LAWYERS AND CONSUMER PROTECTION LAWS

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The conventional model of the practice of law views lawyers as those who apply legal rules in the service of client interests, checked only by the constraints of the adversary system. A study of the impact of consumer protection laws on the practice of Wisconsin lawyers shows this to be an oversimplification. Lawyers for individuals tend to know little of the precise contours of consumer protection law. They most often serve as mediators between buyer and seller, relying on general norms of fairness and good faith. Lawyers for businesses are more likely to make use of the law, but they are seldom called on to deal with particular disputes. Lawyers' own values and interests are reflected in the way in which they represent clients. As a result, reform laws which create individual rights are likely to have only symbolic effect unless incentives are devised to make their vindication in the long-range interest of members of the bar. Moreover, an understanding of the many roles played by lawyers also requires a more expanded picture of practice. The picture of the lawyer as litigator in the adversary system may itself serve largely symbolic functions.

I. INTRODUCTION

Towards a New Model of the Practice of Law

In Western culture the lawyer has been regarded with both admiration and suspicion for centuries. Both judgments seem

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to rest on a widely held image of what it is that lawyers do or ought to do. On one hand, the profession paints a picture of itself defending individual liberties by advocacy and facilitating progress by creative social engineering (see, e.g., Bloomfield, 1976; Nash, 1965). Novels, plays, motion pictures, and television programs have reinforced this view. On the other hand, a debunking tradition—recently revived by the Watergate episode—shows lawyers as people who profit from the misfortunes of others, as manipulators who produce results for a price without regard to justice, and as word magicians who mislead people into accepting what is wrong. Fiction supports this view too. Yet much of this writing may cost us understanding because the debunkers accept the classic stereotype of good lawyering as a yardstick, measured against which actual practice falls short.

In this classical model of practice, *lawyers apply the law*. They try cases and argue appeals guided by their command of legal norms. They negotiate settlements and advise clients largely in light of what they believe would happen if matters were brought before legal agencies. Of course, it is this mastery of a special body of knowledge, certified by success in law school and passing a bar examination which gives one the status of being a lawyer and justifies the privileges which come with being a member of the profession (see Abel, 1979a). In the common law version of the model, *lawyers represent clients in an adversary system*. They take stock of a client's situation and desires and seek to further the client's interests as far as is possible legally. The lawyer is a "hired gun" who does not judge the client but vigorously asserts all of the client's claims of right, limited only by legal ethics. Lawyers place the interests of clients ahead of their own. A high place in the legends of the profession, for example, is awarded to the heroic and lonely advocate for an unpopular client, who battles for justice in the face of threats to person and pocketbook. However, even these aggressive lawyers cannot go too far because of the operation of the adversary system. An aggressive lawyer on one side will be matched on the other, and from this kind of advocacy a proper outcome will emerge. As a result, lawyers need not, and should not, be influenced by their own ethical judgment of the client's cause. (For a recent criticism of this positivist theory of practice, see Simon, 1978.)

Only the most innocent could think that this classical model describes professional practice. The model may reflect

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some of what goes on, but it is, at best, a distortion. Both Wall Street and Main Street lawyers often operate in situations where they do not know much about the relevant legal norms or where those norms play an insignificant part in influencing what is done. Lawyers regularly engage in the politics of bargaining, seeking to work out solutions to problems which are acceptable to the various interests. Rather than playing hired gun for one side, lawyers often mediate between their client and those not represented by lawyers. They seek to educate, persuade and coerce *both* sides to adopt the best available compromise rather than to engage in legal warfare. Moreover, in playing all of their roles, ranging from arguing a case before the Supreme Court of the United States to listening to an angry client, lawyers are influenced by their own values and self interest. They will be more eager to do things which they find satisfying and not distasteful and which will contribute to their income both today and in the future.

The legal profession may find the classical model valuable in justifying its activities and status (see Abel, 1979a). The public may benefit too insofar as this conventional view of practice is a normative indicator of what a lawyer ought to do and what influences behavior. Nonetheless, the classical model has costs: it may serve to mislead clients about what lawyers can, should, or will do. It may obstruct serious thought about the techniques and ethics of counseling, mediation and negotiation. And it may undermine effective efforts at reforms through law. Over the past twenty years when reformers have won victories in such areas as civil rights, sex and racial discrimination, and consumer protection, their successes have come in the form of cases, statutes, and regulations which, along with other things, have granted rights to individuals or groups (see, e.g., Flink, 1978; Cohen, 1975; Field, 1978; Frenzel, 1977; Scheingold, 1974). But the actual nature of law practice may leave these rights as little more than symbolic words on paper with only marginal life as resources in the process of negotiation.

This case study will develop some ideas about an expanded picture of the practice of law. I will consider the roles played by lawyers in connection with a number of consumer protection laws which create individual rights. This will not be a report of the full impact of these laws. That would require an examination of such things as the effects of the consumer movement and publicity given to consumer issues, the activity

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of governmental agencies at both the state and federal level, and the threat of more drastic laws which might be passed in the future. Instead, the subject of the present study is lawyers, and the focus on consumer laws serves as a way of looking at the behavior of various types of attorneys.

A Description of the Research

The research on which this article is based began as a study of the impact of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-12 (Supp. V 1975) in Wisconsin. This statute, which became effective on July 4, 1975, was heralded as an important victory for the consumer protection movement, and was given national news coverage (see, e.g., *Business Week*, 1975; *Consumer Reports*, 1975; Fendell, 1975; *Ladies Home* Journal, 1976; Rugaber, 1974; *Time*, 1976) and prompted an outpouring of law review articles (see, e.g., Brickey, 1978; *Cornell Law Review*, 1977; Eddy, 1977; Fahlgren, 1976; Fayne and Smith, 1977; *Indiana Law Journal*, 1976; Roberts, 1978; Rothschild, 1976; Saxe and Blejwas, 1976; Schroeder, 1978; Wisdom, 1979.)

As our research developed, it quickly became apparent that the focus of the study was too narrow. We found that most lawyers in Wisconsin knew next to nothing about the Magnuson-Moss Warranty Act—many had never heard of it. When asked about the statute, they tended to respond with comments on consumer protection in general. It was extremely difficult to find lawyers who knew much about any specific consumer protection law other than the Wisconsin Consumer Act [WCA], Wis. Stat. §§ 421-427 (1975), a law largely concerned with procedures for financing consumer transactions and collecting debts. A few lawyers were well informed about the WCA, but most knew only of "atrocity stories" (see Dingwall, 1977) about debtors who had used the statute to evade honest debts. However, we also found that, in spite of this ignorance of the specific contours of consumer protection regulation, most lawyers had techniques for dealing with complaints voiced by clients, or potential clients, who were dissatisfied with the quality of products or services or could not pay for what they had bought. These techniques will be the major focus of this article.

What follows is based on in-person and telephone interviews conducted by a research assistant and me during the summer of 1977. We talked with about 100 lawyers in five

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Wisconsin counties and with representatives from each of the state's ten largest law firms, from the legal services programs in Milwaukee and Madison, from Wisconsin Judicare—a program for paying private lawyers to handle cases for the poor in the northern and western parts of the state (Brakel, 1973; 1974)—and from all the group legal service plans registered with the State Bar of Wisconsin. (For discussions of group legal service plans, see Alpander and Kobritz, 1978; Case, 1977; Colvin and Kramer, 1975; Conway, 1975; Freedman, 1977; Harris, 1977.) In addition, a questionnaire concerning experiences with the Magnuson-Moss Warranty Act was sent to all lawyers who had attended an Advanced Training Seminar dealing with that statute, sponsored by the State Bar of Wisconsin. While in no sense is this study based on a representative sample of all lawyers in Wisconsin, there was an attempt to seek out lawyers whose experiences might differ. The great consistency in the stories that this very diverse group of lawyers had to tell suggests that almost any sample would have served for the study. Even at points where very divergent interpretations were offered by the lawyers interviewed, their description of practice was consistent. Moreover, the information I gathered was consistent with, and helps explain, the findings about lawyers and consumer problems of the American Bar Association-American Bar Foundation study of the legal needs of the public (Curran, 1977). This ABA-ABF study was based on a random sample of the adult population of the United States, excluding Alaska and Hawaii.

However, my study has some obvious limitations. I cannot offer percentages of the lawyers who have had certain experiences or who hold particular opinions. Often the lawyers themselves could say no more than they get a certain kind of case "all of the time," or that they "almost never" litigate. Since lawyers have no reason to compile statistics, usually they offered only general estimates of their caseload. Many informal contacts and telephone calls never appear in lawyers' records, and lawyers are unlikely to have a very precise memory of them. Moreover, many of the attorneys interviewed were former students of mine, and others seemed glad to aid a University of Wisconsin law professor's research. This effort to be helpful, while appreciated, may have introduced some distortion. On one hand, these lawyers may have been willing to go along with the interviewer's definition of the situation, which was implicit in the questions asked, rather than

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challenge the entire basis of the inquiry. On the other hand, a few may have modified a fact here and there to present a good story to entertain their old professor or to make themselves look good. While I cannot be sure that this did not happen, again the consistency of the stories across 100 lawyers suggests that this was not a major problem.

Finally, it should be noted that this article reports the author's interpretations of what he was told. Not all of the attorneys were asked exactly the same questions since, as the study progressed, the responses dictated a change in the focus from the Magnuson-Moss Warranty Act to consumer protection laws and then finally to the practice of law itself. This article, then, is an empirical description of a corner of the legal world that my assistant and I explored in some depth rather than a report of quantifiable data from a survey of a random sample of the bar. It should be read as a report from a preliminary study, offering suggestions the author thinks are true enough to warrant reliance until someone is willing to invest enough to produce better data and lucky enough to find a way to get them.

II. THE IMPACT OF CONSUMER PROTECTION STATUTES ON THE PRACTICE OF LAW

Heinz and Laumann (1978: 1114) tell us that "the tendency of lawyers' work to address congeries of problems associated with particular types of clients organizes the profession into types of lawyers: those serving corporations, and those serving individuals and individuals' small businesses." They point out that corporate work is likely to involve "symbol manipulation," while work for individuals will carry a heavy component of "people persuasion." My study offers additional confirmation of these observations. Certain members of the Wisconsin bar were much more likely to see an individual with a consumer complaint, while others were much more likely to be asked to lobby against consumer protection legislation, to draft contracts to cope with such laws, and to plan defensive strategies for dealing with consumer complaints. We will deal with these two types of lawyers separately.

Lawyers for Consumers

Lawyers see but a small percentage of all of the situations where someone might assert a claim under the many consumer protection laws (see Mayhew and Reiss, 1969). Some claims

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are never asserted because consumers fail to recognize that the product they receive is defective, that the forms used in financing the transaction fail to make the required disclosures, or that the debt collection tactics used by a creditor are prohibited (Best and Andreasen, 1977). Other claims are recognized but resolved in ways not involving lawyers. Some consumers see the cost of any attempt to resolve a minor consumer problem as not worth the effort. Resolving never to buy from the offending merchant or manufacturer again, they just "lump it" (Best and Andreason, 1977; Haefner and Leckenby, 1975; Mason and Himes, 1973; Warland, Herrmann and Willits, 1975). Some fix a defective item themselves, while others complain to the seller or the creditor and receive an adjustment which satisfies them. It is likely that most potential claims under consumer protection statutes are resolved in one of these ways (Curran, 1977: 109-10, 140, 196).

Some consumers go directly to remedy agents without consulting lawyers. For example, they may turn to the Better Business Bureau in Milwaukee or to one or more of several state agencies which mediate consumer complaints (cf. Steele, 1975; Thompson, 1979).[1] A few may go directly to a small claims court. Others contact the local district attorney who, at least in

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[1] In Wisconsin many state agencies attempt to mediate disputes between consumers and businesses (see Ladinsky, Macaulay, and Anderson, 1979). The Department of Agriculture, Trade and Consumer Protection issues regulations to control unfair trade practices. (see Wis. Stat. § 100.20 [1975]). In order to gain information about business practices which might indicate the need for new or amended regulations, the Department is eager to receive consumer complaints. After a written complaint form is filed, the agency sends a standard form letter to the complained-against business. Often the business responds with an offer to settle. If it does not, the agency must drop the matter unless its investigators determine that an unfair trade practice has been committed. One agency investigator is very active in mediating consumer disputes in the northern and central parts of the state, but the agency is much less involved in Milwaukee.

The Office of Consumer Protection of the Department of Justice mediates consumer complaints by sending out standard letters on the Attorney General's letterhead. Usually, this will prompt an offer by a business to make some adjustment (see, generally, Jeffries, 1974). There has been some conflict between Agriculture and Justice about which agency has jurisdiction to deal with consumer complaints. At times officials of Justice have viewed people at Agriculture as insufficiently aggressive in championing the consumer; those at Agriculture have not been pleased by Justice's "invasion" of what they view as their territory.

The Department of Motor Vehicles Dealer Inspection Unit mediates complaints about automobiles, particularly those involving used cars. It is given authority to enforce the requirement that used car dealers disclose on a standard sticker placed on the window of cars on their lot all defects they know about (see McNeil, Nevin, Trubek, and Miller, 1979). It has 14 field investigators, most of whom are former members of the state highway patrol. These investigators frequently mediate, dispensing justice based on their view of the condition of the car and the degree of compliance with the sticker law. (See [Madison] *Wisconsin State Journal*, Feb. 11, 1979.)

The Commissioner of Insurance also processes complaints by consumers (see Whitford and Kimball, 1974), as does the Public Utilities Commission.

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the smaller counties in Wisconsin, often offers a great deal of legal advice or even a rather coercive mediation service to consumers who are potential supporters in the next election.

Many lawyers in private practice reported to us that they never saw a case involving an individual consumer. Those who represented businesses and practice in the larger firms were likely to say this, but some business lawyers reported that they answered questions about consumer matters from clients and friends. Other lawyers talked about encountering consumer cases only now and then. Lawyers did see what they called "products liability" cases where a defective item had caused personal injury. However, these cases typically do not fall under consumer protection statutes, and the fact of personal injury opens the door to the chance of a substantial recovery. A specialized group of attorneys is expert in the techniques of asserting or defending products liability cases. Most lawyers knew these specialists and many referred cases to them. No similar network of access to specialists in consumer protection law seemed to exist. Several attorneys mentioned one lawyer whom they thought was an expert in consumer protection, but when I interviewed him, he said that he now tried to avoid such cases.

Those few dissatisfied consumers who survive the screening process and come to lawyers may have special characteristics or kinds of problems. First, some people will bring cases to lawyers that others would see as trivial but which they see as a matter of principle. Second, when regular clients appear with minor consumer problems, a lawyer may attempt to handle them in order to keep a client's good will; one lawyer called this a kind of "loss-leader" service. For example, a lawyer in a small county had drafted a wealthy farmer's estate plan and set up a corporation to handle some of his dealings in land development. The farmer, dissatisfied with a Chevrolet dealer's attempts to make a new car run satisfactorily, called his lawyer and told him to straighten out matters. The lawyer successfully negotiated with the dealer and sent the farmer a bill for only a nominal amount. Third, debtors who cannot pay are sometimes pushed into a lawyer's office by the actions of a creditor. The debtor or the lawyer may see consumer protection law as offering a way to lift some or all of the burden of indebtedness for an expensive item such as a car, a recreational vehicle, or a mobile home. Problems which the consumer might have been willing to overlook may

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now become the basis for a legal attempt to rescind the sale (cf. Landers, 1977).

Consumer cases also are brought to the attention of lawyers through informal social channels. Officers of a corporation which has retained a lawyer to deal with business problems may also ask for personal advice about how to deal with an expensive purchase about which they are dissatisfied. Many lawyers pointed out that they had friends, relatives, and neighbors who asked for advice informally. People who might not make a visit to a lawyer's office about a consumer matter will raise their problem with a lawyer they see at a church supper, a PTA meeting, or a cocktail party. One lawyer noted that it was hard to have a drink at a bar in Madison on a football weekend without being called on for free legal advice. Few of these problems ever become cases, but occasionally lawyers find one that demands more than a few minutes of talk.

Decisions about whether or not to contact a lawyer are affected by personal factors. One lawyer remarked that many people seem to need reassurance that it is legitimate to complain and make trouble for others (cf. Sniderman and Brody, 1977). Many people are hesitant about admitting that they were cheated by a retailer or manufacturer when they think they should have known better. Some lawyers said that most of their clients—both those who come to their office and those who ask for advice during informal contacts—come to them through friendship networks. A former client may talk with a friend at work or at a bar and end up sending the friend to see the lawyer (see Curran, 1977: 202, 203). Some people seem to need the encouragement of friends before they can take the plunge (Ladinsky, 1976; Lochner, 1975).[2] There seems to be a "folk culture" that defines, among other things, which kinds of cases one should take to a lawyer, which call for solutions not involving lawyers, and which should be just forgotten. Those facing aggressive debt collection procedures are likely to be told to see lawyers; those with complaints about the quality of products are usually advised just to forget it.

[2] In a poll of a sample of the population of Wisconsin, eighteen years and older, the State Bar of Wisconsin LawInfo Program reports that about 34 percent of the population thought that an ordinary person would get poor legal service on small matters. Forty-four percent of those who expected poor service had experienced consumer problems; 67 percent had family income below $15,000 per year. Nearly 70 percent of the sample, on the other hand, disagreed with the statement that "most lawyers aren't really interested in getting middle-income and working people as clients . . . they really prefer to work with wealthy people and business" (State Bar of Wisconsin, 1979).

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Many lawyers seek to avoid taking clients with consumer protection problems (Curran, 1977: 204). Firms that specialize in representing businesses discourage individuals from bringing their personal problems to the firm by the expensive elegance of their offices and often by the location of those offices. Everything about these firms tends to tell potential clients that these are expensive professionals who deal only with important people on important matters. One who is not to the manor born would hesitate to waste the time of this professional establishment with a mere personal matter.

Even lawyers who look more approachable have techniques for avoiding cases they do not want to take. Receptionists try to screen cases so that minor personal matters will not waste their bosses' time (cf. Hosticka, 1979). Lawyers engage in techniques of conversion or transformation of attitudes. Some try to brush off individuals by talking to them briefly on the telephone in order to keep them from coming to the office.[3] Some listen to people who come to the office for only a few minutes and then interrupt to spell out the cost of legal services. These attorneys see their role as that of educating would-be clients to see that they cannot afford to pursue the matter. The lawyer serves as a gatekeeper, keeping people from burdening the legal system.

If the potential client with a consumer matter is not rejected out of hand, lawyers may still limit their response to nonadversary roles. One part played fairly often might be that of the therapist or knowledgeable friend. The client is allowed to blow off steam and vent anger to a competent-seeming professional sitting in an office surrounded by law books and the other stage props of the profession. By body language and discussion, the lawyer can lead the client to redefine the situation so that he or she can accept it. What appeared to the client to be a clear case of fraud or bad faith comes on close examination to be seen as no more than a misunderstanding.

The lawyer may then "help" the client consider the practical options open in the situation. It may be against the client's interests to pursue the matter: legal action may cost more than it is worth, either directly or indirectly in terms of

[3] One lawyer told us that "I am in an office with three lawyers, and we opened last November, breaking away from a larger firm. We have three secretaries and a half-time bookeeper, and they keep good records of every activity of the office. We take over 50 telephone calls every morning up to 1:00. Seven out of ten of these calls will involve a client who wants to shoot the breeze on some off-beat problem or idea. We do not bill in these cases, and I do not think that most lawyers would. A lot of free advice is available to anyone who will call. There is no real crisis in the delivery of legal services. The middle class can afford them, but it just doesn't want to pay."

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the client's long-run interests. The client may also have adopted too narrow—perhaps too legalistic—a view of the case. The client's grievance may be one which the lawyer could translate into a perfectly legitimate—indeed compelling—legal argument, but the "law" may not be the only standard by which the merits of each party will be judged. Such arguments, needless to say, may anger the potential client; or they may make the client feel foolish for being upset and bothering a lawyer. On the other hand, by helping the client see the case in a new light, the lawyer may be indulging in a kind of therapy.

Perhaps the lawyer will take a further step and combine the therapist role with that of an information broker or a coach, hearing the complaint and then referring the client elsewhere for a remedy. This gets the would-be client out of the office less unhappy than had the lawyer just rejected the case and offered nothing. People can be sent to state agencies which mediate consumer claims or to private organizations such as the Better Business Bureau. Some lawyers go further and try to coach clients on how to complain effectively to a seller or creditor or how to handle a case in a small claims court without a lawyer. Sometimes this information and coaching may be of more help than formal legal advice. Consumers may need to be reassured that they have a legitimate complaint, to be given the courage to complain, to learn where to go and whom to see, and to be given a few good rhetorical ploys to use in the process of solving their problems. Sometimes the coaching does not help the client. The referral only prompts the client to give up. Few lawyers know what happens when they tell a client to complain to the seller or go to a state agency. Clients rarely report back to the lawyer unless they are friends or neighbors. On the other hand, such referrals may serve to help lawyers see themselves as helpful people.

Attorneys who become more involved in a case may find themselves playing the part of go-between or informal mediator. They may telephone or write the seller or creditor to state the consumer's complaint. The very restatement of that complaint by a professional is likely to make it a complex communication. On one level, the attorney is reporting a version of the situation which may be unknown to the seller or creditor even in cases where consumers have complained before seeing a lawyer. The lawyer may be able to organize a presentation so that the basis of the complaint is more understandable, and transform it so that it is more persuasive. The fact that the report comes from a lawyer is likely to give

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the complaint at least some minimal legitimacy. The lawyer is saying that he or she has reviewed the buyer or debtor's story, that the assertions of fact are at least plausible, and that the buyer or debtor has reason to complain if these are the facts.

The lawyer is more likely than the consumer to get to talk to someone who has authority to do something about a problem. For example, the consumer may have gotten no farther than the sales person, while the lawyer may gain access to the manager or owner of the business. The lawyer is likely to speak as a social equal of the representative of the seller or debtor, though such may not be the case for the consumer. This may be important. A retailer, for example, may care little about the opinions of a factory worker complainant, but wish to avoid having a professional judge him or her as foolish or unreasonable. Finally, the attorney's professional identification conveys a tacit threat that an unsatisfactory response could be followed by something the seller or creditor might find unpleasant. Indeed the unstated and vague threat of further action may be coercive precisely because it is vague. If sellers and creditors were aware of the cost barriers to litigation, and if they knew, or appreciated, just how much of a paper tiger most attorneys are in consumer matters, they would be less easily intimidated.

At this point, a seller or creditor may assert that the client has just misunderstood the situation or has told the lawyer only part of the story. At this stage lawyers often discover that a client's case is not as clear-cut as the client claimed. However, sellers and creditors still are more likely to make conciliatory responses to lawyers than to buyers or debtors, as long as the lawyers do not ask for too much. And it is part of a lawyer's stock in trade to know how much is too much (cf. Ross, 1970). One lawyer told us:

> I enjoy negotiation. Of course, what happens is not determined by the merits . . . One has a discussion about what is best for everyone. You do not make an adversary matter out of it. It is a game, and it is funny or sad, depending on how you look at it. You call the other side and tell him that you understand that he has a problem satisfying customers but that you have a client who is really hot and wants to sue for the principle of the thing. Then you say, "Maybe I can help you and talk my client into accepting something that is reasonable." The other side knows what you are doing. It is a game. You never want to get to the merits of the case.

The seller or creditor is likely to make some kind of gesture so that the lawyer will not have to return to the client empty-handed. The simplest gesture the seller or creditor can make is a letter of apology, explaining how the problem occurred and accepting some or all of the blame. A supervisor may attempt

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to blame an employee with whom the consumer dealt, perhaps remarking that it is difficult to find good sales people or mechanics. Manufacturers often blame dealers, and dealers, in turn, seem eager to pass the blame on to manufacturers. In addition to an apology, the merchant may also offer token reparations such as minor repairs or free samples of its products.

More rarely, the lawyer may be able to persuade a seller or manufacturer to offer the consumer a refund or replacement for a defective product. Sometimes a lawyer can gain a refund or replacement even where the flaw in the thing purchased was not so material as to warrant "revocation of acceptance" under Section 2-608 of the Uniform Commercial Code. New car dealers or fly-by-night merchants are unlikely to do this; new car dealers are tightly controlled by manufacturers, who seem to value cost control more than consumer goodwill (see Whitford, 1968); fly-by-night operators seldom worry about repeat business. But Sears, Montgomery Ward, J.C. Penney, and many other large department stores, have an announced policy of consumer satisfaction. One can get his or her money back without having to establish that there is something materially wrong with the product (see Ross and Littlefield, 1978). Other retailers and manufacturers do not announce this as their policy, but will grant refunds or replacements selectively when their officials think that the customer has reason to complain or if repeat business is valued. In such cases, a telephone call from a lawyer may be enough to swing the balance in favor of the complainant—it probably seems easier to make a refund than to argue with a lawyer. Occasionally, a lawyer may be able to persuade a new car dealer who has sold a client a used car to pay some percentage of the cost of repairs of a major item such as a transmission, provided the work is done in the dealer's shop. A lawyer may be able to persuade a creditor to give a client more time in which to pay rather than repossessing the item in dispute. But lawyers are seldom able to persuade a seller or creditor to pay a large sum as damages to an aggrieved buyer or debtor.

The lawyer's view of the adequacy of the remedy offered by the merchant or lender will necessarily turn on a reappraisal of the client's case in light of the other side's story, the ease of taking further action, the likelihood of success of such action, and the client's probable reaction to what has been offered. The lawyer may have to persuade the client to see the situation in a new light. The response of the merchant or lender must

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also be considered. The axiom that "there are two sides to every story" now becomes a reality for the client. An important part of the lawyer's task now is to persuade the client to see the problem as an adjustment between competing claims and interests, rather than as one warranting a fight for principle. From the lawyer's perspective, the client must now be guided to the view that what the merchant or lender has offered is probably the best that could be expected. Anything more may require legal services more costly than the client can afford or is prepared to pay.

In this context, lawyers are often pushed into a role Justice Brandeis described as "counsel for the situation." Geoffrey Hazard (1978: 64-65) notes that such a lawyer must be advocate, mediator, entrepreneur, and judge all rolled into one. He or she is called on to be expert in problem solving and asked to produce a solution which will be acceptable over time rather than only an immediate victory for the client. This often means persuading or coercing both the other party and the client to reach what the lawyer sees as a proper solution, often "translating inarticulate or exaggerated claims . . . into temperate and mutually intelligible terms of communication." At all levels of law practice, this is a difficult task. The client tends to want vindication, while the lawyer is talking about costs balanced against benefits. It is an especially difficult task when the client is angry but has what the lawyer sees as a questionable case that involves too little money to warrant even drafting a complaint—let alone litigating. Clients in consumer protection cases often find it hard to believe that they cannot do better than the lawyer says they can. Curran (1977: 214) reports that "persons consulting lawyers on . . . consumer difficulties . . . are more likely to be negative about the lawyer-client exchange." The client may leave the lawyer without obtaining satisfaction, but the client leaves.

Only in rare instances will lawyers go further than conciliatory negotiation in a consumer matter. If the antagonist fails to offer a satisfactory settlement, the lawyer may counter with more explicit threats of unpleasant consequences. But some lawyers report that once overt threats are made, one is likely to have to draft and file a complaint before any offer of settlement will be made by the other side. One reason is that serious threats from a lawyer are likely to prompt sellers or creditors to send the matter to their lawyers. But even at this point, the lawyers for both sides have every reason to settle rather than litigate. Some consumer cases do go to trial—we

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can find appellate opinions to put in law school casebooks[4]—but they are unusual and atypical of the mass of consumer complaints.

There are a number of reasons why lawyers either refuse to take consumer protection cases or tend to play only nonadversarial roles when they try to help a client with such a complaint. The most obvious explanation is that the costs of handling these cases in a more adversarial style would be more than most clients would be willing to pay. Few consumers can afford many hours of lawyers' time billed at from $35 to $75 an hour just to argue about a $400 repair to their car or even a repossession of a $5,000 used car. Few lawyers can afford to spend time on cases that will not pay. One lawyer in northern Wisconsin emphasized that "after all, I am self employed." Another lawyer from one of Wisconsin's important firms commented,

> A lawyer in private practice has to earn money. He has to take a very hard look at the cases that are brought to him, and he must reject those which will not pay. It is very hard to have to tell a potential client that she or he has a meritorious case and would likely win but that there is not enough involved to make it worth taking. As you get older, you have to carry your part in covering your share of the

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[4] White (1977: 1272) found that the warranty and warranty disclaimer sections of the Uniform Commercial Code were heavily cited in reported cases from California, New York, and Ohio published in the late 1950s and early 1960s, and that these sections comprised a substantial plurality of all the citations to the Uniform Commercial Code from each of the three states he studied. He explained this result by noting that "many of these warranty cases are brought by an allegedly injured consumer-buyer against the seller, with whom he has no continuing relationship. Unlike the businessperson, the consumer-buyer pays no added litigation cost in the form of injured or severed business relationships" (cf. Macaulay, 1963). However, White does not indicate how many of the warranty cases he found involved consumer-buyers and how many of the cases involving consumer-buyers reflected situations where the consumer-buyer alleged that a personal injury had been caused by a defective product. While a consumer's litigation costs might be lower than a business-buyer's in terms of severed or injured relationships, the potential benefits of litigation to a consumer-buyer are also likely to be less in cases where there was no personal injury to support a large claim for damages, if only because consumer purchases seldom cost as much as a business purchase.

Jane Limprecht, my research assistant, collected all of the reported cases in 1977 which involved a breach of warranty theory from the *Modern Federal Digest*, the *U.C.C. Reporter*, and *West's General Digest*. Of the 147 cases she discovered, 82 involved business purchases and 65 involved consumer-buyers. Thirty of the consumer cases had personal injuries prompting substantial damage claims; of the 35 that did not involve personal injuries, 16 involved new or used cars or pick-up trucks, and six involved mobile homes, with claims running from $1,050 to $14,395, where reported. Four more cases involved boats and yachts, with claims running from $950 to $37,000. The other consumer-buyer cases without personal injury involved such things as an inflatable mammary prosthesis, a vault for a child's casket, a home sewage treatment system, and a stove which exploded and destroyed a house. These reported decisions suggest that consumer product quality cases involving no personal injury that get to the appellate courts are likely to be prompted by certain kinds of products—particularly yachts, cars, and mobile homes—and we might guess that they are likely to involve consumers who can afford both these products and lawyers.

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> overhead. When I was younger, I could take just about any case. The firm could always chalk it off to training a young lawyer. Now I am an experienced lawyer, and I must invest my time where there is enough money involved to help the firm.

Consumer product quality cases are very similar to products liability litigation except for the factor of personal injury. But this factor in products liability offers the chance for recovering very large damages and prompts lawyers to work for contingent fees.

Not only are consumer protection cases unlikely to warrant substantial fees (Curran, 1977: 208), but they usually require a major investment of professional time if litigation is to be considered seriously. Those most expert about consumer laws tend to be the lawyers who counsel businesses and draft documents in light of these laws. Yet these are the lawyers least likely to see an individual consumer's case—except, perhaps, as a favor to a friend. Most other lawyers in Wisconsin know very little about any of the many consumer protection laws, and it is difficult for most attorneys to master all of the relevant statutes, regulations, and cases in this area. Most of them did not study consumer law in law school. Either they graduated before most of it was passed or they did not take elective courses in this area when they were in law school. Moreover, since consumer protection cases worth an investment of time come up so infrequently, a lawyer is not even likely to know whom to call for help. Most lawyers in Wisconsin lack easy access to the text of consumer protection law. Most are unlikely to own the necessary law books themselves. The folk wisdom of private practice dictates that one should buy only those law books that are likely to pay for themselves. Most lawyers have access to the Wisconsin statutes, the decisions of the state courts, and at least some of the state administrative regulations. Fewer have access to federal materials dealing with statutes such as Truth in Lending (15 U.S.C. § 1601, *et seq.* [1970]) or the Magnuson-Moss Warranty Act; and only a very few have ready access to loose-leaf services dealing with trade regulation. Many lawyers rely heavily on practice manuals and on continuing legal education handbooks for most of their legal research. However, there are not many of these in the area of consumer protection. Lawyers in Milwaukee and Madison have access to relatively complete law libraries. Lawyers in other areas could travel to these cities to do research or hire a lawyer who practices there to do the work. But this is not practical if the potential recovery in a case is small. Even those in Milwaukee or Madison would have

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to leave their offices to use the libraries located there, and the time invested in doing this might be too much for a client who can pay only a modest fee.

Furthermore, consumer protection law is complex and involves many qualitative concepts, such as "reasonable" or "unconscionable." This uncertainty makes the law hard to apply; even an expert cannot be sure how a court would decide a particular case. For example, suppose a consumer were dissatisfied with a newly purchased car and wanted to return it for a refund. Approached legally, one probably would have to overturn the warranty disclaimers and limitations of remedy found on the form contracts under which the car was sold. To do this, a lawyer would have to apply the Uniform Commercial Code and the Magnuson-Moss Warranty Act, arguing such things as whether "circumstances [had] cause[d] a . . . limited remedy to fail of its essential purpose. . . ." This concept is not well defined in the Code or in the cases interpreting it (see Eddy, 1977b). A lawyer might also have to argue about whether the remedy limitations were "unconscionable," and whether the regulations governing remedy limitations issued by the Federal Trade Commission under the Magnuson-Moss Warranty Act applied in a breach of warranty action brought in a state court by an individual or were limited to enforcement by the FTC in federal court (see Schroeder, 1978). One might seek to cast the cause of action as one for innocent misrepresentation but couple that action to all of the UCC's remedies for breach of warranty under the little-known section 2-721. These legal strategies are all matters of debate, and any decision won before a trial court would be vulnerable to an appeal. Many other consumer protection laws present similar problems.

Apart from the nature of the law itself, consumers often face difficult burdens of proof under these laws. The buyer who wants to return the car, in our example, would have to establish that the car was defective when it was delivered or that the seller or manufacturer was in some way responsible for a defect that appeared later. This kind of evidentiary problem is faced often in products liability litigation where personal injury puts several hundred thousand dollars at issue, and there the matter usually is established by expert testimony (Rheingold, 1977). Products liability supports a high degree of specialization. For example, a recent issue of the *Trial Lawyers Quarterly* (Winter, 1978) carried an advertisement for a consulting service which claimed "a quarter century's

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experience" in testifying in cases where a client had been "maimed by a lawn mower." However, experts are expensive, and one cannot afford to use them in the typical action arising under a consumer protection statute or regulation. One office offering legal services to the poor was able to use expert testimony in cases involving complaints about automobiles because it could call on a program which trained poor people to be automobile mechanics, but this kind of access to experts is rare.

We were told about a case where all of these difficulties were surmounted, and it can serve as an example of how rarely one might expect a consumer case to be taken as far as the complaint stage on the way toward litigation. A wealthy doctor ordered a $500,000 custom-made yacht from a boat yard. He refused to accept delivery, asserting that the boat was defective in many respects. He sued to recover his down payment, and also asked for a large sum as damages. His complaint reflected a high degree of creativity in the blending of traditional and newly developing contract and consumer protection theories. Only the wealthy can afford to pay for such creativity as well as the expert testimony that was called for. The example suggests that consumer protection law may most benefit an unintended population—the wealthy who can afford to pursue individual rights in dealing with the purchase of yachts and other luxury goods. The reformers may have aimed an inadequate weapon at the wrong target (cf. McNeil, *et al.*, 1979).

Problems of cost and difficulty in litigation have not gone completely unnoticed by those who draft consumer protection legislation. Some of these statutes seem based on the assumption that the individual rights they create will be reinforced by provisions for lawyers at low or no cost—either as part of an antipoverty program or as a benefit of membership in a particular group. Other statutes award attorneys' fees to consumers who win, and many of these newly created rights open the way for class action suits. Magnuson-Moss even makes a bow toward encouraging suppliers of consumer goods to set up informal arbitration schemes. All of these approaches may have had some effect, but neither singly nor all together do they offer an adequate solution to the problems of cost and difficulty in consumer litigation. There are a number of reasons why this is so.

Low-cost or free legal service plans employ lawyers who are willing to deal with consumer problems. Legal Action for Wisconsin (LAW), a program to supply legal services to people

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with low incomes in Milwaukee and Madison, probably sees as many consumers as any group of nongovernmental lawyers in the state. However, LAW's services are limited and must be rationed carefully. LAW's attorneys may make a telephone call or write a letter seeking relief if either strategy looks appropriate, but most often its lawyers refer clients to the consumer mediation service of the Department of Justice or to the Concerned Consumers' League, a private organization which trains low-income consumers to complain effectively or to use the Small Claims Court. Occasionally, LAW lawyers will make an appearance in the Small Claims Court on a consumer matter, but they try to avoid this so that they can devote their time to what they see as more important matters. Sometimes, the LAW lawyers will attempt to work out a complicated consumer financing problem that looms large in the life of a poor client, and they frequently attempt to use the federal Truth-in-Lending law or the Wisconsin Consumer Act to strike down a transaction. Sometimes they assert a highly technical defense based on these statutes as a surrogate for bankruptcy or to fight a breach-of-warranty claim. For example, it may be easier to find a clause in a form contract which violates statutory requirements than to prove that the goods were defective and that the seller is responsible for the defects (see Cerra, 1977; Landers, 1977).

Wisconsin Judicare pays private lawyers to take cases for the poor in northern and western Wisconsin. However, poor people rarely bring consumer protection cases to these lawyers. Lawyers who take Judicare cases say that they usually refer consumer complaints to officials of the state Department of Agriculture, Trade, and Consumer Protection who ride circuit around the state to mediate complaints. Occasionally Judicare lawyers write letters to retailers or businesses which repair cars, snowmobiles, or mobile homes; but they say that Judicare fees for consumer matters are so low that they often do not bother submitting a bill to Judicare for giving advice over the telephone or dictating a short letter and that they are unlikely to consider doing much more than this with a poor person's consumer problem, since it just would not pay.

Members of a number of labor unions, condominiums, cooperatives, and student organizations are entitled to the benefit of legal services under various plans. However, under almost all plans the amount of service is limited and carefully defined. Usually a member is entitled to a specified number of telephone calls or office visits. If a legal problem warranting

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more service is discovered, the member can retain a plan lawyer at a reduced rate. The use of these plans by members with consumer disputes varies, but few lawyers working for plans see many of these matters.

Members of cooperatives and of primary and secondary school teachers' unions almost never bring consumer matters to the lawyers who serve those plans. Lawyers employed by these plans believe that members face few consumer disputes which they cannot resolve by their own actions. One lawyer reports that members of his plan tend to read *Consumer Reports*, to shop carefully both for price and the cost of financing, to be able to borrow from a credit union rather than paying high rates to a loan company or an automobile dealer, and to buy goods that would need servicing only from businesses likely to be able to provide it. In short, they are model consumers who need little legal advice. Another lawyer suggests that they are the type of people who are unwilling to admit it when they do make a bad purchase or allow themselves to be fooled or cheated. Those who deny they have problems also have little need for legal advice.

The members of the condominium group plans also bring few consumer protection problems directly to their lawyers. However, these lawyers attend condominium association meetings and often make presentations on how to avoid common consumer frauds and what to look for in consumer contracts. Before or after these meetings, individual members often ask for informal advice about consumer matters, and this may be the extent of the legal service needed by these condominium owners.

When we turn to student plans we see a very different picture. Students at several campuses of the University of Wisconsin are entitled to legal service, and many of them use these benefits. Typically, plan employees train the students to handle their own case before a small claims court or tell them how to invoke the complaint procedure of the state agency that mediates consumer complaints in the area in question. Students often prefer to assert their rights rather than compromise. Some students seem to delight in battling local landlords and merchants in whatever forum they can find. But students tend to have the time to devote to such battles, and landlords and retailers tend not to value student patronage enough to remedy complaints voluntarily. When a pattern of unfair practice by a particular retailer or landlord is discovered,

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the plan's lawyers attempt to find a general remedy for the students to prevent future abuses.

Members of plans that benefit industrial unions fall somewhere between cooperative members and the students in terms of using their services in the consumer area. Industrial union plans usually are framed so that the lawyers cannot get rich off them, and often have problems of overload. As a result, their services are strictly rationed. One firm which provides legal services to many union locals' plans will write letters to merchants or refer members with consumer complaints to a small claims court or the mediation service of a state agency, but little more. One of their attorneys says that he only writes letters and will not telephone sellers, because if he telephoned, he would have to listen to the seller's side of the story and there is never time to do this. This lawyer sees consumer matters as less important than the many other kinds of cases that plan members regularly bring to him.

One law firm representing several union plans does sometimes pour much time and effort into consumer protection matters. The firm member who handles most of these cases negotiates with manufacturers, retailers, sellers of services, record and book clubs, health and dance studios, and the like. If he cannot get a good settlement, he takes the case himself to a small claims court. He does not think that clients can handle cases by themselves before legal agencies. This lawyer has a good working knowledge of consumer protection law and ready access to the firm's large law library which has the materials needed for this work. However, this firm is not typical. Group legal services are viewed as a cause by its partners; and though there may be long-run benefits to the firm, in the short run they are not being paid fully for all of the services they provide. One can wonder how long the firm will be able to devote this much energy to individual cases and whether we can expect other firms to follow their pattern. Moreover, it is not clear how popular group legal service plans generally are with union leaders and members. Even if a law firm can offer a high level of service, union locals may not continue to bargain for legal services as a fringe benefit.

Some consumer protection statutes have followed the pattern set by civil rights acts and allowed successful consumers to recover reasonable attorneys' fees. One might expect this to be an incentive for lawyers to handle these matters. However, few lawyers know about the attorney's fee provisions in consumer protection statutes, and those who do

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know about them point out that these really are contingent fees because one must win the case in order to benefit. As a result, these statutes are unlikely to be very attractive in close cases, since they do not give lawyers the opportunity to win very large fees in some cases to offset the cases they lose, where they will have invested their time for no return. Furthermore, most statutes leave the amount of recovery to the discretion of the trial judge. Many trial judges do not like awarding bounties to lawyers who bring certain types of cases. These judges often will award fees at a rate far below that usually paid in the community for attorney's services. In one recent Wisconsin civil rights case won by the complainant, the size of the lawyers' fees requested was the subject of critical newspaper comment (Kendrick, 1978). A large award of fees acts as a penalty, and many judges do not see the conduct regulated by consumer statutes as warranting punishment. Moreover, elected judges may worry about the reaction of the voters to awards of large sums as attorneys' fees.

The economic barriers to claims made under consumer statutes might be overcome to some extent if many small claims could be aggregated into a class action. For example, all those buyers of Oldsmobiles who discovered that they had received cars equipped with Chevrolet engines could be a powerful class. However, this is not a technique suited to most consumer problems, which turn on the facts of individual cases and present no common problem to aggregate. Moreover, class actions are hard to manage successfully. A lawyer must discover that the problem is common to many consumers and then find them so that the constitutionally required notice can be given to each one. This costs more money than lawyers are usually able to invest on the mere chance of winning a large judgment. The general belief among Wisconsin lawyers is that those lacking experience in handling class actions should not attempt them.

There may be other important factors besides the economic ones we have discussed that make Wisconsin lawyers reluctant to take consumer cases, and that affect the way they handle the ones they do take. Some of the information gained in our interviews suggests that problems with an individual rights strategy in the consumer area would not be solved if these cases were made only a little more attractive economically. Many of the attorneys interviewed represent banks, lenders, local car dealers, or even the major automobile manufacturers when they are sued in local courts. These lawyers would face a

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pure conflict of interest if they were to take a consumer protection case against one of their regular clients (cf. Hagy, 1977; Paul, 1976).[5] Other lawyers have less direct but nonetheless important ties to the business community. Although these ties to a segment of that community may enable a lawyer to be more effective in working out reasonable settlements or at least gaining a gesture, an over-aggressive pursuit of a consumer claim might risk the goodwill of existing and potential clients or endanger a whole network of contacts. Even lawyers who would face no direct conflict of interest think it important to avoid offending business people unnecessarily (cf. Brakel, 1974). One lawyer in northern Wisconsin stressed that, "you can always get a merchant's name in the newspaper just by filing a complaint. However, this will make him bitter, and you will pay for it in the future." Lawyers' contacts are part of their stock in trade. They know, for example, where to get financing or who might want to invest in a business deal their client is interested in. Lawyers also often get clients through referrals and recommendations, and bankers and retailers frequently serve as experts who can tell others where to find a good lawyer. In short, most lawyers in private practice must work hard to become and stay members in good standing of the local business and political community if they are to prosper.

We cannot expect lawyers concerned with the reaction of business people to take a tough approach to solving consumer problems; they have too much to lose and little to gain. It is safer to refuse these cases or refer them to a governmental agency which mediates consumer complaints against business. It is safer to call an influential business person to try to work out matters in a low-key conciliatory manner than to file complaints. If the lawyer handles the situation skillfully, a conciliatory approach can even gain the appreciation of the business person against whom the consumer is complaining. A dissatisfied customer can be transformed into a person with much less sense of grievance. Whether or not the consumer is persuaded that a conciliatory approach is the best one, considering the whole picture, the consumer's lawyer serves at least the short-run interest of the business complained against if the client is persuaded to drop the matter and go away.

[5] A conflict of interest problem does not always stop a lawyer from acting as a mediator. One lawyer told us that "in one case a customer came to the office, and he had a complaint against a store we represent. Clearly, the store should have made good on the matter, and so I called the store and told them to fix things up. They did without question, and the man left my office happy."

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The local legal community recognizes legitimate and not so legitimate ways of resolving problems. For example, most lawyers feel strongly that one should not escalate a simple dispute into full-scale warfare which will benefit neither the parties nor the lawyers. Lawyers interested in the good opinion of other members of the bar and bench will follow accepted, routine, and simple ways of dealing with consumer problems. Only when one is doing a public service by going after a fly-by-night company or some other disreputable firm is a tough adversary stance seen as appropriate. There is also a segment of the legal community that is hostile to consumer protection law and to those who assert their rights under them. They view business people—at least local business people—as honest and reasonable. While misunderstandings are always possible, these lawyers doubt that serious wrongs are ever committed by the local bank, automobile dealer, or appliance store. Consumers who complain often are seen as deadbeats trying to escape honest debts or as cranks who are unwilling to accept a business' honest efforts to make things right. For example, one lawyer who practices in a large city states:

> Most of the fraud now is against the lenders. Debtors, especially the young kids, are wise to the tricks. They know that it costs money and takes time to get the wheels in motion, and it isn't worth the trouble if there isn't too much money involved. Recently a young woman bought a brand new car and financed it through a bank. She got a job delivering photographic film and put over 100,000 miles on that car within a year. Then when she was tired of making payments, she just left the car in the bank's parking lot and put the keys and all the papers into the night deposit slot with a note saying, "Here's your car back." What can the bank do realistically? They may be entitled to a deficiency judgment, but it is not worth the trouble to get it under the new laws. . . .
>
> The hallways outside small claims courts are crowded with little old people, crying because of the way young kids have screwed them out of several month's rent. . . . A judgment is just a piece of paper and the Wisconsin Consumer Act has made collection procedures so difficult that a judgment is almost worthless.

Two other lawyers who practice in a small town, and were interviewed together, express similar views:

> There has to be some way of handling the deadbeats, who are the only ones who benefit from all the consumer laws anyway. The administrative costs of consumer protection laws are a major cost of business to firms out here in smaller communities because they are always operating on a shoestring.
>
> We feel sort of grimy representing consumer clients. In one recent case, a young man was being sued for a legitimate $700 debt. We negotiated in light of consumer protection laws and got the guy a settlement for $500. It was really a $200 robbery, just as if the guy had gone into the store with a gun.

As Abel (1979b: 27) puts it, "Lawyers inevitably identify with those they serve; law practice would be intolerable otherwise, whatever we may say about the importance of

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objectivity. . . ." And most lawyers serve business interests or relatively well-off individuals who run businesses. Undoubtedly, the quotations are accurate descriptions of some consumers whom lawyers encounter. On the other hand, some lawyers view the average consumer-client more positively. Another lawyer in the same small town as the two interviewed together says, "local people are being ripped off by local merchants every day. . . . Attorneys in town can't believe that these guys whose fathers went to the country club with their fathers could be dishonest. They consider these ripoffs just 'tough dealing.' But the local merchants have absolute power—people have to deal with them, and merchants just can't resist the temptation to use this power for all they're worth."

Many lawyers also have personal reasons for hostility to consumers and consumer protection laws. Lawyers are engaged in small businesses themselves. They may face problems when they try to collect fees from clients (see Granelli, 1979). They see and read about dissatisfied clients who have been bringing enough malpractice suits to drive up the malpractice insurance rates for all lawyers. Moreover, they themselves are unlikely to face serious consumer problems. Attorneys tend to be affluent enough and sufficiently well connected that the businesses they have personal dealings with will make efforts to keep them happy. Some lawyers make many major purchases from or through clients. Lawyers generally understand the consumer contracts that they sign. While they may not read a particular contract, the provisions of, say, a conditional sales contract will involve variations on a well-known theme. Lawyers pay their debts or know how to negotiate with their creditors to avoid collection procedures and trouble. And if there is a problem, lawyers tend to be assertive people who complain directly to the seller and get their defective stereo or camera fixed or replaced. Lawyers are more likely to personally experience consumer problems that flow from computer and data processing errors, but these tend to be viewed as frustrating annoyances and not as major problems. One attorney reflects a common position in saying:

> I am not sympathetic to consumer complaints. I refer them to the Department of Agriculture Consumer Protection Office, and I have no desire to hear how they come out. *People should find a reputable place to trade instead of bargain hunting. They ought to know better than to trust fly-by-nights.* [Emphasis added]

As I have suggested, a lawyer who holds such a negative view of consumer laws and consumers who complain is likely to find wholly inappropriate an aggressive pursuit of the

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remedies granted by these laws. A number of attorneys suggested that a lawyer has an obligation to judge the true merit of a client's case and to use only reasonable means to solve problems. These lawyers seemed to be saying that an attorney should not aggressively assert good cases under ill-advised or unjust statutes, but no one went so far as to say this explicitly. A reasonable approach in the consumer area was seen as a compromise. For example, several attorneys were very critical of other members of the bar who had used the Wisconsin Consumer Act so that a lender who had violated what they saw as a "technical" requirement of the statute would not be paid for a car which the consumer would keep. While this might be the letter of the law, apparently a responsible lawyer would negotiate a settlement whereby the consumer would pay for the car but would pay less as a result of the lender's error. Several lawyers said that if a lawyer for a consumer offered an honest complaint about the quality of a product or service, it would be resolved in a manner that ought to satisfy anyone who was reasonable. A lawyer who sued in such a matter would be only trying to help a client illegitimately wiggle out of a contract after he or she had a change of heart about a purchase, particularly if the case was one a manufacturer or retailer could not afford to defend on the merits. A lawyer who represents Ford in actions brought in certain areas of Wisconsin commented, "The economics are not only a problem for consumers. How many $200 transmission cases can Ford defend in Small Claims Court? Lots of suits are bought out only because it is easier to buy them off than defend them. A lot of people forget that there are cost barriers to defending cases too. Ford cannot bring an expert from Detroit and pay me to defend product quality cases, and a lot of lawyers for plaintiffs know this and count on it when they file a complaint."

Those attorneys who often press consumer rights are called such things as members of the "rag-tag bar" who have no rating in Martindale-Hubbel and who ignore the economic realities of practice. An older lawyer comments that many younger lawyers are very consumer minded and seem to be "involved emotionally with clients when the word consumer comes up." One attorney who characterizes himself as an "establishment lawyer" explains that in Madison and Milwaukee there now are many lawyers who do not depend on practice for their total income or who live life styles in which they need far less than most people. He is particularly

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concerned about women lawyers who, he believes, live off their husband's income and thus are freed to play games and crusade without recognizing the economic realities of practice. Still another attorney points out that consumer cases are often brought by young lawyers just beginning practice. Since they have few cases and want to gain experience, these beginners often refuse to accept reasonable settlements and file complaints. Similar objections are made to some legal services program lawyers who fail to go along with the customs of the bar about the range of reasonable settlements, and who are seen as far too aggressive in asserting questionable claims against established businesses. Some older "establishment" lawyers are annoyed by the mavericks, while others view the younger lawyers with amusement, predicting that they would learn what to do with such cases as they grew up.

Not all lawyers are tied to the local business and legal establishments. Yet even those lawyers who are not in the club face disincentives to using consumer lawyers. Of course, these lawyers are not free to treat every potential client who walks in from the street as the bearer of a major cause. They must ration their time among the worthwhile cases that come to them and balance their good works with enough paying clients so that they can meet payrolls and pay the rent and utility bills. Many who call themselves "movement" lawyers and who are engaged in representing various causes do not honor consumerism any more than do establishment lawyers. Consumer protection is viewed by many of these "progressive" lawyers as only a middle-class concern. It just is not as important as criminal defense of unpopular clients or battling local government authorities on behalf of migrant laborers. Even some who see themselves as radicals seem to have internalized many of the norms of capitalist society about paying debts and avoiding trouble by being careful at the outset of transactions. This attitude is reflected in the following comments of a person who regards himself as a progressive lawyer and who has represented a number of unpopular clients:

> You want to avoid filing complaints and trying consumer law suits. Partly this is economic, but we cannot overlook another important reason. What have you done when you win one of these cases? You have saved a guy a couple of bucks in a minor rip-off. It just isn't fun. It would be a boring hassle. If you win, the client gets only a marginal benefit, and he won't be grateful. So this kind of case will fall to the bottom of the pile of things to do. There are many cases that are far more satisfying. We take consumer cases sometimes, but they are not the things we really enjoy.
>
> You may feel funny about even negotiating consumer cases. A

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> lawyer often can get his client something he is not really entitled to. For example, one client had a contract with a health club. There was nothing really wrong with it. The client was just tired of the club. We wrote a letter on our letterhead, and the club folded and let him out of the deal. This isn't the way the case should have come out, but it is the way it works. You do not get a great deal of satisfaction out of such a case, and you will try to avoid doing this sort of thing when you can.

Even "movement" lawyers report that they must distrust consumer clients who complain. They say that many are "flaky" or "freaks" who simply do not understand the situation or who will omit or make up "facts" and get the lawyer out on a limb. Many of them have mistaken ideas about their legal rights and will not accept the lawyer's attempt to tell them that they are wrong. It is not worth the time it takes to argue with them about what the statutes say. Many are seen by the lawyers as people projecting their anger onto a single dispute in an attempt to get even. "You just have to try to ward off those potential clients who are overreacting or are crazy."

A number of lawyers report that many Wisconsin judges and their clerks are not sympathetic to an adversary handling of consumer protection laws. One lawyer explained that the local judges are all experienced lawyers who understand how such cases should be handled, and so he could end consumer cases without much difficulty by simple motions; the judges just were not going to let these cases go to juries or even to trial. Judges and clerks will see that their time is not wasted by cases which they think never should have been brought to them. Many judges will help consumers handling their own cases in a small claims court reach some kind of settlement, but if a consumer wants to try the case, some judges respond by applying the rules of procedure and evidence very technically so that they will not have to reach the merits. These lawyers tell stories about trial judges who refuse to enforce individual claims based on Wisconsin administrative regulations designed to protect consumers. The judges, it is said, seem to view these regulations as illegitimate enactments by liberal reformers in Madison who are out of touch with conditions in the rest of the state.

Judges are also likely to be unfamiliar with these regulations and with federal materials, and they may lack ready access to copies of these laws or to articles in law reviews explaining various provisions. A lawyer for a local retailer, it was reported, successfully defended a consumer case, in which his client had violated a state regulation, on the ground that the Wisconsin Administrative Code lacked a good index; the lawyer for the consumer had not played fairly when

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he raised a law with which lawyers in the community and the judge were not familiar. Another lawyer remarked that he would not use the Magnuson-Moss Warranty Act in a case brought in a state court, although this is just what the drafters of that act planned, because "as soon as you throw federal law at a state judge, they freak out since they have no familiarity with federal law. You would have to spend an hour and half convincing them that they had jurisdiction." Still another attorney commented "judges hate consumer cases because they simply do not understand the new law. The courts are just now getting used to the Uniform Commercial Code [the UCC became effective in Wisconsin in 1965]. If you try to use consumer laws, you are letting yourself in for a lot of briefing to educate the judges." One trial judge gained some measure of local fame among the bar by threatening to declare the Uniform Commercial Code's provisions on unconscionable contracts void for vagueness. Other trial judges, or their clerks, flatly tell lawyers that consumer cases just will not be tried in their courts. Of course, a lawyer who wanted the formal state or federal law to penetrate into a county in which such a judge sat would always be free to appeal, but the cost barriers placed before this route assure trial judges a large degree of freedom to do what they see as justice in the teeth of consumer protection laws which displease them.

Perhaps "atrocity stories" (see Dingwall, 1977) about judges are exaggerated, but insofar as they are repeated among lawyers, they are likely to affect the strategy any attorney will pursue. For example, few lawyers would look forward to arguing that a contract was "unconscionable" under Section 2-302 of the Uniform Commercial Code before the trial judge who was so unhappy about the open texture of this provision of the UCC. Young lawyers who have mastered the administrative regulations designed to protect consumers will learn to hesitate to display their wisdom before a trial judge who has never heard of such laws and who is unlikely to sympathize with their goals. Reformers and law professors often assume that laws published in the state capital automatically go into effect in all the county courthouses in the state. Experienced lawyers know better.

Lawyers for Business

In contrast to lawyers for individuals, attorneys for business play fairly traditional lawyer's roles when they deal with consumer law: they lobby, draft documents, plan

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procedures, and respond to particular disputes by negotiating and litigating. Indeed, our idea of what is a traditional lawyer's job may flow largely from what this part of the bar does for clients who can afford to pay for these services. As Hazard (1978: 152) puts it, "One of the chief reasons why competent lawyers go into corporate work is precisely that business clients are willing to invest enough in their lawyers to permit them to develop the highest possible levels of professional skill. Indeed, it is not far wrong to say that lawyers for big corporations are the only practitioners regularly afforded latitude to give their technical best to the problems they work on." But even when we turn to business practice, the classical model of lawyering is only a rough approximation of what happens. This suggests that the amount of the potential fee is not the only factor prompting problems with the classical view. I will consider each of these traditional kinds of lawyer's work in the business setting, looking at what is done for clients, which lawyers do what kinds of work, and the degree of independent control exercised by lawyers in each instance.

Lawyers working for manufacturers, distributors, retailers and financial institutions are likely to be present at the creation of any law that purports to aid the consumer. For example, the decision of the Supreme Court of Wisconsin (1970) that found the revolving charge account plan of the J.C. Penney Company to run afoul of the state's usury statute was a major chapter in the story of consumer protection in Wisconsin (see Davis, 1973). Lawyers from several of the state's largest and most prestigious law firms were involved in defending revolving charge accounts in the challenge before the courts and in the complex negotiation which led to legislation reversing the Supreme Court's decision in exchange for support of what became the Wisconsin Consumer Act. Perhaps less dramatically, lawyers representing both state and national businesses have been involved in the process of administrative rulemaking that has produced such consumer protection regulations as those governing warranties on mobile homes, procedures for authorizing repairs on automobiles, and door-to-door sales.

Not surprisingly, the role of the lobbyist for business is a specialized one, usually played by a small number of lawyers from the larger firms in Milwaukee or Madison, or by lawyers employed by industry trade associations. Smaller businesses seldom hire lobbyists. They rely on being represented by larger businesses or trade associations, or they contact their

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representatives in the legislature directly. Often legislators who are lawyers find themselves representing home-town businesses before state agencies as a matter of constituent service.

The lobbying role is a familiar one (see Horsky, 1952). Lawyer-lobbyists alert their business clients to what consumer advocates are proposing in the legislature and before various administrative agencies. These lawyers then attempt to influence the shape of the statutes and regulations so that their clients can live with them. This can involve drafting and advocacy, but it is also likely to involve bargaining and mediation. In an era when consumer protection is generally popular, business lawyers usually take a cooperative stance. Their key argument seems to involve painting their clients as honest people who want to do the right thing and who should not be burdened by regulations aimed at a few bad actors. They also play on traditional anti-regulation arguments about red tape and the cost of meaningless procedures and forms.

In order to gain concessions from those pushing consumer protection, business has to give something. These lawyer-lobbyists make judgments about which regulations are reasonable, acceptable or inevitable, and then try to sell this view to their clients. Only a few lawyer-lobbyists have the power to make decisions without consulting their clients, and some clients will not accept their lawyers' opinions about what is reasonable and what is not. Nonetheless, the lawyers generally have great influence on the decisions about which laws must be accepted and which ones can be fought. One reason for this is that often they control much of the information necessary for making such judgments (cf. Prottas, 1978; Ross, 1970). For example, to a great extent they are the experts both about the political situation facing the agencies and legislators and about the intensity of commitment to a particular proposal of those who speak for consumers.

After consumer laws and regulations are passed, business lawyers help their clients cope with them. Much of the work involves drafting documents and setting up procedures for using these forms. For example, both the federal Truth-in-Lending Law and the Wisconsin Consumer Act required a complete reworking of most of the form contracts used to lend money and sell on credit. The Magnuson-Moss Warranty Act demanded that almost every manufacturer, distributor and retailer selling consumer products rewrite any warranty given with the product and create new procedures to make

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information about these warranties available to consumers. (See Fayne and Smith, 1977; Wisdom, 1979, for a description of how national manufacturers' lawyers have coped with this statute.) This is traditional lawyers' work, requiring a command of the needs of the business, a detailed understanding of the law, and drafting skills. Moreover, the uncertainties and complexities of many consumer protection laws call for talented lawyering if the job is to be done right.

Counseling business clients about consumer protection laws and drafting the required contracts and forms is the stock-in-trade of the largest firms in the state and a small group of lawyers with a predominantly business practice; some of this work is also done by the inside legal staff of some large corporations (McConnell and Lillis, 1976). Some of this work can be mass-produced by lawyers for trade associations. Many lenders, retailers, and suppliers of services in smaller cities rely on standard forms supplied by these trade associations. Small manufacturers and financial institutions may send problems concerning consumer protection laws to lawyers in Milwaukee or Madison, either directly or through a referral by their local attorney. There is also a "trickle-down" effect: lawyers who are not expert in consumer law often collect copies of the work product of the more expert, receiving them from clients who get them from trade associations or through friends who work for the larger law firms. They may simply copy these forms or they may produce variations on them but with little or no independent research.

Several lawyers commented that the flood of regulation of the past ten years has made it hard for a smaller law firm or a solo lawyer to keep up with all the new law and to maintain the resources needed to advise business. Some do very well for their business clients, but it is difficult for younger lawyers to gain all the needed knowledge quickly. Lawyers who represent business must be ready to alert their clients to changes in the law which require review of the way business is done. These lawyers usually have their own copies of the federal and state administrative regulations as well as the expensive loose-leaf services necessary to keep up to date. Large law firms and corporations with house counsel can afford to have someone in their office specialize in the various consumer laws. They can send them to continuing legal education programs put on at the state or national level. Indeed, many of these law firms face the problem of coordinating their large staff so that all of their lawyers will recognize a problem of, say, the Truth-in-Lending

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Act and then call on the resident expert in the area. A consumer law specialist in a large law firm often can call on people working for the various agencies for informal advice about how the agency is likely to respond to particular procedures or provisions in form contracts. Of course, any lawyer can call on the agency, but often these specialists from the large firms will know the administrative officials from previous contacts or from participating in continuing legal education programs.

Some of the lawyers who have been involved in this redrafting of forms and fashioning of new procedures saw the task as one of making the least real change possible in traditional practices while complying with the new laws or regulations. They designed new forms to ward off both what they saw as the unreasonable governmental official and the unreasonable consumer—in the unlikely event that the matter ever came close to going to formal proceedings before agencies or courts. Other business lawyers, however, used the redrafting exercise as a means to press their clients to review procedures and teach their employees about dispute avoidance and its importance. In some cases the lawyer's views significantly influenced the client's response to a new law. For example, many business people are proud of their product and service and want to give broad warranties, but their lawyers usually convince them that this is too risky. The Magnuson-Moss Warranty Act attempts to induce manufacturers of consumer products to create informal private processes for mediating disputes. At least some business people have expressed interest in taking such steps to avoid litigation and in experimenting with new procedures for dealing with complaints by consumers. However, lawyers, in at least two of the largest firms in Wisconsin strongly advise their clients to avoid creating private dispute resolution processes. These lawyers see the benefits as unlikely to be worth the risks, and they are in the position to have the final word with many clients about such matters. This is an area about which lawyers are supposed to be expert; a business person who has paid for an expert opinion is likely to listen to it.

Finally, business lawyers do become directly involved in the process of settling particular disputes when attempts to avoid or otherwise deal with them have failed; lawyers in the largest firms seldom have to help ward off individual consumers, but some lawyers for business regularly are involved in particular cases. For example, lawyers represent

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banks and other creditors in collections work. At one time this was a routine procedure that yielded a default judgment and made clear the creditor's right to any property involved. However, many of the traditional tactics of debt collection have been ruled out of bounds or are now closely regulated by state and federal laws. Lawyers who do collections work describe what seems to them to be a new legal ritual to be followed whenever a debtor who is armed with legal advice resists a collection effort. The lender first attempts to collect by its own efforts, and then it files suit, often in a small claims court. The debtor responds, asserting that something was wrong with the credit transaction under the Truth-in-Lending Act or the Wisconsin Consumer Act, or by asserting that the creditor engaged in "conduct which can reasonably be expected to threaten or harass the customer . . ." or used "threatening language in communication with the customer . . ." as is prohibited and sanctioned by the Wisconsin Consumer Act (Wis. Stat. §§ 427.104 [g], [h] [1975]). The lender then has to respond, either by offering to settle or by claiming to be ready to litigate the legal issues. Then the lawyers on both sides negotiate and, occasionally, battle before a judge.

Large retailers who sell relatively expensive products or services face a regular flow of consumer complaints. Almost all of them are resolved without the participation of lawyers, but an attorney may have to enter the picture occasionally. This may not happen until the consumer files a complaint in court. Often the business lawyer will be facing an unrepresented consumer in a small claims court. Several of these lawyers commented that the consumer was only formally unrepresented since the judge often seemed to serve both as judge and attorney for the plaintiff, particularly in pre-trial settlement negotiations. These are expensive cases for a business to defend if the consumer gets a chance to present the merits of the claim to the court. One law firm in Madison represents one of the largest automobile manufacturers in such matters, but it sees only three of four such cases a year. Interestingly, these cases almost never involve an application of the many consumer protection laws or even the Uniform Commercial Code; the real issue is almost always one of fact concerning whether the product or service was defective. The law firm's recommendation about whether to settle is almost always final. Their recommendation will be rejected only where the manufacturer wants to defend a particular model of its automobiles against a series of charges that the model has a

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particular defect; the manufacturer may be far more worried about a government order to recall that model than a particular buyer's claim.

Another situation that brings out lawyers is the consumer complaint that prompts a state agency to begin a regulatory enforcement action. Typically, a business lawyer will try to settle rather than litigate this kind of case, but, of course, the possibility of formal action affects the bargaining by both sides. Here, too, the lawyer has great influence on the client's decision about whether to settle or fight. The lawyer's advice is likely to involve a mixture of predictions about the practical consequences of the proposed settlement, the outcome of a formal enforcement proceeding, and the risks of adverse publicity if the matter goes to a public forum.

It should be stressed that most of these lawyers for business do not see themselves as hired guns doing only their clients' bidding. However, most of our sample viewed their clients as responsible people trying to do the right thing. Members of the elite of the bar seldom see any "but the most reasonable business people," at least when it comes to consumer problems. Of course, it is not surprising that these lawyers tend to see their clients as reasonable people, since the lawyers are likely to hold the same values as the clients. Business lawyers concede that consumer protection laws make more work for them, and thus increase their billings (see Beal, 1978; Dickinson, 1976; Galluccio, 1978), but they also see their clients as being swamped by governmental regulation and paper work which serves little purpose (cf. Bugge, 1976). They are unhappy because they cannot explain these laws to their clients in commonsense terms. Some business lawyers are concerned about easy credit practices and how simple it is for consumers to evade debts when they become burdensome. They worry that the importance of keeping promises and paying one's debts is being undermined by reforms directed at problems which politicians invented. Several remarked that when they left law school, they were strongly in favor of consumer protection, but after a few years in practice, they see matters differently. In short, as we might expect, Wisconsin business lawyers are not radicals and are comfortable representing business interests.

At the same time, some business lawyers concede that occasionally they must persuade their clients to change practices or to respond to a particular dispute in what the lawyers see as a reasonable manner. For example, these

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lawyers may tell their clients that they must appear to be fair when they are before an agency in order to have any chance of winning in this era of consumer protection. In this way, they may be able to legitimate sitting in judgment on the behavior of their clients and occasionally manipulating the situation to influence clients' choices.

A few of the lawyers we interviewed reported having to act to protect their own self-interest when dealing with a business client. One prominent lawyer, for example, described a case where he represented an out-of-state book club in a proceeding before one of the state regulatory agencies; he took the case only as a favor to a friend who had some indirect connection with the club's officers. As the case unfolded, the lawyer discovered that the book club had failed to send books to many people who had paid for them. It was not clear whether the situation involved fraud or merely bad business practices. The lawyer insisted that the book club immediately get books or refunds to all of its Wisconsin customers and sign a settlement agreement with the agency which bound the club to strict requirements for future behavior. The attorney explained that the business had been trading on his reputation as a lawyer when it got him to enter the case on its behalf. Once it became clear that the administrative agency had a good case against the client involving conduct at least on the borders of fraud, the lawyer felt that the client was obligated to help him maintain his reputation as an attorney who represented only the most ethical businesses.

In conclusion, there is evidence of the continuing truth of Willard Hurst's (1950: 344-345) observations about the historical role of the bar:

> The lawyer's office served in all periods as what amounted to a magistrate's court; what was done in lawyers' offices in effect finally disposed of countless trouble cases, whether preventively, or by discouraging wasteful lawsuits, or by settling claims over the bargaining table. After the 1870's, as the lawyer assumed a broader responsibility in his client's business decisions, a corollary result was to extend the occasions and degree to which the lawyer was called on to judge the rights and duties of his client, with a decisive effect on future action. . . . Elihu Root remarked, ". . . about half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."

About the only amendment of Root's statement needed to bring it up to date is that it is not necessary for a business lawyer to tell a client anything in order to bring much damned fool behavior to an end. The lawyer often has the power to channel the behavior of clients without their awareness of what is being done. Of course, the business lawyer is likely to share the

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views of his or her clients that consumer protection statutes, rather than customary business practices, call for damned fool behavior.

III. DISCUSSION

In this section I will try to integrate the findings of this study into a broader picture of the practice of law, with some special attention to a question central to other recent research on the legal profession: are lawyers agents of social control or are they so tied to their clients as to lack the professional autonomy so often ascribed to them?

A descriptive model of practice would accept much of the classical view as a starting point. Traditionally, we have emphasized lawyers being involved in certain transformations: clients bring problems to lawyers who, in Cain's terms (1979: 343), "translate [issues] into a meta-language in terms of which a binding solution can be found." For example, lawyers translate client desires to transfer property to others into such legal forms as declarations of trust, deeds, and wills. Lawyers try to convert some of the many factors involved in an automobile accident into a winning cause of action for negligence (cf. Hosticka, 1979). Indeed, as Abel (1979a) points out, it is the lawyer's authority over this meta-language which gives the profession much of its status and market control; one goes to law school to master it in order to enter the profession, and entry usually is gained by passing a bar examination where that mastery can be displayed.

However, even when clients come to lawyers for relatively defined services such as drafting a will or a contract, the lawyers' work may involve often overlooked interactions whereby lawyers influence the outcome, and these interactions also must be part of our sketch of practice. For example, some may hesitate to ask for certain provisions in their will if they fear even implicit disapproval by a lawyer who, with his grey hair, three-piece suit, and symbols of membership in the legal profession, may be seen to represent conventional morality. The lawyer, also, may ask questions necessary for counseling or drafting which force the client to consider possible consequences and make choices that he or she has not foreseen or has avoided thinking about. The lawyer may tell a client that the law blocks taking certain action, but sometimes an attorney can suggest other ways of achieving at least some of the client's purposes. Just by explaining the requirement for a cause of action in negligence, the lawyer can affect the

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client's memory, or willingness to lie, and thus affect the outcome (cf. Fair and Moskowitz, 1975).

If our model is to have a wider focus, we will have to recognize other translations and transformations which only indirectly involve legal rules but which often take place in interactions between attorneys, clients, opponents, and legal officials. As I have pointed out in this article, lawyers play many roles in these interactions, including the gatekeeper who teaches clients about the costs of using the legal system, the knowledgeable friend or therapist, the broker of information or coach, the go-between or informal mediator, the legal technician, and the adversary bargainer-litigator. In playing these roles, lawyers often have to transform their clients' perception of the problem and their goals. Sometimes clients do come to lawyers seeking fairly specific services—a client may want to make a will, to convey property, or gain a license to run a television station. However, the lawyer is often involved in transforming both the client's perception of the problem and the goals. Sometimes the lawyer will turn away a client, saying that (1) the client has no case legally, (2) it is against the client's best interest to pursue the matter as the costs will exceed the likely benefits, (3) the client is unreasonable to complain or seek certain ends as judged by standards other than the law, or (4) some mixture of these arguments. On the other hand, the lawyer may seek, in Aubert's terms (1963), to redefine a conflict of value into a conflict of interest which can be settled by payment of a reasonable amount of money rather than by a public declaration of right and wrong.

And the lawyer may be involved in transforming the views of the opponent about both the client and the situation so that an acceptable settlement will be forthcoming. Sometimes lawyers use their status as experts in the law, legal arguments, and express or implied threats of legal action in this process of persuasion. Often, however, a legal style of argument fades into the background. The attorney may not be too sure about the precise legal situation or may worry about seeming to coerce the other party. In such situations lawyers are likely to appeal to some mixture of the interest of the opponent and to standards of reasonableness apart from claims of legal right. Then, as I have stressed, if there is a settlement offer, the lawyer must sell it to the client, and here again appeals are likely to be made primarily in terms of reasonableness or interest rather than right.

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The research reported here shows lawyers for individuals playing these nonadversary roles without great knowledge of the contours of consumer law, while the lawyers for corporations act more traditional parts—lobbying, counseling, drafting documents, and defending cases after complaints are filed. However, lawyers for corporations are at least occasionally pushed out of the character of legal technician. For example, a lawyer for one of the nation's largest law firms, who has an extensive corporate practice, sees himself as engaged in "the lay practice of psychiatry." He explains that a manager of a large corporation often is worried about making a decision, but he or she has few people with whom to talk openly. Others in the corporation tend to be rivals; psychiatric help is unthinkable as it would indicate weakness. However, it is legitimate to see an attorney seeking legal advice. Often this lawyer finds himself asking questions which lead the manager to see the options and their likely costs and benefits. The questions are justified as necessary in the process of giving legal advice; their actual function, the lawyer says, is a very directive short-term therapy. Sometimes he does not need to ask many questions, because it is enough to serve as an audience while the manager thinks aloud. Another lawyer engaged in corporate commercial litigation sees lawyers as curbing the influence of ego and pride on the part of business executives in dispute resolution. Frequently, the lawyer is the one raising cost-benefit considerations which point towards settlement to engineers who refuse to admit that they have ever made a mistake or to managers who want to teach the other side a lesson. Of course, this is but anecdotal evidence, but it suggests that if we are to make our model of practice more true to reality, we need to investigate corporate as well as individual lawyers' nontraditional roles.

One builds models for a purpose, and an expanded view of lawyering could offer a number of benefits. First, it should enable us to plan and evaluate reforms better. Individual rights created by such reforms are almost meaningless unless people can get a court or agency to enforce them or make a credible threat to do so. Here is where lawyers enter the picture, serving as gatekeepers to the legal system and sometimes offering only transformations instead of vindication of legal rights. But vindication of rights may not be the best solution in all or most cases.

An evaluation of what I have discovered about lawyers in the consumer protection area suggests a number of things

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about the strategy of creating individual rights to bring about social change. On the positive side, one might view the practices of the lawyers I studied as yielding a kind of rough justice. Lawyers for business, prompted by federal and state statutes and regulations, work hard to help their clients comply with the disclosure requirements that have been demanded. Of course, there is reason to doubt whether disclosure regulation actually benefits consumers (see Whitford, 1973). We can wonder, for example, how far consumer behavior is influenced by the now common disclosure, mandated by the Magnuson-Moss Warranty Act, that the seller offers only a "limited warranty." But this is the disclosure that the drafters of the statute required, and business lawyers have seen to it that their clients have made it. Although they may interpret it to their clients' advantage, these lawyers are a force pushing for compliance with the law.

Lawyers for individuals have guarded an expensive social institution—the legal system—from overload by relatively minor complaints. Consumers who are dissatisfied with such things as warped phonograph records, defective hair dryers, or inoperative instant cameras can return them to the seller. Almost always, the seller will replace them or offer a refund if they cannot be fixed. If the seller refuses, the buyer can shop elsewhere next time, and the buyer has an "atrocity story" with which to entertain friends which, in turn, may affect the seller's reputation. In short, many problems can be left to the market (see Diener and Greyser, 1978; Ramsay, 1978; Ross and Littlefield, 1978; Wilkes and Wilcox, 1976). At the other extreme, consumers who have suffered serious personal injuries as the result of defective products usually can find a lawyer to pursue their case aggressively, since the growing law of products liability offers generous remedies which will support contingent fees. Moreover, products liability and government-ordered product recalls together give manufacturers a great incentive to pay attention to quality control and avoid problems.

It is necessary to sort out claims falling between these poles. Defects in new automobiles and mobile homes, for example, often warrant buying at least a little of a lawyer's time, especially when manufacturers and sellers fail to remedy the problem after a customer makes a complaint. But a full-scale war using elaborate legal research and expert testimony usually would be a waste of resources. A telephone call or a letter from a lawyer may be all the effort the claim is worth. If

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all clients with cases supporting substantial fees had to subsidize cases involving only small sums, then lawyers might buy all of the necessary law books and learn all the details of consumer law, but this might price legal services out of the reach of some who now can afford them. Alternatively, lawyers could be subsidized by governments to master consumer laws and litigate, but many citizens would see better uses for tax revenues.

Also on the positive side, those lawyers who are willing to do something for clients with a consumer case may be defending the values of social integration and harmony. In Laura Nader's (1969) phrase, they are seeking "to make the balance" by restoring personal relations to equilibrium through compromise. They do this by clearing up misunderstandings and promoting reasonableness on both sides, avoiding vendettas aimed at hurting the opponent. They offer their clients their status and contacts—but rarely an expensive-to-acquire legal knowledge—which allow them to reach the person who has power to apologize, to offer a token gesture, or to make a real offer of settlement. The fact that a manager or owner accepts the blame and apologizes may be as effective in placating the client as a recovery of money. The real grievance may rest on a sense of being taken, insulted, or treated impersonally. Lawyers can help their clients see themselves not as victims but as people with minor complaints; they can help them get on with the business of living rather than allowing a $200 to $300 problem to become the focus of their lives.

One can emphasize this point by stressing what these lawyers are not doing. Lawyers often are portrayed as promoting disputes in order to make work for themselves. A partner in a consulting firm that, in its words, aids corporations to "manage change" recently charged that,

> It is probably not coincidental that the United States, the country with the highest proportion of lawyers in its population, is the most litigious country in the world. All those lawyers are looking for work, and they are sure to find it among a self-centered, demanding, dissatisfied population which has grudges—real or imagined—against institutions or individuals (*Behavior Today*, 1978: 3-4).

Rather than pour gasoline on the fire of indignation in members of a "self-centered, demanding, dissatisfied population which has grudges," almost all of the lawyers interviewed in this study seem far more likely to use some type of fire extinguisher. Even lawyers who see themselves as progressive and those who work for group legal service plans try to push aside potential clients whom they judge to be

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"crazy," to want something for nothing, or to be acting in bad faith.

It would be difficult deliberately to plan and create a system such as the one I have described. Perhaps it could only have arisen in response to laws that created a number of individual rights which could not be fully exercised. By relying on lawyers as gatekeepers, we get enough threat of trouble to prompt apologies, gestures, and settlements which are acceptable, but not enough litigation to burden legal or commercial institutions. We avoid having to reach complete agreement on the precise boundaries of the appropriate norms governing a manufacturer's and seller's responsibility for quality defects and for misleading buyers short of absolute deliberate fraud. We avoid having to live with inappropriate norms which might result from the confrontation of interest groups in the legislative and administrative processes. We avoid having to resolve difficult questions of fact concerning the seller's responsibility for the buyer's expectations and for the condition of the goods—questions which often cannot be resolved in a satisfactory manner. Finally, we offer some deterrence to consumers who want to defraud sellers or creditors or to those who are eager to get something for nothing (see Wilkes, 1978).

On the negative side, one could highlight the unequal access consumers have to remedies, despite the merits of their cases. Some do not see lawyers at all, but we cannot be sure that their complaints lack merit or are trivial or that they are resolved in some other manner. Those few who do seek legal services will get only what the lawyer sees as appropriate—some will get turned away with little more than token gestures, while a very few will recover their full statutory remedies through legal action. The pattern is not as simple as it was before the creation of various legal services programs, but here, too, the "haves" are likely to come out ahead (Galanter, 1974). Lawyers are likely to want to please middle-class and rich consumers, to whom they may offer "loss-leader" services. Lawyers are also more likely to persuade a merchant that the goodwill of a "better off" person is worth some substantial gesture.

Arguably, whether or not a claim is trivial or significant does not turn on whether there is enough at stake to support a substantial legal fee. For example, in this era of inflation, perhaps, the $400 many spent to replace four defective "Firestone 500" steel-belted radial tires would have seemed

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trivial to successful lawyers, or many consumers would have thought that to be the case. Nonetheless, the amount was not trivial to many of those faced with this problem. After clerks in local Firestone stores denied responsibility for the problem, few buyers had "the balance" restored; they felt cheated or taken by a large impersonal bureaucracy, and some were upset by a sense of "near miss," since the defective tires which had been purchased to provide added safety might have killed or injured them or their families. They suffered an injury to their expectation interest which could not be redressed (Bernacchi, 1978). They were likely to have been even more unhappy with lawyers and their lack of remedy when they watched the General Counsel of Firestone testify before a congressional committee that the problems were entirely the consumer's fault, because consumers did not keep these tires adequately inflated. As one who faced this problem, I can report that it does not seem enough just to avoid ever again buying Firestone products, to learn that Firestone's president took "an early retirement" as a result of the situation, or to watch Firestone lose ground in the stock market, despite the efforts of an aging actor—James Stewart—to prop up its reputation in television commercials about how Harvey Firestone always wanted to make the best tires. Of course, Congress and an administrative agency ultimately induced Firestone to offer a remedy to some, but not all, of the buyers of the "500 Steel-Belted Radial"; but the recall does not serve to legitimate the system described in this study, because this happy outcome for some consumers was not prompted by lawyers handling individual claims.

The Firestone case illustrates the possibility that even more important interests may be badly served by the present system. Even if a lawyer had obtained some gesture from Firestone for an individual before publicity forced it to recall the tires, Firestone still might have been rewarded for its incompetent engineering and production techniques had the problems with the tire not become a scandal to be featured on the evening news broadcasts. These individual settlements probably would not have added up to very much as compared to the profits being made from the tire.[6] Conciliatory

[6] Perhaps the most dramatic reaction to a manufacturer's judgments about the value of human suffering and death involved the Ford Pinto. In *Grimshaw* v. *Ford Motor Co.*, (Orange Co. Calif. Superior Ct. [1978]), reported in 21 ATLA L. Rep. 136 (April, 1978), a 13-year-old boy suffered burns over 90 percent of his body when a Ford Pinto's gas tank ruptured and ignited. The jury was shown a Ford memorandum in which it considered installing a check-valve on its fuel tanks to increase their safety. The authors of the memorandum estimated that if the valve were not installed, there would be 180

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settlements may subvert the purposes of consumer protection law because they can shield socially harmful practices from effective scrutiny by the public or some legal agency. The Firestone affair eventually did come to light after people were injured and killed. Such claims cannot be resolved by gestures and token recoveries, but it seems to take death or serious injury to trigger the system; and passengers in cars equipped with the Firestone tire were at risk for a long time before the recall. The conciliatory tactics favored by lawyers may block the market correction called for by consumer protection legislation and prevent public awareness that the markets are not being corrected.

We can ask whether we should be satisfied to delegate the power of deciding which claims will be asserted, and to what extent, to individual lawyers who are typically white, middle-class males well integrated into their communities. P.H. Gulliver (1977: 34) notes that a mediator "inevitably brings with him certain ideas, knowledge and assumptions, as well as certain interests and concerns, his own and those of the people whom he represents." Gulliver goes on to point out that when a mediator acts as a go-between with the parties physically separated and not in direct communication, as is commonly the case when a lawyer is playing this role, the mediator's own ideas and interests are given scope to operate. Mediators can change the content, emphasis and implications of the messages

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lives lost and 180 burns suffered. The study valued each life at $200,000 and each severe burn at $67,000, and it estimated the cost of the valve as $11 per car. It concluded that the benefits to be anticipated did not outweigh the cost. A retired Ford engineer, testifying for the plaintiff, produced other internal Ford documents and test films. He showed that Ford had found it could save $20.9 million by delaying certain safety improvements on gas tanks for two years. There was other evidence about the safety of Pinto gas tanks, and the foreman of the jury later described the Pinto as "a lousy unsafe product" (*Wall Street Journal*, Feb. 14, 1978: 1, 14).

The jury awarded the plaintiff $2,841,000 compensatory and $125 million punitive damages. The foreman explained that "We came up with this high amount so that Ford wouldn't design cars this way again." One juror said the jury thought that Ford had saved $100 million by not installing safe gas tanks on the Pinto, and so it was necessary to award substantially more than that to be really punitive. Even though the amount awarded might be reduced by the courts, the jurors "wanted Ford to take notice." It has been reported that the award was later reduced to $3.5 million for punitive damages (*Wall Street Journal*, June 12, 1978: 2).

One cannot tell whether the jury was offended by Ford's procedure in balancing the costs of safety measures against human life or by what the jury viewed as an inadequate valuation of life and severe burns. It is likely that both the Firestone and the Pinto episodes have taught manufacturers of consumer goods lessons about public relations if not about safety engineering. Whatever the rationality of deciding which safety improvements are cost-efficient, many people will react negatively to attempts to assign a cost to burns over 90 percent of a 13-year-old boy's body to be balanced against $15 per car for safety improvements, particularly when the balancing is to be done by a manufacturer's engineers.

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they pass back and forth, because neither party is able to monitor the mediator's activities. In addition, in the guise of telling clients what the law says they must do, lawyers have some power to tell them what the lawyers think they should do. These considerations are likely to be important in any area where reformers have created individual rights but where the attitudes of conventional society have not embraced the cause. For example, lawyers who respect university faculty members, honor the idea of liberal education, enjoy teaching part time in the law school, and doubt the reality of discrimination against women are not likely to be willing to take a case against a university for a woman denied tenure who thinks she was discriminated against. Most lawyers who do take such cases are likely to handle them very differently than lawyers who are feminists. The nonfeminist lawyer is unlikely to press very hard for, say, language in a settlement agreement that might help the women's movement on campus in addition to seeking a payment of money to settle the complaint.

Lawyers who play "counsel for the situation" may leave the rest of us a little uneasy (see Frank, 1965: 702). What qualifies these lawyers as experts in problem solving? Certainly this was not the approach of their law school training, and we can wonder if their professional experiences have produced wisdom in finding good solutions to such problems as are involved in women's rights, consumer protection, racial discrimination, or environmental protection. In short, there is a problem of legitimacy. As is true in the case of so many empirical studies related to law, once again we have stumbled on the problem of discretion and the expert whose skill rests on experience rather than on training and science (see Macaulay and Macaulay, 1978). And a counsel for the situation has little accountability to much beyond his or her own conscience (cf. Brown and Brown, 1976).

The mystification involved in the gap between the classical picture of the lawyer's role and the portrait painted here also may be objectionable. Clients may find themselves manipulated and fooled. Few clients probably go to lawyers seeking to have their situations redefined or their problems solved by apologies and token gestures. At least some clients do not want a "counsel for the situation" but a lawyer who will take their side. The settlement worked out after a five-minute telephone call may be the best possible in light of the lawyer's and the business's interest, and an objective observer might be able to defend it as serving some social interest. But do clients

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know how their interests regularly are offset by all of the others involved? If they knew, would they accept the situation?

Conciliatory strategies require little investment of professional time as compared to more adversarial ones. Mediation does not require much knowledge of consumer law, and a lawyer can negotiate a settlement based on rules of thumb rather than hard legal research. However, lawyers get an exclusive license to practice because they are supposed to be expert in the law. Indeed, Chief Justice Burger (1976: 93) comments that "if lawyers refuse minor cases on economic grounds they ought not insist that only lawyers may deal with such cases." Many who have never seen the inside of a law school might be better conciliators than lawyers, since legal education does little to train students for this part of practice, but non-lawyers are not given the privilege of representing clients. In theory, lawyers are qualified to negotiate and mediate because they assess the legal position and work from this as a baseline. Lawyers who know almost nothing about consumer law are operating from a different baseline. Earlier I quoted Geoffrey Hazard's (1978: 152) comment that people go into corporate law because they have the opportunity to "give their technical best to the problems they work on." Hazard continues by saying that the "rest of the bar ordinarily has to slop through with quickie work or, as one lawyer put it, make good guesses as to the level of malpractice at which they should operate in any given situation." Indeed, an official of the Federal Trade Commission who was concerned about the failure of the Magnuson-Moss Warranty Act condemned Wisconsin lawyers who were not fully acquainted with that statute two years after it had become effective as being guilty of serious malpractice. He thought that perhaps a malpractice action or two might wake up the Wisconsin bar. Several lawyers interviewed in this study commented that many lawyers do not know enough consumer law to recognize that it offers a good legal theory and that if they did see this, it might change the course of their negotiations.

But it seems unfair to blame lawyers who almost never see a consumer case involving more than a few hundred dollars for not mastering a complicated and extensive body of law and for not purchasing expensive loose-leaf services to keep up to date. While, perhaps, we can ask lawyers to do some charity work, they cannot provide reasonably priced services for every case that comes in the door (cf. Schneyer, 1978). There is no way that any lawyer can know much about all branches of the law;

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lawyers naturally become expert in the areas they see regularly.

The lawyers studied seem to be responding predictably to the social and economic structures in which the practice of law is embedded. Liberal reforms such as consumer protection laws create individual rights without providing the means to carry them out. Grand declarations of rights may be personally rewarding to those who struggle for legislative and appellate victories, but, in practice, justice is rationed by cost barriers and the lawyer's long-range interests. Even lawyers working for lower-income clients must pick and choose how much of their time and stock of goodwill to risk investing in a particular case.

We could see most of the individual rights created by consumer protection laws, as well as many other reforms of recent times, as primarily exercises in symbolism. The reformers gained the pretty words in the statute books and some indirect impact, but the practice of those to be regulated was affected only marginally. We can wonder whether those who wrote these reforms understood that the individual rights they had created would be converted into little more than an influence on the bargaining process if lawyers learned about and chose to make use of them. As the issues embedded in these reforms become less fashionable, even these indirect influences may wane (see Stuart, 1979). Of course, it is possible that as time passes, lawyers will become more and more aware of at least some reform laws. It may take a generation or two for some of them to penetrate into day-to-day practice. Perhaps as new forms of delivering legal services develop and old areas of practice are reformed out of existence, lawyers will turn to some of these new reforms as an unmined resource and find ways to make exploitation commercially feasible (see Falk, 1978; Ross, 1976). Nonetheless, if awareness of a more empirically accurate view of legal practice is not developed, reformers are likely to go on creating individual rights which have little chance of being vindicated, and, as a result, they may fail to achieve their ends repeatedly. And a gap between the promise of the law and its implementation may have consequences for the society (see Viera-Gallo, 1972).

A kind of classic response to the empirical picture of professional practice that I have drawn is to call for a return to the adversary model with, perhaps, some additional legal services supported as a government or group benefit and with new institutions for dispute resolution, such as neighborhood

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justice centers (see, e.g., Abel, 1979b; Danzig, 1973; Felstiner, 1974; 1975; Danzig and Lowy, 1975; Johnson, 1974; Johnson and Schwartz, 1978; McGillis and Mullen, 1977; *Yale Law Journal*, 1975). Whatever the merit of any of these new measures and the philosophically comforting virtues of such proposals, the issues raised by the empirical sketch I have drawn are not likely to go away so easily. This study just adds another instance to our growing catalogue of other-than-adversary roles played by lawyers (see Shaffer, 1969). For example, legal literature recently has paid some attention to the problems lawyers face in proceedings for involuntary commitment of a client to a mental institution when the lawyers themselves believe that their client needs treatment (see e.g., Cyr, 1978; Dawidoff, 1975; Galie, 1978; Zander, 1976). Other articles have considered the problems of lawyers who learn that their clients are violating the regulations of the Securities and Exchange Commission now that the SEC is trying to impose a duty on these lawyers to blow the whistle (see Lorne, 1978; Miller, 1978; Solomon, 1979; Williams, 1978). Still other articles look at the problems of lawyers assigned to represent young children in child custody disputes—one cannot just ask a four-year-old whether he or she wants to live with Mommy or Daddy and seek to carry out this preference using all of the skills involved in evidence gathering and cross examination (see, e.g., Church, 1975; Deutsch, 1973; Elkins, 1977; Spencer and Zammit, 1976; *Yale Law Journal*, 1976; 1978). In all these situations, lawyers are pushed to play counsel for the situation and to mediate. It is likely that their activity will reflect some mixture of their values and long-term interests and be only indirectly related to their expert status relating to the formal law. All of this suggests that our empirical model of practice reflects the structural constraints on practice, social needs, and difficulties with adversariness as a solution for all our problems.

Moreover, many would see the conciliatory counsel-for-the situation stance as the right one for lawyers to take despite all of the problems it poses (see Griffiths, 1977; cf. Abel, 1978; Crowe, 1978; Simon, 1978). Most non-lawyers likely would question the desirability of telling attorneys always to act as hired guns rather than as problem solvers. President Carter, for example, said, "Mahatma Gandhi, who was himself a very successful lawyer, said of his profession that 'lawyers will as a rule advance quarrels rather then repress them.' We do not serve justice when we encourage disputes in our society rather than resolving them." (*New York Times*, May 6, 1978). If

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anything, we may be witnessing pressure to move even further from adversariness with current demands that lawyers and other professionals take responsibility for their clients' compliance with the law. The counsel-for-the-situation role, as troublesome as it is, is unlikely to fade away. Therefore, it makes sense to think seriously about how the values, personality traits, and structural constraints of the bar influence the choices that are made.

Apart from mediating and acting as counsel for the situation, this study seeks to add to the classical model of practice the idea that the lawyer's own interests and values play an important role whatever the ideal of service asserted in professional theory. Others have made this point: Reed (1969) talks of the lawyer-client situation as one managed by the lawyer; Blumberg (1967) goes so far as to talk of the practice of laws as a "confidence game." On the other hand, Heinz and Laumann (1978) see the legal profession as one where the problems addressed generally are "defined by clients rather than professionals." The legal profession, they say, is "shaped and structured by its clients"; it manifests client interests rather than its own concerns, interests and values to such an extent that it is deprived of autonomy so that it cannot determine its own social organization or set standards of conduct.

There is no necessary inconsistency between Heinz and Laumann's position and that of this study or Reed and Blumberg. Lawyers typically pursue their *long-range* interests. This means positioning themselves to serve those clients they are likely to see and those who occasionally bring them cases they prize. For example, a partner in a large Milwaukee law firm decided that he could not be the campaign manager for a law school classmate's race for Congress in the early 1960s. The friend was a Democrat, and the law firm's major clients were large family-controlled corporations locally famous for supporting right-wing causes. The lawyer did not know and did not ask whether these clients would object; even raising the question carried more risk than he wanted to take. Muir (1967) studied one of the few cities in which there was real compliance with the Supreme Court's school prayer decisions. A major part of the explanation was the presence of a Jewish lawyer on the school board who thought the decisions were right and as a legal expert punctured the common evasions and rationalizations for noncompliance offered by the educators who did not want unhappy parents. But this Jewish lawyer

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was relatively free to take a civil libertarian stance, since he did not expect those who favored prayers and Christmas programs in the schools to be his clients. One can imagine what would have happened to the practice of any lawyer member of the school boards in the down-state Indiana communities studied by Dolbeare and Hammond (1971) had he or she blown the whistle and pressed for compliance with the law. In these communities prayers continued as before the decisions, to be offered at the discretion of the teachers.

However, a lawyer's long-range interest is not always that of any particular client, even a fairly good one. For example, a president of a sizeable corporation complained:

> [M]any attorneys['] . . . practice before . . . administrative bodies consumes much more of their time than the time spent in litigation before the courts. It has therefore become very important to an attorney to maintain strong and close relationships with these respective agencies so that he can get informal rulings, hints as to the agencies' attitudes and other "favors." These are necessary, he believes, if he is to adequately advise his many clients. However, if I want to take a position that is very unpopular with that particular agency and which will almost certainly lead to litigation, I will have difficulty in getting my counsel to go along. If I am unaware that such a position can be taken, he may not suggest it to me. He fears that by serving as an aggressive advocate for my position, he may estrange himself to some extent with the members of the agency and thereby reduce his ability to serve his many other clients who also deal with that same agency. This is not an abstract or imagined problem; it is a very real one and others have written even more forcefully about it (Rast, 1978: 845).

Moreover, lawyers have some discretion in selecting what cases to take and how to handle them without being forced to make hard choices and risking their careers. Perhaps if clients had perfect information, lawyers would have little control over relationships with clients. However, even sophisticated buyers of lawyers' services usually have far less than perfect information.

It is probably the case that if a new reform law can be seen as likely to yield substantial fees, some lawyers will gear their practice toward clients who want to bring such cases. Laumann and Heinz (1977) tell us that personal injury practice has relatively low prestige among the attorneys they studied. Nonetheless, the development of the doctrines of products liability during the 1960s prompted many lawyers to become specialists in the area—contingent fees, a good chance to win high verdicts and settlements, and real advantages from specialization have produced a recognizable segment of the bar. Moreover, causes such as civil rights may draw the attention of organizations such as the NAACP which will provide the lawyers. But if one has neither an organized cause

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nor the chance of a real monetary payoff, reforms resting on individual rights are likely to produce no more than the conciliatory gestures reported by this study. In such situations, the inability to mobilize needed legal services may be a form of social control blunting the impact of efforts at reform through law.[7]

Undercutting the conventional picture of practice may have costs. Law, as is the case with many professions, justifies its position by the mastery of a special body of knowledge, and this mastery is produced by training and certified by examinations. Law school and bar examinations deal with the rule of law and not deals reflecting cost-benefit calculations and the emotions of clients. This view may help give or defend a measure of status and wealth for those who learn the law so that some will be induced to try to master it. And it may be useful in our kind of society to have a group of people capable of calling governmental, corporate and private power to account by legal standards. The theory of the adversary system may offer unpopular or powerless people some degree of protection from bias or a politically expedient solution to the problem they present to the powerful. This theory is a major part of the reason why our government provides some amount of legal service to those accused of a crime when they cannot afford their own lawyer. It is a major part of the rationalization that a lawyer for an unpopular client can offer in an attempt to ward off pressures against causing difficulties by vigorous advocacy. The ideal of disinterested service to clients may draw some

[7] The failure of statutes which create individual rights to provide the means for their vindication does not necessarily indicate that such laws are ineffective. As Willard Hurst (1960: 137-152) emphasizes, the passage of a law may become a rallying point for an interest group and may force a definition of means and ends. Moreover, a particular law, such as the Magnuson-Moss Warranty Act, cannot be viewed in isolation. Magnuson-Moss is but one event in the entire consumer movement. All of the many consumer protection laws may only reflect a general dissatisfaction with the marketing of modern consumer goods and services, and this dissatisfaction itself may be what has prompted an ever-increasing concern by manufacturers with improving quality and using public relations techniques to avoid complaints and minimize those that do occur. Of course, the process likely involves complicated interactions: dissatisfaction prompted the laws, and they in turn helped focus the dissatisfaction and make it newsworthy; the scandals then may have made jurors more willing to find against manufacturers and administrators more willing to enforce regulations vigorously. Even laws which may appear to have but a limited impact may be part of a general vague threat—if the dissatisfaction that prompted the law continues and the law is seen by those who can press for legislation as flawed, then new and more distasteful legislation may be forthcoming. And such threats may affect behavior (see Scheingold, 1974: 205-219). This article is part of a larger study of the Magnuson-Moss Warranty Act. Kenneth McNeil's interviews with officials of the large American automobile manufacturers indicate that this statute did play some part in placing the issues of product and service quality on their agenda.

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people into the profession and offer nonpecuniary rewards to lawyers so that more of this kind of service exists than it would in a system where the single-minded pursuit of self-interest was recognized as fully legitimate.

Of course, this argument rests on untested empirical assumptions. We do not know whether these normative ideals have enough influence on behavior to be worthy of concern. It may be that the classical view has had little importance beyond making lawyers who do little public service feel bad on occasion. However, the empirical assumptions are only untested. They have not been disproved, and the argument is plausible enough for attention. Nonetheless, many of the nonadversary roles played by lawyers also seem to have some social value—experts in coping with the claims of other individuals, corporations or the government by using all available tools including, but not limited to, legal rules can offer useful help to citizens. Perhaps the classical position does serve as a golden lie (Plato, *The Republic*, Book III), misleading both lawyers and the public for a good purpose. Yet it has costs, particularly as more and more people discover that lawyers' behavior so often fails to conform to the model. There seems, moreover, no reason to assume—without even making an attempt—that we cannot rationalize when a lawyer can be expected to refuse a case, to mediate and play counsel for the situation and when to vindicate rights. Perhaps no ideological statement ever can be without flaw (cf. Unger, 1976), but the classical picture of the practice seems to fit the legal profession of the 1980s so poorly as to be embarrassing.

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