

Experiences of Family Law Attorneys With Current Issues in Divorce Practice*

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A survey was administered at a state bar convention to 72 family law attorneys who reported on their experiences in representing a total of 3,860 clients. Results showed that lawyers believed that (a) most losers in relocation cases do not or would not ultimately move; (b) the Family Court Masters system seems to be helpful to families; (c) lawyers' actions often raise the emotional level of the dispute; and (d) the divorce and custody system is biased against fathers.

There is a strong impetus in the United States to view family relationships as an entirely private matter, something the family members work out largely by themselves without outside intervention unless they seek it. On the other hand, many aspects of family relations are governed by legal restrictions, policies, and procedures.

Because the state is seen to have a valid interest in certain family matters, in many respects it restricts how family members may act toward one another. Such restrictions are especially obvious in the instance of family dissolution and divorce. Because divorce (like marriage) is a legal and familial event, it must be sanctioned by the law and the courts to be valid. For the most part, and based on the U.S. Constitution and interpretations thereof by courts, laws concerning families apply at the state level, as opposed to lower levels of jurisdiction, such as the county, or the higher federal level.

Nonetheless, the federal government has immense influence on state-level family policy because of enormous financial incentives. For example, the child support policy in each state is greatly affected by the opportunity of the state to receive Federal Child Support Enforcement funding, but only if it hones its laws to complement federal "guidelines." As a result, virtually all states have similar child support policies, such as the use of "presumptive guidelines." Moreover, laws concerning families are virtually always adjudicated and enforced at the county level via county superior courts. Therefore the practices and procedures are likely to be in effect countywide. Despite these qualifications, the major difference in law occurs at the statewide level, and there are substantial variations across states in their laws concerning the matters addressed by the survey administered in this study.

Thus, many state statutes, policies, and procedures constrain the actions of the two divorcing parties. States' constraints are maximal when there are contested matters that the parties have not been able to resolve themselves, and they submit these issues and themselves to the court to decide or adjudicate. However, it is surprising to many that the incidence of this happening actually is small. Braver and O'Connell (1998) report that only 5% of the more than 300 cases they examined required judicial ren-

dering of decisions, whereas Maccoby and Mnookin (1992) reported a figure of 1.5% based on 1,100 cases.

It might appear that the law's constraint would not be substantial in the remaining cases, in which the two parties agree on all of the various matters they must settle when the decision is made to legally terminate their marriage. In the case of such full agreement between the parties on these matters, "private ordering" (Mnookin, 1985) dictates the settlement of their affairs, and they merely bring their paperwork to a judge who (generally with no questions asked) typically "rubber stamps" their decisions, making them legally binding. (In the case of these "agreed-upon" settlements, it may not be a judge, but a commissioner, hearing officer, or even a clerk who stamps their agreements with the seal of the court.) However, even in settled cases, the backdrop of the court and the formal setting has considerable influence on the family. What Erlanger, Chambliss, and Melli (1987) term the *informal processes* of bargaining and negotiation occur "in the shadow of the law" (Mnookin & Kornhauser, 1979.) In other words, how divorcing individuals believe the authorities will decide if the parties fail to come to agreement is likely to exert large influence on their choices. Simply knowing professionals' views of what is best for them can result in normative pressures to the bargaining session (Braver, Hipke, Ellman, & Sandler, in press). Unfortunately, little is known about these informal processes or the contexts that affect the family upon dissolution.

In this article, we examine a data source that has been surprisingly overlooked in efforts to understand the influences of family law—the perspectives of family law attorneys. There are several benefits to exploring their experiences. First, divorce attorneys are privy to many or most of the negotiation processes and can make informed judgments about how the family members were influenced and how they behaved and felt. They can comment with authority on the process and know details of the cases that may never reach the formal filings or arguments. Second, much of the informal process is influenced strongly by the attorney. What the lawyer tells his or her client about the chances to prevail, regardless of whether or not the forecasts are accurate, can constrain the bargaining of the client (Pruett & Jackson, 1999; Sarat & Felstiner, 1995).

Another advantage of querying attorneys is methodological: It is possible to "leverage the N." By asking 20 or so attorneys to report on their cases, data may be obtained about thousands of families. Still another methodological advantage involves overcoming social desirability biases. Former spouses are likely to report in exaggerated ways on their own and their former spouses' actions (Braver, Fitzpatrick, & Bay, 1991; Braver & O'Connell, 1998; Braver, Wolchik, Sandler, Fogas, & Zvetina, 1991; Braver et al., 1993; Pasley & Braver, in press). Although lawyers represent only one of the former spouses, they are less

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prone than the principals themselves to have distorted views of the parties.

Although several studies in the literature have surveyed attorneys, most suffer from the problem of self-selection bias (Braver & Bay, 1992). In all surveys, those who respond typically differ from those who fail to respond in ways that are related to the issues under study. When the response rate is low, as it has been in most previous attorney surveys (ranging from 20–50%; Draughn, Waddell, & Selleck, 1988; Felner et al., 1985; Lee, Beauregard, & Hunsley, 1998; Smart & Salts, 1984), the chance that the survey results inaccurately reflect the population is maximal (Braver & Bay). For example, in Smart and Salts's study of attorney attitudes toward divorce mediation, only 29% returned the survey. It is highly likely that those who participated had different attitudes toward divorce mediation than those who declined to do so.

The problem of low response rate was countered to a large extent in the current study, because the authors had been invited by the family law section of the state bar conference to give a presentation on the latest social science research applicable to the practice of family law, which was to begin with the administration of the survey. Thus, the respondents were more or less a "captive audience;" they were free to decide whether to participate, but they were provided a context that maximized their inclination to do so.

The survey reported here, although taking place in a single state, was designed to assess attorney experiences with respect to a number of issues that are currently controversial or in contention in family law more generally. Issues were selected for the survey if (a) there was a need for more empirical evidence to inform the issue; (b) the issue was simultaneously of interest to family law professionals and family research scholars; and (c) there was reason to think family law attorneys could provide useful information. These issues were: relocation; Family Court Advisors, Masters, and Coordinators; behavior of lawyers in the process of representation; and gender bias in custody proceedings and in the divorce "system" in general. In the next sections, each of these issues is briefly addressed and a rationale provided for its inclusion in the survey.

Relocation

Should a parent with primary custody be permitted to move with the children to a different locale, removing them from frequent contact with the other parent afforded by close proximity? This is one of the most contentious issues in family law, with different states and courts taking a variety of stances (Bruch & Bowermaster, 1996; Puente, 1996). Some disallow relocation if the nonmoving parent objects; however, most states allow it unless it is shown not to be in "good faith" and as long as satisfactory arrangements can be made to somehow maintain the relationship between the child and the nonmoving parent.

The Supreme Court of New Jersey is the most recent to lay down this standard, in April 2001 (*Baures v. Lewis*, 2001; Booth, 2004), following California's lead with the *Burgess* decision (*Marriage of Burgess*, 1996; Shear, 1996). Citing social science research that "uniformly confirmed the simple principle that, in general, what is good for the custodial parent is good for the child" (*Marriage of Burgess*, p. 222), the court ruled that the child's best interest was best served by such a standard. As inferred from the written ruling, the social science research referred to was primarily that summarized in the amicus curiae brief by family researcher Judith Wallerstein (Wallerstein & Tan-

ke, 1996), which was influential in the California *Burgess* case. However, Warshak (1999a, 1999b, 2000) has attacked that brief, arguing that it completely miscasts the published literature by ignoring the bulk of evidence to the contrary and suggesting that it fails to properly characterize the findings of Wallerstein.

In their case law or statutes, almost all states, like New Jersey, ultimately give priority to the "child's best interests" as a basis for decision making regarding relocations, just as for other custody, visitation, and access issues. Yet, when the custodial parent wishes to move, it is clear that an analysis of what is ultimately in the child's best interests rests importantly on the question of what the relocating parent will do if permission to move the child is denied (Braver, Ellman, & Fabricius, in press).

Two primary possibilities exist: The custodial parent will move anyway without the child, so physical custody switches to the nonprimary parent, or the custodial parent will choose not to move if the child cannot move, too. In the former case, a number of changes will befall the child that the judge attempts to weigh: the child will remain in the familiar general environment (which is likely a benefit); the child will retain the relationship with the nonprimary parent (which is generally regarded as a benefit, though the research is not unequivocal; Amato & Keith, 1991; Guidubaldi, Cleminshaw, Perry, & McLoughlin, 1983; Hetherington, Cox, & Cox, 1982; Healy, Malley, & Stewart, 1990); the child will lose the day-to-day contact with the primary parent (likely a negative); and physical custody will be switched from the parent somehow previously deemed to be more appropriate for primary physical custody (likely a negative). Differences of opinion about how to weigh these pluses and minuses are what make these decisions controversial.

On the other hand, if the custodial parent chooses not to move if permission to take the child is denied, the pluses and minuses to the child are easier to weigh. That is, the status quo remains in force, albeit with perhaps a dissatisfied and possibly more impaired or poorer custodial parent. In such a scenario, the child's interests would be harmed if—and only if—that dissatisfaction or impairment "trickled down" to the child. For example, this might be the case when there is a high level of conflict between the parents, or when the move would greatly expand the moving parent's economic prospects. In any case, much hinges on what the petitioning parent will do if he or she loses. This is an empirical question about which no data currently exist. In this study, attorneys were asked to provide the number of relocation cases that they won and lost, and what the custodial parent did (or would have done) when (if) they lost.

Family Court Advisors, Masters, and Coordinators

The field of family law has seen increasing use of diversion-type programs, where nonjudicial personnel intervene with disputants. For example, parent information programs, where parents are mandated to attend to learn of the impact of divorce and their actions on children (Blaisure & Geasler, 1996; Braver, Salem, Pearson, & DeLuse, 1996; Geasler & Blaisure, 1998, 1999); mandatory mediation programs, where disputants are forced to resolve disputes through mediation (Kelly & Duryee, 1992); and custody evaluations conducted by trained mental health professionals (Ackerman, 1995; Gould & Stahl, 2000; Stahl, 1994) are growing in number and influence as alternatives to formal court proceedings (Braver et al., in press; Geasler & Blaisure, 1999). These developments relate to an aspect of divorce that family researchers have studied closely: the role of conflict between the parents after the divorce (e.g., Cookston, Griffin, Braver, & Wil-

liams, 2002; Emery, 1982; Grych & Fincham, 1990). Because this research has almost uniformly found such conflict pervasive and destructive to all family members, albeit somewhat diminishing over time (Ahrns & Rogers, 1987; Hetherington et al., 1982; Maccoby & Mnookin, 1992), procedural means have been sought to ameliorate the effect of court fights in exacerbating hostility.

The latest in this string of innovations is the use of court-appointed third parties to resolve ongoing postdivorce disputes about visitation. First introduced in California as "Special Masters" (Johnston, 1994), this system allows virtually immediate access by both parties to a trained nonjudicial (typically, a mental health professional) decision maker assigned to their case, whose job it is to mediate or make recommendations to the parties, and ultimately to the court, concerning parenting disputes in the post-decree period. Designed to be far less costly, formal, and cumbersome than bringing the matter before a judge, as well as bringing to bear the wisdom of a professional with appropriate expertise and therapeutic skill, this system has spread to a number of other jurisdictions where it has different titles (e.g., Family Court Advisor or Family Court Master in Arizona, Parenting Coordinator in Colorado).

Despite its promise, the system has been criticized because of questions about whether judges can simply cede some decision-making authority to a nonjudicial entity. Also, there are concerns that with the informal procedures, due process safeguards are not in place as they would be in a courtroom, injuring the rights of the disputants. A more obvious concern is that, to date, there has been no evaluation of the system in any jurisdiction. If the system works as it was designed to do, the level of hostilities between the parents would be lowered because of the informal nature of the dispute resolution. In turn, this would provide a benefit to all family members.

Does the system work as intended? Although a full answer to this question would require a careful program evaluation with an experimental or quasi-experimental design, an approximate answer to the usefulness of this system in decreasing hostilities can be obtained by asking the questions of the attorneys whose clients are participants in this system. After all, previous research has demonstrated that the perceptions of divorce lawyers, both pro and con, are communicated to their clients through the actions and statements of the lawyers interacting with their clients (Mather, McEwen, & Maiman, 2001; Pruett & Jackson, 1999; Sarat & Felstiner, 1995). If divorce lawyers do not perceive that the Family Master program is working, they likely communicate their dissatisfaction to the parents they serve.

Behavior of Lawyers

In all fields of law, diligent pursuit of their clients' interests might well call for lawyers to unleash aggressive tactics, tactics designed to gain advantage over the other side. However, in family law cases with minor children, unlike almost all other fields of law, the disputants must continue to have relationships, preferably civil ones, for a long time after the attorney concludes his or her work. This tension between the instincts of the attorney to try to "win the case" and the longer-term interests of the family to achieve some harmony has been noted by several researchers. For example, Sarat and Felstiner (1995) found that lawyers felt that strict deference to the client's wishes would compromise their ability to win the best possible outcomes (cf. Mather et al., 2001). Perhaps as a result, Pruett and Jackson (1999) found that parents judged the actions of the lawyers as

exacerbating the problems associated with negotiating a divorce situation (though the attorneys attributed any problems to the parent on the other side.)

Many scholars have argued that the adversarial nature of attorney representation raises the level of conflict between the parents both during and after the formal divorce (Braver & O'Connell, 1998; Emery, 1994, 1999; Folberg & Milne, 1988; Margulies, 2001; Pruett & Jackson, 1999). As noted in the previous section, this is problematic because conflict exacerbates the psychological and other problems of all members in divorcing families. In an effort to decrease adversarialness, codes of conduct formulate a model of attorney behavior for family lawyers that is modulated somewhat from that of attorneys in other fields. For example, the American Academy of Matrimonial Lawyers (2000) specifies that attorneys shall "attempt to resolve matrimonial disputes by agreement and should consider alternative means of resolution . . . including negotiation, mediation, [and] arbitration (Principles 1.4 & 1.5)"; "should refuse to assist in vindictive conduct" (Principle 1.3) toward the other side; and "should strive to lower the emotional level" of the dispute (Principle 1.3).

Is such modulated behavior possible? Can attorneys, trained and socialized since law school to zealously advocate for their clients' interests when practicing family law, adopt methods of representation that are more collaborative? Five statements were included in the survey in reference to the opposing counsel and self to assess this question.

Gender Bias

Are custody proceedings or the entire divorce system gender biased? Many scholars have discussed this issue (e.g., Fineman, 1991; Mahoney, 1996; Mason, 1988; Weitzman, 1985). According to the National Center for State Courts, 45 states have recently established gender bias task forces (<http://www.ncsc.dni.us/is/clrhouse/Gbstat99.htm>).

Most scholars have made the case that the system is biased against women, largely on the basis of women's alleged inadequate financial status after divorce or their lack of capacity to afford competent representation. Just as vociferously, others (Pruett & Jackson, 1999) purport that men are the victims of gender bias, largely on the basis of alleged unfairness in custody and visitation decisions, and research has demonstrated that fathers tend to feel that the system is slanted toward mothers. Also, it has been argued by some that women are disadvantaged in custody decisions (Chesler, 1986; Polikoff, 1982; Schafran, 1994), despite the fact that demographic and census data have shown that 86% of children live primarily with their mothers after divorce (Meyer & Garasky, 1993; National Center for Health Statistics, 1991; Nord & Zill, 1997), which is down only slightly since 1950.

The disagreement remains because the two sides interpret the data in different ways. The biased-against-fathers advocates assume that the figure itself indicates bias, because, if the system were gender blind, custody would be 50-50. The biased-against-mothers proponents instead point to the figures that show that in only 5% or less of cases does a judge decide custody (Braver & O'Connell, 1998; Maccoby & Mnookin, 1992); this implies that "most of the mothers who have custody attained it with the father's consent, presumably because the father understood and agreed that the best interest of the children was served by such an arrangement" (Tippins, 2001). In fact, among those few adjudicated cases, women and men win about equally (Maccoby

& Mnookin, 1992; Pearson & Ring, 1982–1983), seemingly disproving the argument that courts are too mother friendly. However, Warshak (1996) counterargued that selection bias clouds that interpretation: “If the perception exists of an uneven playing field favoring mothers, fathers with weaker cases are apt to drop their bid for custody early in the legal process” (p. 401). He claimed that if among the extremely highly selected and supposedly ironclad cases that make it to trial, fathers still lose half the time, that loss may be regarded as evidence of prejudice against fathers.

To be persuasive, the latter argument requires evidence, hitherto nonexistent, that such selection truly takes place, probably as a result of counseling by the attorneys. Thus, it is important to family research to know whether lawyers’ advice or perspectives contribute to gender bias. To evaluate this, we constructed a hypothetical scenario and asked the attorney-respondents to report what they would tell the client about “the chances to prevail” and the “likely legal and other fees.” Unbeknownst to the respondents, half of the attorneys were randomly told to imagine that they represented the father, and half were told to imagine that they represented the mother. The scenario was carefully constructed to convey that the mother and father were virtually identically involved in child care prior to the divorce, to avoid primary caretaker issues (Chambers, 1984; Crippen, 1990; Neely, 1984; Scott, 1992) from overwhelming gender as a basis for responses. In addition, similar to Braver and O’Connell (1998), a question was asked regarding what the respondents thought about the gender “slant” of the divorce system toward divorcing parents. We also asked the attorneys to indicate how their “average male client” would answer the question, as well as their “average female client,” judges and judicial officers, and custody evaluators and mediators.

Method

Sample and Procedures

A survey was administered at a session that family lawyers attended as part of an annual state bar meeting, a professional conference for which continuing legal education credits could be earned. At the beginning of the June 15, 2001, session that was designed for the family law attorneys (entitled “A Mixed Bag of Family Law Issues”), attendees were asked to voluntarily complete a survey about their practices *before* the official presentations began. A total of 90 surveys were distributed to those in attendance, and 78 were returned at least partially completed, for a preliminary response rate of 87%. However, six participants did not return their surveys until after the beginning of the speeches and so were omitted from the analysis (to avoid the possibility that the speech might contaminate their responses through social desirability, demand characteristics, etc.), yielding a sample size of 72 for analysis. Many other respondents did not complete the survey in its entirety because of time constraints. (They needed to complete the survey in the 15 minutes allowed before the speech began. The relatively short time allowed for the survey before the presentation and the corresponding need for respondents to rush their responses could possibly have affected the accuracy of the responses.) Thus, each analysis reports data only for the subset of attorneys who had nonmissing data on all items pertaining to that particular issue. For example, 56 respondents answered all of the “slant” questions, so only these 56 respondents were included in the results for that issue.

Sample Characteristics

Included on the survey were a number of items pertaining to the respondents’ personal history (e.g., age and gender, whether they personally had been divorced, and whether that divorce involved minor children) and professional issues and details of their practice (e.g., the number of years the respondent had been practicing law, whether he or she was certified as a specialist in family law, number of clients with a minor child represented in the past year, the percentage of those cases in which the parent was female, the hourly rate the respondents charged their clients, and their “initial retainer for your ‘average’ divorce case involving children”). The sample comprised 30 women, 40 men, and 2 participants who did not indicate their gender. The men were significantly older than the women (men, $M = 53.50$ years, $SD = 10.20$; women, $M = 44.17$ years, $SD = 10.18$; $t[68] = 3.79$, $p < .001$); had practiced longer (men, $M = 20.09$ years, $SD = 10.87$; women, $M = 9.20$ years, $SD = 6.36$; $t[65] = 4.75$, $p < .001$); and charged a higher hourly rate (men, $M = \$197.23$, $SD = 39.15$; women, $M = \$173.80$, $SD = 34.92$; $t[58] = 2.37$, $p < .05$). However, no differences were found in other study variables including demographic information such as initial retainer ($M = \$4,137.29$, $SD = \$2,726.14$), the number of clients undergoing a divorce with minor children they had represented in the last 3 years ($M = 67.74$, $SD = 60.89$), the percentage of their cases in which their client was the mother (as opposed to the father) ($M = 56.5\%$, $SD = 17.75$), or whether they described themselves as more adversarial on a scale from 1 to 9, where 1 represented the most adversarial behavior ($M = 5.35$, $SD = 1.49$).

Twenty-nine of the participants had been divorced themselves, whereas 43 had not, and 18 participants reported that their divorce included minor children. Sixty-three of the lawyers were not certified specialists in family law, and 9 reported being specialists. Those who were specialists tended to have been practicing longer ($M = 23.78$ years, $SD = 8.24$ for certified lawyers and $M = 14.26$ years, $SD = 10.49$ for uncertified lawyers, $t[65] = 2.59$, $p < .01$), charged a higher hourly rate ($M = \$229.78$, $SD = \$50.02$ for certified lawyers and $M = \$179.42$, $SD = \$32.03$ for uncertified lawyers, $t[59] = 3.98$, $p < .01$), and required a larger retainer than their noncertified counterparts ($M = \$7,678.50$, $SD = \$4,651.71$ for certified lawyers and $M = \$3,580.39$, $SD = \$1,805.16$ for uncertified lawyers, $t[57] = 4.60$, $p < .01$).

The measures of the primary study variables are described in the more detailed Results section under the appropriate topic headings. In general, the variables noted above (e.g., attorney gender, proportion of clients that are female, own divorce status, financial aspects of their practice, or how long practicing) were not found to be related to and did not moderate the responses to these primary study variables; the few exceptions are noted where appropriate. Summed across all responding attorneys, they reported representing 3,860 clients in the last 3 years.

Results

Relocation Disputes

For this set of questions in the survey, the text was preceded with: “We ask you to give a rough estimate of the number of your cases involving minor children in the last 3 years that have certain characteristics. . . . We recognize that a completely accurate answer to these questions would require extensive file

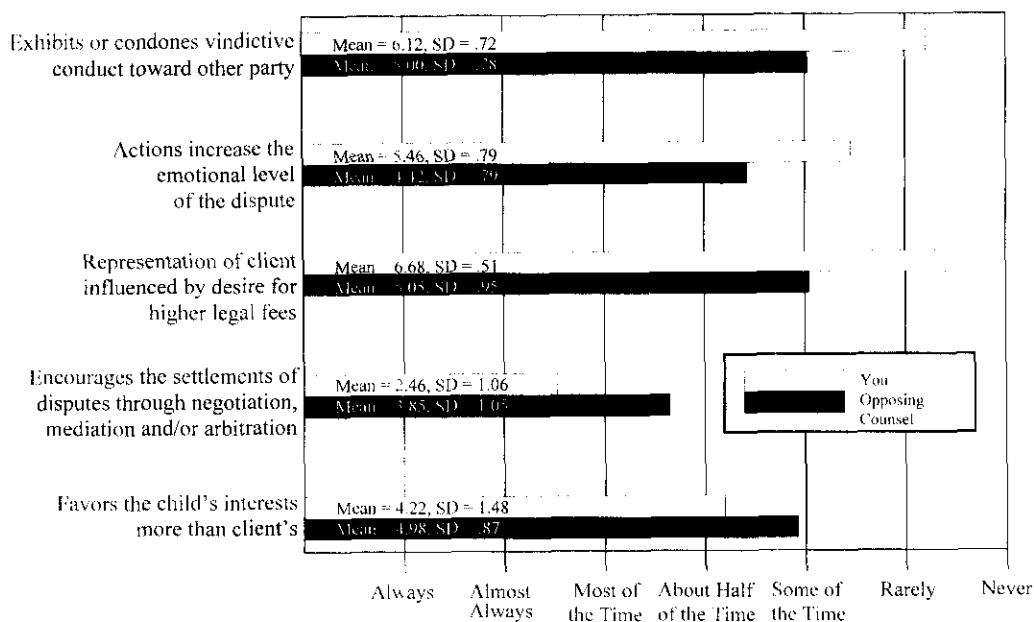


Figure 1. Mean responses to lawyer behavior items for "you" versus opposing counsel.

review. In the interests of time, all we request is a quick guess." The attorneys first indicated the approximate number of their clients in the last 3 years "who desired to move away with their child" to a new area, the number for whom they had been successful in winning the right to relocate, and the number of cases that had been unsuccessful and the child remained. The lawyers reported that in the last 3 years they collectively represented a total of 39 cases in which their client desired to relocate but lost and 84 cases in which their client won, and the parent and child relocated. Adding these together and modifying the total number of divorce cases represented to accommodate missing data, 4.2% of the lawyers' cases involved a relocation dispute in which it was their client who desired to move, and the reporting attorneys claimed to be victorious in obtaining legal sanction for the move in 68.3% of those cases. They were next asked to estimate the number of their unsuccessful cases in which the desiring-to-move parent "moved away anyway, without the child," as well as their estimate of the number of their successful cases in which their "client would have moved away anyway, without the child, if he or she had lost." According to the lawyers, 46.2% moved anyway, implying that 53.8% of the unsuccessful clients did not move once they lost the court decision. They estimated that only 36.9% of their successful clients would have moved away had the final decision not been in their favor, implying that 63.1% likely would not have moved away without the child.

Family Court Advisor or Master

Participants were asked to estimate "how many cases they had represented in the past 3 years in which a Family Court Advisor or Master had been appointed." Of the divorce cases involving children represented by the sample participants, 15.6% of the cases had a Family Court Advisor or Master. Then they were asked in how many of these did they "personally feel that the Family Court Advisor made generally good or defensible decisions or recommendations" and "lowered the level of hostility between the parents." In 72.9% of these cases, the Family

Court Advisor was evaluated by the lawyers as making generally good or defensible decisions and recommendations, and in 59.1% of the cases the lawyer indicated that the Advisor lowered the level of hostility between the spouses. The greater the retainer charged, the higher this latter percentage was.

Lawyer Behaviors

The lawyers were asked a series of questions about the behaviors of attorneys representing the other spouse: how often they found the opposing counsel "encourages settlements of disputes through negotiation, mediation, and/or arbitration"; how often opposing counsel "exhibits or condones vindictive conduct toward your client"; whether "opposing counsel's actions increase the emotional level of the dispute"; whether "their representation of their client is influenced by their desire for higher fees"; and whether "they favor the child's interests more than their client's." In addition to evaluating the behaviors of other lawyers, the respondents also were requested to answer these same questions about their own behaviors (much later in the survey). All responses had ratings ranging from *never* (1) to *always* (7).

The results of these items are presented in Figure 1. The results indicate that the attorneys reported that opposing counsel exhibited or condoned vindictive conduct toward the other party "some of the time," but that this was true for themselves "rarely" ($t[59] = -9.38, p < .0001$). The same trend was true for the attorneys' evaluations of themselves and opposing counsel as in regard to representation of their clients being influenced by a desire for higher legal fees ($t[58] = -12.98, p < .0001$). Further, opposing counsel's actions were evaluated as increasing the emotional level of the dispute "about half of the time," whereas the reporting attorneys' actions only increased the emotional level "some of the time" ($t[58] = -8.09, p < .0001$). The attorneys indicated that opposing counsel encouraged settlements of disputes through negotiation, mediation, or arbitration "about half of the time," whereas they encouraged it between

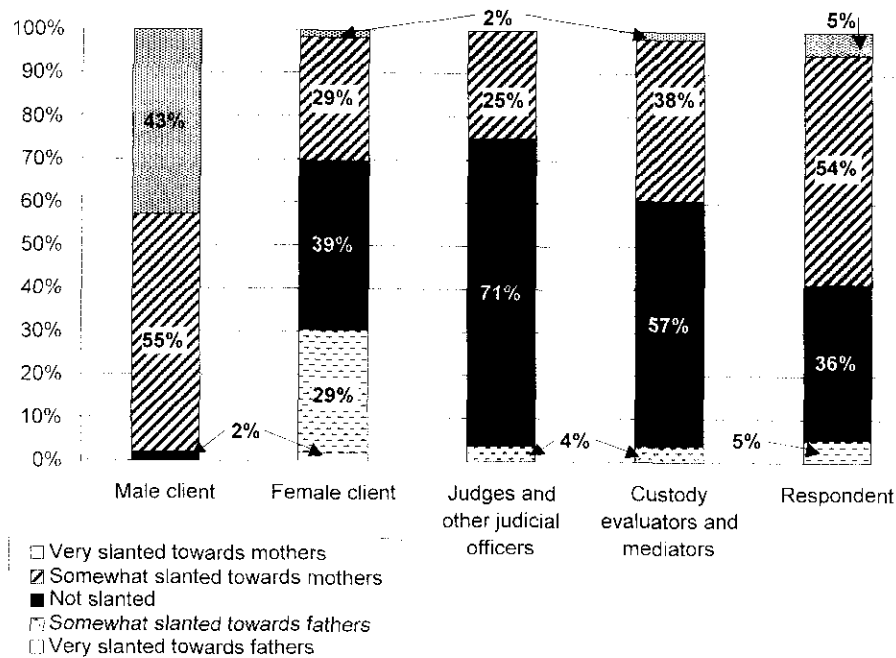


Figure 2. Responses to "How would you describe the 'slant' of the legal system toward divorcing parents?"

most of the time and almost always ($t[58] = 8.30, p < .0001$). Finally, opposing counsel favored the child's needs only "some of the time," whereas study participants perceived they favored the child's interests more than their client's "about half of the time" ($t[57] = 4.31, p < .0001$). We found one moderator variable: the difference between self- and other-report on the "encourages settlement" item reduced as the attorney's hourly rate increased.

The "Slant" of the Legal System

Participants were asked to judge how their clients, representatives of the legal system, and they themselves "described the 'slant' of the Arizona legal system as a whole toward divorcing parents." Responses ranged from *very slanted toward mothers* to *not slanted toward either mothers or fathers* to *very slanted toward fathers*. As Figure 2 indicates, 98% of participants thought that their "average male clients" would perceive that the legal system was either *very slanted* or *somewhat slanted toward mothers*, whereas 2% judged that fathers would see that the system was not slanted, and none thought it was slanted toward fathers. In contrast, exactly equal percentages of attorneys judged that their "average female clients" would see the system as slanted toward fathers rather than mothers, and 39% thought mothers would see it as not slanted. In further contrast, 71% of respondents estimated that judges and judicial officers would deem the system to be not slanted at all; however, 25% guessed that judges would see the system as favoring mothers (25%), and only 4% guessed judges would see it as favoring fathers. A similar pattern was evident in reference to custody evaluators and mediators, with 57% of attorneys perceiving that the latter would say the system is not slanted, 38% perceiving that the latter would report that it favors the mother, and only 4% thinking that the latter would believe it favors the father. Finally, the participants provided their own perceptions of the biases of the legal system, with 5% indicating that it favors the

father, 36% believing it is not slanted, and 59% believing it favors the mother. All the distributions are significantly different from one another by Wilcoxon tests at $p < .05$. These patterns did not differ for male and female attorneys (i.e., the results were not moderated by the attorney's gender) and did not differ based on the percentage of their caseload that was mothers or their own divorce status. Certified Divorce Specialists were significantly more likely to indicate that mothers might think the system was slanted toward fathers than were nonspecialists ($M = 2.44$ for certified lawyers and $M = 3.10$ for uncertified lawyers, $t[58] = 2.21, p = .03$).

Custody Gender Bias

The survey asked respondents to imagine that they represented one of the parents in a case in which custody and access of two apparently normal children (7 and 9 years old) was an issue. Half of the surveys (randomly administered) asked them to imagine that they represented the father and half the mother. In all other respects, the surveys were identical. The scenario continued:

Imagine that the financial issues of the case represent absolutely no special problems and appear readily resolvable. Imagine that there are no indications about lack of parental fitness, emotional or mental problems, drug or alcohol problems, domestic violence, or physical or sexual abuse on the part of either parent. Both parents have worked full-time (both M-F, 9 to 5) continuously except for a 3-month maternity leave taken by mother after the birth of each of the children. Father also took a lot of time off during those periods to help with the infants. Father earns \$50,000, mother \$35,000. The children currently stay in an after-school program until father picks them up, since he gets home 15 minutes earlier, while mother takes them to school in the morning. Mother has taken the children to most doctors' and

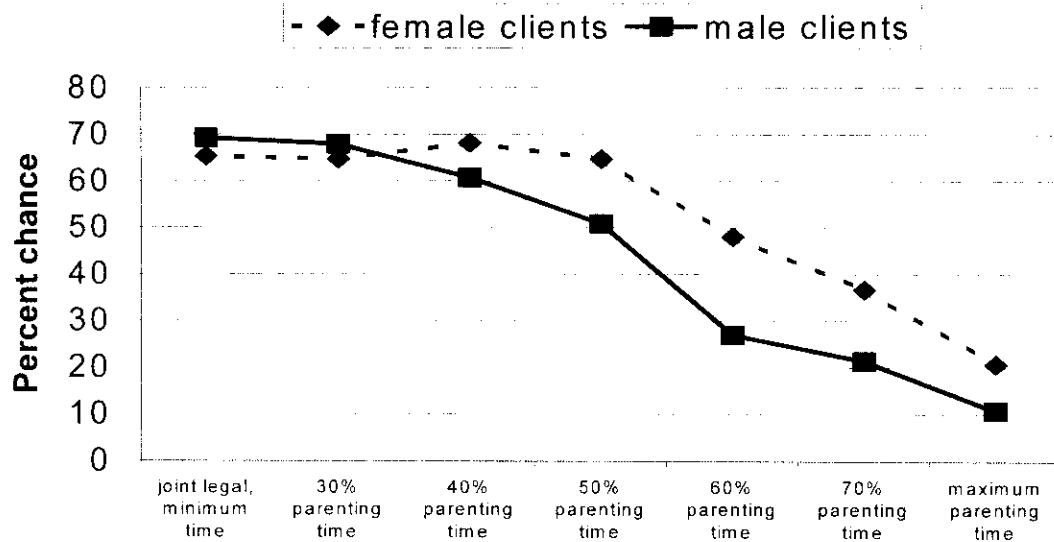


Figure 3. Mean client's "chances to prevail" for various custody arrangements by client gender.

dentists' appointments; father is more involved than mother with each of the children's sports activities, soccer and T-ball. Mother and father are equally likely to stay home with an ill child, but this actually happens only rarely.

The opposing parent was said to "be strongly insisting" on full legal and residential custody and offered "your client" visitation amounting to about 20% of the child's time. Meanwhile, the client "indicates to you [he or she] wants 'as much custody and time with the children as [he or she] can get.'"

Based on these facts, we asked participants to answer two questions for each of a number of alternatives concerning their client's wishes: "What would you tell your client were [his or her] chances to prevail" and his or her "likely legal and other fees."

The results on the "chances of prevailing" variable are presented in Figure 3. A mixed analysis of variance yielded a significant interaction, $F(6, 162) = 2.66, p = .02$; a marginally significant gender-of-parent main effect, $F(1, 27) = 3.73, p = .06$, with mothers being more likely to prevail in obtaining parenting time than fathers; and analogous significant simple main effects of gender of parent for obtaining 60% parenting time, $F(1, 27) = 8.26, p < .01$, 70% parenting time, $F(1, 27) = 5.02, p = .03$, and maximum parenting time, $F(1, 27) = 5.33, p = .03$. The results on the "legal fees" variable showed fathers would generally need to pay more, especially at the higher levels of custody, but here neither the interaction nor the gender of parent differences was significant.

Discussion

The current investigation surveyed a "captive audience" of family law attorneys on a number of issues currently under debate by experts in the area, on the assumption that they could provide information about family dissolution processes either unavailable from other sources (e.g., what they would tell their clients about their chances in a custody case), or more cost-efficiently gained from such informants (e.g., what percentage of cases involved relocation disputes). We discuss the results

concerning each of the issues in turn, followed by a more general discussion.

Relocations

The attorney respondents indicated that relocation disputes in which they represented the parent wishing to relocate with the child arose in less than 5% of their divorce cases. They further indicated that they were victorious in getting legal permission for the move in about two thirds of these cases. This rather high victory rate is noteworthy inasmuch as it occurs in a state whose controlling statute is comparatively inimical to relocation (Bruch & Bowermaster, 1996), because, unlike most states, it requires the parent wishing to move to have the "burden of proof" that the move is in the child's best interest (Braver & O'Connell, 1998).

The more significant finding is that, according to their attorneys, in the majority of cases, the parent with physical custody either did not move when they lost or would not have moved if they had lost. This is important information, because almost all states have as their guiding principle in relocation disputes the best interest of the child. It may be unclear or debatable whether it is best for the child to move with the moving parent or remain with the other parent, switching custody in the process. However, if the custodial parent will ultimately choose not to move when permission to take the child with him or her is denied, another alternative exists. If the parent remains, the status quo is preserved, which could benefit the child's interests unless (a) the denial of permission to move results in impairing the custodial parent to the extent that his or her parenting is diminished, or (b) other advantages for the child (e.g., better economic outcomes) are prevented. Data analyzed by Braver, Ellman, and Fabricus (in press) show a variety of deficits reported by college-aged children of divorce, one of whose parents moved, compared to children whose parents never moved. We believe the present finding argues for allowing a line of questions about the intention of the desiring-to-move parent, if permission to move is denied. Simultaneously, evidence should be admissible that allows the judge to make an informed judgment about the extent to which

diminished parenting capabilities might surface if permission to move is denied.

Family Court Masters

The lawyer respondents indicated that such professionals were involved in about one sixth of their cases, probably similar to the percentage of cases that are deemed "high conflict" (Johnston, 1994). This sample of attorneys regarded these appointments quite positively, indicating that 75% made "good recommendations," and most lowered the "level of hostility" between the parents. Although not a definitive program evaluation of this system, and mindful of the differences in form that such programs might take in different jurisdictions, the present results are heartening. We cautiously endorse further development of this specialty and strongly recommend further study of its implementation, cost effectiveness, and outcomes. If such investigations continue to suggest benefits to families, the legal system should be helped by family specialists to understand their salutary effects.

Lawyer Behaviors

In an effort to decrease the zeal with which attorneys advocate for their clients' interests in family dissolution cases, codes of conduct for family law attorneys have recently developed to constrain some of the more aggressive and harmful behaviors. However, the results reported here suggest that this effort has been far from completely successful. For example, opposing counsel's actions were seen as increasing the emotional level of the dispute in about half the cases. More time and more education of the profession may be needed before this effort to redirect and modulate the attorneys' actions is completely successful. Some writers (Emery, 1994, 1999; Margulies, 2001) believe that such efforts can never be largely successful because they are contrary to the adversarial system, and that instead structural reforms and alternatives need to be developed.

It is particularly interesting to note that, for every question, the attorneys thought they themselves were significantly more conciliatory, collaborative, and prochild than their counterparts on the opposing side. Although it is conceivable that those lawyers who attend continuing legal education presentations are truly less inflammatory than their myriad opposing counsels, it is more plausible that the results reflect the usual self-aggrandizement and "other-bashing" tendencies found in similar self-other comparisons, where, for example, business people see themselves as more ethical than their counterparts (e.g., Brenner & Molander, 1977; Myers & Bach, 1976). As is typical in such circumstances, the truth for both parties probably lies somewhere in between. What is encouraging under the latter interpretation is that family law attorneys apparently recognize in which direction they should respond to self-aggrandize. Rather than exaggerating their aggressiveness and adversarialness, it is heartening that they embellish their own collaborativeness.

Gender Bias

Supporting the views of fathers (Braver & O'Connell, 1998; Pruett & Jackson, 1999) and in opposition to the claims of many writers (e.g., Mahoney, 1996; Mason, 1988; Weitzman, 1985), the legal system generally was thought of by the attorneys (both male and female) to be biased in favor of mothers and against fathers. In this view, they agreed with how they guessed their male (but not their female) clients would see it but were some-

what less extreme. Two thirds of respondents estimated that judges thought the system was completely unbiased; the remaining third indicated that judges, too, would think the system biased toward mothers.

In responding to the hypothetical custody dispute case we presented, the attorneys provided what may be the reason for these judgments. Male and female attorneys alike indicated that they would respond differentially to father versus mother clients about the client's "chances to prevail." Mothers would be advised that they had a greater chance than fathers, especially (in view of the significant interaction) for the higher parenting time scenarios, despite facts that should advantage neither. Thus, attorneys appear to be advising clients what Maccoby and Mnookin (1992) ultimately declared after their landmark custody investigation: "When two competent parents—a fit mother and a fit father—each want to be primarily responsible for the child following divorce, mothers usually end up with the children" (p. 283).

Of course, it is conceivable that even blatant judicial gender bias on either side might result in appropriate decisions. For example, if courts are biased in awarding too little financial support after divorce to women, it might deter some of the woman-initiated divorces that are merely whims and later regretted. Analogously, if children generally do better in the residential custody of their mothers, even when the two parents appear otherwise equal, gender bias that favors mothers might be appropriate. However, much of the available evidence supports neither possibility (Clark-Stewart & Hayward, 1996; Downey & Powell, 1993; Nixon, 1997.)

Because these responses come from the advising attorneys, these results are important even if factually wrong. Attorneys' views of the bias in the system can become a self-fulfilling prophecy, even if results show that judges are not as biased as believed. Thus, a gender bias against men in custody cases may well be operating *de facto* in the law. This finding also can help explain the disparity between the views attributed to the various players. Judges (and, to a slightly lesser extent, custody evaluators and mediators) can continue to think the system is largely unbiased, because the cases that come before them are so filtered and strained that they can maintain this view for the cases that they are actually called upon to administer.

General Comments

It is important to note the serious limitations and qualifications of the current investigation. First, family law is governed at the state level, and different states may have different laws or practices with respect to the issues under study, but this survey involved just one state. More important, here we present data about attorneys' views of issues, rather than evidence about the actual issues themselves. Thus, for example, we cannot properly conclude that two thirds of custodial parents wishing to relocate with their child would truly have remained if they had lost their relocation case, simply because that was what the attorneys reported.

A similar caveat is that, although our survey sample is probably far less self-selected than most attorney survey reports in the literature (because we conducted it on a "captive audience" of lawyers attending a bar convention), selection bias inevitably affects the results. Those who attend bar conferences for continuing legal education credit are probably not representative of the population of practicing attorneys. Recall also that at least 13% of the attorneys present declined to participate.

Additionally, several responding attorneys reported that the time allowed for completion (15 minutes, and less for late arrivals) was too short for accurate responding. Therefore, they claimed that they were forced to make only rudimentary rather than thoughtful estimates, which may have reflected their own biases as much as their reality. This was especially true when attorneys were asked about impressions over a range of cases, rather than being asked to recall details of specific cases. (For these reasons, the state bar has expressed reservations about the accuracy of the results and has offered to assist us by sponsoring another similar statewide survey.) Finally, as in any survey, the exact wording of the items might have influenced the responses: A slight variation in language might have elicited different patterns. (Copies of the instrument are available upon request from the first author.)

Having admitted to these limitations, this study provides an important yield of new evidence germane to a variety of crucial issues in family law. We present new, interesting, and provocative statistics on relocations, attorney behaviors, and gender bias in the court—all issues currently being debated in the field. We propose that attorney perspectives and experiences provide previously overlooked evidence that should contribute to these debates. To the degree that the perspectives of family law attorneys filter down into the way family members interact with one another, their perspective becomes particularly critical.

We also recommend that these findings serve as the foundation for additional research. For example, asking attorneys specifically about their last 10 to 20 cases might be preferable to asking about all their cases in the last 3 years. Discussing these findings with groups of lawyers also appears promising; the fact that they apparently recognize the value of nonadversarialness in their practice could possibly produce salutary effects on the way they practice in much the same way that informing a community about its pluralistic ignorance can change behavior for the better (Allport, 1924; Prentice & Miller, 1993). Thus, family practitioners appear to have a role to play in reforming the more deleterious practices of attorneys.

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