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TRANSLATION AND THE DIVORCE LAWYER: SIMULATING THE LAW AND SOCIETY INTERFACE

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In this paper I discuss the use of simulation to explore the role of the legal profession in the resolution of matrimonial disputes. Two points are assumed. The first is the importance of the legal profession to both theoretical and practical aspects of family law.1 As Smart states,

> Solicitors are central to the whole process and operation of matrimonial law. They perform the function of gatekeepers, allowing lay people limited access to law, and they also act as mediators and translators. They mediate between parties and between individuals and the courts, and they translate personal conflicts into legally recognisable categories of dispute.2

The second is the relative and possibly related dearth of empirical research about the legal profession. Some empirical studies3 have appeared in response to Mnookin and Kornhauser's complaint that, "in view of the critical role of lawyers and the disparate functions they may perform, it is startling how little we know about how lawyers actually behave."4 But there is no shortage of material explaining the reasons for the paucity of empirical data.5 The absence of much empirical research on the day-to-day activities of the legal profession is a serious gap in our legal knowledge. The traditional family law concentration on statute and precedent detracts from the dynamic nature of family law and neglects the role of the legal profession in out-of-court activity. Yet how can out-of-court activity be taught in the classroom? It does not exist in as convenient a form as the print of the *Family Law Act* 1975 (Cth). Students can draw on their personal experiences with the law and from television series or literature, whether these deal directly with the legal profession or present situations with which lawyers have to deal. *Oliver Twist* reveals one possible alternative to the legislative schemes for state protection of children who are deemed to be in danger.6 Television series such as "Home and Away", "E Street" and "LA Law" present an impressive array of issues in relation to almost every aspect of a family law course. There may be a feeling that references to the popular media make issues less important than they would be if discussed solely in terms of the legislative provisions. But the importance of the link between students' experiences and the learning process cannot be underestimated.7

DEVISING THE SIMULATION

Simulation has been employed since 1988 in the Family Law course at the University of Melbourne for two reasons. First, it uses a teaching method which draws directly on students' experiences. Second, it provides a means of overcoming the lack of written materials available. For example, no-fault divorce can be taught in terms of s48 of the *Family Law Act* and the cases arising from it. Policy issues can be illuminated by comparing s48 with the law in other jurisdictions and with Australian law before the *Family Law Act*. In addition, the writer attempted to explore these issues by simulating solicitor-client conferences.

In 1988, the students were given a hand-out about two weeks before the seminar which set out the following facts:

> You will be introduced to simulation, a method of teaching which you may not have encountered previously. Members of the group will take the role of either solicitor or client, and simulate a conference between the two. No actual acting ability is required. You may, while identified with a role, find yourself behaving in ways which you would not find acceptable in other circumstances. Debriefing from your role is an integral part of the seminar.
>
> The situation on which the simulations are based is as follows. The client has discovered the infidelity of a spouse and visits the solicitor for a divorce. The solicitor's task is to explain the grounds on which dissolution of marriage is available under the *Family Law Act*.
>
> You might find it interesting to read Sherr, Lawyers and Clients: The First Meeting (1986) 49 *Modern Law Review* 323.

The full lecture group was divided into groups of about 20 to enable the creation of a participatory climate. This meant that the class was repeated in successive weeks. In 1988 they were thrown straight into the simulation, having been divided into solicitors and clients and each knowing the other's instructions from the hand-out outlined above.

In 1989, I did not use a hand-out so that each participant did not know what the other wanted. Rather, having divided the class into solicitors and clients, each group had a caucus for about five minutes, in which I gave them their instructions. The clients were told the facts which had been on the 1988 hand-out. They were asked to construct their marital circumstances: numbers of children, length of marriage and so on. They were also asked to consider the sorts of feelings they might be experiencing and what they would be trying to achieve from the conference. The solicitors were told that a client, whom they had not seen before, had made an appointment to discuss a matrimonial matter. They were asked to consider what they might try to achieve in the first conference.

In both years, the simulations were allowed to run for about seven or eight minutes. The students were then asked to consider the following questions:

> How do the solicitor and client express what they want from the conference? To what extent do they give each other what they want? How, if at all, does the solicitor attempt to provide the client with an understanding of the legal position? Who controls the tenor of the conference? What are the implications of the discussion for the concept of no-fault divorce?

They were asked first to write down their thoughts for a few minutes, to compare notes with the person sitting next to them and then to share their discussion in groups of six or eight. Finally there was a plenary discussion of the issues raised by the questions.

Many interpersonal communication issues arose. How did the participants move back and forth in relation to the table? Did the solicitors set up the chairs on either side of the table? How did the parties mimic each other's body movements? But in this paper I want to consider those issues arising from the simulation which concerned the sociology of lawyering — in particular, the question of control in the solicitor-client relationship.

TRANSLATION AND CONTROL

The model of the solicitor-client relationship presented by the official representatives of the legal profession is that

of the solicitor receiving instructions from the client.8 Yet it has also been asserted that lawyers, by virtue of their position and professional expertise, dictate solutions to clients and hence are agents of control. For example, "the decisions of legal practice are made by solicitors because of their knowledge. The power thus created will be used exclusively for the client's best interest. The best interest will be judged by the professional."9

For whatever reasons, it has only been within the last ten years that these questions have been subjected to rigorous empirical analysis. Cain's study was a pioneering one in this field.10 Her research involved a combination of observing solicitor-client conferences, reading client files and attending court hearings. Cain rejected as a radical error the view that lawyers control clients, arguing that this view arose from a "preoccupation with repression as the task of the agencies of the bourgeois class."11 Rather, she said, "lawyers' characteristic and specific practice is translation into a discourse which they both use and create."12 For example, the client's desire to leave their home to particular family members was translated into the lawyer's discourse of joint ownership, tenancy in common and various ownership potentialities and capacities. Rather than ignoring the client's instructions and imposing a solution, the solicitor translated the client's aims into the relevant legal categories.

For Cain, translation had a twofold importance. It was of normative as well as descriptive value. It not only represented how, on the whole, the observed lawyer behaved, but also defined how they should behave. "A good lawyer is therefore one who accepts his client's desired outcome as his own objective."13

The simulations revealed a number of refinements which are demanded by the application of this framework to matrimonial disputes. The first was that the situations which the clients presented to their respective solicitors comprised a number of components. In addition to the issue of personal status, there were also (though not necessarily all in one transaction) questions of housing, protection against physical violence, redistribution of matrimonial property, the future financial relationship between the parties and their children, the allocation of child-care responsibilities between the parties and the legal formalisation of these matters. This suggests that we should discuss translation in terms of desired outcomes and objectives rather than in terms of a desired outcome or objective. The students faced not only the range of issues which would have to be covered but also the fact that the issues do not present in the neatly ordered manner of a hand-out.

The second point is that the client's desired outcomes are not necessarily constants.14 Might the client change his or her mind about the desirability of divorce? The students who played the part of solicitors said they felt that they could not rely on the desire for divorce being maintained, given the range of emotions which were presented to them. The extent to which the solicitor should question the client's desires obviously raises the issue of control, which will be considered later. Here it is enough to make the point that the concept of desired outcome is not unproblematic.

Third, in deciding whether translation has been performed, there is a problem of quantifying the respective contributions of solicitor and client to the adopted outcome. The simulated conference is but one example of the multitude of situations where people talk to each other and influence each other's decisions. It is difficult to separate the inputs of any two parties in a joint venture.15 Greenebaum has argued that, "professional service always changes the client."16 Cain classifies her cases on the basis of whether the solicitor or the client's outcomes were adopted. One exception was classified as, "doubtful because the opinion of each party appeared to carry equal weight, and the advice was often about questions irrelevant to the legal issues of grounds, maintenance, and the house."17 Yet she does not provide any indication of how she quantifies the respective inputs. Galanter appears to reject the notion of a clear division between the input of clients and of solicitors, referring to "continuities between informal and formal, between legal and everyday life."18 Sarat and Felstiner's examination of the interaction between divorce lawyers and their clients19 depicted the conference as the setting where the inputs of the respective participants competed for supremacy. The use of simulation as a teaching methodology gives students an opportunity to experience this competition themselves.

Although the simulations reveal how the solicitor was forced to translate the client's situation into legal discourse, they do not reveal whether the discourse is created by the solicitor or created by the legislature and transmitted by the solicitor. The translation of the breakdown into the formal change in personal status is determined by s48 of the *Family Law Act*. Cain rejected the notion of lawyers as agents of oppression because of the extent to which they

accepted their clients' desired outcomes as their own objectives. But whether the clients' desired outcome is chosen, first demands consideration whether it can be chosen. This underlines Ellmann's definition of a lawyer's duty to the client in terms of fostering autonomy "within the law."20

What is the consequence of the legal system not being able to meet the client's needs? This question arose in Cain's study in terms of the cases which she cites as exceptions to the general principle that solicitors accept their clients' desired outcomes. It also arose in the simulations. How can a solicitor translate the desire for divorce when this is only available on the basis of twelve months separation and the parties have not separated? Where dissolution is only available following twelve months separation, how can a solicitor obtain divorce because of legally irrelevant adultery? How can the solicitor translate a client's desire that an adulterous spouse be punished when the legal system declares such behaviour irrelevant? Cain's acknowledgement in her paper refers to the views of the observed solicitors who had read it. She states that,

> it was argued [by the lawyers in her sample] that my view of the openness of law is incorrect. In many cases, I was told, law is indeed fixed and pre-given, and the lawyer can in truth do nothing for his client.21

But Cain does not provide any answer to this point. It could be argued that the exception to her general principle may be explained by the nature of the legal system, rather than the nature of the lawyer.

In Cain's study, the chosen outcomes of three matrimonial clients of one of the observed solicitors were not adopted.22 This situation also arose in the students' simulated conferences. The first was a husband who, "wanted either custody or to see his child every day." It is unlikely that the court would have granted the husband custody. The children were residing with their mother and it is unlikely that a court would seek to alter the status quo on a contested hearing. Once the mother had been granted custody, the court would probably have been reluctant to make an order for daily access, on the basis that such an order would be disruptive to both the child and the custodial parent. In some of the simulations clients tried to prevent children from having any further contact with their spouse. But the legal system had a strong presumption in favour of continued contact between non-custodial parents and their children, with a consequent conflict between the desires of the client and the client's legal entitlement.

The second of Cain's exceptions was a husband who was, "dissatisfied with the amount of maintenance he would have to pay." There was no shortage in the simulated conferences, nor one would expect, elsewhere of husbands who want to pay less maintenance than the amount which they were advised they were liable for by their solicitors. Yet if Cain's sample had also included the wife of this client, it is likely that she would also have been dissatisfied with the amount of maintenance. On Cain's analysis, it would seem that however the issue of maintenance was resolved, at least one of the lawyers, and probably both, would have been categorised as not translating the client's desired outcomes and, therefore, as a bad lawyer. The existence of a conflict between two parties makes it difficult for the desires of both to be fulfilled.

The existence of a dispute also raises the question of the distinction between advising, and dictating to, a client. In the case of the husband who wanted to see his children every day, on one interpretation of Cain's definition of a good lawyer, the husband's solicitor should have resisted all the claims of the wife's solicitor, and taken his client's claim to court, in the hope that the court would not grant the wife's claim. Yet if a good lawyer should advise the client as to their legal entitlement, what should good lawyers do when clients do not want to follow their advice? Should the solicitor's advice on the client's entitlement extend to persuasion? Cain is clearly worried at the situation which arose when one of the lawyers in her sample said, " 'I don't want to feel I've twisted your arm' . . . to the visibly shattered client."23

The policy of the *Family Law Act* is to encourage out-of-court settlements. Hyman explores the issue whether the litigatory fiduciary attitude of producing the best result for the client is compatible with the multidimensional approach of non-positional negotiation.24 He sets out the benefits of the multidimensional approach in terms of more efficient, appropriate results which have the inherent virtue of respecting the client's self-determination.25 Advice can become more persuasive when costs are used as an inducement to persuade a client of the benefits of

settlement. In matrimonial disputes, the costs of a contested hearing can easily absorb a substantial proportion, if not all, of the parties' assets.

Do solicitors have a duty to consider the impact of litigation on any children of the relationship? It is a fundamental principle of matrimonial law that the welfare of the children should be treated as the most important consideration. Should good lawyers attempt to direct their client's attention to the possible impact of the client's wishes on the welfare of their children, or should they accept the client's definition of the children's interests unquestioningly? Ellmann argues that the provision of advice is empowering because it enables the client to make more informed decisions.26 But is the provision of advice itself manipulation? Ellmann concluded that it was impossible to assist client decision-making without at the same time jeopardising it.27

These possible justifications of persuasion take their advocates onto thin ice, in what Wade has referred to as the ethical minefield of family law.28 Are these explanations of lawyers' activity no more than legitimations of their control over their clients? When solicitors dissuade clients from their course of action, are they advising as to its probable failure, or imposing on the client the solicitors' idea of the most satisfactory way of resolving the dispute? How can the lawyer know that litigation is doomed to failure unless it is attempted? Even if there are no conclusive answers to these questions, simulation provides students with an opportunity to experience the ethical minefield themselves.

Simulation could also be used to explore the particular minefield represented by the third of Cain's exceptions to the translation pattern, a wife who, "was very determined that no provision for maintenance should be made." The client would be entitled to have an objective achieved, but the client does not have the entitlement as an objective. This raises questions how much pressure, if any, should be brought to bear on paternalistic grounds. Might the solicitor be anxious to guard against allegations of negligence if the client subsequently alleged that he or she had not been fully advised as to the consequences of his or her action?

Simulation can also be used to illustrate the relationship between legal and other remedies. In 1988, the following scenario was used once the students had been introduced to the provisions governing child abduction. In 1989, the students were asked to read the relevant provisions before the class and given the facts of the situation otherwise unprepared.

> The client and their spouse separated more than a year ago and their marriage was recently dissolved. An order for "reasonable access" in favour of the spouse was made at the time of the dissolution. It is now 4.30pm, Monday, 27th June. Last Friday, 24th June night the client took the children to the ex-spouse's house for the weekend, expecting the children to be taken to school this morning. Today, the client went to call for the children after school and discovered that neither of the children had been to school that day. It is 5.15 and the client is in the solicitor's office. Where are the children? Imagine the range of possibilities. What does the client want? What can the solicitor do?

The students simulating the part of the solicitor found themselves counselling, as they had been doing in the earlier scenario. This provoked the response from some that they "shouldn't have to do this." They also found that their advice was as to practical issues such as phone-calls. The Hague Convention29 which had occupied our thoughts in the lecture, and taken a prominent position in the hand-out, did not warrant a mention. The simulation is a useful means of revealing the fact that the legal system does not exist in a vacuum; that there are links between the legal world and the rest of society.

Simulation is a direct way of demonstrating the links between the legal and non-legal world. Bergman, Sherr and Burridge suggest that "non-legally-specific" simulation should be used, so that students draw on their own experiences rather than on their perceptions of how lawyers might behave.30 Their examples are taken primarily from the law of evidence, but similar ones could be used for family law: for example, the links between a solicitor selling a settlement to a client, and an estate agent selling an offer prior to auction to a vendor in a declining market.

Finally, simulation was used to explore the ramifications of the multicultural aspects of Australian society.31 As with the simulations discussed above, the classes were conducted with the assistance of the Horwood Language

Centre. In this simulation, the part of the client was played by English language students.

> The client, who migrated to this country 8 months ago and whose first language is not English, returned home from work yesterday to find that their spouse had left the home with the children and removed all the furniture.

An unexpected resource was the extent to which the students were prepared to discuss their own ethnic backgrounds and the impact these might have had on the conference. For example, the privacy of the family differs as between cultures. Students disputed whether a solicitor would be invoked at all. Similarly, the extent to which the clients displayed their emotions was variable. If a non-legally-specific simulation were to be employed, giving directions to a tourist would be an obvious example. The students found themselves giving advice with the exaggerated jaw movements and superior attitude characteristically directed to those who do not share the speaker's language.

CONCLUSIONS

Writing in retrospect raises the danger of presenting the experiences as a structured and completely successful venture. This was not the case, particularly for the 1988 experience, the first year in which simulation was employed. Initially, the ideas arose from week to week. Many of the students were antagonistic to the project, not regarding it as "real law" and resenting participation. In 1989 I used the first of the seminars to discuss teaching methodology with the students, who were asked to read the article by Bergman, Sherr and Burridge before the discussion.32 The prior discussion of the use of simulation meant that students who attended the seminars had some idea what to expect, and by their participation in the discussion of the methodology may have been persuaded of its merits. But prior discussion cannot remove the frustration felt by students at the end of the simulation session that they do not possess the answers to the questions which are raised. The writer's assurances that there are no neat answers and that it is better to appreciate this before entering legal practice, are not always enough.
To conclude, 1 have tried to argue that the use of simulations with simple scenarios provides a possible means of providing students with experience of key questions in family law. Simulation is a convenient way of presenting the dynamic nature of the legal system which is being considered, simultaneously, by other methods. Even the simplest of scenarios, or especially the simplest of scenarios, can illustrate the most complex questions in the law and society relationship and act as a trigger for more extended theoretical analysis.

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24 JM Hyman, Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates be Wise Negotiators? (1987) 34 *UCLAL Rev* 863, at 867.

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28 Wade, *supra* note 14, at 192.

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30 Bergman, Sherr & Burridge, *supra* note 7.

31 R Ingleby, Teaching Crosscultural Issues in Family Law (1989) 13 *Legal Service Bull* 72.

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