should be an occasion that displays the interviewer’s willingness to share his or her own feelings and deepest thoughts. This is done to assure respondents that they can, in turn, share their own thoughts and feelings. The interviewers’ deep disclosure both occasions and legitimises the respondent’s reciprocal revelations.” (p119)

Hammersley and Atkinson (1995) caution against confusing a conversational style of interview, with a conversation: “they [interviews] are never simply conversations, because the ethnographer has a research agenda and must retain some control over the proceedings.” (p152)<sup>42</sup> The researcher must therefore ensure that she remains aware that her paramount role is that of a researcher. Bott (1971) in her seminal study of social networks, remarked of a difficulty encountered in her research, “the fieldworker was confusing at least three largely incompatible and partly inappropriate roles, those of friend, research worker, and therapist.” (p20) This researcher would not entirely agree that the roles described by Bott are incompatible, as is apparent from the arguments outlined above, being a friend and offering a degree of personal support can, this researcher believes, enhance the depth of data available to one as a research worker.<sup>43</sup> However, offering a degree of personal support is quite distinct from adopting the role of therapist, and the researcher in this study did not take on the role of therapist.

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<sup>42</sup> Similarly Dingwall (1997) writes that an interview cannot be described as a conversation, “It is a deliberately created opportunity to talk about something the interviewer is interested in and that may or may not be of interest to the respondent.” (p59)

### 3.33 (iv) Interview content

As has already been disclosed the interviewing strategy involved a combination of interview schedules, and more open interview guides. Interview schedules were employed in the following situations; the preliminary interviews with the solicitors, the interviews with both solicitors and clients after the initial appointment, the interviews with clients after the final appointment and, at the conclusion of the fieldwork, an interview with the participating solicitors. Interview guides were used principally in the follow up appointments with both solicitors and clients. The sections below outline the content of each interview stage. Copies of the interviews schedules and guides are to be found in the appendix.

### 3.33 (v) Solicitors' preliminary interview

All solicitors participating in the project were given a preliminary interview, prior to the commencement of any observations of their practice. The purpose of these interviews was two fold, firstly, to obtain information about the solicitors' professional background and secondly, to allow the solicitors to express their professed beliefs about family law practice. Data obtained for the first of these purposes would be used to investigate whether the solicitor's background, for example if they had received any mediation training, affected their approach to divorce work. The second

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<sup>43</sup> There was a number of ethical issues arising from this approach and these are discussed in section 3.9 Legal and Ethical Issues.



aspect, pertaining to the solicitors' individual attitudes to divorce practice, would provide evidence of practitioners' (professed) views and professional principles. Moreover, by subsequently observing the solicitors 'in action,' the statements made by the solicitors could be verified or refuted.

Solicitors were asked for their perceptions regarding social class or gender differences in clients' approach to divorce. Solicitors were also asked if they had any strongly held views on divorce practice, and to describe their own approach. Question seven asked solicitors to define their 'typical client.' The responses were used as a further indication of the preconceptions and prejudices<sup>44</sup> of the solicitor and also as a guide to the particular market at which the legal practice was aimed.

Questions eleven to fourteen are taken from Maiman et al's (1992) study exploring gender based differences amongst lawyers in America. The questions were designed, "to explore how lawyers make sense of their work" (p49). Maiman et al report that these questions were asked without a clear expectation of where the questions would lead but, in fact the responses allowed them to classify the lawyers into two distinct groups according to their approach to divorce work.<sup>45</sup>

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<sup>44</sup> Some of the senior solicitors, when initially interviewed, gave the impression that they actually dealt with few 'working class' divorces. However, this was later shown to be a misrepresentation, as a number of 'working class' clients were quickly recruited for the study. The *misunderstanding* may have arisen as 'working class' divorce work is often associated with the more junior members of the profession, thus to admit to such work may have been seen as devaluing the solicitor's status.

<sup>45</sup> Maiman et al (1992) labelled the two groups as 'client adjustment' and 'legal craft.' Those belonging to the former category, gave responses indicating a paramount concern

Although this study was not concerned with classifying the solicitor's style, along the lines suggested by Maiman et al, it was felt that the questions used would be extremely useful in identifying solicitor's genuine feelings about the divorce process. A final inquiry, relating to the solicitor's initial appointment with the client, sought to clarify what the solicitors hoped to achieve in their first meeting with the clients.

### 3.33 (vi) First client interview

As already stated, after each client had attended their initial appointment with the solicitor, they were interviewed by the researcher. The semi structured schedule used for the first client interview can be found in appendix two.

The interview opened by questioning whether the client had any past experience with solicitors. This enabled data to be collected on how familiar clients were with the legal profession, and further, if the degree of familiarity had had an effect on their interaction with the solicitor. The second question in the interview was designed to reveal what it is that divorcing clients really want from a solicitor, for example if a solicitor was selected as a result of personal recommendation, what was the client told that led them to expect that solicitor might meet their needs? Did they

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with the client's welfare, whereas those in the latter group found the 'legal combat' the most rewarding aspect of their work.

expect this solicitor to get them a 'good deal,' or was the emphasis on maintaining a reasonable relationship with their spouse?

Whether clients felt that the gender of the solicitor was an issue was explored in question three. Question four, "How did it go today?" was deliberately vague and open. Clients interpreted this question as to how the appointment with the solicitor had compared to their expectations, thus replies varied from comments on the actual advice to the personality and approachability of the solicitor. Question five aimed to discover how comfortable the client felt about communicating with the solicitor. Negative replies may have indicated feelings of intimidation or deference on the part of the client, or domination on the part of the solicitor. These latter two questions provide some evidence regarding issues of control. Information regarding any agreements the divorcing couple may have had prior to the involvement with the solicitor were dealt with in question six.

As the effect of conflict on the process, and conversely the effect of the process on the parties' relationship, was one of the central research questions, clients were asked to classify the level of conflict between themselves and their spouse on a four point rating; none, mild, substantial or intense. This measure was to be combined with a similar rating from the solicitor, and the researcher's own view. Later in the interview, clients were asked how they thought their spouse would react to the action that had been proposed by the solicitor. This was used as a further indication of the existing level of conflict, and as possible evidence

to suggest a relationship between the divorce process and the level of conflict.

Questions eight to ten asked clients to rate a number of statements according to the degree of importance to the client personally. The responses provided further clues as to the needs and expectations of clients in the midst of marital breakdown. Questions eleven and twelve invited the respondent's comments on any action proposed by the solicitor. The adequacy of solicitors' explanations of the law of redistribution on divorce, was also questioned, and the client's views were sought on these 'legal entitlements.' The issue of client understanding was further explored in question seventeen, which related to a specific aspect of relevance in the individual's case, for example maintenance payments for stepchildren. Finally, clients were asked how long they expected their case to last. Replies would be compared to the actual duration of the case on completion (as clients often gave this information after being advised of the most likely time scale by the solicitor, this question would also clarify how accurately solicitors predictions were in this regard). When carrying out the first interviews with the clients, the exact wording which appears on the schedule was not always adhered to as rephrasing the questions was sometimes necessary to ensure that the client fully understood what was being asked of them.

### 3.33 (vii) Interview with the solicitor following the client's initial appointment

The final component of the data gathering from clients' initial appointments with solicitors, was the interview with the solicitor concerned (see appendix three). This interview was of necessity (due to time constraints) shorter than the initial interview with clients. Many of the questions asked of the solicitor mirror those in the client's interview; hence the researcher was able to obtain both perspectives from the solicitor-client meeting.

The interview with the solicitors opened by inquiring what they thought it was that the client really wanted. Originally this question aimed to exploit the solicitors' experience of divorcing clients, by asking them to speculate on the clients' motives or possibly hidden agendas, in coming to see a solicitor regarding divorce. However, responses also revealed something about the solicitors' approach to divorce work, for instance, some solicitors' replies were limited to proposed legal action, whilst others referred to wider aspects such as feelings of guilt or the possibility of reconciliation.

Questions two and three dealt with the level of marital conflict apparent in the first meeting. Solicitors were first asked to rate their perception of the conflict, in the same way as clients had been asked to do, and then to comment on how that level of conflict would affect their action in that particular case. Question four asked solicitors to predict what they expected to achieve in the case, which could be compared to the

eventual outcome. Issues of client control were explored in question five, which asked solicitors to comment on how assertive they had found the client to be in the initial appointment. The viability of any prior agreements made between the spouses is explored in questions six to eight. Responses here could be invaluable in providing some indication of the types of arrangement people entering the divorce process arrive at prior to the receipt of any legal advice. The data obtained might provide evidence regarding the ability of parties to a divorce to negotiate a fair and reasonable settlement in mediation. Questions ten and eleven dealt with financial and property redistribution, firstly to inquire of the solicitors, if they felt that the client now understood how their property and financial issues would be resolved, which involved solicitors in assessing the adequacy of their explanation, and secondly, solicitors were asked to comment on how they thought the client felt about this information.<sup>46</sup> Following on, solicitors were asked if they thought that the client would follow the advice the solicitor had given them. The replies could indicate the solicitor's feelings about the client and perhaps predict possible future tensions between the solicitor and client regarding who is in control. Finally, solicitors were asked for any further comments on the particular case. As divorce cases vary widely, each having their own distinctive features, it was important to include a 'catch all' question to cover aspects which had not arisen in the interview. This also enabled the

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<sup>46</sup> Existing research has indicated that parties to a divorce have little prior knowledge as to what their 'legal entitlements' may be. Davis et al (1994) found that peoples' expectations had been coloured by various 'folkmyths' for example, "The man's belief that it's his money because he earned it" (p48), such prior expectations can lead to feelings of disappointment or conversely elation once the true picture is clarified.

solicitors to emphasise what they thought was the most defining aspect of each case.

### 3.33 (viii) Interviews following the clients' second and subsequent appointments with the solicitor

Both the solicitor and the client were interviewed after each following observed appointment.<sup>47</sup> These subsequent interviews were more open and fluid than those after the initial appointment. There was no interview guide as such used when interviewing the solicitors, instead the interview often opened with a query as to how the case was 'going,' and the conversation was allowed to develop naturally from there. This approach proved very illuminating as often the conversation, as well as covering the current case, would also include incidences from similar cases, which were not part of the study. Moreover, encouraging the solicitors to talk in this way, enabled the researcher to gain a clear impression of how family law solicitors experience their work. Although there was a degree of drift, the researcher always kept in mind the central research questions of this thesis, and would ensure that those areas had been covered.

An interview guide was employed when interviewing clients after their follow up appointments with the solicitor (see appendix four). The topics were devised around the three areas of client control, conflict

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<sup>47</sup> Occasionally where observation had not been possible, interviews were still conducted by telephone.

management, and client expectations and understanding. A sympathetic, supportive style of interviewing was adopted, and clients were encouraged to digress and direct the conversation, consequently topics would be included which had not hitherto been part of the analysis. Some very compelling data were revealed this way, for example, the complex motivational factors that prompt clients to pursue particular legal action. Although clients were encouraged to direct the conversation, use of the interview guide meant that the researcher was able to ensure that all the appropriate topics were covered although not necessarily in the same order that they appear on the guide.

### 3.33 (ix) Final client interview

Upon resolution of their case, clients were given a final interview. An interview schedule was used (see appendix five) to ensure that the research questions had been adequately addressed. Use of the schedule did not unduly constrain the interview, however, as by this time a rapport had developed between the researcher and the client, and the conversational interview would naturally encompass a wider sphere. Not all the clients involved in the study were able to participate in the final interview. Difficulties arose for the researcher in cases where there had been little face to face contact between the solicitor and client. One of the solicitors in the study did operate in this way. Clients were seen by the solicitor at the initial appointment and again to complete the affidavit, but thereafter, much of the contact with the client was by letter or telephone. Therefore, towards the latter part of the process, the



opportunities for the researcher to meet with and interview the client were much reduced. Where feasible, when such circumstances arose, interviews were conducted over the telephone. However, it was not possible to contact all such clients by telephone; some had moved away from their previous address (marital home) and for others, the researcher considered that telephoning at home could not be considered on ethical grounds.<sup>48</sup>

The final client interview aimed to get the clients to reflect on their experience of the divorce process. Questions were designed to both cover the original research questions, and to encourage the client to think about their overall feelings about how their case had been conducted; for example, if having a solicitor had helped, and whether there was anything about their experience they would change. It was anticipated that by encouraging the clients retrospectively to reflect on their experience, we might discover more about the dynamics of the process, and what it is that clients actually need from a dispute resolution service on divorce.

### 3.33 (x) Concluding interview with solicitors

At the conclusion of the fieldwork the solicitors who had participated in this research project were interviewed.<sup>49</sup> The purpose of the interview

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<sup>48</sup> See Section 3.9 Legal and Ethical Issues.

<sup>49</sup> Not all the solicitors who had provided preliminary interviews were also interviewed at the conclusion to the study. One of the solicitors in the study had resigned from her practice in the middle of the fieldwork period, another had been found to be unwilling to

was threefold; firstly to provide a check on the credibility of the findings, secondly to provide feedback for the solicitors on their professional practice, and thirdly to obtain further data on the solicitors' perceptions. A copy of the interview schedule is available in appendix six.

The interview covered two main topics with space for solicitors to introduce other subjects at the end. The first topic concerned the solicitors' professional development. Solicitors were asked if they had undertaken any training in mediation and/or become involved in the various family law accreditation schemes. The views of solicitors were sought on these and other policy developments relevant to this study. The larger part of the interview concerned the research findings. The interview schedule contains a list of the research findings each of which were discussed with the solicitors at this final interview. As the interviews took place immediately after the final observations had been completed, the final analysis of the data had not been carried out, therefore solicitors were questioned on the early findings which were emerging from the study. As the researcher was very familiar to the solicitors by this stage, solicitors were very open in their responses. They provided many interesting comments relating to their own experience with clients and on the perceived feasibility or otherwise of the recent initiatives within this sphere of family law practice.

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participate in the research, and two further solicitors only had very limited involvement in the study.

As previously stated, interview data were supplemented by notes of comments made by the research participants at other times apart from the interview.

### **3.4 Impact of researcher's presence**

“Researchers in the social sciences are faced with a unique methodological problem: the very conditions of their research constitute an important complex variable for what passes as the findings of their investigations ... The activities of the investigator play a crucial role in the data obtained. (Circourel 1964 cited in Shaffir and Stebbins 1991 p15).

This section will outline the strategies adopted by the researcher to contend with the phenomenon Circourel portrays.

The investigator, whether an observer or interviewer, to a degree influences the phenomenon under study. Those following an experiment or survey strategy seek to minimise or even to eradicate the effect altogether, in order that requirements of scientific validity be met. Those following in the ethnographic tradition, however, hold a slightly different view as Hammersley and Atkinson (1995) maintain,

“the fact that as researchers we are likely to have an effect on the people we study does not mean that the validity of our findings is restricted to the data elicitation situations on which we relied. We can minimise reactivity and/or monitor it. But we can also exploit it: how people respond to the presence of the researcher may be as informative as how they react to other situations. Indeed, rather than engaging in futile attempts to eliminate the effects of the researcher completely, we should set about understanding them,” (p18)

From this quotation it can be seen that ethnographers view researcher effects, not as a circumstance to be eradicated, but conversely as a source of data in their own right. Earlier in this chapter instances were

described which may serve to illustrate this positive view of researcher effects, for example in the section on interviewing, interviews were held to be a product of a 'social encounter,' and as such it is both inevitable and desirable that the interviewer influences and contributes towards a joint product, the interview. Similarly, in the passage on observation, the reader was alerted to the fact that a suspicion of behaviour modification by the research subjects, as a result of the researcher's presence, would be seen as worthy of further exploration.

However, the focus for this study was not to see how solicitors and clients behaved as a result of being observed, but to observe normal interaction between solicitors and their clients, as they proceeded (or not) with the divorce process. Therefore measures were adopted to reduce as far as possible the effects of the researcher's presence, in the observations of the solicitor client meetings.

At the early stage of the fieldwork the researcher did have cause to suspect that the 'Hawthorne effect' was operating and research subjects, namely the participating solicitors were modifying their behaviour. The following examples will illustrate the reasons for the researcher's concern. In the first observation undertaken with one female solicitor, the solicitor quoted verbatim a paragraph from The Children Act 1989. This did not fit naturally into the dialogue she was having with her not particularly articulate clients. The researcher suspected that this quote may have been included to impress the researcher with the solicitor's

legal knowledge.<sup>50</sup> On other occasions in the early stages of the fieldwork, the researcher noted that solicitors seemed to overuse the word 'amicable;' this particular term has been popularly used as an description of the 'correct' or 'desirable' manner in which to proceed with divorce, often associated with benefits to any children of the marriage. Thus the solicitor could be seen as creating an impression of themselves as a 'good' family lawyer.<sup>51</sup> The final example involves an instance where the solicitor, in a difficult case, in which the opposing solicitor had been reprimanded by the judge, refused to criticise this opposing solicitor in the observed meeting with the client, despite being encouraged to do so by the client. This may be perceived by the reader as merely the behaviour expected of a professional; however, in the interview with the client, following the observation, it became apparent that the solicitor had not been so cautious in the previous meeting, which coincidentally, had not been observed.<sup>52</sup>

Robson (1993) gives two strategies which may be used to minimise researcher effects, which were employed in this study. They are "minimal interaction" and "habituation" (p208). The former requires the researcher to take negative action such as avoiding eye contact and generally not encouraging attempts to include one in the observed interaction. As already discussed above, the researcher took care to be seated out of the direct line of vision of the solicitor and client. Such strategy became

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<sup>50</sup> The solicitors were aware that the researcher was involved in teaching Family Law at Sheffield Hallam University.

<sup>51</sup> Neale and Smart (1997) discuss what characteristics are perceived to make up a 'good' or 'bad' Family Lawyer.

even more crucial in the final stages of the fieldwork, when both solicitors and clients would on occasion attempt to draw the researcher, with whom they were now very familiar, into the conversations. When this did occur the researcher attempted to smile reassuringly and make a non-committal, light hearted (if appropriate) response. Robson's second strategy "habituation" describes an effect whereby the researcher's repeated presence desensitises the subject(s) to the researcher's presence. As this is a longitudinal study involving repeated contact with both solicitors and clients, such an effect was already built into the research design.<sup>53</sup>

### **3.5 Research questions**

As discussed above, after reviewing the literature, there were three broad areas which the researcher felt merited some exploration. The areas were the level of client control over the process; how the level of conflict between the parties affected the dispute resolution process; and conversely whether the process had an effect on the parties' relationship. Finally, there were clients' expectations and understanding throughout the process. Each of these areas was further refined into a number of more specific research questions. A list of the questions is given below alongside a brief outline of the method employed.

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<sup>52</sup> This was one of those instances when the researcher had not been informed of the client's subsequent appointment with the solicitor.

<sup>53</sup> See section 3.31 (i) which outlines the justification for adopting a longitudinal approach.

(a) Level of client control over the process.

**(i) How much control do clients exercise in the solicitor client conferences and how do solicitors react to an assertion of control by the clients?**

Method:-

1. Observation of solicitor and client conferences, in particular observing the control of topic(s), the source of any proposals, and noting the reaction of solicitors and clients to an assertion of control.
2. Semi-structured interviews with both solicitors and clients.

**(ii) If clients have any previous experience with lawyers does this affect the above?**

Method: -

First client interview to ascertain whether the client has had any past experience of solicitors, and if so in what context, for example conveyancing, criminal defence. The details of those with past experience will be compared to those with no such experience of dealing with the solicitors to see if this affects how they interact with the solicitor.

**(iii) How is control exercised as regards the outcome pursued?**

Method:-

1. Observation of solicitor client conferences, noting the contribution of both solicitor and client as the decision is made over the outcome to pursue.
2. Semi-structured interviews with both solicitors and clients.

**(iv) Do clients want control over the process and ultimate decision? <sup>54</sup>**

Method: -

Semi-structured interviews with clients. To be included in the second and subsequent interviews as appropriate.

**(b) Conflict management**

**(i) What is the inherent level of conflict (participants' perception)?**

Method:-

1. Semi-structured interview to obtain clients' subjective belief of the level of conflict. The clients were asked which of the words below, came closest to describing the current level of conflict between themselves and their (ex) spouse.

Negligible      Mild                      Substantial                      Intense

2. Semi- structured interviews with solicitors also utilising the terms above.

3. Observation, researcher's perception of inherent level of conflict and impact of such on the process.

4. Combination of the client's view, the solicitor's view and the researcher's view.

**(ii) How does the action of the solicitor affect the level of conflict between the parties, their relationship with each other and their children (Clients own perspective)?**

Method:-

1. Semi structured interviews with clients - continuously monitored.

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<sup>54</sup> Thibaut and Walker (1975) suggest that where conflict is high disputants prefer that the ultimate decision be taken by a third party.



2. Observation of solicitor client conferences.

**(iii) How can the approach of the solicitor be characterised (e.g. adversarial, conciliatory, partisan, responsive)?<sup>55</sup>**

Method:-

1. Observation. Researcher's subjective judgement, noting, for example, the strategies proposed by the solicitor.
2. Semi- structured interview with clients.

(c) Clients' initial expectations and understanding throughout the process

**(i) What factors influenced the client's choice of solicitor?**

Method: -

First interview with client.

**(ii) What do clients expect their solicitor to achieve, and how long do they expect their case to last?**

Method.:-

First interview with client.

**(iii) Do clients feel before the first visit to the solicitor that they have any areas of agreement with their spouse? If so, does the client's view of their prior agreement change after their meeting with the solicitor?**

Method: -

First and subsequent interviews with clients.

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<sup>55</sup> These terms have often been used in descriptions of solicitors working style. Solicitors who are perceived to be needlessly stoking up conflict are criticised for being 'adversarial.' This may still be a common perception and is apparent even in the White Paper on divorce reform. The solicitors' representative body counters that most family solicitors adopt a conciliatory approach to their matrimonial work, taking steps to minimise distress and conflict. The term responsive, is one highlighted by Davis et al (1995) when they found family law solicitors far from being needlessly aggressive, merely dealt with virtually unmanageable workloads by only 'responding' when action was demanded.

**(iv) How often do solicitors find such agreements unrealistic?**

Method: -

Interview with solicitor after their first meeting with the client.

**(v) What do clients understand about the divorce process? Does the level of information given to middle and working class clients vary?**

Method:-

1. Interviews with both solicitors and clients throughout the process.
2. Observation of the meeting between the solicitor and the client.

**(vi) What were the client's views on mediation, would they have felt mediation to have been beneficial in their own case?**

Method: -

Second and final interviews with clients.

**(vii) Have the clients been negotiating directly with their spouse throughout the process, either with or without the support or knowledge of their solicitor?**

Method: -

Interviews throughout with clients and solicitors.

**(viii) How important, if at all, did the clients perceive their understanding of the law to be in working out the final provision?**

Method: -

Final Interview with the clients.

**(ix) Do the clients' perceptions of themselves as either perpetrators or victims affect their input into the process?**

Method:-

1. Clients' perceptions obtained in semi-structured interview.
2. Observation to note how cases of such clients differ from those clients with no such perceptions.

It is perhaps pertinent to reiterate at this stage that the above research questions were intended to guide but not unduly constrain the research. Thus as the research developed certain themes emerged and became prominent, other suggested avenues for inquiry were later discarded.

### **3.6 Access**

There is in fact little clear guidance offered in methods texts regarding the negotiation of access. Shaffir (1991) maintains that the provision of explicit advice is not possible given the particular and individual nature of fieldwork:

“Although certain rules of thumb may be offered, the uniqueness of each setting, as well as the researcher's personal circumstances, shape the specific negotiating tactics that come to be employed.” (p73)

Moreover, the problem of securing access is not one which can be overcome and dispensed with at the onset of fieldwork; it is an issue which needs to be continually addressed throughout the process (Hammersley and Atkinson 1995 p54, Robson 1993 p296). In ethnographic research the field of interest can initially be very wide; the

data sought may originate from a multitude of disparate sources which vary throughout the study. The negotiation of access is thus held to involve more than contact with gatekeepers or sponsors, to discuss the researcher's physical presence in the setting. Hammersley and Atkinson (1995) make the point succinctly,

“Negotiation here takes two different but by no means unrelated forms. On the one hand, explicit discussion with those whose activities one wishes to study may take place, much along the lines of that with sponsors and gatekeepers. But the term ‘negotiation’ also refers to the much more wide-ranging and subtle process of manoeuvring oneself into a position from which the necessary data can be collected. Patience and diplomacy are at a premium here.” (p79)

Much of the success for negotiating the wider type of access that Hammersley and Atkinson describe, may thus depend more on the interpersonal skills of the researcher, than on the merits of the particular project. Shaffir (1991) argues that this is indeed the case.

“Co-operation depends less on the nature of the study than on the perception informants have of the field researcher as an ordinary human being who respects them, is genuinely interested in them, is kindly disposed toward them, and is willing to conform to their code of behaviour when he or she is with them. In short, the skills in using commonplace sociability (friendliness, humour, sharing) are as much a prerequisite in conducting field research as they are in managing our affairs in other settings and situation unrelated to our professional work. (p80)

More specific guidance was discovered in an article by Danet et al (1980), which discusses an unsuccessful attempt by a research team to secure access to lawyer-client conferences, and the reply by Rosenthal (1980) in the same journal. Danet and her colleagues contacted four hundred attorneys by post, regarding a proposed study into lawyer client communication. Of the original four hundred, only thirty one replies were

received, and sixteen of those were refusals to participate, most often citing issues of confidentiality as the prominent reason for their refusal. Of the remaining fifteen, seven were discarded by the researchers, which left eight, only one of which, according to Danet et al, "stood the test of time" (p917). The initiative was left with the lawyers to contact the researchers, when a client was found who agreed to participate. Danet et al discuss in their paper the possible reasons for this failure to secure access to lawyer client interaction, citing an earlier work by Rosenthal (1974) in which he lists four reasons why lawyers may be reluctant to participate in such research,

"(1) the matter of attorney-client privilege; (2) lawyers' reluctance to impose on their clients, to displease them by merely suggesting that they sacrifice their privacy; (3) the lack of incentive for lawyers to co-operate in a venture which could only cause them trouble; (4) the reluctance to be observed. (Rosenthal 1974 cited in Danet et al 1980 p917).

Danet et al state that their experience supports Rosenthal's analysis, furthermore, they argue that there is a need to "make the legal profession more sympathetic to the needs and interests of social science" (p920).

Rosenthal (1980) in his reply criticises Danet et al's "exaggerated sense of professional self-esteem," (p926) advising potential observers of lawyer-client interaction to adopt more humility. Rosenthal highlights the problems with Danet et al's approach. Firstly, Rosenthal maintains the researchers did not provide the lawyers with clear information about what they were seeking. This becomes even more problematic as many lawyers, according to Rosenthal, do not value social science research,

believing that it is merely “belabouring the obvious” or is “knowledge for knowledge’s sake” (p924). Rosenthal offers the following solution,

“To get the attention of lawyers and their co-operation in social research, the first critical step is to define an issue that is meaningful to lawyers: an issue they can understand; an issue they care about; one they feel merits some investment of their time.” (p923)

Without the identification of an issue meaningful to the lawyers, there is little, according to Rosenthal, to tempt them to participate, particularly when they have little to gain and possibly much to lose if sued by the client. Rosenthal closes by referring to a comment made by Danet et al regarding the abundance of studies examining doctor - patient interaction, particularly considering the dearth of similar research into lawyers and clients.

“Whilst it is true there have been hundreds of studies into doctor-patient communication, including many which relied primarily on observation, it is also true that many of these have been done with little regard for the rights or dignity of patients-clients, issues to which lawyers tend to give greater attention.” (Rosenthal 1980 p928)

These two papers were very influential in the approach taken to securing access in this project. A number of decisions were taken as a direct result of issues contained within Danet et al’s and Rosenthal’s papers. In particular it was decided that firstly, the recruitment of solicitors was unlikely to be successful if the only contact was through the post. Face to face communication was required, which is similar to Shaffir’s (1991) point above regarding personal skills. Secondly, the researcher needs to take the initiative, leaving solicitors little to do regarding the research. Thirdly, the research must be made meaningful and understandable for the solicitors. Fourthly, there must be some possible gain for the

solicitors. Danet et al suggest some sort of financial remuneration; this researcher did not feel that was at all appropriate and defined 'gain' in terms of a benefit to the profession. Finally, there needs to be a minimisation of risk for the solicitor and client, this latter point including the vital provision of guarantees that confidentiality be respected.<sup>56</sup>

### 3.6 (i) How access was negotiated in this project

As Danet et al discovered, and as is suggested by the relative lack of observational studies into solicitor client interaction, securing access to observe the confidential meetings between solicitors and their clients, would not be a straightforward task. An early suggestion was to approach the local committee of the Solicitors Family Law Association (SFLA), a body representing the interest of family lawyers, to seek their authority to observe their members at work. After some thought this idea was dismissed, firstly, although if, the SFLA had agreed, this would have ensured wide access to many family solicitors (albeit all members of the SFLA with any accompanying bias), a refusal would have possibly closed all doors and thus risked the viability of the whole project. Secondly, the researcher was concerned that sponsorship by the SFLA could contaminate the research, as there was a possibility that the researcher would be perceived by the solicitors as a 'spy' of the SFLA, checking for

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<sup>56</sup> A full discussion of the issue of confidentiality is provided in 'Legal and Ethical Issues' section 3.9.

adherence to the code of practice, and this may have led solicitors to modify their behaviour.

In the event it was decided to approach a locally well known family solicitor, to whom the researcher had been introduced<sup>57</sup> at a recent interdisciplinary conference. The ensuing discussion between the researcher and the solicitor confirmed his interest in the divorce process, and his regard for social science research. An appointment was made with the solicitor, at which the research might be discussed, and his advice sought. In the event a very productive meeting was had and the solicitor concerned suggested a number of his peers, whom he felt might be willing to co-operate. Moreover, the solicitor suggested that his name might be used in the initial approach to the solicitors as a recommendation for their participation in the research. The study accordingly had a sponsor.

The sponsoring solicitor provided a list of five legal practices which could be approached; a sixth firm was suggested by one of the research supervisors through her contact with one of the partners.

Much thought was devoted to the letter which would be the first contact with the solicitors. After a number of drafts the letter was shown to the sponsoring solicitor for approval before being sent to the nominated practitioners. University headed note paper was used in order to create

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<sup>57</sup> The researcher was introduced to this solicitor by one of her researcher supervisors. Researchers are advised to exploit personal contacts in this way (Fielding 1993 p 159).



an appropriately professional image, and to dispel any notion that this was part of an under-graduate dissertation.

The letter (see Appendix seven)<sup>58</sup> was composed with the earlier points made by Danet et al and Rosenthal in mind. The letter opens by referring to an area of concern to many family lawyers at the time, the passage of the Family Law Act, which contained within it measures to divert potential clients from lawyers to mediators. The research, therefore, covered a topic which was considered by most solicitors at that time to be very important. Moreover, solicitors believing their service to the divorcing public was in many cases the most appropriate, were likely to welcome a study which might publicly support their convictions. There was, therefore, a potential 'gain'<sup>59</sup> for the profession as a whole, should the research findings support their case. The reference to the journal 'Family Law,' was included as this journal is widely read by both practitioners and academics, and any resulting article would therefore reach what lawyers would consider to be the appropriate audience. The letter continued by outlining exactly what would be involved, on a practical level, should the solicitors agree to participate, and contained assurances regarding confidentiality. As a form of reassurance the third paragraph contained the names of two of the PhD supervisors,<sup>60</sup> who were also known to members of the local legal community, through their membership of the

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<sup>58</sup> The letter addressed to the legal practice suggested by the research supervisor differed only in that all reference to the sponsoring solicitor was deleted and in its place the name of the academic concerned was inserted.

<sup>59</sup> Robson (1993) also comments on the need to ensure that research participants benefit in some way from their inclusion in the study (p297).

<sup>60</sup> Professor Shapland who has been responsible for much of the supervision of this project, joined the supervisory team after the composition of this letter.

Local Family Court Forum.<sup>61</sup> Enclosed with the letter was a separate sheet containing a list of the original research questions. Finally, the letter closed by informing solicitors that the researcher would contact them the following week, thus removing the initiative from the solicitors. On receiving and reading the letter, the solicitors therefore had nothing further to do.

The researcher initially telephoned the solicitors the following Tuesday. The beginning and end of the week were deliberately avoided, as these can often be very busy times, and the solicitor might therefore be more likely to refuse. Actually getting to speak to solicitors themselves takes both time and persistence, however, it was felt to be imperative that contact was made with the solicitor concerned, as opposed to communicating through a secretary, and so the researcher persisted, often telephoning in excess of ten times a day.<sup>62</sup> Having successfully negotiated that minor obstacle, the researcher, in her telephone conversation with the solicitor, further outlined the project and, preventing the solicitors from coming to a premature decision, suggested a meeting in which the project could be discussed in more depth. The personal approach was considered vital.

As indicated above, the decision over whether to participate in a research study may be influenced as much by the potential subject's perception of

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<sup>61</sup> The local Family Court Forum is an inter-disciplinary group which holds regular seminars and discussion on family law matters.

<sup>62</sup> The researcher insisted that it was her who telephoned the solicitors again, rather than allowing them to return the call; she felt that by minimising any extra work or reliance on the solicitors, she was more likely to ensure acquiescence.

the researcher as a person, as by their interest in the research topic. Therefore particular attention was paid to appearance, dress and manner.<sup>63</sup> A solicitor commented later that appropriate dress had been an important consideration in allowing the researcher access to solicitor client conferences.<sup>64</sup> The researcher also suspects that gender may have had a positive impact in securing access. This study will indicate that clients of both genders often prefer a female solicitor when dealing with the sensitive and personal nature of marital disputes; similarly the solicitors may have felt that the presence of an extra female in the room would be more acceptable to such clients than the presence of an additional male.<sup>65</sup>

At the meeting with the solicitors, more information was given regarding the project. In actual fact the solicitors appeared more concerned with the practical aspects of observation, for example where would the researcher sit, and reassurances regarding confidentiality, than with further queries regarding the nature of the investigation. These initial contact meetings with the solicitors also turned out to be a source of data in their own right, as solicitors talked at some length on their views of family law practice. The encounter also provided an opportunity for the researcher to

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<sup>63</sup> This is where Rosenthal's comment on appropriate degree of humility proved useful.

<sup>64</sup> The observer will be seen by the clients, at least initially, as a representative of the solicitor's firm. It was important therefore that dress created an appropriately professional image.

<sup>65</sup> Hornsby-Smith (1993 p57) refers to the impact of gender of negotiating access.

convince the solicitors that she had an adequate knowledge of the law regarding the redistribution of finance and property on divorce.<sup>66</sup>

In the event, in all cases where access was sought, it was agreed to (a success rate of one hundred percent!). Such co-operation was better than had been expected and mirrors Shaffir's (1991) experience, who comments, "despite my anxieties and fears that I will be rejected, people are more co-operative about participating in the research than I anticipate." (p72) In fact two of the firms who agreed to participate were not included in the study, as the amount of extra data generated would have been more than could be managed by a sole researcher (within a limited time span).

The initial contacts in each firm were not in all cases the solicitors finally involved in the study. In two cases the 'gatekeeper' was a senior partner, who in turn nominated his junior colleagues, 'who dealt with more legal aid work,' as participants. An ensuing difficulty with this can be that although one has agreement from those in authority, the actual participants may not be as willing. In short, "gatekeepers' approval of the research does not guarantee that co-operation will be forthcoming from others in the settling..." (Shaffir 1991 p75). In this present study there was one such unwilling participant. This junior solicitor effectively concealed her unwillingness, but after a few weeks, it was noted that there had been no referral of cases. The researcher chased this up with

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<sup>66</sup> Lofland and Lofland (1984) urge the researcher to 'have enough knowledge about the setting or persons you wish to study to appear competent to do so.' (cited in Robson

the solicitor's secretary, and was assured that no suitable cases (financial and property disputes) had arisen. A few weeks later the researcher did undertake an observation with this solicitor. However, it became clear that this opportunity had only arisen as a result of the solicitor's regular secretary being absent. It was apparent to the researcher, without any explicit dialogue being exchanged on the subject, that this solicitor did not want to be observed, and had used her secretary as a block. The researcher decided to not proceed any further with this particular solicitor. The opposite situation arose when another junior solicitor offered access to various documents, access which was later withdrawn by the senior partner<sup>67</sup>.

A further complication which arose, was that of a personal sense of obligation on behalf of the researcher towards the participants. Fielding comments on this issue, "Observers often feel bound to help members in exchange for their tolerating the research..." (p160) The most striking example from this study was, when the author of the research became the victim of a road traffic accident, she felt obliged to instruct a solicitor<sup>68</sup> from the sponsors' firm, to act for her, in her personal injury claim. On a separate occasion the researcher had to resist the temptation to offer her services as a baby-sitter to one of the clients!

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1993 p297)

<sup>67</sup> Access to these documents had not been sought by the researcher, the solicitor was merely attempting to assist the researcher, beyond what she was authorised to do. Hammersley and Atkinson (1995) comment, "even the most willing informant will not be able, to divulge all information available to him or her." (p79)

<sup>68</sup> This was not the same solicitor, just the same firm of solicitors.

The solicitors, who were themselves participants in the research, acted as 'gatekeepers' to the clients. It was left to the solicitors to decide how they would like clients to be approached. Two of the solicitors preferred to obtain the clients' consent over the telephone prior to the initial appointment. All the other solicitors merely asked their secretaries to inform the researcher when a new divorce client was booked in.<sup>69</sup> The researcher arrived at the solicitors' office some fifteen minutes before the appointment, the solicitor then introduced the researcher to the clients, and gave the necessary assurances regarding confidentiality.<sup>70</sup>

The researcher was unsure as to how readily clients would agree to participate. In the event, only two refusals were ever made, and one of these changed her mind at the end of her first interview with the solicitor.<sup>71</sup> As Shaffir (1991) states, "People who believe they have important stories to tell are usually eager to share their experiences with willing listeners."(p76) Solicitors also predicted that clients would value the opportunity to be able to talk to someone outside of their circle, and this did indeed prove to be the case, clients almost without exception commenting that they had appreciated having someone to talk to who

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<sup>69</sup> In many cases, there was not sufficient information to be certain that the clients were seeking a divorce and that there were financial and property issues to resolve. Therefore the researcher had to sit in and observe cases which could not be included in the study. However, these occasions could still provide a useful insight into the solicitor's style of work, and therefore there was still a potential gain from the experience.

<sup>70</sup> The researcher suspects that more clients were encouraged to participate in the research as a result of the solicitor's introduction. Clients are perhaps inclined to trust their own solicitor and further are aware that solicitors are unlikely to risk a negligence claim, and were therefore reassured as to the degree of risk to themselves as participants.

<sup>71</sup> However, the case was not followed as the first crucial meeting had been missed.

wasn't involved. Accordingly, there was some benefit for the clients in participating in the project.<sup>72</sup>

The approach described above to securing access to this previously unobserved field is not without disadvantages. Chief amongst these concerns the question of whether the reliance on a single sponsor, for three of the four firms, biased the sample. In particular, were the solicitors part of a group who adopted an untypical conciliatory approach to matrimonial work? In practice, the researcher found quite a variance in the solicitors' individual styles, but, in the interests of balance took action to recruit a solicitor who had a reputation for a more adversarial approach.<sup>73</sup>

When attempting to secure access to a previously closed field, one cannot aspire to the obtaining of samples completely free from bias or other contaminating factors. As Sarat and Felstiner (1995) wrote of their study, "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." (p9)

In short, each researcher does the best they possibly can in the circumstances they are faced with. Hammersley and Atkinson's (1995) conclusion is worth restating at this point.

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<sup>72</sup> Potential gain for the research participants is one of Rosenthal's points above. See also Robson (1993 p 297)

<sup>73</sup> A solicitor adopting such strategies is referred to as a 'shark' by Maclean and Beinart (1999)

“Negotiating access is a balancing act. Gains and losses now and later, as well as ethical and strategic considerations, must be traded off against one another in whatever manner is judged to be most appropriate, given the purposes of the research and the circumstances in which it is to be carried out.” (p74)

### **3.7 The pilot**

Pilot studies are an invaluable mechanism for checking out and adapting, where necessary, the research design. In this project a pilot study was undertaken in the firm of the sponsoring solicitor. The data obtained, however, were incorporated into the substantive study. Clients recruited at this early stage had their cases followed to conclusion. There would be little justification in discarding the material obtained in these initial observations, Robson (1993) maintains that in a case study the pilot does not merit treatment purely as an assessment of the viability of the research design.

“Case studies have sufficient flexibility to incorporate piloting within the study of the case itself. The effort needed in gaining access and building up acceptance and trust is often such that one would be reluctant to regard any case study as a pilot.” (Robson 1993, p301)

The following aspects were considered during the pilot stage of the research:-

1. How to approach the clients. As a result of experiences in the pilot study, it was decided it would be better for the solicitors to seek the clients' initial permission to having their case included in the project. The reasons for this decision were two-fold, firstly, solicitors were more comfortable with this, and therefore were more natural, which in turn provided reassurance for the client. Secondly, the solicitors' authority



and assertion of confidentiality carried weight with the clients. The solicitors outlined the research in their own words, and it became apparent, during the pilot, that the researcher needed to reintroduce herself and more fully explain the research, prior to the first client interview. It was crucial that clients understood the purposes of the study, both for ethical reasons,<sup>74</sup> and for the validity of the research, for example, the researcher was concerned that in some cases she would be perceived by the clients as a 'market researcher' acting on behalf of the solicitor's firm, this could have had implications regarding the responses obtained in the interviews.

2. What role should the researcher adopt? During the pilot study the researcher was able to experiment with different styles. An aim was not to be identified by either participant group, that is the solicitors or the clients, as being aligned to the other.
3. The most effective way to take notes. This was a very important aspect of the pilot process. Until actually involved in an observation, one cannot anticipate how much of what goes on, one is able to note. During the pilot the researcher developed an individual shorthand style.
4. Where should the observer sit? The researcher did not want to sit in the direct line of vision between the solicitor and client, as such would have been too intrusive and possibly distracting. On the other hand it was also important to be visible, the researcher having decided to be open about the research, did not want to be scribbling notes sitting

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<sup>74</sup> See also the discussion on informed consent in 'legal and ethical Issues' section 3.9.

behind a filing cabinet! In the event, most often the researcher was placed in the middle of the room against the wall, thus half way between the solicitor and the client, clearly visible, but not intrusively so.

5. Do the interview schedules 'work'? The interview schedules, for use with both the solicitor and client after the initial appointment, were modified a number of times.<sup>75</sup> Some questions were clearly not understood and so were rephrased. In addition the schedule was expanded as the observation had revealed new areas of inquiry. Jorgensen (1989) succinctly outlines the thought process the researcher went through, which resulted in amendments to the interview schedules "After a reasonably short period of observation, your questions would be re-evaluated. Did they lead to relevant observational materials? Were they relevant to the insiders' perspective? Have additional questions emerged from observation?" (p34). In addition to amending the actual questions, the researcher also found that she needed to improve her interviewing technique. Possibly through feelings of nervousness, the researcher felt that she came across as rather constrained and unnatural. Deciding to stick less rigidly to the actual words in the schedule appeared to lessen this difficulty quite considerably.
6. How long would it take to recruit sufficient clients? The number of new clients contacting each firm would vary according to factors such as the firms' size and profile, and therefore this was not an aspect which could adequately be explored in the pilot. The issue to resolve in the

pilot study, concerned the question of how readily would clients agree to become involved in the project. The sponsoring solicitor advised that if anyone were to refuse, it would be more likely to be those clients from a middle class background. The pilot however, revealed that the middle class clients seemed to value the opportunity to talk even more than their working class peers. Comments made to the researcher by some of the middle class clients in the research, have indicated that the middle class may lead more 'privatised' lives, and are often geographically removed from their kin, accordingly, there are less people with whom they feel happy to confide. Such is of course mere speculation on the part of the author; contemporary research may refute such a suggestion.

Linked to the question of how long it would take to recruit sufficient clients is the issue of 'wasted visits.' This refers to those occasions when the researcher went to the solicitors to observe a new client, only to find that the case could not be used, as it did not involve divorce. This issue did not actually arise in the pilot, as the solicitors' secretary (very experienced) was happy to ask the potential clients in some detail about what they needed legal advice for. However, in some of the other legal firms, the secretaries were not happy to ask potential customers such detail, and so the researcher observed consultations on children issues, and more often, cohabitees' disputes, which were all beyond the scope of this study. Another cause of 'wasted visits' occurred when clients failed to turn up for appointments. This seemed

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<sup>75</sup> The clients' interview was modified five times, the solicitors' version three.

to happen most in the largest, and most well known firm in the study. The author suggests that people, when angry with their spouse may be more likely to contact this high profile firm, as a tactic to either threaten their spouse or reassure themselves, perhaps with little genuine intention to pursue divorce.

7. Where to carry out the interviews with the clients? In other words what would be the most appropriate physical location in which to conduct the client interviews? The solicitor in the pilot generously provided access to a small library, for this purpose, in which the researcher and client would not be disturbed. It became clear however, during the pilot, that this was not ideal, there was too much association with the solicitor, and the researcher felt that clients were not as open and relaxed as they could have been; therefore, a decision was made to interview the clients away from that environment whenever possible.
8. How to arrange the follow up observations. This issues further divides into two related concerns, how to obtain the client's consent, and how to manage the more practical aspects of ensuring the researcher would be informed every time the client made a subsequent appointment. The best time to seek the client's consent to the case being followed throughout, was found to be at the conclusion to the first interview. The second aspect, proved more problematic. During the pilot, a scheme was developed whereby the researcher, after having obtained the necessary consents in the client interview, gave the solicitor a note to place in the front of the client's file which would alert anyone viewing the file, that this was a case in which the researcher needed to know of any appointments. However, this

strategy would not work on its own, as the file might only be viewed minutes before the client arrived. Accordingly, a list of the participating clients was placed with the solicitor's secretary, to remind her that when she received a request for an appointment from those named on the list, to also let the researcher know. This met with limited success. Some secretaries are more vigilant than others. In the pilot study the secretary did sometimes forget to inform the researcher. The researcher then took to telephoning the secretary to check whether any of the participating clients had booked in to see the solicitor. This was a little difficult, as it was important to the success of the access strategy not to alienate the secretaries; secretaries had become the 'gatekeepers.' Eventually, it was decided that this last tactic could only be employed occasionally.

### **3.8 The sample**

Sampling considerations do not often receive as much attention from those following a case study design, as would be the case if the alternative approaches of experiment or survey were being employed. (Robson 1993, p154) In these latter two strategies sampling forms a central component in the aim for statistical generalisability, case studies, however, seek to establish external validity or credibility by other means, as already discussed.

Arber (1993) summarises,

“Important sociological work is often based on relatively small samples drawn from one local area. Although these samples may attempt to be representative of specific category of people, they are not probability samples from which precise inferences can be made about the characteristics of the population from which the sample was drawn. Using a probability sample is often unrealistic for small scale or qualitative research,” (p73)

This research project, based on a ‘relatively small sample drawn from one local area,’ is aiming for a deep understanding of a social process, and is employing a case study strategy. In this current study ‘the sample’ can be further divided into three separate components; the legal firms, the solicitors and the clients.

### 3.8 (i) Legal firms

Six legal firms were contacted regarding this research and all agreed to participate. The sponsoring solicitor was aware of the research focus on legal aid claimants, and suggested firms which specialised in work of this nature, in addition the researcher asked the solicitor for contacts in legal firms which had a more middle class client base, to enable comparisons to be undertaken. The six firms approached varied along the lines of size, location and client base. In the event it was decided to limit the fieldwork to four legal firms. Of the two firms not included, one had many of its referrals from a women’s refuge; although domestic violence as an issue would inevitably arise within the cases observed during the substantive fieldwork, it was felt that working in a firm which specialises in work of that nature, might bias the small sample towards the more violent relationships. As the fieldwork progressed it became apparent that the

researcher would be more effectively engaged in monitoring four firms than mismanaging the monitoring of five firms, with the increased possibility of clients' follow up appointments coinciding with each other. Thus a fifth legal firm approached was not in the event included in the study.

A brief profile of the solicitors' firms participating in the research is given below. In order to prevent identification, information regarding the number of partners has been restricted to groups.

Firm A (Involved in Pilot Study).

Number of Partners: In the 2-5 group.

Number of offices: One.

Location: City Centre, 'Legal Quarter.'

Number of solicitors participating in the research: One.

Number of clients participating in the study: Eight<sup>76</sup>

Notable Characteristics: Small firm, informal atmosphere. Against significant expansion as they believe that their shared commitment to personal service and client care would be at risk in a larger concern with more partners.

### Firm B

Number of Partners: In the over twenty group

Number of offices: 'Centres' in several major conurbations.

Location:<sup>77</sup> City Centre 'Legal Quarter.'

Number of Solicitors participating in the research: Five (including one trainee).

Number of Clients participating in the study: Twelve.

Notable characteristics: Large, high profile firm, committed to further geographical expansion. A major legal aid provider.

### Firm C

Number of Partners: In the 5-20 group.

Number of Offices: More than one

Locations: City Centre: 'Legal Quarter' and 'business areas' of an affluent suburbs.

Number of solicitors participating in the research: Two.

Number of clients participating in the study: Ten.

Notable characteristics: Medium sized firm, attracting 'middle class' clients.

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<sup>76</sup> As this was a small practice with only one Family Law solicitor, it was decided to only recruit eight clients and recruit twelve clients from Firm B, in which five solicitors participated in the research.

<sup>77</sup> Used in the fieldwork for this study.



## Firm D

Number of partners: In the 5-20 group

Number of offices: More than one

Locations: out of the centre deprived areas of the city.

Number of solicitors participating in the research: Two.

Number of client participating in the study: Ten.

Notable characteristics. One of the larger legal firms in the area of the study, mainly involved in private client work. A major legal aid provider.

### 3.8 (ii) Solicitors

Ten solicitors participated in the research, three males and seven females. A higher number of females were included in the research because female lawyers are over represented in both family law and the junior levels of the profession (Maclean et al 1998, McGlynn 1998). The length of time the solicitors had been practising ranged from three to thirty years. One trainee solicitor also had some limited involvement in the study.<sup>78</sup> The sample therefore included both junior solicitors and their more senior peers.<sup>79</sup> Two of the solicitors had been trained in family mediation, but only one of those had received any mediation experience beyond the training requirements. Seven, at the commencement of the

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<sup>78</sup> The trainee completed the solicitor's preliminary interview, and was observed whilst interviewing clients regarding their affidavit.

<sup>79</sup> Sarat and Felstiner (1995) acknowledge that a possible bias within their sample of lawyers in that it did not include many senior or high status lawyers (p9).

study, were members of the Solicitors Family Law Association (SFLA).<sup>80</sup> All were family law specialists,<sup>81</sup> spending the majority of their chargeable time on family law matters.

Case study research which may pay less attention to the representativeness of the sample than other techniques, may be criticised for “over reliance on accessible informants” (Robson 1993, p402), thus the informants are those which are available and willing, the exclusion of the unwilling and unavailable being a source of bias. As the ‘sponsoring’ solicitor nominated the practices, and not the individual solicitors, the researcher feels that this is not a criticism which can be justifiably made of this research. In a number of cases the solicitors involved in the fieldwork had been nominated by their senior partners, thus the sample of solicitors was not confined to those were willing and open to being studied, but also included those who might not have been willing had the initial approach been made to them.<sup>82</sup> A possible source of bias within the study, however, is that all the solicitors were family law specialists. It may have been beneficial to examine the process as carried out by non-specialists. However limited resources did not permit an extension of the work to include that facet and such exploration may have to be undertaken by others or by this researcher at a later time.

Further details of the solicitors involved in this study will be provided in the results chapter as appropriate.

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<sup>80</sup> Significant, because of the SFLA’s conciliatory code of practice.

<sup>81</sup> The definition of a family law specialist being adopted in this study is that provided by Maclean et al (1998). Maclean et al describe a family law specialist as a practitioner who spends at least fifty per cent of their fee earning time on family work.

### 3.8 (iii) The clients

It was decided only to recruit one of the parties to each dispute for the fieldwork. As this was a study being conducted solely by one researcher, it was felt there could be a risk of the parties attempting to draw the researcher into the conflict. In addition clients might be less likely to be honest and open in interviews, knowing that the researcher was also speaking to their (ex-spouse). In short, the interview could be seen as an opportunity to put their side, criticise their spouse or justify their own behaviour. Davis et al (1994) considered that interviewing both parties might deter some from participating, but considered this was a price worth paying in order to hear both sides of the dispute (p299).<sup>83</sup> This researcher would submit that both parties might participate, but it is not possible to ascertain whether the responses obtained are as open as they would have been, had there been no contact with the opposing side. Davis et al's study, involving as it did more than one researcher, may have been able to overcome the difficulties referred to above where each party is interviewed by the same person. On a more pragmatic level, the inclusion of both disputants (and their solicitors) would have necessitated reducing the number of cases monitored to about twenty in order to be manageable. Therefore for the all reasons outlined above, only one party in each dispute was monitored. Having made the decision to only recruit

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<sup>82</sup> One solicitor who was unwilling to participate devised her own strategies to avoid being involved in the study. See section 36 Access, where this instance is outlined.

one side for each case, action was taken to ensure that the researcher did not in fact follow both sides by default (for example, if a husband or wife of one of the clients participating in the research, approached one of the other solicitors in the study). The researcher kept the details of each case being followed on a small card. When alerted by a legal firm that a new client had an appointment regarding divorce, the researcher was thus able to check the name and other details to ensure that she was not already monitoring that dispute.

Forty clients participated in the research. The researcher had to achieve a balance between monitoring enough cases to be able to claim some authority for the study, whilst not pursuing too many cases for one researcher to manage effectively. Forty cases seemed to fit this requirement;<sup>84</sup> moreover this number was not incompatible with existing research. For example, Sarat and Felstiner (1995) who employed very similar methods to those in this study monitored forty cases, Davis et al (1994) followed eighty cases, but this did not include any observations of solicitor client conferences, Ingleby (1992) monitored the files of sixty cases and Griffiths (1986) reports investigating one hundred divorces but observed twenty eight first meetings between lawyer and client, thirty three later meetings and eleven post divorce making seventy two observations in all.

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<sup>83</sup> Moreover Davis et al report that of the eighty cases, preliminary interviews were carried out with the wife only in forty eight cases, with the husband only in fourteen cases and with both spouses in the remaining eighteen cases (p298)

<sup>84</sup> Oakley's (1974) seminal study, "The Sociology of Housework," was based on interviews with forty individuals, Oakley declares, "For the goals of mapping out an area, describing a field, and connecting events, processes or characteristic which appear to go together a sample of forty individuals is certainly adequate." (p33)

As gender might have an impact on solicitor client interaction, clients from both genders were recruited; the sample contained fifteen male and twenty five female clients.

Social-economic class was originally one of the central aspects of this investigation. It would not be possible to state with any conviction, that certain characteristics of a dispute may be influenced by a client's social class, without having a broad representation of clients from different social class backgrounds. Each client was therefore categorised regarding their socio-economic status. Sixteen of the clients were recorded as middle class and twenty four, working class.<sup>85</sup> Similarly, a note was made for each client over whether they had claimed legal aid or not. This was relevant to the research focus as under the reforms contained within section 29 of the Family Law Act, legal aid claimants would be subjected to a mandatory mediation assessment, before being awarded financial assistance to fund legal representation. Fifteen of the clients were legally aided and twenty five were privately funded.

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<sup>85</sup> The researcher assigned class on the basis of the Registrar General's six point scale, whereby class is allocated on the basis of the occupation of the head of the household, or chief wage earner. Rose et al (1997) propose a new eight point scale which is still based on occupation but is argued to be a more accurate portrayal of today's society, including as it does long term unemployment and unskilled service sector work. Those in occupations included in the registrar general's scale of 1 - 111 (non-manual) were included in the middle class sample and those from classes 111 (manual) - V were included as working class. The author acknowledges that allocating class on a economic basis, and linked to the concept of head of household is not ideal but, felt that as the research was concerned with legal aid claimants, ( a means tested form of financial assistance) as well as the experiences of working class clients, economic criteria would not be inappropriate.

Table 3.1 below, summarises the characteristics of the client sample.

**Table 3.1 Profile of Client Sample**

	MALE		FEMALE		
	15		25		
Social Class	Middle Class	Working Class	Middle Class	Working Class	Total
	5	10	12	13	40
Funding	Legal Aid	Privately funded	Legal Aid	Privately Funded	Total
	2	13	12	13	40

When recruiting clients for this study, at the beginning of the fieldwork, the researcher was initially more concerned with actually gaining the consent of sufficient individuals to make the study viable, than of ensuring that the sample was representative. However, in the event, as the table indicates above, a reasonable degree of balance regarding such aspect as gender, social class and legal aid was obtained by recruiting clients by this method, that is clients were recruited as they contacted the participating solicitors regarding divorce.<sup>86</sup> Had an obvious bias appeared whilst the fieldwork was ongoing, for example too

<sup>86</sup> This approach to sampling is similar to that described by Robson (1993) as "convenience sampling" in which the "nearest and most convenient persons" act as respondents, until a sufficient number have been recruited. (p141). Although in the case

many middle class clients, the researcher would have taken action to limit recruitment of certain clients, although this would have been problematic, necessitating as it would the obtaining of information regarding the client, prior to their first visit to the solicitors.

Research already existing in this field illustrates some of the problems faced in attempting to secure a balanced and representative sample. For example, Davis et al (1994) acknowledge that a bias may have been introduced into their study, as a result of obtaining their client sample from ancillary relief applications to the court, cases which were settled by solicitors without invoking the court were excluded (p298). Similarly, McEwen (1995) remarks of Sarat and Felstiner's (1995) research, that although little information is given about the clients in the study the dialogue indicates an over representation of the articulate and well-educated. Sarat and Felstiner also relied on the solicitors to nominate clients. As an aim of this study was to consider the social context in which solicitor client interaction occurs, and to observe a number of cases which may reflect the variety of divorce disputes which are negotiated by solicitors everyday, it is believed that this aim has been successfully achieved.

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of the present study a small number of clients were recruited from four different legal practices.

### **3.9 Legal and ethical issues**

This research has involved the collating of personal data from individuals as they proceed through the divorce process. The researcher was thus privy to confidential communications which included intimate details of clients' personal lives, and particulars of their financial background. Moreover, this information was gathered at a time when these persons were often at their most vulnerable. Consequently, legal and ethical issues assumed great significance and a great deal of time was, therefore, devoted to the consideration of these issues in the planning stage of the research design. Some of the matters arising which posed ethical concerns had been foreseen; others had not been anticipated. When considering such issues, the author broadly adopted a consequentialist stance, that is the resulting overall consequences of an action were considered in light of the eventual utility for the divorcing population. This is not to state that individual rights would be disregarded in pursuit of some unrealised, but anticipated future good for the divorcing population as a whole, merely that all such factors would be included in the equation. The researcher was guided by the Socio-Legal Studies Association's (SLSA) statement of ethical practice. A copy of the statement is provided in appendix 8. This section outlines the many ethical considerations which arose during the study and describes the strategies devised, and the decisions reached, in the light of those considerations. The discussion will be divided into five distinct areas; confidentiality, informed consent, avoidance of detriment, ensuing benefit and legal issues.



### 3.9 (i) Confidentiality

Confidentiality, in this study, is both a legal and ethical issue. As regards the legal aspects, the communications between solicitors and their clients are protected by legal professional privilege.<sup>87</sup> Solicitors, under their own professional code of conduct may not breach that confidentiality, which governs solicitor client communication, without the client's consent. In order to be able to undertake this study, which would involve the researcher openly observing the privileged meetings between solicitors and clients, both solicitors and clients had to receive categorical guarantees of confidentiality. Assurances were given to solicitors both verbally and in written form, the original letter seeking access expressly stated that, "strict confidentiality would be ensured."<sup>88</sup> Clients received verbal assurances, firstly from the solicitor, and again from the researcher, in the interview held immediately after the first observation.

Confidentiality was also an ethical concern. As already stated, the very nature of divorce involves clients, often in an emotional and vulnerable state, communicating with their solicitors information regarding their personal relationships and financial backgrounds, which they may not have previously divulged to anyone.<sup>89</sup> Additionally, in a number of cases the spouse was not aware that their partners were seeking legal advice

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<sup>87</sup> Research data however does not enjoy legal privilege; this is considered under the sub heading Legal Issues below.

<sup>88</sup> See Appendix seven.

<sup>89</sup> This seemed to particularly be the case with some of the middle class clients in the sample, who appeared to leave more 'privatised' lives, telling in the interviews of their unwillingness to share the details of their relationship breakdown with either family or friends.

regarding divorce. A breach of confidence on the part of the researcher could have had serious personal implications for the client concerned, perhaps most obviously in the cases of domestic violence. As a consequence of the legal and ethical issues outlined above, action was taken to ensure that confidentiality was maintained, the measures taken being detailed below.

Section 3.3 of the Socio-Legal Studies Association's statement of ethical practice, advises researchers to consider whether, "it is proper or even appropriate to record certain kinds of sensitive information." In the present study, the researcher deliberately excluded from the note-taking, in both observation and interview, certain categories of information. For instance, no record was kept of the parties' intimate relationship details, beyond the barest information needed for analysis. For example, a long dialogue from a client detailing their spouse's unfaithful behaviour, would be recorded as, 'client enters into dialogue on spouse's adultery.' Similarly, financial information was only recorded in the broadest sense, sufficient to monitor the case. Detailed notes would not be taken of actual figures of assets or debts, but overall indications of whether there was sufficient equity to re-house one of the partners for example, would be recorded, as this was relevant to the eventual outcome of the case. Addresses were never recorded in order to preserve anonymity, and telephone numbers were only noted in the interviews after the clients gave their specific consent for the researcher to contact them in this way.

All data were stored securely, kept in a locked filing cabinet in a room which was locked when not occupied.<sup>90</sup> All the transcripts were handwritten.<sup>91</sup> The researcher felt she could not ensure confidentiality had she processed the data on the university's personal computers (PCs). All the PCs were networked and therefore not secure, moreover all printing was carried out on a printer shared by the whole school, four floors above the researcher's office. Any printing was therefore able to be read by any member of the school staff. The researcher did not feel that merely providing each client with a pseudonym would provide the same level of protection as simply handwriting and ensuring that transcripts were never available for public scrutiny.

The use of pseudonyms does provide some protection, and hence they have been used in this thesis. However, some difficulties remain. It is not possible, for example, to rely on the use of pseudonyms throughout the actual fieldwork. The participants in the study, when communicating with the researcher, did not use pseudonyms, for instance, the legal secretaries would telephone the researcher either at the university or at home, when clients had booked a subsequent appointment, and would readily use the client's real name. The researcher, therefore, had to ensure that solicitors, when ringing the university, only used a direct line, which would only be answered by the researcher, and not the general office line, which would have been answered by a number of different members of staff. A further point regarding the limitations of

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<sup>90</sup> The provision of secure storage is a statutory duty imposed under the Data Protection Act 1998 - see Legal Issues below.

pseudonyms, in the securing of anonymity, concerns the difficulty of removing all the identifying features from the data. For instance, a solicitor might make a particularly pertinent point in an interview, but in the dialogue she describes her legal practice in such terms as it could be identified by people with sufficient local knowledge; merely annotating the quotation with a pseudonym would be insufficient. The SLSA statement of ethical practice (1999) offers the following advice,

“Potential informants and research participants, especially those possessing a combination of attributes which make them readily identifiable, may need to be reminded that it can be difficult to disguise their identity without introducing an unacceptably large measure of distortion into the data.” (para 3.3 ).

Upon consideration it was decided that this risk did not apply to the clients, as the researcher had been able to remove any identifying detail from the transcripts. However, some of the solicitors had made remarks which might have identified them, especially if read by others in the local legal community. As the solicitors had been so definite regarding the necessity of confidentiality, it was decided that any such data could be used in the analysis but any verbatim quotations, which could lead to identification, would be excluded from the thesis.

The Socio-Legal Studies Association’s statement of ethical practice advises the researcher to ensure that academic colleagues, who may have sight of the data, are aware of their obligations towards the maintaining of confidentiality (para 3.3). In the present study no one person had access to the data apart from the researcher. The research supervisors were not told of any of the client’s names but were aware of

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<sup>91</sup> Manual notes are now covered by the Data Protection Act 1998 Section 1 (1).

the legal practices in which the fieldwork was being conducted. Similarly, the participating solicitors, apart from the initial sponsor, were not informed of the identification of the other participating solicitors.

### 3.9 (ii) Informed consent - Autonomy

The principle of informed consent relates to an individual's right to self determination (autonomy). A simple but accurate definition of informed consent is "...that the people to be studied by social researchers should be informed about the research in a comprehensive and accurate way, and should give their unconstrained consent." (Hammersley and Atkinson 1995, p264). The obligation on the researcher could be divided into three separate aspects: information given to the potential participants must be comprehensive; comprehensive in both senses of the word that is, complete in the sense that participants are fully informed, and understandable, from each of the participants' individual perspectives. Finally, participants must have given their "unconstrained consent," that is free from any coercion, from whatever source. It is possible to argue that informed consent is never obtainable in its pure form, as research participants cannot fully understand all the possible implications that may follow from their involvement in a research project, actually prior to the event. However, this perception of informed consent as myth, does not negate the researcher's obligations towards the research participants to ensure they freely give their consent and understand, as far as possible, the implications for themselves.

In the present study consent was obtained from the solicitors, in the meeting held to negotiate access, during which much of the research process, and practical effects were outlined. Two points require further discussion regarding the consent from the solicitors, firstly, concerning the participation of the junior solicitors, and secondly, regarding the adequacy of the information given to the legal practitioners regarding the study. The first point relates to the difficulty encountered when a senior partner in one of the solicitors firms, on agreeing that his firm would participate in the study, 'volunteered' the names of two of his junior colleagues as participants. Although the researcher, when subsequently speaking with these junior solicitors, repeated the same information given to their superior,<sup>92</sup> one could not state with any certainty that their participation was truly voluntary, as ethical codes require. An occasion has already been related<sup>93</sup> in which it became apparent to the researcher that one of the junior solicitors was not willing to participate.

The second point requiring further discussion, relates to the aspect of comprehensive information. Solicitors had not been fully informed of all the areas of inquiry the researcher wished to explore. The researcher's justification for this is, that had the solicitors been informed that certain aspects of their behaviour were under scrutiny, there was a real danger that they could have modified their behaviour accordingly, and thus created a misleading picture, invalidating the research, and ultimately

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<sup>92</sup> The junior solicitors were also given a copy of the original letter seeking access, see appendix 7.

lessening the eventual utility of the research for society generally. The above decision can be seen as an illustration of the researcher's consequentialist approach to ethical questions.

Different issues arose when securing the consent of the clients who were to participate in the study. Initially, each client's consent was obtained by the solicitor whom they had their first appointment with. A disadvantage of this was that the solicitors' explanations could be so simplified and brief as to be distorted. Often, the researcher felt that the description given to the clients sounded more like a market research study into that firm's client care. The researcher therefore, took great care to ensure that a clear and more detailed account of the research was given to the clients prior to their first interview. The reader will note that, by the time the researcher had obtained more satisfactory consent, an observation had already been carried out. This is an ethical issue in itself. In point of fact, however, no clients did retract their consent at the point of being fully informed. Thus one can speculate that all those giving their consent to the solicitor, after the rather limited explanation, would have still consented had they received the fuller explanation earlier. However, there is no way of knowing whether this would in fact, have been the case.

Although the researcher took care to explain to the clients the aims of the research, and in particular the implications for themselves, it was not possible to be entirely confident that clients had fully understood. Often

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<sup>93</sup> See section 3.6(i).

clients were, quite understandably, more concerned with their own position regarding the divorce, than to have more than a passing interest in an academic research project. It is pertinent to note here that, for the client, the greatest value from the project was possibly the fact that they had someone to talk to about their experience. Secondly, some clients were not very articulate. The researcher therefore simplified her explanation accordingly. This of course can lead to distortion, although every effort was made to avoid this. A further way to enhance the reality of informed consent is to reaffirm the consent throughout the project, and this in any case is a recommendation for longitudinal studies, such as the present project, under the Socio-Legal Studies Association's statement of ethical practice, which provides the following guidance.

"It should also be borne in mind that in longitudinal research consent may need to be obtained on more than one occasion. It may be necessary to regard consent not as a once-and-for-all prior event, but as a process subject to renegotiation over time."(para 3.2)

This advice was followed with both the solicitors and the clients, and the repetition also served the purpose of encouraging a fuller understanding of the project by participants involved.

Finally, the researcher experienced some unease when she recorded comments made by the solicitors and clients, at times which would not be seen by the participants as part of an interview. For example, with the solicitor whilst rearranging the office furniture after an observation, or with a client on the way to the café. Some rich and valuable data were collated in this way. The issue concerns whether informed consent had



been obtained to record such comments. Hammersley and Atkinson (1995) describe this situation and provide some assurance,

“Even when the fact that research is taking place is made explicit, it is not uncommon for participants quickly to forget this once they come to know the ethnographer as a person. Indeed, ethnographers seek to facilitate this by actively building rapport with them, in an attempt to minimise reactivity. Certainly, it would be disruptive to continually issue what Bell (1977:59) refers to as ‘some sociological equivalent of the familiar police caution, like “Anything you say or do may be taken down and used as data...”’” (p265)

Certainly, one can imagine the effect of such a caution on the participants. In the present study, both solicitors and clients were explicitly told when the consent was obtained, that such ‘throw away comments’ would be noted and kept in their file. Nevertheless, the point remains that without reiterating this knowledge almost constantly, one cannot be certain that on each occasion consent was actually given.

### 3.9 (iii) Avoidance of detriment -Non-Maleficence

The ethical principle of non-maleficence concerns the obligation on the researcher to ensure that the research participants do not experience any physical or emotional detriment, as a consequence of their involvement in the research. The SLSA’s statement of ethical practice contains the following reference,

“Socio-legal researchers have a responsibility to ensure that the physical, social and psychological well-being of research participants is not adversely affected by their research. Members are not absolved from this responsibility by the consent given by research participants.” (para 3.1)

This obligation towards the research participants was of particular significance in this study.

The researcher envisaged that telephoning client at their home could certainly be problematic. The majority of clients offered their telephone number willingly to the researcher, that is they 'consented' to being contacted by the researcher on their home telephone. The researcher however, only used this facility with extreme caution, as she considered there were a number of inherent dangers, not anticipated by the research participants, which could follow from such contact. Firstly, there was concern that any children present should not overhear a telephone conversation between the researcher and their parent. The parties themselves should decide exactly the information they wished to impart to their children., It would be most unfortunate, although not unlikely, for the client to make comments in a telephone conversation, that with hindsight she would have preferred the children not to hear. Secondly, clients were never contacted at home when they had not yet separated from their spouse. One can envisage how a stressful situation could be made worse by the researcher contacting one of the parties in the home, to hear one side's account of the impending divorce. Thirdly, in the early stages of some cases, the spouse was not yet aware of their partner's intention; the potential to harm is in such cases immense.

In cases of domestic violence the need for vigilance is particularly acute. In one case, where domestic violence had occurred, the perpetrator, despite the existence of an injunction, would still occasionally visit the

marital home. The client (the victim of the abuse) reported that on these occasions she would try to keep the situation calm and would avoid any reference to the divorce; such talk would anger the husband who was hoping for reconciliation. An ill-timed telephone call regarding the divorce could have provoked an assault. This may have been unlikely, but considering the worse case scenario, it was vital in order that any risk be avoided.

An issue arose which the researcher had not anticipated when one client stated that, although he was willing to participate in the study, he did not want to be contacted at home. The client was concerned that his estranged wife might think he was having an affair if he received telephone calls from an unknown female. The client was justifiably quite emphatic that no such contact should be made.

Interviewing clients regarding this topic required great sensitivity; the researcher was concerned that relating details in the interview should not increase the participant's distress in any way. The SLSA statement contains the following advice,

“Members should consider carefully the possibility that the research experience may be a disturbing one and, normally should attempt to minimise disturbance to those participating in the research.” (para 3.4)

Occasionally, the researcher would decline to interview participants in the belief that the already emotional client would be further upset had the interview gone ahead. For example, on a case which was scheduled for a final hearing, the researcher did not interview the client on the day that

the hearing had taken place, as she felt the client would have been too distressed. The data obtained from an immediate response may have been valuable but it was felt the risk of potential harm to the client was too great. The interview was thus delayed for a few days, giving the client chance to come to terms with the experience and the outcome.

Finally, the researcher was aware that talking about the divorce could raise a variety of feelings in the participant. The interviews had to be conducted in such a way as to minimise any negative effect. A supportive, almost counselling style of interviewing was adopted in which the interviewer was extremely careful that the interview would not heighten the distress being experienced by the participant. Had the participants suffered in this way from the interview, not only would this have increased their own suffering, but also have exacerbated the stress for the whole family. The researcher's duty is not confined solely to the research participants, but all those to whom the process might directly or indirectly impinge.

On a more pragmatic level, the researcher had also to consider that she did not negatively affect the solicitors' ability to continue with their work. Hence the interviews following the observations were brief, so as not take up too much time. The researcher was also aware that the solicitors, by allowing themselves to be observed, had accepted no small degree of risk themselves. For example, breach of confidentiality by the researcher could have resulted in a negligence claim against a participating solicitor. On a less dramatic note, anyone allowing themselves to be put under

such scrutiny can be vulnerable, and solicitors were no exception. In the initial stages of the fieldwork, one solicitor commented after the first observation, "I was so nervous, it was worse than an exam!" The researcher therefore adopted a similar approach when interviewing solicitors as she did when interviewing the clients, that is supportive and never critical.

### 3.8(iv) Ensuing benefit - Beneficence

The ethical principle of beneficence imposes on the researcher a positive obligation to do good. This obligation applies to the products of the research, as well as to those directly involved. Concerning the former, the author of this thesis hopes that this research will enhance the level of knowledge regarding the divorce process, and ultimately improve the experience of those resolving such disputes. As regards the latter aspect, the author has experienced some unease; a cursory review might indicate that the participants could expect little in the way of direct personal benefit whereas the researcher, should the study be successful, would benefit substantially in being awarded a doctorate. A consequentialist might argue that the potential benefit for the divorcing population as a whole would justify this limited intervention into people's lives, providing they suffered no detrimental effects. The researcher's unease was lessened a little as she was in fact able to identify some perceptible benefits which accrued to the participants.

Both solicitors and clients appeared to value the opportunity to 'off load' to someone with whom they had no personal involvement. Clients were obviously better off unloading their emotional baggage to the researcher, than doing so with the solicitor, who will charge them £120 per hour for the privilege. The researcher's qualms were lifted a little as many clients remarked how grateful they were to have an opportunity to talk to someone outside of their circle. Less obvious is the benefit for the solicitors, but as the researcher is now aware, practising family law can be very stressful: the clients can be extremely emotional, not always rational, and occasionally relate details which can be very upsetting. Further, it is rare for clients to go away happy. Unlike for example personal injury, there is rarely a winner from ancillary relief negotiations. More often there are two losers; therefore the personal rewards can be limited. The opportunity to talk with someone again from outside but who was also constrained within the boundaries of confidentiality, was reported to be appreciated.

It is perhaps pertinent to consider under this heading an ethical issue which arose during the fieldwork, which generated some debate amongst the researcher's academic peers. The issue concerned a client who appeared to the researcher to be highly ambivalent regarding the divorce. The question which arose was should the researcher, in the post observation interview, suggest that the client seek counselling? Those colleagues arguing that the researcher should suggest counselling, would cite the possible benefit to the participant. Those with the opposite view would state that researchers cannot interfere in people's lives to that

extent; moreover, it was pointed out that solicitors may have refused any further co-operation, had they become aware that the researcher was intervening in such a way. In the event the researcher did not recommend any counsellors to the client and the client did not proceed with the divorce with that solicitor.<sup>94</sup> This instance perhaps provides a useful illustration of how difficult ethical issues can be to resolve.

### 3.9 (v) Legal Issues

Under this heading the author will discuss those aspects of the fieldwork which had legal implications. Legal and ethical are not two distinct categories; there is inevitably much overlap, for example confidentiality as a legal issue, has already been discussed under ethical principles.

One of the first points to note is that research data do not benefit from the protection accorded to solicitor client communication, that is there is no equivalent of the legal professional privilege.<sup>95</sup> Consequently, the researcher could be subpoenaed as a witness, and the data collected, scrutinised in a court of law. The research supervisor had warned the author of this potential risk, and an occasion did arise in which one of the participating solicitors, unhappy about how a meeting with a client had transpired, told the researcher that he had made a note in the client's file of the observer's presence, in anticipation of a negligence claim. This is

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<sup>94</sup> It is possible that the client did proceed with the divorce with another solicitor, however, as this was one of the cases where the researcher would not telephone the client at home, the outcome will never be known.

<sup>95</sup> Para 3.3 SLSA, statement of ethical practice.

perhaps a stark reminder that the need for accuracy, in the recording of fieldnotes and interview data, is not solely for the purpose of satisfying the academic requirements of validity or credibility.

A number of complex legal and ethical issues arose when one of the participating solicitors invited the researcher to attend a court hearing of one of the cases she was following. The researcher was to attend the court, ostensibly as a legal clerk, and record the details of the hearing for the solicitor involved. The offer was made in good faith by the solicitors, who thought the researcher's presence would provide a benefit for the researcher, in that she would be able to observe the hearing, and a benefit for the solicitors, in that they would save the costs involved in sending one of their own employees to attend the hearing. There were a number of clear difficulties which could have ensued had the researcher accepted the offer. In the event, after the receipt of some extremely valuable advice from the researcher's supervisor, the researcher declined the invitation. The reasons for the refusal included legal and ethical as well as practical issues. Firstly, the researcher was concerned how adequately she could take notes which would meet the separate and possibly conflicting needs of both the solicitors and the research. Secondly, data collected in this way, could form part of the solicitor client communication, and thus the solicitors' firm could thus demand access. Thirdly, there could be potential difficulties with the opposing party, should they become aware of the researcher's role, and as a consequence, further harm for the client. Fourthly, the researcher would, had she participated, been engaged in covert research, with all the



ensuing ethical problems that would entail. Fifthly, the researcher could render herself liable to contempt of court, should she later publicly describe the hearing she observed. Finally, the researcher had even more reason to be grateful to her supervisor who had advised her of the above risks, when the client revealed in an interview, that the hearing had not proceeded to plan. At a point in the hearing the client urgently required some specific legal advice, however, the legal clerk accompanying the client, was not able to contact the solicitor. The researcher believes that had she been present instead of the clerk, she would have come under immense pressure to provide some form of guidance. Although the researcher would obviously have had to refuse, the situation would still have been extremely difficult.

Two 'legal' issues which arose, which the researcher had anticipated, concerned the instances where clients sought legal advice from the researcher, and secondly, where solicitors were observed giving incorrect advice to clients. In the former situation, the researcher always advised that clients approach their solicitor and never volunteered any guidance. The latter issue is potentially more complex ethically. However, the researcher observed few instances of solicitors proffering incorrect advice and on each occasion they were minor errors. An occasion from the fieldwork will serve as an illustration. In an initial interview between a solicitor and client, the researcher observed that the client was given incorrect advice regarding her benefit entitlement. The researcher did not comment to the client on the discrepancy, reasoning that the client would be made aware of her true position by the Benefits Agency when she

initiated her claim. Fortunately for the researcher, she was not aware of any more serious errors. However if such had occurred a decision would have to be made taking into account all the circumstances of the case. The most likely solution would be to discuss the issue with the solicitor concerned, giving them an opportunity to amend the situation. This may of course had an adverse effect on the relationship between the solicitor and the researcher, but the ultimate benefit for the client would be seen to outweigh the loss, if the error was a serious one.

Finally under this section it is important to refer to the Data Protection Act 1998 <sup>96</sup>. This Act imposes certain statutory duties on the researcher, previously confined to automated records. The protection now extends to manual records which form part of a 'relevant filing system.' 'Relevant filing system' is defined as,

“...any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that information relating to a particular individual is readily accessible.”  
<sup>97</sup>

The files collated by the researcher could be included within this definition. Each of the participants had an individual file in which all the information pertaining to their case, which had been collated by the researcher, was 'readily accessible.' Under Section 33 of the Act, there is no personal right of access to the data for the research participants,

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<sup>96</sup> Although this Act was not fully in force at the time the data were collected it was thought to be advisable to follow its provisions.

<sup>97</sup> Data Protect Act 1998 Section 1 (1).

but the researcher is obliged to comply with other principles in the Act, for example, to ensure that the data were obtained fairly<sup>98</sup> and will be stored in a secure manner.<sup>99</sup>

### 3.9 (vi) Personal issues

Under this heading the author will briefly outline some of the personal issues which she had to confront whilst undertaking the fieldwork for this study. One of the foremost issues concerns the researcher's association with the research subjects. The relationship between the researcher and the research participants had to be 'managed,' that is it had to be close enough to generate feelings of trust, but not so close as to risk contaminating the data. The researcher could not allow herself to get personally involved, no matter how much sympathy she held for the particular individual concerned. This is not always easy to accomplish, and can leave one feeling bereft, as one is not able to provide actual tangible support.

Similarly, in the process of fieldwork of this nature one inevitable hears recounted tales of immense personal distress. The researcher cannot restrict herself to an academic interest in such occurrences. A degree of emotional stress is inevitable and measures should be adopted to

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<sup>98</sup> The term 'fairly' will perhaps exclude some of the more intrusive journalistic techniques employed, but should include research data collected in such a manner as to ensure the informed consent of the participants is obtained.

address this. Most obviously, this would involve the services of a mentor, although the confidentiality requirements do restrict the benefit obtainable a little.

Finally, there is the issue of personal safety. The researcher, to protect her own physical safety, ensured that all 'face to face' interviews were conducted in public places, for example in the café bar. On only one occasion did the researcher carry out an interview in the client's home. The client concerned was already divorced, and was by that time quite well known to the researcher,<sup>100</sup> moreover, the researcher knew the locality concerned very well, and so had no qualms regarding conducting that interview in the client's own home.

### 3.10 Analysis

"To this is added the lack of procedural clarity that characterises field research; there are few useful rules (unlike other forms of social research) available for transforming chaotic sets of observations into systematic generalisations about a way of life." (Shaffir and Stebbins 1991 p4)

Shaffir and Stebbins articulate the fact that there are no universally accepted guidelines to assist the qualitative researcher in the mammoth/painstaking task of analysis.<sup>101</sup> Research of an ethnographic nature usually generates a mass of data (Fielding 1993, p167) and this current project is no exception. The challenge facing the researcher is to

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<sup>99</sup> An account of the implications of the Data Protection Act 1998 can be found in Carey (1998).

<sup>100</sup> This was a final interview with a client with whom the researcher had already conducted ten observations.

organise this mass of data, in this instance, observational notes, transcripts of interviews and incidental notes recorded in the fieldwork notebook, in such a way as to allow systematic analysis to be undertaken, the ultimate goal of analysis being to find answers to the research questions and therefore the analytical process should be structured around the research aims.

Despite the lack of clear guidance referred to above, Robson (1993, p373) argues that there has, in recent years, been an increasing emphasis on adopting a more rigorous and disciplined approach to the analysis of qualitative data, than was perhaps considered appropriate in the past. Such a development has not been accepted by all researchers employing qualitative methods, and Robson gives the example of phenomenologists who “do not see a social reality ‘out there’ to be accounted for, and find a concern for things like validity and reliability alien.” (p373) This researcher holds the view that the analysis has to be carried out in a rigorous and systematic manner for the research to attain credibility. But, she also considers that analysis should be in sympathy with the nature of the study and not be “over mechanistic.” (Robson 1993, p384)

The process of analysis was not a distinct phase in this research, but was carried out concurrently with the data collection. Hammersley and Atkinson (1995), despite recommending this course of action, warn that,

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<sup>101</sup> Indeed Robson (1993) comments that a prescribed approach would be resisted by many who view qualitative research as, “more of an art than a science” (p370).

"... engaging in sustained data analysis alongside data collection is often very difficult." (p206) Accordingly, the researcher limited the observations undertaken to three a week. This ensured that the researcher was allowed some time in which to reflect on the themes/findings emerging from the data.

Methods texts advise that the first step in analysis is the careful reading and re-reading of the transcripts (Hammersley and Atkinson 1995, p206, Robson 1993, p375). The principal themes emerging should be identified, and any gap in the fieldwork should be used to 'step back' from the data, and further reflect on what is emerging. (Fielding 1993, p167) The researcher engaging in ethnographic research is also advised to remain open to new suggestions, that is to be prepared to 'abandon original hypothesis' (Fielding 1993, p167) and explore the evidence offered by contradictory evidence. This research did not involve hypothesis testing per se, and was not entirely flexible, as the researcher was seeking answers to a number of specific questions. However, the researcher did endeavour to remain open to possible new areas of inquiry, whilst ensuring that the original research questions were the paramount consideration throughout all stages of the analysis.<sup>102</sup>

In practice, after each observation, the researcher followed the same procedure. The field-notes of the observation were fully transcribed by hand. This was a slow but rewarding process, the very mechanism of

hand writing aiding the reflective process. As the researcher was in the process of transcribing, certain themes became apparent; these would be immediately highlighted and a comment made in the margin. Once the transcribing was complete, the researcher would again read through the text. Often interesting points would be revealed at this second stage and the researcher would appropriately annotate the text, as before. Thirdly, the researcher would again read through the text, but this time combining the process with an examination of the interview data obtained at the same time, and with any notes recorded in the fieldwork notebook. This process confirmed the relevance of some aspects of the case, and allowed the personal perspectives of each participant to be considered alongside what the researcher had herself observed. Finally, the researcher would prepare a separate summary sheet for each observed meeting. The summary sheet contained a number of headings relating to each of the research questions. A detailed comment was made under each heading, whether or not there had been a relevant occurrence. This had a number of specific benefits. Firstly, it ensured that the researcher structured her analysis around the original research questions. Secondly, it forced the researcher to consider contradictory indications and similarly a lack of evidence. Finally, by including a section headed 'other notable features of this case' the researcher was able to remain flexible and include new issues as they emerged. The summary sheets did change a little as the research developed. Certain issues which the researcher had considered in the early stages, which had generated little data, were

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<sup>102</sup> Robson (1993) advises that research questions should be carried by the researcher 'literally and metaphorically' (p379). A strategy adopted by this researcher who always

eventually replaced by topics which had emerged as justifying further exploration, but which had not been anticipated at the commencement of the study.

Once all the fieldwork had been completed, a final analysis was undertaken. All files relating to both solicitors and clients were again read through, and themes were identified and confirmed. Finally a comparative analysis of the data was undertaken to explore the impact of such certain factors on the dispute resolution process, for example, the client's social class or the solicitor's gender.

Once the analysis had been completed one final element of fieldwork was undertaken. Solicitors were interviewed regarding the research findings. This form of respondent validation can enhance the credibility of the analysis, as well as providing further insights, but one has to be aware that the research subjects may have a vested interest in misrepresenting themselves (Hammersley and Atkinson 1995, p229). The solicitors, for example, might be expected to agree wholeheartedly and welcome a study which reveals them in a positive light, but to object to and disagree with research which portrays them as not providing the level of service that the client might wish. In the event solicitors did not dismiss the more negative findings, the most common response being to link such problems to the constraints, both in relation to the emotional state of the clients and limited time available, they operated within.

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carried a copy of the research questions with her whilst engaged in fieldwork.



### **3.11 Numbers and methods: a brief outline of the general research plan**

The original intention was to observe between thirty and fifty initial meetings between solicitors and those clients seeking divorce, where there would also be some financial or property issues to resolve. Each meeting was to be observed, and followed by semi-structured interviews with both the solicitor and client. The study was to be longitudinal, all cases being continually monitored. On each occasion the client returned to the solicitor, the meeting would be observed and the comments of both the solicitor and client sought after the event.

### **3.12 Brief outline of the reality of the research**

As Becker has argued,<sup>103</sup> actual fieldwork does not often go exactly to plan. Table one below represents the number of initial meetings between solicitors and clients that were observed. The first encounter between the solicitor and client is arguably the most important. The essential facts of the case, which will dictate the available strategies, are gathered at this stage (Greenslade 1993, p1), and, "... it is the beginning of a working relationship between lawyer and client in which both parties need to develop confidence and trust in each other if the lawyer's work is to be carried out effectively." (Sherr 1986, p7)

**TABLE 3.2 – Number of Initial Meetings Observed**

<b>Firm</b>	<b>Number of Initial Meetings Observed</b>
A	8
B	12
C	10
D	10

As referred to above, the researcher intended to follow the divorce cases throughout the whole process of negotiating the financial settlement. The researcher did experience some problems in attending every client's subsequent appointment with the solicitor. Some of the difficulties were anticipated, some were not. The greatest problems were experienced in being kept informed of clients' appointments. Strategies<sup>104</sup> devised to ensure the researcher received notice of clients' visits were on occasion unsuccessful. When this did happen, to avoid losing valuable data, the solicitor and client were interviewed on the telephone.

A notable factor, was that with some solicitors, cases progress with very few face to face meetings with clients, the bulk of communication taking place through letters or on the telephone, and the affidavit being prepared by a junior member of the legal staff. This issue was explored in the final interviews with each solicitor.

Table 3.3 below gives the research profile for each client. The number of observations and post meeting interviews with solicitors and clients is recorded.

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<sup>103</sup> See the quotation from Becker in section 3.2(ii).

<sup>104</sup> For example, attaching a note to the client's file and giving the solicitors' secretaries a list of clients who were participating in the research. This aspect of the research process is discussed fully in the section on the pilot stage.

**TABLE 3.3 – Research profile of clients.**

Client	Observations	Client Interviews	Solicitor Interviews
Mr Booth	1	1	1
Mr Chapman	2	3 (inc.1 phone)	1
Mrs Eastwood	1	1	1
Mrs Lawson	2	2	3
Mr Jarvis	2	3	1
Mrs Clarke	3	3	1
Mrs Hall	1	2 (inc 1 phone)	1
Mr Ashe	1	2 (inc. 1 phone)	1
Mrs Bailey	2	4 (inc. 2 phone)	2
Mr Hyde	1	0	1
Mrs Cowen	1	1	1
Mrs Denton	1	1	1
Mrs Page	1	1	1
Mrs Shaw	1	1	1
Mr Yates	1	1	1
Mrs Raynor	1	1	1
Mrs Taylor	1	2	1
Mr Fearn	1	1	1
Mrs Long	1	2 (inc. 1 phone)	1
Mrs Knight	1	1	1
Mr Barnes	2	2	2
Mrs Egan	9	12	9
Mr Farrell	8	9	10
Mrs Shepherd	1	2	1
Mrs Johnson	1	1	1
Mr Spencer	1	1	1
Mr Danks	2	2	3
Mrs Wallace	3	3 (inc. 2 phone)	5
Mrs Ellison	1	1	1
Mrs Dale	3	4	3
Mrs Gibson	2	4	4
Mr Atkins	1	1	1
Mrs Mellor	1	1	1
Mr Ramsey	3	3	3
Mrs Whittaker	1	1	1
Mrs Radcliffe	1	1	1
Mr Garner	1	1	1
Mr Pearson	1	1	1
Mrs Foster	3	4 (inc. 1 phone)	4
Mrs Donnelly	1	1	1

## Summary

Number of Observations Undertaken: 72

Number of Client Interviews Undertaken: 88

Number of Solicitor Interviews Undertaken<sup>105</sup> : 77

Number of Solicitors Preliminary Interviews Undertaken: 10

Number of Solicitors Final Interviews Undertaken<sup>106</sup> : 5

Monitoring of the initial appointments began in October 1996 in firm A. The final initial appointment observed was in November 1998 in firm D. The fieldwork continued until the final observation in September 1999. The data in this study has been obtained from observation and interviews, the researcher did not generally have access to the files (although two solicitors did show the researcher some files) or see postal correspondence. In February 1997 the researcher was involved in a road traffic accident sustaining a head injury; the fieldwork was therefore interrupted for a while. As this occurred early in the process the impact on the fieldwork was minor. The researcher did miss a few appointments with one client but as this was one of the longest cases in the study, and the secretary in that firm was particularly helpful and kept the researcher informed, the impact was minimal. The researcher returned to monitoring the case as soon as she returned.

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<sup>105</sup> That is solicitors' interviews regarding cases in progress.

<sup>106</sup> The discrepancies with the number of preliminary interviews is as a result of various factors beyond the researcher's control. For instance, one solicitor resigned whilst the fieldwork was in progress, one solicitor was unwilling to participate further, and two solicitors despite volunteering, had not been substantially involved in the fieldwork. On these occasions a final interview was not undertaken.

# Chapter Four

## The Initial Appointment

### 4.1 Introduction

This section of the thesis is concerned with the results of the fieldwork, the methodology of which was described in the previous chapter. This chapter will report the findings of the research in relation to the first stage in the legal process of divorce, the initial appointment<sup>1</sup> between the solicitor and client. Chapters five, six and seven will document the findings of the research in relation to: how these cases progressed; how control was exercised and by whom; before moving on to report on the contribution made by both solicitors and clients towards resolving the disputes. The impact of social class will be considered as it applies in each section.

The evidence presented in this chapter consists of data collected about the initial appointments, including the observations, the interviews undertaken with the solicitors and clients following the initial appointment; preliminary interviews with the solicitors (undertaken prior to observation),

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<sup>1</sup> The term 'appointment' is used in preference to 'interview,' in order to avoid any confusion with the interviews used in the research process.

and interviews carried out with the solicitors at the conclusion of the research.

The chapter begins by providing a justification for the study of the initial appointment. This is followed with a brief description of the context in which the initial appointment occurred. The results relating to the actual initial appointment are reported chronologically. Accordingly, the participants' prior expectations of the initial appointment will be considered, before moving on to a detailed account of the results pertaining to the initial appointment as it progressed. Finally, the participants' own impressions, recorded after each initial appointment, are reported and compared. The chapter closes with a brief comment by the author on the results.

## **4.2 Why study the initial appointment?**

It is the initial appointment which is arguably the most critical of the encounters between the solicitor and the client. Aside from the methodological considerations discussed earlier,<sup>2</sup> the benefit for the researcher in studying the initial appointments of solicitors and clients is that, firstly, it is in the initial appointment that the relationship between the solicitor and the client is established and secondly, much of the information which guides future action is gathered at this stage

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<sup>2</sup> See section 3.31 (ii) in the previous chapter.

(Greenslade 1993 p1, Sherr 1999 p1). Consequently the initial interview may have a strong influence on the process and outcome of the individual case. Lewis writes that, "As many people contemplating divorce go to lawyers first, the lawyer's initial advice sets the tone for the future conduct of the parties." (2000 p8).

Sherr (1999 p8) outlines three stages which, he maintains, should exist in an effective initial appointment between a solicitor and client. The first stage involves the solicitor actively "*listening*" to the client, allowing the client to tell his or her own story whilst noting down the salient points. Sherr's second stage, "*questioning*," involves the solicitor in a more dominant and active role, as the client is questioned to reveal the legally relevant detail.<sup>3</sup> Finally the solicitor is to adopt the role, perhaps most often associated with the profession, of "*advising*." The solicitor at this stage should be able to offer advice on the legal or practical solutions to the client's problem or propose a plan of action.<sup>4</sup>

In sum, the initial interview performs two vital functions for the solicitor: revealing information and establishing an effective 'working' relationship with the client. The author would argue that the initial interview performs very similar functions for the client, although as will become apparent, the

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<sup>3</sup> Although as Greenslade cautions it is only in the simplest cases where a solicitor would expect to obtain all the information needed (1993 p10).

<sup>4</sup> Such action may merely consist of the solicitor or the client carrying out further research.

client may also have other needs which they may seek to have met at this stage.

### **4.3 Background contextual information**

The word background should not be taken as an indication that the information that follows is peripheral to an understanding of what occurs in the initial appointment. As this is an ethnographic study, which by definition studies subjects within their own setting, it is important to provide for the reader detail of that setting.<sup>5</sup> Moreover, existing research has indicated that space and time can have a significant impact on operations within legal arenas.<sup>6</sup>

#### 4.31 Temporal aspects

This section reports on the length of the initial appointment. It would also be interesting to consider the time in relation to the waiting period, between a client contacting the solicitors and the first appointment, however data collected in this respect was incomplete and anecdotal.<sup>7</sup>

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<sup>5</sup> An extensive discussion of the Ethnographic approach is provided in section 3.2.

<sup>6</sup> Rock (1993) in his study on an English Crown Court comments, "what emerged quite clearly was the importance of time and space within that process." (p6) An earlier study by Carlen (1976) reports a similar finding.

<sup>7</sup> Two of the solicitors in the study informed the researcher that clients would have to wait between two and three weeks for a first appointment. The researcher found no support for the solicitors' view. Even in the busy post-Christmas period, clients were often seen within a few days of the initial contact with the firm.



Moreover, on a pragmatic level, the researcher was only able to observe those initial appointments of which she had been given some notice, therefore no 'drop-in' advice sessions have been included in the study.<sup>8</sup>

It is possible to distinguish three types of initial appointments from those observed: the 'standard'<sup>9</sup> initial appointment, which included both privately paying and legally aided clients; the 'fixed fee' appointment and the 'free half-hour' interview. Twenty one of the 'standard' type initial appointment were observed, eighteen 'free half-hour' appointments and one 'fixed fee' appointment. The median length of the standard type of initial appointment was between forty and forty five minutes. The fact that the client was paying privately did not appear to lengthen the time spent in the appointment. One fixed fee interview was observed, a half-hour consultation with the solicitor.<sup>10</sup> The client in that case was warned just prior to the expiry of the half-hour, that to continue would incur a further charge, which the client agreed to pay. Free half-hour appointments were observed in three of the four practices in the study.<sup>11</sup> In firm C, it was noted that these often ran to forty minutes without the client incurring a charge. One free-half hour appointment was observed in firm A. This also ran over time, although the solicitor commented to the researcher

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<sup>8</sup> Including such cases could have biased the sample by involving clients who, acting in 'anger,' might not, after further reflection, proceed with a divorce.

<sup>9</sup> 'Standard,' 'fixed fee' and 'free half-hour' were the phrases used by the legal secretaries in firms to distinguish the different forms of initial appointment.

<sup>10</sup> This solicitor was not available on a free half-hour consultation basis.

<sup>11</sup> No free initial appointments were observed in firm B, as they were staffed by trainee solicitors, who were not involved in this research project.

that such appointments were usually limited to the half-hour or charged; but on that occasion, to limit the advice given to within those time constraints, the solicitor remarked, may have risked a claim for negligence. Firm D uses 'free half-hour' appointments as a major client recruitment tool. All but one of the observations of initial appointments carried within firm D were of this type. Notably all were concluded within the half-hour.

Only two initial appointments lasted over an hour; both were female, middle aged, middle class, privately paying clients. Their cases were not more complex but both clients were particularly assertive and confident in their dealings with the solicitor. The extra time therefore was accounted for by their greater willingness to participate in the dialogue, questioning the solicitor throughout the appointment.

Finally, under this sub-heading, it should be noted that, apart from one occasion, the only telephone conversations had by solicitors during appointments with clients related to the client who was present. Solicitors deactivated telephone equipment, prior to the client's arrival, to ensure that there would be no in-coming calls to distract either party from the consultation.

#### 4.32 Physical surroundings

When a client visits a legal practice, the impression given by the physical surroundings play a significant part in the client's experience.<sup>12</sup> How relaxed, or otherwise, the client feels within that environment may influence their degree of participation in the consultation. A brief description follows of the two most relevant locations; the waiting/reception area, and the room in which the initial appointment took place. In order to avoid identification of the premises concerned, the following descriptions will be limited.

The waiting area in firm A was very small; clients waiting were seated close to reception staff and a back office. Clients were therefore able to overhear the communications between staff and the switchboard operation. Reception staff were young, friendly and informal. No art work adorned the walls, but there were photographs of the practice staff. The Independent newspaper was provided for clients to read. No toys were available in the waiting area. The researcher would describe the waiting area as functional and informal.

Informality was also a feature of the reception area in firm D. The reception staff were very informal and friendly (on more than one

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<sup>12</sup> Section 3.32 (v) in the previous chapter discusses the reasons for recording details of the physical environment.

occasion the researcher was able to overhear their private conversations). There was constant 'bustle' in the reception area with staff and clients moving in and out of the room. The furnishings in the waiting area were very basic and could be described as slightly tatty. There was a large toy box, which often appeared to be in use as many of the firm's clients brought their small children with them. The Times newspaper was provided for clients to read. The researcher would describe the atmosphere as friendly and non-threatening.

In contrast to the physical surroundings described above, the waiting area in firm C contained very good furniture. The presence of large leafy plants added to the comfortable/luxurious ambience. A toy box was partly concealed behind one of the chairs. The Independent and the Yorkshire Post newspapers were provided for the waiting clients to read. The receptionist, who was friendly but professional, also performed secretarial work and so was often typing whilst clients waited.

In firm B the receptionists' duties were more limited; the only staff communications the clients could overhear being confined to notice of client arrival. The most notable feature of the waiting facilities in firm B was that there were two separate waiting rooms. The first waiting room was the one in which all clients would have to pass through and where they would meet the reception staff. This first room was large, rather sparsely furnished (hard plastic seats) and no reading material was provided. The second waiting room, to which the more 'well-dressed'

clients<sup>13</sup> were shown, was more pleasant. Pictures adorned the walls, large leafy plants stood in the corner of the room, better chairs were provided, and, in the centre of the room was a coffee table on which was placed the Independent newspaper and a selection of monthly magazines. The two separate waiting rooms perhaps reflected the diverse client base. The practice attracted a large legal aid clientele, civil and criminal, as well as the more affluent private client. Clients were probably not aware of the two waiting room system; those allocated to the first waiting room would not see the better room on their way to the solicitor's office.

Before considering the rooms in which the appointments took place, it is worth noting two features, which were common to all of the solicitors in the study. Firstly, all the solicitors adopted the same seating arrangements during consultations with clients, that is, solicitors sat behind the desks with the clients placed directly opposite.<sup>14</sup> Secondly, all desks were relatively uncluttered, that is there were no visible accumulations of files requiring the solicitors' attention.

In firm A most of the appointments observed took place in the solicitor's own office. The office was small but light and airy. In the office, clearly

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<sup>13</sup> Emily (solicitor in firm B) – described the use of the two waiting rooms, one for the “well dressed and respectable” and the other for the “green form and criminal types.”

<sup>14</sup> Sherr (1999) remarks on the importance of seating arrangements and notes that medical practitioners often prefer to seat patients at right angles to themselves in order to aid communication.

visible to the client, were a number of well-thumbed books concerning the non-legal aspects of divorce, including texts aimed directly at children. The researcher was informed that a toy box “comes in when required.”<sup>15</sup> There were family photographs on top of the filing cabinets. Out of the client’s line of vision was a small stop-clock operated discreetly by the solicitor.

Solicitors in firm B also interviewed clients in solicitors’ own offices. The most notable features of these offices were firstly, the lack of personalised items, for example family photographs, and secondly the frequent operation of the practice intercom system, which the researcher personally found quite disconcerting, however no clients made any comment on the system.

In firm C, appointments with clients took place in various locations, as the participating solicitor’s office was too small. The alternatives available to the solicitor were to use the office of a colleague, or to conduct the appointment in the practice’s ‘interview room.’ The interview room, which was the most frequently used location, was a rather bare functional room. The colleagues’ offices were brighter and more personal, containing family photographs and small trinkets.

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<sup>15</sup> Although, the solicitor did discouraged the presence of all but very young children in consultations concerning, divorce.

Appointments with clients in firm D took place in the solicitors' offices. The rooms were small and plain, with few personal touches. One of the participating solicitors had a number of thank you cards, from past clients, predominantly displayed.

Visiting each of the above premises was thus a different experience. The client will have an expectation of the legal practice which will be influenced by, *inter alia*, the physical surroundings in which they find themselves. This expectation will in turn have an effect on the client's initial interaction with the solicitor.

Once clients had arrived at the legal practice concerned, the procedure followed by the solicitors in the study was broadly similar. The solicitors would always come into the waiting area to introduce themselves, before taking the client to the office in which the appointment was to be conducted. No clients were left to find their own way in an unknown environment.

#### 4.4 Expectations of the initial appointment

##### 4.4.1 The expectations of the solicitors

The solicitors' stated expectations of the initial appointment were obtained in the preliminary interviews undertaken prior to the observational fieldwork. As with all participants in this study, in order to avoid identification, the genuine names of the solicitors are not used. Instead each solicitor has been given a forename, chosen at random, of which the only identifying feature is the gender. In order to assist the reader the names of the solicitors and the firms in which they practised are given below.

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Tel: +44 (0) 1865 517222 email: [salesuk@abc-clio.com](mailto:salesuk@abc-clio.com)

Solicitors were asked what point they expected to have reached by the end of the initial consultation with the client. The majority of solicitors



emphasised the imparting of information, either on the law or the divorce process, to the client. The response below is fairly typical,

“What you try and achieve is a general understanding of the law and how it affects them including what it’s going to cost them and how long it’s going to take, and an agreement as to what the next step is going to be.” (Mary).

The quote from Mary indicates that information given to clients should be specific<sup>16</sup> enough to allow some future planning. Tom made a similar point,

“I expect to have a series of options over which they can make a choice – having given the client an overview of the whole case. Let them know where we will be in six months time. Possibly be clear about the end results or outcomes” (Tom).

In sum, the solicitors in the study reported that they aimed, by the end of the initial appointment, to have given to the client a degree of information specific to their case with the result that, at the very least, the next stage in the process is planned.

Only one solicitor commented, at this very early stage in the research, on problems she faced in the initial appointment.

“The first interview is usually the most emotional – so I hope by the end of that [the first interview] they’ve got it out of their system. I hope by then I can make it clear to them what I *can* do.” (Claire) (Emphasis added).

Claire continued,

“If they’re emotional I say have they thought about counselling. I do refer them to other people I think can help. So I like to get it clear. That I can help with the legal system, but not other things.”

William expressed a similar view,

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<sup>16</sup> Unlike the general advice to have been given out in the S. 8 Family Law Act 1996 Information meetings.

“I take the view – people pay us a lot of money and come to us for advice and guidance, we’re not counsellors, there’re plenty of other agencies to do that.”

The majority of the solicitors in the study were similarly clear about the limits of their role.

Perhaps surprisingly, reconciliation was only mentioned by two solicitors in connection with the initial appointment.<sup>17</sup> Claire merely referred to reconciliation as a possibility,

“... it [action plan] will be different for some – it will be reconciliation, for others they will think about it.”

Richard however, indicated that he used the initial appointment specifically to explore whether reconciliation was a possibility, and was critical of practitioners who did not act in the same way.

“I try to discover what the client *really* wants. Some solicitors especially those pressurised as fee earners will go straight into issuing the divorce petition.” (Richard)

Richard continued by describing to the researcher the methods he used to explore reconciliation with his clients. These included the use of diagrams and discussions of current celebrity (dysfunctional) marriages.

It is perhaps notable that the majority of solicitors reported information giving or *advising*, as a major aim of the initial appointment. No solicitor stated that by the end of the initial appointment, they should have heard

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<sup>17</sup> A criticism of the current system, referred to in the white paper, Looking to the future: Mediation and the ground for divorce Cm2799 was that it did nothing to aid reconciliation. Para 2.15

the client's story (*listening*). The responses given by the solicitors could indicate that they expect to take a more directive role than is suggested by Sherr above. *Listening* (beyond information gathering for advice purposes) appeared to be suggested as a remit for an outside agency, specifically counsellors.

#### 4.42 The expectations of the clients

As it was not possible to interview clients until after they had met with the solicitor, this section will be rather brief. However, in the interview with clients immediately following the initial appointment a number of clients made comments regarding their prior expectations.

Before recounting the clients' views it is interesting to note how clients selected their solicitor. It appears from the data obtained in this study that advertising may have limited value in client recruitment; the overwhelming majority of clients, thirty-one, out of the forty in the sample, had selected their solicitor as a result of a personal recommendation from friends, relatives, or work colleagues.<sup>18</sup> When asked what specifically had been said to recommend the solicitor, only a minority mentioned issues related to the 'legal skills' of the solicitor. The majority of clients instead

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<sup>18</sup> Genn (1999) reported that those respondents in her study experiencing divorce and separation had the highest rate of contact with legal advisors compared to other the areas of civil disputes covered in the study (p115). Respondents in the study had selected their solicitor on the advice of friends or colleagues, or because the geographical location was convenient, or they had found the firm through yellow pages (p91).

referred to the solicitor's inter-personal/social skills, for instance the ability to make clients feel at ease, and minimise social differences. The comment by Mrs Radcliffe is typical,

"It was word of mouth – they were friendly, laid back – not stuffy."

This emphasis on the social skills of the solicitor was a particularly common response from clients of the two large legal aid practices. Comments linked to 'legal skills,' although in a minority, were more likely to come from clients from a middle class background.

"She (friend) said Helen (solicitor) seemed to deal with everything very quickly – and that's what I want – she also came out with a very good settlement." (Mrs Egan)

Other sources of recommendation were outside/voluntary agencies, for example in this study clients were referred from a domestic violence advisor, a drug rehabilitation centre, and the local citizen advice bureau.

Of the nine clients who had not acted on recommendation, seven of the nine referred to the convenience of the location, the practice being either near to their work or home. The remaining two clients had both chosen the firm they used because of the availability of legal aid. One reported having seen the legal aid sticker in the window of the practice concerned. The other client had searched through yellow pages.

"I picked it because of legal aid – not many does it. I found it in the phone book – yellow pages." (Mr Danks).

Clients were also questioned as to whether they had used a solicitor before. Twenty-seven out of the forty had used a solicitor previously, in the majority of cases related to a property matter, most often

conveyancing, although there were a few tenancy issues. This finding is perhaps an inevitable consequence of the sampling, as the study concentrated on clients who had financial and/or property issues to resolve. A small number of clients in the study reported having previously employed a solicitor for a personal injury matter and had returned to the same legal practice (not solicitor) for their divorce.

Clients' previous experience in dealing with a solicitor did not seem to have a great impact on their prior expectations. A good example of this is Mrs Eastwood, who was going through divorce for the second time,

"I didn't really know what to expect. I couldn't remember much about the first time. It's like having a baby – you forget." (Mrs Eastwood)

The majority of clients similarly claimed that they had not known what to expect. These views, whilst indicating a general lack of knowledge over solicitors and the divorce process, could also be indicative of the stress being experienced by the client.

A number of clients indicated that they had felt a degree of apprehensiveness before meeting the solicitor.

"I was a bit nervous, when I found out it was a male solicitor." (Mrs Hall).

"I was apprehensive before coming in." (Mr Spencer).

Many clients, in conversation with the researcher whilst on the way to the café,<sup>19</sup> commented that they had found the solicitor much more approachable than they had expected. This may be because the clients' perceptions were informed less by personal experience and more by the depiction of solicitors in film and television (where solicitors are often portrayed as upper middle class, high earning, Oxbridge educated).<sup>20</sup> This lack of familiarity with solicitors was articulated by Mr Danks, a working class client,

“A lot of people are frightened of solicitors because they don't come into contact with them regular.”

#### 4.43 Comparison of the prior expectations of solicitors and clients

The most striking finding on prior expectations is that solicitors' comments related almost exclusively to legal issues, the giving of specific legal information leading to a plan of action. The clients on the other hand, made no comments regarding legal information or future action; they had 'not known what to expect.' Their concerns rested at a more personal level; they were nervous at the very prospect of meeting with a solicitor. The solicitors' goal was to impart (and obtain) sufficient information to get the process underway and possibly indicate likely outcomes.<sup>21</sup> The

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<sup>19</sup> The researcher cannot reproduce such comments as she was not able to record the verbatim comments at the time, and had instead to rely on a note made as to the comment as soon as possible after it had been made.

<sup>20</sup> Genn (1999) found that peoples' expectations of legal personal are influenced more by portrayals in television and the tabloid press than by personal experience (p 246).

<sup>21</sup> In a recent study comparing the divorce practice of solicitors and mediators, solicitors described their role which was “to a great extent outcomes orientated” (Myers and Wasoff, 2000 p 52).

clients did not look this far ahead; their first hurdle was to be able to communicate and feel at ease with the solicitor.

Clients were commenting on what was to them, in most cases, a unique and previously unknown experience. Solicitors, on the other hand, were giving their views on what to them is part of their everyday working life. One could question whether solicitors are/remain aware of the unfamiliarity of the experience for the client, and the possible effects which might follow from this. For example, the ability of clients to absorb and understand the information, which the solicitors are so keen to give at the initial appointment, might be significantly impeded by such feelings.

#### **4.5 How the initial appointment progressed**

##### 4.51 How clients presented themselves

This section reports on the presentation of the clients at the initial appointment. This includes consideration of how clear clients were about their intention to divorce,<sup>22</sup> their apparent emotional state, and finally looks for evidence of prior thinking relating to the practicalities of divorce and post-divorce life.

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<sup>22</sup> The current system has been criticised as steamrolling individuals into divorce and allowing little opportunity for reconciliation (see Ch.2 in Looking to the Future Mediation and the Ground for Divorce Cm 2799).

In this research the majority of clients (three-quarters of the sample) claimed to be very certain that they wanted a divorce. Before looking at this in a little more detail it is worth pointing out that this figure would have been higher had the figures from Firm D not been included. In Firm D, four of the ten clients indicated a degree of ambivalence about divorce in their first appointment. This is probably a result of the firm's policy regarding widely promoted 'free-half hour' appointments which may attract those perhaps experiencing some marital difficulties at the time but who are not yet ready to proceed with divorce.<sup>23</sup>

However, as stated above, the majority of clients in the sample appeared clear about their intention to divorce. For example,

Richard: "What's your feeling about the marriage?"

Mrs Jarvis: "Finished!"

Some of the solicitors in the study required more than one such statement before being convinced of the client's intent. For example, in the case of Mrs Donnelly, examination of the transcripts reveal the solicitor (Mary) asking Mrs Donnelly on five separate occasions whether she was sure she wanted to proceed with divorce; each time receiving a most emphatic and positive reply, "oh yes, absolutely."<sup>24</sup>

Even when clients had made clear their intention to proceed with divorce, one solicitor in the study was always very keen to ensure that his clients

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<sup>23</sup> Indeed the number of clients in Firm D (seven) who did not proceed with divorce after attending the initial free appointment does suggest that this may be the case.

<sup>24</sup> Although, Mrs Donnelly did in fact abandon the divorce two days after her initial appointment.



were aware that they were still not committed to follow that route to conclusion.

“Well out of every 100 cases [of divorce] 50 will change their mind. So you can change your mind. Okay?” (Richard to Mrs Clarke, but also very similar if not identical comments made to many of Richard’s clients in the sample).

The researcher noted that the more junior solicitors (fee-earners) in the study, were more likely to accept the client’s first statement regarding divorce without enquiring further. One such solicitor, having obtained information from her secretary, was never observed asking clients if they wanted a divorce, and she would proceed on the assumption that the decision had already been made by the client prior to their meeting. Such an approach was being followed in the initial appointment of Mrs Page. The transcript of the observation of this meeting reveals Mrs Page suddenly interrupting the solicitor.

Emily: “So, the first thing is – separate. Then get a Green Form. Just come in and see my secretary, sign a Green Form, so that you’re not paying privately, then we’ll sort out the house. It sounds a long process, but that’s good because it gives you time to adjust ... (Mrs Page interrupts)

Mrs Page: “I don’t know what to do. The kids won’t know what to do without their Dad - so I don’t know what to do.” (Mrs Page)

Emily: “Mmm, well the thing to do is - we’ve got your file now, we’ll keep that for two years. Just ring if you decide.” (Emily then continued discussing the Green Form).

The interruption by Mrs Page suggests that the solicitor was moving ahead too fast; indeed the indication is that in this case the decision to divorce had not been taken. Claire had a different approach,

“Well if you’re saying the relationship’s over ... (pause)? There are a number of routes you can take – *if* the relationship’s over. And divorce is one of those – but I don’t know if you’re ready for that yet.” (Claire to Mrs Radcliffe).

As stated above, in the majority of cases, clients expressed clearly the fact that they did want to pursue a divorce. Of those remaining some, like Mrs Page above, were experiencing some marital problems but were not yet sure whether to seek a divorce, others were seeking a divorce reluctantly after pressure from their spouse.<sup>25</sup> Mrs Eastwood is one such example.

Richard: "So both of you want a divorce?"

Mrs Eastwood: "No – he wants one ... (pause) I'm not sure... (pause) there is no way we can remain married!"

Richard: "Have you thought about going to Relate?"

Mrs Eastwood: "No ... it's no good."

Richard did not probe further at that stage but continued throughout the remainder of the appointment to refer to action etc, "*if* there is a divorce."

Many clients did appear to the researcher to be in an emotionally charged state in the initial appointment. There was anger, sadness and nervousness, although only a few (quiet) tears. Clients, in their conversation with the solicitor, would concentrate on the past hurts inflicted on them by their spouse. In a few cases, the determination of the client to issue a divorce petition citing adultery,<sup>26</sup> in direct opposition to the advice given by the solicitor, provided further evidence of the client's emotional state.

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<sup>25</sup> Such clients are not necessarily the respondents. If one spouse can obtain legal aid, they can be put under pressure from their husband/wife to initiate proceedings.

<sup>26</sup> In the locality in which the research was conducted, a high level of proof was demanded in order to satisfy the court.

“Would you try and approach [it as] adultery and send HER and him the papers ...”

and, later in the same appointment,

“I could crucify that girl. I would very much like that a letter go to that madam” (Mrs Donnelly)

After an initial appointment with a particularly angry client (in the opinion of the researcher), Emily commented,

“She was very, extremely angry. She wanted to kill him. You can still feel it, even in this room! Her (Mrs Taylor) neck was bright red ... I thought no wonder she has shingles!”

These quotations are given just to provide the reader with an illustration of the clients' emotional state at the first interview. The focus of the clients' dialogue with the solicitor will be considered more fully in the next section.

In relation to the thought given by clients to the practicalities of post divorce life, few clients came to the solicitor with any serious arrangements already considered, beyond who would care for the children.<sup>27</sup> Of those who had made prior arrangements, the majority were considered by the solicitors to be ill-thought out or impractical. Helen commented to the researcher on the prior arrangement Mr Farrell had arranged with his estranged wife,

“In principle it's realistic because she's getting a roof over her head but not practical because she can't afford to pay the mortgage.”  
(Helen)

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<sup>27</sup> The child issues are outside the scope of this thesis. However, there are many excellent texts on this issue, for example, see Maccoby and Mnookin (1994) Smart et al (2001).

In sum, the majority of clients arrived at the solicitors apparently clear about their intention to divorce, often very emotional, but with little thought having been given to the realities of post-divorce life.

#### 4.52 The clients' information

As already stated a prime purpose of the initial appointment, for both the solicitor and client, is the giving and receiving of information. Clients need to tell the solicitor the facts in their case and then receive information regarding how their case will proceed. Solicitors need to obtain from the client, sufficient detail of the ground(s) for divorce and the financial and property situation. Only then can they offer the client advice, which will enable the client to provide 'instructions.'

This section will look at the information provided by the clients in the first appointment, and the method by which the information was obtained.

The solicitors in this study varied as to how they opened the dialogue between themselves and the client. Claire, in her opening introduction, appeared to encourage clients to talk about what they considered important.

"Hi, I'm Claire – I'm a matrimonial solicitor – I trust that's what you've come to see me about.

"It is yeah."

“Right – this a free half hour – the idea is *you tell me what it’s about* and I tell you what we can do.” (Claire to Mr Garner)

Other solicitors opened the dialogue in such a way as to limit the possible responses. Sarah had such an approach.

“What can I do for you?”

“Divorce!”

“Right, first we’ll look to see if you’re eligible for legal aid.” (Sarah to Mrs Bailey)

Solicitors were aware that their opening remarks could significantly affect the direction and content of the clients’ dialogue. Richard, a solicitor of long experience commented to the researcher,

“I used to get very long stories from clients but now I greet them with, ‘tell me, why are you here *today*,’ which immediately cuts out the history.” (Emphasis added)

However, many clients were observed using/or attempting to use the limited time available in the initial appointment to tell solicitors of the stories behind their marital breakdown, or more specifically, of their spouses behaviour. Such dialogues would include much information, which was not relevant to the legal resolution of the case. For example Mrs Donnelly talked at length to Mary.

“It’s a forty year marriage – it was two weeks ago – our anniversary. He’s having an affair. And there’s lots of money involved, about £600,000. She was a Saturday girl with us. I told him – if you ever touch that girl – but what can you do – I couldn’t sack her – she’s worked for us for two years ... He came to me and said suddenly – I want to be 35 again ... he gives her lifts to college and lots of money’s going that way...She’s just been bragging about a new expensive coat she’s got, says its from her Grandad. Mind you he’s like her Grandad he’s old enough at 67 ...” (client continued in similar vein) (Mrs Donnelly to Mary).

Clients who were responding to a divorce petition, which cited their behaviour as proof of the breakdown of the marriage,<sup>28</sup> would spend time complaining to their solicitor of the injustice and inaccuracy of the 'facts' cited in the petition.

"... but his letter (from wife's solicitor) she wants to divorce me for adultery – it's all lies." (Mr Jarvis to Richard.) Mr Jarvis returned to this theme throughout the first appointment).

Solicitors, in the majority of cases, responded to clients' emotional dialogues in one of two ways. Sometimes the solicitor would give only the barest acknowledgement to the client, merely making a small utterance, "mmn," before continuing to question the client on an unrelated matter.

A more common response was for the solicitor to pick out the legal issues, relating to divorce, from the client's emotional dialogue. Solicitors would then confine their comments to the legal aspects. For example, behaviour of the client could be relevant for a divorce petition.

"We were splitting up and then he found out I'd been having an affair." (Mrs Wallace)

"Right does it matter to you, who divorces who?" (Helen)

Often solicitors were observed interrupting the client's emotional dialogues in order to tell the client of a legal concern.

"He's (husband) got debts, he's a borrower not a saver. He drinks a lot, he's violent when he's drunk..." (Mrs Shaw)

Emily (interrupts) "I think I should register your interest in the house, because if the house is sold for a profit, you could get your share."

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<sup>28</sup> Matrimonial Causes Act 1973. S.1.(2)(b)

Solicitors did not respond directly, either sympathetically or otherwise, to clients' accounts of their spouses' behaviour. This was even the case where clients referred to incidents of domestic violence. The extract below, taken from the initial appointment of Mrs Bailey, provides an example where the client refers to violence in the past and whose comment could indicate a threat of violence in the future.<sup>29</sup> Mrs Bailey was accompanied in the initial appointment by her mother.

"He has hit me – threatened to hit me and cut my throat!" (Mrs Bailey)

"If he has a saving grace – last week they had a head to head but he wasn't violent"(Mrs Bailey's mother)

"It's not really physical, more verbal. I let him see the children whenever he wants. They can ring him every night. We all went to Macdonalds with the kids, afterwards he tried to force himself on me. I said it's over - he threatened to sort me out – he says he misses me and loves me – then he threatens me - he'll kick my head in and slit my throat." (Mrs Bailey)

"Mmmnn, going back to the children, how often does he see them?" (Sarah)

In this case the solicitor did not comment on the allegations of abuse at all. More frequently the solicitor would respond to such allegations in terms of satisfying the divorce petition. For example in the case of Mrs Raynor,

Mrs Raynor's stepfather: "He's been throwing her across the kitchen!"

Emily: "Yes, that's the sort of thing (for a petition based on behaviour). So you write a list (of behaviour) or see the trainee and she'll do it."

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<sup>29</sup> Hester and Radford (1996) suggest that violence may continue and escalate after separation.

In this and other similar cases, the solicitor listened to clients' accounts of abuse and responded to them in terms of the legal issue she was at that moment dealing with, that is divorce. Consequently accusations of violence were considered solely in terms of the evidence needed to support a divorce petition, based on the respondents' behaviour. The solicitors in the study did not appear to hear that such clients may have been in need of some protection.

In thirteen of the cases clients were accompanied by other adults<sup>30</sup> at the initial appointment. These third parties were often observed having a significant effect on the content of the discussion as they were observed intervening and making comments particularly in relation to other spouses' behaviour. An example of this can be seen from the quotation above where Mrs Raynor's stepfather tells the solicitor of the husband's violent behaviour. A similar incident was observed in the case of Mrs Knight, where the client Mrs Knight was accompanied by a close friend. The close friend was observed intercepting Mrs Knight's accounts with further information,

Mrs Knight: "He's been very violent..."

Mrs Knight's friend: (Interrupts) "Yeah. He put your head through a plate glass window!"

Mrs Knight: "I seem okay – but that's because it's gone on too long..."

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<sup>30</sup> Most often companions were new partners (male clients) family members and friends (female clients). In three cases, the third party was already a client of the solicitor for their own divorce. The solicitor was then dealing with, what the author refers to as an extended client (from the term extended family). It is arguable, given the increasing



As the quotation above indicates, third parties could exert an influence on the dialogue and thus the emotional issues would often form a larger part of the discourse in such circumstances.

It was notable that clients who had a perception of themselves as guilty, made very little independent contribution to the discussion between themselves and the solicitor. Such clients kept their contribution to a minimum, giving the briefest outline of the facts and confining themselves to answering the solicitors' questions.

Apart from the exception above the majority of clients did attempt to focus their information on the emotional background to their marital breakdown. The solicitors, however, apart from brief information required in order to satisfy the ground for the divorce, in fact required information of a more mundane (although complex) nature, for example, ages of children and length of the marriage, pensions, insurance and mortgage details. In all but one case, this information was obtained from the clients by the aid of a pre-printed proforma.

The proformas used by the solicitors' firms in the study were similar in content and covered three areas of information,<sup>31</sup> personal, family and financial. By completing the proforma the solicitor was able to ensure that they had obtained information from the client on their employment, marital circumstances, number and ages of children, property (including

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complexity of family life and growth in reconstituted families (step families,) that this

existing mortgage and an estimate of any equity remaining), assets and debts. Solicitors by following the proforma gathered enough specific information to enable them to offer the client some preliminary advice.

Without such an aid the information provided by the clients may have proved inadequate. The interview with Richard after the initial appointment with Mr Chapman provides an illustration of this point.

“You may have thought I was making heavy weather of completing the proforma – but it was essential. It was only at the end of the proforma that it was revealed that he still has five thousand worth of debts!” (Richard)

Emily, a solicitor from firm B, before embarking on the general proforma, would ask a few specific financial questions of the client, to ascertain whether the initial appointment could be publicly funded.

“The reason I’m asking you these question about assets is because I need to know whether you would be eligible for Legal Aid. If your income is solely derived from this £60. Plus your child benefit – you will be eligible for Legal Aid. So we can fill in this form (Green Form) and that will pay for this advice.” (Emily to Mrs Raynor)

In all but one case, the information provided by clients, in response to the solicitors’ questions, was clear but lacked detail. The one exception was Mrs Taylor, who brought with her sheaves of documentary evidence relating to the finances.

In sum, the information volunteered by clients often appeared to be focussed around their emotional lives and not the legal implications of

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phenomenon might occur more frequently.

their predicament. Solicitors did obtain some information on this first appointment, via the use of a proforma, although the information was generally of an indicative nature. This was often not specific enough to enable the solicitor to offer a clear indication of the outcome of the case regarding the finances, although the pathway to divorce was clear.

Solicitors and clients did appear to hold different views on what information was relevant.<sup>32</sup> Solicitors are 'repeat players'- they have heard similar accounts many times before. For the solicitor the relevant information was that obtained with the aid of the proforma, which would assist her to proceed with the divorce. Information provided by clients, which did not fall into this definition of relevant, and therefore was not included on the proforma, was often disregarded.

For the majority of clients the initial appointment is a unique experience. They do not know what the relevant information is. Moreover, they may have a story to tell, with the information the solicitor requires being tied up, partially concealed, within this story. For the client the telling of their story may satisfy a number of needs. Most obviously, there is the need to provide the solicitor with information to enable the divorce to proceed. Additionally, the initial appointment may also satisfy an emotional need in the client, to tell their story to someone, outside of their personal circle. In telling their stories to the solicitor, the client could be seeking emotional support akin to counselling, which solicitors reported being so keen to

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<sup>31</sup> The researcher is very grateful to solicitors in the study for sight of the proformas.

resist. An alternative interpretation is that the clients, in giving these accounts of their marital history/strife, are not only looking for emotional support but are also seeking confirmation from an independent and authoritative figure, that divorce is the most relevant option for them. Alternative solutions to the problems presented by clients could include protection from domestic violence, or help from various welfare agencies. The majority of solicitors in this study did not explore/consider alternative solutions but confined their questions to those necessary to proceed with divorce.

#### 4.53 The solicitor's information

Just as the solicitor cannot advise the client without adequate information, the client cannot instruct the solicitor unless the solicitor has given them clear information and advice.<sup>33</sup>

The need for information to be provided which is clear and understandable, has been highlighted by academics<sup>34</sup> and policy makers

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<sup>32</sup> Sherr (1999) comments that the perceptions of the solicitor and client over what is relevant may well diverge (p24).

<sup>33</sup> The distinction between advice and information is not always clear, a useful definition is provided by Eekelaar et al (2000) in their study on the divorce work of solicitors, under information they include, "... dates, procedures, or even descriptions of what the court was likely to do." Advice is said to be the appropriate term when "a course of action is under discussion." (p74).

<sup>34</sup> Genn (1999) claims in her "Paths to Justice" study that one of the strongest messages to come out of the research was the disputants "profound need for knowledge" (p255). Davis (2000) specifically commenting on financial disputes arising on divorce writes that, "a plain man's account of the basis upon which the court expects the financial cake to be apportioned is the most important piece of information people could have." (p62)

in recent years, and has formed a significant part of the discussion surrounding the repeal of the Family Law Act 1996.<sup>35</sup>

This section will report on when during the initial appointment solicitors were observed giving out information/advice, what that information consisted of, and how the information was conveyed.

Many solicitors would indicate at the very beginning of the initial appointment when and how they could give the client information/advice.

“My name is (Emily). I’m a marital solicitor. I need to fill in this form to get your details. Then I can advise you. Okay?” (Emily to Mrs Raynor).

Although not all solicitors would specifically outline to the clients that this was how the appointment would proceed, the majority of appointments did follow the pattern described by Emily. Most solicitors would avoid giving information or advice until after the proforma was complete. If issues arose which required immediate comment, the solicitor would normally just briefly indicate that they would address the issue later. For example, in the case of Mrs Shaw,

Emily: “Is the house in his name, or is it joint?”

Mrs Shaw: “It’s in his name.”

Emily: “That’s quite important, I’ll have to advise you about that later.” (continues with proforma).

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<sup>35</sup> Most notably, in discussions over the Information Meeting Pilots - see Walker (2001) and in the Legal Services Commission Paper “Family Advice and Information Networks.” July 2001.

Later, in the same appointment, after giving information/advice on the grounds for divorce and child contact, Emily returned to the topic of the marital home,

Emily: "To tell you the truth I was going to say get your name off the mortgage. But it's already off, the debt is in his name – so that's good news. You need to establish some rights though if he sells the house. I mean someone could come and fall in love with the house and pay more for it..."

Mrs Shaw (Interrupts): Yes, I did, it's a nice house."

Emily: Well, if he did sell it, you'd want some of that money."

In this case Emily had returned to the topic referred to earlier (although the concept of shared marital property was not explained to the client). The researcher noted that some solicitors, despite an indication to the contrary, did not always return to the particular issue raised. An example of this can be found in the case of Mrs Bailey. At the time of the initial appointment Mrs Bailey had left the marital home.

Sarah: "What about the household contents – have you left them all there?"

Mrs Bailey: "Had to!"

Sarah: "Have you tried to get anything?"

Mrs Bailey: "Well (pauses) he can be violent."

Sarah: "Right."

Mrs Bailey: (continues) "he phoned last week (pauses) he was getting quite aggressive – I don't know whether to cut my losses (and not ask for household contents)."

Sarah: "Right leave that on one side for a moment. (pause) What do you know of the grounds for divorce, or do you want me to run through it?"

The question of the household contents and the difficulty for Mrs Bailey in getting access to the house was not returned to during the initial appointment.

Some solicitors appeared to conduct the meeting in two parts, the first (shorter) part relating to divorce (grounds) and the second concerning financial, property and child aspects. The questioning and advising on divorce was completed before moving on to the ancillary matters. But whichever method was employed information and advice giving was generally delayed until the proforma was complete.

Richard had a slightly different strategy. A proforma was completed during the appointment but information and advice was given as each topic arose. By the time the proforma was complete Richard would reiterate the information and advice he had given throughout the appointment, but this time in the form of an action plan.<sup>36</sup>

Most often the first piece of information to be given out by the solicitors concerned the ground for divorce,<sup>37</sup> or, more specifically, advising the client (where the client was the petitioner) that they could satisfy the court that they had sufficient grounds to obtain a divorce.<sup>38</sup> The solicitors' definitions of the ground for divorce were simplistic, sometimes to the extent of being misleading, and were often limited to the two 'facts' of

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<sup>36</sup> 'Action plans' are discussed further in section 4.56 below.

<sup>37</sup> S.1 (2) Matrimonial Causes Act 1973

<sup>38</sup> Or where the client was a respondent, that their spouse had sufficient grounds.

behaviour and adultery.<sup>39</sup> If one of the other grounds was referred to this was usually to emphasise the advantages of using the adultery or behaviour facts.

“...the grounds (for divorce) do not affect the settlement but you do need a ground. There are three. Adultery, a non-starter in this case, unreasonable behaviour and separation, where after two years living apart you both agree (to divorce) and sign a paper. Many people feel this (separation) is the most civilised way but it is the least common, unreasonable behaviour is used much more often, and I’ll tell you why, it’s not because people are angry and bitter but because it’s much quicker. For unreasonable behaviour some people sit down together and draw up a list, they don’t make it up, but they agree on what to put.” (Richard to Mrs Eastwood).

In this extract the solicitor tells the client that there are three grounds<sup>40</sup> for divorce, when in fact there are five.<sup>41</sup> Richard then gives one of the ‘facts’ used as evidence to obtain a divorce as “unreasonable behaviour,” a phrase adopted by the majority of solicitors in this study. Use of this term could be argued to be misleading, as the statute does not require proof of unreasonable behaviour, but, “that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.”<sup>42</sup> Although, the term unreasonable behaviour may be easier for the client to understand, it is arguably “a significantly different concept”<sup>43</sup> from that required by the statute.

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<sup>39</sup> S.1 (2) (a) & (b) Matrimonial Causes Act 1973

<sup>40</sup> In fact there is one ‘ground’ for divorce, irretrievable breakdown, proved by establishing one or more of the five ‘facts.’

<sup>41</sup> See Sec 1 (2) (a)-(e) Matrimonial Causes Act 1973.

<sup>42</sup> S.1 (2)(b) Matrimonial Causes Act 1973

<sup>43</sup> *Bannister v Bannister* (1980) 10 Fam Law 240.



Despite describing qualifying behaviour as unreasonable, solicitors were observed referring to such behaviour in such a way as to emphasise the normality of the behaviour rather than its unreasonable aspects.

“We’re all guilty of unreasonable behaviour. Just provide a list of things she’s done which have pissed you off.” (Emily to Mr Fearn).

Similarly, when dealing with respondents accused of such behaviour,

Helen: (reading the papers that the client has received from his wife’s solicitor). “They haven’t actually said on what basis they’re getting the divorce.”

Mr Spencer: “She (wife) said unreasonable behaviour (angry tone)!”

Helen: “Right – well if you haven’t committed adultery that’s all she can do.”

Following the information (and advice over which fact to use) about the divorce ground, solicitors outlined the basic procedures with regard to what would happen to the divorce petition, “the court will send the petition to him and he will have to respond.” And where difficulties were anticipated how these would be dealt with,

“Let me explain what happens in an unreasonable behaviour divorce. We will have to compile a list of his behaviour. Your husband will get a copy of all the things you have said about him. It’s rare for husbands to object. The court will ask if he’ll co-operate. Now men tend to do two things, either put in the acknowledgement to say they will co-operate, or ignore it and don’t reply. So we then send the court bailiff round to make sure he has the forms. Then it doesn’t matter if he returns the forms or not because we can prove to the court that he’s had it.” (Sarah to Mrs Bailey).

The reminder of the process would be outlined, including the period of time between the degree nisi and decree absolute. All solicitors in the study were observed emphasising the fact that divorce is now a postal exercise and that “no-one ever goes to court.”

Advice and information given to clients concerning child issues was often brief. Solicitors appeared reluctant to get involved, and after ascertaining that there were reasonable contact arrangements in place, would stress the benefit to the child of parental co-operation and further remark that “courts don’t automatically get involved.” Where clients did not give an indication that contact with the absent parent was ongoing and working well, the solicitor intervened,

Mrs Cowen (after a deal probing by the solicitor admits) “I don’t want them (children) seeing her (husbands new partner)!”

Sarah: “Well that’s okay now, but eventually, if the relationship is permanent you’ll have to allow them to meet her.”

Mrs Cowen: “Well that’ll be up to (daughter aged six) she doesn’t want to go.”

Sarah: “She’s too young to make up her own mind. It’s up to you. You need to encourage her.”

Alongside the enquiry into contact arrangements some solicitors would inform clients about parental responsibility. In the main this was to inform mothers and fathers, that the fathers had and would retain parental responsibility. This rather vague legal concept was explained to clients in simplistic and practical terms.<sup>44</sup>

“Moving on to (daughter age four). Both of you have parental responsibility therefore both of you are entitled to a copy of the school reports and any medical reports. If the school is difficult I’ll write to them. The court don’t generally get involved they leave it up to you.” (Emily to Mr Yates).

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<sup>44</sup> Although one solicitor (Sarah) was heard defining parental responsibility almost verbatim to that in S.3 (1) of The Children Act 1989.

Advice and information concerning the financial and property aspects generally occupied the most time. After completion of the proforma solicitors would give an indication of how the assets/debts could be redistributed.

“Well on the fact of it, if you own the house in joint names you each own half unless you can convince the court otherwise. In divorce the court has wide powers to redistribute, but nowadays, if there are no children involved, they start at fifty/fifty.” (Mary to Mr Pearson).

“There is £26,000 equity in the house ... we would ignore the cars because you’ve both got one, plus the policies. So add this up and divide by two. That leaves £17,000 each. One way it could be done would be for you to have the house and she has the policies – or you borrow to pay her out. The court will look at everything no matter whose it is and will divide it fifty/fifty.<sup>45</sup> The only way to get away from that is to let the children stay with you and you say you can’t afford to pay her.” (Emily to Mr Fearn).

In common with other areas of civil law few matrimonial property disputes are actually adjudicated by the court,<sup>46</sup> however all solicitors in this study referred to the court when discussing how the assets or debts would be redistributed. Statements giving advice/information were often prefixed by “the court will look at ...” or “the court would want to see ...” Clients were also advised to adopt certain courses of action in order to impress the court.

“You need to end up in court in the best possible light. And the fact that you are taking a part time job will look good.” (Helen to Mrs Ellison)

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<sup>45</sup> The advice concerning an equal division of property was given out by the solicitors in this study before the House of Lords decision in *White v White* [2000] 2 FLR 981 in which a ‘yardstick of equality’ was advocated as a starting point when redistributing assets.

<sup>46</sup> A study by Davis et al (2000a) examined the records in four separate courts and found that only 4.6 % of ancillary relief cases were resolved by adjudication.

Very occasionally solicitors would advise the client that action needed to be taken immediately,

“You mustn’t allow the joint account to remain, all sorts of nasty things can happen....The purpose of freezing is to stop him going overdrawn. Because they can come to you to repay the whole amount, it doesn’t matter that you haven’t got any money!” (Helen to Mrs Wallace)<sup>47</sup>

Advice on welfare benefits was usually limited to reference to an outside agency or to the firm’s in-house welfare specialists; however, on two occasions solicitors were heard giving preliminary advice on welfare benefits to clients which could be regarded as misleading.

“After three months the benefit agency would pay the mortgage, I don’t know but I think they would pay the endowment as well.”<sup>48</sup>  
(Emily to Mrs Page)

Where finances were limited or already resolved by the client to such an extent that the only order envisaged was a clean break,<sup>49</sup> the advantages and disadvantages were explained to the client in simple and practical terms.

“The only thing is if you win the lottery he could get a share of your winnings. Or less dramatically if you ever get better off, either through promotion or you remarry, Mr Long can claim from you and it would be the same the other way round. So if he wins the lottery you come to me and we rub our hands with glee. So it’s a double edge sword.” (Emily to Mrs Long)

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<sup>47</sup> Mrs Wallace went straight to the bank after her appointment with the solicitor and froze the bank account, although she was alarmed to discover that her husband had managed to accrue a significant debt on the account already.

<sup>48</sup> Mrs Page would have been unable to receive any help with her mortgage repayments for the first eight weeks of her claim and then only fifty per cent for the following eighteen weeks. If she was still entitled to benefit after six months unemployment she would be entitled to have the mortgage interest paid; repayment of capital and premiums for endowment policies would not be covered (Rahilly, 2000 p427). The suggestion to Mrs Page that she would receive public funding for her mortgage costs including any linked policy premiums and/or capital repayments is clearly misleading and could have led to a false sense of security.

Three of the solicitors in the study alluded to the national lottery when illustrating the effect of a clean break. Making or changing a will, and severing a joint tenancy, which were also advised on in the first interview, were explained in similar terms,

“One other thing make a will and another thing is sever the joint tenancy. Because if you die your half of the house will automatically go to your wife, the only thing is if you do and she dies first you don’t get her share. You have to think who’s going to die first.” (Emily to Mr Fearn).

Information regarding costs for privately paying clients was generally given at the end of the initial appointment. Those clients eligible for Legal Aid (Green Form Scheme) were often advised of this earlier and in some cases right at the start of the appointment. Clients applying for a full Legal Aid certificate were warned of the effect of the statutory charge and advised to behave accordingly.

“You’re on Legal Aid because you’re on Income Support. You must not think it’s free because it’s not! If you get the house they will say whenever it is sold the Legal Aid Board must be paid back plus interest. So it does matter to you to minimise costs even though you’re on Legal Aid” (Sarah to Mrs Cowen).

Explanations given of the statutory charge were often very simplistic. This may have been out of consideration for the client, who would have much to remember, or because the solicitors did not fully understand how and when the charge applied.<sup>50</sup>

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<sup>49</sup> Whereby all financial ties and obligations (excluding those relating to children) between the couple are severed.

<sup>50</sup> Davis et al (1994) found that solicitors “lacked confidence in their interpretation of the charge.” It not being always clear as to what had been ‘recovered’ or was ‘in issue.’(p136). Application of the statutory charge has arguably become even more complex with the advent of pension sharing (Wagstaff, 2001 p 623).

Solicitors were often observed advising clients on how to minimise their costs. For example clients were encouraged to resolve the simple areas of dispute themselves without involving the solicitors.

“It’s worth trying to agree because it can get desperately expensive fighting over knives and forks.” (Richard to Mrs Eastwood on household contents).

One solicitor was also observed advising a client on how to proceed with the divorce independently, to save costs. The solicitor told the client where in the county court she could obtain the forms and an explanatory booklet, and encouraged the client to, with her husband’s assistance, complete the divorce without legal help.

“Say to him, we’ll do it together, let him see all the forms (obtainable from the court). At the end of the day you can do it.”

Although the following caveat was added.

“I strongly recommend you to get a solicitor to draft the financial order. People make huge mistakes, either they don’t bother, or they draft it out themselves and it all goes horribly wrong.” (Helen to Mrs Johnson).

Finally, information and advice would often be given during the first appointment which might be viewed initially as non-legal. However, the researcher considered that most of this advice was closely linked to the divorce process. For example the closing advice to Mr Fearn to “keep your temper,” could be seen as emotional support but was, as the solicitor remarked later in the interview, because she feared an injunction would be sought and then Mr Fearn might lose the house. Similarly, the solicitors frequently advised clients to delay before embarking on a new relationship.

“Do think carefully before becoming committed, be cautious you are vulnerable. I would say you should not marry or cohabit within two years.” (Richard to Mrs Eastwood).

Although many clients could be described as emotionally vulnerable at the time of the initial appointment and therefore a new relationship could be seen as precipitating emotional difficulties, for the solicitor a much bigger problem could be the effect on the financial settlement.<sup>51</sup>

As is apparent from the above, solicitors give their clients a vast amount of information in the initial appointment. Much of this information is repeated during the initial appointment and further supported by a follow up letter summarising the main points of discussion and detailing the action to be taken. Clients attending the free half-hour sessions were generally not sent follow up letters.

In sum, the information given by the solicitors during the initial appointment was very much divorce process orientated and was dictated to a large extent by the information contained in the completed proforma. Information was given in simplistic and practical terms and was often repeated. No solicitors were observed using complicated or exclusionary language to explain legal concepts, rather explanations were perhaps over simplified and occasionally misleading.

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<sup>51</sup> The resources of a new partner can affect the financial settlement. Similarly, it is common for deferred charge on a property to contain a clause relating to cohabitation which could trigger an early sale.

#### 4.54 Control of the initial appointment

Control is one of the major themes of this thesis and questions concerning client control over outcomes and action pursued will be considered comprehensively in chapter 6. This section is more limited in scope and concentrates on the apparent control over the discussion in the initial appointment. More specifically, this section reports on, how and by whom the agenda of the initial appointment was set and whether, and in what circumstances, this was subject to challenge by the participants.

Marital solicitors are advised to retain control of the initial appointment with their clients in a way that is, “subtle but none the less real” (Greenslade1993, p3). Controlling the initial meeting with the client is advocated as a means of reassuring clients that the solicitor has “command of the subject on which they (clients) have sought advice” (Greenslade1993, p3). Sherr (1999) describes how some solicitors will achieve this control by, “firing off sets of questions as soon as they have narrowed the issues down to what *they* consider to be a legally relevant topic.”(p14) (emphasis added).

In this study solicitors did, on the whole, retain control of the dialogue throughout the initial appointment. This was achieved, in a way similar to that described by Sherr, with the aid of a proforma. The proforma limited the areas under discussion to those considered by the solicitors to be



relevant, namely divorce and ancillary relief. Attempts by clients to include other areas in the consultation were successfully resisted by solicitors.<sup>52</sup> Just how effective a proforma can be in controlling the agenda in the initial appointment, became apparent in the observation of Mr Ashe's initial appointment with Richard. In this case Richard did not have access to a proforma until some time into the meeting.<sup>53</sup>

The initial appointment with Mr Ashe was observed opening in a similar way to Richard's earlier appointments. Richard introduced himself, gave his age, and talked briefly about divorce and (his) family law practice. Mr Ashe then responded, he mirrored the form of Richard's speech but linked it to his marital history.

Mr Ashe: "I'm 54 and married. I've been married before – I divorced in 1971. I remarried, we met actually during the divorce process, we shared commiserations (client continued outlining marital history). We've been married 24 years. The last three years it's been going more and more wrong – in a sense we are living apart and now she's taken up with someone else."

Richard: "Are you still living together?"

Mr Ashe: "Yes, but it's a large house, we live separate lives. Either of us could divorce the other, we both have grounds."

Richard: "Is that something on the agenda?"

In his reply the client raised the topic of separation as an alternative to divorce.

Mr Ashe: "Sort of – I said I wouldn't use her adultery, and I would not go back on my word. I would prefer separation."

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<sup>52</sup> As was shown in section 4.52.

<sup>53</sup> Because of Mr Ashe's disability the appointment was not carried out in Richard's office, Richard did not remember to bring a blank proforma with him to the new location. As soon as Richard realised his mistake he phoned his secretary to ask her to bring in a blank form, this took some time and so the first part of the interview was conducted without the aid of a proforma.

The solicitor attempted to turn the discussion back to divorce.

Richard: "So there is a sense that the marriage is over with the possibility of divorce ...?"

The client resisted and set an agenda around separation.

Mr Ashe: "I don't really want that. It would be in the future. I am looking for separation. I've got some questions. As I understand it separation is the one that is enforceable?"

Richard: "In general terms yes, its agreement without divorce but it's always possible that it (financial agreement/settlement) could be overturned later upon divorce... (continues by expanding on reasons for possible changes to a settlement arranged on separation)."

The client having got the information he required on separation moved onto a new topic.

Mr Ashe: "A further problem is my health, my wife is my carer, she gets invalid care allowance, she could still do it, it would take about 35 hours a week."

Richard: "Would she want to?"

Mr Ashe: "I don't know I could get alternative care from the social services but I would have to pay. So there is the option we could continue but lead separate lives."

Richard: "There appears to be some tension and some compassion as well."

Mr Ashe: "Yes there is. I've had MS for 37 years. I've done better than I thought. I've done well! I couldn't look after myself where I am now."

Richard: "It could be difficult anywhere."

The client then indicated what he would need in a settlement.

Mr Ashe: "Yes, but if I could get a ground floor flat – but I'd need capital."

The solicitor took the opportunity to return the meeting to more familiar lines.

Richard: "Tell me about your capital!" (Secretary enters at this point with proforma, at that point Richard took over the leading role and the appointment followed a similar pattern to other observations).

In this appointment, prior to the arrival of the proforma, Mr Ashe took a more dominant role in the initial appointment than was observed in other cases. Mr Ashe introduced new topics, attempted to set an agenda around separation and was able to talk about his marital history, action which was normally discouraged. Richard acknowledged in the post appointment interview, the impact of acting without a proforma.

"He had the advantage over me, because there was no proforma and without the proforma it's very difficult to structure the thing."

The lack of a proforma in this case severely restricted the ability of the solicitor to control the initial appointment.<sup>54</sup> By using a proforma the solicitors were able to structure the appointment and to limit discussion to the areas they perceived to be relevant. The majority of clients were relatively passive participants in the initial appointment, responding more to the solicitors' enquires rather than raising issues themselves. However, clients from a middle class background were more likely to introduce new topics into the dialogue than were their working class peers, for example Mrs Egan raised the issues of index linking of child maintenance and pensions into the dialogue.<sup>55</sup> Such interceptions by clients did not occur very often and solicitors generally dealt with such queries and then continued with the meeting as before.

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<sup>54</sup> As was noted earlier one of the solicitors always acted without a printed proforma, however, she was observed conducting her appointments in a similar format to those who had a printed form, questions were asked in the same sequence and on the same topics each observation.

<sup>55</sup> The issues of pensions would probably have been discussed by the solicitor at some point during the initial interview had Mrs Egan not raised the issue herself first.

A more frequent challenge to solicitors' control of the agenda has already been referred to and concerns clients,' mainly unsuccessful, attempts to get their emotional stories onto the agenda. The strategies solicitors employed to discourage clients talking at length of their marital histories have already been discussed.<sup>56</sup> However, although these strategies were on the whole successful, there was one, very striking, observation where the solicitor had great difficulty in retaining control of the initial appointment. The solicitor (Emily) originally resisted the client's (Mrs Taylor) attempts to set the agenda.

Mrs Taylor: "Shall I give you my background"

Emily: "First, I'll take down some details if that's okay (begins to complete proforma)."

The completion of the proforma continues.

Emily: "Any mortgage?"

Mrs Taylor: "No, can I tell you briefly? We bought the house in ... (clients give some relevant details, but then continued with a long dialogue describing her husbands' behaviour, the effect of this on their son and her parents).

When the client mentions her husband's flat, the solicitor tries to regain control of the agenda.

Emily: "Yes, I was going to ask. How much is his flat worth? And how much is his mortgage?"

Mrs Taylor then replied with the details but before the solicitor could continue with the proforma Mrs Taylor started detailing her husband's employment history. This was information that the solicitor would require, but it had been given too early in the meeting, Emily had not yet got to

that part of the proforma. This appeared to disadvantage the solicitor and enabled Mrs Taylor to continue to dominate the meeting. Examination of the transcript from this initial appointment shows how Mrs Taylor dominated the exchange and suggested many of the topics discussed. This was a very unusual occurrence, the solicitor remarking that the client's behaviour had made the process more difficult. "It's taken one hour to get one instruction out of her."

Solicitors were also observed experiencing some difficulties in controlling the initial appointments where clients attended accompanied by another adult. The presence of these third parties could have affected the exchange in two ways, it could have made the client more confident and therefore more willing to interrupt and challenge the solicitor, or the third party could have contributed themselves to the discussion. In this study there appeared to be little evidence to support the first proposition; clients did not appear to be more willing to contribute where they were accompanied. It was the latter prospect which was more notable, the third parties would contribute towards the discussions themselves.

The form of the contribution would vary depending on the third parties' relationship to the client. New partners, often the most forceful contributors, were frequently observed trying to move the case in a particular direction. In the case of Mr Chapman, his new partner interrupted an exchange about child maintenance,

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<sup>56</sup> See section 4.52.

Mr Chapman: "...yes, and I pay £50 a week for the child (name) it's all voluntary."

Richard: "Some people believe that these are better in a court order..."

Mr Chapman's new partner: "(interrupts Richard) Could we reduce this? It is a lot £50, I only get £30. For two children!"

Similarly, in the case of Mr Garner, his new partner interrupted both himself and the solicitor (Claire) throughout the initial appointment with comments including "couldn't Mr Garner get a share of the house" and, "She (client's wife) should have to work shouldn't she?" The comments did not relate closely to the topic under discussion at the time.

Family members and friends were more likely to interrupt in an attempt to get the client's emotional story back on to the agenda. For example, Mrs Raynor was accompanied by her mother and step-father to the initial appointment. At a very early stage in the appointment the solicitor (Emily) was asking about income, in order to see if the client qualified for legal aid (green form), when the step-father interrupted.

"He (husband) finally left –last night – gave her sixty quid saying that's all that's left – that'll have to last ... he said the welfare can take of them (children of the marriage) for all I care."

Despite the solicitor not responding to his contributions the step-father continued to interrupt with deleterious comments on the behaviour of Mrs Raynor's husband throughout the appointment.

Some of the solicitors in the study reported, and were observed, using particular strategies to limit the involvement of third parties in the initial

appointment. This would include avoiding eye contact with the third person wherever possible, only giving the barest acknowledgement (if any) of any uninvited contribution, and looking directly at the client when speaking. Such strategies limited third parties' opportunities to contribute to the meeting but were not, as the cases above illustrate, always entirely successful. Sarah commented on the role she preferred the third parties to play,

"In this case the friend was ideal. Not saying anything until she reminded the client of questions that she had wanted to ask but forgotten. Supportive but not intrusive." (Sarah after the initial appointment of Mrs Cowen).

To conclude, in this study the majority of solicitors retained control of the initial appointment by using a proforma. This gave solicitors the leading role and enabled them to limit the agenda to what they considered relevant. Most clients conceded control to the solicitor and it was unusual for clients to interrupt the solicitor or to introduce new items onto the agenda. The exception was the emotional stories which clients would attempt to include but solicitors would resist. Third parties and in particular new partners were the most problematic to the solicitors when trying to retain control of the initial appointment.

#### 4.55 Was there a plan of action in place at the close of the initial appointment?

At the close of the initial appointment most solicitors and clients appeared to have some sort of action plan in place. The plan would often include a

number of tasks for both the solicitor and the client to undertake prior to the next appointment. Tasks for clients included collating the information for a legal aid application, contacting banks and insurance companies regarding redemption figures and cash surrender values and providing a list of spouses' behaviour for a divorce petition or finding a long lost marriage certificate. Some solicitors would offer the client a list.

“So we need a valuation figure for the house, a redemption figure of the mortgage – shall I write it down?” (Helen to Mr Spencer)

The solicitors' tasks usually consisted of drafting the divorce petition and writing to respondents or their legal representatives about the proposed divorce. Some solicitors would tell clients that details of the action plan would be included in a follow up letter.

“Right! We have a six point plan – what happens now is I give you a letter explaining all this.” (Richard to Mrs Eastwood)

Very occasionally, the action plan proposed consisted of the client rethinking whether they wanted a divorce.

“I'm really going to have to draw it to a close now. You need to think whether you need a divorce and whether you need to talk to your wife and whether you can sort it out between you.” (Claire to Mr Garner)

In sum by the end of the initial appointment there was usually some sort of action plan in place. Often this included preparing the divorce petition and gathering the information required for the financial settlement. Issues raised by clients during the initial appointment, which were not seen as of



immediate relevance to the divorce and thus had not been explored by the solicitor, were not included in the action plan.<sup>57</sup>

#### 4.56 The establishing of a working relationship

The establishing of a working relationship or rapport with the client, is one of the main functions of the initial appointment. Some of the solicitors in the study appeared to pay more attention to this aspect of their work than others. Two of the solicitors in the study would attempt to reduce the social distance between themselves and the working class clients by modifying their language even to the extent of introducing the occasional mild expletive into the dialogue. Another common tactic to encourage the development a working relationship was the use of the word 'we' when talking client of their case. In the initial appointment of Mrs Egan with Helen, Helen repeatedly used this inclusive term when talking to the client. For example,

“...the capital he’s giving you is more than he has to but I suspect he’s doing that to rid himself of his income obligations towards you. So we have to weigh up ...”

However, there were cases observed when the relationship between the solicitor and client did not get off to a good start. Emily and Mrs Knight provide a clear example,

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<sup>57</sup> The most frequent issue to raised in this regard was domestic violence, other issues included affect of spouses behaviour on children and concern for a child whose mother (the respondent) was addicted to Heroin.

“When she said, ‘did I understand’ I wanted to tell her to f\*\*\* off!”  
(Emily on Mrs Knight).

And Mrs Knight provided the following comment when asked in the interview how she thought the appointment had gone,

“Not as I expected. I thought she (Emily) found it pretty tedious”  
Mrs Knight on Emily)

Such responses were rare. In the majority of cases the solicitor did appear to have established a reasonably effective working relationship with the client. The next section on the views of clients and solicitors on the initial appointment explores this issue further.

## **4.6 The views of the solicitors and clients after the initial appointment**

### 4.61 The views of the clients

The views of the clients of the initial appointment were obtained in the interview, which took place following their meeting with the solicitor.<sup>58</sup>

This section will not recount all the findings from the first interview with the clients as these are reported throughout this thesis.

The focus in this section falls in four related areas. Firstly, the clients’ overall impressions of their initial meeting with their solicitor. Secondly, whether clients had felt able to get all their points across in the initial

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<sup>58</sup> A copy of the schedule can be found in Appendix 2.

appointment. The third area concerns the information given to the clients by the solicitor, and the clients' level of understanding of that information. And finally, the clients' views regarding the gender of their solicitor will be reported.

The majority of clients expressed a positive view of their initial meeting with the solicitor.

"I was really impressed. She (solicitor) seemed confident – keyed up. I felt that what she was telling me was right. She was confident and it made me feel confident in her." (Mrs Dale)

Notably, in the few negative responses received it was law, not the solicitor, which was held to be at fault.

"He's (husband) tied us up. We're disappointed not with the solicitor, but with the law." (Mrs Raynor)

"She was easy to understand, knowledgeable ...she was a bit negative – I know already the law is an ass." (Mrs Taylor)

When clients were asked if they had managed to get everything across, or if there was anything they wanted to ask but had not felt able to, the majority again were positive about their communication with their solicitor. However Mrs Egan's comment suggests that her solicitor did not invite or encourage clients to ask questions.

"She didn't stop to ask if I had any queries. – I felt if I had had a query I could have asked."

Other clients found the consultations to be too short to allow a full exchange of information. For example, Mr Ashe, when asked if he had managed to raise all the points he needed to, responded.

“Not quite, it was only half an hour, there were one or two important ones (left to raise).”

Mr Yates, although complaining that his initial appointment was a little rushed appreciated the cost implications.

“She tried to rush it – I know why she’s doing that - £110 an hour! Which I suppose is fair enough.”

As some clients value the opportunity to talk of their marital history any time allocation may, to them, seem short.

“I forgot a couple of things. If she’d let me I could have been there two hours talking.” (Mrs Shaw)

A majority of clients reported being given information/advice, concerning their situation or the procedure of which they had no prior knowledge or expectation of.

“I didn’t really think I’d get anything. If I was going to get anything at all I expected a couple of thousand – not fifty – fifty.” (Mrs Gibson)

“It was quite interesting (there were) a couple of points I hadn’t even considered.” (Mrs Hall)

“I didn’t realise I could get Legal Aid. She explained it very well – otherwise I wouldn’t have known how to proceed.” (Mrs Denton)

“I didn’t know about that (clean break). Someone at work told me something I thought that’s got to be rubbish.” (Mrs Long)

A vast amount of, often complex, information is given out by solicitors in the initial appointment. Solicitors were observed simplifying the information they gave to clients and this was appreciated by some.

“(Richard) is a nice guy - soothing voice - he did a lot of explaining” (Mrs Eastwood)

“I expected loads of legal jargon – which I wouldn’t have understood. But she simplified everything.” (Mrs Bailey)

Despite such simplification, some clients had not understood all the information given to them by the solicitors. For example, one when asked for her views on the solicitor's proposals responded,

"I didn't really understand." (Mrs Shaw)

Other clients commented on specific areas which they had found confusing.

"I didn't really understand about the pension." (Mrs Knight)

"I didn't understand that bit about the endowment – I have friends where the mortgage has been taken over by the wife and he got the endowment." (Mr Garner).

For some clients the amount of information given proved overwhelming.

"I found it very confusing, but that's a lot to do with my own level of ignorance." (Mr Pearson)

"It was mind boggling – I thought it would be straight forward." (Mrs Whittaker)

One of the most striking comments made by clients in the interview following the initial appointment concerned the gender of the solicitor. Clients were asked if they had found it helpful that the solicitor was male or female. Those clients who had a male solicitor responded to the question by claiming that the gender of the solicitor was not relevant. None of the clients in this study reported finding it helpful that their solicitor was male. The converse applied where the solicitor was female. An overwhelming number of clients declared a preference for a female solicitor. This was the case for both male and female clients. The reasons given for preferring a female solicitor fell into two categories. Firstly clients would refer to the specific skills of listening and empathy that female solicitors were thought to possess.

“You can talk to them (female solicitors) I felt more relaxed.” (Mrs Gibson)

“Yes, I found it better, surprisingly, (to have a female solicitor) yes, women are more sympathetic.” (Mr Yates)

Some clients commented specifically on the lack of these skills in male solicitors.

“I asked for a female solicitor – I thought she would understand – a bloke would be detached.” (Mr Fearn)

“Last time it was a bloke he was so vicious –‘you want to do this, and this, and this.’ You need evil people sometimes but it was awful. He scared me to death so I changed firms.” (Mrs Radcliffe referring to a male solicitor involved in her first divorce.)

“Yes, I asked for her, women are more understanding, men don’t think they want hear the details.” (Mrs Knight)

The second reason for preferring a female solicitor, expressed solely by female clients, was that female solicitors would be more likely to protect their fellow women and understand the particular nature of the problems faced by women in divorce.

“Yes, I do think professionally it is a situation, where you can take sexist sides. Sisters under the skin, that sort of thing.” (Mrs Taylor)

“It’s nicer sitting with a woman they can see your side.” (Mrs Shepherd)

“I was pleased it was a woman – because we are fundamentally different. Women know about children, you need a woman on your side.” (Mrs Denton)

Female solicitors then, were preferred by clients undergoing divorce because of the specific attributes and skills that they were thought to

possess.<sup>59</sup> The specific skills valued by the clients were listening and empathy; and for some female clients a female solicitor was seen as someone more likely to be sympathetic to the problems faced by women and possibly more partisan.

In sum, all the clients in the study were very positive about their initial meeting with the solicitor. Any criticisms made were levelled at the law and not at the legal advisors. Many clients reported being given information about their situation which they had not previously been aware of. Clients appreciated the solicitors' attempts to simplify information, although there was some evidence that clients leaving the initial appointment had not fully understand all that had been said. Some clients found the amount of information given in the initial appointment overwhelming. The responses concerning the gender of the solicitor indicate firstly that clients have an expectation that male and female solicitors have behaviour traits linked to their gender. Secondly, clients are seeking a solicitor with specific social skills, for example, the ability to listen and empathise. It appears that, at this very early stage in the process, such attributes are valued by the clients undergoing divorce, perhaps more than legal skills.

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<sup>59</sup> For example of the literature on the subject on female lawyers and whether their

#### 4.62 The solicitors' views after the initial appointment

The views of the solicitors were obtained in the interviews, which took place following the initial appointments with the clients.<sup>60</sup> This section will be limited to reporting solicitors' comments on four specific areas. These are firstly, the solicitor's perception of the client's motivation in coming to see the solicitor. Secondly, whether the solicitors felt that the client had understood the information, which had been given out in the first appointment. Thirdly, if solicitors were confident that the client would follow the advice given and finally solicitors' additional comments on their overall impression of the client and impending case will be reported.

The first question asked in the interview was, "what do you think this client really wants?" Solicitors gave many varied responses, recognising that the clients' motivation for action is often complex. For example,

"He wants to protect his inheritance." (Helen on Mr. Danks)

"I think he's just seen the possibility of some cash." (Mary on Mr Pearson)

"A new house, regardless of what she'll be giving up. She's in danger of doing something silly in order to get the house." (Helen on Mrs Shepherd)

"Someone to moan at – she needs a counsellor not legal aid." (Emily on Mrs Knight)

"I think she really wants to get back at her husband." (Mary on Mrs Donnelly)

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approach (or the perception of their approach) differs from their male peers see Gilligan (1982) Menkel-Meadow (1995 b) and Wilkins (1998).

<sup>60</sup> A copy of the schedule can be found in Appendix 3.



Some solicitors commented that they did not believe that the client they had just seen did want a divorce.

“Justice! He doesn’t want a divorce at this stage. He’s angry and thinks she should be punished.” (Emily on Mr. Fearn)

“He wants to stitch her up good and proper – he will be divorced but doesn’t want to be.” (Helen on Mr Spencer)

Claire remarked on the ambiguity of some of her clients concerning divorce.

“She doesn’t know – she’s been through it all before – so she knows how horrendous it can be. Everyone’s telling her she should be rid of him, obviously something is still there between them.” (Claire on Mrs Radcliffe)

“I actually think she’s not sure. She’s been in a long relationship, where she’s put up with things for a long time.” (Claire on Mrs Mellor)

In this latter case Claire acknowledged that the client’s wants may have been far short of divorce.

“I have a feeling that we may not get instructions from her. The letter may prompt him (husband) to be as good as gold – which is what she wants.”

The influence of new partners was also noted by solicitors, in relation to clients’ wants. For example when Claire was asked what she thought Mr Garner, who was accompanied in the initial appointment by his new partner, wanted she replied,

“Whatever she (new partner) tells me he wants.”

It was notable that on only one occasion did a solicitor answer the question concerning client wants with a simple, “divorce” and somewhat surprisingly no solicitors stated in this interview that they thought that the client had come merely for information. The question seemed to be

interpreted most often as, what is the client's motivation for beginning the action, rather than what is the client's motivation for seeking an appointment with a solicitor? Solicitors in responding to the question in terms of motivation for action recognised that clients' reasons may be complex and diverse. Solicitors claimed that their clients were driven by a number of factors including revenge, a need for emotional support and a wish to resolve various financial and property issues.

As already stated, much, often complex, information is given out by solicitors in the initial appointment. In the interview following the initial appointment solicitors were asked if they felt they had been able to make the client understand two specific and crucial areas of information. These two areas concerned the grounds for obtaining a divorce and the information relating to the redistribution of property and other financial aspects of divorce. The majority of solicitors did claim that they had been able to make their client understand the grounds for divorce, although, the fact that the information given on the grounds for divorce was limited was recognised in the reply Claire gave after her appointment with Mrs Radcliffe.

“We only touched on unreasonable behaviour.”

When it came to the financial and property issues solicitors were much more cautious, acknowledging how difficult some aspects were for clients to understand.

“She understood the concept regarding getting her hands on the cash – but the information regarding benefits and capital was above her head. I found it frustrating, she was really dippy.” (Emily of Mrs Raynor)

"He struggled a bit on the severance of the joint tenancy." (Claire on Mr Ramsay)

"It's very difficult to get clients to understand that the house and mortgage are different." (Sarah on Mrs Cowen)

The emotional state of the client could also be seen as providing a barrier to client understanding.

"I felt it went over her head. We were at cross-purposes. She was at the angry stage." (Emily on Mrs Page)

The fact that clients might misunderstand was identified as a cause of possible problems in the future by Mary.

"I don't think he understood it – most people don't. He's probably saying things to his wife, which will be wrong. Then she'll go to her solicitor saying he wants half the house – it will make things worse." (Mary on Mr Pearson)

"She seems quite happy – half's fine (of the assets). I didn't quite mean her to think that. That's probably all she remembers – although I did say starting point." (Mary to Mrs Donnelly)

Such problems could possibly be mitigated by the provision to clients of follow up letters containing the main points of information given out during the appointment. Solicitors, whose practice had a policy of issuing such letters, thought the letters were a useful aid to client understanding.

"I think she understood why I couldn't tell her if it was right or not (new house purchase) and why the pension was relevant. Hopefully she'll understand more when she gets my letter." (Helen on Mrs Shepherd)

In the case of the free half hour appointments offered by firm D such letters were not sent, this was acknowledged to be problem by Mary.

"It's a drawback for free advice because you can't go into a lot of detail and can't confirm in writing." (Mary on Mr Pearson)

Solicitors were also asked to comment on how they thought the client felt about the advice/information the solicitors had given to them in the initial appointment. The replies indicate an awareness that often the advice and information given in these situations could be seen as quite negative from the client's perspective. For example, in the quotations below both solicitors assumed that their client had a negative attitude about the advice offered.

"Frustrated that she can't put an offer in (on the house)." (Helen on Mrs Shepherd)

"Frightened her – financial insecurity frightens her – she's already been there, a one parent family." (Claire on Mrs Radcliffe)

New partners were often thought to have a more negative attitude to the advice given than the actual client.

"He was resigned to it he's accepted it's his responsibility – three children still at home. She (new partner) was pissed off." (Claire on Mr Garner)

Often the information given to clients in the initial appointment would include directions to the client to undertake some action or behave in a particular way. Solicitors in this study did not expect clients always to follow the advice they had given. For example Helen had advised Mrs Shepherd not to put an offer in on a new house at this earlier stage in the process. However Helen remarked in the interview,

"I think she'll go for it (put an offer in for the house) whatever."

Similarly Emily had given very clear advice to Mr Fearn regarding his behaviour towards his wife. Again, Emily did not expect the client to follow this advice as she told the researcher,

"He's going to have a right argument with her as soon as he gets home."

Generally, when the advice given by solicitors was non-contentious, for example to collect documents or advise certain official bodies of the impending divorce, solicitors expected that their client would follow their directions. However, solicitors were much less confident about influencing clients when it concerned aspects of behaviour (most often towards their spouse) or where the guidance was in conflict with the specific wishes of the client, regardless of whether these were realistic or not.

At the close of the interview solicitors were invited to add any additional comments, and would often give their overall impression of the client and potential case. These comments were often quite negative and often linked to the negative financial implications, for the client, of divorce.

“They both want the same thing (house) they won’t be able to get it so neither of them will be happy with the outcome.” (Helen on Mr Farrell)

“It’s a difficult one because he’s got to face up to reality. There’s not much capital and his wife is financially dependant.” (Claire on Mr Garner)

Some cases were characterised by the solicitor as potentially problematic.

“A nightmare when you have someone self employed.” (Claire on Mrs Radcliffe)

“It’s quite complex and she wants a quick solution.” (Mary on Mrs Donnelly)

Difficulties were most often envisaged where the apparent spousal conflict had been rated as high by the solicitor.

“This divorce should be straight forward they have both got new partners, both got jobs, there are no children involved, but there is the potential for irrational conflict.” (Richard on Mr Jarvis)

Those clients who are involved in a high conflict separation are often those who are the most emotional. The highly emotionally client can be very difficult for the solicitor to communicate with. Emily passed the following comment after her appointment with Mrs Knight, an alleged victim of domestic violence.

“This is a nightmare client. That’s what we have to put up with. People think you have nice rational clients – but you have more like this – impossible.”

The more emotionally stable clients were seen as offering easier cases.

“She seems to have sorted herself out emotionally. It’ll be a nice straight -forward case.” (Emily on Mrs Long)

In sum, in the opinion of the solicitors in this study, the motivations of clients in seeking an appointment with them, were more complex than just divorce. Clients’ ‘wants’ were thought to range from the practical, for example protection of inheritance, to the satisfying of emotional/psychological needs, such as revenge or a need for emotional support. Regarding client understanding, solicitors generally felt that clients had understood the simplified information regarding the grounds for divorce but were much less confident regarding information given on the financial and property aspects. Follow up letters were thought to be a useful aid to client understanding and their lack was seen as a problem in the free half hour sessions offered in firm D. Clients’ misunderstanding of the information given was seen as a potential source of difficulty in the future. During the initial appointment solicitors gave advice and guidance

to the client which, they claimed in the interview, they did not always expect the client to follow. This was particularly the case where the advice concerned the client's behaviour towards their spouse. Finally, solicitors often gave a rather negative view on their overall impression of the impending case. The negative views may have been influenced by a number of factors: the expectation of an adverse financial outcome for the client, and consequently a potentially unhappy client at the conclusion of the case; anticipated difficulties with the process in a particular case, and the prospect of dealing with a highly emotional client. The most negative comments were made in cases where the solicitor had rated the spousal conflict as high and/or the client was seen to be very emotional.

#### 4.63 A comparison of the views of the solicitors and clients

Whilst solicitors and clients appear to hold very similar views regarding client understanding of the information given out in the initial appointment; there were striking differences in the comments made regarding the immediate overall impression of the client/solicitor/impending case. Clients reported feeling very positive after their meeting with the solicitor; the solicitor had given them confidence and reassurance. Solicitors on the other hand had mainly negative comments; various compounding factors were identified which solicitors anticipated would make the dispute resolution process problematic.

Another notable area of divergence concerned clients' preference for solicitors offering particular social skills, such as the ability to listen and empathise with the client. Clients appear to be seeking solicitors who are able to provide emotional support as well as legal expertise. Solicitors, on the other hand, view clients with obvious emotional needs, with unease. Those clients with less emotional problems are preferred and their cases anticipated as being more straight forward and 'enjoyable' even. There is then a problem in that, clients may be seeking a service which not all solicitors are willing or able to provide.

#### **4.7 Comment**

This chapter has described what occurred in the initial appointments between the solicitors and clients involved in the study. A number of points have emerged which merit further comment.

Firstly, the majority of clients, in this study, claimed that they had not known what to expect from their meeting with the solicitor. It was for most clients a unique experience.<sup>61</sup> Clients arrived at the initial appointment without plans for the future beyond who would care for the children and a few clients appeared ambivalent about divorce. They reported seeking a solicitor who would listen, communicate with them on their own level, and

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<sup>61</sup> Some clients had been through the process before, however they claimed to be able to remember little about their initial contact with the solicitor. See section 4.43.



be supportive; reference by clients to the legal skills of the solicitor were very rare.

Solicitors on the other hand, did know what to expect. As a result of increasing specialisation within family law, the solicitors in this study concentrated almost exclusively on a narrow aspect of family law. For the solicitors in this study, this was divorce where there were some property financial issues to resolve; complex financial and property divorces were not part of their general remit, and neither were disputes under the Children Act 1989. Consequently, the solicitors in this study dealt with a narrow range of cases containing similar factors. And perhaps, with a cynicism born of experience (although acknowledging that clients' motivation in coming to the initial appointment was often multifaceted and complex), solicitors took steps to avoid listening to clients' individual stories.<sup>62</sup>This could be problematic, intertwined with client's accounts of marital disharmony were clear statements of other areas of concern,<sup>63</sup> most commonly relating to domestic violence.<sup>64 65 66</sup> The initial interview could provide solicitors with an opportunity to identify situations where abuse has occurred and thus be able to advise clients of the measures of

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<sup>62</sup> Eekelaar et al (2000) similarly notes that solicitors in their study discouraged clients from giving information relating to the emotional side of their marriage. (p73)

<sup>63</sup> Genn (1999), and the later work by Pleasance et al (2004), found that people experiencing family problems such as divorce often had other associated problems which required resolving. Genn refers to this phenomenon as "problem clusters" (p31).

<sup>64</sup> Reference was also made to drug abuse and welfare rights issues.

<sup>65</sup> Eekelaar et al (2000) also found that allegations of domestic violence were "played down" by solicitors. (p86)

<sup>66</sup> Greatbatch and Dingwall (1999) similarly found evidence of domestic abuse issues being marginalised in mediation.

protection available.<sup>67</sup> Solicitors in this study did not take advantage of this opportunity in the cases that were observed. Moreover, if, as suggested earlier, clients are telling their stories in order to gain confirmation from the solicitor that divorce is the right and only option for them, the majority of solicitors did not meet this need. Whilst clients were seeking help from someone who would listen to and address the wider aspects of their problems, solicitors focussed on the narrow legal issues surrounding divorce.<sup>68</sup> Emotional issues were ignored rather than explored and, with one exception,<sup>69</sup> solicitors did not refer clients to outside agencies who could have provided the appropriate help.

It may be pertinent to introduce the subject of the solicitor's gender into the discussion at this point. As disclosed earlier in this chapter clients reported a preference for a female solicitor. This preference was most often supported by comments relating the specific interpersonal skills that female solicitors were thought to possess, most notably the ability to listen, sympathise and empathise, skills linked to Gillighan's "ethic of care."<sup>70</sup> In the present study, the female solicitors did not appear, in the initial appointments, to be more prepared to listen, sympathise and

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<sup>67</sup> The recently published Family Law Protocol by the Law Society (2002), advises solicitors to be, "aware of the widespread incidence of domestic abuse and remedies available," and where the client does disclose that they are a victim of such abuse to, "undertake a needs assessment and safety planning with client." (p 3 para 1.10)

<sup>68</sup> Douglas and Murch (2002) reported that solicitors in their study were "more comfortable" with demands made on their legal skills, emotional support was offered merely as means of assisting clients get through the legal process, not as a means of family support. (p73,75).

<sup>69</sup> This solicitor gave clients a small information pack as they left the initial appointment, which did include contact details of counselling services etcetera.

<sup>70</sup> Gillighan (1982).

empathise than their male counterparts. So this perception amongst clients may be without foundation.<sup>71</sup>

Information given out to clients in the initial appointment regarding the financial and property aspects of separation from their spouse, was often complex and sometimes unexpected. Many clients reported difficulty in recalling and fully understanding all the information given. Follow up letters may be crucial, and whilst it is possible to understand the resource constraints which prevent solicitors sending out letters after the free half hour appointments, this can in itself lead to problems as the client may proceed, on the basis of misunderstanding.

In relation to the three stages that Sherr suggests should exist in an effective initial appointment - listening, questioning and advising - listening to the client appeared to be the stage that was most neglected. No solicitors referred to listening as a key component of the initial appointment.<sup>72</sup> Questioning of the clients was confined to the areas included in the proformas, that is those topics which, appear to the solicitor, to be relevant to divorce. The solicitor will then advise the client, Sherr's third stage, on the information, which has been revealed in the questioning. The advice therefore was confined to aspects which the solicitor has defined as relevant. By neglecting the listening aspect of Sherr's three stages, it is arguable that the solicitors have not been able

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<sup>71</sup> Mather et al (2001) recounts that female solicitors in their research were "slightly less likely to report that they encouraged their clients to discuss their emotional problems." (p83)

to identify and deal with the client's needs. This difficulty may be compounded by narrowness of the specialisms within family law.

Finally, by the close of the initial appointment, for the majority of clients, the process had begun. There was a clear plan of action, at the very least of action to be undertaken before the next appointment, and often an indication of the eventual outcome. As the majority of clients were very positive about the outcome/conclusion of initial appointment this suggests that clients have found it reassuring that the solicitor is taking the burden from them and providing them with an, even if unfavourable, clear indication of the future. If this is the case it could offer an explanation of why mediation does not appeal to the general public. In mediation the outcome is not prescribed. It develops throughout the process; there is no clear indication of the eventual outcome and no person to whom the client can pass the burden.

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<sup>72</sup> In the study by Mather et al (2001) "being a sensitive listener" was rated by the lawyers as the most important skill in divorce practice (p 67).

# Chapter Five

## How did the cases progress?

### 5.1 Introduction

Before outlining the results of the fieldwork in relation to the major themes of the thesis that is issues concerning control and the contribution of solicitors, it is important to provide the reader with information regarding the progression and eventual outcomes of the cases discussed in the previous chapter. This chapter therefore reports on what happened to the cases in the study after the initial appointment. It begins by outlining the various routes/destinations for the cases in the sample in relation to divorce before moving on to consider the precipitating factors for subsequent appointments. The second part of the chapter concentrates on the resolution of the ancillary issues, in particular the financial disputes, and will close with a brief comment.

### 5.2 Forty clients – what happened to them?

The table below illustrates what happened in the forty cases whose initial appointments were observed as part of this study.<sup>1</sup> The table relates to

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<sup>1</sup> The number of observations and interviews undertaken for each case are given in table 3.3 in the methodology chapter.

divorce only; the financial outcomes can be found in table 5.2 in this chapter.

**Table 5.1 Forty clients – outcomes relating to divorce**

Did not return to the solicitors after the initial appointment <sup>2</sup> .	<b>14</b>
Reconciled.	<b>1</b>
Divorce – Decree Absolute.	<b>18</b>
Changed Solicitor.	<b>3</b>
Delayed process in order to use separation fact. <sup>3</sup>	<b>1</b>
Judicial Separation	<b>1</b>
Already divorced – Financial resolution obtained.	<b>2</b>
<b>Total</b>	<b>40</b>

<sup>2</sup> This figure includes one client who had already obtained his divorce and who was seeking advice regarding the financial settlement. He did not proceed.

<sup>3</sup> Under the provisions in S.1(2)(d) Matrimonial Causes Act 1973 a petitioner can obtain a divorce if "the parties to a marriage have lived apart for a continuous period of at least two year immediately preceding the presentation of the petition and the respondent consents to a decree being granted." Thus a divorce can be obtained via this 'fact' without the petitioner having to make allegations of fault against the respondent.

Of the original forty cases, eighteen went on to obtain their divorce (decree absolute), two of the clients were already divorced, their cases progressing on the ancillary relief issues; and one client obtained a decree of judicial separation. This leaves nineteen clients who, in their initial appointment were apparently seeking a divorce, but did not proceed directly to a divorce with that solicitor. Three clients changed solicitors during the process. One client duly informed the solicitor that she was now reconciled with her partner and another client decided after the initial appointment to wait until she could use the two year separation ground, specifically to avoid any acrimony. The remaining fourteen clients did not return to the solicitors, or continue with the process, after the initial appointment.

### **5.3 The non-returnees or “fizzler”<sup>4</sup> cases**

The majority of cases which did not proceed consisted of those clients who did not return to the solicitors after the initial appointment. It was a much rarer occurrence for cases to fail after more than one appointment with a solicitor; in this study there was only one such case, Mrs Shepherd, referred to above, who withdrew after a second appointment with the solicitor, claiming that she and her husband had reconciled. The solicitor in this case commented that she expected that this client would return eventually and proceed with the divorce. A similar view was

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<sup>4</sup> The term “fizzler cases” was coined by Maclean S (1998) to describe family justice cases which do not progress to the anticipated end point.

expressed by solicitors regarding many of the clients who did not return after a first visit.

The transcripts of the initial appointments of the clients who did not return were examined to see if they contained any indications as to why the client did not proceed. In some cases there was a very clear indication that the client would not return. A perhaps extreme example can be found in the case of Mr Hyde where the solicitor made it clear that she could not accept his instructions.

“I can’t possibly tell you to move money – to conceal it, so that she (wife) can’t get at it. As well as a solicitor I am an officer of the court. I can’t advise you to take such action to stop your wife claiming – it’s illegal.” (Sarah to Mr Hyde)

Mr Hyde was unwilling to accept any further advice and walked out of the meeting shortly after the above response.

More notably, in seven of the fourteen cases which did not continue, the financial implications of proceeding with a divorce, as highlighted by their solicitor, could be seen as particularly problematic. Two of the clients, who did not qualify for legal aid advice and assistance, indicated that they would find it difficult to fund proceedings privately. This was particularly acute for Mrs Whittaker who was just above the prescribed income level in order to qualify.

“I am afraid from what you tell me – if your income is over £80 per week you’re not eligible for it (legal aid advice and assistance). And the costs privately will be about 550 quid.” (Claire)

Claire commented in the post appointment interview,



“I don't expect her to come back. I could do a letter for her (to her husband) but £50 is quite a lot. You can't let your heart strings be pulled.”

The other financial aspects which may have influenced the clients not to continue related more to the eventual outcome than the process of divorce. One client, Mrs Mellor faced complications relating to the recent purchase of the marital home, a council property and the repaying of a discount.

“As you probably know – council houses are sold at a discount. If you sell them within three years the council claw some of the discount back. So if the house is transferred back to you – you may have to pay some back.” (Claire to Mrs Mellor)

Other notable financial issues from the cases that did not progress included those middle class clients who lived relatively comfortable lifestyles, which according to the information given out by the solicitors during the initial appointment, were at risk of significant deterioration had a divorce gone ahead.

More worryingly, in four of the seven cases where financial implications appeared relevant to the decision not to proceed, the client had made allegations of domestic violence. Mrs Radcliffe was such a client. Claire was observed warning Mrs Radcliffe of the cost implications of proceeding.

“Bad news I'm afraid – you're not going to get legal aid. And an injunction and divorce would cost between five hundred and one thousand pounds.”

Three cases which did not proceed were those clients who had appeared ambivalent about a divorce at the initial appointment, specifically stating

in some cases that they were merely seeking advice; for example, “I just want some advice, about divorce. I don’t want to go ahead yet.”(Mrs Page)

Finally, for some clients merely attending an initial appointment with the solicitor may achieve the desired outcome. For example, Mrs Eastwood, who claimed not to want a divorce, arranged for the solicitor to send a letter to her husband detailing the possible deleterious financial outcome should the divorce go ahead. A more interesting example is that of Mrs Donnelly, who despite reiterating throughout the initial appointment that she was clear in her intention to proceed with the divorce, withdrew two days later. Mrs Donnelly’s attendance at the initial appointment had prompted a family conference with the result that the husband had agreed to put all the marital assets, which were substantial, into joint names and in addition had agreed to change his will in Mrs Donnelly favour. Thus Mrs Donnelly’s interests appeared to have been brought to the fore within her family, by attending the appointment with the solicitor.

It is of course not possible in this study to provide any certain answers as to why some cases did not proceed. Clients were not contacted once they withdrew. The above merely provides some suggestions as to why the clients in this study did not continue.

#### **5.4 The cases which continued: the subsequent appointments**

We now need to look at, from those who continued, as to who instigated the subsequent appointments and their reasons for doing so. The practice amongst solicitors regarding the number of subsequent appointments was not uniform. Helen had the highest number of subsequent appointments per client in the sample. Sarah and Emily had the lowest but this was partly because for routine matters, for example the completion of a petition, the clients were given appointments with a trainee solicitor.

The majority of subsequent appointments, in this study, were arranged at the request of the solicitors, the most common reason for requesting a meeting being the completion of documentation. Such meetings usually occurred in the early stages of the process and concerned such things as completion of the divorce petition and supporting affidavit, the application for a legal aid certificate and, later on in the process, the completion of the affidavits relating to financial and property issues. The return of various documents to the solicitor's office would also trigger meetings. For example, the arrival of a legal aid certificate would precipitate an appointment to discuss the financial and property dispute. The bulk of the meetings between solicitors and clients appeared to take place in the early stages. Some solicitors appeared to have little face to face contact with the client once the early procedural stages had been complete, relying instead on communication via the post or telephone.

Of the solicitors who continued to meet with their clients the most frequent reason for calling a meeting apart from that relating to documentation outlined above, concerned correspondence from the opposing solicitors. For example in the case of Mr Ramsey, the opposing solicitor had written to inform Mr Ramsey's solicitor that their client had stopped instructing them. More often, such correspondence related to the financial negotiations, and was in the form of offers and counter offers. Meetings with clients were then arranged to inform the clients of the offers and to discuss possible responses.

Finally, solicitors were observed calling meetings to clarify the client's financial information, for example Helen called a meeting with Mrs Egan to discuss Mrs Egan's breakdown of weekly expenditure.

It was more unusual for clients to instigate the solicitor client meetings. The most common reason for clients to seek such a meeting was when they had received direct communication from their spouse concerning the financial settlement. For example, Mrs Gibson told Claire why she had asked for the meeting,

"He (husband) phoned me and offered me one thousand pounds for his shares."

Similarly Mrs Dale made an appointment to see Helen after her husband had contacted her regarding a letter he had received from Helen.

Mrs Dale: "You were absolutely right about the letter."

Helen: "He hit the roof did he?"

Mrs Dale: "Well probably – but, we are speaking and he said he will raise half the value of the house to buy me out"

Clients also arranged meetings with their solicitor after material changes in their circumstances of the type to affect the financial outcome. For example Mr Farrell asked for a meeting after discovering that his wife had obtained a full time job. Mr Jarvis similarly arranged a meeting after his father died, the subsequent inheritance potentially increasing Mr Jarvis wealth.

In only two cases, both female middle class clients, did the client request an appointment with the solicitor, with the apparent intention of checking on the progress of their case and encouraging some solicitor activity.

Helen: "What can I do for you then?"

Mrs Dale: "Well I've got notification of the decree nisi – I was just worried if you were away on your holidays - ."

Helen: "I'm not going away until October so don't worry about that."

The strategy may have been successful as the solicitor had, by the end of the appointment, agreed to draft a letter to Mr Dale regarding the financial settlement. Mrs Egan also arranged an appointment to check on case progress, although in the interval between arranging and attending the appointment, she had received a letter from her ex husband which she then wanted to discuss with the solicitor.

Helen: "Just remind me – have you come in because I asked you to, or have you come in because you thought you needed to?"

Mrs Egan: "Well, I came to see what's happening – but he sent me this letter this morning and I've been so nice to him and it's just appalling."

Although it was rare for clients to seek a meeting with their solicitor to check that their case was progressing satisfactorily, it cannot be implied from this that all clients were satisfied with how their case was progressing. The cost implications of contacting their solicitor were perceived by some clients as providing an insurmountable barrier to such action. For example Mrs Taylor having told the researcher in an interview that she was dissatisfied with the pace of progress in her case stated,

“There’s nothing you can do. I’d like to speak to Emily (solicitor) to ask why nothing’s happened but at £2 a minute I might as well speak to someone in Australia.”

The subsequent appointments with solicitors were generally of a shorter duration than the initial interview, the median length being twenty minutes.

In addition to appointments with the solicitors one client had two conferences with counsel. In both cases the contact with a barrister was suggested by the solicitor. In the first instance the solicitor proposed getting counsel’s opinion prior to making a decision over whether to go to court. The solicitor asked if the client would prefer postal correspondence or to meet with the barrister personally. The client chose the latter. On the second occasion the circumstances had changed significantly in that the client, who was seeking spousal maintenance, had obtained full time employment. The solicitor explained to the researcher her purpose in arranging the conference.

“She says she can’t manage on less – but I think she can. I wouldn’t normally ask for a conference (with a barrister) but I want a second person to say to her No! You don’t need the extra money – you might just get a nominal order.” (Helen on Mrs Egan)

As stated above the practice between solicitors regarding the number of subsequent appointments they had with clients varied. The views of the solicitors were sought on whether they preferred to continue their case with face to face meetings with clients or believed communication could be just as effective via other means, for example post or telephone. Two solicitors referred in their reply to the individual needs of the client,

“It depends on the client – some can’t cope with letters... There are some intelligent clients who you could see in the beginning and you might not need to see them again until the end. It varies according to the client.” (Mary)

“It depends on the area which needs to be discussed and depends on the client. If I’m at all unsure I prefer to meet them face to face.” (Claire)

Mary and Claire worked for a practice with a large number of working class clients. A more common response was for the solicitors to refer to their preference in terms of managing their workload.

“My preference is for correspondence. Some clients get miffed but it’s the only way of controlling the caseload.” (Helen)

The benefits of limiting the face to face contact with clients, was also seen to bring other benefits.

“I’d rather use a letter or phone; it fits in more with the volume of work. It also keeps an emotional distance.” (Emily)

Richard was quite clear about the means of limiting the number of subsequent appointments.

“The policy is not to see clients unless I invite them in – otherwise there are some who would come in every week....They have to convince (secretary) and me that a meeting is necessary before they come in.”

In sum, most appointments between solicitors and clients were called by the solicitor. The main reason given for arranging subsequent

appointments with the clients was for the completion of documentation. The majority of these appointments occurred at the early stages of the case. In the later stages, some solicitors appeared to communicate with clients mainly through the post or via the telephone. Of those who continued to meet with their clients, communication from the opposing solicitor appeared to be the most common reason for these subsequent meetings. Clients were less likely than solicitors to instigate meetings. The most frequent reasons for clients to ask for a meeting were after receiving communication from their spouse or following a change in relevant circumstances. It was very rare for clients to be proactive and seek meetings merely to check on the progress of their case.<sup>5</sup>

## **5.5 The financial, property and child Issues**

This section will report on the outcomes relating to the financial property and child issues. The table below details the outcomes as at the close of fieldwork.

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<sup>5</sup> Other clients did report checking on the progress of their case via the telephone but, as far as the researcher is aware, apart from the two examples given above they did not seek an appointment solely for that purpose.



**Table 5.2 Forty clients – outcomes relating to financial issues**

Consent Order	<b>9</b>
Settled on the day of the trial	<b>1</b>
Parties own agreement – no order made.	<b>3</b>
Case continuing at close of fieldwork.	<b>4</b>
No financial issues to resolve.	<b>4</b>
Case did not progress.	<b>14</b>
Reconciled	<b>1</b>
Changed Solicitor.	<b>3</b>
Delayed Process in order to use the separation fact.	<b>1</b>
<b>Total</b>	<b>40</b>

Of the cases that progressed, the majority had their financial and property resolutions ratified in a consent order. Four cases were not finalised at the completion of the fieldwork. According to the information provided by the solicitors, most were in the final stages of settlement. In four cases no financial orders were made. In three of these there were no significant financial assets to justify seeking an order. In one case however, the client had decided against seeking an order, despite there being a significant amount of equity in the marital home. The solicitor had closed the file but later told the researcher in an interview that she expected the client (Mrs Foster) to return,

“Yes I do think she will (return) - if she gets over her guilt. It’s a lot of money to turn your back on. She has doesn’t want to go ahead now and I have some sympathy with that.” (Mary on Mrs Foster)

In three cases the financial disputes were resolved by the parties themselves. As two<sup>6</sup> of these agreements were arrived at without disclosure they were not able to be ratified into a consent order.<sup>7</sup> In such situations the solicitor sought written confirmation from the client regarding their instructions.

“I’ll need you to sign a letter saying ... I can’t advise you adequately without the financial information and that you’ve decided to accept his offer even though you might be entitled to more – then you can’t come back later and sue because you didn’t get a share of his pension.” (Helen to Mrs Dale)

No cases went to a full court hearing although one case settled at ‘the door of the court’ on the day of the trial.

In only two cases was there any dispute concerning contact or residence<sup>8</sup> of children. In neither case had the client referred to such difficulties in the initial appointment. In the case of Mrs Egan her ex-husband’s contact arrangements became an issue at the same time as the financial negotiations became more acrimonious. Mr Ramsey, who in the early stages of separation reported having an amicable relationship with his wife, was considering applying for a residence order at the close of fieldwork, as his relationship with his spouse appeared to have deteriorated, and he claimed to have concerns regarding his son. In the event, there were no court orders for residence or contact applied for by

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<sup>6</sup> Insufficient information was provided by the solicitor regarding the financial outcome of one case beyond the fact that the parties had resolved the issues themselves.

<sup>7</sup> Certain information regarding the material facts has to be provided before a court can make a consent order. See *Livesey v Jenkins* [1985] 1 ALL ER 106. Rule 2.61 of the Family Proceeding Rules 1991 specifies the information that must be provided to the court.

<sup>8</sup> A contact order is an “order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other;” A residence order is “an order settling the arrangements to be made as to the person with whom a child is to live.” Section 8 (1) of The Children Act 1989.

the clients in the sample although the fieldwork was complete before Mr Ramsey's case was finalised. It is therefore possible that there may have been a residence or contact order applied for and granted in that case. Mrs Egan and her ex-husband resolved the dispute themselves without court involvement. As discussed in the previous chapter on the initial interview,<sup>9</sup> the solicitors tended not to get involved in the child issues beyond ascertaining that reasonable arrangements for contact were in place. Clients were generally advised by the solicitors that it was best if such issues could be resolved between the parties themselves.<sup>10</sup>

## **5.6 The duration of the process**

The process of obtaining a divorce and resolving the ancillary matters varied in duration from between six months to nearly three years.<sup>11</sup> The table below shows how the different durations are distributed in the research sample.<sup>12</sup>

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<sup>9</sup> See section 4.53.

<sup>10</sup> Eekelaar et Al (2000) found similar evidence of solicitors encouraging parties to resolve disputes without recourse to the law (p102).

<sup>11</sup> The duration of cases has been measured from the date of the initial appointment to the date when the researcher was informed that the case had been closed. This information came from the solicitors or the solicitors' secretaries, the actual date of completion therefore is not specific to an actual date but to a period within two/three weeks.

<sup>12</sup> As the four cases which were not finalised at the close of fieldwork were, according to the solicitors, close to completion they have been included in the table below according to the time that had elapsed when the fieldwork ended.

**Table 5.3 Case duration**

<b>Duration</b>	<b>Number of Cases</b>
6 months or less	<b>2</b>
7 – 11 months	<b>5</b>
12 – 17 months	<b>7</b>
18 – 24 months	<b>6</b>
24 months and over	<b>1</b>
<b>Total</b>	<b>21</b>

As is clear from the table above, the majority of cases reached conclusion between one and two years after the initial appointment. The median duration for the cases in the sample was eighteen months.<sup>13</sup> No cases were completed in less than six months and the longest period between initial appointment and conclusion was two years nine months.

Clients were asked, in their very first interview with the researcher, how long they expected their case to last and these expectations were compared to the actual length of the case. No cases were concluded quicker than the clients expected. In two cases, both of which were completed at six months, the client's estimation was accurate. However the majority of cases continued for longer than clients claimed to expect. In some cases, the difference was only minor. For example, the estimation of six to nine months for Mrs Clarke was only one month short of the ten months that the case did take to complete. In other cases the difference was more significant. For example, Mrs Raynor and Mrs Bailey

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<sup>13</sup> This is a longer period than that found by Eekelaar et al (2000) who reported a median duration of between 12-13 months for privately paying clients and between 14-15 months where one or both parties were legally aided (p169).

both told the researcher that they expected their case to last six months; this was far short of the eighteen months the cases did take to complete.

Many clients, when asked for their expectation of the duration of the case, merely repeated the information given to them by the solicitor in the initial appointment. Solicitors often prefixed such advice with phrases such as “if all goes to plan ...” It may be that solicitors were underestimating, when giving the client advice on duration how often cases did not proceed “according to plan.” In the case of Mrs Bailey above, the duration of the case was, according to the solicitor, significantly lengthened after problems with the court bailiff and process server.<sup>14</sup> Had the services of the court bailiff not been required the process would have been shorter and closer to the client’s original estimation. Mrs Bailey had initially accepted the solicitor’s original estimation, as she told the researcher,

“I expected it to take six months at the most, which was what I was told. It’s (been) a lot more messy than I thought. I thought it would be straightforward. I remember Sarah (solicitor) telling me that most cases are six months, nine months at the most if someone is being difficult.”

A problem, which was apparent in some of the longer duration cases, was that the material facts, which were relevant to the resolution of the financial and property disputes, changed as time passed. Thus, solutions which appeared appropriate in the early stages of the process were not

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<sup>14</sup> Before a divorce can proceed the divorce petition has to be served on the respondent and acknowledgement of service signed by the respondent has to be returned to the court (Family Proceedings Rules 1991 r. 2.9). If the respondent does not return the acknowledgement of service it is possible to use the services of the court bailiff to obtain the appropriate signature.

viable in the later stages. For example in the case of Mrs Egan, the original goal was to seek an extension of her spousal maintenance. During the period of time when her case was continuing, Mrs Egan obtained full time employment which greatly reduced her likelihood of success in her claim. Later a close relation of Mrs Egan, who had been providing the childcare to enable Mrs Egan to work, died. The family circumstances therefore had changed significantly during the progress of the case and the initial solution was no longer appropriate. The case of Mr Jarvis further illustrates this point. Mr Jarvis's father died unexpectedly during the ancillary relief process, substantially increasing Mr Jarvis wealth and potentially Mrs Jarvis' claim on any capital. In cases such as these a longer process can lead to greater uncertainty, as the appropriate resolution is far from clear.<sup>15</sup> In addition, in the cases above, both clients reported increasing conflict with their ex-spouses in the later stages of the process. A longer time span for ancillary relief negotiations may therefore have negative implications for the parties' post-divorce relationship.

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<sup>15</sup> Davis et al (1994) similarly found that a consequence of a longer process was that circumstances changed which nullified earlier potential solutions.

## 5.7 Comment

Nineteen of the original forty clients in this sample did not complete the process with the solicitor with whom they attended the initial appointment. Possible reasons for abandoning the process have been discussed earlier in this chapter but it might be worth emphasising that the initial appointment itself may adequately meet the needs of some clients. There was evidence in this study of clients attending an initial appointment with a solicitor solely to obtain information and/or to exert pressure on their spouse.

Of the cases that continued the process was usually longer than predicted by the clients. Face to face meetings between solicitors and clients were less common as cases progressed. The majority of solicitors in this study were keen to limit the number of face to face meetings with clients; most solicitors claiming this was necessary in order effectively to manage their workloads.

However, meetings between the solicitors and clients in this study were most often instigated by the solicitors, although examination of the data reveals that it was, most often, the actions of others which precipitated the solicitors' action in calling for a meeting with the client. For example, documents returned from court or the Legal Services Commission, or correspondence from the opposing solicitor; were all common triggers for solicitors arranging subsequent appointments with clients. Solicitors,

therefore, were calling meetings with their clients as a reaction to action from other sources. This reactive approach has attracted criticism in the past. Davis et al (1994) describe how solicitors in their study adopted a “responsive mode” when dealing with the ancillary relief issues, despite an acceptance that this was not appreciated by the clients (p120-125). Clients in this study similarly commented on the lack of action. For example Mrs Lawton complained in the final interview,

“I needed to push it all the time. We nearly missed the final date set by the building society. If it was left to him (solicitor) we would have.”

Mr Jarvis made a similar point,

“I had to get on to him a couple of times. They all need chivvying up don’t they.”

No solicitors were observed providing clients with dates for a subsequent meetings at the initial appointment. There was no planned programme of work. It is possible that a more proactive approach with greater certainty for the clients, at least regarding the case progress if not the outcome, would be more reassuring for clients. The present reactive system, tolerant of delays,<sup>16</sup> encourages greater uncertainty, and can leave the clients in a state of limbo and the resolution process at risk, as real life events (such as birth, death and unemployment) may intervene and make early solutions unworkable. A clear programme of meetings and stages may minimise delay and uncertainty and benefit both the client and the solicitor.

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<sup>16</sup> Delay is not always viewed negatively. Eekelaar et al (2000) describe solicitors’ use of “constructive delay” as a tactic in negotiation and to ensure clients were certain about divorce (p166), but this was not relevant to cases in this study.



# Chapter Six

## Control

### 6.1 Introduction

The question of who exercises control over the process and outcome in solicitors' negotiation of divorce is one that is central to this thesis. The concept of party control is one of the central tenets of mediation and was highlighted by the government as a benefit that the traditional system, of bipartisan negotiation by solicitors, did not supply.<sup>1</sup> A review of the existing research into the exercise of control in the process of resolving the financial and property disputes in divorce, in both family mediation and solicitor negotiation, is provided earlier in this thesis.<sup>2</sup> This chapter recounts the findings from this study relating to aspects of control. It begins with a brief reminder of the issues of control which were apparent in the initial appointment between the solicitor and client and will move on to present the evidence regarding the exercise of control at later stages in the process. Finally the views of the participants, both solicitors and clients, on the exercise of control throughout the process, will be recounted.

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<sup>1</sup> Para 5.6 and para 2.20 in *Looking to the Future: Mediation and the Ground for Divorce* Cm 2799 (1995).

<sup>2</sup> See chapter two.

## 6.2 Control of the initial appointment: a reminder

The issue of control was briefly examined in the chapter on the initial appointment. It was reported that the solicitors in this study were observed exercising control over dialogue and agenda in the initial appointment via the use of a proforma. Use of the proforma in this way limited discussion to the topics deemed relevant by the solicitor. Control of the dialogue was argued to be necessary by the solicitors, in order to limit the capacity of clients to squander the limited time available on their stories of marital disharmony. The majority of clients did allow the solicitor to dictate the agenda, although middle class clients appeared more willing to introduce topics of their own volition.

Where the client was accompanied by another adult this did appear to have a negative impact on the solicitors' ability to control the dialogue. These third parties were observed on numerous occasions interrupting the solicitor in an attempt to either raise issues of concern to themselves<sup>3</sup> or to get the clients' stories of mistreatment by their spouse back onto the agenda. Solicitors adopted various tactics to limit the involvement of these third parties, but did not appear able to demonstrate the same level of dominance as they had when the clients had been unaccompanied. The adoption of the proforma as a tool to limit the dialogue, it was argued, limited the solicitor's ability to listen to the client and thus the solicitor only

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<sup>3</sup> For example, 'new partners' who were keen to limit the funds given to the client's first family.

'heard' the information which had been deemed relevant to the process of divorce.

### **6.3 The subsequent appointments**

In the subsequent appointments, although clients from a middle class background were still more assertive than their working class peers, it was notable that nearly all clients appeared more forthright, in their conversations with the solicitor, than they had in the initial appointment. Clients in subsequent appointments were observed being more willing to interrupt and question the solicitor; and occasionally introduce topics into the conversation. For example, in the second meeting between Claire and Mrs Gibson, Claire was starting to go through the divorce petition,

Claire: "Right we'll sort out the legal aid – but first we need to sort out the divorce. This is the important bit; it's called the prayer ..."

Mrs Gibson interrupts with a question, which changes the topic back to an earlier discussion concerning a letter she had received from her husband.

Mrs Gibson: "You know – when he wrote that letter, where he said if he died any superann (sic) would come to me – Is that right?"

Claire: "It'll change when you're divorced – but he can still nominate you. I think we need to protect those benefits for you."

This increased assertiveness of clients in the subsequent appointments did mean that although still dominant, solicitors did not have the same degree of control over the dialogue that was observed in the initial appointments. There are, however, other ways in which control can be

exercised, in relation to the outcomes pursued and whose perspective of the clients' situation prevailed, and it is to these that we now turn.

#### **6.4 The exercise of control by solicitors**

Existing research indicates that solicitors justify exercising control over clients' chosen outcomes and perceptions, by claiming that clients come to them with unrealistic and ill-thought-out expectations. The solicitor thus has to re-orient the client towards more realistic goals.<sup>4</sup> The solicitors in this study similarly claimed in interviews with them that clients needed a degree of direction. This was seen in some cases as protecting clients from themselves. As Richard commented, the justification for exercising a degree of control over clients was to,

“Try to help clients, stop them putting their heads in nooses which most of them would do.”

There were many examples in this study where solicitors were observed successfully modifying the clients' original perceptions of their case and the possible solutions, to ones which the solicitor considered more appropriate. For example, Mr Chapman arrived at the solicitors with what the solicitor seemingly viewed as a totally unsuitable solution.

“So, you're giving her the house. And the policies. And repaying the debts – Are you going for man of the year, or something!”  
(Richard to Mr Chapman).

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<sup>4</sup> For example, Mather et al (2001) reported that lawyers exercise “considerable leverage in their relationships with clients that enables them to bring pressure to bear in aligning their clients' perspective with their own.” (p 90). Similarly in the UK Eeklelaar et al (2000) observed family lawyers taking steps to modify the client's expectations and views to that which the lawyer believed was realistic. (p 98).

Richard clearly did not regard this as a settlement he could endorse and he successfully persuaded Mr Chapman to pursue an alternative and more favourable resolution.<sup>5</sup> Another example was Mrs Dale, who informed the solicitor that she was prepared to forgo her share in the marital home on the understanding that her husband would ensure that her share was bequeathed to their sons on her ex-husband's demise. After meeting her solicitor, Mrs Dale's view changed, and she did seek financial compensation for her loss of the capital tied up in the marital home.<sup>6</sup> There were many such examples of solicitors influencing the client's view of the most appropriate outcome.

Solicitors were also observed applying pressure to clients not to accept inadequate offers when received from the opposing party. In the case of Mrs Egan, there were a number of appointments with the solicitor when Mrs Egan appeared to want to accept the offers of settlement put by her ex-husband's solicitors, each time being persuaded by the solicitor to continue with the case and eventually to court. The following comment made by Mrs Egan's solicitor Helen, after the seventh observed appointment, is fairly typical of her comments throughout the process and demonstrates the solicitor's awareness of the pressure being applied to the client.

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<sup>5</sup> Mr. Chapman obtained a 'Mesher Order' on the property whereby he would obtain a third of the proceeds from the sale of the house, the sale of the house being precipitated by certain events, for example when his children reach a certain age or his ex-wife remarries. Such orders originated from the case *Mesher v Mesher and Hall* [1980] 1 All ER 126.

<sup>6</sup> Mrs Dale agreed to seek a sum equivalent to roughly half the value of the property. Later on in the process the solicitor tried to persuade Mrs Dale to seek a larger portion in recognition of Mr Dale's other financial holdings. Mrs Dale resisted the solicitor on this point. See section 6.5.

“By the time we got to the end of the meeting she wanted to take the plunge (applying for a court hearing). There were occasions before when I thought she’s going to bottle it.”

In sum, this study supports the view that solicitors in divorce cases do often exercise control over their clients; solicitors were observed altering both the client’s original goals and the perception of their case.

#### 6.4 (i) How control was exercised: the solicitors’ tactics

Solicitors were observed using a number of tactics to persuade the client into accepting the solicitor’s perspective. The most frequently observed strategy was repetition. For example in the case of Mr Chapman, referred to above, examination of the transcripts reveals the solicitor questioning Mr Chapman on Mr Chapman’s initial proposed solution on eight separate occasions during one appointment. Each time the solicitor would be pointing out difficulties with Mr Chapman’s solution, some serious, others less so but still relevant. Below is a brief example:

Richard: “What if your wife goes out with Richard Branson – and you’ve given all this away?”

Mr Chapman: “It’s still okay – I have the car and the caravan.”

And later,

Richard: “She’s getting everything!”

And towards the end of the appointment, after Richard had suggested an alternative solution (the Mesher Order).

Richard: “What I am suggesting is that it could be worth a few days excitement to get things sorted out.”

Mr. Chapman eventually conceded and agreed to pursue a claim for a share of the capital tied up in the marital home.

Mrs Egan was a client who, as already stated, appeared to be on the point of giving in and accepting her husband's offers almost continuously throughout the whole process. In the third observed meeting between the solicitor and client, the client, once again, claimed to want to accept the husband's latest offer. The solicitor however, thought it was worth continuing with the case and wished the client to seek counsel's opinion regarding an adjudicated outcome.

Helen: "Well it depends on if you can manage on £100 less a month."

Mrs Egan: "Well – if I don't go out at all "

Helen: "The court will expect you to have a life. I mean they wouldn't expect you to have holidays if he didn't." (the husband had just returned from a holiday in Spain.)

Helen continues by pointing out the long term implications of accepting the offer.

"It's a position that no one can see what it will be like in five years."

Later, referring to an expenditure list prepared by herself, Mrs Egan comments,

"I'd like to know what I can get down here."

Helen offers immediate support:

"yes, that's what I thought."

Eventually Mrs Egan agrees to seek the advice of a barrister. The solicitor immediately supported the client in this, accepted the instructions and began making the arrangements for the conference. Later in the

appointment Mrs Egan again refers to giving in and accepting the husband's offer, but the solicitor does not respond.

Mrs Egan: "I just feel like giving in."

Helen: "Well if you can redo this list (expenditure) as a matter of some urgency. So I can give it to the barrister."

There was no further discussion in this appointment regarding whether the client should continue with the case or not. It appeared to the researcher that the client's instructions were not accepted until she had agreed on, what the solicitor perceived to be, the correct course of action.

Another tactic employed by solicitors when wishing to discourage clients from certain courses of action was to highlight the possible future deleterious implications. Sometimes this would include reference to spouses' new partners, of whom it could be expected that the client may be hostile in their comments. This was the case for example for Mr Farrell, who had suggested letting his wife retain all the value of the house.

"If she lives with someone else you're giving her and HIM £5,000. So be careful about what you do agree with her." (Helen to Mr Farrell on his initial appointment)

There was some evidence that Mrs Farrell was cohabiting with her new boyfriend at the time.

Reference to the court was also used by solicitors to influence clients. Clients were advised that certain conduct would create a favourable or unfavourable impression in court. For example, Mrs Wallace was keen to



retrieve some of the household contents from the marital home. Helen advised Mrs Wallace,

“Legally you’ve as much right to joint items as he has but it will look better to the court if you just take your personal things.”

This was despite the fact, as noted earlier, that so few cases are resolved by the court.<sup>7</sup>

Reference to costs, most notably to encourage clients to adopt an amicable approach during the divorce, was most often observed at the very early stages of the process.

“Some further advice, if you do separate, I’d advise you to do it in the most civil and amicable way possible. That’s the way we do it – it means you have less to pay if it’s not contested.” (Sarah to Mrs Denton)

Finally, one solicitor was observed using delay, when the client was particularly immovable. Mr Farrell was ready to accept his wife’s offer. The excerpt below is taken from the transcript of the fifth observed meeting between Helen and Mr Farrell.

Helen: “If her suggestion is really that you have the car and she has the house it really is a duff deal for you”

Mr Farrell: “I’m not bothered.”

Helen: “You’re giving away ten thousand.”

Mr Farrell: “Well we’d have to pay the council (repay a discount)”

Helen: “I’m not suggesting you sell the house. What you can do is have your share later, say when the youngest child (Mrs Farrell’s from a previous relationship) leaves school. What you are doing is suggesting giving away about five thousand to her and him – you can have an order where – she gets to live in the house, and owns

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<sup>7</sup> In Davis’s (2000a) only 4.6% of the sample had their ancillary relief applications resolved by the court. In this study no cases were resolved in a court hearing.

the house, you get off the mortgage but keep a share of the equity and if she marries or cohabits you get your share back<sup>8</sup>. The court will say the two of them could raise the money to give you your share – or you could get it later. Him living with her brings your share up to half. Rather than writing to them now (opposing solicitors), I'd rather you wait and think about it.”

There then followed a brief discussion about the projected value of some shares that the client was expecting. The solicitor then returned to the offer,

“Forget about the penalties due to the council because you're not going to sell the house. So the court will look at the equity and the shares, less the car loan, and divide up. I don't want to say to you, you must fight for it. I want you to know what your options are.”

The solicitor continues in a similar vein throughout the meeting and closes with,

“It's up to you do you want to make a decision now – or think about it? I wouldn't want you to make a decision in five minutes.”

The client returned one week later.

Helen: “Did you get the letter giving you the options?”

Mr Farrell: “Yes.”

Helen: “Have you decided?”

Mr Farrell: “I'm going for what I'm entitled to!”

In this transcript there are examples of many of the tactics used by solicitors to exert pressure on their clients. Notably, in this study,<sup>9</sup> the majority of such instances concerned solicitors applying pressure to clients to increase their expectations. Many clients, whether through feelings of guilt, ignorance or sheer exhaustion, did appear initially to be willing to settle for less than they were perhaps entitled. In the majority

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<sup>8</sup> This was said at the time when both the solicitor and the client had good reason to believe that Mrs Farrell was cohabiting.

<sup>9</sup> The researcher accepts that this could be a peculiarity of the sample.

of instances, the solicitor was successful, however this is not always the case and the next section will report on instances where clients resisted the solicitor's attempts at control.

## **6.5 Clients' resistance and tactics**

Not all clients are passive and even the most compliant may resist the solicitor's attempts at control at crucial points in the process.<sup>10</sup> Such resistance may relate to whose perspective of the client's situation prevails, the solicitor's or the client's; or there could be a challenge over the solicitor's suggested course of action or proposed outcome. The transcript from the case of Mrs Denton provided a good illustration of a client resisting the solicitor's interpretation of her situation.

Sarah: "How involved with your son is your husband?"

Mrs Denton: "He's wonderful – very involved absolutely adores him."

Sarah: "You say he's wonderful – but what about when (child's name) vomits at 3.00am in the morning, will he see to him?"

Mrs Denton: "Oh yes – absolutely he's marvellous with him. I won't do anything to upset (child's name). I will not use that child in any upset between us. (Husband's name) would never hurt him."

Sarah: "Who is (child's name) closest to?"

Mrs Denton: "Oh both of us. We need to keep it that way!"

Sarah: "Oh right – You need to sort out first who (child's name) will live with. What I told you earlier about the house, well that depends on (child's name) staying with you."

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<sup>10</sup> Mather et al (2001) reported that some clients could be quite stubborn and resist the lawyers version of their situation (p107)

From the solicitor's perspective the client needed to be identified as the primary carer of the child if she was to remain in the marital home. A picture of the father as a secondary carer or as an inadequate parent would have supported this perspective. The client did not accept this view and resisted the solicitor's interpretation despite the solicitor's repeated attempts (reference to caring for the child when sick and closeness of the relationship). The client was fully aware of this successful challenge to the solicitor's interpretation as she commented in the post meeting interview,

"I was very pleased with the way I did that – when she asked what sort of father (husband's name) was I wasn't going to say he was bad just because what he's like at home (to me)"

Such explicit challenges to the solicitor's version of reality were rare; most clients appeared to accept the solicitor's perspective without question.

Resistance relating to action advised by the solicitor was slightly more common. Mrs Dale, who, in the early stages of the process, had been successfully persuaded by the solicitor to increase her expectations,<sup>11</sup> resisted the solicitor's later attempts to persuade her to seek financial disclosure and further increase her claim. Although initially compliant Mrs Dale was now resolute.

Mrs Dale: "I'll go for half the value of the house. I just want to finish completely."

Helen: Are you sure about that?"

Mrs Dale: I'm sure."

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<sup>11</sup> See section 6.4.

Helen: "And you want to do that without any investigation of his financial situation?"

Mrs Dale: "I'm happy with the thirty five."

Helen: "And if he has to sell the house?"

Mrs Dale: "Yes still thirty five"

Helen: "Even if it sells for ninety?"

Mrs Dale was aware that she was settling for less than was possibly fair.

Mrs Dale; "He's going to be better off – I know. I just want it sorted."

Helen: "And if you're right about ninety<sup>12</sup> you do realise you'll be giving him ten thousand?"

Mrs Dale: "More than that he's got the contents!"

Mrs Dale persisted and went for the lower claim, without disclosure. The solicitor asked Mrs Dale to sign a statement confirming that she was acting against advice. Mrs Dale was, therefore, a client whom the solicitor had some influence over but only up to a point. Mrs Dale appeared to have her own position over which she would not step, so she was willing to be persuaded that she should seek up to half the value of the house, but was not prepared to further upset her husband by seeking financial disclosure or increasing her demand. Other clients, sometimes naturally very timid, exhibited similar behaviour. A notable example was Mr Ramsey, from whom the solicitor always had great difficulty in obtaining instructions, as he was always very unwilling to make any decision. However, when the solicitor outlined the strategy, and closed with "...and if she won't agree we'll go to court." Mr Ramsey interrupted, "We'll wait a

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<sup>12</sup> Although the transcripts show that this figure of ninety thousand came from the solicitor not the client.

while, see if she responds to the first letter.” Although this statement does not on the face of it seem very resolute, in the context of Mr Ramsey’s communications with the solicitor it was remarkable.

Very occasionally, the solicitor’s proposals met with an immediate dismissal from the clients. Emily had suggested that Mr Yates be released from paying the endowment. Mr Yates interrupted the solicitor,

“But she needs that to pay the mortgage. I’m not out to stitch anyone up!”

In the case of Mr Yates his resistance to the solicitor’s ideas was open and apparent; another client Mrs Foster employed more subtle tactics. Mrs Foster was a client who appeared to want to get out of the marriage without receiving what the solicitor considered to be her fair entitlement.

Mary: “You must bear in mind that you’d be starting with nothing. I understand you not wanting to disrupt the children’s<sup>13</sup> lives. But you’d be giving up an awful lot! And you need to know what it is you’re giving up. You don’t have to sell now – you could get your share later.”

Mary kept repeating similar points throughout the first meeting, Mrs Foster hardly responded and the solicitor closed the meeting by asking that the client collect certain information and documentation. Whilst Mrs Foster did gather the documents and information relevant to the divorce, she did not provide information relevant to the financial settlement.

Mary: “I think when I last spoke to you; you were trying to get a valuation (on the marital home).

Mrs Foster: I tried to do that but I couldn’t get one.

Mary: “Right – and there was a redemption figure we need for the mortgage.”

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<sup>13</sup> The children were adults, at the time of the observation they were ages 21 and 25.

Mrs Foster: I haven't got that."

Mrs Foster's inactivity also extended to failing to sign the legal aid application; and she also, according to the solicitor, kept making appointments which she would cancel at short notice. In the end Mrs Foster got her decree and the solicitor "provisionally" closed her file, the financial issues remaining unresolved. Although Mrs Foster did not explicitly resist the solicitor, by failing to carry out the tasks and not signing the legal aid certificate, she did in the end get the outcome she apparently desired (although her reasons for this are questionable<sup>14</sup>), as opposed to the outcome that the solicitor had deemed appropriate.

The final example of a client's resistance concerns Mr Farrell. Mr Farrell had been successfully persuaded, by the solicitor to seek a share in the marital home. Eighteen months after the initial appointment the client decided to give in to his wife's demands and agreed to something that was, according to the solicitor, not only less than his legal entitlement but left him worse off than the initial proposals. Mr Farrell told the researcher,

"Although (Helen) said there was no chance of maintenance, if we'd gone to court there could have been. My friend, well he's had to pay – and she'll (Mrs Farrell) say look what happened to Steve (client's friend). No way I'm giving up everything."

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<sup>14</sup> Mrs Foster did tell the researcher that she was afraid how her husband, who was mentally ill, might react if she pursued a share in the house.

It appears that the solicitor's influence only goes so far; clients when away from the solicitors are subject to the "folk myths"<sup>15</sup> which abound about divorce and in the case of Mr Farrell he appeared to find these more convincing.

The above are example of clients resisting the solicitors' attempts at control. In this study, however, it was notable that such resistance was relatively rare. Most clients appeared ready to comply with the solicitor's interpretation of the situation and proposed action. However, the data indicate that even the most submissive clients are unlikely to be completely dominated by the solicitor, each client having in their own mind boundaries over what they consider reasonable or appropriate action for their own situation.

## **6.6 Clients' perceptions of who is in control**

An interesting aspect of control is how it is perceived by the parties involved and the clients' individual perceptions of control were explored in this study. Before considering the solicitors' and clients' views on the exercise of control and the rationale behind such, it is interesting to examine the clients' perceptions of who was ultimately in control in their particular case.

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<sup>15</sup> Davis et al (1994) provide an interesting discussion on the influence of folk myths on clients' expectations of the ancillary relief process (p48-56).



The results were often surprising, the parties sometimes having a very different view to who was in control to the impression obtained by the researcher. For example, Mrs Taylor, who her solicitor (Emily) had described as, "Very assertive and very resistant;" responded to the question "Do you feel that you are 'in charge' of the solicitor? Or do you sometimes feel that the solicitor has taken over?" with,

"I think the second – she's a nice person – but I feel intimidated by what goes on in there."

Mrs Taylor had appeared to be very dominating in her communications with the solicitor, so this was not the response that was expected. Similarly when solicitors appeared to the researcher to have been applying pressure on a client to proceed in a certain way, for example by frequently referring to a preferred strategy, clients did not always perceive this pressure. Mrs Foster stated,

"I've felt in control all along. At no time has Mary (solicitor) pushed me into anything and I like it that way. You know you hear of solicitors pushing people to do things, well she (solicitor) hasn't been like that at all and I do like it that way – if she'd tried to push me I'd run a mile."

However, for other clients such tactics were regarded as the solicitor taking over control. For example Mr Chapman made the following comment after agreeing to a course of actions which was different from his initial plan.

"He (Richard) explained alright, but we only wanted to sort out some points. It (client's prior agreement with his wife) seemed a fair deal - now it seems to be going all out for a fight. They (solicitors) put words into your mouth."

Mr Ashe had not been subjected to such pressure and when asked about control, was very clear about the distinction between the solicitor giving advice and the solicitor being in control,

“No question of who is in charge – He (Richard) has been giving clear advice which on the whole, I’ve been taking. There was one thing Richard (solicitor) wanted to ask for a lump sum settlement, she, my wife, wanted to pay over a number of years. She explained to me and I felt bound to accept ... So, I agreed a smaller lump sum now – then the rest later. Over this I felt more in charge than Richard (solicitor).”

Whether clients felt in control or not depends, not only on the situation and personalities involved, but also whether they are able, as Mr Ashe has, to distinguish between advice and direction, and act accordingly. The distinction may often be unclear, particularly when solicitors employ tactics to emphasise their preferred perspective.

## **6.7 The views of solicitors and their clients on the exercise of control**

In addition to seeking clients’ understanding over whether they thought the solicitor or themselves was in overall control of the process, the views of both solicitors and clients were sought regarding the rationale and justification for exercising control.

The overwhelming view amongst the solicitors was that clients did not want to exercise control. Getting instructions from clients was reported

often to be difficult, the client who was willing to make a decision held to be exceptional. As Sarah remarked,

“It is rare to get a client who will decide for themselves which action to pursue.”

Mary made a similar point,

“People want you to tell them what to do.”

Claire suggested why clients in the process of divorce may find it difficult to instruct their solicitor.

“Sometimes they are so vulnerable they are not in a position to make a decision. Which is why I’m often asked – what would you do – which is ridiculous!”

Claire continued,

“So many clients won’t tell you (instruct), they say ‘whatever.’ They want someone to take over.”

Emily saw the source of the problem as emotional,

“Clients get too emotionally involved. They can’t see the wood for the trees. They need someone to sort it out for them.”

The views recounted above are typical of the whole sample of the solicitors in this study. The solicitors were unanimous in their view that clients in the process of divorce are unwilling to provide instructions and actively desire the solicitor to adopt a more directive approach.

The attitude of clients, expressed to the researcher, does appear to some extent to support the solicitors in their belief. Mr Chapman, who had at the early stages of the process been critical of the solicitor’s dominating approach, when asked in the final interview if he would have liked more control over what was happening responded,

“No, not really. Some of the things I wouldn’t have thought about.”

Similarly, Mrs Egan was also positive about her solicitor being more directive as she stated after the fifth meeting between herself and the solicitor.

“I let her take over – but I think it was better for me. If she’d said really you can manage – I’d have probably given in.”

Some clients appeared to want more from their solicitors in this regard. Mrs Gibson when asked in the final interview with the researcher, “Did the solicitor let you make the decisions or did you feel she was a bit ‘bossy’ or controlling?” replied,

“I wanted her advice – but she wouldn’t say nought.”

Mrs Lawton was similarly critical,

“Well the ideas (regarding the house) came from me. Richard didn’t back me up 100%.”

Mrs Egan’s comment made in the final interview probably sums up the feelings of many clients. Mrs Egan was asked, “Did you feel you were in full control of the process?” Mrs Egan replied,

“I suppose I knew that it was up to me, but sometimes it was hard, because you’re feeling so stressed about everything. Sometimes I think it was easier to let someone else make the decisions. But I did realise really it was up to me to say no, or whatever. I mean she did make that clear, but sometimes, certainly at the court<sup>16</sup> I just wanted someone to tell me what to do!”

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<sup>16</sup> Mrs Egan’s case was resolved ‘at the door of the court,’ her solicitor was not able to be present.

## 6.8 Comment

There are a number of issues arising from the material presented above which merit further discussion. When examining questions of control in solicitor client interaction it is important to distinguish between control over the dialogue and agenda<sup>17</sup> in the solicitor client meetings and control in relation to outcomes<sup>18</sup> and processes. In relation to the former, this issue was considered in some length in the chapter on the initial appointment. It was reported that solicitors in the main controlled the agenda through the aid of a proforma limiting the topics under discussion to those deemed as relevant to the solicitor. Clients in the main remained relatively passive. In the subsequent appointments however, clients appeared to be more assertive and confident in the conversations with the solicitor. It is possible to speculate as to why this was, three reasons will be suggested. Firstly, as this was a subsequent meeting, clients were more familiar both with the solicitor and the surroundings and therefore more comfortable and assured. Secondly, clients may have felt more confident as the process was already underway, the initial decision over whether to proceed or not was behind them. Thirdly it may have been that some clients were disgruntled with the progress of their case and were being more assertive in an attempt to move their case forward. It is not possible to know which if any of these reasons applied as they are merely speculative. However it is important to emphasise that, although the

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<sup>17</sup> Hositka's (1979) study of lawyer client interaction considered the issues of control by focussing on control of the agenda in lawyer client meeting and noted the unwillingness of clients to interrupt the lawyer or to introduce topics into the dialogue.

<sup>18</sup> Heinz (1983) sees the ability of lawyers to modify their client's goals as evidence of lawyer control.

majority of clients were more assertive as their cases progressed, class differences were still apparent. Middle class clients were still observed to be more forthright in the subsequent meetings with their solicitors than their working class peers.

This chapter is more concerned with the question over whether solicitors exercise control over the outcomes. The evidence presented above suggests that to a degree solicitors do exercise control over clients and influence the clients towards seeking particular outcomes. Most often these outcomes are in the form of some sort of court order so a degree of finality, as regards the legal aspects, can be obtained. The ideal of a strong, directive solicitor appeared to be valued by the clients, and some clients were critical when they felt that their solicitor had not been directive enough. The provision of clear guidance and information may not adequately meet the needs of all clients. Some clients want someone to take the decisions for them, to tell them what to do. The views, obtained from the solicitors, provide a similar picture of clients being unwilling to make decisions and of instructions being difficult to obtain. It is possible that to some clients divorce is such a traumatic process,<sup>19</sup> which has wide reaching effects not only on their own lives but also that of their families; that it is not so much unwillingness to make decisions, but inability to make decisions without the clear direction and support that a strong solicitor could provide. This suggestion receives some support

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<sup>19</sup> See Day-Sclater, (1999) for a psychosocial consideration of parties' personal experiences of divorce.

from Genn (1999) who, writing in the seminal “Paths to Justice” study, reported that for some clients, mere guidance will not meet their needs.

“What was wanted was someone to take over and deal with the problem – to make difficult phone calls or to write difficult letters. Moreover, some respondents were so emotionally drained by the worry about the problem that even if they would normally feel competent and confident, at that particular time and in those particular circumstances they were not able to manage dealing with the problem. They did not want to be *empowered*, they wanted to be saved.” (p 100 emphasis in original)

It appears therefore, that there may be a number of clients, perhaps particularly in the field of divorce where clients might be more likely to feel ‘emotionally drained,’ that do want the solicitor to take control. Past research has found evidence that many solicitors have, to a degree, performed this role.<sup>20</sup> The removal of control from the parties concerned has been criticised in policy documents,<sup>21</sup> family mediation, which arguably allows a greater degree of party control,<sup>22</sup> being held to provide a more appropriate service. The assumption that parties to a divorce wish to be empowered,<sup>23</sup> and have greater control over the process and outcome; or are able to benefit from such, does not appear to be supported by the evidence.

In this study it was notable that in instances where pressure or control was exerted by the solicitors it was most often to encourage clients to

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<sup>20</sup> For example Davis (1988) in the UK and Mather et al (1995) in the US.

<sup>21</sup> See Para 2.20 in Looking to the Future: Mediation and the Ground for Divorce Cm 2799 (1995).

<sup>22</sup> The degree of control that parties do exercise in mediation has been questioned see for example Greatbatch and Dingwall (1989).

<sup>23</sup> Empowerment can be understood to have a wider meaning than just control over the process and outcome in divorce. Ingleby (1992) discusses the issues of empowerment in more depth (p139-143) and some further aspects of empowerment will be included in the next chapter on the solicitors’ contribution.

increase their expectations; to seek a larger share of any assets. This may be a peculiarity of the sample but if this picture was reflected in the wider population there would be questions over the policy of promoting family mediation. The core tenet of party control<sup>24</sup> parties making “their own agreements at their own pace”<sup>25</sup> could leave some individuals vulnerable. In this study there were a number of clients who were initially willing to agree to a settlement which was well below that to which they may have been entitled. In most cases, as a result of pressure applied by the solicitor, the clients revised their goal to something closer to what the solicitor had advised. However, in mediation, these initial ideas of the clients could form the basis of their “own agreements” and final settlements. If the clients in this sample were typical of the general population and included a not insignificant number being willing to settle for less than they were entitled, it could be argued that encouraging such clients to resolve their disputes principally through mediation could lead to unfair outcomes.

Perhaps a more notable finding from this study is not that clients may want the solicitor to take over, but that clients have their own preconceived boundaries over which they will not allow the solicitor to push them. Clients appeared to have notions of boundaries of fairness. Some, as discussed above, would arrive at solicitors ready to agree to

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<sup>24</sup> Roberts M (1997) states, “The precepts of mediation are ..., the competence of the parties to define their disputes and assert their own meanings, their right and power to make their own decisions, and the opportunity to do so. The mediator is subject to their authority and not vice versa.” (p11)

<sup>25</sup> Para 5.6 Looking to the Future Mediation and the Ground for Divorce Cm 2799 (1995).



settlement perhaps well below what they would get in an adjudicated outcome. These clients were often willing to be persuaded by the solicitor to increase their expectations to something perhaps more realistic, but only up to a point. No clients appeared completely malleable; persuasion could only go so far. Clients were more willing to sign the documents saying they were acting against legal advice than to trespass over their preconceived boundaries of fairness. These preconceived notions of what is right or fair, as distinct from the legal concepts, have been apparent in another area concerned with the reallocation of resources on divorce. A pension can often be, if not the most valuable asset on divorce, at least the second most valuable.<sup>26</sup> Pension sharing orders<sup>27</sup> however, have not been as widely used as expected.<sup>28</sup> Research carried out by Arthur and Lewis (2001)<sup>29</sup> reported that female claimants were unwilling to draw on a resource which they saw as being built up by and owned by the husband. The reluctance of clients to include the husband's pension in definition of a marital resource provides support for the idea that clients have their own concept of fairness, a concept which may be out of line with the legal position.

This study has similarly found that clients had their own definitions in relation to fairness of proposed settlements. The data show that when

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<sup>26</sup> Hanlon (2001).

<sup>27</sup> A pension-sharing order is defined in s. 21A (1) of the Matrimonial Causes Act 1973.

<sup>28</sup> Since December 2000 only 1,300 Pension Sharing Order have been given by the court out of 300,000 divorces. Ginn S cited by Carvel J in "Divorced women 'face poverty at 65'" The Guardian 30 January 2004.

<sup>29</sup> Arthur and Lewis (2001) "Factors shaping the role of pension rights in financial arrangements after divorce." paper presented at the Socio-Legal Studies Association Conference (Bristol 5<sup>th</sup> April 2001). See also Arthur and Lewis (2000) (p71).

clients were advised by their solicitor that to increase their claims to a level which was viable or correct in the legal sense, this did not always correlate with the client's view of what was right or fair in their own case. It is not possible to know for certain the factors which may influence the client in arriving at their definition of fairness. However, it is possible to speculate that these factors may be tied up in the emotional aspects of divorce. Griffiths (1986) argued that there are two types of divorce: an emotional one, that clients are concerned with, and a legal one with which the solicitors engage. It may be within the field of the emotional divorce, that the key to identifying and understanding these preconceived ideas of fairness lies.

Solicitors do not appear aware to be of their clients' preconceived boundaries of fairness, and arguably cannot know as they ignore the emotional aspects of divorce. Not only do solicitors not listen to clients' emotional stories but they take active steps to avoid listening.<sup>30</sup> This ignorance of the emotional side of the divorce leaves solicitors at a disadvantage when trying to understand the clients. Solicitors cannot uncover the client's beliefs about fairness whilst they still practice separating the emotional divorce from the legal one. These boundaries of fairness may be easier to identify if the solicitor has some knowledge of the client's emotional divorce. The unwillingness of clients to make decisions or take certain steps may appear more rational when understood in the context of the client's emotional background.

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<sup>30</sup> See chapter 4 The Initial Appointment.

In sum the issue of control is complex and multifaceted. Solicitors in this study were observed seeking to influence clients towards particular outcomes and, although many clients complied with the solicitor to a degree, this was never a story of solicitor dominance and client passivity. It has been argued in the past that solicitors with their knowledge of the law and legal processes are able to exercise authority over their clients<sup>31</sup>, but what has not been acknowledged is that the disputes that arise on divorce go beyond the mere legal and economic, and that clients' views on the most appropriate settlement for themselves may be unlikely to be framed solely in those terms. An understanding of the wider issues of the divorce needs to be obtained in order for the solicitor to guide towards the most appropriate resolution.

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<sup>31</sup> Davis et al (1994) p 71.

# Chapter Seven

## What do solicitors contribute to the process?

### 7.1 Introduction

The initial impetus for this project was when the UK Government championed the cause of family mediation as, at least in the early stages an alternative to, and later as an adjunct to, the services of a solicitor to resolve the ancillary relief issues which arose on divorce.<sup>1</sup> Those claiming legal aid would be the main participants to experience these changes, as receiving public funding to resolve the disputes was conditional upon contact with a mediation provider.<sup>2</sup> It has been argued earlier in this thesis that this change was being proposed without an adequate knowledge of the service provided by solicitors.<sup>3</sup> This chapter attempts in part to address this issue and recounts the findings in relation to the contribution made by the solicitors in this study towards meeting the complex needs of the clients in the process of divorce.

The chapter begins by providing a summary of the needs of clients and then considers how successful the solicitors were at imparting information

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<sup>1</sup> See chapter one.

<sup>2</sup> S29 The Family Law Act 1996, later incorporated into C27-29 of the Community Legal Service Funding Code.

<sup>3</sup> See chapter 3.

to the clients, and continues by recounting the findings in relation to the provision of partisan or other types of support by the solicitor. A review of the evidence regarding the effect of solicitors' involvement on spousal conflict is provided before reporting on how the solicitors respond when dealing with guilty spouses. This is followed by a consideration of the solicitors' contribution to resolving the dispute including a brief comment on the solicitor client relationship.

## **7.2 The clients' needs**

Clients in the process of a divorce have a number of complex needs. Some of these needs may be met by various professionals outside of the legal sphere, for example, by general practitioners; other needs, however, relate more to the legal process and could be met by solicitors. Needs which it is perhaps appropriate to look to the solicitor to provide include a need for information, both in relation to the legal process and procedures involved in obtaining a divorce and information about the client's possible entitlements. Clients may also need someone to take action on their behalf and to communicate with various bodies (for example, the court) and in particular with their spouse, or their spouse's legal representative. In connection with this latter point, clients may feel they have a need for someone on their side to provide partisan support and to protect their interests in any negotiations. In the previous chapter it was reported that some clients expressed a need for someone to take decisions for them;

although solicitors act on clients' instructions and so cannot perform this role. As was shown on the chapter on the initial appointment, many clients appeared to have a need for someone to listen to their stories of their past marital histories and provide some emotional support and reassurance, although, as we have seen, this was not a service that the solicitors were willing to provide. Clients who are victims of domestic abuse need some advice and help to improve their situation. At a more basic level clients need a solicitor to be efficient, communicative and to help to resolve the financial/property/child disputes which arise on divorce.

The perceived needs of clients in relation to their overall aims was further explored in the first interview between each client and the researcher<sup>4</sup> Clients were asked three questions: firstly, "How important is it to you that the solicitor obtains the best deal possible for you?" secondly, "How important is it to you that the solicitor will do nothing which would damage your relationship with your husband/wife?" and thirdly, "How important is it to you that any agreement reached will be fair to all sides?" Clients were invited to respond with, Very important, important, not very important or not at all important (Table 7.1). It was hoped that the results would provide some knowledge regarding clients' initial overall goals and intentions at the initiation of the divorce process. It has been well documented that family law practitioners have modified their approach

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<sup>4</sup> See appendix two.

and become more conciliatory over the last twenty/thirty years.<sup>5</sup> This conciliatory approach, with its emphasis on minimizing conflict and seeking agreements which are fair to all parties involved in the dispute, is explicit in the Solicitors Family Law Association Code of Practice.<sup>6</sup> The responses of the clients to the questions given above, should provide some indication of how closely aligned the solicitors' conciliatory approach is to the clients' own perception of their needs.

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<sup>5</sup> Walker (1996) argues that the development of a more conciliatory approach amongst the legal profession was a result, at least in part, of the emergence of the new practice of family mediation.

<sup>6</sup> See Appendix nine.

**Table 7.1 The needs of clients in relation to overall aims**

Question	Very Important No.	Important No.	Not very Important No.	Not at all Important No.	Other/No Response. <sup>7</sup> No.
"How important is it to you that the solicitor obtains the best deal possible for you?"	14	8	8	8	2
"How important is it to you that the solicitor will do nothing which would damage your relationship with your husband/wife?"	9	20	2	3	6
"How important is it to you that any agreement reached will be fair to all sides?"	10	18	5	5	2

During the interviews clients did not confine themselves to providing responses from the categories given and any comments thus made were recorded by the researcher. These comments have been included in this section.

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<sup>7</sup> One client did not complete an interview with the researcher. Another client did not consider that the first and third questions were appropriate in their case as there were no assets or debts to be redistributed. The other responses to question two are discussed in the text.



Regarding the question on the importance of the solicitor obtaining the best deal possible; twenty-two of the clients rated this as important (8/40), or very important (14/40). Notably, this was a lower importance rating than was achieved for either of the other two questions (not damaging the relationship (29/40), achieving a fair settlement (28/40). Perhaps predictably, the responses appeared often to be linked to the cause of the marital breakdown. Those clients who perceived themselves to be the guilty party were less likely to respond that it was very important to get the best deal possible:

“It’s not important – just get sorted.” (Mr Chapman).

Similarly those who felt aggrieved were more likely to respond that it was very important to get the best deal possible. “It’s very important because I’ve been hurt and I deserve it.” (Mrs Lawton). “Very important – because it’s not me that’s damaged the relationship.” (Mrs Whittaker). A typical response from a client who did not feel it to be important to get the best deal possible was, “No, I’m not into that grabbing – I just need enough to survive.” (Mrs Denton). The picture revealed in this study that getting the ‘best deal possible’ was not rated by the clients to be as important as the other areas they were questioned about, receives some support from research by Pleasance et al (2003 b), in which 73% of respondents said that their action in taking divorce was non-monetary (p826).<sup>8</sup>

The second question concerned whether it was important to the clients that the solicitor did nothing which would damage their relationship with

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<sup>8</sup> The article draws on the findings from the Legal Services Research Centre’s survey of adults experiences of justiciable problems carried out in 2001.

their spouse. Twenty-nine clients rated this as important (20/40) or very important (9/40). The size of the 'other' response category was increased as there were a number of clients who claimed that a rating of importance was not relevant in their case, their relationship already being, according to the client, irrecoverably damaged. The comment by Mr Chapman was typical. "Can't make it any worse." Clients who were victims of domestic violence had their own reasons for not wanting their spouses further upset, "(I want) the least amount of friction, he can be violent." (Mrs Mellor). Mr Fearn similarly had his own reasons for wanting to keep the relationship as amicable as possible, "It's very important – still trying to be reconciled." Mrs Raynor, who had responded the question regarding the best deal possible with, "Extremely important" when asked about the importance of the solicitor not damaging the relationship with her husband replied that not damaging the relationship with her husband was even more important to her than obtaining the best deal possible. Overall, clients gave a higher importance rating to the proposition that the solicitor would do nothing to damage their relationship with their spouse, than to either of the other two propositions.

The final question sought to uncover the views of clients regarding seeking a settlement which was fair to all sides. Twenty-eight clients thought it was important (18/40) or very important (10/40) that any agreement reached should be fair to all sides. Mr Spencer who rated this aspect very important stated, "I want to be able to hold my head up and say I've done nothing wrong." Once again the marital history could

influence the client's views. Mrs Whittaker, who had claimed that she was a victim of domestic abuse, responded to the question with, "I don't see why I should walk out with nothing." Mr Ashe explained his choice, "important – I'm very conscious that we've both done things to hurt the other."

In sum, a picture emerges of a typical client who rates the importance of the solicitor doing nothing to further damage the relationship with their spouse, marginally above the goal of seeking a settlement which is fair to all sides, and significantly above the need to get the best deal possible. This client needs a solicitor not to act as a 'hired gun' but as someone to help them keep their relationship with their husband and wife on as reasonable terms as possible (in the circumstances of divorce), but who will still ensure that the client receives a fair resolution to the financial and property disputes. To such a client the conciliatory approach advocated by such organisations as the Solicitor Family Law Association seems appropriate. However, the other picture to emerge was that the views and opinions of clients on these matters were influenced by their marital history. In order for the solicitor to be able to address the needs of clients, some understanding of the client's marital background appears to be required.

Having identified a number of needs that persons undergoing divorce may seek to have met by their solicitor we shall now move on to review

the evidence from this study regarding whether these needs are actually being met.

### **7.3 The imparting of information: do solicitors meet clients' needs?**

A key duty of solicitors is to provide specialist knowledge to their client. Without such knowledge/information clients cannot make fully informed decisions. In the case of divorce such information<sup>9</sup> could include how the marital assets and debts are likely to be redistributed, the procedures to be followed and how long the case is to last. In the earlier chapter on the initial appointment<sup>10</sup> it was reported that much information is given out to clients in the initial appointment, including such things as the procedures to be followed for obtaining a divorce and the possible solutions for redistribution of marital property and child issues, although the latter were dealt with only very briefly. It was noted that the information given out in the initial appointment was very much divorce process orientated and areas outside of this narrow field were often ignored; this even being the case with issues of domestic violence. Information tended to be given to clients in a sometimes simplistic way, often repeated, and key details were included in a letter sent to clients following the appointment, although this latter service was not made available to clients attending on a free half hour basis. Despite the solicitors' efforts, many clients

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<sup>9</sup> The distinction between advice and information provided by Eekelaar et al (2000) is being adopted, so information includes such things as "dates, procedure, or even description of what the court was likely to do," advice being when "a course of action is under discussion" (p74)

<sup>10</sup> See chapter 4, section 4.53.

reported experiencing difficulty is absorbing and fully understanding the vast amount of information given out at the initial appointment.

This section will report on the provision of information at later stages in the process, together with the views of both solicitors and clients regarding the client's understanding of the information.

The information given out to clients in the subsequent appointments included more detailed information regarding legal aid, information on the procedural aspects of the case (for example the difference between the decree nisi and the decree absolute) and specific information relating to the progress of the particular case. As clients were more assertive in the subsequent appointments, they occasionally initiated the provision of specific information from the solicitor. For example Mr Ramsey was observed interrupting Claire,

Mr. Ramsey: "While you're on about pensions, some of the lads I am working with are getting their pension while they're working..."

Claire: "Well you can't because you've transferred, but you should get advice, contact the customer services of (pension provider), and ask how soon you can draw against it."

Information was generally given to clients in one of two forms, either in letter form or verbally in meetings or over the telephone.<sup>11</sup> Most clients reported that letters were clear and easy to understand; use of legal jargon/terminology was not reported to be a problem. For example, Mrs Wallace stated that the letters she received from the solicitor were, "very

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<sup>11</sup> Telephone conversations between the solicitor and client were not monitored in this study so there are no findings to be reported on that form of communication.

clear – plainly worded and clear.” Two clients in the sample, although stating that the letters had generally been understandable, disclosed that they had contacted their solicitor asking for some points in the letters to be explained to them verbally. Although the majority of clients did claim that the letters received from the solicitors had been clear, this was not a universal view. Mrs Lawton had two areas of complaint.

“I’ve had letters which were gobbledegook. I went to see Richard and asked him to explain.”

Researcher: “Did he?”

Mrs Lawton: “Yes very well, but there were also some letters incorrect – saying things that would be done in a few weeks which we had already done.”

Another client, Mr Danks, despite initially responding to the question, “have you been able to understand all the letters you’ve received from the solicitor?” positively, also indicated that he had not fully understood the information and was unhappy with the language used.

“Yeah – there were one that I wasn’t sure about but I understand it now. They use big words – Why don’t they use plain English – Say you’re not going to get a penny – or it’s going to cost you this...”

The majority of clients did, at least initially, claim that the information given to them in letter form had been reasonably clear. The information given out in meetings between solicitors and clients did not always appear to be so easily understood. Observational data reveal that solicitors did not always explain all aspects of the case clearly. The quotation below provides an example and is taken from a subsequent meeting between Claire and Mr Ramsey.

Claire: “They (solicitors acting for Mrs Ramsey) may ask for a cash equivalent valuation for the pension. I think we’ll have to ask for

the pension to be left on one side for you – and you want a clean break. Is that what you want?”

Neither of the terms, cash equivalent valuation and clean break, were explained to the client. Such terminology is, of course, very familiar to the legal practitioner, but is not part of common parlance for most clients. At the other end of the scale was Richard who was observed, on occasion, to take a great deal of time explaining aspects of the case, sometimes drawing small diagrams to illustrate a particular point. In the extract below Richard is explaining the operation of the statutory charge to Mrs Lawton.

Richard: (drawing a diagram) “...at the end of the job there will be a bill say seven hundred or eight hundred. I send this to the legal aid board. They say by the way (Richard) what happened to Mrs Lawton. And I’ll say well she got the house. Then John Major or Tony Blair – whoever it is (laughs) comes round to your house and says we want our money back. Legal aid is not free help. It’s free if you lose, it’s free at the time, but not actually free it’s called the statutory charge.”

Richard’s approach was the most unusual in the sample. The extract from Claire above provides a more typical example of the form information giving took at the subsequent meetings. It was, therefore, not surprising that clients did not always appear fully to understand what had been said. Although, as in the case of Mr Ramsey, above, clients did initially claim to understand most of the points raised, their responses do raise some questions over the client’s actual level of comprehension. Mrs Shepherd remarked in her final interview with the researcher,

“Only thing I don’t understand is the payment. I’m getting Family Credit – so I’ve got that Green Paper (sic) (legal aid green form scheme). I thought you had to pay it back but she (Helen) says I don’t have to – not the divorce – It’s going into the house- I think it’s just financial I pay back.”

Similarly Mrs Foster, in an interview following an early meeting with the solicitor, responded to the query did she understand what was happening in her case, with,

“Yes, I think so; it’s a series of stages isn’t it? I’ll be glad when this stage is over. I think he’ll (husband) go ahead with it, but he’s worried about the house that’s the main thing.

But then continued,

“I’m not committed yet am I?”<sup>12</sup>

This was despite the fact that the solicitor had spent some time attempting to reassure the client that proceeding with the divorce would not commit her to pursuing a financial claim.

Notably, clients appeared more willing to admit to not fully understanding all the information given out in the solicitor client meetings, as their case progressed; and their relationship with the researcher developed. Such clients were also often observed to be willing to lay the blame for any lack of understanding on themselves. Mrs Foster will again be used as an example. In the quotation above Mrs Foster claimed to understand the information given to her by the solicitor, but her response indicates that she was in fact not completely clear about the information. In the next observation of Mrs Foster, her response to a similar question was,

“I feel a bit befuddled at the moment. I think I do.”

And after the final appointment,

“More or less, where I haven’t understood it’s been on my side, my fault, I get easily confused.”

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<sup>12</sup> It was not uncommon for clients to seek reassurance from the researcher regarding points covered in their meeting with the solicitor. Clients were always referred back to the solicitor for clarification.



If the client was correct in her view it would appear that the solicitor was not providing the information at the appropriate level or in the correct manner for that particular client to understand. Mrs Egan made the following comment in a post meeting interview.

“It’s quite biased towards the middle class isn’t it – the legal system? There’s the costs and it’s difficult to understand.”

Mrs Egan was an articulate and well educated client but she admitted that in her own case, she had not understood the reasoning behind the settlement proposals.

“And it seems to me that, that (husband getting a share in the house) wasn’t explained to me as well as it should have been. But maybe I’ve not taken it in mmm – I don’t know though, I’m usually quite good at taking things in.”

In this study the indications were that clients did not fully understand all the information to them by their solicitor. The lack of full understanding was not confined to the less well educated and articulate clientele, as the quotation from Mrs Egan, above, demonstrates.<sup>13</sup> Many clients did claim initially to understand but would then qualify their statement. Consequently it is possible that clients gave the solicitors an impression of understanding the information and instructions were accepted on the basis that the client was making a fully informed decision. Helen thought it was possible to identify whether the client had understood.

“I’d like to think I make them understand and I think you can tell – if they don’t understand they glaze over.”

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<sup>13</sup> Eekelaar et al (2000) refer very briefly to a solicitor in their own study who despite dealing with a middle class educated client had to repeat the information several times and confirm in writing. (p 67-68)

Another solicitor remarked on some of the problems faced by solicitors in trying to achieve client understanding.

“Solicitors find it difficult, we could be found to be negligent. We have lots of information to give out. We do send letters but we’re not sure that clients read them. All we can do is keep a record of letters sent and at least we’re covered for negligence – but we have to repeat the information at subsequent interviews and that is not taken on board by the Legal Aid Board. (Mary)

According to Mary, taking steps towards better client understanding by reiterating the information at subsequent appointments could have resource implications for those solicitors dealing with legally aided clients.

In conclusion it appears that in this study an extensive amount of information was given to clients throughout the divorce process by their solicitors. The data suggest that coverage of information provided by the solicitors was adequate. However this did not always translate into client understanding. The timing of the information provision and the level at which solicitors gave information out was not sufficient to ensure that each client fully understood all the information that they had been given.

#### **7.4 Do solicitors provide partisan or other forms of support?**

Beyond providing legal information to clients, solicitors are also in a position to provide individual support to their client in a number of other ways, for example, by providing reassurance and emotional support or

offering a form of partisanship.<sup>14</sup> This latter form of support is a service that cannot, by definition, be offered by mediators.<sup>15</sup> The term partisan has been used in the literature examining solicitors' role in the divorce process. A dictionary definition of partisan reads "a strong specially unreasoning supporter of a party, cause etcetera."<sup>16</sup> Mather et al (2001) in their study on divorce lawyers in the US provided the following definition in relation to legal practice, "Partisan advocacy, in which lawyers pursue legal strategies in an effort to maximize their clients' interests, is a central tenet of legal professionalism." (p110) These definitions suggest that solicitors described as partisan adopt a 'hired gun' or adversarial approach to resolving disputes. However, despite use of this term, existing research has indicated that this is not an approach adopted by the majority of family lawyers,<sup>17</sup> who instead reportedly demonstrate a commitment to the whole family and work within notions of fairness.<sup>18</sup>

This section attempts to clarify this issue further by looking in depth at the sort of support given to clients by solicitors, whether such support could properly be described as partisan, or whether the support provided is in fact quite distinct and the term partisan inappropriate.

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<sup>14</sup> Davis et al (1994) argue that "highly circumscribed partisanship" was one of the factors that characterised the most effective solicitors in their study (p 83).

<sup>15</sup> The required neutrality of mediators precludes the provision of partisan support to either party.

<sup>16</sup> Concise Oxford Dictionary 8<sup>th</sup> edition.

<sup>17</sup> For example see Davis et al (1994), Eekelaar et al (2000) Mather et al (2001).

<sup>18</sup> Davis et al (1994). See also the Solicitors Family Law Association Code of Conduct – Appendix nine.

If one employs a definition of a partisan as one whom acts as a champion for their client, or who seeks to maximise their client's interest, there was little indication of such an approach amongst the solicitors in this study. Evidence was presented in the last chapter which showed solicitors encouraging clients to increase their initial expectations to something more in line with their entitlement, but there was no evidence of solicitors encouraging clients to seek the maximum financial benefit for themselves from the negotiations. Most of the solicitors in the study described their approach, in their first interview with the researcher, as conciliatory. Tom put it most succinctly, "Practical, conciliatory, unemotional, non-belligerent." Jane's response signals the influence of the Solicitors Family Law Association (SFLA) "I'm quite conciliatory I suppose, I use the SFLA principles." Only one solicitor in the study markedly deviated from this type of response. William, when asked what he considered to be his primary responsibility in representing clients in divorce replied, "To get them the best possible settlement." And continued, "I'll be shot down in flames for that one," indicating that it might not be considered appropriate to admit to pursuing such an approach.<sup>19</sup>

Apart from William, all the other solicitors in the sample characterised themselves as offering a conciliatory approach to resolving the disputes which arise on divorce. Many solicitors were quite explicit with clients, telling them at the start of the process that the goal was to seek a resolution which was 'fair'. Richard was particularly open about this,

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<sup>19</sup> William, despite claiming being willing to be included in the study did not in fact provide any cases for the researcher to observe. There is therefore no further examination of how his approach impacted on his clients.

remarking on his conciliatory style in the first few minutes of the meeting with the client. However, perhaps recognising that to some clients such an approach might not appeal, he qualified the statement.

“I seek to achieve a negotiated fair, quick and cheap solution. Having said that I’m not a wimp and if push comes to shove I will fight. But that’s very much a last resort” (Richard to Mr Ashe).

Although most of the solicitors in this study could not be described as strongly partisan in their approach, there was clear variation. If one simplifies the matter a little and draws a line with strongly partisan at one end and strongly conciliatory<sup>20</sup> at the other, William would be at the strongly partisan end and Mary at the strongly conciliatory end of the dichotomy. Mary, far from championing her clients’ cause at the expense of the spouse, would instead encourage clients, wherever possible, to talk to their ex-partners and reach their own agreements. An example of Mary’s approach can be found from the transcripts of her meeting with Mr Pearson. Mary had advised the client on possible grounds for divorce and collected some basic information regarding the financial and property issues, Mary then continued by emphasising the benefits of reaching an agreement with his wife,

“What I’m saying is, it will be cheaper to reach an agreement with her...I could suggest you go to mediation. Essentially there you meet someone to help you sort it out and you don’t have to go to court.”

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<sup>20</sup> This simplification is being used to illustrate the different degrees of partisanship being offered by solicitors in this study. ‘Conciliatory’ does not imply the tone of interaction of the solicitor, but whether they adopt the mediators’ approach of seeing the needs of both sides. Davis (1988), however, would see partisanship and a conciliatory approach as able to coexist but he seems to be opposing the tactics, seeing conciliatory as opposed to assertive and aggressive.

And after explaining to the client how to obtain more detailed financial information regarding the value of the house and the insurance policies,

“And once you know what money you’re talking about you can make any agreement you like.”

Richard, despite his introductory remark to clients was also very much at the conciliatory end of the spectrum. As he said to Mrs Eastwood, “Well I try to be fair. I think it is very important.”

Sarah and Helen appeared to the researcher to offer a slightly more or moderately partisan service. An example of Helen’s partisanship can be seen in the case of Mr Farrell when Helen has discovered a mistake made by the opposing side’s solicitors

“Right we’ve heard from her solicitors, and they’ve made a mistake, they’ve sent back the forms and she signed and admitted the adultery and he’s (co-respondent) admitted it. It says she will co-operate if you agree no costs. Well you can ignore that statement, because we’ve got the evidence now. ... My view is why should you pay if she’s partly to blame? They should have written it without prejudice and if they had we shouldn’t have been able to use it, but we can show this to the court. So they’ve made a bit of a mistake so it’s up to you whether you use it or not.”

Helen can be seen here trying to maximise her client’s interests by exploiting a mistake made by the opposing solicitors. Claire, who was perhaps slightly less partisan than Helen, was also observed taking advantage on behalf of her client after an oversight by opposing solicitors. She made the following remark concerning the resolution of Mr Ramsey’s case.

“The only thing left is his pension which I don’t think the other side have thought about – so I suppose I’m being a bit underhand really.”

A similar tactic was observed in the case of Mrs Dale. In the initial appointment Helen advised Mrs Dale when responding to her husband's divorce petition<sup>21</sup> not to tell him that she was going to seek a share in the property, Helen commented on this in the post appointment interview.

“He (husband) wants everything – she just wants what she entitled to. We're not going to tell him. Once she's got what she wants – the divorce - she'll move on and do the finances. I wouldn't normally be that sneaky – but if he chooses not to be represented that's his fault. I don't like being sneaky but we can take advantage of that.”

The above actions are examples of where the solicitor has furthered the interests of their client at the expense of the opposing side. Such action could not be seen as in pursuance of a settlement which was fair to both parties, but could be viewed as the solicitor offering a form of limited partisanship to their client.

Clients of solicitors who adopted a moderately partisan approach seemed to appreciate this. Mrs Dale remarked in her final interview,

“I felt that she was very good in working for me. She knew exactly what she wanted and went all out for it.”

There may be other benefits for the client in having a solicitor who is perceived as partisan. Mrs Egan identified one such advantage.

“Stuart (client's husband)<sup>22</sup> knows I've got Helen. Some close friends of ours - well (friend's name) she had Helen – Stuart knows she got a good settlement. So I think that's made him nervous.”

A degree of partisanship, when offered, was appreciated by the clients in the sample. Other clients were critical where it was felt that their solicitor

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<sup>21</sup> Mr Dale, the petitioner, was not legally represented and had completed and submitted the petition himself.

<sup>22</sup> Names of all participants have been changed.

had not been partisan enough. Mrs Lawton, who was a client of Richard's, held this view.

"Sometimes I felt he (Richard) was working for him (husband) rather than me."

Mrs Lawton continued,

"I felt he was not 100% on my side. He was easy to talk to and explained things well, but did not fight for me."

As partisanship is a service provided by solicitors that cannot be provided by mediators, it may be worth considering if, where there is a lack of partisan support, this could lead to some of the possible disadvantages linked to mediation, perhaps the most notable disadvantage being the failure to address power imbalances. The case of Mr Ramsey illustrates this concern. Mr and Mrs Ramsey had managed to maintain a reasonably friendly relationship during the divorce process, but Claire admitted towards the end of the process that the potential resolution may not have favoured her client.<sup>23</sup>

"They go out together, but there's fear and guilt. In the end it will be resolved. It will be resolved however she (wife) wants it to be."

It is worth reminding the reader, however, that for some clients, who are proceeding within their own boundaries of fairness, such a resolution may meet their needs.<sup>24</sup>

Solicitors were asked for their views on the provision of partisan support in their final interview with the researcher.<sup>25</sup> None of the solicitors who completed the final interview advocated a partisan approach.

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<sup>23</sup> This aspect of Mr Ramsey's case is examined more fully in the next section on solicitors' involvement and the affect on spousal conflict.

<sup>24</sup> Please see section 6.8 in the previous chapter.



“No, it’s not important, and it’s not what I would offer. If war breaks out they want you on their side. But not too partisan – I prefer the term even handed and supportive.” (Richard)

Most solicitors in this study were quite clear about only offering a (very) moderate or limited form of partisanship, although it was acknowledged that this might not be what the client actually wants from them.

“My job is to be objective and provide advice on what can best be achieved. They (clients) do want someone on their side – and you tread a middle line and they complain, ‘you’re all for my husband’ or ‘you’re colluding with my husband’s solicitor.’ It’s difficult to balance representing them with offering objective advice.” (Claire).

Emily suggested that the limiting of partisanship was not always made explicit to the client.

“It’s quite complex there’s a balance. It’s difficult especially if you’ve got a client wanting revenge. You have to give the impression you’re on their side but be neutral. You have to step back and see how you can resolve it. You mustn’t get involved and must stay objective. Give the impression that you’re on their side but really not be – be neutral. The two solicitors should have the same view and they should each persuade their client that this is what should happen.”

If the view of Emily is typical it appears that solicitors may be creating a third view which is distinct from the view held by either of the two parties involved in the dispute. According to Emily it is the duty of the solicitors involved, having agreed between themselves a third view regarding the appropriate resolution, to persuade their client into accepting their perspective. The case may then progress towards a prospective resolution neither of the parties initially wanted.

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<sup>25</sup> See Appendix six.

It was also notable that the solicitors in this study appeared very critical of solicitors whom they viewed as adopting a partisan/adversarial approach.

Sarah when asked for any strongly held views on divorce practice stated,

“I’m extremely irritated by hostile solicitors who are needlessly aggressive.”

Mary had a similar response to the same question,

“I object to solicitors who are terribly partisan and aggressive – it’s not that common though”

Claire expressed a view articulated by many solicitors in the study, that the main protagonists of an over partisan or adversarial stance were solicitors who did not specialise in family law.<sup>26</sup>

“I tell you what’s worse. When you have a solicitor on the other side who doesn’t know what he’s doing – a jack of all trades. They’re aggressive; they just don’t know how to go on.”

This view could suggest that there is a perceived need in different areas of the law for varying levels of partisanship.

In sum the majority of solicitors in this study did not aspire to or offer outright partisan support. Extreme partisanship could be seen as needlessly aggressive and was therefore frowned upon. The emphasis on seeking a fair solution and adopting a conciliatory approach was the more prevalent in this study. It appears, therefore, that the majority of solicitors, at least in this research, have absorbed and practice the conciliatory ethos which is advocated by the Solicitor Family Law Association. The knowledge that clients may prefer a more partisan approach does not lead those solicitors committed to the conciliatory

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<sup>26</sup> Such solicitors would be unlikely to be members of the Solicitors Family Law Association.

ideal to modify their approach to something more in line with their clients' preferences. Solicitors instead emphasize the goals of fairness to all, neutrality, objectivity, and seek solutions which are perceived by the solicitors as fair to all.

Apart from support which is partisan in nature there are other types of support which solicitors may provide for their client. Emotional support, which clients in the midst of divorce might need, was generally not offered by the solicitors in this study. This aspect of support has been discussed in the chapter on the initial appointment where it was noted that solicitors were unwilling to provide emotional support, something that was viewed as more appropriately provided by counsellors. In the cases that progressed, the researcher did observe that the approach of the solicitors did not change and generally emotional support was not offered. However there was one notable exception. Mrs Clarke was a client who was seeking divorce in very difficult circumstances. She had been married for 24 years to her husband who for the last ten years was suffering from schizophrenia. The husband was still very attached to his wife and although having not returned to the marital home on being discharged from hospital, did not want the marriage to end. Richard was observed continuously throughout the process providing emotional support and encouragement to Mrs Clarke.

Mrs Clarke: "He (husband) phones up every night – he doesn't want me to leave him."

Richard: "I fear when you tell him he will be distressed ... he will pressure you – 'take me back I'll be good' and to get him off the phone you might say, 'I'll think about it.' That'll give him hope.

Therefore you must say clearly 'our marriage is over, there is nothing you can say or do that will change my mind.' Don't let him have hope."

Mrs Clarke: "He so loves me – well love, or need I don't know ..."

Richard: "Well it's been a long time – how long has it been successful."

Mrs Clarke: "Well it was okay before we got married – then he started missing work – and he was funny with the children."

Richard: "Well you've done remarkably well to keep going."

Throughout the process Richard repeated his advice.

"You must be consistent, keep telling him or you'll give him hope."

Richard did tell the researcher, at the start of the case, that he expected that Mrs Clarke would not be able to resist the pressure from her husband and he predicted that she would abandon the divorce. Mrs Clarke did in fact complete the process and obtained her divorce. In the final appointment Richard tells the client, "Well you've done very well." This case was however exceptional and in the main the solicitors in the study did not offer any more than a cursory level of emotional support.

A form of support that was observed much more frequently was that of providing reassurance. Solicitors were observed on many occasions reassuring clients as to their position and their potential entitlements. Ingleby (1992) suggests that informing clients of their rights against each other is one of the ways that solicitors can empower clients in the dispute resolution process.<sup>27</sup> There are many examples revealed in the transcripts of solicitors providing such reassurance. The case of Mrs

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<sup>27</sup> Ingleby (1992) p 139.

Denton provides a good example. Mrs Denton was worried that she would have to leave the marital home which had been purchased from the proceeds of her husband's more substantial income. Sarah had been able to reassure the client that this was not the case and also that legal aid would be available allowing her to proceed with the divorce. Sarah drew the appointment to a close and commented to the client.

Sarah: "Well you're in such a strong position particularly because it's such a long marriage (22 years)."

Mrs Denton: "It's all this from him 'It's my house'"

Sarah: (Laughs) No, not after 22 years it's not"

Mrs Denton: "This is all very useful. I feel much much better now."

In the post appointment interview Mrs Denton remarked to the researcher,

"I was very worried before. You don't know what you're getting into. She (Sarah) helped a lot."

She continued,

"Before seeing Sarah I felt worth nothing and couldn't see a way out. Now I feel much happier."

There were many similar examples in the data where the solicitor had been able to reassure the client, particularly female clients, as to their entitlements and clients did often report feeling more positive about their situation after such advice. It is possible that by improving the client's knowledge in this way it did empower them in any negotiations with their spouse.

It has already been suggested<sup>28</sup> that for many clients a desirable outcome to the dispute resolution process would be to maintain a reasonable relationship with their spouse whilst receiving a fair share of any finances or property that were in dispute. It appeared to the researcher that some clients were able to achieve this, or were empowered to do this, by using their solicitors, not as a weapon or 'hired gun,' but as a shield. The case of Mrs Gibson will be used as an illustration. Mrs Gibson came to the solicitors still on apparently reasonable terms with her husband, whom she lived apart from. However there appeared to be a lack of trust, and Mrs Gibson was unsure how her husband would react when she was told her entitlement to the marital finances could be fifty/fifty. When asked about this by the researcher she responded,

"I'm not certain. I don't really know him. He seems to be a bit snider (sic)."

The process got underway and letters were sent from Claire, Mrs Gibson's solicitor to Mr Gibson. After the second meeting with the client, there was the first indication that the client was (successfully) using her solicitor as a shield to protect her from her husband's anger. Claire told the client of the correspondence that Mr Gibson had sent back to her.

"What concerns me is your husband saying (reads from the letter) that I'm a 'stirring madam' 'causing friction between the two of you.' My main concern is to do the best for you. So tell me what you want."

Mrs Gibson: "I don't want to fall out with him and it's going that way – He says I shouldn't have gone to a solicitor."

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<sup>28</sup> See section 7.2 in this chapter.

Claire: "You've done exactly the right thing. He wanted the divorce and if that also means you're going for your share – well that's tough."

Claire commented to the researcher,

"He's playing me as the big bad wolf – which is fine because it gives her something to hide behind – 'it's all the solicitor's fault.'"

Mrs Gibson told the researcher of her own contact with her husband,

"He weren't very pleased when he got the second letter. He said he knew it weren't me it was the solicitor. ... I am a bit scared of him he can be nasty."

In the end Mrs Gibson negotiated the final settlement directly with her husband. The researcher asked Mrs Gibson if, being as her and her husband negotiated the final settlement themselves, they could they have resolved the issues without a solicitor. Mrs Gibson was clear,

"No, not really, he would have swindled me out of it all. I wouldn't have got a look in."

Mrs Gibson also told the researcher at the close of the case, that her relationship with her ex-husband was 'fine.' It appears that Mrs Gibson was able, by hiding behind her solicitor, to reach a settlement which, although it might have fallen short of what she could have obtained if she had continued with the legal process, she regarded as 'fair.' Moreover she had achieved this without further jeopardising her relationship with her ex-husband. Any anger from her husband was directed at Claire, Mrs Gibson's solicitor, and it was Claire who was seeking demands which Mr Gibson was unwilling to meet. This may have made the proposals made by his wife more palatable.

In sum, when looking into the question of whether solicitors provide partisan or other forms of support, the data collected show that most solicitors in this study did not offer a form of partisanship, as defined by Mather et al (2001) above. Most solicitors did not take action seeking to *maximise* their clients' interests, although the more partisan amongst the sample were observed using some strategies to increase the advantage to their client over the opposition. The allegiance of the more conciliatory solicitors in this study appeared to be towards an ideal of achieving a resolution which they objectively perceived as fair to all the parties involved in the dispute. This, as we have seen from the previous chapter, can involve encouraging clients to increase their expectations, but this is not a case of maximising the client's interests but rather of increasing the client's expectations up to a level where the resolution could be regarded as fair.

The term 'partisan' did not appear accurately to define the approach of any of the solicitors in the study, apart perhaps from one. The support provided by the majority of solicitors in this study could more appropriately be described as support which promotes the client's interests up to a point perceived by the solicitor as objectively fair. Solicitors were, however, able to support their clients in other ways, most notably by reassuring clients as to their entitlements, about which many clients commented positively and which may have empowered them in communications with their spouse. It could be concluded that solicitors were firm but fair, they supported their client in dealing with their spouse,



taking on the role of shield; and they helped their client achieve what in the solicitors' view was a fair settlement. The term 'partisan' may not be an appropriate term for this type of support. The support could perhaps be better described as support for a third view, different from that of the two parties, the lawyer's view of the desirable solution to the dispute. This finding further develops a theme highlighted by Eekelaar et al (2000). Eekelaar et al draw on work by Halpern (1992) in which the negotiating styles of English lawyers are divided into three categories. Firstly, the competitive, positional or win/lose style, in which action is taken on the assumption that "the parties interests are diametrically opposed," (p123) this approach involves the use of more aggressive strategies. The second of Halpern's styles is the constructive, co-operative, collaborative or win/win approach to negotiation, this is a more compromise driven approach. The third of Halpern's negotiating styles is the principled, problem solving approach and it was this category which Eekelaar et al found described the negotiating style adopted by the majority of the solicitors in their study. (p123-125) The principled category is described thus,

"it focuses on the problem in issues in abstraction from the parties' objective wishes. It proposes some objective or fair outcome which both parties work together to achieve. In this model, negotiators try to reduce the emotional heat of the dispute in order to concentrate better on the objective standard which should be reflected in the outcome." (Eekelaar et al p123)

If, as the evidence from both this research and the study by Eekelaar et al suggests, family law solicitors are adopting a 'principled' or 'third view' approach to resolving the disputes on divorce, the question that then arises is, are the solicitors pursuing a third course, informed by a particular

legal perspective on the case, or a middle course 'between' the views of the two parties? The evidence reviewed in this study appears to suggest that the former approach is being adopted.

### **7.5 Solicitor's involvement: the effect on spousal conflict<sup>29</sup>**

Spousal conflict is perhaps, by definition, an almost inevitable feature of divorce. Concerns were raised by the government in the 1995 white paper<sup>30</sup> that such spousal conflict and hostility could be further exacerbated by "litigation and arms length negotiation."<sup>31</sup> The perception that action taken by solicitors in resolving the disputes arising on divorce heightens hostility between spouses is perhaps widely held, although existing research does not provide any evidence in support of this view.<sup>32</sup> This section reviews the evidence collected in this study regarding the issue of spousal conflict and the actions taken by solicitors.

The initial perceptions of both solicitors and clients regarding the apparent levels of spousal conflict present prior to any intervention by the solicitor, were obtained in the interviews following the initial appointment. In each case, both the solicitor and client were asked to rate, on a scale from negligible to intense, where they thought the level of spousal conflict

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<sup>29</sup> The term conflict is being used to refer to the degree of hostility and antagonism between the spouses and does not refer to a conflict of interests.

<sup>30</sup> Looking to the Future: Mediation and the Ground for Divorce. Cm 2799.

<sup>31</sup> Para 2.20.

<sup>32</sup> See for example Davis et al (1994), Ingleby (1992), Sarat and Felstiner (1995), Eekelaar et al (2000).

was at that early stage in the process. The results are contained in the table below.

**Table 7.2 Perceptions on the level of spousal conflict**

<b>Response</b>	<b>Clients<sup>33</sup></b>	<b>Solicitors</b>
	No.	No.
None/Negligible	14	17
Mild	8	7
Substantial	9	13
Intense	8	3

This table shows that for over half the sample the level of conflict between the spouses was rated as either negligible or mild by both the solicitor and the client. When solicitor and client disagreed over the conflict rating, it was notable that most solicitors would give a rating below that given by the client (although, this was not the case with Emily, who tended to give a higher conflict rating than the other solicitors). When allocating a low conflict rating to a case some solicitors referred to an expectation that the conflict might increase once the process got underway. As Claire said after her first meeting with Mrs Gibson,

“There is no obvious conflict - she doesn’t see much of him –so negligible. But there’s potential for huge conflict which she won’t handle at all.”

There were some problems encountered by asking for such a subjective assessment. Participants had different views as to where the boundaries

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<sup>33</sup> One client, Mr Hyde, did not provide an interview.

for each category lay. This was demonstrated by Mrs Shaw who had responded to the question on her own case with a rating of “substantial” and then explained, “He’s not come at me with an axe or anything so it’s not intense.” Notably, in this case the solicitor had rated the apparent spousal conflict as intense.

Examination of the data collected for this study reveals a rather complex picture regarding the effect of solicitors’ involvements on spousal conflict. There was evidence that in some cases spousal conflict did rise as solicitors became involved, but the data suggest that blaming the solicitors for this rise may be both over simplistic and unjust. The picture to emerge from the research was that there were a number of factors which may have been influential in increasing the spousal conflict once the dispute resolution process began and solicitors became involved.

One of the first factors relates to the actual grounds for the divorce. Three separate issues were observed to influence conflict under this heading. Firstly, where the evidence for irretrievable breakdown of the marriage had been supported by the fact relating to the respondent’s behaviour,<sup>34</sup> this did appear to, in some cases, lead to an increase in hostility. The chapter on the initial appointment reported how solicitors when faced with a respondent who had received a petition based on behaviour, took various steps to defuse the client’s anger. In this study there were some cases where the client was the petitioner and the

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<sup>34</sup> S.1. (2) (b) of the Matrimonial Causes Act 1973.

respondent was unrepresented; there was therefore no solicitor on the respondent's side to warn them about how this ground is used. This was the situation for Mr and Mrs Foster. Mrs Foster appeared very keen throughout the process not to hurt her husband, even to the extent of not seeking a share in value of the marital home. However, despite this, there was some apparent increase in spousal hostility during the process. Mrs Foster reported after the third observation,

"The most upsetting point for me was the behaviour ground – that upset him a great deal. He looked at the list and said those things are normal."

The second indication that the divorce petition caused problems concerned those situations where the respondent had not wanted the divorce. This was the case for Mr Barnes who, having complained that his wife did not accept that the marriage was over, remarked,

"She wanted me to try again – she's still nasty now - still pulling (new partner) down to (son)."

The third reason for spousal conflict rising was also linked to the financial resolution and concerned the anger which arose when the 'innocent' party to the divorce realised that the cause of the divorce would not be reflected in the financial and property settlement. This effect was observed most often where the 'guilty' party had committed adultery. Mrs Wallace was one such case; she made the following remark in her final interview concerning the level of hostility between herself and her ex-husband.

"It's not getting any better, if anything it's getting worse – he's still fighting, he will drag it out you see, he's thinking I did wrong. So he's not going to pay a penny."

The disparity between parties' expectations regarding the appropriate financial/property resolution and that put forward by the solicitor could cause increased spousal conflict irrespective of the cause of the marital breakdown. Richard made the following point,

“The other way (spousal conflict is increased) is when they've decided to separate and the husband offers the wife a deal which she sees as fair. Only when she sees a solicitor she realises it's not fair.”

According to Richard then, conflict may be initially low as one party (knowingly or unknowingly) is exploiting the other party. A rise in conflict may be inevitable as the exploiting party (in the case of the above quote, the husband) sees his potential share in the marital assets reduced. There are a number of ways in which the financial and property resolution may increase spousal conflict in addition to the rejection of the opposing side's initial solutions. Foremost amongst these is the process of disclosure. Disclosure is a necessary component of the financial dispute resolution process. However, in this study, disclosure was a notable factor increasing spousal conflict. Helen acknowledged this,

“We don't deliberately make it (spousal conflict) worse. I'll say to them (clients) I'm looking after you – and to do that'll need to ask questions and some of them they're (client's spouse) not going to like.”

There were many examples in this study of conflicting rising, notably where the client was female, and the solicitor had requested evidence of the husband's financial circumstances. Perhaps the clearest example is in the case of Mrs Shepherd. Mrs Shepherd was not available to be interviewed immediately after her meeting with the solicitor so the researcher telephoned her at home. Mrs Shepherd told the researcher,

“There was a bit of trouble when I got home – in the past he’s been violent. When I asked for his payslips he went mad shouting ‘why does she want to know those.’”

To an outsider, in cases such as this and the other examples outlined above, it might appear that as soon as a solicitor became involved spousal conflict rose. This cannot be disputed, but solicitors do not appear to be the primary cause of this effect. The cause may be more to do with the goal of seeking an appropriate settlement.

A further reason for spousal conflict apparently to rise when solicitors become involved was suggested by Mary. Mary thought conflict could rise as a result of the client not fully understanding the information the solicitor has given him regarding the financial resolution.

“I don’t think he understood it, most people don’t – He’ll probably say things to his wife which will be wrong – then she’ll go to her solicitor – saying he’s said he wants half the house. I’ll make things worse.” (Mary after an appointment with Mr Pearson).

This effect was most likely to occur after the free half hour appointments where the firm’s practice was that no follow letters were sent detailing the information given out.

One of the most potent sources of increased spousal hostility which became apparent during the study concerned the involvement of other parties, most notably family members or new partners. Emily commented,

“You get clients and they’re quite amicable, but when their parents come in they’re terribly angry.”

The involvement of other family members was observed to occur most often with clients who were from a working class background. The involvement of new partners did not appear to be linked to social class and was observed to occur more frequently than the involvement of family members. The effect new partners had on spousal conflict appeared to the researcher to be quite high. New partners would often attend their partners meetings with the solicitor, contributing to any discussion and critical of any proposed solution which they viewed as overly favourable to their partner's spouse. Solicitors in this study were generally quite critical of the involvement of the new partner in the process.

“New partners can be very vindictive – you get the girlfriend from hell. They take over the case – they phone up – they just want a fight with the ex-wife.” (Emily)

“People say when you get solicitors involved it all goes horribly wrong. I've found when you get new partners involved it all goes horribly wrong” (Helen)

In sum, it became clear in this study, there were a number of factors which could lead to an increase in spousal conflict. Some of these, for example, the pursuance of disclosure, only occur once legal proceedings are to be taken; active pursuit of disclosure being more likely once solicitors are involved. Therefore an impression can be created that the involvement of solicitors increases spousal conflict. The justice of this view will be discussed below, but if one accepts that notion it is important to also examine the perception that solicitors also act in ways to minimise conflict and it is to that we now turn.



Solicitors employed various tactics to avoid further exacerbating any spousal conflict. A strategy referred to frequently by the solicitors concerned the letters sent by the solicitor to their client's spouse. Solicitors claimed that they took great care when composing such correspondence; the tone was to be as conciliatory as possible and in addition some solicitors would refer to the tactic of drawing any anger from the spouse towards themselves. Richard explained how he used the term "I now feel it's time to ..." when outlining proposed action, deliberately drawing any blame towards himself, and was observed making this tactic clear to clients. As this extract from Richard's meeting with Mr Chapman shows,

Richard: "I would just like to reiterate if you see your wife – stay friendly. Blame me about the letter, say you didn't understand – I'm paid to take the blame."

Although this may not have worked in this case as Mr Chapman replied,

"That's what she does, says she doesn't understand and it's her solicitor."

Many solicitors in the study also told of writing letters in such a way as to draw blame away from the client and towards themselves.

Another strategy was for solicitors to pressurise clients to into keeping their relationship with their spouses as reasonable as possible, by referring to the consequences of not doing so. Sarah was very clear with her clients.

"If there is any unpleasantness the main reason to avoid it is because it's bad for the children and secondly it's expensive."  
(Sarah to Mrs Cowen)

Solicitors were also observed on occasion modifying their client's anger against their spouse. For example Mr Jarvis was complaining about his wife's waste of her redundancy money.

Mr Jarvis: "not many people are made redundant, spend x on a chiropody course and then don't work."

Richard: "Well it could be because there is no work."

Richard was observed throughout this case modifying Mr Jarvis's views of his wife's actions. Mr Jarvis commented in the final interview,

"He's certainly calmed me down a lot – he's very placid – Stopped me doing anything stupid."

This study also revealed that the 'arms length' approach criticised in the White Paper,<sup>35</sup> could also have a positive effect on spousal conflict in that it acted as a tool for conflict containment. The case of Mrs Egan provides an example. Mrs Egan's relationship with her ex-husband was rated initially by both parties as mild. The relationship then appeared to deteriorate as the various factors mentioned above, for example disparity of expectation, influence of new partners and others, impacted on the process and the couple's relationship. However by the seventh observation it was noted that the relationship between Mr and Mrs Egan appeared to have improved. The researcher asked Mrs Egan about her relationship with her ex-husband.

"It's been quite pleasant – We don't talk about it at all (the dispute resolution process). It's not made it worse – I suppose, we don't talk about it; it's a matter for the solicitors. I think it's a good thing that solicitors take it on to their shoulders, so that we don't have to."

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<sup>35</sup> Looking to the Future: Mediation and the Ground for Divorce, Cm 2799.

Mrs Egan continued to explain that by leaving all the matters in dispute, in the hands of their solicitors, the couple were able to communicate freely and easily regarding the children. In this and other cases, arms length negotiation, far from exacerbating conflict, tended to remove the dispute outside of the couple's direct responsibility.

The minimalization of spousal conflict may appear to be always a laudable goal; however data from this study suggest that this assumption is questionable. Apparent low spousal conflict could indicate the existence of a continuing power imbalance. The case of Mr Ramsey illustrates this point. Both Mr Ramsey and his solicitor, Claire, rated the initial level of spousal conflict as mild. After the second appointment with the solicitor Mr Ramsey told the researcher,

“We're getting on well – in fact we're getting on better than we did before.”

But when the researcher asked if he could negotiate a settlement with his wife, Mr Ramsey responded,

“It wouldn't work!”

The researcher asked why.

“Because of what she's like – she's firey (sic), unpredictable, has mood swings and she's self motivated”

The researcher also asked Mr Ramsey if he felt they could have resolved the issues in mediation.

“No it's better with my own solicitor because we'd finish up arguing. We'd probably not have said what needed saying – because I won't say anything that'll cause argument.”

Despite the apparent low conflict rating Mr Ramsey did tell the researcher that both he and his wife had been violent towards each other in the past; he claimed that he was the main victim when this had occurred. Claire acknowledged that the level of conflict only appeared low because of the client's subservience,

“They get on really well. He’s feeling guilty. He keeps talking of not wanting to rock the boat or ruffle feathers. I suspect there’s no conflict because he’s treading carefully.”

The case of Mr Ramsey was not complete by the close of the fieldwork although most of the financial issues had been resolved, leaving Mr Ramsey very little apart from his pension. In the final interview with the client Mr Ramsey admitted,

“Well she’s (ex-wife) unpredictable and volatile it’s made me hold back.”

The case of Mr Ramsey provides an example of how the spousal conflict can be kept at a reasonably low level throughout the process but this can also be linked to the cost of maintaining an unequal relationship and concluding with a resolution which favours the stronger party.

The views of clients were sought throughout the process regarding their opinion on whether the involvement of the solicitor had increased any conflict between themselves and their spouse. The majority of clients reported that the involvement of their solicitor had not had a negative impact on their relationship with their (ex) spouse. One client, Mr Jarvis, did claim that the actions of the opposing solicitors had made the situation worse, but this was not a view expressed by other clients.

In conclusion, the evidence from this study suggests that conflict may arise as solicitors become involved in the process but this is due to a number of factors linked to the reallocation of previously shared resources. A degree of conflict may be inevitable, not only psychologically as part of the uncoupling process<sup>36</sup> but in order to obtain an appropriate resolution. In most cases there is a conflict of interests as resources will have to be split and spread more thinly. Some of this conflict may then transfer into the spouses' relationship. Solicitors can take action to minimise this conflict and we have seen that clients do not generally attribute blame for increased conflict on the solicitors. But a degree of conflict may be inevitable when seeking a fair solution and addressing power imbalances. Strategies may be employed to minimise such conflict and this study has questioned the assumption that arms length negotiations necessarily heightens spousal conflict as, on the contrary, it was shown that it can in fact lead to a containment of the conflict which is a fundamental aspect of the dispute resolution process.

Blaming solicitors for the conflict which occurs during the dispute resolution process is overly simplistic and unjust. Ingleby (1992) refers to the myth of solicitors' adversariality, whereby an impression is created of a solicitor increasing spousal conflict but this is a result of, Ingleby suggests, clients being empowered by their solicitor to seek a larger share of property than was previously offered by their more dominant

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<sup>36</sup> See Day-Sclater (1998) ,Vaughan (1987)

spouse.<sup>37</sup> This study supports Ingleby's view and would add factors such as disclosure and the impact of new partners and family members, who may be keen to protect the clients share in the marital assets. The assumption that spousal conflict is increased by the actions of the solicitors ignores both the inevitability of such conflict and the reasons for its existence.

## **7.6 Emotional factors: how do solicitors deal with guilty spouses?**

In the previous chapter on control it was suggested that parties to a divorce have their own preconceived 'boundaries of fairness,' which influence their view regarding the appropriate resolution. It was suggested that these boundaries of fairness are informed by the client's emotional concerns. One of the most potent emotions to influence the process of divorce can be feelings of guilt or innocence relating to the cause of the marital breakdown. This section will consider this issue in greater depth and recount the findings concerning how solicitors reacted in situations where they were faced with a guilty spouse.

The discussion in this chapter is confined to where the marriage breakdown<sup>38</sup> had been attributed to one of the parties' adultery. Adultery

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<sup>37</sup> p 141.

<sup>38</sup> Not necessarily the fact used in the divorce petition. Solicitors in the study often advised clients against using the adultery fact as the local courts required a level of proof to accompany the petition which was not always easy or cheap to obtain. In addition the adultery fact can not be used in petitions where the respondent had a sexual relationship with someone of the same sex. Therefore a number of divorces in

appeared to generate very clear feelings amongst the clients regarding perceptions of guilt or innocence. This was not the case for the behaviour fact,<sup>39</sup> possibly because in most cases it was less clear that one party was solely to blame.<sup>40</sup>

This study included clients from both sides of this particular issue. There were clients who reported feelings of guilt after their marriage had broken down as a result of their adultery and there were clients who saw themselves as the innocent victims of their spouse's adultery. Both these perceptions appeared to have a significant impact on the process. The researcher also noted that the impact was increased the closer the adulterer was to the original family group. In this study there were some cases where spouses had committed adultery with close friends of their spouse; in these circumstances the emotions seemed particularly acute.

We have seen earlier in this thesis that feelings of guilt or innocence can have an impact on the strength of feelings regarding the grounds for divorce,<sup>41</sup> on the level of control exerted by the solicitors when guilty partners are willing to settle for less than their entitlement;<sup>42</sup> on the level of spousal conflict as innocent parties are aggrieved to find that justice is

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this sample relied on the behaviour fact contained in section 1 (2) (b) of the Matrimonial Causes Act 1973 when the primary cause of the marital breakdown had in fact been the adultery of one of the spouses.

<sup>39</sup> S.1. (2) (b) of the Matrimonial Causes Act 1973.

<sup>40</sup> The researcher is not suggesting that where adultery has occurred there are no other factors which lead to the breakdown of the marriage but rather that adultery allows the parties to attribute blame much more clearly to one party.

<sup>41</sup> See section 4.51 in Chapter four, The Initial Appointment.

<sup>42</sup> See Chapter Six.

not reflected in the financial negotiations,<sup>43</sup> and on the client's initial overall aims and goals.<sup>44</sup>

Clients who had a perception of themselves as guilty and responsible for the marital breakdown often exhibited very similar behaviour. They arrived at the solicitors apparently contrite and appeared willing to agree to a minimal settlement possibly to appease their feelings of guilt. Mr Chapman was such a client. Two weeks before his visit to the solicitors he had left the marital home in which his wife and son remained and was now living with his new partner. Mr Chapman arrived at the solicitor's office bringing with him a letter from his wife's solicitors which contained the outline of a possible settlement, devised between Mr Chapman and his wife. The terms were viewed by Richard as imbalanced and unfair to Mr Chapman. Richard asked Mr Chapman to comment on the proposal.

Mr Chapman: "I agree with it – when I left I said she could have the house. She wants the house signed over to her but me to continue paying the mortgage – she has no money."

Later in the same appointment there was a question raised regarding the level of child maintenance Mr Chapman was paying.

Richard: "Where did this figure of £50 per week come from?"

Mr Chapman: "It is a lot – guilt I suppose."

Mr Chapman appeared initially willing to settle for less financially than he may have been entitled and was himself aware that his stance may have been caused by his feelings of guilt. Not only did guilty clients appear willing to settle for less financially than they may have been entitled but

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<sup>43</sup> See section 7.5 this chapter.

<sup>44</sup> See section 7.3.



they also on occasion displayed an unwillingness to proceed too quickly or do anything that they thought might further upset their spouse. This is demonstrated by Mrs Dale who having received notification of her degree nisi was attending her second appointment with Helen. Helen suggested that it was time to move forward with the financial resolution; Mrs Dale was reluctant and explained to Helen,

“I know you’ll think this is silly – but he’s been ill – and I’d rather wait until after he’s been away in August. I don’t want to make it harder for him I don’t want to push it at all.”

The guilty client then, by being both unwilling to pursue what the solicitor views as a reasonable settlement and reluctant to tolerate action which could further upset their spouse, could provide the family law solicitor with some potential problems. Emily expressed the following view when asked by the researcher if the client’s perception of themselves as guilty or innocent affected the negotiating process or outcome.

“Oh definitely, always affects the case. At the last firm we marked up the files Guilty Husband Syndrome, after the initial interview. There is a time aspect though, it doesn’t last. I don’t know how long it lasts but it doesn’t last for ever. As first they (guilty husbands) are all for giving up everything – ‘I’ve been a bastard – she can have the house – everything’ – but then they set up home with their new partner and they start to feel the pinch and they try to get things back. The other side is the angry wife - they came in ‘take him for every penny.’”

Emily’s perceptive comment is supported by the evidence how guilty/innocent parties acted in this study. The researcher asked Emily how this label of guilty husband or angry wife affected how she dealt with the case. On the ‘angry wife’ clients Emily explained,

“Oh yes – I’d tell clients to rush through (with the process) while they’re (guilty parties) feeling guilty because it won’t last.”

And on representing 'guilty husbands' reported,

"Well I advise him and get him to sign what he could for so he won't come back."

Emily's position advising the guilty client of their entitlement and should the client not accept this advice, protecting herself via a disclaimer whilst being willing to exploit a guilty party when there was such a client on the opposite side - were typical of the views held by the solicitors in this study. Helen told the researcher of her own attitude,

"It's bad when you've got a guilty client, but great when there's one on the other side."

Researcher: "So you'd exploit that?"

Helen: "I'll say to them (angry/innocent spouse) this is what I think you'll get if it goes to court, but if we can get more I'll say yeah why not!"

Even Mary, possibly the most conciliatory and least partisan solicitor in the study, admitted,

"Basically be very careful to ensure people (guilty parties) are aware of what they could get in writing.... But I must admit if I'm for the other side (angry/innocent spouse) I'll try to rush it through."

Of the apparently guilty parties in this study, it has been noted in the previous chapter on control that the solicitors did attempt to guide the client to a more reasonable settlement and if unsuccessful get the client to sign a disclaimer.<sup>45</sup> Regarding the two clients above, Mr Chapman and Mrs Dale, Mrs Dale settled for, according to her solicitor, ten thousand pounds less than she could possibly, have obtained had there been full disclaimer and maybe a court hearing. As Helen remarked on Mrs Dale,

"She feels really bad and doesn't want him to lose out."

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<sup>45</sup> See section 6.4 in the preceding chapter.

Mr Chapman though, did increase his expectations and the eventual resolution was more favourable to Mr Chapman than the solution that Mr Chapman had originally agreed with his wife. It would, however, probably be misleading to attribute this change in Mr Chapman's attitude solely to the actions of his solicitor, as this would exclude recognition of the, researcher suspects, significant influence of Mr Chapman's new partner.

Emily, in the quotation above, refers to both the transient nature of the 'guilty husband syndrome,' and the influence of the new partners in curtailing the effect of the perception of guilt. Mrs Egan provides an example in the study of where a 'guilty' partner, originally willing to give everything away, had over time, and perhaps influenced by the new partner, retrenched. Mrs Egan had obtained her divorce some time before becoming a client of Helen. She had been dissatisfied with her previous solicitor, but her reason for again seeking legal advice was because her husband who had subsequently remarried wished to reduce and limit the spousal maintenance and revisit the property resolution.

Mrs Egan told the researcher,

"I'd advise anyone separating not to leave it – to sort it out straight away. When he left it was all you don't have to worry about a thing."

Just as the guilty party may initially want to give everything away, the party who feels themselves to be the innocent victim may seek financial redress to balance out the hurt that they have suffered. It has already been reported that such clients were more likely to claim that it was important to them to achieve the best deal possible from the dispute

resolution process than other clients.<sup>46</sup> Of the cases that progressed through to conclusion Mrs Lawton was a client who clearly fitted the profile of a client who felt herself to be an innocent victim of the marital breakdown and who, as a result, had higher expectations and goals. After the initial appointment Mrs Lawton explained to the researcher why it was important to her to get the best deal possible.

“(I want the) best deal possible – financially and for the children – I don’t see why I should lose out it’s not my fault.”

In the second interview with the researcher, Mrs Lawton told of her hurt,

“I’m very bitter – I’ve asked if he won’t come to the house anymore – I think that’s better ... I still love him ... She’s (Mr Lawton’s new partner) in my place with my husband and my children.”

In the meeting with the solicitor however, Mrs Lawton appeared very calm and reported that she had taken a number of steps towards resolving the financial and property issues herself. The extract below taken from the observation of the second appointment between Mrs Lawton and Richard shows a client who is taking an active role in pursuing a financial outcome which is more favourable to her than her ‘guilty’ spouse and is informed by her own perception of herself as an innocent victim. Richard opened the meeting and after a brief greeting continued,

Richard: “Dear Kevin<sup>47</sup> (Mr Lawton) hasn’t got a solicitor now – well that’s no problem. Has anything changed since we last met?”

Mrs Lawton: “Well, I am having the mortgage changed into my name, the house has been valued ...it’s all going through now.”

Richard: “Well that is a surprise – though you still might need a guarantor.”

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<sup>46</sup> See section 7.2.

<sup>47</sup> All names have been changed.

Mrs Lawton: "Well, I spoke to a woman at the (Building Society) and she said it would be okay on what I earned, provided that Kevin pays £4000 off the mortgage now. Which he's agreed to do."

Richard: "Well it's much better if the mortgage is in your name. Then you don't have to ask anyone if you want to sell the house or anything else you might want to do. The problem is building societies usually will require a guarantor."

Mrs Lawton: "Well, she (building society manager) said it would be okay provided I pay in the £4000. And I've already got the cheque. I've got it on me now, payable to (building society)"

Richard: "And how has he got that?"

Mrs Lawton: "He's got a loan to pay off his debt it's part of that."

Richard: "Sounds to me like you're co-operating very well."

Mrs Lawton: "Yes, I'm getting all my own way."

Later in the appointment Richard summed up,

Richard: "Well you're getting a house worth £45,000 with an £18,000 mortgage, that's £27,000 equity; but of course you'll have the £4,000 to pay back if you sell. So that's £23,000 equity. So for that £23,000 what are you giving up? You're paying your own costs; he's got the caravan and £12,000 worth of debts - Seems fairly clear to me who's the winner."

Mrs Lawton: "Well he shouldn't have messed about. I wasn't going to lose."

At the close of the appointment Richard light-heartedly asks the client,

"Why are you divorcing this man, he's so kind?"

Mrs Lawton replies,

"It's guilt that's what it is."

The case concluded basically on the lines worked out by the client above.

The researcher asked the client in the final interview if she thought that the fact that she saw herself as a victim had affected how she had approached the process.

Mrs Lawton's replied,

"Yes definitely! I didn't want to hurt Kevin. I would hurt her (husband's new partner) though – I didn't want her to benefit. It would be different if we'd just drifted apart – I would have said fine fair enough have half the house."

Mrs Lawton continued,

"I've done a lot of this myself. I went to the building society myself, sorted out the transfer myself with (building society manager). I wanted it quick, so he didn't change his mind – get him while he's feeling guilty."

The case of Mrs Lawton provides a clear example of a client whose perception of herself as an innocent victim led to her pursuing a larger share of the marital assets than might have been the case if she had not held such a view. Moreover, Mrs Lawton was successful in her actions, although the transcripts suggest that this was perhaps more a result of her own efforts, and the fact that her husband was not legally represented, than by the actions of her solicitors.

These feelings of guilt or innocence that some clients brought with them to the solicitors had a clear impact on the eventual outcome. They were a factor involved in the eventual resolution, which may have been as influential as the more objective mathematical issues such as redemption figures and monetary assessments. The solicitors in this study claimed to adopt strategies in an attempt to mitigate the loss suffered by guilty parties and in some cases this met with a degree of success.<sup>48</sup> The solicitors also referred to a willingness to exploit guilty parties when there was such a party in opposition. This study does not have the data to

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<sup>48</sup> See chapter six in which the solicitors' tactics and degree of success in modifying clients expectations and goals is discussed.

verify or refute that claim, as the client who most closely fitted the profile of the innocent victim, was so determined in her goal regarding the financial settlement that she undertook much of the action herself.<sup>49</sup> However, what is not in dispute is that the client's perception of herself as an innocent victim was an important factor in the eventual resolution.

There are two further issues which need highlighting at this point. Firstly, it could be questioned whether it is the role of the solicitor to, in the case of the guilty client, persuade the client into seeking a solution different to the solution originally sought. Such a solution, which might seem to the solicitor to be unfair in financial terms, may have met the client's needs in other ways. If the answer to this is that clients do need a degree of protection from their feelings it could be questioned where this leaves mediation. Richard, the solicitor in the study with the most mediation experience raised the issue,

“Now in mediation it could start in January – one person full of guilt giving everything away – but by November the guilt has evaporated and they've got needs. So where does that leave the mediation? It's a bit stark but it could happen - but people are responsible for themselves and people must be allowed to have feelings.”

The second point concerns the incorporation of marital conduct via feelings of guilt and innocence into the financial and property settlement. According to the law marital conduct, unless it is inequitable for the court to disregard it,<sup>50</sup> and adultery does not fit this criterion,<sup>51</sup> is not recognised

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<sup>49</sup> It is arguable that there is over simplification in the existing literature which does not adequately consider the impact of clients' own work in resolving the dispute.

<sup>50</sup> The guidelines for the reallocation of marital assets and debts are contained in S.25 (2) (a)-(h) of the Matrimonial Causes Act 1973. Paragraph (g) guides the court as to the

as a factor to be taken into account by courts when resolving the financial and property issues on divorce. However, this study suggests that in fact conduct such as adultery may be being introduced informally as a result of the parties' perceptions of guilt and or innocence, and the compliance of their legal representatives.

## **7.7 Resolving disputes: the contributions of the solicitors and the clients**

Both solicitors and clients have a contribution to make towards resolving the financial, property and child issues which arise on divorce. Solicitors communicate with the opposing side (be that a solicitor or an unrepresented spouse); negotiate the terms of a possible resolution, invoke the court if appropriate, and provide knowledge to enable the client to take decisions and provide the solicitor with instructions. As we have seen there were some areas which were in dispute in which solicitors exhibited an unwillingness to become involved. These included redistribution of household contents, arrangements for children and allegations of domestic violence. Clients provide information to their solicitor, and based on their solicitor's advice, take decisions and provide instructions. Clients will often have to resolve the matters in which solicitors are unwilling to become involved, such as redistributing the

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circumstances in which conduct should be considered the paragraph reads, the conduct of each of the parties; if that conduct is such that it would in the opinion of the court be inequitable to disregard it. Inglis (2003) provides an interesting discussion on the interpretation of conduct by the courts for the purposes of paragraph (g).

<sup>51</sup> Duxbury v Duxbury [1987] 1 FLR 7



household contents and arranging child contact. Issues such as domestic violence, however, may be left unresolved. Some clients may also be involved in the negotiation of the eventual financial and property settlement, by negotiating directly with their spouse. This section focuses on the involvement of both the solicitors and clients in resolving the financial and property disputes.

As this study progressed it became apparent that the degree of solicitor involvement in resolving the financial and property disputes varied widely. Some cases had a very high degree of solicitor involvement, the solicitor negotiating the eventual terms of settlement with either the opposing solicitor or, where unrepresented, directly with the other party. The client's involvement was limited to providing instructions and signing the necessary documentation. At the other end of the scale, there were cases in which the role of the solicitor was very much reduced, as clients undertook a great deal of the negotiation work themselves, the solicitor's role being more concerned with drafting the legal documentation.

An example of a high level of solicitor involvement was apparent in the case of Mr Jarvis. According to Mr Jarvis, he and his ex-wife did not communicate together at all; all activity towards resolving the dispute was undertaken by each of the parties' respective solicitors. High solicitor involvement was also apparent in the case of Mrs Egan, although this couple did communicate regarding their children; Mrs Egan claimed that they did not discuss their financial and property dispute, preferring to

leave the matter solely in the hands of their legal representatives.<sup>52</sup> An example of low solicitor involvement was found in the case of Mrs Lawton. Mrs Lawton, whose case has been discussed in the previous section on the impact of guilt, negotiated the details of the settlement with her husband (who was unrepresented) and the building society herself; the involvement of the solicitor in that case was minimal<sup>53</sup>

The degree of solicitor and client involvement in negotiating the resolution not only varied between cases but also within cases. There were examples in this study of solicitors being actively involved in the early stages of the process but the client taking over during the later phases, negotiating directly with their spouse. Mrs Gibson was such a client. Despite the early involvement of the solicitor the eventual outcome was negotiated between the spouses.

“To start off with she (solicitor) did it, at the end we did it ourselves.”(Mrs Gibson)

Claire explained how her early communication with the husband led to him negotiating with his ex-wife.

“By writing to him and putting pressure on him – he’s done a bit of soul searching.”

The pressure that the solicitor was referring to included a threat to invoke the court. It was noted by the researcher that this threat also had the, possibly unintended, effect of encouraging the client to negotiate directly with her spouse, by-passing the solicitor. Mrs Gibson expressed some

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<sup>52</sup> Mrs Egan's dispute was eventually resolved by barristers at the door of the court.

<sup>53</sup> The outcome negotiated by Mrs Lawton was viewed by the solicitor as very favourable to his client. It is possible that the solicitor may have intervened more in negotiations had this not been the case.

concern regarding the terms of settlement to the researcher, and indicated that the threat of court was influential in her decision to accept the solution her and her husband had negotiated between them.<sup>54</sup>

“I think he’s (husband) lying – I think I might just take the shares. I can’t be doing with court. But I can’t understand it, at first he said he would be getting one thousand for every year, but now he seems to have changed his mind. I spoke to someone else, a cousin of mine, and her husband works for them (Mr Gibson’s employers) and he’s worked there for 21 years, and he’s had one thousand shares, and he’s getting another four thousand. But I don’t want to go to court – my legs were like jelly when I went to sign the affidavit.”

Despite this comment Mrs Gibson did express satisfaction with the eventual outcome of her case, but it is relevant that one of her reasons for negotiating with her ex-husband was fear of the court.

The researcher was interested to ascertain the views of those clients who had been highly involved in resolving the dispute themselves, particularly over whether there was a perception amongst them that they could have resolved the dispute without their solicitor. The responses were surprisingly uniform,

“I found it very helpful having a solicitor. He (ex-husband) sacked his. I thought good. I’ll really get what I want.” (Mrs Lawton)

Mr Farrell, although his solicitor had initially been very involved in the negotiations, eventually resolved the dispute directly with his spouse.<sup>55</sup>

The resolution arrived at by Mr Farrell and his ex-wife was very close to the position he’d agreed with his wife before first coming to the solicitor.

Helen commented,

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<sup>54</sup> Mr Gibson’s employers had recently been taken over and as a result all employees were to receive a number of shares in the company.

<sup>55</sup> Mr Farrell was also a client whose decision to come to an agreement directly with his ex-wife was influenced by his own fear of going to court.

"I tend to feel what a waste of time – 18 months and no further forward."

Mr Farrell however held much more positive views.

"We sorted it out amongst ourselves."

Researcher: "So, what use has the solicitor been to you?"

Mr Farrell: "Without pressure, I wouldn't have got this much."

Mr Farrell continued,

"If I didn't have a solicitor I wouldn't have got anything. I was expecting to keep paying the mortgage. You can't do anything without solicitors. When I spoke to the insurance company about the endowment they said a solicitor had to sort it out."

No clients who had been more involved in the process expressed the opinion that they could have proceeded without their solicitor. As we have seen in previous chapters the solicitor could support their client in spousal negotiations by providing knowledge of entitlements and acting as a shield to deflect the spouses' hostility. Given such support some clients were willing to negotiate directly with their spouse. It could be said that such clients were willing to take on a degree of responsibility for resolving the financial and property issues arising from the breakdown of their marriage, as envisaged in the white paper promoting mediation,<sup>56</sup> but clients would only do this if being supported by their solicitor. Such clients could be said to be negotiating in the 'shadow of their solicitor'<sup>57</sup> - that is, negotiation carried out by clients against a framework of possible legal entitlements, which has been provided by their solicitor. For other

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<sup>56</sup> Looking to the Future: Mediation and the Ground for Divorce. Cm 2799. Para 2.18.

<sup>57</sup> A similar concept was introduced by Mnookin and Kornhauser (1979) in their seminal article "Bargaining in the Shadow of the Law: The Case of Divorce." They discuss how lawyers negotiate settlements using the framework provided by their knowledge of legal entitlements that could be invoked by a court, should the case proceed to trial. The current research encourages the broadening of this concept to client/lawyer, as opposed to lawyers/court.

clients there was little possibility of spousal negotiation. Mrs Dale admitted in the final interview with the researcher,

“I shouldn’t have had to use her (solicitor). We should have been able to sort it out, but we couldn’t.”

Two of the clients with high solicitor involvement were quite critical of the high level of activity amongst the solicitors,

“It was very long and drawn out – and costly no doubt. I’m frustrated by it – solicitors are playing little games with one another.” (Mr Jarvis)

“It took longer than I thought I suppose, but then both solicitors were digging their heels in a bit. There seemed to be a lot of letters which I thought weren’t really absolutely necessary – copies of letters. Copies of this and that.” (Mrs Egan)

The solicitors in this study generally expressed a favourable view concerning clients negotiating directly with their spouse, although there was a belief that not all solicitors did share that opinion. Claire made the following comment after an appointment with Mr Ramsey,

“You do find this a lot, two levels of negotiation going on. One on paper between the solicitors, and one between the clients themselves. I don’t discourage it. Some solicitors do, you get some clients saying that their husband or wife says ‘my solicitor says not to discuss it with you.’ I think it’s a bit high and mighty of solicitors.”

Richard was similarly critical of solicitors discouraging spousal negotiation,

“Some solicitors will say, don’t speak to (spouse) – I might be being cynical but it gives the solicitor control and a longer and more expensive case.”

Emily however, although not discouraging spousal negotiation, was observed cautioning clients as to the limitations.

“...She earns more than you it’s not much more. What people do and it’s a big mistake, they sort things out between them and

because the court have never made an order and never dismissed a claim, later on one can ask for more money. So by all means reach agreement then let me know and I'll draft a court order and a dismissal." (Emily to Mr Fearn)

The idea of clients taking a greater part in resolving their disputes, as some clients were willing to do, raises questions regarding the role of the solicitor in divorce. The earlier section on the needs of the clients<sup>58</sup> argued that clients had certain needs which it was appropriate to look to the solicitor to provide. These needs included a need for information, which we have seen the solicitors provided, but also noted that this did not always translate into client understanding. Clients also needed someone to communicate with various bodies, and their spouse or their spouse's legal representative, on their behalf, although some clients were willing to perform parts of this role. The need for partisan support was not generally met although other support, most notably the willingness to act as a shield, was provided by solicitors. Overall, clients expressed a need for a solicitor to take action towards seeking a fair settlement in a manner which would not further damage the client's relationship with their ex-spouse. We have seen that the solicitors did attempt to limit their action in such a way as to minimise spousal conflict and did generally seek a fair settlement - although the parameters and definition of what is a fair settlement, are set by the solicitors. Finally, there appeared throughout the process to be a need that solicitors did not always meet, the need to listen.<sup>59</sup> It may be that only by actively listening to the client can solicitors resolve the dispute appropriately.

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<sup>58</sup> Section 7.2.

<sup>59</sup> In the study by Mather et al (2001) "being a sensitive listener" was rated by the lawyers as the most valuable skill in divorce practice. (p67). The reader is also

Some of the solicitors appeared to acknowledge, in theory if not in practice, how the role of the solicitor in divorce relies less on legal skills and more on other inter-personal qualities.

“We’re becoming less advice and legal knowledge and more and more, ‘I’ll hold your hand and get you through it.’” (Helen)

“Family law practice is not much to do with the law.” (Richard)

“The more law you can take out of family law, the better.”(Mary)

Claire made the following pertinent remark.

“It’s okay the solicitor having an idea about what should be done but you must remember that clients are not living within something purely on a mathematical level – but on an emotional level as well. That’s not in S.25<sup>60</sup> but you have to be aware of that.”

It could be argued that it is only by listening to clients that solicitors will be able to uncover this emotional level and be able more fully to understand the complex needs of the client.

A final point needs to be made regarding the distinctive role of the solicitor dealing with divorce and that concerns the relationship between the solicitor and the client. Emily made the following remark in her final interview with the researcher.

“It’s a bizarre relationship. It’s not appropriate to become friends but clients don’t want the relationship to end – you’ve been supporting them for two years. Being a matrimonial solicitor is very emotionally draining. You have to appear professional and like a friend but you can’t get too attached – you can’t get involved. It’s a schizophrenic existence.”

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reminded that Sherr (1999 p 8) notes the importance of listening to clients during the initial appointment. See section 4.2 in chapter four.

<sup>60</sup> The solicitor is referring to the guidelines for financial and property reallocation which are contained within s.25 of The Matrimonial Causes Act 1973.

Helen acknowledged the problems of becoming close to clients.

“You do get attached to clients – when a client sees you as a friend they don’t always take advice seriously. There needs to be somewhere else for them to go for their counselling.”

The end of the relationship was also perceived to be difficult.

“I think, they expect you always to be there for them. It’s difficult for both sides – ending the relationship.” (Claire)

And could appear abrupt to the solicitor as well as the client.

“All I got from her was the cheque – no note nothing.” (Helen on the completion of Mrs Egan’s case)

The relationship between solicitors and clients during the divorce process appears to be a distinctive professional relationship. The solicitors may know intimate details about the client’s personal life. Such knowledge does not fit easily into a purely business relationship.



# Chapter Eight

## Discussion

### **8.1 Does the initial appointment between the solicitor and client set a path towards divorce?**

This is a study concerning divorce, and for the majority of clients in this research who progressed with the process, divorce (together with the appropriate financial and property orders) was the eventual outcome. However, it is important to consider whether divorce was the most appropriate and only end point for the clients in this sample. After that we can go on to look at the exercise of control between solicitors and their clients, the approach of solicitors towards resolving the financial and property disputes arising on divorce, and the client's perspective on their experience.

In chapter four, on the initial appointment between the solicitor and client, it was noted that solicitors would, with the aid of a proforma, limit the dialogue to those areas perceived by the solicitor to be relevant, that is those closely related to divorce. Use of the proforma was observed keeping the interview focused around the legal requirements of divorce, and in one observation the solicitor argued that without such an aid relevant information, in that case, the client's debts, would not have been revealed<sup>1</sup> (or not until a later stage). The proforma can then be seen

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<sup>1</sup> See section 4.52 in chapter four.

as an aid to enable the solicitor to practice in an efficient manner. Relevant information is exchanged and (chargeable) time is not spent on discussion of issues irrelevant to the obtaining of a divorce. In particular, it was noted that the ability of clients to get their emotional stories on to the agenda was severely restricted. It was reported that by the close of the initial appointment there would be some sort of action plan in place<sup>2</sup> and in most cases this action was towards the goal of divorce. The path to divorce was often clear by the end of the first appointment.

A difficulty with providing the client with a clear path towards divorce is that divorce may not be the appropriate or only solution for that client. Clients seeking the services of a solicitor regarding divorce may have other needs, linked to the relationship breakdown, with which a solicitor could assist. Genn (1999) reported that clients often experience a number of associated justiciable problems at the same time, which Genn refers to as problem 'clusters.' In the field of divorce such clusters were said to include disputes over child issues and money (p 31). Such problem clusters were also evident with the clients in this sample, including a number who referred specifically to incidences of domestic violence. The financial and property disputes were dealt with by the solicitor alongside the divorce. Disputes over child contact did not appear frequently in this sample and it has been noted<sup>3</sup> that solicitors generally appeared reluctant to get involved and were observed stressing to clients

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<sup>2</sup> See section 4.55 in chapter four.

<sup>3</sup> See section 4.53 in chapter four. Eekelaar et al (2000) report similar findings.

the benefits of parental co-operation. A more common problem was that of domestic violence<sup>4</sup> and it is to this issue we now turn.

In this study it was noted that when an allegation was made by the client of domestic violence, the most common response from the solicitor was to refer to the violence as an incident which would satisfy the grounds for the petition for the divorce.<sup>5</sup> In no cases in this study, were protective measures either sought or obtained. It could be thought that this was a peculiarity of the sample. However, similar evidence from other studies suggests that this is not in fact the case. For example Eekelaar et al (2000) note that the solicitors in their study tended to minimise accusations of violence and suggest that the solicitors “seemed unwilling to encourage the escalation of the conflict by ... resorting to special protective measure(s) unless this was clearly needed” (p 86). Piper and Kaganas (1997) conducted a small study to look specifically at this issue. They interviewed 36 solicitors who practiced in divorce to see if they questioned their clients about domestic violence and if so, what were their reasons for doing so. Piper and Kaganas report that of those solicitors in the study who claimed that they would ask clients about domestic violence,<sup>6</sup> the largest group gave their reason as to satisfy the grounds for a divorce petition. Thus providing protection was not seen as a primary response.<sup>7</sup> Mediators appear to be similarly reluctant to

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<sup>4</sup> Pleasance et al (2003), whose study built on Genn's earlier work, found that 20% of the individuals who cited divorce as a problem they were facing also reported domestic violence (p 499).

<sup>5</sup> See section 4.52 in chapter four.

<sup>6</sup> Out of the 36 solicitors, 14 said they always asked about domestic violence, 20 said they sometimes asked and two claimed never to ask. (p276-277).

<sup>7</sup> Only three of the 36 solicitors in the study claimed to give information about legal remedies for domestic violence or refuges (p 278).

respond to allegations of domestic violence. Dingwall and Greatbatch (2000) report that, despite a draft code of practice requirement that clients should not participate in mediation if they may be influenced by fear of violence or other harm, there was evidence of mediators 'marginalising' accounts of domestic abuse<sup>8</sup> and noted that no cases in their study were terminated because of this issue.

Family law practitioners, both solicitors and mediators, may be leaving victims of domestic violence unprotected. As research by Hester and Radford (1996) has indicated that such abuse may worsen on separation, it is particularly important that this issue should be addressed when clients present seeking a divorce. In addition, in this study, a number of clients who had made allegations of domestic violence did not return to the solicitor.<sup>9</sup> It may be that clients have an expectation that if their story was sufficient to merit legal action regarding the abuse, the solicitor would have advised them of this, perhaps separately from the issue of divorce. As such advice was not forthcoming the impression may have been taken that their situation was not serious enough to merit such a response. Clients might not know the law, and may not be confident enough to ask a specific question regarding issues of protection, when they are unsure if this would be relevant to their situation. It was reported earlier in this thesis, that clients were often nervous about meeting their solicitor initially.<sup>10</sup> Telling their emotional stories of their marriage to a solicitor may be a less embarrassing or

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<sup>8</sup> A more detailed account of the process of marginalisation is provided in Greatbatch and Dingwall (1999).

<sup>9</sup> See section 5.3 chapter five.

<sup>10</sup> See section 4.42 chapter four.

threatening option than asking certain questions outright. By failing to listen to and respond to the clients' stories, when they fall outside the scope of relevance to divorce, a valuable opportunity to meet the client's needs, and in the case of the existence of domestic violence, the opportunity to provide protection, may be lost.

The emotional stories of the clients might also, it was suggested, be an attempt by some clients to gain verification from the solicitor that divorce was the correct course of action for them. If so, the majority of solicitors in this study did not respond to this need. It was reported,<sup>11</sup> that some solicitors would ask for confirmation of the decision to divorce, but the majority would still not engage in the client's emotional dialogue, arguably leaving any uncertainty on behalf of the client hidden. Furthermore, only two solicitors in this study referred to reconciliation as a subject to be covered in the initial appointment. It is, therefore, possible to question whether solicitors are setting a path to divorce at the initial appointment which excludes thorough consideration of reconciliation.

Marriage saving was a central aim of the Family Law Act 1996. Research into the Information Meetings, commissioned to test the viability of the reforms, suggested however, that this aim would be difficult to meet. Walker et al (2001) reported that where couples had been directed into counselling at the information meetings this had only met with very limited success, in terms of saving marriages. In reviewing their data Walker et al (2001) suggested that only 5% of marriages could be saved by intervention at that stage of the process (p 32). This finding

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<sup>11</sup> See section 4.51 in chapter four.

supported the widely held assumption that by the time a party sees a solicitor regarding divorce, the decision to divorce has been made. The solicitors in this study and, prior to the fieldwork, the researcher also believed this to be the case.

This assumption appears to influence practitioners, both solicitors and mediators. For example, Eekelaar et al (2000) in their study of the divorce work of solicitors state that clients were clear in the first meeting that their marriage was over, and that the content of the first meeting with a solicitor was on how the case would progress and what the next stage would be (p 73). Similarly, Dingwall and Greatbatch (2000), noted that mediators<sup>12</sup> did not actively pursue questions of reconciliation with clients (as required in a draft code of practice), further commenting,

“It is doubtful whether the possibility of reconciliation should be treated as a serious issue in mediation as required by the Code. Little attention is paid to it and it is clearly irrelevant in most cases. Its presence is a hangover from the politics of the Family Law Act 1996. Anybody familiar with the circumstances of family breakdown knew that filing for divorce very often came a long time after the point of breakdown and separation, at the point where one or other party had a strong reason for moving their life onwards and needed to be in a legal position to do so. The idea that intervention at this time would have an impact on the decision to divorce can charitably be described as naïve...”  
(p 250)

Recent empirical studies into both solicitor-led divorce and mediation have shown that the professionals in these fields do not generally

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<sup>12</sup> The reader is reminded that mediation is a dispute resolution process and is not to be confused with reconciliation. Section 2.41 in chapter two outlines Eekelaar and Dingwall's (1988) argument that development of family mediation has been very much influenced by early drives to promote reconciliation. This shared history may have led to some confusion about the role and goals of mediation. The term conciliation was replaced by mediation during the late eighties in order to avoid this confusion (Roberts, M, 1997 p5).

explore reconciliation<sup>13</sup> and there is an apparent assumption amongst authors,<sup>14</sup> (in the quotation above), that to do so might not be productive.

However, in this current study, despite the researcher's expectations, there was a surprising degree of ambivalence apparent regarding the decision to divorce. During the initial appointment three quarters of clients claimed to be clear about seeking a divorce.<sup>15</sup> The picture becomes a little more complex if one looks at the cases which did not progress.<sup>16</sup> In firm D, for example, four clients indicated during the initial appointment, that they were unclear about whether to divorce. However, seven clients from this firm did not proceed. Some clients, therefore, may have given the impression that the decision to divorce had been taken when in fact that was far from the case. One client was strikingly emphatic that she wanted a divorce at the initial appointment only to withdraw two days later. It is perhaps important to emphasise at this point that this study only contains a very small sample and as such any conclusions can only be tentative and indicative of areas which could perhaps be further researched. One such indication, drawn from the evidence above, is that clients may not always be as certain about divorce, at the time of their first appointment, as is commonly assumed. Earlier work by Davis (1988) suggested that it was not uncommon for solicitors to be faced with clients who were unsure about divorce and

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<sup>13</sup> S.6 (1) of the Matrimonial Causes Act 1973 does contain a provision whereby solicitors are required to confirm whether they have discussed reconciliation with their client, but this is not a requirement to discuss reconciliation.

<sup>14</sup> It is notable that the term reconciliation is not contained within the index of the many of the works examining solicitors and divorce.

<sup>15</sup> See section 4.51 in chapter four.

<sup>16</sup> See chapter five section 5.3 for a discussion of the cases which did not progress.

who might be using their solicitor as a “sounding board” (p 88).<sup>17</sup> The finding from this current work indicates that a number of clients might still have that need, albeit a need that in most cases was not met.

Participants included in the evaluation of the information meetings, influential in the decision to abandon the Family Law Act 1996, had already progressed some way towards their divorce. Fifty-five per cent of the sample had already separated from their spouse, 34% had already seen a solicitor and 21% had already attended counselling. In Dingwall and Greatbatch’s (2000) study of mediation for many of the clients, reconciliation would not be relevant as in a “high proportion of cases” the divorce had already been obtained; the disputes concerned post divorce issues such as child contact (p 240). Thus, Dingwall and Greatbatch’s point that exploration of reconciliation was not relevant for *those* clients appears valid.

However, an important distinction regarding this present study is that it was carried out at an earlier stage of the process; the majority of clients still residing with their spouse, whilst legal advice had been sought at an early stage in the process. This is not a peculiarity of the sample, as Genn (1999) reported that about half of those obtaining advice regarding divorce and separation, did so within one month of the problem emerging (p 116). It is possible that at this earlier stage, where clients are ambiguous regarding divorce, further discussion of reconciliation may have saved some marriages. The view that it may be possible to

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<sup>17</sup> Davis (1988) argued that since 1977 the more limited ‘green form’ legal aid provision has led some solicitors to claim that they are no longer able to spend time with clients on this counselling element of their work.(p88)



intervene and save marriages at the stage where legal advice is being sought receives some support from the later work by Walker et al (2004). This study followed up participants from the original information meetings study. The later study indicates that the original figure, suggested by Walker et al (2001), of 5% of marriages that could be saved, may have been pessimistic. In fact 19% in the follow up study had managed to save their marriage, although the authors note that there was a lack of stability present in some of these marriages (p 6).

The assumption that parties are clear about divorce by the time they visit a solicitor is not supported by the evidence in this study. The majority of solicitors in this study and others, however, appear to accept this assumption and proceed with the case accordingly. It is possible that in some cases divorce is not the right option, or not the right option at that time. Further research into the clients whose cases do not progress and who do not come back to a solicitor might provide some valuable insights into this issue.

Of the proportion of cases that progressed in this study the majority went on to obtain a divorce. The initial appointment often closed with a clear plan of action in place and the process towards divorce was underway. If this is the correct course of action for that client, this could be very reassuring and removes some of the burden from them at a stressful time in their lives. An alternative view is that although a clear path to divorce provides certainty, divorce may not be the most appropriate and only outcome for that client. Furthermore, clients who withdraw from the

process may have made a decision that divorce is not right for them; however their other legal needs which they articulated or attempted to articulate in the initial appointment may remain unmet.

The research by Genn (1999) indicated that solicitors are often the first port of call regarding separation or divorce.<sup>18</sup> If, as in this study, solicitors are using a proforma or similar device to limit the information obtained and thus the advice given, and are therefore providing a clear path to divorce, it is difficult to see solicitors, despite being the first port of call, as always offering the appropriate service for clients who may be uncertain about divorce or who have a number of related problems which require assistance. The issues that have been focused on above, (reconciliation and domestic violence) were not explored in any depth by the solicitors in this study and there were no instances of referrals to outside agencies. Bearing in mind Genn's finding that people do initially go to a solicitor when contemplating divorce, it might be worthwhile for solicitors to widen their remit and be more open to other possible avenues which might meet the client's needs.

Subsequent to the fieldwork, the Law Society have introduced their family law protocol which contains guidance for solicitors on both reconciliation<sup>19</sup> and domestic violence.<sup>20</sup> However, the study by Douglas and Murch (2002) carried out after the scheme was introduced, reports a lack of referral activity (and knowledge of local services) in the solicitors

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<sup>18</sup> p 115-116.

<sup>19</sup> para 1.2-1.4.

<sup>20</sup> para 1.20.

in their study.<sup>21</sup> Solicitors might not be providing the appropriate gateway to the wide range of services which could meet the client's needs.

This study was very small and one cannot draw generalisable conclusions from such a small sample. However, for the clients in this sample, if divorce was the right and only option for them, the service provided by the solicitors in this study, albeit narrowly focussed, could be seen as an efficient way of meeting that need. But should the clients' needs be wider or there be some doubt about divorce, this narrow focus may not be appropriate. The high rate of withdrawal from the firm offering free half hour appointments may be suggestive of a need for a service to be provided at an early stage which is not as narrowly focused around divorce. Whether the need for this service could be met by the Family Advice and Information Service (FAInS)<sup>22</sup> it is too early to tell, as the service is still being piloted.<sup>23</sup> An alternative might be a rethinking of the legal aid provisions. The current legally aided advice period of three hours is strongly associated with divorce, as the petition and associated documentation have to be drafted within that limit. A restructuring of legal

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<sup>21</sup> This lack of referral behaviour is not confined to solicitors. Moorhead (2003) found that advice agencies did not refer their clients to a more appropriate service although 35%-40% of clients were signposted to a more appropriate supplier.

<sup>22</sup> Currently being piloted by the Legal Service Commission, the Family Advice and Information Service (FAInS) project aims to provide a single port of call for those experiencing family or relationship difficulties. The two aims of the service are firstly to, "facilitate the dissolution of broken relationships in ways which minimise distress to parents and children and which promote ongoing family relationships and co-operative parenting." And secondly to, "provide tailored information and access to services that may assist in resolving disputes and/or assist those who may wish to consider saving or reconciling their relationship" (Legal Service Commission 2001 p 7). Those delivering the service are to provide referral or signposting to agencies which might appropriately meet the client's needs.

<sup>23</sup> Initially piloted using solicitors, the source of potential providers has widened and a mediation service of which the author is involved is currently being considered.

aid could enable solicitors to perform a wider role and provide advice about family dispute linked legal difficulties other than divorce.

## **8.2 Aspects of control in solicitor-client interaction**

Questions concerning the exercise of control are one of the central areas of inquiry in this thesis (see chapter two). This section will discuss different aspects of the exercise of control between solicitors and clients, starting with the exercise of control over discussions. We will then move on to consider the exercise of control over the process before finally discussing control over the eventual outcome. This section is concerned with the exercise of control between the solicitor and their client, not questions of power and control between the parties, which is dealt with in a later section.<sup>24</sup>

### 8.21 The exercise of control in the discussions between the solicitor and client

In chapter four on the initial appointment it was noted that the solicitors and clients had different conceptions over what was relevant for discussion.<sup>25</sup> For the majority of clients there appeared to be a need to tell the solicitor of their marital history leading up to the breakdown. For solicitors, however, the aim was to restrict the discussion to aspects relevant to the completing of the petition for divorce and to the resolution of the financial and property disputes. It was noted that in the majority of cases the solicitors were successful in limiting the agenda for discussion.

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<sup>24</sup> See section 8.4 this chapter.

<sup>25</sup> See section 4.52 in chapter four.

In some cases it was observed that solicitors would exert their control over the agenda by making their opening remarks to the client, following their initial greeting, with a closed question, to which only very limited response could be made.<sup>26</sup> This tactic, observed in the longer serving solicitors, was, one solicitor admitted, deliberately employed to limit the client's opportunity to embark on stories of their marital history.

More notable, as we have seen above, was the use in the initial appointment, of a proforma. The proforma contained a list of topics pertaining to divorce and reallocation of resources, and by following the structure of this form the solicitors were able in most cases to control the agenda for discussion. During the initial appointment it was rare for clients to introduce topics of their own volition, although those clients from a middle class background were observed being more assertive than their working class peers. The efficiency of the proforma in enabling the solicitor to control the agenda was starkly illustrated in one case where the solicitor had to conduct the early stages of the appointment without this aid.<sup>27</sup> For the time period when the solicitor was operating without a proforma the client appeared to be dominating the agenda, introducing the topics for discussion to which the solicitor then responded.<sup>28</sup> The majority of clients in this study, however, were observed conceding control of the discussion in the initial appointment to

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<sup>26</sup> Sherr (1999) contends that clients faced with closed questions from their solicitor often do not have the strength to resist the solicitor's assertiveness (p 15).

<sup>27</sup> See section 4.54 in chapter four.

<sup>28</sup> This was a client from a middle class background. It is not possible to be certain that the same effect would have been observed with a working class client.

the solicitor; clients remained relatively passive, responding to the solicitor's questions rather than raising issues themselves.

This picture of solicitors controlling the dialogue in their conferences with clients accords with earlier findings, for example, the early work by Hositka (1979), and, specifically in relation to divorce, Griffiths (1986) and Sarat and Felstiner (1995).<sup>29</sup> However this study suggests that this is not a simple picture of solicitor dominance, as the ability of solicitors to control the discussion was affected by other factors. The impact of social class has already been briefly referred to, clients from a middle class background being notably more assertive than their working class peers. Although solicitors were still observed dominating the direction and content of the dialogue, middle class clients were more likely to introduce new topics and question the solicitor. The most passive of the clients were those who had a perception of themselves as the guilty party in terms of the breakdown. In these cases it was observed the client would contribute very little to the discussion, giving very limited responses to the solicitor's questions. The solicitor dominated the exchanges.

The most significant factor limiting the solicitor's capacity to control the dialogue was the presence of third parties during the appointment. In a third of the initial appointments in this study, clients were accompanied by another adult (or adults). The solicitor in these circumstances was observed having much less success in controlling the direction and content of the discussion.<sup>30</sup> It may be that the presence of another adult

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<sup>29</sup> See section 2.51 in chapter two.

<sup>30</sup> See section 4.54 in chapter four.

on the client's side addresses a power imbalance between the solicitor and clients. The solicitor holds specialist knowledge and is familiar with the procedures, whilst most clients are not so familiar and their knowledge relates to their specific circumstances, much of which the solicitor may regard as of limited relevance. One would expect that the presence of a third party would make the client more confident and assertive with the solicitor. Surprisingly this was not the case in this sample. Clients who were accompanied did not contribute more to the solicitor client discussion than those who were unaccompanied. The effect on the solicitor's ability to control the dialogue derived, instead, from the third party's own contribution. Third parties, which fell into two groups, new partners and family and friends,<sup>31</sup> would interrupt, introduce new topics and suggest proposals. New partners of the client were more likely to put forward proposals for the resolution of the dispute; whereas family and friends of the clients were more often observed ensuring that the client's emotional stories were heard. The content of the discussion during the initial appointment was often much wider when third parties were present.

During the subsequent appointments, whoever was present, the researcher noted that the solicitor did not exert the degree of control over the dialogue that had been apparent in the first meeting.<sup>32</sup> There was no proforma as such by this stage, but the agenda was often dictated by the reason for calling the meeting, for example, to complete the petition for

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<sup>31</sup> In this sample where family and friends accompanied the client this, in all cases, was a client from a working class background.

<sup>32</sup> See section 6.3 in chapter six.

divorce, or apply for a legal aid certificate. In fact, meetings seemed to be largely reactive, with solicitors not planning matters within a set timetable (see below). In such cases the agenda was set by the documentation. However the researcher also observed that the majority of clients were more assertive than they had in the initial appointment, being willing to challenge and question the solicitor, although class differences were still apparent. A number of reasons for this increased assertiveness were suggested,<sup>33</sup> including that, first, at this later stage, clients were more familiar with the solicitor and surroundings and therefore might be more confident; secondly, as the decision over whether to proceed or not had been taken, some pressure was removed from the client; and thirdly, that some clients may have been unhappy with the progress of their case and their assertiveness was an attempt to move the process forward.

In the same way as the solicitor was observed controlling the direction and agenda for the discussion in the initial meeting, there was also evidence of solicitor dominance regarding the perspective adopted over the client's situation. An example was provided in chapter six<sup>34</sup> of a (middle class) client actively resisting the solicitor's interpretation of her situation. However it was also noted that such resistance was rare and that generally it was the solicitor's perspective of the client's situation which prevailed.

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<sup>33</sup> See section 6.8 in chapter six.

<sup>34</sup> See section 6.5.



In the majority of cases in this study solicitors dominated discussions between themselves and the client. Although their ability to do this became more limited as the case progressed, the impact of this was not overly significant, due to the fact that the number of face to face meetings can be very small (as further discussed below). The presence of third parties did have an impact on the solicitor's ability to control the agenda but did not appear to increase the contribution of the client. The dominance by solicitors in relation to the dialogue may be a result of the solicitor's success in using various techniques towards this end. This perspective sees clients as passive and subservient. There may be some evidence for this but it may also be important to consider whether this lack of involvement does in fact accord with the client's needs and we will return to this point further below.

#### 8.22 The exercise of control over the process

Much of the literature on issues of control between solicitors and their clients focuses around control of the talk in solicitor client conferences or the exercise of control in relation to the outcomes pursued. This section is concerned with perhaps the more mundane aspect of control over the process and includes consideration of the frequency and form of contact between the solicitor and client.

Subsequent face to face meetings between solicitor and client were, in the majority of cases, instigated by the solicitor.<sup>35</sup> Face to face meetings were more common at the early stages of the process (particularly where

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<sup>35</sup> See section 5.4 chapter five.

there was documentation to complete which required the client's presence) than later on. Many solicitors reported that they actively discouraged face to face contact with the client, preferring instead to communicate through the post or via the telephone. This was justified as a method of enabling the solicitor to cope with a heavy workload and by one solicitor as a way of maintaining some emotional distance from the client. Clients were much less likely to instigate meetings and only two clients (both middle class) asked for a meeting with the solicitor to check on the progress of their case. Fear of costs may have been an important reason for clients' reluctance to seek out their solicitor and some clients had clearly indicated this to the researcher.

In the majority of cases in the sample the solicitor appeared to dictate the frequency and form of communication. When solicitors did take action to contact the client, however, it appeared that this was driven by the receipt of communication from another body (for example from the Legal Services Commission or from the opposing solicitor). Consequently to say that the solicitor was exercising control over this aspect of the process may be misleading. It appeared to the researcher that there was in fact often a lack of control as solicitors' action was often instigated by the actions of others. This is similar to what Davis et al (1994) have referred to as "responsive mode" (p 120-125). Moreover it was argued<sup>36</sup> by acting in this way and by failing to provide the client with a clear programme of work this could be very frustrating for clients. Clients, however, may have little power; the fear of escalating costs is very real;

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<sup>36</sup> See section 5.7 in chapter five.

furthermore their lack of familiarity with the process makes it difficult for them to challenge. It could be argued that if clients were more fully informed of the process they may be more able to participate and assume a degree of control.

A further consequence of a responsive mode is that both solicitors and clients lack control over the duration of a case. It was reported for the majority of clients in the sample the cases took longer than they had expected.<sup>37</sup> Solicitors often estimated the duration of the case and informed clients of this in the initial appointment. However use of the prefix “if all goes to plan” by the solicitors was misleading as it could be seen to imply a plan of time linked to the process. In no cases did it appear to the researcher that such a time plan was in place. Adoption of such a strategy could improve the efficient processing of cases and holding such information could give the client a degree of power.

### 8.23 Control over outcomes

“The relevant issue for an analysis of the power of lawyers in the dyadic lawyer-client relationship is not whether lawyers determine tactics or technique, but whether they modify their clients’ goals or objectives.” (Heinz 1983 p897)

It is arguable that in the case of divorce there may be two elements to the client’s goals or objectives. There will be an outcome related to the legal ending of the marriage, the divorce, and there will be resolution of the disputes relating to the reallocation of property and financial matters. This section is concerned with control over the latter aspect, that is the outcomes pursued in relation to the financial and property disputes. The

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<sup>37</sup> See section 5.6 in chapter five.

influence of solicitors over the outcomes pursued, has in past research (and by the solicitors in this study) been justified by lawyers as necessary in order to realign the client's initial views over the outcome to something the lawyer sees as more realistic or appropriate (Eekelaar et al 2000, Mather et al 2001).

In the current study, the solicitors' idea of the more appropriate outcome appeared to be influenced more by adherence to the goals of neutrality and objectivity than maximising the client's interests.<sup>38</sup> The author refers to this lawyer view of the most appropriate outcome, which may be quite distinct from the parties' notion of a suitable outcome, as the 'third view.' This third view of resolving the dispute, informed by a legal perspective of the case, may have, it was argued, represented an outcome that neither of the parties to the dispute actually wanted, but which met the values and ideals of the solicitors regarding resolution of these disputes. It is perhaps useful at this point to refer the reader back to chapter two in which it was seen that a pervasive feature of the lawyer led resolution was that very few cases were adjudicated, settlement away from court being very much the norm. This was also the case in the present study; no cases were resolved by the court. This avoidance of trial appeared to be a further element in the construction of the solicitors' 'third view' of the most appropriate resolution.

Having arrived at this notion of the most appropriate resolution, solicitors in this study were observed employing a number of tactics in order to persuade the client to adopt the solicitor's perspective regarding the

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<sup>38</sup> See section 7.4 in chapter seven.

outcome sought.<sup>39</sup> These tactics included frequent repetition of the solicitor's preferred outcome; pointing out the long term implications (including reference to their spouse's new partner) of failing to follow the solicitor's advice; reference to the impact of certain actions on the eventual costs; reference to the likely approach of the court; and use of delay.<sup>40</sup>

In many cases the solicitors in this study were observed being successful in modifying the client's goals in relation to the outcomes to be pursued. The tactics, referred to above, were also employed to persuade clients to continue with a particular course of action, including whether to continue with the case at all.

The researcher, observing the application of these tactics by the solicitor and, when it occurred, the client's compliance, regarded this as evidence of the solicitor exercising control. However this was often not the impression of clients. On some occasions, the pressure applied to the client to proceed in a particular way appeared to the researcher to be quite strong. It became apparent, however, during the post meeting interviews, that many clients were unaware of the pressure that had been applied. Clients, for example, did not appear to notice that a particular solution had been proposed by the solicitor ten or more times in one meeting, remarking instead that they had not felt that the solicitor

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<sup>39</sup> See section 6.4(i) in chapter six.

<sup>40</sup> The divorce lawyers in the study by Mather et al (1995) claimed in interviews that they used a number of tactics to influence clients; these tactics were similar but not identical to those which were observed in this study. However, the Mather et al study discovered this from interviews, whereas the current study has actually observed these tactics being used.

had pushed them one way or another. It appeared to the researcher that solicitors did exercise control over the outcome but that this was not always visible to clients.<sup>41</sup>

This rather subtle exercise of control has also been a criticism made of mediation (see for example, Dingwall 1988, Greatbatch and Dingwall 1994). Although solicitors did not conceal exercise of control under the blanket of neutrality, informality and client empowerment, as may be the case in mediation, in this study clients did not appear fully aware of the pressure they had been placed under to pursue a particular course of action and therefore the exercise of control could be as invisible with a solicitor led service as was found in the past with mediation.

One of the areas of inquiry in this study was whether clients actually desired control over the eventual outcome. The data indicate that the majority of clients appreciated a directive solicitor, someone to take decisions for them. Clients were critical where they felt that their solicitor had not been assertive enough and those who felt their solicitor had been directive appreciated this approach.<sup>42</sup> Further empowerment for those in the emotional turmoil of divorce does not appear to be something that the clients in this study would have appreciated. This finding accords with that of Genn (1999) who reports that clients who are experiencing problems which are emotionally draining, of which the author suggests divorce is one, need someone to deal with their

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<sup>41</sup> Griffiths (1986) also reported that clients were unaware of the exercise of control by their lawyers.

<sup>42</sup> See section 6.7 in chapter six.

problems, rather than being *empowered* to resolve the disputes themselves.

Although clients reported appreciating a directive solicitor, there was not always clear lawyer dominance over clients. There were a number of instances in this study where even the most compliant and passive clients were observed resisting the solicitor. These clients were observed modifying their outcomes after being persuaded by the solicitor, but would only go so far. Clients would, for example, increase their expectations from their original point but did not go as far as the solicitor had advocated. These clients appeared to have conceptions of what the author refers to as their 'boundaries of fairness,' that is an intrinsic idea about what was a fair outcome for them in their particular circumstances, and would not, despite pressure applied by the solicitor, be moved from this.

A possibly similar phenomenon may have been noted by Eekelaar et al (2000) who, in an aside, remarked that some legally aided clients in their study agreed to settlements against the advice of their solicitors. This, Eekelaar et al suggest, may be because the many of those clients were female and thus be more likely to "perceive their interests more broadly than in material terms" (p98). However, in this present work, the ability of clients to see their interests in broader terms or to have their own boundaries of fairness was not linked to gender; both male and female clients possessed this trait.

The interview data and the researcher's knowledge of the clients, indicates that factors such as perceptions of guilt or innocence regarding the marital breakdown were significant factors in the construction of the boundaries of fairness, as was the belief of a shared past history. In cases where such boundaries were apparent the influence of the solicitor was therefore constrained.

It is possible that a further example of resistance could have come in those cases that did not progress i.e. the client did not return to the solicitor after the initial appointment. Potential clients, perceiving that the solicitor was providing a service solely on divorce, when they might have had other needs or been unsure regarding divorce withdrew from the process and just went away.

In thinking about issues of control, we also need to consider third parties. The Heinz (1983) quotation above refers to the dyadic nature of the lawyer-client relationship. In this study, in a third of the cases, the client was accompanied in their meeting with the solicitor by a third party.<sup>43</sup> These third parties were often observed to be very active participants in the ongoing interaction. The new partners of the client were particularly inclined to propose potential solutions and, in the opinion of the researcher, provide instructions to the solicitor. Moreover, it would be naïve to assume that the influence of these third parties is confined to contributions made in solicitor client conferences. An analysis of the exercise of control which proceeds on the supposition that the lawyer-client relationship is dyadic could be argued to be flawed.

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<sup>43</sup> See section 4.54 in chapter four.



There was an assumption in the White Paper<sup>44</sup> that in disputes arising on divorce only the two parties (the husband and wife) are involved (Lewis 2001). A dyad is said to be the most appropriate form for mediation (Fuller 1971). However, in the disputes arising on divorce, it could be argued that in reality there is rarely a true dyad. There are often other interested parties involved. Most obviously there are the children, but in addition there are outside bodies such as building societies, the Inland Revenue<sup>45</sup> and the Benefits Agency and, as was found in this study, the new partners or family members.

In sum, the issue of lawyer control over clients is more complex than that of lawyer dominance (see also Sarat and Felstiner 1995, Eekelaar et al 2000, Mather 2001). If one uses the definition provided by Heinz (1983) of lawyers' exercise of control - that is whether the lawyers modify the client's goals or objectives) in this study - the evidence was that the solicitors did exercise control, goals in relation to outcomes sought were modified, but this control was not unfettered. Clients were observed being persuaded to amend their views but some clients appeared to have points of resistance and the solicitors did not overcome these.

Eekelaar et al (2000) suggest that the decision over which outcome is pursued is as a result of the negotiation of three elements; "the lawyer's perception of the client's interests, the normative standards set by the law, and the expression of client autonomy as revealed in the client's instructions." (p 90) It is argued here that the lawyer's perception of the

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<sup>44</sup> Looking to the Future: Mediation and the Ground for Divorce Cm 2799.

<sup>45</sup> Ingleby (1992) found that solicitors frequently had to deal with building societies, Inland Revenue and similar bodies.

client's interests - that is the 'third view' - may differ significantly from the client's perception of their interests. Moreover, we have seen in this study that client's instructions evolve as the case progresses. The instructions are not fixed at a point in time.

If, as we have seen in this study, solicitors control the dialogue, limiting any discussion to what the solicitors perceive as legally relevant, much information, which may be of fundamental importance to the client, may remain unheard. Such information could include that which informs the client's boundary of fairness. Therefore in order to seek a solution appropriate for that client and to restore the balance of the negotiating framework identified by Eekelaar et al, the client needs to exert their autonomy. Not all clients are willing or able to do this.

The picture revealed in this research is of solicitors exercising control over the dialogue throughout the process, but most effectively in the initial appointment. The question of control over the process itself was less clear as, although solicitors did control the number of meetings with clients, the frequency and timescale appeared to be driven by external factors. Third parties (the client's new partner, member of the client's family or close friend), by contributing to the discussion and putting forward proposals, appeared to have an effect on both the control of the dialogue and the outcome pursued. The impact of these third parties on solicitor client interaction has not been adequately considered in the past. Regarding the outcomes pursued, solicitors in this study were seen to be very influential, but were not completely dominant. Clients did

value a strong directive solicitor but some clients perceived that direction as out of alignment with their own goals. They would then resist the solicitor and exert authority.

### **8.3 The approach of solicitors to resolving the disputes arising on divorce**

A number of terms have been used both in the literature and in policy documents to describe the service (and the effects of that service) provided by solicitors. For example, a possible advantage for a client of obtaining the services of a solicitor is that she may benefit from the partisanship that a solicitor can provide. On a more negative note, policy documents have suggested that involvement of solicitors can heighten spousal conflict and reduce communication.<sup>46</sup> Imbalances of power between the parties may, it has been suggested, be more effectively addressed where each party has their own solicitor than in mediation, where the neutrality of the mediator may enable such imbalances of power to be reproduced.<sup>47</sup> This section will therefore review the evidence from this study regarding these issues, beginning with the question of partisanship.

#### 8.31 Partisanship

Partisanship, where lawyers act in a manner designed to maximise their client's interests, may be seen as one of the core principles of legal professionalism (Mather et al 2001). However, evidence from this study

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<sup>46</sup> See para 2.20 in Looking to the Future; Mediation and the Ground for Divorce.

<sup>47</sup> See for example Mnookin (1985), Dingwall and Greatbatch (1994).

and the existing literature (see chapter two), suggests that this principle may not fully permeate legal practice in the sphere of family law. Adherence to wider goals, that is the lawyer's notion of fairness and commitment to a conciliatory approach, militates against the adoption of a partisan approach.

In this study it was found that, apart from one solicitor, partisanship, as in adopting strategies to maximise the client's interests, was not offered by the solicitors.<sup>48</sup> Some solicitors were observed taking action to improve the position of their client in relation to the opposing side, but describing this as a 'limited 'partisanship' could be problematic, as the aim never appeared to be to maximise the client's interests but rather to gain a degree of advantage. Regarding the eventual financial outcome, the overall goal of the solicitors appeared to be to achieve a settlement which was perceived by the solicitor as objective and fair to both parties. This third view approach has been discussed above.

In interviews solicitors were very critical of their peers who did adopt a partisan approach but also expressed awareness that this was an approach that many clients would appreciate. The tension between representing their client and seeking a settlement which the solicitor considered appropriate (the third view) was one of which a number of solicitors appeared aware. In order to placate clients, it was suggested by one solicitor that an impression of a partisan approach should be created, whilst at the same time working closely with the opposing side

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<sup>48</sup> See section 7.4 in chapter seven.

towards a resolution which both the solicitors would regard as fair and appropriate - the lack of partisanship being concealed from the client.

It was reported in chapter seven that clients of those solicitors, who appeared most reluctant to pursue partisan strategies, were critical of the solicitor. Likewise clients of solicitors who adopted what could be described as a limited partisan approach were appreciative. However this is not to argue that clients wanted a 'hired gun.' Indeed the evidence from this study is that the majority of clients did not want that, but someone on their side to protect their interests.<sup>49</sup> Whether solicitors are always able adequately to protect their client's interests with an approach which is characterised by a lack of partisanship, when the definition of the client's interests is defined by the solicitor (drawing more on legal perspectives and professional ethos than knowledge of the client), is questionable. If clients desire (and pay for) at least a limited degree of partisanship, it could also be questioned whether it is appropriate for this branch of legal profession to offer a different service, that is one that has goals and ideals independent of the clients wishes.

### 8.32 The effect of solicitors' involvement on spousal conflict

One of the reasons that a partisan approach is criticised is for its possible effect on increasing spousal conflict. One of the key research

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<sup>49</sup> There were a few clients who did want their solicitor to get them the best possible deal, notably where their partner had committed adultery. See section 7.6 in chapter seven.

questions in this study concerned whether the actions of solicitor did increase spousal hostility as was suggested in the White Paper.<sup>50</sup>

This study found that conflict did appear to rise once the divorce process had started and solicitors became involved.<sup>51</sup> However, it was suggested in chapter seven<sup>52</sup> that this exacerbation of hostility was not caused so much by careless or deliberately provoking action by the solicitors (who as we have seen did not on the whole adopt a partisan approach), but was linked to requirements and components of the divorce process itself. A number of factors which appeared to lead to an increase in spousal hostility were outlined in chapter seven. These included such aspects as the grounds for divorce; the pursuance by the solicitor of disclosure; dissatisfaction that proposed outcome did not reflect fault; and the influence of new partners and family members.

Solicitors, in this study, appeared very aware of the accusation that as a professional group they exacerbate spousal conflict. The professional body, the Solicitors Family Law Association (SFLA)<sup>53</sup> has a code of practice<sup>54</sup> which *inter alia* advises solicitors on the need to avoid further inflaming spousal hostility, and solicitors in this study were observed adopting a number of tactics, with the apparent aim of mitigating the effect of the dispute resolution process on spousal conflict. These are described in chapter seven,<sup>55</sup> and included very careful composition of

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<sup>50</sup> Looking to the Future: Mediation and the Ground for Divorce Cm 2799 para 2.20.

<sup>51</sup> The initial level of spousal conflict prior to the involvement of solicitors will be discussed in section 8.5 in this chapter.

<sup>52</sup> See section 7.5.

<sup>53</sup> All the solicitors in this research were members of the SFLA.

<sup>54</sup> See Appendix nine.

<sup>55</sup> See section 7.5.

correspondence to the client's spouse; emphasising to the client the link between remaining on amicable terms with their spouse and a shorter and thus cheaper process; and encouraging the client to use the solicitor as a shield. This latter strategy allows the client to proceed with action that the spouse may perceive as hostile, by deflecting the blame for pursuing such action onto the solicitor.

The nature and form of a solicitor led dispute resolution process has been described as 'arms length negotiation'<sup>56</sup> and it has been suggested in policy documents that this distance has a negative impact on the spousal relationship and ability to communicate. This study, however, found that for some clients this distance had a beneficial effect on their ability to communicate with their spouse. By removing the difficult areas of dispute away from the parties' immediate responsibility, some clients reported that they were then able to communicate more easily with their (ex)spouse on other issues. Most often this was regarding the couple's children and more mundane 'housekeeping' issues. Clients claimed that the aspects of the dispute that the solicitors were dealing with, they left to one side, not referring to them at all in their meetings with their spouse. It could, therefore, be argued that the distance imposed by arms length negotiation can actually be quite helpful, potential conflict over finances and property being able to be contained, leaving the parties and their children free to communicate over other family matters.

The evidence from this study was that the majority of solicitors acted in a manner designed to minimise the perhaps inevitable, once the process

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<sup>56</sup> Looking to the Future: Mediation and the Ground for Divorce. Cm 2799 para 2.20.

was underway, rise of spousal conflict. However, it was argued in chapter seven<sup>57</sup> that this pursuit of low conflict divorce might be problematic. Firstly, the reader was reminded of the literature which argues that such conflict is both inevitable and possibly psychologically healthy. Secondly, it was questioned whether the professional goal of conflict minimalisation could lead to a failure to address power imbalances and the subsequent reproduction of these imbalances of power in the eventual outcome. It is to this second aspect that we now turn.

It has been suggested that one of the reasons that spousal conflict may rise when solicitors get involved is that one party may, as a result of seeing a solicitor, seek a larger share of any assets that they had previously agreed with their more dominant spouse (Ingleby 1992). This effect was observed in a number of cases in this study. However, following on from this, by not pursuing an increased share of any assets, an individual may be able to keep their relationship with their ex-spouse on apparently reasonably amicable terms. The relationship may remain comfortable for the client, but the eventual financial outcome may be unfair, favouring the dominant spouse. There were a number of cases in this study in which this appeared to have occurred. In some cases the client had resisted the solicitor's advice to pursue a higher claim, eventually signing a document confirming that they were acting against advice. In other cases it appeared to the researcher that the solicitor's actions may have been so constrained by goals of conflict

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<sup>57</sup> See section 7.5.



minimalization, that the client's interests had not been fully pursued. Just as in mediation there may be a tension between ensuring that the mediator remains neutral and addressing power imbalances between the disputants; there may be a similar tension apparent in the solicitor led service where the goal of keeping the spousal relationship as amicable as possible may come into conflict with the aim of achieving a fair and balanced resolution.

### 8.33 Guilt or innocence: does the client's perception affect the outcome?

When a marriage breaks down sometimes one party feels that they are more to blame than their husband or wife, similarly one party may feel themselves to be the innocent or wronged party. An aim of this study was to discover whether the client's perceptions of themselves as guilty or innocent had an effect on the eventual outcome negotiated.

We have already noted (see above) that some clients had their own notions of an appropriate resolution (boundaries of fairness), which, it was suggested, were grounded in their marital history. Perceptions of guilt or innocence are a clear example of a circumstance which influences the client's attitude regarding the eventual financial and property outcome. It was reported<sup>58</sup> that clients who felt themselves to be the innocent party were more likely to claim in the initial interview with the researcher that it was very important to them to get the best deal possible. Those who admitted to feelings of guilt were more likely to claim that this aspect was not important.

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<sup>58</sup> See section 7.2 in chapter seven.

Throughout the process, in the interviews between the researcher and the clients, it became very clear that clients held the view that some element of justice, regarding the breakdown of the marriage, should be reflected in the financial/property resolution.<sup>59</sup> If these financial and property disputes were to be resolved by a court, it is extremely unlikely that factors such as guilt or innocence would have any relevance regarding the eventual outcome. The court is directed only to consider conduct which it is inequitable to disregard,<sup>60</sup> and has generally only included extreme conduct or that linked to financial aspects, in this category. Adultery, the most common cause in this study of the perceptions of guilt or innocence, would not be sufficient.<sup>61</sup> According to the law, conduct such as adultery and the perceptions of the parties of guilt or innocence are not relevant factors when formulating the terms of a financial and property resolution on divorce. The solicitors in this study also appeared to hold this view, discouraging the client's discourse regarding blame. In the study by Davis et al (1994) it was reported that the solicitors talked of having to educate their clients as to the irrelevancy (in relation to the financial outcome) of marital conduct (p51). However, the current study found that conduct could be relevant, solicitors being willing to exploit perceptions of guilt when they were apparent in the opposition.<sup>62</sup>

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<sup>59</sup> Davis et al (1994) also found examples in their study of clients who held this view.

<sup>60</sup> See s. 25(2) (g) of the Matrimonial Causes Act 1973.

<sup>61</sup> Inglis (2003) provides an interesting discussion on how the courts have interpreted conduct in S.25 (2) (g).

<sup>62</sup> See section 7.5 in chapter seven.

The data in the current study contained examples of both 'guilty' and 'innocent' spouses. Guilty parties, who were often, initially at least, apparently willing to settle for less than they were entitled to, were observed being encouraged by the solicitor to seek a larger share of the marital assets. If unsuccessful in this endeavour, solicitors would then ensure they had the appropriate disclaimer signed, stating that the client was going to proceed acting against the solicitor's explicit advice. Where the client was an 'innocent' party, with a guilty party in opposition, solicitors admitted that they would rush through the process and attempt to exploit the guilty feelings of their client's spouse, thus procuring a better deal for their client. These actions could result in agreements, which are imbalanced and 'unfair,' favouring the innocent party.

Such agreements will normally be formalised into a consent order.<sup>63</sup> Davis et al (2000) in a project examining ancillary relief applications made in county courts, noted that terms contained in some of the applications for consent orders were not that which a court would have arrived at, commenting,

"one might infer that the outcome in many of these cases depended as much on extraneous factors, such as generosity, guilt, or parental support, as it did on what might have been thought would be the principal determining factors." (p58)

In this present study there was evidence that factors such as guilt did influence the eventual terms of the financial outcome. Outcomes arrived in this way could be unfair to one party. Moreover, Davis et al note that in their study such agreements were not subjected to extra judicial

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<sup>63</sup> S.33A Matrimonial Causes Act 1973.

scrutiny, district judges appearing to take on trust agreements reached through lawyers (p 63). If solicitors in the wider community are acting on these perceptions of guilt and/or innocence and including them as factors concerning the eventual terms of the resolution, it could be argued that solicitors are not merely negotiating in the shadow of the law, as these bargaining chips are not contained within the law. If extraneous factors are intervening and if district judges are not scrutinising the consent applications a number of unfair agreements may be being formalised into court orders.

#### 8.34 Solicitors' reaction to spouses negotiating directly with each other

It was noted in chapter seven that some clients were very actively involved in resolving their financial and property disputes. A number, particularly as their case progressed, were negotiating the terms of the eventual settlement directly with their spouse. The implications of this from the client's perspective will be discussed further in the next section. However what was notable, when examining the solicitor's approach to resolving disputes, was how comfortable the solicitors in the study appeared to be with this. This is arguably different from other areas of law, where the client's involvement may be limited to providing instructions. By encouraging the parties to undertake some of the negotiating, the role of the solicitor comes close to the facilitator role undertaken by mediators. However, by providing the client with knowledge of their legal position, and possible back up, should the

negotiations fail, the actual service provided by solicitors remains quite distinct.

### 8.35 Has mediation influenced solicitors' approach to resolving the disputes arising on divorce?

It has been argued that the increasing prominence of family mediation has led to family lawyers modifying their approach to their work (Walker 1996). The establishment and growth of the professional body, the Solicitors Family Law Association (SFLA), with its conciliatory code of practice, provide further evidence of this influence.

The two professions are not, however, completely separate, as there are a number of solicitors who are also family mediators. In this study, which involved ten solicitors, two had been trained in mediation, although only one of these actually took part in mediation on a regular basis. It would naïve to assume that being trained and practising as a mediator, has no impact on a solicitor's approach to their work. The solicitor in this study who had the most extensive mediation experience was also one of the most conciliatory in his approach. This is only one solicitor and it is not possible to ascertain if this solicitor's temperament had predisposed him to practice mediation, or whether his mediation experience had influenced his approach to legal representation.

In reviewing the evidence from this study regarding the approach solicitors adopted toward resolving the financial and property disputes on divorce, it appears that solicitors in the study were not always acting as 'solicitors.' The majority of solicitors in this study were not partisan;

adopted a conciliatory approach to their work; took steps to minimise conflict, which sometimes led to power imbalances being reproduced into unfair agreements; would act as facilitators encouraging their clients to negotiate directly with their spouse; and would seek a resolution which the solicitor regarded as fair to both sides. These characteristics are similar to those used to describe mediation. It was also notable that a number of solicitors would advocate remaining neutral and seeking a settlement which they regard as objectively fair, the language used reflecting the ideals and values of mediation.

In this study it appeared that the solicitors had absorbed some of the ethos behind mediation. This may be as a result of the government's advocacy of mediation (and need to retain their market share) and criticisms made of solicitors' approach in the past. This study is very small and was never intended to provide an account of how all family law solicitors approach divorce. However, the data indicate that there may be a new hybrid profession emerging, influenced both by the tenets of mediation and by the principles of legal representation. This hybrid group may provide legal knowledge, expertise and very clear guidance and direction, whilst also adopting a conciliatory approach, encouraging spousal negotiation (where feasible) and seeking agreements fair to all sides. Hybridity can, however, lead to confusion and contradiction. An example would be a solicitor's pursuit of a fair settlement but willingness when the opportunity arises to exploit weakness (such as feelings of guilt) in the opposition.

Hybridity is not a new concept within family law. Davis and Pearce (1999) argued that there was a degree of hybridity emerging from the various professional groups (court welfare officer, barristers, district judges and solicitors) involved in resolving disputes under S.8 of the Children Act 1989. For Davis and Pearce however, hybridity appears to consist of a consensus of ideas between the different professional groups, and the adoption of shared skills. Such a professional consensus is shown by Davis and Pearce to be that disputes should be resolved in the way, perceived by the professionals, as being in the interests of the whole family, but which may not actually accord with the wishes of the individuals involved. Such an idea is similar to that of the 'third view' articulated in this thesis. The 'hybridity' referred to in this current work relates to the adoption by solicitors of some of the skills of family mediators, and not necessarily that they have ceased to follow clients' instructions. In this thesis the hybridity of solicitors' practice and the 'third view' approach to resolution are two distinct concepts.

As a result of the pressure from the emergence and the government's promotion of mediation, the profession of family lawyers may be in a state of flux. Solicitors may be unclear about their role, as the principles behind mediation and legal representation may come into conflict, and clients may not be aware of the true nature of the service they are paying for.

## 8.4 The client's perspective

The perspective of the client, whilst it has not been ignored in past research, has not received the same degree of attention as has the solicitors' own perception<sup>64</sup> (see chapter two). This study followed clients from their initial appointment with the solicitor until the conclusion of the case. Much valuable data was gathered in this way, providing a viewpoint of the process which was sometimes at variance to that of the solicitor.

### 8.41 Characteristics of the clients

It could be said that there are a number of characteristics which were common amongst the clients in this sample. Many appeared to be preoccupied with the emotional side of their divorce and had emotional stories which they attempted to share with the solicitor at the first appointment (although often unsuccessfully).<sup>65</sup> Female solicitors were preferred by clients of both genders because of their perceived ability to listen and empathise.<sup>66</sup> Many clients appeared to rate the solicitor's interpersonal skills above their apparent legal skills (although this was not a view shared by some of the middle class clients).<sup>67</sup>

A number of clients appeared to have more than one problem<sup>68</sup> which may have required a legal remedy, but in most cases these other issues

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<sup>64</sup> A notable exception being the work by Davis in 1988 and Davis et al in 1994.

<sup>65</sup> See section 4.5 in chapter four.

<sup>66</sup> See section 4.61 in chapter four.

<sup>67</sup> See section 4.42 in chapter four.

<sup>68</sup> Genn (1999) reports that individuals often suffer from clusters of justiciable problems. In this study the most notable associated problem was domestic abuse but clients also presented with problems relating to welfare benefits and inheritance issues.



were not dealt with by the solicitor. It was also noted that clients sometimes had quite diverse agendas in arranging to see a solicitor<sup>69</sup> or pursuing a particular courses of action. For example, some clients used the meeting with the solicitor to exert pressure on their spouse.<sup>70</sup> Another client asked her solicitor to apply for increased maintenance to cover childcare costs; but admitted to the researcher, that what she actually wanted was for her husband both to realise how hard it was for her to bring up their children on her own, and for him to offer to look after the children more frequently.

To the surprise of the researcher, a finding from this study was that the initial level of conflict between the spouses was rated by over half of the clients as mild or negligible. This apparently low level of spousal conflict could be a peculiarity of the sample, but Dingwall and Greatbatch (2000) also noted the low level of conflict in their sample of mediation clients. Dingwall and Greatbatch put forward a number of possible reasons for this relating to their sample but also hypothesize that such low levels of conflict could reflect a secular change in the management of conflict within society. Both the current work and the study by Dingwall and Greatbatch are too small to be able to draw conclusions generalisable to society as a whole. However, this may be an area in which further research could provide some enlightenment. Knowledge of base line levels of spousal conflict could usefully inform the practice of both solicitors and mediators.

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<sup>69</sup> The views of the solicitors as to what these agendas are given in section 4.62 in chapter four.

<sup>70</sup> See section 5.3 in chapter five.

On a similar note it was found that the majority of clients were not seeking the best deal ever<sup>71</sup> (although clients who perceived themselves to be innocent did want to maximise their financial benefit<sup>72</sup>). The picture revealed in this research, was rather that a typical client would aim to achieve a settlement which they perceived to be fair and not want further to damage their relationship with their spouse. Further evidence that clients were not seeking the maximum financial gain from the divorce, was found when it became clear that it was much more common for solicitors to be observed encouraging clients to increase their initial expectations (that is clients start from a low point initially) than to reduce them.<sup>73</sup>

Eekelaar et al (2000) may have observed a similar phenomenon, although this is not made completely clear as they state, "We would say that the theme of failure of clients to appreciate their entitlements arose so frequently that it was a pervasive feature of our case study data." (p92) later adding, "[solicitors] were more commonly engaged in raising the expectations of female clients than in lowering the expectations of husbands" (p 99). However, they also report that where clients resisted the solicitor's advice "Mostly this was because the client was prepared to accept an outcome less than their entitlements would indicate." (p 95) and continue, "One might have thought that men are more prone to resist solicitors' advice than women, and our data supports this" (p 95). The

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<sup>71</sup> This finding may be replicated in society as a whole as The Legal Services Research Centre much larger survey of legal need reported that 73% of those respondents seeking divorce claimed that their motive was non-monetary. Pleasance et al (2003b)

<sup>72</sup> In section 7.2 in chapter seven it was reported that the perceived cause of the marital breakdown influenced the client's views regarding the outcome sought.

<sup>73</sup> See section 6.5 in chapter six.

picture therefore is a little unclear. If the most common reason for *resisting* the solicitor's advice is that the client is prepared to settle for less than entitled, and men are more likely to resist the solicitor's advice than female clients, it would logically follow that male clients are often prepared to accept less than they may be entitled to. In this current study there was no gender difference, a number of both male and female clients being willing, initially, to settle for a lesser share from the marital pot than they may have been entitled.<sup>74</sup>

The image of the clients in this study, as not seeking the maximum financial benefit for themselves from the divorce, and seeking to protect their relationship with their spouse from further hostility, may appear to conflict with their apparent desire for a partisan solicitor (see for example Eeklelaar et al 2000 p 52). However, the researcher would argue that these goals do not necessarily conflict. What the clients in this study appeared to want was someone on their side to help them get (what they saw as) their fair share regarding the finances and property. Much as they did not want their relationship with their spouse further damaged, the relationship was by definition already damaged to a degree and the trust had gone. A solicitor, who is perceived by the client as being on their side, can therefore protect the client from any actions by the spouse they no longer trust.

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<sup>74</sup> As already discussed above, guilt is a factor which can lead to the client being willing to settle for less than they may be entitled. However, it is argued that the characteristic of low initial expectations was more pervasive and not limited to client's who held perceptions of guilt.

#### 8.42 Clients' understanding of the process

The level of understanding by clients of the divorce process was one of the initial research questions in this thesis. The need for clear information and for this to be translated into client understanding has been highlighted by academics (see for example Genn 1999) and policy makers.<sup>75</sup> An initiative of the Family Law Act 1996 was to provide information at the very start of the process, in order that individuals contemplating divorce could make an informed decision.

The form in which information was given to the clients in their initial appointment was outlined in chapter four.<sup>76</sup> It was noted that much information regarding the divorce process was given out by solicitors in this appointment. The observations revealed that information was given in simplistic (occasionally misleading) terms, and was often repeated in a follow up letter. Such correspondence was not however provided to clients attending the free half hour appointments; one solicitor in particular highlighted this as a problem which had led to misunderstanding and consequently an occasional rise in spousal hostility.<sup>77</sup>

The level of the clients' understanding was explored in the interviews carried out by the researcher, immediately following the clients' initial appointments (prior to receiving any communication from the solicitor which may have clarified points of confusion). The simplification of

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<sup>75</sup> Most recently regarding the establishment by the Legal Services Commission of the Family Advice and Information Service (FAInS). See chapter two.

<sup>76</sup> See section 4.53.

<sup>77</sup> See section 7.5 in chapter seven.

information was appreciated by some clients, although for others the information was still seen to be complex and confusing. The sheer bulk of information imparted by the solicitor (which for example would include information pertaining to the ground for divorce; the procedure to be followed; legal aid and the statutory charge; the severing of a joint tenancy, the implications regarding endowment policies, mortgages, and employment pensions) was often problematic. The impression gained by the researcher was, that for the majority of clients, the amount of information given to them at the initial appointment was felt to be overwhelming.<sup>78</sup>

As cases progressed the information given by the solicitors to the clients in the solicitor/client meeting was specific and more detailed than in the initial appointment. Regarding communication via mail, it was reported in chapter seven<sup>79</sup> that the majority of clients claimed that letters from their solicitor were reasonably clear and understandable, although some clients reported having to, on occasion, seek further clarification from the solicitor over parts of the letters about which they were not clear. Only a minority of clients complained about the use of jargon in the letters they had received from the solicitor.

The information given out by the solicitors in the solicitor/client meetings, however, did not appear to be so well understood. It was observed that solicitors sometimes had a tendency to use technical (not specifically legal) terminology with which the clients may not be familiar. Such terms

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<sup>78</sup> See section 4.61 in chapter four.

<sup>79</sup> See section 7.3.

were not explained to the clients and clients were not observed asking for clarification. A solicitor confirmed that, due to resource constraints, letters were not generally sent to clients confirming discussions in subsequent meetings.

It was noted in chapter seven<sup>80</sup> that clients would initially claim to the researcher that they had understood all the information given out in the meetings, but would then demonstrate, in their subsequent comments, that their level of understanding was actually far from complete. As the cases progressed and their relationship with the researcher developed, clients became more willing to admit to not fully understanding all the information they had been given. This lack of understanding was not limited to the working class clients; middle class, well educated clients were just as likely to misunderstand the information as their working class peers.

A significant finding from this study is, following on from the above, that as cases progress, clients may conceal from their solicitor their lack of understanding. This lack of understanding was only admitted to the researcher after a trusting and intimate relationship had been built up between the client and the researcher.<sup>81</sup> Instructions to solicitors on how to proceed, therefore, were sometimes provided by clients who had not always fully understood the options available to them.

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<sup>80</sup> See section 7.3.

<sup>81</sup> One of the benefits of the methodology adopted in this study was that a close and trusting relationship between the researcher and the research participants would be fostered, thus encouraging the participants to be more open, relaxed and honest, than may have been the case in a more short term relationship with a researcher. This aspect is discussed in section 3. 31 (i) in chapter three.

Further research on how to achieve an acceptable level of client understanding would be beneficial for both solicitors and their clients. This present study found that for clients in this study the level and timing and form of information giving were not always appropriate (although as has been stated clients did not make this clear to the solicitors). The resource constraints which limit the number and content of letters sent could perhaps also be usefully revisited.

#### 8.43 The involvement of clients in resolving the disputes

The bulk of the existing research into solicitors' involvement in resolving the financial and property disputes arising on divorce, does perhaps inevitably concentrate on the contribution made by the solicitors. The contribution made by clients towards resolving these disputes, which might be significant, has not been explored in such depth.

In chapter seven<sup>82</sup> it was reported that the degree of solicitor involvement in resolving the financial and property disputes varied quite widely. In some cases the clients carried out much of the negotiating work themselves, both with their spouse and outside agencies.<sup>83</sup> The degree of solicitor and client involvement was observed not only to vary between cases but also within cases, it being observed that as cases progressed some clients would become more involved, negotiating in the latter stages directly with their spouse.

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<sup>82</sup> See section 7.7.

<sup>83</sup> The most striking example is that of Mrs Lawton, who negotiated directly both with her husband and the building society. See section 7.6 and 7.7 in chapter seven.

For some clients, such spousal negotiation only appeared possible if the client was able to use the solicitor as a 'shield' in negotiating with their spouse. This tactic of encouraging the client to use the solicitor as a shield was observed quite frequently and was often suggested by the solicitors as a means of minimising spousal conflict.<sup>84</sup> Not only did the solicitor's suggestions for a proposed solution provide a useful bargaining point for the client in their negotiations with their spouse, but, by the solicitor remaining present, albeit in the background, the client could, it is suggested, negotiate with their spouse, safe in the knowledge that, should negotiations fail, she can return to her solicitor who would then take over.

Interestingly, despite the high level of involvement of some clients in resolving their disputes, no clients expressed the opinion that they could have proceeded without their solicitor. Clients who were highly involved in their own negotiations, also reported being very positive about the solicitor's contribution. The shared perception of these clients seemed to be that, without the solicitor's actions in providing knowledge of legal entitlements, and the solicitor's ability to act as a shield, the clients would not have been able to negotiate as effectively with their spouse.

This phenomenon could be described as clients negotiating in the 'shadow of their solicitor.' This is to suggest that the concept developed by Mnookin and Kornhauser (1979<sup>85</sup>) could be broadened out to

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<sup>84</sup> See section 7.5.

<sup>85</sup> The applicability of the Mnookin and Kornhauser's concept of the 'shadow of the law' has been questioned by, for example, Griffiths (1986) and Davis et al (1994). See Section 2.54 in chapter two.



encompass client/lawyer in addition to the original concept of lawyers/court. To clarify, Mnookin and Kornhauser originally argued that lawyers negotiating divorce settlements with other lawyers do so in light of the knowledge of what a court would provide. In this present study, it was found that clients negotiated with their spouse, in the light of the knowledge of what the solicitor had indicated would be the outcome achieved, had the case been resolved by the process of solicitor negotiation.<sup>86</sup>

As has been noted many clients were, initially at least, willing to settle for less than they were entitled,<sup>87</sup> and there was some evidence in this study of clients who carried out their own negotiations, settling for less than they were, perhaps, entitled. The solicitors concerned expressed, to the researcher, a degree of dissatisfaction with the outcomes achieved. It was also indicated that some apparent imbalances of power between the parties were replicated in these spousal agreements.

The researcher submits that the issue of clients' involvement in negotiating resolutions to the financial and property disputes arising on divorce, arguably oversimplified in the current literature, is one that merits further investigation. The characteristics of settlements arrived at in this way could be further examined, and compared to those which have been achieved by a process of solicitor negotiation. In the study

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<sup>86</sup> Dingwall and Greatbatch (2000) found that mediators would seek to influence the outcomes arrived at in mediation by referring to the "view likely to be taken by courts or solicitors of possible agreements (p234). If this was replicated in mediation practice as a whole, it could appear that solicitors may be casting a shadow over mediation.

<sup>87</sup> See section 8.51 this chapter.

referred to earlier<sup>88</sup> which examined ancillary relief applications to court (Davis et al 2000a), it was questioned, by the authors, whether extraneous factors had influenced some of the final terms of the orders. It has already been suggested that factors such as guilt or innocence may be influential in arriving at outcomes which may be perceived of as unfair.<sup>89</sup>In addition, it may be that the final terms, in these possibly 'unfair' agreements, have been arrived at as a result of spousal negotiation, the influence of legal endowments conferred by the law and adopted by legal practitioners being negated. This study did find that where resolution was reached in such a way, the eventual terms could be seen as unfair to one party (although possibly within the client's boundaries of fairness).

It would be also interesting to explore the motivations and needs of clients who willingly take on this work of resolving their disputes and whether such cases have certain characteristics in common. For example, is this approach sought by clients from low conflict divorces (although as has been seen, apparent low spousal conflict can conceal imbalances of power between the parties), or by more highly educated articulate clients?<sup>90</sup>

Finally, including the contribution that clients may make to the dispute resolution process in any questions concerning the involvement of solicitors brings into question what the role of solicitors should be. Should, for example, solicitors adopt a more paternalistic approach and

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<sup>88</sup> See section 8.43 in this chapter.

<sup>89</sup> See section 8.43 in this chapter.

<sup>90</sup> This was not found in this study.

discourage a high level of client involvement, particularly when it appears that the final terms of the agreement are unfair? Or, should solicitors encourage client autonomy, leaving clients free to make agreements which may appear unfair but which may meet the client's needs in other ways?

Encouraging spousal negotiation fits in with the notions of individual responsibility which were apparent in the ethos behind the Family Law Act 1996. However, by adopting such a role the solicitor may be leaving vulnerable clients unprotected. In particular, this may allow imbalances of power between the parties to be replicated in the final outcome. Furthermore, effective negotiation requires an adequate knowledge of the options available, but, as we have seen, clients do not always fully absorb and understand all the information they have been given. On the other hand, clients may have very good reasons for agreeing to a settlement which may appear unfair to an outsider in financial terms but which may meet the client's wider needs. The apparent tension between protecting vulnerable clients whilst allowing a degree of client autonomy is difficult to resolve.

### **8.5 Emerging questions**

This research aimed to explore how the service provided by solicitors met the needs of their clients using an in-depth study of both solicitors and clients in a small number of cases. The focus on certain areas, such as control and spousal conflict, was included as result of criticisms levelled at the service in policy documents in the mid 1990s, which

proposed a shift to mediation. In addition to the findings relating to those areas and others a number of questions have emerged, which merit further exploration, but which the current methodology and sample could not fully explore.

In this study it was noted that the solicitors worked within very narrow fields of specialisation. For example, one solicitor would specialise in high asset divorces, another solicitor in the same firm would deal with those cases which were at the lower end of the capital/income scale; other solicitors would spend most of their time on disputes under the Children Act 1989. It could be argued that the increasing specialisation *within* family law practice<sup>91</sup> which may be seen to promote a high level of expertise also engenders a narrow focus of expertise and knowledge which may come into conflict with the wider needs of clients. It was noted that the solicitors appeared to be reluctant to listen to clients, and that the wider needs of clients (such as protection from violence) are neither heard nor, if they are heard, addressed. Research examining the wider needs of clients could indicate how (a) these needs might be revealed and (b) how these needs might be adequately met.<sup>92</sup> It is notable that research into both mediation and the solicitor led service, has exposed a failure to pick up indications of domestic violence,

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<sup>91</sup> The relevant point here is not that solicitors specialise in family law as opposed to other areas of the law but that their practice (specialisation) is limited to a narrow field *within family law*. The increasing degree of specialisation *within the law* has been well documented. See for example Shapland and Sorsby (2003) who report on the increasing degree of specialisation within the junior Bar.

<sup>92</sup> Walker (2004) on going research into FAInS indicates that solicitors are not referring clients on to appropriate agencies.

suggesting that this issue is not being dealt with by either professional group.

An area which has not so far attracted much academic interest is that of the clients who, after attending an initial appointment with a solicitor do not progress. These seem to be a considerable proportion of clients initially approaching solicitors. An exploration into the motivations of these clients for (a) seeing a solicitor and (b) not returning could provide some extremely valuable data on, for example, if these clients did have clear intentions to divorce and whether they had other legal problems. Knowledge at the moment on this subject appears to be largely anecdotal.

Another finding from this study, which appears to have been neglected in earlier studies, concerns the influence and contribution of third parties, that is new partners and family members. It has been argued in this study that the dispute between the parties to a divorce is not in reality dyadic, as the emphasis on mediation would seem to assume. The increasingly complex nature and relationships within families, leads to this factor being increasingly relevant. However little is known about the impact of these third parties on the disputes arising on divorce.

Regarding the clients, research could usefully be carried out into client's own, sometimes significant, contribution towards resolving the disputes. Such research would be particularly pertinent, highlighting perhaps the boundaries, from the client's perspective, between spousal negotiation

where parties are assisted by a mediator and spousal negotiation where each (or one) party is assisted by a solicitor.

Remaining with the clients, further exploration on the impact of social class on the dispute resolution process could prove valuable. Tentative findings from this small study have indicated that the working class may be more intimidated by the solicitor, less likely to challenge the solicitor's dominance over the agenda and therefore their stories may be more likely to remain hidden. It may also be the case that this group of the population may be less likely to be aware of their legal rights. It is arguable therefore that the failure of solicitors to listen may have a greater impact on clients from a working class background than their middle class peers. This may be particularly significant in relation to issues such as domestic abuse. Further research into the impact of social class could provide some clarification.

Finally, a study examining the role and most appropriate professional background of the family law solicitor could be conducted. At the present time the profession appears to be in a state of flux. There is pressure from the Legal Services Commission (Walker 2004) for solicitors to widen their role, adopting a more holistic approach to family disputes, this being particularly apparent in relation to the development of the Family Advice and Information Networks (FAInS). Whether current training enables solicitors to perform this wider role could be explored, using a study comparing the approach of solicitor/mediators to their legal practice to those solicitors who have not been mediation trained.

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## APPENDIX ONE

### Solicitors Preliminary Interview

1. Which areas of law do you/have you practised in?
2. Are you a member of the Solicitors Family Law Association?
3. Have you received training in Mediation? If so when? and who by?
4. Do you have any Mediation experience?
5. How many years have you been practising? As a Family Lawyer?
6. How would you describe your own approach?
7. Can you describe your 'typical client'?
8. Do you think there are any differences in the way middle and working class clients approach the divorce process?
9. Any differences in the way male and female clients approach the divorce process?
10. Do you have any strongly held views on divorce practice?
11. What aspect of your work as a divorce lawyer do you enjoy the most?
12. What aspect of your work as a divorce lawyer do you enjoy the least?
13. What do you consider to be your primary responsibility in representing divorce clients?
14. What criteria do you use to judge your success as a lawyer?
15. What point do you expect to have reached by the end of the first interview? Probe, and why?

## APPENDIX TWO

### First Client Interview

1. Have you used a solicitor before? If yes, for what service?
2. Why did you choose this solicitor? Probe.
3. Did you find it helpful that the solicitor was male/female?
4. How did it go today?
5. Do you think you managed to get everything across? Was there anything you wanted to ask but didn't feel able to?
6. Were you and your husband/wife agreed on any areas before seeing the solicitor? -Divorce-Children- Property- Maintenance.  
  
If, yes. Have your views of these agreements changed since seeing the solicitor? - Divorce-Children- Property- Maintenance.
7. How would you describe the current level of conflict between yourself and your husband/wife? – None/Negligible - Mild - Substantial - Intense.
8. How important is it to you that the solicitor obtains the best possible deal for you? - Very Important - Important - Not very important - Not at all Important.
9. How important is it to you that the solicitor will do nothing which would damage your relationship with your husband/wife? - Very Important - Important - Not very Important - Not at all Important.

10. How important is it to you, that any agreement reached will be fair to all sides? Very Important - Important - Not very important - Not at all Important.

11. What do you think of the solicitor's proposals?

12. Were they what you expected?

13. How do you think your husband/wife will react to these proposals?

14. What do you understand about the law relating to the grounds for divorce?

15. Do you understand how your property/assets/debts are to be redistributed?

16. What are your views on that?

17. Did you understand the solicitor when she explained (insert relevant issue)?

18. How long do you expect your case to last?

Explanation and request regarding following cases throughout the process.

Request for telephone contact number - if appropriate.

-

## APPENDIX THREE

### Interview with Solicitor after the Client's initial Appointment.

1. What do you think this client really wants?
2. How would you rate the inherent level of conflict in this case?  
None\Negligible - Mild- Substantial - Intense.
3. Do you think this will affect the process or your actions? And if so  
How?
4. What do you expect to achieve in this case?
5. How assertive, with yourself, was the client?
6. Had the client come to you with any areas already agreed with their  
husband/wife?
7. How realistic were these?
8. If not realistic, how did you advise the client?
9. Do you think you were able to make the client understand, the  
grounds for divorce?
10. Do you think you were able to make the client understand how any  
property/assets/debts will be redistributed?
11. How do you think the client felt about this?
12. Do you think this client will follow all the advice you have given them?
13. Any further comments on this case?
14. How long do you think it will be before anything further happens in  
this case?

## APPENDIX FOUR

### Second and subsequent client interviews.

Topics to be addressed include:

1. Would the client like to be able to exercise more/less control over the solicitor client conference and the eventual outcome?
2. Would they like to think of their (ex) spouse exercising the same?
3. How is the progress of the case comparing with their expectations?
4. Do they understand the process (for example, have the solicitors letters been clear)?
5. Do they think that the dispute resolution process has affected their relationship with their (ex) spouse and their children?
6. Have the clients views on any prior agreements made with their spouse changed after consultation with the solicitor?
7. Have the clients been negotiating directly with their spouse either with or without the knowledge of their solicitor?
8. What are the clients views on the 'face to face' negotiation methods of mediation. Would clients have felt able to mediate in their own case?
9. Do clients perceive themselves to be victims/perpetrators of the martial breakdown, or was no party to blame?
10. How would clients describe the approach of their solicitor?

## APPENDIX FIVE

### Final Client Interview

1. What do you feel about it all?
2. Did you feel you were in full control of the process, or outcome, or do you feel that the solicitor was in charge? How do you feel about that?
3. Do you think your ex-spouse was able to exercise control over the process? How do you feel about that?
4. How did the progress of the case match up with your expectations?
5. Did the solicitor keep you fully informed throughout the process? Did you understand what was happening? Was your understanding of the law important in working out the final settlement?
6. Has the process affected your relationship with your ex-spouse or the relationship between yourselves and your children?
7. Did you negotiate directly with your ex-spouse, either with or without the knowledge of your solicitor?
8. Do you think that you and your ex-spouse could have resolved this dispute through mediation?
9. Do you perceive yourself to be a victim/guilty party in the marital breakdown, or was there no party to blame?
10. How would you describe the approach of the solicitor?
11. What are your feelings on the final resolution of your case. Do you consider it to be a fair outcome? Did having a solicitor help?
12. Is there anything about your experience you would change?

## APPENDIX SIX

### Solicitors' Final Interview

#### **Professional Development**

1. Any significant professional developments – since our preliminary interview on ----- (date)?
2. Any Mediation training undertaken?  
  
If so, (a) what was your motive for participating in the training?  
  
And,  
  
(b) How useful do you expect it to be?
3. What are your views on the Family Law Accreditation schemes?
4. What is your experience of clients mediating marital disputes – and the operation of S.29?
5. Any views on the delay of the implementation of part II of Family Law Act 1996?

#### **Research Findings.**

These are some of the findings which are emerging from the study; I would be interested to hear your views. As the final analysis of the findings has not been completed yet, we are talking about the preliminary findings.

6. In the interview, following client's first appointment with the solicitor, clients were asked, whether it was important to them that the solicitor was male/female. The majority of clients, both male and female expressed a preference for a female solicitor. Any comments?

7. Clients were also asked how important they considered it to be that the solicitor obtained the 'best deal possible,' the majority replied that it was not important – they wanted what was fair. Has there been a culture shift? How does this fit with your own experience?
8. In the same interview the majority of clients stated that it was important that the solicitor did not do anything which would further damage their relationship with their spouse. Any comments?
9. Many Clients reported having difficulty in taking in all the information given to them during their first meeting with the solicitor. Any comments?
10. Many clients did not appear to have given much thought, before seeing the solicitor, as to how issues might be resolved; instead they appeared to be operating at a more emotional level. Any comments?
11. There were a number of clients who after their initial appointment with the solicitor did not return. Why do you think this is?
12. Sometimes the motivations of clients in coming to see a solicitor regarding divorce, or the client's agenda, were quite complex and not always made explicit by the client. Any comments?
13. In the majority of cases that were observed in this study, the solicitor appeared to dominate the agenda in the solicitor/client meetings. Clients were rarely assertive. Any comments?
14. It was noted that clients who demonstrated feelings of guilt often did not want to pursue their full entitlements. How far do you believe you should go in order to persuade them to seek what you would consider to be a fair resolution?



15. It was noted that solicitors would attempt to 'guide' client's behaviour, or expectations, by referring to the court. For example, by saying, 'The court will look at,' 'It will look good to the court.' But only a few cases are adjudicated. Any comments?
16. Some clients reported in the interviews that they had a fear of court. Any comments?
17. Some differences between how middle class and working class clients approach the process were noted for example, middle class clients were more assertive than their working class peers in the discussions with the solicitor, and working class clients were more likely to include members of their wider families. Middle class clients seemed more reluctant to involve their families and appeared to have a more individualised/private approach to their family difficulties. Any comments?
18. It was observed that client's 'new partners' sometimes exerted quite an influence regarding decisions over which action to pursue. Any comments?
19. It was noted that solicitors would attempt to 'cool down' the clients by for example refusing to comment on the client's account of their spouse's behaviour. How important do you consider this type of action to be as part of your work?
20. Clients appeared, in some cases, to use their solicitor as someone to hide behind, using their solicitor as a type of shield, and observation revealed that some solicitors would collaborate with this. Similarly,

some clients appeared to be 'empowered' by their solicitor and were then able to negotiate directly with their spouse. Any comments?

21. Some examples were observed, in this study, of solicitors 'containing conflict.' For example, some clients said that, as solicitors were dealing with the negotiations regarding the house and finances, they (the ex-husband and wife) were able to leave this out of their personal communication, and were then able to talk about the day to day issues such as arrangements regarding the children. Any comments?

22. Spousal conflict did appear to rise as the ancillary relief process began. Any comments?

23. Do you think it is important to emphasise that you will provide partisan support? Is that what you feel most clients want?

24. Do you consider that it is part of solicitors' duty to explore reconciliation with clients?

25. Do you think that solicitors approach to resolving the disputes arising on divorce is different from other areas of law?

26. In some of the longer duration cases, the client's circumstances had changed significantly from that at the initial appointment; with the result that the outcome which had been sought originally was no longer appropriate. Any comments?

27. After the first meeting between yourself and the client, do you prefer to discuss any issues, which may arise, face to face with the client or do you believe that communication can be just as effective via other means, for example the phone or post?

28. There seems to be a quite distinct relationship between family law solicitors and their clients. Clients will tell the solicitors some very intimate details of the type most often only shared with close friends. Some clients indicated that they did not feel that this was a 'business' relationship and found the sudden ending disconcerting. Any comments?
29. Specific questions/comment relating to the practice of that solicitor.
30. Have you any other comments you would like to make?

9 July 1996

Dear

I am writing, to ask if you, as a solicitor experienced in family law, would consent to being involved in a research project which has arisen out of the proposals contained in the Family Law Act. I am concerned that mediation is being promoted as a 'better way' to solve ancillary relief disputes without an adequate knowledge of what the present system offers. I intend therefore to carry out some in-depth research into the current system. I have chosen to focus my research around those clients at the lower end of the income scale as such clients in the future will, as a result of the amendment to the Legal Aid Act (contained in the Family Law Act), be pressurised into mediation.

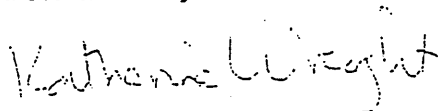
I would therefore like to carry out an in-depth study of the present system. . . . of . . . , has agreed to participate in the project and suggested that you might also be able to help. In order to obtain as complete a picture as possible, I should like to interview both the clients and the solicitors, and sit in on the solicitor client conferences. I would be as unobtrusive as possible. Strict confidentiality would be ensured, all names would be changed, and any notes from interviews etc. would be immediately destroyed after being transcribed. The thesis will be available for inspection throughout.

The research will form the basis of a PhD thesis and I should hope to be able to publish some of the findings in a journal such as 'Family Law.' The research will be supervised throughout by Mary Hayes Professor of family law in the University of Sheffield, and Alan Sanders, principle lecturer in Social Work at Sheffield Hallam University.

I would be very grateful if you felt able help me in this matter, I believe that it is very important that such a radical change to the divorce process is adequately researched. I enclose for your inspection a separate sheet listing the questions around which my research would focus. I will contact you during next week to see whether you feel able to assist.

Thank you very much for your time in reading this letter,

Your sincerely



Katherine Wright

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Questions which the research will address

1. What do clients coming in to the process expect from their solicitor?
- 2.(a) How many clients have already come to some preliminary agreement with their spouse over financial/property/child issues?  
(b) How realistic/appropriate have Solicitors found such agreements to be?\*
3. What is the inherent level of conflict at? Does this effect the negotiation of any settlement, and how do Solicitors manage such clients?\*\*\*
4. How often do Solicitors have to 'cool out' their clients (dampen their expectations) as opposed to 'fire them up' (encourage a more assertive attitude). and,  
(a) Is the above related to gender in any way?  
(b) Do solicitors feel that some clients are too willing to forgo entitlements because (i) a belief that it will be better for the children, or (ii) to ensure a better post divorce relationship with their spouse?
5. Given the goals and ideology surrounding mediation, how adequately could mediation be perceived to meet the needs of the working class clients in the research sample?\*\*\*

\*(research carried out in Holland found that couples often arrived at their solicitors with totally unrealistic 'agreements.' My concern is that if such is the case in the UK, the reforms could lead to more of such agreements being ratified.

\*\* Research has indicated that conflict presents a problem to effective negotiation in up to 85% of cases.

\*\*\* I have chosen to focus on working class clients because (a) the Legal Aid reforms will mean that this group of the population will be more likely to have to mediate their disputes in the future, (b) research suggests that disputes can be more difficult as resources are scarce (c) research into mediation has focused entirely on middle class clients.

## STATEMENT OF ETHICAL PRACTICE

Fingle Bridge, Drewsteignton  
1st April 1993

### ACKNOWLEDGEMENTS

The Socio-Legal Studies Association gratefully acknowledges the use made of ethical codes produced by the British and American Sociological Associations, the British Psychological Society, the Association of Social Anthropologists of the Commonwealth, the Social Research Association and the Manual for Research Ethics Committees prepared by the Centre of Medical Law and Ethics at King's College, London. The statement below has been drawn up by the SLSA Ethics Sub Committee on behalf of the Association. It is primarily concerned with the external context of contemporary socio-legal research and does not consider directly the more private responsibilities of the socio-legal scholar including, for example, professional responsibilities and relations with students and colleagues, and the role of equal opportunities and review processes in academic careers.

*Kim Economides,*  
Convenor, SLSA Ethics Sub-Committee,  
February, 1993

## 1. INTRODUCTION

### 1.1 Ethical Issues.

Socio-legal studies embraces disciplines and subjects concerned with the social effects of law, legal processes, institutions and services. Styles of socio-legal research are diverse, covering a range of theoretical investigations and a wide variety of empirical research methods. Socio-legal researchers, in carrying out their research, inevitably face ethical dilemmas which arise out of competing obligations and conflicts of interest. The following statement aims to alert members of the Association, and sponsors of socio-legal research, to issues that raise ethical concerns and to indicate potential problems and conflicts of interest that might arise in the course of professional activities.

### 1.2 Ethical Principles.

While they are not exhaustive, the statement points to a set of ethical principles which should guide members' conduct. The purpose is to make members aware of the ethical issues that may arise in their work, and to encourage them to educate themselves and their colleagues to behave ethically. The statement does not, therefore, provide a set of recipes for resolving ethical choices or dilemmas, but recognises that often it will be necessary to make such choices on the basis of principles and values, and the interests of those involved.

Departures from these principles should be the result of deliberation and not ignorance. The effectiveness of this statement rests ultimately on active discussion, reflection, and continued use by socio-legal researchers. Members should encourage colleagues to adopt these principles and ensure that they are understood by all researchers under their supervision. In addition, the statement will help to communicate the professional position of socio-legal researchers to others, especially those involved in or affected by socio-legal research.

## 2. OBLIGATIONS TO THE DISCIPLINE

### 2.1 The Integrity of the Discipline

Members should strive to maintain the integrity of socio-legal studies as a subdiscipline, and to publish and disseminate the results of socio-legal research. Members have a responsibility to report their findings accurately and truthfully and to keep themselves informed about the development of socio-legal research and scholarship.

### 2.2 Professional Competence.

While recognising that training and skill is necessary to the conduct of socio-legal research, members should themselves recognise the boundaries

of their professional competence. They should not accept work of a kind that they are not qualified to carry out. Members should be careful to claim an expertise in areas outside those that would be recognised academically as their true fields of expertise. Particularly in their relations with the media, members should have regard for the reputation of so-called legal studies and refrain from offering expert commentaries on matters which as researchers they would regard as comprising inadequate and tendentious evidence. Members should satisfy themselves that the research they undertake is worthwhile and that the techniques proposed are appropriate. They should be clear about the limits of their detachment from and involvement in their areas of study.

### 2.3 Obligations to Colleagues.

Members should always acknowledge the contributions of colleagues in their research work. The names of everyone who has made a substantial contribution to a piece of research should appear in publications that arise out of that research and, conversely, the names of those who do not make a substantial contribution should not appear in subsequent publications. Members should also take care to acknowledge the source of material which has been referred to during the research process. During the research members should avoid, where they can, actions which may have deleterious consequences for socio-legal and other researchers who come after them or which might undermine the reputation of socio-legal studies as an academic sub-discipline. A socio-legal researcher who believes that another colleague or investigator may be conducting research that is in accordance with the principles above should encourage that investigator to re-evaluate their research.

## 3. OBLIGATIONS TO RESEARCH PARTICIPANTS

Socio-legal researchers in the course of their activities enter into personal and moral relationships with those they study, be they individuals, households, social groups or corporate entities. While socio-legal researchers are committed to the advancement of knowledge, that goal does not, of itself, provide an entitlement to override the rights of others. Members must satisfy themselves that a study is necessary for the furtherance of knowledge before embarking upon it.

In some political, social and cultural contexts some sources of funding and sponsorship may be contentious. Candour and frankness about the source of funding may create problems of access or co-operation for the socio-legal researcher but concealment may have serious consequences for colleagues, the sub-discipline and research participants. The emphasis should be on maximum openness.

### 3.1 Consequences of Research.

It is incumbent upon members to be aware of the possible consequences of their work. Socio-legal researchers have a responsibility to ensure that the physical, social and psychological well-being of research participants is not adversely affected by their research. Members are not absolved from this responsibility by the consent given by research participants.

Members should strive to protect the rights of those they study, their interests, sensitivities and privacy, while recognising the difficulty of balancing potentially conflicting interests. Because socio-legal researchers study the relatively powerless as well as those more powerful than themselves, research relationships are frequently characterised by disparities of power and status. Despite this, whenever possible, research relationships should be characterised by trust. In some cases, where the public interest dictates otherwise and particularly where power is being abused, obligations of trust and protection may weigh less heavily. Nevertheless, these obligations should not be discarded lightly.

Members should be aware that they have some responsibility for the use to which their research may be put. Discharging that responsibility may on occasion be difficult, especially in situations of social conflict, competing social interests or where there is unanticipated misuse of the research by third parties.

### 3.2 Consent.

As far as possible socio-legal research should be based on the freely given informed consent of those studied. This implies a responsibility on the socio-legal researcher to explain as fully as possible, and in terms meaningful to participants, what the research is about, who is undertaking and financing it, why it is being undertaken, and how it is to be disseminated. Research participants should be aware of their right to refuse participation whenever and for whatever reason they wish. They should also not be under the impression that they are required to participate.

It should also be borne in mind that in longitudinal research consent may need to be obtained on more than one occasion. It may be necessary to regard consent as not as a once-and-for-all prior event, but as a process, subject to renegotiation over time.

In some situations access to a research setting is gained via a 'gatekeeper'. In these situations members should adhere to the principle of obtaining informed consent directly from research participants to whom access is required, while at the same time taking account of the gatekeepers' interest. Where sponsors/funders also act directly or indirectly as gatekeepers and control access to participants socio-legal researchers should not devolve their responsibility to protect the participants' interests onto the gatekeeper. Since the relationship between research participants and the gatekeeper will continue long after the socio-legal researcher has

left the research setting, care should be taken not to inadvertently disturb that relationship unduly.

### 3.3 Confidentiality.

The anonymity and privacy of those who participate in the research process should be respected. Personal information concerning research participants should be kept confidential. In some cases it may be necessary to decide whether it is proper or even appropriate to record certain kinds of sensitive information.

Where possible, threats to the confidentiality and anonymity of research data should be anticipated by socio-legal researchers. The identities and research records of those participating in research should be kept confidential whether or not an explicit pledge of confidentiality has been given. Appropriate measures should be taken to store research data in a secure manner. Members should have regard to their obligations under the Data Protection Act. Appropriate and practicable methods for preserving the privacy of data should be used. These may include the removal of identifiers, the use of pseudonyms and other technical means for breaking the link between data and identifiable individuals such as "broadbanding" or "micro-aggregation". Members should also take care to prevent data being published or released in a form which would permit the actual or potential identification of research participants. Potential informants and research participants, especially those possessing a combination of attributes which make them readily identifiable, may need to be reminded that it can be difficult to disguise their identity without introducing an unacceptably large measure of distortion into the data.

Guarantees of confidentiality and anonymity given to research participants must be honoured, unless there are clear and overriding reasons to do otherwise. Other people, such as colleagues, research staff or other employees, given access to the data must also be made aware of their obligations in this respect. By the same token, socio-legal researchers should respect the efforts taken by other researchers to maintain anonymity. Where there is a likelihood that data may be shared with other researchers, the potential uses to which the data might be put may need to be discussed with research participants. Research data given in confidence do not enjoy legal privilege, that is they may be liable to subpoena by a court. Research participants may also therefore need to be made aware that it may not be possible to avoid legal threats to the privacy of the data.

There may be less compelling grounds for extending guarantees of privacy or confidentiality to public organisations, collectivities, governments, officials or agencies than to individuals or small groups. Nevertheless, where guarantees have been given they should be honoured, unless there are clear and compelling reasons not to do so.



When filming or recording for research purposes, socio-legal researchers should make clear to research participants the purpose of the filming or recording, and, as precisely as possible, to whom it will be communicated. Participants should be able to reject the use of data-gathering devices such as tape-recorders and video cameras. Socio-legal researchers should be careful, on the one hand, not to give unrealistic guarantees of confidentiality and, on the other, not to permit communication of research films or records to audiences other than those to which research participants have agreed.

#### 3.4 Privacy.

Socio-legal research may at times intrude into the lives of those studied. While some participants may find this experience positive and welcome, for others the experience may be disturbing. Members should consider carefully the possibility that the research experience may be a disturbing one and, normally should attempt to minimise disturbance to those participating in the research. It should be borne in mind that decisions made on the basis of research may have effects on individuals as members of a group, even if individual research participants are protected by confidentiality and anonymity.

Special care should be taken where research participants are particularly vulnerable by virtue of factors such as age, social status and powerlessness. Where research participants are ill or too young or too old to participate, proxies may need to be used in order to gather data. In these situations care should be taken not to intrude on the personal space of the person to whom the data ultimately refers, or to disturb the relationship between this person and the proxy. Where it can be inferred that the person about whom data are sought would object to supplying certain kinds of information, the material should not be sought from the proxy.

#### 3.5 Covert Research.

There are serious ethical dangers in the use of covert research but covert methods may avoid certain problems. For instance, difficulties arise when research participants change their behaviour because they know they are being studied ('Hawthorne effect'). Researchers may also face problems when access to spheres of social life is closed by powerful or secretive interests. However, covert methods violate the principles of informed consent and may invade the privacy of those studied. Participant or non-participant observation in non-public spaces or experimental manipulation of research participants without their knowledge should be resorted to only where it is impossible to use other methods to obtain essential data. In such studies it is important to safeguard the anonymity of research participants. Ideally, where informed consent has not been obtained prior to the research it should be obtained post hoc.

#### 4. OBLIGATIONS TO SPONSORS/FUNDERS

##### 4.1 Research and Consultancy.

There is a distinction, which in practice is often blurred, between research and consultancy. Research is the disinterested collection of information for the advancement of knowledge which will normally be published without constraint. A common interest exists between sponsor/funder and socio-legal researcher where the aim of the research is to advance knowledge. Conflicts of interest may arise where the aim is to provide knowledge which will be of particular benefit and practical use to the sponsor/funder as is often the case when a member is employed as a consultant. A consultant is commissioned to produce information to the specifications of a client and therefore may be constrained to reach particular conclusions or prescribe particular courses of action. The client will also have some control over the publication of the results. The higher rates of pay for consultancy work reflect this distinction.

This statement of good ethical practice refers predominantly to research rather than consultancy. Members should attempt to ensure that sponsors/funders appreciate the obligations that socio-legal researchers have not only to them, but also to society at large, research participants and professional colleagues in the socio-legal and wider academic community.

##### 4.2 Research Proposals.

In the preparation of proposals for research, members should be honest and candid about their qualifications and expertise, the advantages, disadvantages and limitations of the various methods of data collection and analysis proposed, and acknowledge the necessity for discretion with confidential information obtained from sponsors. They should also try not to conceal factors which are likely to affect satisfactory conditions or the completion of a proposed research project. Socio-legal research projects should not be undertaken on the basis of either time or resources known from the start to be inadequate.

##### 4.3 Competitive Tendering.

Members should encourage sponsors/funders using a system of competitive tendering to provide a detailed specification for the research, listing the criteria on which applications will be judged (e.g. type of methodology, experience in the area etc.) and a 'guide price' as to the maximum funding available. Where socio-legal researchers are shortlisted and invited to submit detailed applications the sponsor/funder should offer reasonable remuneration and a detailed evaluation of each proposal, particularly if use is made of unsuccessful tenders and such use should not be made without the express consent of the applicant. Members should resist the

twin temptations to under-price and over-commit themselves in an attempt to secure a contract.

#### 4.4 Research Contracts.

Members should clarify in advance the respective obligations of funders and socio-legal researchers where possible in the form of a written contract. Members should clarify with sponsors the methods of data collection and analysis to be used. They should refer the sponsor/funder to the relevant parts of the professional code to which they adhere and encourage them to recognise the professional independence of the socio-legal researcher in the contract. Members should also be careful not to promise or imply acceptance of conditions which are contrary to their professional ethics or competing commitments. For example, members should not accept contractual conditions that are contingent upon a particular outcome or set of findings from a proposed inquiry. A conflict of obligations may also occur if the funder requires particular methods to be used.

Where some or all of those involved in the research are also acting as sponsors/funders of socio-legal research the potential for conflict between the different roles and interests should also be made clear to them. Members should also recognise their own general or specific obligations to the sponsors whether contractually defined or only the subject of informal and unwritten agreements.

Members should try to clarify, before signing the contract, that they are entitled to be able to disclose the source of their funds, the personnel and aims of the institution, and the purposes of the project. Members should normally avoid restrictions on their freedom to disseminate research findings. Researchers expect to be able to publish on the basis of their research and permission to publish should not normally be withheld by sponsors/funders. Members should, where appropriate, publish a disclaimer making it clear that the views expressed are those of the researchers and not the funders/sponsors.

Members are frequently furnished with information by the funder who may legitimately require it to be kept confidential. Methods and procedures that have been utilised to produce published data should not, however, be kept confidential.

When negotiating sponsorships members should be aware of the requirements of the law with respect to the ownership of and rights of access to data.

#### 4.5 Research Process.

Members have a responsibility to notify the sponsor/funder of any proposed departure from the terms of reference or proposed change in the nature of the contracted research.

#### 4.6 Research Outcomes.

When financial support or sponsorship has been accepted, members must make every reasonable effort to complete the proposed research on schedule including reports to the funding source. By the same token, sponsors/funders should allow reasonable time for the completion of projects by the socio-legal researcher. Members should be prepared to take comments from sponsors/funders or research participants. The dissemination of findings should proceed without any unreasonable delay by members or sponsors/funders.

# **Appendix Nine**

## **Solicitors Family Law Association**

### **Code of Practice**

#### **General**

- 1.** At an early stage, you should explain to your client the approach you adopt in family law work.
- 2.** You should encourage your client to see the advantages to the family of a constructive and non-confrontational approach as a way of resolving differences. You should advise, negotiate and conduct matters so as to help the family members settle their differences as quickly as possible and reach agreement, while allowing them time to reflect, consider and come to terms with their new situation.
- 3.** You should make sure that your client understands that the best interests of the child should be put first. You should explain that where a child is involved, your client's attitude to the other family members will affect the family as a whole and the child's relationship with his or her parents.
- 4.** You should encourage the attitude that a family dispute is not a contest in which there is a winner and a loser, but rather that it is a search for fair solutions. You should avoid using words or phrases that suggest or cause a dispute when there is no serious dispute
- 5.** Emotions are often intense in family disputes. You should avoid inflaming them in any way.
- 6.** You should take great care when considering the effect your correspondence could have on other family members and your own client. Your letters should be clearly understandable and free of jargon. Remember that clients may see assertive letters between solicitors as aggressive declarations of war. Your correspondence should aim to resolve issues and to settle the matter, not to further inflame emotions or to antagonise. You should not express your personal opinions on the behaviour of your client's husband, wife or partner.
- 7.** You should stress the need for your client to be open and honest in all aspects of the case. You must explain what could happen if your client is not open and honest.

#### **Relationship with a client**

- 8.** You should make sure that you are objective and do not allow your own emotions or personal opinions to influence your advice.
- 9.** You must give advice and explain all options to your client. The client must understand the consequences of any decisions that have to make. The decision is to be made by your client, you cannot decide for your client.
- 10.** You must make your client aware of the legal costs at all stages. The

benefits and merits of any step must be balanced against the costs.

**11.** You should make sure that your client knows about other available services (such as mediation and counselling) which may bring about a settlement, help your client and other family members, or both. You should explore, with your client, the possibility of reconciliation and, where appropriate, give every encouragement.

### **Dealing with other solicitors**

**12.** In all dealings with other solicitors, you should show courtesy and try to maintain a good working relationship.

**13.** You should try to avoid criticising the other solicitors involved in a case.

### **Dealing with a person who does not have a solicitor**

**14.** When you are dealing with someone who is not represented by a solicitor, you should take even greater care to communicate clearly and try to avoid any technical language or jargon, which is not easily understood.

**15.** You should strongly recommend an unrepresented person to consult an SFLA solicitor in the interests of the family.

### **Court proceedings**

**16.** When taking any step in the proceedings, the long-term effect on your client and other family members must be balanced with the likely short-term benefit to the case.

**17.** If the purpose of taking a particular step in proceedings may be misunderstood or appear hostile, you should consider explaining it, as soon as possible, to the others involved in the case.

**18.** Before filing a petition, you and your client should consider whether the other party or his or her solicitor should be contacted in advance about the petition, the "facts" on which the petition is to be based and the particulars, with a view to coming to an agreement and minimising misunderstandings.

**19.** When you or your client receive a Petition or Statement of Arrangements for approval, unless there are exceptional circumstances, you should advise your client not to start their own proceedings without giving the other party at least 7 days' notice, in writing, of the intention to do so.

**20.** You should discourage your client from naming a co-respondent unless there are very good reasons to do so.

### **Children**

**21.** You should encourage both your client and other family members to put the child's welfare first.

**22.** You should encourage parents to co-operate when making decisions concerning the child, and advise parents that it is often better to make

arrangements for the child between themselves, through their solicitors or through a mediator rather than through a court hearing.

**23.** In any letters you write, you should keep disputes about arrangements for the child separate from disputes about money. They should usually be referred to in separate letters.

**24.** You must remember that the interests of the child may not reflect those of either parent. In exceptional cases it may be appropriate for the child to be represented separately by the Official Solicitor, a panel guardian (in specified proceedings) or, in the case of a 'mature' child, by another solicitor.

#### **When the client is a child**

**25.** You should only accept instructions from a child if you have the necessary training and expertise in this field.

**26.** You must continually assess the child's ability to give instructions.

**27.** You should make sure that the child has enough information to make informed decisions. The solicitor should advise and give information in a clear and understandable way and be aware that certain information may be harmful to the child.

**28.** You should not show favour towards either parent, the local authority or any other person involved in the court proceedings.

**29.** Detailed guidelines for solicitors acting for children have been drawn up by the SFLA. Please contact SFLA for a copy. [info@sfla.org.uk](mailto:info@sfla.org.uk)