TRANSCRIPT OF CONFERENCE PROCEEDINGS

LESTER BRICKMAN *and* RICHARD O. LEMPERT, *Editors*

Preface

It is perhaps misleading to describe the paper that follows as a transcript. It is in the form of a transcript and, indeed, began life as a transcript, but it has been pulled apart, word by word, and completely reorganized; if it looks like a transcript, it reads—in our estimation—like an article. It is richly mined with research possibilities and problems. Our task, as editors, was to strip away unessential verbiage and expose the substantial intellectual substructure. What began as 480 pages of original transcript representing 12 hours of discussion has, through substantial editing, been reduced by approximately 70 percent. Concern for the integrity of the record requires some explanation of our editing processes.

This transcript is a record of the proceedings of a conference organized to react to commissioned papers which are published in this volume. The papers were presented in abbreviated form on the morning of the first day of the conference. Brief discussion of each paper ensued, but only enough to identify major clusters of issues toward which the remainder of the discussion would be channeled. That afternoon, the group was split into two and each dealt separately with these issues. That evening, the conference consultants met and drafted a summary of the clusters of issues that had been thus delineated. The next morning the conference reconvened in plenary session and addressed itself to these issue clusters.

After reading the transcript several times, the editors independently identified the major themes running through the discussion. When our analyses were compared, they were found to be identical. In the first redraft, we did not attempt to refocus discussion around these themes but sought to pare down the 480 pages to a more manageable size. Occasionally we added material contained in reports too briefly described by speakers. Footnotes were also added. We rewrote many comments in more concise form, striving to retain the substance of ideas while not being bound by chronology or colloquy. Thereafter, we went through four additional redrafting efforts, each time recombining more of the remarks into the thematic structure and each time producing a more concise version of the remarks retained.

If A, B, and C spoke, in turn, to different points, and D then responded to each point, we moved A, B, and C's remarks to those parts of the transcript where they were thematically appropriate and divided D's response so that each of the three segments followed the remarks of the speaker to whom D was replying in that segment. We took similar liberties in rearranging remarks wherever this seemed likely to increase the clarity of what was said or to improve the organization.

In addition, we have liberally enhanced the participants' powers of oratory, including our own when we were speakers. As one of the participants observed in a letter responding to the edited copy: "I am impressed with the degree of perception I displayed and the conciseness and accurate syntax with which I spoke. Please consider this an offer to edit all of my remarks in the future."

Occasionally we placed words into speakers' mouths, but only to accomplish transition—not to convey substance. Each participant approved the editorial changes which were made in their remarks. Several took the opportunity to revise their remarks extensively, for which we, the editors, express our gratitude.

On a final note, the efforts of Helen Hatcher, secretary to one of the editors, should be acknowledged. Typing a transcript with instructions to go from one paragraph on one page to the middle of a paragraph 20 pages *infra* to the last sentence of a remark 35 pages *supra* and so on for the entire length of the transcript is an exceptional accomplishment. To do so in a spirit of good cheer borders on the incredible.

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TRANSCRIPT

MR. LESTER BRICKMAN: The format for this morning will be as follows. I am going to call on each of the consultants to the conference to summarize his paper briefly, with particular emphasis on research needs, and will then allow a short period for comments and questions. This commentary will identify clusters of issues, which will be discussed more extensively this afternoon and tomorrow morning.

The purpose of this conference is to react to the papers and to assist the conference consultants in devising research priorities for improving the delivery of legal services to middle class consumers. I hope it has been apparent from the list of participants that the mix of skills represented is a deliberate choice. It includes representatives of the government and of private foundations that fund legal research, individuals with social science backgrounds, several people who are involved in group and prepaid programs, law professors, consumer and bar representatives, and others who are perhaps not easily categorizable.

MR. CHARLES H. BARON: If we are to come up with an agenda for coordinated research in the field of delivery of legal services or, more generally, for the attempt to reduce unmet need for legal services, we are going to have to develop some sort of overview of what research needs to be done and what priority that research merits. Accordingly, our paper is an attempt to develop an overall conceptual scheme or a checklist for research needs to serve as a basis for discussion of priorities.

In terms of specific research proposals, I would like to call your attention to the discussion of characteristics of systems for eliminating the need for legal services. Since it is possible to reduce the unmet need for legal services not only by delivering those services but also by eliminating the need for them, one set of research possibilities is elimination of the need for legal services.

Research should be done to determine the relative costs and benefits of "delegalization" and of simplifying legal procedures. For example, divorce could become a purely administrative procedure—thus allowing parties to change their legal relations with minimal judicial involvement. However, there is a possibility that reducing the need for legal services in one area will increase the need for legal services in another area—for example, via complications in property settlements.

MR. DOUGLAS ROSENTHAL: It strikes me that perhaps you are concentrating less on reducing the need for legal services than on an attempt to find ways for nonjudicial institutions to solve traditional legal problems. Your example is interesting, because it would seem that the need for a lawyer or somebody providing a lawyerlike service would increase rather than decrease if you had a system of divorce through private contract. One research area worth exploring, therefore, is what kind of legal tasks might better be performed by nonlawyers?

Those seeking to protect the traditional preserves of lawyers say that only they have the requisite expertise and competence to give this kind of service. Well, I think we ought to study situations where accountants give tax advice, where title insurers advise on conveying property, or where psychologists or psychiatric social workers do divorce counseling and see how well that works as an alternative to lawyers providing services. Perhaps we should even develop model programs of this sort for systematic study.

But I suspect that in trying to find ways to eliminate the need for legal services we are not going to eliminate the need for some sophisticated expert services. Merely removing lawyers from the process is not always going to make the problem easier or clearer or less expensive for the concerned recipient of the service, the one who has the need for the service.

MR. MARC GALANTER: From my reading of the other papers, I gather that the conceptual struggle against the notion that there is some objective measuring rod called "legal needs" has been won. We now see that the demand for legal services is contingent on a variety of institutional and cultural forces which are continually changing and with them the parties' and our own perceptions of what happens to be a legal need.

I argue in my paper that we should try to reach a similar diversified and contingent view of the supply side. That is, we should try to overcome the presumption that when we find a need we would call legal, at least one which we think is worthy of being assuaged, the thing to do is to rush some lawyer's services into the breach. It is problematic whether any given set of needs is best going to be filled by provision of legal services. In many cases there are alternative paths to the benefits that legal services purportedly supply, namely—to categorize them in a rather schematic way—changing the rules, changing the institutions, and changing the parties themselves.

Presumably legal services are a good thing because they lead to certain kinds of results. They deliver certain kinds of benefits. It is a very tricky business to catalog those benefits, but I shall lump them together for the moment under the rubric of "legality." My argument then is that in almost all instances there are alternative paths for providing legality: by simple and accessible forums, public or private; by aggressive governmental champions; by more competent and organized parties; as well as by legal services on an individual representation basis.

Obviously, the optimum means of maximizing legality in any specific case is going to depend on a detailed assessment of costs and benefits. So it seems to me that we must begin to inform ourselves about some of the cost/benefit factors in connection with these alternative paths to legality. This requires research into the problems and difficulties that people experience. What is the social location of people's troubles? Is most trouble in connection with interpersonal relations with intimates? Is it in connection with their occupational lives? Is it in connection with ownership of property, or what? And we need research into what people do once they have problems. How do they shop around for remedies? Do they seek out alternative forums, call on "champions" to help them out, or attempt to avoid the source of trouble?

We know very little about people's beliefs and expectations and attitudes about the legal system. Therefore, one kind of inexpensive and worthwhile research would be to pull together and reanalyze existing survey data on attitudes toward the legal system.

In talking about alternative remedies we should consider the possibility of promoting self-help remedies, the most prevalent of which is exit, walking away from unpleasant situations (Hirschman, 1970; Felstiner, 1974). What are the possibilities of making it easier for people to walk away—for example, by a vested pension you can take with you if you have a dispute with your employer. It seems to me that a number of very ugly and rancorous disputes might well be resolved by devices that would enable people to use the self-help remedy of exiting from an unpleasant situation.

My emphasis is very much like that of Doug Rosenthal in suggesting that the crucial factor—and the one that has been most neglected in research—is the capability of the parties themselves. For purposes of discussion, I would divide this into two aspects. The first is personal competence: the ability to perceive problems, to perceive appropriate remedies, to make those who are serving you serve you well, and so forth. But there is another aspect of party capability—the structure or organizational qualities of the parties

themselves. What gives parties the capacity for using the legal process in ways that allow them to adopt rational long-range strategies, to utilize high grade legal services, to monitor the situation so that rules favorable to them ultimately get applied, and so on? We know that some parties have considerable capacity to use legal services in these fruitful ways; others are much less able to do so. We ought to be looking at what makes for ability to use the legal system effectively.[1]

Competence, moreover, not only affects the way parties use legal services but it may also be an important product of them. We should concern ourselves not only with whether a party won or lost a particular case but also with the impact of that case on his capacity to cope with comparable (or different) situations in the future.

We also need to know what people are looking for. Existing research suggests that there are interesting variations in the kinds of outcomes that people are seeking when they try to find remedies for their problems. Some people are interested in justice, in being vindicated in the sense that they are told, "Yes, according to the official, authoritative norms, you are right."

Leon Mayhew (1975) found that there is very little of this justice-seeking activity and that what there is tends to be concentrated in certain problem areas. In landlord-tenant disputes or problems with public organizations, very few people are looking for justice. Everybody says, "No, I just want to get this matter settled; I want to stop the trouble; I want some kind of expedient solution."

A recent study by Eric Steele (1975) of the consumer fraud bureau of the Illinois Attorney General's Division of Consumer Fraud and Protection found a strong correlation between income of the party and interest in a public rather than a private remedy. This suggests that class, educational, and economic factors operate to distribute interest in public-regarding remedies. This finding seems of immense importance in designing legal services delivery systems that will mesh with people's preferences. But these preferences are themselves shaped by social arrangements. Both Mayhew's study and Steele's study deal with isolated individuals trying to resolve personal problems. It might well be that if their problems were related to some kind of group activity, many more individuals would be interested in public-oriented remedies.

Also, the preferences that individuals express are formed by the dispute processing institutions that they have encountered and

1. For a discussion of structural and organizational differences in party capability, see Galanter (1974).

by the legal services that they have used—or at least that is my hypothesis. In different institutional settings, or if different kinds of legal services were available, individuals might turn out to have somewhat different preferences.

To return to the general organizational point, a growing body of research shows that courts are used overwhelmingly by organizations against individuals, and that organizations when they use courts are generally more successful litigators than are individuals.[2] A basic problem is to create forums that don't amplify but rather overcome the relative strategic advantages that seem to be conferred on organizational parties in the American system. Therefore, there is an enormous area for research about the sources and character of the strength a party wields in legal forums. Does it have to do with his information-handling capacities? The way in which he can use legal services on a continuing basis? Just the ability to endure delays?

Once we know something about the sources of that kind of formidability, we face the interesting question of translating such findings about organizational competence into programs for providing or upgrading the representation of underrepresented interests. And there I think lies a fascinating opportunity for field experiments comparing different styles of organizing or aggregating claims by means of membership organizations and assignment or joint management schemes. For instance, I think the American Society of Composers, Authors, and Publishers (ASCAP) is an extremely interesting and little studied example of a very successful device to give effective legal rights to people with unmanageable small claims, one that I describe in greater detail in my paper.

In conclusion I would submit that most earlier efforts to mitigate disparities between the law's promise and what is actually delivered have had limited success because basically they left the parties as they found them. The thrust of my paper is that the crucial obstacle to the creative use of the legal order is the lack of capability on the part of the parties so to use it. I suggest, therefore, that the critical task for reform is creating more competent parties and thus new possibilities of making law fulfill its promises.

MR. JULES BERNSTEIN: Marc, your paper indicates to me, as a union lawyer, that a great deal of work needs to be done in looking at prepaid legal services from the perspective of transferring to the individual the union's ability to vindicate rights in certain areas. That is to say, unions do an effective job of representing people

2. This research is summarized in Galanter (1975).

vis-à-vis their employment relationships. Prepaid legal services may move collective union power into other areas. It brings the group's cohesiveness, its strength, and its expertise to bear on the individual's grievance. In society at large, the individual is worse off because there is no group involved in helping him vindicate his rights.

A final comment: institutional lawyers always have a bad conscience about litigating against an individual because all the organizational benefits Marc describes are usually on the side of the institution. Obviously the institution has the ability to grind down the individual litigant so that the merits may become irrelevant. It is staying power, that is, economic power, that will usually prevail. From that point of view I thought Marc's analysis was very penetrating.

MR. STANTON WHEELER: If Marc Galanter is right in his judgment about the relative capabilities of organizations versus individuals in responding to legal problems, and I think he probably is, then we must investigate the barriers that inhibit the conversion of amorphous individual needs into a socially organized response.

With respect to the question of client competence, the principal question I have is this: to what extent is competence with regard to legal problems any different from competence with regard to any other kind of problem? Is it the case that people who are generally competent in managing their affairs are also going to get the best legal services, or is there something distinctive about the legal arena that calls for a special kind of competence?

As far as I am concerned that question is quite open. I have a feeling we are dealing with a general quality. That is, the same people who get the best legal service also get the best medical service, also do better shopping for automobiles, et cetera. When we talk about raising the legal competence of parties, are we then really talking about raising competence in dealing with life generally or are we talking about something specific to legal services?

As for Marc's point that competence and the different components of competence not only affect the way parties use legal services but may also be an important product of them, that is a very difficult quality to measure. Indeed, output issues may be more complicated than we think. I am reminded of some of the research on the effects of watching Sesame Street, a program which was developed in part with the goal of reducing the gap between the culturally deprived and those who were less so. From what I recall, research revealed that both groups exposed to this program improved to some degree in learning rates, reading scores, and so on.

But the gap between the more and less culturally deprived increased rather than decreased (Cook, 1975). This suggests that if we provide new resources for some litigants, we may find that their adversaries will build up their own legal service resources so that what we will have is much more money going into law with no distributive effect on the outcome. I do not know the extent to which that is likely to be the case. It seems that there are some areas of law where it is likely to occur and others, such as the drafting of wills, where these effects will not exist. To tie this in to Marc Galanter's comments, when we talk about output and consequences, we need to look at these not simply in terms of immediate effects upon particular litigants, but also in terms of the long-run consequences for the balance between one category of potential litigants and another. That is a much more difficult kind of research to conduct.

MR. F. RAYMOND MARKS: My task has been to review existing empirical research, but I will limit my presentation to pointing out interfaces with prior discussion. A deficiency in past research is that the system was accepted as a given. The legal system was seen as able to deal with certain kinds of problems. Most legal need studies examined whether or not these problems, if they were encountered by people, were identified as "legal problems". A major defect of those studies was that they failed to consider the possibility that there might be other serious problems amenable to legal resolution which either the legal system had not addressed historically, or which people did not think of as problems that could be redressed by the legal system. One research problem connected with group delivery mechanisms is how much the fact of having a lawyer or the potential use of a lawyer changes the way people relate their problems to the legal system—an issue that was suggested by the Shreveport experience (Marks *et al.*, 1974). If you have already paid for the use of a lawyer as against, for example, a social worker or a psychiatrist, then that may bias you in favor of relating your problem to the legal system. Research has to be done into what the users think the legal system is about. And I don't mean just the existing legal system, but what they think the potential of the legal system is about.

Another area that was briefly touched in the ABF-OEO studies (Maddi & Merrill, 1971), which I think holds a lot of promise, is the question of how the server's view of the problem solving styles of the group being served relates to the views that the people being served have of legal services. The way the lawyer thinks that the client wishes to solve his problems affects the way the lawyer

himself is used. Doug Rosenthal's (1974a) models of distance, detachment, and intimacy may be relevant to setting up studies here.

As I indicated in the paper, I still think we need a comparison between open and closed panel group legal service plans. We looked at the open panel in Shreveport (Marks *et al.*, 1974), but that was not a comparative study. There has not even been any research on the comparative costs of the two delivery modes. One should know how limitations on the choice of a lawyer affect the client's control over the lawyer and the kinds of problems he brings to the lawyer.

I think that the issue Doug Rosenthal raises about client control is terribly important. One of the things I think has to be researched is the leeway retained by a client to back off once a legal remedy or a legal service option has been pursued. One might design an experiment where people are given the occasion to withdraw from the legal service relationship.

Much of the mismatch between the desire for service and the way the legal system is used occurs because clients come to lawyers who have a fairly clear though not necessarily accurate concept of what the legal system is. If a problem is identified by a lawyer as one that he "understands," usually because he has handled it in the past, then a service button is hit. If a problem is mentioned that does not fit the lawyer's present concept of the system, a service button is not hit. This suggests an additional area of research, namely how lawyers change their concept of what constitutes client service.

The legal need research done thus far is really self-fulfilling. We have systematically identified certain formal remedies and certain procedures as being legal. Then we ask questions based on this constructed index—a sort of legal IQ test. Do clients see the legal system in the same way we see the system?

Studies are based on a rigidified way of thinking about the delivery of legal services and legal remedies. No matter what kind of research priorities you end up with, I would strongly urge that you try to find a definition of the legal system that does not recapitulate the one that exists now.

MR. ROSENTHAL: I am not terribly optimistic that survey research about the needs or desire of the public is going to provide much payoff, either from reworking existing data or going out and getting new data.

First, I think people are often unselfconscious about what they need and want. It is difficult to get any kind of meaningful information from them since they are unsophisticated about what options are open to them.

Second, there is so much to do to figure out what lawyers are capable of. We lawyers do not know very much about our own capabilities. We have to focus on what we can provide, what is cost-feasible, what we want to do as lawyers or leave to nonlawyers. Now, that is not to say we should not be terribly concerned about the needs of clients within the context of a specific kind of interaction between lawyers and clients.

Once clients enter into a process where they can respond to something specific, some real experience, some real need, that is when the most useful kind of feedback will be obtained, not in general surveys of large populations asking a person about dealing with lawyers when the person only dealt with a lawyer once five years before about buying his house.

The other thing I would stress is that there is a kind of survey work we need to do. We must get feedback from clients, particularly clients of organized programs such as prepaid programs or OEO Legal Service programs, indicating their satisfaction or dissatisfaction with specific aspects of the service provided or the remedy obtained. We cannot be content with looking at lawyers from the top, from the board of directors, just internally.

MR. MARKS: To do this we should use an index that measures morelthan satisfaction versus no satisfaction.

MR. ROSENTHAL: That's right. When you are questioning people right after they have had a specific experience with a legal service program, you can begin to focus on what satisfaction means. You can talk in terms of the problem they brought to the lawyer, what they thought they brought, what they got and what they thought they got.

MR. RICK CARLSON: Just a quick point about the assessment of need question. One of the more promising developments in medical care is what is called the problem oriented record, which is based on the notion that if you leave the definition of need up to physicians, they will always find illnesses, no matter what the problem is. On the other hand, if you ask the patients why they are there, and ask them in terms of problems, not their imperfect understanding of what their sicknesses may or may not be, you get problems that don't match up very well with the illnesses. Then the system supposedly locks in on problems instead of illnesses and you get very different results (see, e.g., Fessel and Van Brunt, 1972).

MR. GALANTER: Some very interesting research remains to be done on the basic profile of attitudes and expectations about the legal order. I'm not thinking of survey research, but of more in-

depth research, such as Lane's *Political Ideology* (1962). If we had a study investigating what working class Americans and, for that matter, corporate executives, think about the legal order, we would be a lot better off than we now are, when people tend to project their own ideas of what various parts of the population need in the way of legal services.

MR. BRICKMAN: I am wondering about the implications of the comments on survey research for the ABF study on legal needs (Curran and Spalding, 1974). Do people feel that that kind of approach is not going to yield usable data? Ray, you indicate that that study is going to be a very important one.

MR. MARKS: Well, I have mixed feelings about it. I think there is limited utility in further needs studies because I think that the one being undertaken now by Barbara Curran and Frank Spalding is quite sophisticated. That should be the end of it. I am skeptical about whether surveying past use patterns of a group will be of any help in determining whether legal services are needed or how they should be allocated.

MR. SPENCER KIMBALL: I think the question one might fairly ask is if it was worth spending three-quarters of a million dollars for the ABF study. I think that the information that will be obtained from it will be exceedingly rich, and will provide a great deal of understanding about the system as it is and the way people perceive it. And the open-ended questions, when fully coded and analyzed, will provide a great deal of the kinds of information that Ray Marks and Marc Galanter and Doug Rosenthal are suggesting. I would certainly agree that this ought to be the end of it for the time being. When the results are in we may learn that even in conventional terms, legal needs are not met in certain areas or for certain groups. It is conceivable that in some of those areas more survey research would be worthwhile to allow more detailed analysis.

MR. JACK LADINSKY: My thought in reviewing the literature on consumer needs, utilization of legal services, problems with the system, etc., was that very often in the enthusiasm for creating new perspectives, ancient common wisdom is forgotten. It is the conventional wisdom of the sociologists, and I simply want to repeat it briefly, that the traditional model of professionalism is well entrenched. It is a hallowed symbol, a strong structure that has accumulated over perhaps three to five centuries. The professional model of delivering certain critical services to consumers has never worked perfectly in any society. From my point of view, a critical factor is understanding those systematic structural weaknesses that lead to disparity between the ideal model and reality.

In that sense, I disagree with Doug Rosenthal's paper that there is much to be gained in attempting to improve individual input into the lawyer-client relationship. It seems to me that structural changes of a larger sort in the court system and in alternative forms of delivery are, in the long run, going to lead to greater change. However, I hasten to add that any structural changes will have both benefits and costs. Herein lies a great deal of the challenge of research.

If we go back one step from structural changes to the more specific conditions that determine utilization of services, I try to focus on two aspects of the lawyer-client interface: first, how problems come to be defined as amenable to lawyer's services; and second, how citizens find their way to a lawyer's office once they define a problem as legal.

The line between definition and migration is not easy to draw. But, for the moment, let's try to separate them conceptually. I see the problem with most of the legal needs studies as being the problem of new research generally. Information from research grows incrementally, like information from all kinds of problem solving processes. Up to this point we have been able to refine a checklist of areas of legal need, particularly in the ABF's survey. When that research is fully exploited, I think we will have some substantial insights into variations in problem areas of legal needs.

What we will not have is the next step in research on needs, an understanding of the process by which a felt need for a solution to a vague problem comes to be perceived as a problem that is legally remediable. It does not follow that individuals who perceive problems as potentially remediable by legal intervention will take those problems to a lawyer. In most instances, I am sure they will find alternative ways to solve them. We have no idea how individuals decide where to take problems before they are defined as legally remediable. They become legal problems only when they are taken to a lawyer's office and are then processed through the legal system.

Obviously, this process of deciding where to take a problem will vary by type of problem. But we can begin asking about simple common factors that influence the process of perceiving matters as legally remediable—attitudes towards lawyers and the law, knowledge about law, prior experiences with law and lawyers, age, sex, education level, income, race, ethnicity, marital status, rural-urban origin, and we could probably continue the list. That's ground clearing. We haven't even begun to do the ground clearing in the legal services area.

From the institutional side, the research question is how do cultural currents, legal developments, and other societal variables stimulate the perception of problems as legally remediable? That really gets to the question Mayhew (1975) so nicely lays out; that is, that there are cultural currents which shift people's perception of certain problems so that they become defined as potentially remediable by law. Obvious examples today are environmental problems and women's rights; an earlier area was civil rights.

This is academic research. I don't think it is an area where there ought to be a heavy investment of funds. From the point of view of the kinds of problems this conference is concerned with, it is a low priority. The structured ways in which lawyers and clients link up should have high priority. This area has been addressed only recently (Galanter, 1974; Lochner, 1975; Mayhew, 1975; Rosenthal, 1974a).

What might a more thorough research agenda on the lawyer-client link look like? First, I think we need empirical studies of the effectiveness of common mechanisms by which lawyers build a clientele. For example, we do not know how effective neighborhood law office outreach workers have been in building ties to consumer groups that yield legal work. We need to know how such outreach efforts operate in different social conditions and whether any negative side-effects emerge from efforts to link citizens and groups to lawyers.

Second, I think we need research on the ways that consumers actually make decisions about the quality of legal services. That's the outcome that we are most interested in. In my paper I suggest that uncertainty in the determination of quality drives the client in his pursuit of services. Often we characterize as irrational the ways in which clients search for lawyers, despite the fact that the only way in which they ca achieve some assurance of reliable service is to fall back on what Lochner calls intermediaries (1975: 449), and what Freidson (1961), in the medical area, calls a lay intermediary system.

We don't understand how that intermediary system operates, nor do we know when clients who use it achieve satisfaction but not quality. Indeed, I would assign high priority to research that reveals the conditions under which quality is correlated with satisfaction. ABF-OEO studies indicate that there is greater utilization of lawyers where people had friendly intermediaries putting them in touch (Maddi, 1971). Social workers not only acted as brokers or referees for their clients, but frequently "solved" or worked on their client's "legal problems."

MR. MICHAEL SAKS: As a researcher, I would like to talk about a major problem I have with most of the papers and most of the comments; that is, they are very strong on the input end but weak on the output end. They tell us to do research by varying the characteristics of the delivery system and the people using them, but they do not tell us what we are trying to accomplish by changing the way in which legal services are delivered.

I have been trying to write down the dependent variables mentioned in the discussion and the papers. The clearest one is dollar cost, but it is not clear what particular dollar costs should enter into a cost-benefit formula. People have also mentioned utilization of legal services, and someone mentioned the ability of a client to withdraw from an ongoing lawyer-client relationship.

What strikes me about these outcome measures is that they are very poorly conceptualized. I have no idea what experimentation in this area is supposed to measure. What is it we are really trying to accomplish?

MR. MARKS: I think your assessment is accurate, but it is part of our job to wrestle with the question of what it is we want from the legal system. Indeed, we must wrestle with the question of what a legal system is. We do lack agreement on what we are looking for.

MR. SAMUEL KRISLOV: The only one who really has a criterion on the output side is Marc Galanter, and he wants everybody to win 50 percent of the time. Since that can't happen with individuals the way they are, he is going to change the position of individuals. This is a confession that the whole program which was intended to change people through litigation hasn't quite worked, so now we are going to change people for litigation. Of course, 50 percent is a pleasant sounding figure, but why not 60 percent or 70 percent wins for the underdog? Or a success ratio built on the pool of possible litigants who don't sue?

We know from medicine that an optimal delivery system will reflect the wishes of neither the clients nor the lawyers; indeed, we have trouble defining what we mean by an optimal delivery system. In medicine, where patients die, you can use morbidity rates, cure rates and so on. Even so—I think this would be a fair statement—the state of the art won't permit a valid definition of what are good or bad medical services.

Now the question you are raising—and I think it is the problem that will haunt us for these two days—is how we are going to define legal service outcomes independently of the wishes of lawyers and clients when we lack even criteria as crude as morbidity and

recovery rates. And obviously, while the availability of and effectiveness of medical services affect their use, it appears that the use of legal services is many times more elastic—maybe catastrophically so.

MR. RICHARD LEMPERT: Mike Saks's remarks focus on output. We should also think about the processes that lead to output. There has been considerable attention devoted to our lack of information about the needs and desires of clients and about what happens in the lawyer's office. There seems to be a general consensus that clients have considerable difficulty in perceiving their needs and in dealing effectively with the law and lawyers. There seems to be agreement that these must be overcome if the system is to work as it should. But if we succeed in getting the client to the lawyer and he is able to present his demands effectively, the unspoken assumption seems to be that the rest of the system works very well. We all know, however, that it doesn't. The lower courts that deal with matters like divorce, juvenile delinquency, and other vital human issues, are often very ineffective in delivering what Marc Galanter has called "legality". They are crowded, understaffed, and poorly funded.

There are studies about small claims courts, for example, that suggest that even if you get a judgment, you will face considerable difficulty in collecting it (*University of Cincinnati Law Review*, 1973: 483; *University of Toledo Law Review*, 1975: 406; Driscoll, 1974: 501; Yngvesson & Hennessey, 1975: 254). But it is the collection that you are probably after. If we really want to talk about effective delivery of legal services, we ought to focus more attention on what the legal system has to offer totally apart from the client-lawyer relationship and any deficiencies that might be involved there. Although there are allusions to research on these aspects of the legal system in some papers, little attention is focused on this area.

MR. ROSENTHAL: I would like to sharpen a disagreement between us on this point. I think that the primary focus of research should be on the lawyer-client interaction and how that relationship can be made effective. Failures of the present lawyer-client relationship are relatively unappreciated. There is already considerable awareness of the deficiencies of the legal system.

I think that there is a lot of potential for doing justice, for promoting legality, in the Selznick (1969: 11-18) sense of legality, within the lawyer-client relationship. There is a tremendous potential for the lawyer to educate the client and to redress some of the imbalance between the organizations, with all their resources and expertise, and individuals. That problem may be attacked without

restructuring the court system or finding alternatives to litigation. One way is by promoting and supporting lawyers who will tell an organizational employer, "We should not do this to the individual because it is unfair, because it is wrong, because it doesn't serve our interest and it doesn't serve his interest, and doesn't serve the interest of justice." We haven't even begun to focus on the potentials for promoting legality, for doing justice, for providing legal services through altering the nature and extent of the interaction between the lawyer and the client.

MR. LEMPERT: I don't disagree with you on the issue of priority because such a large proportion of legal problems are resolved through negotiation or other processes which do not involve action by other legal institutions. But even in these matters a lawyer's action is influenced by conditions in other parts of the legal system; they are not irrelevant to our concern here.

MR. GALANTER: I agree that lawyer-client interaction is an interesting area but I disagree with Doug Rosenthal's a priori assumption that this is the most cost-effective place at which to invest research and demonstration money. I think there will be more leverage from investing money in structural changes. Research in this area means we must face the question of output measures, which has two levels. One is the problem of measuring effects or outputs, the other is the question of what one is aiming at. The latter is basically a political question. It is a question of the kind of society your heart approves; whether you want more income or cleaner air, or some particular trade-off between them. Which we prefer is not a decision we make in our academic or scientific capacities, but rather as citizens. Accordingly, we may eventually be interested in very different output measures; everybody will have his own.

MR. RICHARD SCUPI: That, of course, is hard to deal with in a research context. But I wonder how you could evaluate the delivery of medical services without talking about "health," and how you could really evaluate legal services without talking about something called "justice"? And obviously, if you are talking about the amorphous "middle class," you can't talk about justice because the legal system advances certain interests in certain ways at certain times. Middle class people have different interests. But if you are talking about a more discrete group, you can evaluate the delivery of legal services by talking about promotion of their particular legal interests and the way they may be slighted by the legal system. Only when you also consider the extent to which group legal interests are affected can you fully evaluate the adequacy with which group legal services are being provided.

From this perspective, much of the discussion in the papers on the relationship between lawyer and client and/or the client's satisfaction becomes irrelevant, although of course it is important to any practicing lawyer. What I think our program is doing and what I think any prepaid program for a specific group is attempting, is trying to advance specific interests of that group. Given these ends, a focus on outcome, both in individual problems and group interests, is really important.

MR. RICHARD HOFRICHTER: And evaluating outcomes, in relation to research, means examining the political context and the structure of power, public and private, within which a legal services delivery mechanism operates. Jurisdictions with different systems of landlord-tenant rights, or those where creditors use the courts as collection agencies, require a delivery mechanism capable of redressing the balance of political power. A system of one lawyer handling one client at a time may not be applicable under certain conditions where individuals are facing actions initiated against them by institutions. I would therefore advise paying close attention to the social and institutional context within which a delivery system operates.

To relate this comment to what Mike Saks was saying: one of the problems with social scientists is that they try to avoid values or eliminate them from consideration in their research. They sometimes believe that objective research can be conducted without attention to ideological assumptions implicit in the form of analysis. The questions we choose to ask about legal services and the methods we employ may communicate a great deal about what we may or may not be trying to accomplish in reorganizing the structure of legal services delivery, and about who benefits from different types of systems. For example, I was surprised Marc Galanter did not mention some of the issues he has discussed in another context (Galanter, 1974) regarding the assumptions of legalism rather than the assumptions of professionalism. That is, we need to understand more about how legal rules and procedures affect outcomes. In looking at the legal system one should examine who, in fact, has used the courts and for what purposes. The legal system is not a neutral, impartial instrument. It reflects community power. This seems to be critical in determining what kind of delivery mechanism is going to serve what ends.

So, when considering the concept of "quality" legal services, something more than legal competence of lawyers must be studied. Even if ideal legal competence could be achieved, the bargaining power of groups is not necessarily altered in delivering adequate legal services.

MR. KRISLOV: There are other outcome measures that are researchable. We can ask how many people are served. There is an assumption in Jack Ladinsky's argument, and I think in Marc Galanter's, that if the legal system served a larger percentage of the population, that would be accepted by most people as evidence of a better system.

Actually I don't think social scientists try to get away from values or norms so much as we try to get away from terms that are, as the philosophers say, essentially contested concepts. If we start talking about justice, one man's justice is not another man's. If we talk about the solution of problems, I think we would come very close to what most people think of as justice and yet we would have something relatively measurable, that is, an outcome measure. We can ask how many problems in society have been solved and how many problems have been ignored. If we satisfy the guy who wants his rent kept low, but we don't deal with the question of building new buildings for other people who desire low-rent apartments, then I think we can say one problem has been solved, but other problems have been ignored. This brings us to the power structure question of who should decide how the system should be changed.

MR. S. WHEELER: I would imagine that measuring the effectiveness of output will differ greatly depending on what type of legal work we are talking about. What satisfaction may mean or what a good outcome means in landlord-tenant disputes may be rather different from what they mean in employment discrimination and so forth. One of the problems for a conference like this is that unless one really gets down to talking in great detail about a particular concrete area, it is difficult to outline measures of output. I would guess that is one of the reasons why discussion of output tends to be a little bit weak and vague.

MR. BRICKMAN: The "outcome" variable may be properly subsumed under the broader rubric of the quality and competence of legal services. Accordingly I would now like to take up the issue of competence of legal services, which will complement our earlier discussion of client competence. Two papers have been commissioned. The first, by Rick Carlson, focuses on aggregate competence, that is, the competence of the work product of a legal services delivery program. The second, by Doug Rosenthal, on ways of measuring the competence of the individual attorney.

MR. R. CARLSON: The goal of my paper, which I attempt to reach by analogies to the medical care system, is to suggest that one could indeed construct a "quality assurance system" for legal services. There is, I think, a great deal we can learn from the medical

care system, especially in view of the large sums that have been expended for health services research—somewhere between 350 and 400 million dollars in the last five years.[3] While we have learned a good deal about the health services delivery system as a consequence of this massive expenditure, the principal beneficiaries of that research have been the grants economy and researchers. We have hardly bent the system at all as a result of knowing a lot more about it; which is only to say that I don't think there ought to be too many grandiose assumptions about a lot of research money affecting the legal services delivery system. Moreover, in analyzing the impact of health care expenditures, I would point out that although you may be able to achieve good results at the individual patient level, they don't necessarily aggregate to produce a good result at the systemic level. In the legal system even a large number of individually good outcomes at the practitioner-client level will not necessarily aggregate to produce good results for society as a whole. A good outcome for the client is not necessarily a good outcome for the larger society.

My principal interest in medical care in the last few years has been to figure out why, despite all of the money that has been spent to improve the medical care system, the health of the population has not improved. The answer is essentially that the assumption that more money means better health is false. This is not to say that all the money spent on health services research has been wasted. A finding, for example, of particular relevance to legal services is that poor people who benefit from Medicaid see a doctor as many times as rich people. That is to say, Medicaid worked in the sense that it changed distribution patterns even though it didn't have any necessary impact on health.

But despite these somewhat disquieting facts, it is nonetheless instructive to employ the knowledge gained from the medical care system to design a quality assurance system for legal services—an effort I have undertaken in my paper. I begin by breaking quality regulatory measures into input, process, and outcome components, a framework that is used frequently in the medical care area. Then I look at what lawyers do, not in input terms, because who lawyers are may not determine what they do, but in process and outcome terms—largely by breaking their work down into the procedures that they follow. This measurement system could then be applied to lawyers' work to determine whether the work products fall qualitatively within the established set of parameters.

3. This estimate is based upon an expenditure level of 70 to 80 million dollars per year for the last five years reported in the Federal Budget for the years 1971, 1972, 1973, 1974, and 1975.

We can fight about this later, but I am fairly convinced that you could indeed construct a quality assurance system for legal services with greater ease than has been possible in the medical care system. Consider that a good outcome in medical care is presumably a healthier person. But that has very little to do with what physicians in hospitals do. Therefore, to try to construct an outcome measure of what physicians in hospitals do to patients misses a host of variables that influence whether people are or are not well. It's probably not quite as tough to measure quality in legal services because the services and outcomes are more discrete, there are fewer variables that influence outcomes, and most of them are not as esoteric as those which influence health.

There is, however, a substantial part of the law where such a measurement program could not apply—what I characterize as a "nuance" part. I suggest, not entirely facetiously, that people don't go to Clark Clifford because he is fastidious. There is an awful lot of law that you can't evaluate according to my system because it doesn't have anything to do with whether somebody files a paper on time; rather it has to do with whether somebody makes a phone call at the right time.

But I think you could construct a process oriented evaluation of the mechanical parts of law, especially since what we would conventionally call a process measure, at least in medical care, often tends to be an outcome measure in legal services. Whether you file a paper on time may look like a process item, but in fact it determines outcome because if you don't file it on time you are in trouble. On the other hand, if you are a good "nuance" lawyer, lateness may not make any difference.

We should also think about who ought to do the regulating, assuming you could construct such a system. There are three basic ways to do it: the professional self-regulation model; some form of governmental intervention; or regulation by the consumer. Obviously they overlap, and you can use them in various mixes.

Now I am going to try quickly to identify some researchable areas that I think flow from what I've said.

One issue is the aggregate question: whether or not the results at the individual level in the system aggregate and what the aggregates produce. Next is the empirical evaluation of performance which is implicit in the design I suggest in the paper. Field studies using various designs should be created and parameters set on the basis of our assumptions. We might then be able to find out exactly how well or poorly lawyers perform. Also, I think it would be worthwhile to see whether we can link process or outcome evalua-

tions with inputs, such as those that regulate the entrance of lawyers into practice.

Finally, I would emphasize that there is a good deal to be gained by looking further at analogies to medical care. We could argue endlessly about how different the medical and legal care systems are, but the fact remains that medical care has been studied for a long time and I think there are enough similarities between the two systems to justify further work.

Two quick examples of what you might learn. The medical care system was profoundly influenced by the passage of Medicare and Medicaid, and we are only now beginning to find out exactly how. I realize we are probably never going to have such ambitious programs for legal services; however, there has been some development in third-party financing in legal services, and since there has been a tremendous amount of research on what happens to the medical care system once you get third-party payers, it would be crazy not to look at it.

Another example is the open and closed panel problem. There is a great deal of information about this area of the medical care system in terms of cost, distribution, and quality which almost cries out for analogy to legal services.

MR. ROSENTHAL: I want to begin by stressing Rick Carlson's point about the tremendous costs of doing ambitious, comprehensive social research in this area. I think there is a need for analytical, conceptual thinking before we allocate a lot of money. Research funders should be hardheaded about authorizing large expenditures for empirical work for the most fruitful research may not require large sums of money.

Having said that, I would introduce my thoughts on competence by noting an issue that puts me into sharp conflict with a recent statement of Dean Roger Cramton (1975: 1342), that the objective of a legal services program is to provide legal service clients the same kind of service that the rich client can have. I find that statement astonishing.

We have to deal in the real world. What we are trying to do is reach minimum levels of competence, get some service to people who now are denied any. To talk about giving the kind of service that, say, Covington and Burling can give ignores the differences between what the Covington and Burling clients are seeking and what the poor client is seeking and is naive. If that is really what Dean Cramton wants, then I have a proposal: a lottery system for the assignment of lawyers in which rich and poor would pay the fees

they now pay, but attorneys would be assigned by chance. That is the way to equalize service between rich and poor. But it is not a proposal that most people in this society are going to accept.

Mike Saks, Sam Krislov, and Stan Wheeler have focused on the need here for the definition of dependent variables, on outcomes. But there are two kinds of outcome that we want to look at and some of us are more concerned about the one than the other. Sam mentioned solving problems of competence as an outcome measure. That, it seems to me, is an ultimate outcome. For certain ultimate outcome measures, it is not difficult to define a good result. When you are dealing with battered children, a good result is taking them out of the situation where their lives are going to be threatened. However, some kinds of problems do not have an obvious, appropriate solution. What is a competent ultimate solution to a client's desire for legal advice about a possible profitable merger opportunity? Or, what is a competent solution when a client brings a hopeless case—he has waived all his rights in writing, he read the waiver, has a college education, and was not the victim of fraud or duress? While it may not be possible in these situations to assess the competence of outcomes, it may be possible to look at the way the lawyer went about the problem solving, how well he or she analyzed the problem, how well he or she tried to deal with it, and how well the lawyer responded to the client's needs and concerns. In a sense, these are intermediate measures of outcome.

The central purpose of my paper is to try to present some intermediate measures of outcome. I do not present measures in the precise social science sense of measure, but I try to identify the values we want to achieve through legal representation and what competence means in terms of these values.

My suggestion about values is going to be rejected by a number of people. One of the most difficult problems with any performance measure, if we are trying to achieve consensus, is that each of us is going to have different values, a different research agenda. That's fine. Let us each proceed with his own research. In conducting and reporting our research, we should try to make clear which values are being measured and which are controlled so that others can accept, reject, or modify our assumptions in evaluating our analysis.

It is my hunch that the greatest pay-off for improving legal services is improving the way that lawyers and clients deal with each other. My principal suggestion for research is to try to structure lawyer-client interactions in such a way as to facilitate active client participation and meaningful shared decision making between lawyers and clients. We should see if it works, see what the

spillover effects are, and determine whether, as most people assume, it is necessarily more costly.

I think that Stan Wheeler's point is an extremely important one; that it may well be that what we are talking about is a generalized set of skills and attitudes which leads to competence not only in dealing with lawyers, but in dealing with other providers of services. It seems to me that that is an important hypothesis for us to test about delivery. Is consumer competence a generalized quality? Are those skilled in getting legal advice skilled in getting and using medical advice as well? I suspect they are.

As a way of improving the competence of clients, one relatively simple but potentially important structural change, susceptible to evaluation by social scientists, would be the promulgation and distribution to clients and potential clients of a bill of rights (Rosenthal, 1974b). This would be a document which tries to raise the client's level of sophistication, and his awareness that it is perfectly legitimate to make certain kinds of claims upon lawyers or other professional service providers. It should be noted that the American Hospital Association has promulgated a patient's bill of rights, which has been of limited effectiveness. What has been the impact of that bill on the sophistication, capabilities, and demands made by patients? This is an area well worth measuring.

Medical sociologists find that a principal service which doctors provide to patients is the definition of their problems. The capacity to define something that the patient himself cannot define as the problem is the critical outside resource that the expert is providing, whether he is a psychiatrist, lawyer, or whatever.

It seems to me that we have to encourage lawyers to help clients see that many of their problems are best solved outside the legal system and by nonlawyers. The fact that a problem is brought to a lawyer does not automatically mean that it should be defined as a legal problem. One of the functions of a lawyer, one of the skills of good lawyers, is being a good problem definer. I see tremendous unexplored opportunities for lawyers and lay substitutes to expand the kinds of services they provide to the public by helping them define problems as nonlegal, suggesting the means to cope with them, and helping clients to articulate their interests in dealing with third parties. It seems to me that the role of "lawyer" as a problem defining and interest articulating expert is going to be an ever increasing one as we increasingly appreciate the importance of developing these kinds of skills in a pluralist society.

MR. BERNSTEIN: I very much like the idea of a client's bill of rights, but disagree with the nomenclature. We think of a bill of rights as protecting the people against a sovereign, but I for one

refuse to accept the notion that the legal profession is sovereign. To change the focus from rights against the sovereign to ordinary consumer protection, we should call the bill the Legal Service Consumer's Protection Act.

At the same time, I must say that while I know intuitively that we need such protection, I don't know whether from a research point of view anybody has as yet demonstrated the need. Further, we don't even know whether there would be public support for this. No one has been asked.

MR. LEMPERT: My problem with this type of micro approach is that it would not at all surprise me if one could develop a pilot program of, for example, client bill of rights, study it and show that it works, that clients are more satisfied, that they get better service, and that they get higher returns of other sorts. But I really wonder if such a demonstration project might not be very misleading in terms of long-run pay-off. Much of our current knowledge about the criminal justice system shows the great power of attorneys acting unobserved to subvert the system to their own ends (Blumberg, 1967b; Alschuler, 1975).

I believe that as long as we don't make fundamental institutional changes, as long as attorneys deal with clients individually, whatever we try to do to structure that relationship will be open to a very high probability of subversion if, by our changes, we increase the strain on the lawyer and give the lawyer incentive to avoid whatever control mechanisms we are trying to apply. Not that I don't think the research Doug Rosenthal suggested is interesting, but I have real doubts about whether the pay-off will justify the expense.

MR. BARON: Intuitively, it sounds very sensible to say that you are never going to be able to supply the same level of legal services for the poor that you can supply for General Motors. But once you get beyond the intuitive reaction, I really wonder how much obvious sense that makes—whether that *has* to be right? Talking this way assumes that you can measure the amount and quality of the legal services that you are getting in terms of how much attention is devoted to your particular problem. I am not sure that is true. Nor is it necessarily true that the poor are better off if they get some legal services, even though they don't get as much as General Motors.

I think that it is entirely possible that the clients of the Legal Services Corporation could be worse off as a result of getting a little bit of attention from a lawyer than they were when they got none. I am not saying the same level of work must be done for both General Motors and the indigent client, but the lawyer should feel that he

has done all he could to make the client substantially better off than he would have been had a lawyer's attention not been directed to the problem.

MR. MARKS: I think ending with these two papers helps us pull together some of the rumbling about output. It seems to me that at a macro level the thing we are most concerned about is whether the delivery of legal or other types of services helps individual clients or groups of clients cope with the kinds of problems they face in their life situation. As I suggested in the Shreveport study (Marks *et al.*, 1974:66), exposure to lawyers may increase people's capacities to deal with one another and to deal with others in the community. When a person's position relative to others breaks down—what I call "legal pathology"—it can be rectified with the aid of attorneys. Legal services and access to the legal system can help people assemble resources so they can more adequately cope with the problems of their daily existence. So, I am much more optimistic about research making a difference in legal delivery systems than in medical delivery systems.

I. MEASURE OF THE QUALITY OF LEGAL SERVICES AND THE COMPETENCE OF ATTORNEYS

MR. BERNSTEIN: I would like to see some fundamental research into the issue of who receives legal services and into the quality of those services. For example, I would like to see researchers examine a random sample of court files to determine, if only in some broad sense, whether the representation received by people of moderate means was competent. We know far too little about the quality of legal services actually being delivered today.

MR. SAKS: As a behavioral scientist, two questions come to my mind about the kind of study you propose. First, will there be enough information in the case files to allow an outsider to make the kind of evaluation you propose, or would we have to follow the much more expensive procedure of searching out the parties and attorneys to try and reconstruct what actually happened in the case? Second, what will be the criteria for evaluating the adequacy of legal representation? What are the standards of care and how may they be measured? If researchers like myself are to be able to provide the information you desire, you must state your goals as specifically and concretely as possible.

MR. JACQUES FEUILLAN: Before doing research like this we should be clear about why we want to undertake it and what we want to know the quality of. Are we talking about measuring the entire legal delivery system in the country? Do we want to measure the quality of legal services delivered by lawyers ranging from a

firm like Covington and Burling in Washington, with a hundred and fifty lawyers, to a sole practitioner in upstate Wisconsin? Or should we focus on the quality of legal services delivered to a particular spectrum of the middle class in a particular geographic region?

MR. PHILIP MURPHY: It would be of great value if we could develop some general means to evaluate the performance of individual lawyers according to some standard of minimal competence. This has been a longstanding concern of the bar, but one which they have never been able to resolve.

MR. SAKS: It is very difficult to evaluate the constituent elements of lawyer-client interaction. I think that if we are going to measure the performance of individual attorneys we will have to focus on outcomes. The lawyer's first job is to decide what the client desires and then whether legal services are an appropriate response. If they are, then we can measure the effectiveness of the actions taken by whether the client attained what he sought. This doesn't mean that outcome is everything. Lawyers may do good jobs and lose cases. But with a criterion one can decide whether a certain strategy was completely misguided or whether it was an appropriate way of seeking the particular outcome.

MR. KIMBALL: I don't think you can attempt to measure quality through outcomes. Too many factors are involved. In one case a good outcome is winning a judgment and in another it is minimizing the amount of an opponent's judgment. In a will case the outcome may be whether property is distributed as the testator intended some thirty years after the instrument is drawn up.

MR. MARSHALL BREGER: While it is difficult to make determinations about the quality of legal services work through the examination of outcomes, looking at outcomes has an advantage in that it forces us to ask what kind of work a community legal services program should be doing. Should it be spending its time on divorces? On consumer complaints? Some have defined quality in part by the particular mix of activities which a local legal services delivery agency has engaged in. We should continue to do so, especially since that is an opportunity for client input. In the past, at least in theory, the decision about the mix of services to be delivered was made by the local board of directors, one-third to one-half of which represented clients, again in theory though not always in practice.

MR. BARON: Maybe, instead of trying to find out what quality is in legal services, we should experiment with systems that allow the client to monitor the kind of legal services he is getting and, over time, make judgments of quality. It is a subjective judgment, but it is the client who should be served by the system.

MR. BERNSTEIN: I think it is a mistake to try and evaluate the quality of legal services by asking the clients what they think. What comes to mind is the Teamster study in New York in the early sixties by Ray Trussel (1964) at the Columbia College of Physicians and Surgeons which found that fifty percent of the hysterectomies, appendectomies, etc., were unnecessary surgery, but when patients were questioned, they said, "Oh, I love my doctor, I love my surgeon, he had a great bedside manner."

MR. LADINSKY: That's a measure of satisfaction, not of quality.

MR. LEMPERT: I would like to try and focus discussion by suggesting a more or less systematic way of approaching the problem of quality measurement. For a social scientist, a fundamental problem that is encountered at the start of any attempt at empirical research concerns what it is we can measure and how we can go about measuring it. If we cannot find some way to measure a concept, like quality, through accessible data, we cannot investigate it empirically. I think we can approach the problem of measuring quality from at least three directions. First, we can take the client's perspective. As I see it this will generally focus on the micro level, that is, on the individual lawyer-client relationship. One obvious measure is client satisfaction. We can investigate satisfaction with process, in which case we may well find the legal equivalent of patients who loved every minute of their unnecessary surgery, and we can investigate satisfaction with outcomes. We can ask clients about their feelings and we can look at the way in which legal services are used, perhaps a more objective measure of client evaluations. Return visits, for example, will reflect in part the incidence of legal problems, but may also be a measure of satisfaction, particularly in areas where there is a choice of programs and in programs where there is a choice of attorneys.

The second perspective which I think is important is the lawyer's perspective. I would divide this into two subcategories.

The first is the attorney's evaluation of himself and his situation. Why don't we ask attorneys how satisfied they are with what they have done for their clients? What influence does the type of legal delivery system have on an attorney's job satisfaction? On attorneys' opinions about the quality of representation they are delivering? What influence does caseload have?

The second is the lawyer's evaluation of the quality of the work which other lawyers are doing. I am thinking here of "peer review." This is very expensive, but it might be the best way of making quality judgments. Attorneys could evaluate process and outcomes. They could look at process in terms of attorney-client interaction

and in terms of the actions—like research activity—which lawyers engage in when their clients are not present.

The third basic perspective from which we might want to measure outcomes is that of the larger society. For example, we might be concerned with how different systems for the delivery of legal services affect the use of law or the kinds of problems which become defined as legal. From this perspective we would clearly be concerned with costs. We might also want to investigate such hard-to-research questions as whether easier access to lawyers helps prevent certain disputes from developing. This may have occurred in Shreveport where merchants apparently became more careful in dealing with people who they knew had access to legal aid.

I should add that if we are really concerned about pinpointing feasible research, I don't think we can talk about any of these suggested approaches in the abstract. They must be discussed in the context of the specific legal delivery systems to be investigated. For example, peer evaluation might be inordinately expensive as a way of looking at the quality of services rendered by private practitioners. Indeed, the problem of securing access might make this impossible. But in a legal services office, where the director might order attorneys to cooperate and sampling techniques can be used, peer review might be a practical way of evaluating the quality of services delivered.

MR. R. CARLSON: We talk about measuring services delivered to individuals versus the impact of legal service delivery systems on society as a whole. In examining competence, whether of paraprofessionals or lawyers, it is important not to dwell excessively on the competence of the individual practitioner. The most fruitful type of outcome oriented research in medical care is the measurement of delivery units such as hospitals or clinics, not measurements of physician performance. With rare exceptions, attempts to measure individual performance haven't led very far, in part because of professional resistance to attempts at individualized evaluation. There is much less resistance to the measurement of the hospital's outcome and output.

If we can apply this analogy to the legal system, we would examine firms, corporate legal departments, the Neighborhood Legal Services offices, et cetera. If we focus on delivery units, we avoid what I think is the trap of talking about individual competence. Not that individual competence isn't worth exploring, but I don't think the pay-off from such research would be very great, at least for the present.

Moreover, in the real world what we are often talking about is a product which represents the collective efforts of a number of people. A given matter can be handled at different stages by a number of lawyers, paralegals, and legal secretaries. The end result is often the product of a firm rather than an individual. That product can be judged as a corporate product without necessarily looking at the individual efforts and trying to aggregate them in some way. That is why I prefer a term like quality assessment or quality assurance which encompasses individual competence, firm product, systemic product, and so on. To phrase the competence problem in terms of individual competence may lead us to overlook those corporate aspects that affect the quality of legal services as delivered.

MR. LADINSKY: But there is peer review of individual performance in the medical profession, is there not? The issue is not whether it can be done but whether there is going to be client or patient input into the review process. Professions are real although invisible to the public; they do have standards and it is hard to develop lay inputs. But lawyers, like doctors, evaluate each other all the time in terms of competence. That is probably the best criterion we have for rating the performance of individual practitioners.

MR. LEMPERT: I think it is important to remember why in the context of this conference we are interested in measuring quality. I see two reasons. The first is that we want to evaluate different delivery systems. There are many ways to evaluate them: cost, access, etc. One important dimension is quality. If it turns out, for example, that we reach more people with Judicare than with staff legal aid but outcomes with Judicare are more frequently unsatisfactory, this is an important datum to have in choosing between the two programs. So, we have to be able to measure quality to evaluate competing programs. This suggests that evaluation at the delivery unit level would be most appropriate.

Second, we want to be able to measure quality because, in theory, if we can measure it we can do research on ways of increasing quality within the current system or within new systems. For this purpose we would want to measure both the quality of services rendered by individual practitioners and the quality of services rendered by delivery units. What measurements are feasible will, however, depend on the particular delivery system being studied.

MR. SAKS: Let us assume that we wished to measure the effects of caseload upon quality. For experimental purposes we might assign half the attorneys in the delivery unit 500 cases per year and the other half 100 cases per year. Now, I think most of us would intuitively suspect that the 100 case-per-year lawyers would

do higher quality work than the 500 case-per-year lawyers. What specific differences in behavior would you expect to see and how would that tie into outcomes for the client?

MR. R. CARLSON: You would also want to introduce a cost-effectiveness measure related to the cost per case. Theoretically and intuitively one would assume the cost per case is higher with lighter caseloads. The question is whether it is justifiably higher. For example, is spotting more legal problems worth the extra cost at the margin?

MR. JULIUS TOPOL: About five or six years ago the head of OEO in New York told me that because of the massive caseload, an enormous amount of malpractice is inevitable. Overlooking of statutes of limitation, the failure to meet other deadlines and the failure to conduct sufficient research are examples of the way one would expect quality to decrease as caseloads grew larger.

MR. SAKS: The intent of my question was not really to have you grapple with the problem of caseload but rather to see if we could generate concrete, measurable indices of quality. Some suggestions are the number of malpractice actions, the amount of research time available, promptness in dealing with clients, the need for court-approved postponements, the number of legal problems found by the lawyer, and scheduling foul-ups. There are no doubt many other measures we could name. Now, most of these, with the possible exception of malpractice, sound like differences in process to me. I would like to know whether this variation in process makes any difference in outcomes.

For example, does it make a difference that attorneys appear to argue motions without briefs. Would a well-written brief make any difference in how the court rules on the motion? In a custody fight is the client whose lawyer has more time to prepare more likely to get custody of the children? If a legal delivery system is organized so that attorneys have a substantial amount of time to consult with each other, is that likely to result in better outcomes for the clients?

Now there may be some things that so obviously relate to outcome that there's no point to asking this question. Forgetting to file papers or failing to meet a crucial deadline may be omissions of this sort. Maybe to the lawyers here it is equally obvious that the failure to prepare a brief substantially reduces the probability of a successful outcome.

To the researcher, specification of the factors that relate to outcomes is the essential point. But instead of asking attorneys to specify those processes that relate to outcomes? I would like to address the process itself; that is, does the research establish which of these things makes a difference in outcome? If one knows the

relationship one can then focus on processes without looking at outcomes.

MR. LADINSKY: Whether processes such as brief writing make any difference will, of course, depend on many factors which are independent of the legal delivery system, such as the strength of the case, the identity of the adversary, the judge, and the jurisdiction.

MR. ALFRED CARLSON: Of course, for determining which processes relate to which outcomes we don't really have to worry about these confounding factors. Statistics come to our aid here. What we are talking about is a probability. We are interested in whether having a written brief will change the probabilities of success. This will be evident in the long run though it may not be in each and every case. Of course, you have to work with large enough samples so that variation will cancel out.

MR. LEMPERT: I think there is a peculiar difficulty, however, in relying on probabilities when we are talking about something as value laden as legal outcomes. For example, statistically we could never spot five people out of 10,000 who were sentenced to death because of ineffective legal services. Any association between process measures and outcomes wouldn't be statistically significant. Yet, there is something very offensive about the idea that innocent people are convicted of serious crimes because they receive deficient legal help. I think that many of the actions we think of as processes are really outcomes as well, in that there is an independent value to quality performance on these measures totally apart from such results as how much money plaintiffs get or how much property is passed by will rather than intestacy. There is social value in having a legal system which generally appears to be working well, to be delivering justice.

MR. A. CARLSON: If we are trying to evaluate various delivery systems, then somehow we are going to have to manage to pool this collection of criteria in some meaningful way so that we can come up with a single evaluation to compare different delivery systems or some way to look at the different pieces in a meaningful fashion. We want to be able to say this kind of delivery system makes lawyers unhappy, but it results in good service to clients, or vice versa.

Let me take this opportunity to describe what we are doing. The Educational Testing Service is engaged in a program of research to develop measures of the performance of lawyers. This research is sponsored by the Law School Admission Council, the National Conference of Bar Examiners, and the Association of American Law Schools, with assistance from the National Science Foundation, and should have significant implications for those concerned

with lawyer competence (Carlson, 1975). What we are attempting is to provide a feedback loop that would enable us to relate lawyer performance to input measures. Phase I of our study is a comparison of the correlations among undergraduate grades, LSAT scores, law school grades, Multistate Bar Examination scores, and bar examination grades.

Phase II involves what industrial psychologists refer to as job analyses. We are examining the work of the legal profession with three major questions in mind. First, what are the various roles that legally trained people are called on to play in society, what are the principal functions they perform in the course of their work, and to what extent do lawyers believe that their legal training prepared them for performing these functions? Second, what are the specific activities performed by lawyers, how is their time divided among these activities, and what is the importance of each of these activities to the discharge of their professional responsibility? Third, what methods and procedures are currently used by members of the profession to evaluate the performance of lawyers?

Phase III will be based on the outcomes of Phase II. It will involve the development and field testing of measures of proficiency for the significant tasks the lawyer is called upon to assume. The results of Phase II should provide a rich source of ideas for the development of competency measures and will serve as the basis for the development of measures such as situational tests, job knowledge tests, simulation tasks (such as in-basket tests), and rating scales. The choice of performances to be measured will be based on three criteria: (1) the frequency with which the task is undertaken by different specialists (its generality), (2) the importance, as judged by lawyers, of the performance to the discharge of professional responsibilities, and (3) the feasibility of developing psychometrically adequate measures. It is also the purpose of Phase III to try out the measures, to examine their psychometric properties, and to refine and select measures for use in Phase IV.

The outcome of Phase III will be a set of tested instruments for conducting studies of the legal practitioner. These measures will not only be used in the final phase of this research program, but, as a by-product, some of them may be useful as part of a set of performance measures used for monitoring the continued competence of practicing attorneys, either through a self-assessment system or a periodic recertification program. Another potential use for these measures, or adaptations of them, would be as instructional tools in law schools or in continuing education. The criteria that are developed could also be used in research, e.g., comparative studies of teaching methods and studies of the effect of situational variables on performance.

Phase IV involves the collection and analysis of data to examine the relationships between the performance of lawyers and the preceding qualifying steps; that is, between the newly developed criterion measures and the measures of aptitude and performance obtained on the aspiring lawyer prior to admission to the bar. This examination will highlight the usefulness of the "gatekeeping" measures and suggest ways of improving them in order to make them more directly relevant to actual practice.

It is unlikely that the results of Phase IV will show either that the present screening procedures are perfectly suited to their purposes or that they are entirely useless. What we are likely to find is that the grades, tests, and examinations scrutinized in the study are reasonably good as far as they go but that there is far more to being a lawyer than these procedures can be expected to capture. What we hope for is significant progress in defining and measuring the "far more" in ways that will help law schools as they reexamine their educational objectives and that will assist bar examiners in their efforts to bring their examinations into closer consonance with the realities of practice.

The kinds of measures that we will be in the process of developing over the next several years are likely to have an impact on legal education; moreover, they could be used in other research on competence. They might, for example, enable us to determine why some attorneys perform better in one institutional or delivery setting than they do in another. A long-range possibility is the devising of standards for the measurement of competence of practicing attorneys.

MR. ARTHUR KONOPKA: Researchers should be aware of another measure of competence, that is, the malpractice system administered primarily through the courts. If we are going to take the message from medicine and most other professions, I think we can anticipate a substantial growth in the filing of malpractice suits, especially in light of *Smith* v. *Lewis*, 530 P.2d 289 (1975), a recent California case where the California Supreme Court liberalized the standard enunciated in *Lucas* v. *Hamm*, 364 P.2d 685 (1961), thereby heralding a new era of lawyer malpractice.

To attempt to measure competence only in terms of peer satisfaction leaves out the very important element of the malpractice suit and the pressure that will be placed upon practicing attorneys by insurance companies who will be expected to underwrite their liability.

MR. R. CARLSON: In medical care, there isn't any evidence that malpractice has had much impact on performance except to induce physicians to undertake many more procedures than they would

otherwise, thus driving up the cost of medical care. Insurance premiums have shot way out of sight and this is also reflected in the cost of medical care.

MR. KIMBALL: While I think we can learn a great deal from medicine, I would like to urge resistance to the notion that we can learn from medical malpractice. One of the problems in medical malpractice is that the legal profession, through the judges, have injected their judgment to a very considerable extent into an area about which they know little. You cannot say that about judicial judgments on the performance of lawyers. So, I think we are dealing with a fundamentally different situation.

MR. LEMPERT: To follow up these remarks, it seems to me that just in terms of research priorities, we need someone to plumb the depths of what can be learned from other disciplines—even if only at the library research level. Medicine appears to hold the most promise but the lessons do not carry over exactly.

Malpractice, to my mind, is a good example of an area where, on the surface there may appear to be important similarities, but, when one really thinks about it, the differences may be more important than the likenesses. To give just one example: I take it that one of the major indictments of the malpractice action is that it has led to defensive medicine, ordering a battery of painful, expensive, and perhaps dangerous tests as a way of coping with the low probability that one may be questioned retrospectively about the way one treated a patient. Assume the analogy holds to the extent that there is an increase in legal malpractice actions and this leads to more defensive practices by the lawyers. What will "defensive law" look like? It may be that the lawyer will do more research, that he will be prompter in filing motions, that he will inform the client more clearly about what is going on, and that he will, in general, be better organized. While this may increase the cost of legal services, it may be that defensive law, unlike defensive medicine, is, on balance, quite salutory.

MR. GARRICK COLE: I believe that our thinking about the medical analogy has to be more than intuitive. We have to devise ways for concrete research in this area.

MS. JANE FRANK: I think we should also investigate the costs and effects of alternative forms of regulation ranging from self-regulation to peer review to recertification to the effects of rules like those proposed in the Second Circuit (Ehrlich, 1975; Kaufman, 1975a), which would require practitioners to have taken specific courses. The penultimate question is whether bar associations, through their Codes of Ethics and their disciplinary machinery or the state and federal governments have any significant impact on

competence. The ultimate question is whether there are things they might do to affect competence.

MR. R. CARLSON: There is a fairly substantial movement in medicine towards recertification. This results in piling one input measure on top of another one, although the first has not yet been validated. Recertification is being tied to continuing education. I wouldn't be surprised if within four or five years virtually all states require physicians to have 50 hours of continuing education or face decertification upon failure to do so.

MR. BRICKMAN: Recertification is an issue in the legal profession both as a matter of continuing competence and in the area of specialization. Several states have instituted specialization plans which have recertification components. In one case, recertification is accomplished by attending ten hours a year of continuing legal education for three years (*In the Matter of the Florida Bar*, 319 So.2d 1, Fla., 1975). In California, on the other hand, recertification is much more rigorous process (*Florida Bar Journal*, 1974).

MR. LEONARD JANOFSKY: I would like to focus attention on the California certification program. As some of you know, California instituted a pilot program in specialization a little over three years ago which is a certification program in three fields of law: taxation, criminal law, and worker's compensation. Certification in California is certification as to competence. A lot of work was done to set up standards for determining competence and as you might expect a great deal of difficulty and confusion was encountered in the effort. Moreover, this has led to considerable controversy. And I think a study of that program will show the importance of the question of what level of competence one should strive for. In my estimation, even though I was instrumental in originating the program, they are striving for too high a level of performance, too high a standard for the good of consumers and of the legal profession. As a result, the program is very limited in its scope and in its effect on the profession. Only a relatively small number of the total California bar have become certified. The ABF has been requested to evaluate the California specialization program. While not at all quantitative, the study will be empirical in the sense that it will be based on extensive observation and interviews with the people involved in California and New Mexico—two quite different systems—mainly to develop some hypotheses that might later be tested in more extensive research on a broader scale. Moreover, the ABA Committee on Specialization will be publishing shortly a report of its June 1975 conference which will include a description of the research methodology being used.

MR. ROSENTHAL: In looking at the role that client competence can play in improving the quality of services provided, the most interesting and urgent question is whether an active role for clients can promote efficiency and quality in terms of some of the other values that we want to achieve.

A proper concern for client competence could, for example, help avoid a potential crisis in the area of legal malpractice. If the client participates in the decision, this will substantially limit malpractice liability and the profession will not face that source of cost acceleration. It is crucial, therefore, that we explore ways of making informed consent a meaningful part of lawyer-client interaction so as to increase client participation, minimize lawyer manipulation of the relationship and determine if this has any relationship to other measures of quality.

MR. TOPOL: I am somewhat worried about this informed consent. Can the client ever really be as informed as he should be to become your partner in some of the decisions that have to be made? I have doubts. I would like to suggest that you add a role for social workers who could help increase client collaboration and participation. Perhaps they could be affiliated with the law office as they are in our Municipal Employees plan.

MR. BERNSTEIN: When Solicitor General Robert Bork argued the *Goldfarb* case, 421 U.S. 773 (1975), he told the Court that in the typical lawyer-client relationship, there is an inherent conflict of interest, namely, that the lawyer has the opportunity to benefit personally from his own advice. If he says appeal, he may profit, whereas, if he says settle, he may lose, in terms of his own pocketbook. I think some of the Justices, who were struck with this idea had never really thought through this implication of the lawyer-client relationship. When you talk about informed consent, you are dealing with a broader aspect of the same problem.

If the lawyer is thinking about protecting himself by getting the client to sign a piece of paper, then you have a built-in bias for obtaining the consent, and therefore you raise the question as to whether an intermediary, a neutral force, is required. Salaried staff attorneys may be different from private practitioners in this regard, since the latter are most likely to be affected financially by the advice they give.

MR. LEMPERT: The proposal to enhance informed consent illustrates a general point. That is, when we talk about these various proposals, it is important to foresee those results that would less obviously follow—what sociologists call "latent functions."

As a working hypothesis, I would suggest that the major benefit from devices designed to increase informed consent would not be to give substantial decision making power to the client. I assume that most clients will not know enough about the law or will be too easily manipulated by the lawyer for this to happen. But, if the informed consent device requires the lawyer to go over the available options with the client in some detail, the result of this extra review may improve substantially the results achieved, whatever the client consents to, or whatever the lawyer leads the client to consent to.

MR. CLINTON BAMBERGER: Much has been said at this conference about client involvement in assessment of competence. Bar associations have begun to add lay people to disciplinary boards and even bar governance boards. If lay people are going to be involved, one ought to think about some way to select and educate them so that they can perform their tasks effectively and avoid being dominated by the professionals as they are in the attorney-client relationship. There is ten years of unanalyzed experience in the Legal Services program with client involvement on policy-making boards. This source of information should be consulted.

II. QUALITY AND COMPETENCE IN THE CONTEXT OF THE LEGAL SERVICES CORPORATION AND GROUP LEGAL SERVICES PROGRAMS

MR. KONOPKA: In discussing research into quality we should consider who the consumers of that research are likely to be. At this point there are at least two obvious consumers likely to fund this type of research. The first is the Legal Services Corporation, which will want to measure the quality of services delivered to its clients and to learn how that quality may be improved. The second are group legal service plans. If such plans are negotiated for unions, union members have a right to know whether they are getting quality legal representation.

MR. BAMBERGER: The Legal Services Corporation has two pressing needs for research. One is mandated by statute; within two years we must report to the Congress on alternatives to our present staff attorney system—a form of closed panels for poor people. Accordingly, we will be looking at the Judicare model, voucher systems, the possibility of buying coverage for poor people in prepayment and group practice plans, and perhaps at legal clinics. My central problem is that when we examine these alternative delivery systems, I am not sure that we know what it is we want to determine. Indeed, we have not yet formulated a statement of the philosophy of the Legal Services Corporation. If we want to know the way for more people to get to lawyers, that is not hard to do. If

what we want to know is the best way in which large numbers of poor people can have counsel who will achieve the results they desire, the research problem is much more difficult. This is the reason for my overriding concern with consequences.

I hope that the studies sponsored by the Corporation are constructed so that they produce data that are not only useful for meeting the needs of low income clients, but will also assist those thinking about the provision of legal services for middle income people.

The second pressing need is for continuing examination of our programs; that is, our grantees. In simplest terms, this involves measuring efficiency and management skills. But the next step in that process is much more complicated, namely, measuring the performance of attorneys. What is meant by competence? Is that satisfaction of clients?

Case results are a possible measure but we cannot restrict our analysis to the order of the court. Richard Danzig (1976) is looking at contract litigation and learning that the final result actually achieved by the parties very often differs from the court's decree.

I am interested in the anthropological approach being taken by Gary Bellow of Harvard Law School, and Chris Argyris, a social scientist from MIT, with the Boston Legal Assistance Program. They go into law offices and observe what happens. I believe they have found, for example, that clients wait an average of 45 minutes in the Legal Assistance Office to talk to an attorney. The attorney comes out, asks the client's name but does not introduce himself to the client, and never really looks at him. A large part of the time is spent discussing eligibility with the client; only a minimum amount of time is devoted to the client's portrayal of the problem. The lawyer enters the conversation very quickly, defines the problem, and offers a solution without asking the client what solution the client wants or asking about alternatives to the lawyer's solution.

As a measure of competence, we should try to develop a system whereby attorneys become conscious of what they are doing and talk to each other about how they are playing their roles. Observation of attorneys at work might be a way of doing this.

The evaluation system used by the Corporation's predecessor involved annual visits to programs by an investigation team, generally near the end of a fiscal year. That, to me, is much like a grand jury visit to the jail. The announcement is made of the forthcoming evaluation, everyone shines their shoes, the ashtrays are emptied, the evaluation team runs through a series of personality tests with the lawyers and the word comes back that everything is fine.

I would prefer a system of self-evaluation on a regular, even monthly, basis. The program's lawyers should administer to themselves certain questions designed to illustrate the nature of the performance of the program. The results should be made available to the program's board of directors.

We should build in an early warning system so when we receive copies of the self-analysis, we can respond, for example: "Your score in area X reveals a program inadequacy. We are therefore sending in a team to look more closely at that area and render technical assistance."

Under our previous evaluation system, all we could do was not re-fund a program if it failed to meet minimal standards. I want a monitoring system that does not offer only capital punishment; I want one that is supportive.

MR. S. WHEELER: I perceive as a research and priority issue evaluation on the one hand versus some type of monitoring system on the other. Because of scarce resources, choices will have to be made. I have a strong impression that enormous resources have been devoted to evaluation, with little to show by way of results. All too frequently they are begun without a clear idea of what one is trying to accomplish. The results are often of little help in deciding how to change an organization or operation. I want to encourage Clint Bamberger's proposal of an internal monitoring system, especially one set up so as to provide research data along with the monitoring process.

MR. ROSENTHAL: I would like to emphasize the need for more anthropological studies and also stress the role of political scientists in doing this kind of research. Political scientists should pay particular attention to the uses of power and claims of authority in simple kinds of social relationships between experts and nonexperts. We have to learn how experts use power and the way in which clients can develop claims to authority to equalize or increase their resources.

MR. BREGER: For the Legal Services Corporation, competence is not just a question of absolute quality. What we have to try to ascertain is comparative quality and costs under different delivery systems. We will then have to look at other factors to determine what kind of delivery system we want to move toward. For example, the type of legal work which will more likely be done under different delivery systems; the types and numbers of lawyers which will be attracted to legal services work under different systems; the satisfactions associated with different kinds of legal services work and the extent to which they can engender career commitments; and, of course, the ways in which client satisfaction varies with different delivery systems.

The Corporation must deliver legal services in a context of severe fiscal constraint. We must develop techniques to evaluate our present operations in light of our various goals. It is possible that in some areas, given the kinds of trade-offs which are unavoidable when financial resources are limited, the quality of legal services delivered may be considered inadequate by certain objective criteria or by peer review committees.

MR. FEUILLAN: Marshall, for your purposes do you want to take an individual attorney, Sam Smith, and measure the quality of his work as against some standard of quality, or do you want to take the whole program or a part of the program and measure the quality of its output; for example, whether Judicare or prepaid or staff offices deliver a better quality at a lower cost?

MR. BREGER: Realistically, I think we are more interested in the second question, although the extent to which the quality of Sam Smith's work would vary under different systems would be relevant to that second question. Basically we need a cost per case index by which to compare Judicare, prepaid, staff attorney, and other systems. Of course, we must also compare them on the other dimensions I mentioned.

MR. MURPHY: I won't belittle the importance of measuring programmatic quality, but isn't the real reason for elevating it our inability to devise measures of competence for individual attorneys? For 20 years I have been hearing discussions about quality and standards as applied to legal services for the poor, and I don't think we have progressed at all. These same questions are always raised. If only people could agree on some few things that are important.

MR. LADINSKY: It is like déjà vu. You have been there before—probably many times. But why this lack of progress?

MR. COLE: Perhaps this anecdote will be responsive. When I was in Legal Services, there was an attempt to develop regulations to propose to the Corporation. Never was there such brouhaha as when we proposed clients' grievance regulations. The representative from our office was shocked by the response of OEO Legal Services lawyers to a proposed regulation for reviewing the level of service rendered and informing clients how to register grievances and what their rights were in cases of malpractice. He said, "There were 200 guys there; I thought they were in favor of the poor. You tell them that somebody might want to raise some question about whether they did a good job and they sound like the Massachusetts Bar Association."

MR. BREGER: You will be pleased to know that the proposed regulations being considered by the Legal Services Corporation

require that every client be given a form which states where he or she can address complaints to the national office of the Corporation. However, we have a good deal more to do before we can be satisfied with the extent of our client accountability.

MS. LEONA VOGT: The Urban Institute has been funded by the former Office of Legal Services to design an evaluation system to be used by the Corporation in a selective way to respond to the Congressional mandate (The Urban Institute, 1975a). We are also interested in how one would go about implementing different delivery models. Our work has been based on the premise that existing data were inadequate to compare different legal services delivery strategies and that new data would have to be generated with which to make comparisons.

At the outset, we sought to get people in the profession to articulate how the different models for delivering legal services might operate and what the expectations were about the relative benefits and costs of the various systems. A review of the literature revealed very little data on the differences among different delivery systems (Vogt *et al.*, 1975). We also attempted to determine what performance criteria or evaluation measures individuals in the profession and the Congress would accept as appropriate for comparing different methods of delivering legal services.

We are now testing four evaluation measures. One is client satisfaction with the service (Vogt *et al.*, 1976a); a second is a measure of quality of services actually delivered based on peer review assessment (Vogt *et al.*, 1976b). The third is cost of service (Vogt *et al.*, 1976c), and the fourth is access to legal services. Our concern is not to survey legal needs but rather to see if clients are denied services by different types of delivery systems and if so under what conditions. Thus, we are interested in how many clients do not get services because they are out of the service area, over-income for this program, or do not meet priorities of the program. For example, if a caseload maximum has been set and reached for a particular type of case, then some otherwise eligible clients would be denied service for that case because they did not come in early enough. That is the kind of information we are developing.

Another measure which can be used but which we are not testing is an aspect of client satisfaction, client preference. Which kind of legal service delivery system would the client choose, given a choice? An experimental design for such a determination would be the provision of two service strategies in the same community. Both would be government subsidized and eligible clients could select either.

The Institute estimated that the alternative delivery system study would cost between $7 million and $32 million over a period of three years. However, most of the cost is for operating the programs. If existing programs are used to the extent possible, only a limited number of new programs would need to be funded.

MR. S. WHEELER: Could you say more about your peer review system for assessing the quality of legal services?

MS. VOGT: That happens to be the most interesting part of the study. We are almost finished and anticipate publication shortly. We began with no preconception about whether a peer review assessment procedure could be formulated, especially in view of the absence of standards. We asked many in the profession what they would look for in a program, how they would measure success, what would be an acceptable cost difference, et cetera. Almost everyone said we would have to examine the system in terms of quality of service. But how does one measure quality? Many said that they knew a good or bad attorney when they saw one. We then asked them how that could be done in a systematic way. Some factors were thus identified, probably about thirty, that seemed to be related to quality. We used these factors to develop a rating system with a five-point scale.

In the field test, which we are completing (The Urban Institute, 1975b), we used teams of two attorney-interviewers who were deliberately chosen to represent different orientations and backgrounds. Both individually, and as a team, they interviewed and rated Legal Services attorneys at four staff and two Judicare projects. This was followed by an attempt to develop a consensus rating of the project. In some cases the project rating was reluctantly given because the interviewers felt they did not have adequate information.

The interview of the staff attorneys was conducted jointly by the interviewers. A random sample of cases was selected including "open cases," "closed cases," and "advice-only cases." In addition, the attorneys were asked to produce the files of what they considered their most outstanding cases, since these could otherwise have easily been omitted from the random sample. Each interviewer, using the list of quality factors, alternately posed a series of questions about the cases selected.

Analysis of the results demonstrated that the procedures produced reliable results. The interviewer teams agreed on 88.5 percent of the ratings given.

In two projects we also sent a second team two or three weeks after the first to interview the attorneys about a different sample of cases to determine whether one interviewer in the first team had

dominated the ratings. The second team's ratings were almost on target with the first team's.

It was surprising that the consensus was reached 88 percent of the time before discussion. So it was not sharing information and opinions which created the consensus. I do not want to oversell this procedure. A five-point scale gives only gross differences. But do you really have to do more than identify the truly inadequate attorneys?

MR. KRISLOV: Was interviewer agreement item by item?

MS. VOGT: No, the interviewers were very close on the *overall* rating, but they varied on the individual factor ratings. We only used the rating factors to determine whether items could be eliminated from the interview procedure. We found, however, that all 13 rating factors are highly correlated with overall attorney performance. If the Corporation adopts this system, analysis of these factors may lead to a way of defining quality and articulating standards.

To address the validity issue, we assembled an advisory panel of twelve people with highly diverse backgrounds to review the initial analysis plan. The panel's recommendations about adding additional characteristics were heeded. These same persons became the team members who conducted the attorney interviews. When this process is completed, the panel will reassemble to make additional recommendations and we will then tender our recommendation to the Corporation.

MR. BRICKMAN: Implicit in what has been said is that we need a consortium of researchers on competence. One clear research need is for someone to take the various ongoing studies and compare the methodologies and results of the different projects designed to measure competence.

I would like to get some reactions from our group legal services representatives as to what the labor union group programs are doing about ascertaining lawyer competence.

MR. TOPOL: Our program, the Municipal Employees Legal Services Fund, Inc., has a very substantial research component in which we are keeping full data on the lawyer's use of his time. We try to keep abreast of modern office management procedures. We also exercise close supervision of our lawyers. I think peer review, supervisory review, and a good office management system are the hallmarks of our efforts. All cases receive periodic supervisory review while they are being handled by the staff. In addition, we have adopted a closing review system whereby each case receives supervisory review and evaluation before it is closed. From that,

there is feedback to the staff about the way they handle their cases. We also have a questionnaire which we send to the client after the case has been closed and which is evaluated by the advisors we have in our program. We find that client satisfaction as to how the case was handled is much higher than satisfaction as to how the case came out.

MR. R. CARLSON: So we return to client satisfaction as a measure of quality and competence. I think it has by now become apparent that cost and quality are inseparable issues. Cost-effectiveness is what one has to talk about. Lawyers like doctors will always argue that you must do more and more regardless of cost, not only to the particular client or patient, but to society in terms of the resources that are being used.

III. COST AND EFFECTIVENESS

MR. KIMBALL: There is a dynamic element in the cost equation. The question is whether the particular system has a tendency to drive up costs or to drive them down.

MR. COLE: The obvious question I think we should look at in the cost area is the impact of different ways of paying for legal services. The reason this issue is so desperately important is that we have had ten years of catastrophic experience with federal and third-party reimbursement in the health care field. Even if we knew what the right answers were to the health cost problem on the basis of our understanding of medical economics, we couldn't stop the inflationary spiral. There are too many institutions and systems which are ingrained in reimbursement practices now.

Anybody who pays for legal services, from client to the Corporation, must be concerned about how to prevent such a situation from developing in the area of legal service. How do we prevent costs from escalating when third-party payment methods are introduced?

MR. LEMPERT: There is a more fundamental question relating to cost which I would like to see researched. There seems to be a general assumption that legal services are a good thing for people to have and that, generally speaking, the more legal services people get the better off they are. When people talk of research into cost, they are usually interested in comparing different kinds of delivery systems and learning which is the more cost-effective.

This is rational, as far as it goes, but what it ignores is the question of social cost. It compares the cost of legal delivery systems A, B, and C, but it ignores the fact that if people don't buy any of these systems, they might be able to buy more automobiles or more

medical care or more of something else. I would like to see research into what people subjectively want to spend on legal services.

It is difficult to design research in this area, but let me suggest an imaginary experiment which will clarify the problem. Suppose that individuals with genuine legal problems and an inability to pay for them—let's assume an effective screening device—were given a voucher sufficient to pay for legal services which would deal with that problem. But, suppose they were told that this voucher was as good as cash and that they didn't have to use it for the legal problem. If they preferred health services they could use it for that; if they preferred a vacation in Florida they could use it for that. I would predict that many of those people would say, for example, "I really could use some help with respect to drafting a will, but I think I will go to Florida now and die intestate later."

If we are really going to arrive at some sensible view of how much money we should be spending on legal services in this country, the issue is not which of two delivery systems is more effective, but how much resources should society be devoting to this kind of service.

MR. SAKS: From what little I know about the literature of medical economics this is a very serious problem. At least one study from Harvard said that if you took all the money that was spent on medicine in this country in the last quarter century and simply gave it away to poor people, all of our major health indicators would be far better than they are now (Kitagawa and Hauser, 1973). If we are really interested in helping people solve their problems rather than being certain that lawyers have ample clients, then—and no doubt for this conference this sounds heretical—it is possible that the people whose problems we are interested in solving would be better served by doing other things with the resources that would otherwise be devoted to legal care.

MR. TOPOL: I am not sure that asking individuals how they would spend money that might be spent on legal services is a wise way of proceeding. Individuals are not always aware of what contributes to the quality of their life. Organized into groups they decide differently than they do when they are on their own. Unions choose pensions instead of immediate pay increases. New legal services are continually appearing. If we perceive them we should educate individuals so that they perceive them as well. There is a need to raise consciousness as to what really contributes to the quality of life.

MR. R. CARLSON: There is another issue that hasn't been precisely identified, which is the relationship between cost and utilization. At what price will people stop buying what legal services?

MR. KONOPKA: I am interested in learning more about the kinds of actions that are important to people but which are not brought because they are not economically feasible; for example, a $10 toy fails after three months of use and there is no way to collect on the warranty.

MR. FEUILLAN: Can we catalog those kinds of cases—the pedestrian kind that we all recognize—and then investigate how different treatment strategies—the organization approach that Ralph Nader identifies, the public interest lawyer, and the Legal Service Corporation lawyer—would respond?

MR. MURPHY: This abstract discussion of costs is very interesting, but the furor in the field is about whether you should be charging $50 an hour, $65 an hour, a fee of $700 for a divorce, et cetera. People are interested in the dollar cost of legal services, not social costs. They want to know the comparative costs of different delivery systems. A former public defender of Cook County used to brag that it only cost $16 a case to run his office. That was, of course, obviously shocking, but he was very proud of it.

MR. DAVID MATZ: I would like to change the focus of our attention on cost to focus also on effectiveness. Lawyers are not the only people who engage in the kinds of activity we have been talking about. There are others, generally called paralegals, and many who do not call themselves paralegals, who are doing legal work. They number in the tens of thousands although nobody has a good count.

We should view paralegals as a resource allowing greater flexibility. In investigating the cost-effectiveness of different legal service delivery systems, we should ask if paralegals could perform more tasks currently assigned to lawyers. We should be concerned with the quality, control, and supervision implications of using paralegals.

People who provide paralegal services range from trained individuals supervised by attorneys to part-time advisors who to some degree help others increase what we have called "client competence" (Brickman, 1971). So if we are talking about real service being provided, it seems to me that it is next to impossible to ignore the mountain sitting alongside.

MR. BRICKMAN: Does anybody know of any studies underway that relate the cost of providing legal services to the degree of utilization of legal paraprofessionals?

MR. TOPOL: Yes, but I must say the results are disappointing and fragmentary. We are providing a broad base of civil legal services, and, in order to reduce costs, we began with a bias in favor

of using legal assistants. I am keenly aware that our results are not scientifically conclusive, but in such areas as consumer representation, wills, divorce, bankruptcy, and the range of civil matters, our data indicate that using legal assistants *raises* our cost of delivering services, unless we make accommodations for their more limited skills and backgrounds (standardized forms, procedural guides and manuals can be used efficiently, for example, in certain areas of practice).

But this is in the context of a special kind of service. Our lawyers earn very modest incomes. We have fields like the consumer field in which new laws are constantly being enacted. This increases the time lawyers have to spend with paralegals, even though they are college graduates, when they are both working on a case. I have looked into the Allen, Allen, Allen, Allen and Allen firm in Richmond and Mr. Shorter's firm in Norwich, New York, and find that the basic reason why their savings are great is that there is enormous disparity between the cost of the paralegal and that of the lawyer. The lawyers are partners in each case and they earn between 50,000 and 150,000 dollars, while the paralegals are being paid 8,000 to 9,000 dollars. In our case, the paralegals' income is 60 or 65 percent of the lawyers'. So our tentative conclusion is that it does not appear to be economically sound to use paralegals in many of the areas in which we are providing legal services.

On the other hand, we are carving out another area involving representation before administrative agencies, including the welfare department, schools, etc., in which paralegals take the case from the beginning and carry it through the hearing stage with a minimal amount of supervision. We are going to experiment to see whether this is an efficient use of paralegals.

MR. BRICKMAN: What kind of client responses have you received to the use of paraprofessionals? Have your clients distinguished between paraprofessionals and lawyers in their evaluations of the services performed?

MR. TOPOL: No, and the letters we receive praise the paralegals at least as often as the lawyers. We are fortunate that our clients aren't opposed to using paraprofessionals. No client has ever said, "I don't want to talk to a paralegal, I want to talk to a lawyer." That is because there is a basic trust in the sponsoring organization, which is the trade union (Industrial Social Welfare Center, 1972).

MR. R. HARCOURT DODDS: The New Haven Legal Assistance Association is using paralegals in certain selected areas including bankruptcy. I understand they are analyzing this utilization.

MS. VOGT: There has obviously been a lot of experience in the Legal Services program with paraprofessionals. We at the Urban

Institute are designing a set of data collection procedures to ascertain what paraprofessionals are doing in the Legal Services program, the types of activities they are involved in, the types of cases they deal with, and the quality of work done by paraprofessionals versus that done by attorneys. We want to go beyond learning what paraprofessionals are being used for. We want to find out what are the best ways for using them.

MR. GEOFFREY ALPRIN: Most law schools have clinical programs in which law students with a year or two of legal education engage in much the same work as paralegals. A study funded by LEAA compares the effectiveness of work done by New Mexico law school students in clinical programs with that of practicing lawyers (Evans and Norwood, 1975).

MR. BERNSTEIN: Those interested in investigating the effectiveness of paraprofessionals should note that in the labor law field there are nonlawyer union representatives who are constantly involved in representation before the National Labor Relations Board and in arbitration. Indeed some unions have established arbitration departments peopled by paraprofessionals who try cases before arbitrators, many of whom are nonlawyers. Hence, we have in labor arbitration an entire institutional system of dispute resolution, whose influence, by the way, is growing dramatically, in which nonlawyers play a critical role.

MS. FRANK: The use of paraprofessionals raises not only the question of their effectiveness but the potential cost savings. Consider the economic factors from the federal government's point of view. Federal funding is necessarily limited, especially in today's environment where the pressure to cut government spending is great. The Legal Services program receives approximately $100 million, about one-fifth of the amount needed to meet the legal service needs of the poor. Since money is short, priorities must be established. Research into ways of delivering more services for the dollar, such as research into the use of paraprofessionals, is particularly important for this reason.

IV. IDENTIFICATION OF LEGAL NEED

MR. GALANTER: One priority need we do *not* have is more research into the existence of unmet legal needs.

MR. KRISLOV: Nonetheless, there is a need to define need in a better way. Finding that people could be enticed into using more legal services or that they would benefit from them is like finding that people ought to exercise more. That doesn't mean that they are going to exercise. There may be ways to define those needs which are most likely to be taken to lawyers, if lawyers are made available.

There are, for example, experts on consumer habits who can look at a neighborhood and intelligently decide whether there ought to be a hamburger stand there. Usually they are right. These market research techniques could be applied effectively in the area of legal services.

MR. JANOFSKY: When I talk about the need for research on legal need, I am talking about research on whether there is a market for prepaid or group legal services. If we are going to develop such plans, we have to know whether people will buy them. When I was president of the Los Angeles County Bar Association, $50,000 was made available to establish a prepaid legal services program for Los Angeles teachers. But the teachers turned us down. Isn't that—in a most pragmatic way—indicative of a lack of legal need?

MR. LEONARD GOODMAN: Although studies of legal need, which to date have been rather narrowly focused, have been criticized at this conference, I have not heard it asserted that the question of need should be ignored. There is a lot of information that could be obtained from clients and potential clients, not by means of surveys, but by other perhaps more intensive methods which should be explored. How do we get valid feedback from clients? How do we best ascertain client attitudes towards lawyers and the judicial system?

MR. GALANTER: We must avoid the conceptual pitfalls built into the concept of legal need. It is a mistake to regard it as a starting point, or a measuring rod against which to work. I think everyone would agree that need is important if by this we mean that only some of the mass of troubles which beset people are mobilized and presented to the legal profession. This process of mobilization and presentation is enormously important. We should identify the institutions that process a portion of the great mass of "protoneeds" and transform them into legal needs. The question is whether those needs currently processed through existing channels are the needs which legal service programs should deal with or whether there are potentially more important uses of legal services which are not currently mobilized as legal needs and so not recognized as such. Legal needs, in other words, must be seen as products of the legal system and the availability of legal services and not as the external environment in which the legal system operates.

MR. KRISLOV: One interesting experiment dealing with legal need would be to give 1,000 randomly selected people a blank check for legal services and after a year see what they have done and how their lives have been affected.

MR. MARKS: But isn't that exactly what the creation of a group does?

MR. KRISLOV: No, a created group is not randomly selected, which is a problem. And then there are other consequences, which I think Ralph Nader's luncheon speech pointed out, such as that of social enforcement. I would tie the need analysis to the cost analysis because I do not believe that decision makers will pay a lot of attention to social science research establishing need alone.

MR. S. WHEELER: A major problem with research in this area is identifying a reasonable control group for those who have been provided services of some kind. How can one define a population that has not received services and that is situated in circumstances similar to those receiving services? The problem can be solved. If we are interested in how people find their ways to lawyers, we must be able to understand the attitudes toward legal services of those persons who do not seek out attorneys as well as the attitudes of those who do.

Now most attempts to do this use a broad survey research approach. Perhaps survey methods do not give us an accurate assessment of the real needs that the people are experiencing. If so, we have to find some way to get closer to people's lives so we can begin to see the way that they think about their problems. One example from the medical field is a study in which a researcher in a hospital, appearing to be a staff member, interviewed everybody who came into the various emergency wards. He was able to get the data about why they came when they did, rather than two weeks later (Zola, 1966). Now this study suffers from an absence of contact with those who did not come to the hospital at all, but at least it provides substantial information about the paths that led the people interviewed to the hospital. I have not seen any similarly rich ethnographic research on the ways in which people find their ways to lawyers.

MS. VOGT: I think we must pay more attention to specifying the problems we are interested in when we define need. Do we mean awareness of the need for legal services or the degree to which awareness is translated into use of legal services? Is the ideal continued use of service or is it elimination of service because a pattern of practices has been altered so that services are no longer necessary? I think social scientists often do not seem to come up with useful studies because the problems to be attacked are not clearly articulated.

MR. GALANTER: Your point shows that the question of legal need is exactly the same as the question of research need. We are sitting here saying, what are research needs? I think we all realize that there is not some preexisting set of real research needs out there that we will discover if we talk long enough. The research

needs are what we decide they are, whatever we perceive as a result of our own conditioning, whatever we manage to persuade each other of.

It seems to me that legal needs are exactly the same kind of contingent product of a social process. I think the questions you are asking are much more fruitful if one doesn't feel compelled to subsume them under the concept of need. We shouldn't try to formulate research questions in terms of need, but in terms of outcomes, the products we are trying to produce.

MS. VOGT: The research focus should be on what you're trying to achieve or change, and only then on the measurement systems to determine what has been achieved. Therefore, until the research need is defined you cannot know what measurement should be used to evaluate the outcomes and impact. I do not know what change is needed yet.

MR. GALANTER: And I am responding that you can skip the stage of trying to define need.

MR. KRISLOV: I think what Marc is saying is that for the purposes of this group there is enough knowledge of the essence of the term "need" that we can go ahead and do research without worrying about perfecting the starting point.

MR. BAMBERGER: We should not focus on perceived demand for lawyers by potential clients; instead we should attempt an objective evaluation of their needs. For example, we could use court records to look at the criminal justice system and determine whether those who received legal services did better than those who were unrepresented; if not, perhaps there is no "objective" need for representation in this area. Indeed, if we could measure the effect of legal representation on people's lives, it may well be that there are occasions where having a lawyer is a disadvantage.

MR. KRISLOV: There is something that bothers me about trying to define need objectively rather than subjectively. Let me give an example. Suppose the Mennonites would be better off in an objective economic sense if they took some disputes to court. I still do not think that the legal system, the needs of justice or any of the other goals we wish to promote would be better served by forcing them to litigate. So ultimately I think we must come back to subjective demands if we wish to identify needs.

MR. ROSENTHAL: Clint Bamberger's point about the effect of providing legal representation raises for me the question of whether the government should be subsidizing legal services. My opinion is that it should, at least with respect to those legal rights and problems created by the government. The argument is essentially

political and is developed in the first part of a very competent analysis done by Lester Brickman (1973b).

I think that if a government imposes certain legal obligations on its citizens and provides certain legal rights to its citizens, and uses the legal system as a mechanism for imposing these obligations and claiming these rights, then it must be sure that the entire population has access to the legal system so they can claim what they are entitled to and not be imposed upon unjustly. In a democratic society the government cannot shun the obligation to be sure that people have access to the kinds of legal skills they need to protect their rights.

V. THE IMPACT OF PROVIDING ACCESS TO LEGAL SERVICES

MR. FEUILLAN: Access is a matter of getting lawyer and client together. To delineate the research parameters of access, a number of factors which should be investigated could be varied experimentally, such as: the geographic distribution of offices; the hours the offices are open; the number of personnel available to serve a given client population; the physical attractiveness of the offices, etc.

MR. R. CARLSON: We should look at the distribution of legal resources, primarily lawyers, but also courts and other agencies, and ask how that distribution affects cost and other variables like rates of litigation. In medical care, when physicians are highly concentrated, prices go up, not down. That is a really imperfect market. You might find that litigation is analogous to surgery; that where there are more lawyers there is a disproportionately greater amount of litigation. In surgery, the function is perfect; with three times as many surgeons you will have three times as much surgery.

MR. MURPHY: Thus far there is no evidence which indicates that access to legal services produces a noticeable difference in the level of litigation.

MR. BREGER: This may be true on the pure service side, but I am not at all certain it is true with respect to law reform activities. I suspect that if we had fifty more lawyers for the Center for Law and Social Welfare, substantially more litigation would be produced than is the case now.

MR. RUSSEL WHEELER: One should also look at the effects of increased access on judges and court systems. If we do not devote more resources to the courts as we increase representation, what will be the effects on court workloads?

MR. BREGER: The problem of access also must reflect the type of case which the client brings to the lawyer when he does seek one

out. For example, it may be that people come to neighborhood law offices (which are close to the client population) with all sorts of legal problems that wouldn't be important enough to lead them to go to a downtown legal services office.

MR. KONOPKA: If the findings of the current American Bar Foundation study are reasonably correct (Curran and Spalding, 1974), there is a substantial number of people who believe they have a legal problem but have not sought legal advice. If the Mayhew-Reiss (1969) findings are correct, it isn't necessarily lack of money that prevents these people from seeking legal help; it is probably something else. We need to know how to get poor folk into neighborhood legal offices, union folk into their union legal offices, middle income folk into the offices of private attorneys who need work. Simply put, we need to make the system work. I wonder whether we should explore strategies like advertising, public education, public interest spots on television, et cetera.

MR. ROSENTHAL: I think that Jack Ladinsky in his paper has raised some interesting questions about whether legal advertising will promote access, bring needs to the surface, and increase client sophistication about where to get the services they need. The effect of lawyers' advertising on the cost of legal services should also be investigated.

MR. GALANTER: Recent events have made it likely that rules restricting advertising by lawyers are going to be relaxed. Maybe this is the time to begin studying legal services use patterns that we think might be affected by advertising. Then when advertising is introduced we can see if it has the effects we anticipate. Interrupted time series designs which have proved fruitful in studying the impact of other kinds of legal rules should be valuable here.[4]

MS. ILLISE SCHWARTZ: There are other factors affecting access which should be investigated. How do people learn about Neighborhood Legal Services offices? How do they know what problems should be brought there? Does the use of such offices increase if clients are satisfied; if cases are won?

MR. BREGER: From the vantage point of the Corporation, the problem of psychological access is of low priority in that, given the available money, our difficulty is not finding more clients. This is unfortunate but true.

MR. FEUILLAN: But it is relevant if you are going to be comparing Judicare with staff offices in rural areas. In the study that Goodman and I did of the Wisconsin program (1972) we discovered

4. On these experimental designs, see Glass *et al.* (1975); on their application to the study of legal change, see Campbell (1971) and Ross (1974).

that there was a relationship between the poverty of the particular geographic area and the utilization of the program. Where there were more poor people, the program was used less. The relationship was with poverty, not with the distribution of lawyers. Physical access wasn't the problem, but something else seemed to keep clients away—psychological access—and I think that should be of interest to the Corporation.

Also it is important to understand informal referral networks. One comparison between Judicare and staff offices discovered that many of the welfare cases were going to the staff office component rather than Judicare (Conn. State Welfare Dept., 1971). This pattern was traced to an informal community leader who was spreading the word about favorable reports from people who had taken welfare cases to the staff office and unfavorable reports from those who had taken cases to Judicare.

MR. LADINSKY: In investigating the role of intermediaries who lead people to lawyers, we can also investigate the extent to which these intermediaries aid in the actual settlement of disputes. Priests or precinct captains, for example, may settle some disputes brought to them and refer others to lawyers.

MS. SANDY DEMENT: In investigating access one must consider diversions from the legal system. Without making any value judgments we should recognize that people go to H & R Block instead of a tax lawyer, to their title insurance company instead of to a property lawyer, and to advertised divorce services instead of divorce lawyers. Investigating access inevitably has to do with investigating information networks.

MR. BRICKMAN: From the perspective of "impact", I would like to know what differences stem from group funding of legal services? When people have access to lawyers whom they do not pay directly on a fee for service basis, how do they use them? Do lawyers engaged in a group practice function as a group, as in a legal aid office, or as individual practitioners who share space? Does group practice or practice on behalf of a group affect the quality of the work product? What information do we now have on these subjects? What information do we desire? What kinds of research designs will effectively elicit additional information?

MR. BAMBERGER: There is a lesson to be learned in the experience with Blue Shield. It was created with a laudable social purpose at a time when the commercial companies were not in the business and there was no other way for middle income people to have the advantages of insurance pooling for medical costs. A crucial feature of Blue Shield was the community rating system. Under that system the young helped pay for the old, and the not-so-well were sub-

sidized by the well. When Blue Shield had accumulated enough data to give actuaries a fix on the risk, the commercial insurers came in and went to an experience rating system. Blue Shield couldn't survive the competition. Now Blue Shield is nothing more than a payment transfer agency for doctors. It certainly does not serve the social purposes as well as it once did. Will that happen to legal service prepayment plans?

MR. TOPOL: Every group plan has its utilization rates and many have experience with mechanisms designed to affect these rates including specific letters, seminars, newsletters, offers of legal checkup, etc. We offered legal checkups. Only one out of seventy-five came in, although we specifically invited them in a letter designed to whet the appetite but not to frighten (Municipal Employees Legal Services Funds, 1975).

Our municipal employees union in New York is a very heterogeneous group including labor and sewerage treatment people, hospital attendants, school lunch employees, clerical employees, technical people, nurses, engineers, social workers, and psychologists. Incomes range from $6,000 to $20,000, but the average is around $10,000. In our blue-collar group, surprisingly, the utilization was virtually the same as the percentage in the overall sample. In the professional group, the utilization was fifty percent higher than in the sample. On the other hand, the hospital and school group, which consisted essentially of ghetto black people, had a utilization rate considerably lower than the sample (Municipal Employees Legal Services Funds, 1975:5).

Our experience underscores the importance of seeking data from the various groups and correlating it to the kinds of efforts they have undertaken in order to affect utilization. It should be noted, however, that there may not be a desire in some of these plans to have a high utilization; otherwise, they may become actuarially unsound.

MR. MURPHY: The follow-up study of the Shreveport program indicates that the nonusers were as vigorous supporters for the continued existence of the plan as the users had been, perhaps because they felt it was like money in the bank or its availability gave them a psychological security that they did not have before (Marks *et al.*, 1974:80).

The utilization rate in Shreveport about doubled with the free availability of lawyers under the plan. Moreover, the character of the utilization changed as the client became more familiar with the plan. Clearly, the long-range effects of providing legal services in specific areas is of prime interest in terms of formulating the goals for and coverage of plans.

MR. BAMBERGER: Ten years ago we asked at OEO what good is done by the extension of legal services to many poor tenants. If retaliatory eviction cases are won regularly, might not a consequence be less housing for poor people? When a legal challenge effectively changes the system of garnishment, what changes occur in existing systems of credit? In the last decade I don't think these and similar questions have received adequate attention. I think that the Legal Services Corporation must concern itself with such issues.

It may well be that we ask the law to do too much. We now bring to the law, to lawyers, to courts, and to administrative agencies, disputes which in the past were either not resolved anywhere or were resolved somewhere else, by family members, by the clergy, etc. We should investigate the types of problems people now bring to the legal system. Where were they resolved before, if anywhere? What happened to those dispute resolution institutions? Ought we to adopt public policies to encourage people to use such alternative mechanisms for resolving their disputes? It is possible that if people find that the legal system is not any better at resolving their disputes than traditional institutions they will return to former modes of dispute resolution.

MR. R. CARLSON: Take a hypothetical individual with some sort of problem who goes to a psychiatrist, a physician, and a lawyer for help. With the psychiatrist he would probably get ten years of therapy; with the physician, surgery; and with the lawyer, divorce. More seriously, in our discussion there has been an implicit assumption that to improve access we must somehow find a way to spread the legal services model as we know it. An alternative focus is on those structural or institutional factors that prevent many people from using legal services even if they are both physically and financially accessible. In medicine and in law there appear to be many people who fall into this category. We should look at the system and try to figure out why this is the case; not necessarily with the intent of getting them into the system, but at least with the intent of finding alternative dispute resolution mechanisms for people who don't want to use the system the way it is set up.

One issue which might be researched is whether, by increasing the number of lawyers providing legal services, we increase the amount of contentiousness and viciousness in the culture. Perhaps less formal procedures, involving face-to-face confrontations and not lawyers, would lead to more satisfactory dispute resolution.

MR. ROSENTHAL: In canvassing alternatives to the courts for dispute resolution, has there been any systematic evaluation of

arbitration as an alternative? Although arbitration has its own institutionalized rules and imperfections, it is an informal model for dispute resolution with many advantages over the formal court centered system.

MR. KIMBALL: One of the long-range programs of the American Bar Foundation is the study of a whole range of informal and less-than-court-formal means for settling disputes. Eric Steele has just started on a study of consumer arbitration that is part of a long-range program to study informal dispute settling mechanisms.[5]

MR. KRISLOV: One of the things that was done by the National Institute of Criminal Justice was to fund research by Al Blumstein of Carnegie-Mellon, developing a model which purports to be able to determine how changes in one part of the system affect other parts. If, for example, so many policemen are added, how many more lawyers will be needed? How many judges? The Crime Commission in Minnesota is trying to validate the model and adjust it to its own experience (Coleman, 1976; Blumstein and Larson, 1972:317-55). It seems to me that this type of research ought to be funded, even though we know some of the problems with model building of this sort.

MR. KONOPKA: The Futures Group has done some research with grossly predictive models relating to legal service plans. At this point I can't make an estimate as to the potential of these models because I haven't reviewed the material.

MR. HARRY WEXLER: I agree with the need to study alternative dispute resolution mechanisms but, from point of view of priority, we need to focus on the impact question. As we increase the availability of lawyers we will see lawyers entering into organizational settings in which they are likely to tip the existing balance of power between professional and client groups. To some extent this has been happening in the mental health setting—in commitment hearings—and we can expect to see it happen more in other areas such as school disciplinary proceedings. We should examine the social impact and institutional repercussions of this intrusion of lawyers into new areas.

I have a feeling that this overlaps a great deal with client competence. What we are really talking about is equalizing bargaining power in those settings in which individuals are at the mercy of professionals who make unilateral decisions as to their welfare.

5. For a report of an earlier project in this series, see Steele (1975), a study of the consumer fraud division of a state Attorney-General's office.

MR. BRICKMAN: To put a fundamental underlying question: is everybody willing to assume that providing access to lawyers is a good thing, whatever that may mean? If not, then how does one design a study which will generate information necessary to make intelligent decisions about whether lawyers ought to be injected into authoritarian relationships, like school disciplinary hearings, or other settings?

MR. WEXLER: That is a threshold question if you are determining whether money ought to be spent to inject a new resource like lawyers into that kind of setting. But law students are already going into these settings—into prisons and mental health institutions—and providing legal services. Since we are unlikely to change this, we can certainly examine the impact of this activity without first worrying about whether the service ought to be provided.

MR. BERNSTEIN: The more I think about it, the more reasonable it seems to examine our industrial relations system as a model for such institutions as schools, mental hospitals, prisons, and other group settings where there is an institutional environment with a hierarchical organization. In the industrial relatoons setting, we have interposed a spine of responsiveness, in terms of representation, leading from the shop steward to the business agent to the lawyer to the union as an institution, representing and bargaining for changes in working conditions. Lawyers can help organize other groups, particularly if the group pays for the legal services. The industrial setting might give us some clues about what to expect from this type of representation.

I think that the interposition of lawyers will make systems like the prison more humane. Rules will be followed, and they will be more responsive to the people they affect.

MR. SAKS: Once legal services become available to people who haven't had them, there will be a whole range of impacts on their individual lives, the legal system, and other institutional areas. Presumably, some of those consequences will happen immediately and others will happen much further down the line. Some will be the direct result of what lawyers did and intended to do while others will be indirect and perhaps unforeseen.

Ideally, we should be prepared to examine all kinds of occurrences that might be influenced positively, negatively or not at all by the provision of legal services. The general problem is not unlike a lot of evaluation research where there's been an intervention, a change in a community or a system. Researchers seek to examine the range of effects that the change has had for good or for ill.

MR. BAMBERGER: That is an important question for the Legal Services Corporation. A common criticism is that lawyers for the

poor are beginning to behave like lawyers for the rich; that is, not having the economic constraint, they are engaging in dilatory tactics, filing unnecessary motions, and that sort of thing. So the question cuts across the whole profession. The absence of the economic constraint, either because the client does not pay or because the client has enough money to pay for everything, weights the equation in an adversarial confrontation. If you seek to introduce other constraints, they should be as applicable to the very wealthy as they are to the very poor.

When Legal Services was in OEO, it had to operate within the poverty guidelines that defined the target area for OEO. Now, however, the statute creating the Corporation does not set any eligibility limit but requires the Corporation to promulgate regulations. The history of legal aid in this country shows that eligibility standards have always been set very low because of the absence of resources to reach beyond that level. There was no attempt to define a larger population that needed legal services but couldn't afford to pay for them. It may be that in the future the Corporation will have the resources to provide free care to the impoverished and subsidies to those a short step up the economic ladder.

Someone ought to begin to look at the implications of such a broad program of subsidized legal services. The English Legal Aid and Advice Act is probably the best example. I have read that in half of the cases that are litigated in England, one side or both are aided under the Act. But I am also told that the amount of litigation per thousand people in England is much lower than in this country, perhaps because of the fee shifting rule in England.

We should, therefore, be alert to the possibility of learning from the experience of other countries. There is much being done, for instance, in Canada. Cappelletti, Gordley and Johnson (1976) have just completed a book which compares legal service systems in several countries.

VI. STRATEGIES FOR RESEARCH

MR. MATZ: When seeking insight into the impact of legal delivery systems on the social systems of other countries, we must remember the political nature of social and professional change in this country. Resistance to what researchers turn up is far from unique to medicine. I doubt if much research has been done on the specific politics of things like bar associations, state legislatures, state courts—the groups that will have to accept the kinds of things that are being discussed. If we have aspirations for anything more than research moneys, we need to talk about these issues.

MR. LEMPERT: I would like to follow up on this point. It struck me, as I read the papers, that from the point of view of the organized legal profession there would be a set of different reactions to different proposals. Some, like the expansion of prepaid legal services, might be in the interest of most members of the bar. Others, like the delegalization of certain areas of civil justice or the increasing use of unsupervised paraprofessionals, appear to run counter to the self-interest of all or some segments of the bar and might be opposed for that reason. If this analysis is accurate, it suggests a difficult but interesting strategy problem with respect to funding research. At the one level, if you are interested in an immediate pay-off, then maybe the strategy should be to put most of your money in those programs which are most likely to be enacted, i.e., those which will be supported by, or at least not opposed by, powerful segments of the legal profession. Indeed, one might do research into the kinds of programs which would generate support or opposition from various elements of the profession.

The dilemma is that the kinds of suggestions Jack Ladinsky and Marc Galanter make, changing legal institutions and increasing the use of paraprofessionals, may in the long run be the most promising proposals for dealing with the kinds of problems that have been mentioned. Yet many of these proposals make lawyers less relevant; they are likely to receive strong opposition from the legal profession, and there may be little chance of their effective implementation in the short run. So I think that any funding agency has to develop a mixed program. They should fund research likely to yield immediate pay-offs and they should think beyond the short run, beyond the things that won't fly today, politically, and fund the basic research necessary to create intellectual and popular support for programs that might have greater long-run potential.

MS. FRANK: This discussion of political impact leads me to raise the question of the time frame for this research. I think it is no surprise to anyone that the politicians have been hacking away at these issues for many years. One result is legislation establishing a legal services program and another has made it possible for unions to bargain for prepaid legal services. This and other legislation is premised on the general assumption that if more people have legal services, then we will have a more just society. While there has never been an adequate research base to justify this premise, the passage of legislation will no doubt continue. I would hope that any research agenda is relevant, for better or worse, to what the politicians believe is in the public's interest. Moreover, it is important that research projects be contemplated that can be accomplished in the short term. Certainly the Legal Services Corporation is going to

have to think about that because it has a legislative mandate to do a project on alternative ways of delivering legal services to the poor within a two-year time span.

MR. DAVID C. BALDUS: I sense that some people are very much concerned with the assumptions that underlie legislation before Congress and the various alternatives that people delivering legal services must deal with. Others are more interested in the basic process by which disputes arise and people obtain legal services. In formulating agendas we should distinguish between those issues that are more applied and more immediate and those that are more basic. I would note, as a representative of the National Science Foundation, that it is extremely important in allocating money to decide whether the problem can best be dealt with by conceptual or empirical research. For the latter, recommendations of specific research designs would be very helpful.

MR. WEXLER: As I understand the purpose of the conference, it is not to increase access to legal services alone. It is to put together a research agenda that will presumably help us to deal with questions that develop around such issues as access. Unfortunately, research agendas are not self-executing. The agenda should identify issues of importance for which data stocks are available that are likely to yield findings useful to the policy maker or practicing attorney. In carrying out such a researchable issue, we must recognize that we are dealing with two sets of participants—those in the legal system and those in the research community. There may not necessarily be a conflict between the two but they are quite different with respect to their goals and their working procedures. I raise this to emphasize one point: to produce valid and useful research, one must create contexts conducive to the execution of such research.

One must also pay attention to the distinction between research and demonstration. Because of the nature of legal services, much of the funding for research is likely to be for demonstration projects. These will be fruitful contexts for studying legal service delivery systems provided we build in ways to collect data and conduct analyses unobtrusively but systematically. There is inevitable tension between researchers and program staff trying to function together within the same budget. Researchers should not be foisted upon program staff late in the game. The problem is how to build research components into ongoing delivery systems from their inception.

We might look to the delivery of medical services for precedents. I reviewed some materials several years ago on the Newark Health Maintenance Organization associated with the New Jersey

College of Medicine and Dentistry, funded by HEW through the N.J. Department of Community Affairs. The research budget was a very significant percentage of the total operating budget. Indeed, researchers had been brought in initially to help shape the statements of goals and objectives. They designed an evaluation system so that information could be retrieved after two or three years on how effectively the HMO was serving its client groups. Data were also generated on a set of hypotheses testing the validity of the HMO concept for the low income client. It is this meshing of operations and evaluation that creates contexts for valid and useful research activity.

MS. ELLEN J. HOLLINGSWORTH: Harry Wexler's proposal for building data gathering systems into the everyday operation of legal services programs is excellent and, if implemented, will greatly facilitate research. But how are we to proceed until such data become available? I would advocate social experimentation.

I am struck by the wide variety of institutions that are appearing in both the private and public sectors to provide legal services. No doubt additional mechanisms will be introduced, further diversifying the legal system and increasing the need for professionals in delivering legal services. There will also be more no-fault injury claims, self-probate, nonjudicial divorce, et cetera. And, there will continue to be enormous pressure on private and public sectors to reorganize themselves to be more responsive.

I would strongly advocate that now, at the start of these developments, we attempt to accumulate systematic data on the characterisitcs of these institutions and the clients they serve. It is a very ambitious agenda—one calling for a large-scale experimental design to inform us about how institutions define their missions, attract clients, identify problems, and secure outcomes.

We can, of course, engage in research comparing various institutional systems for the delivery of legal services to the indigent. But by experimenting with a very broad mix of institutions, we will be able to extend the parameters of our knowledge concerning client mobilization, client characteristics, types of problems, costs of problems, and costs and benefits. What we need to do is take the information we have and the information which will come from the ABF survey and use this as a base to design an experiment to examine the variables that we think are most important. An experiment will enable us to test quite systematically and somewhat more scientifically questions about how we can efficiently deliver high quality legal services, and its benefits will outweigh the high cost of large-scale social experimentation.

MR. VOLKER KNOPPKE-WETZEL I would like to emphasize the value of comparative research, which I have been involved with for the past year and a half in Europe. In some Western European countries, unions, for many years, have been active in providing legal services via paralegals hired by the unions and trained by them in special seminars. In some of these countries every union local has a legal advice specialist. They also have a team of lawyers in a central location that can be used when litigation is necessary.

There are countries which don't define the practice of law the way we do here. You can find situations all over Europe, for example, where the giving of legal advice and the extra legal resolution of conflicts are separated from the task of court representation. The lawyer operates in the judicial forum while nonlawyers give advice.

Another interesting aspect is the alternative dispute handling mechanisms available in some countries. I am working on a project to be reported next year that studies the client's actual choice between a salaried staff attorney and a Judicare lawyer. In Sweden (as well as in Quebec) these systems exist simultaneously and there is a right to go to either one. One doesn't have to go to the expense of setting up such systems in this country to study their differences.

Sweden is also a country where one might investigate the effects of broad eligibility standards for legal aid. The Swedish legal aid law sets the eligibility level at about $16,000 a year (Muther, 1975). It is not just a legal services system for the poor; it obviously includes others.

The Netherlands has had a system for a number of years, formalized and largely foundation-funded, of staffing so-called law shops, which are similar to what has been referred to here as legal clinics.

It might also be worthwhile to look at some of the incentive systems which have been devised to encourage certain behavior on the part of lawyers. Under one system, the lawyer gets more money if he settles than if he goes to court, thus providing him with an incentive to settle.

If we are concerned with features affecting the competence of attorneys, we may want to look at countries that have included apprenticeship programs in the regular educational settings of their law schools so that students get such experience at an early stage in their education.

We may not find all the answers to the questions we are posing, but we will find settings where significant variables have already been isolated, or where they can at least be controlled by comparison. In terms of the cost-effectiveness of a research agenda, it is

sometimes less expensive to do comparative research than to do research at home. One difficulty, however, is the reluctance of foundations to fund such research.[6]

VII. CONCLUSION

MR. BRICKMAN: The proceedings of this conference reflect a consensus that there are at least five areas which should be important foci for research activity.

First, is the area of competency. This includes the now familiar issue of devising means to measure and increase the competence of attorneys and means of measuring the competence of a legal services program—what has been referred to as a "quality assurance system." This latter concern is, of course, for effectiveness and I am implicitly raising the question of the relationship between lawyer competence and program effectiveness. As for the emerging issue of client competence, one question not discussed is whether it is fruitful to deal with lawyer and client competence as aspects of the same problem or whether it would be wiser to separate the two for research purposes.

Second, there is need for research into the concomitant questions of cost and effectiveness, which lead to a concern with output measures. How can they be identified? What data are or can be made available to create measures of outcome variables? Also under this heading, as well as that of "access," are issues relating to pricing, utilization rates and financing mechanisms.

The third area is that of identifying legal needs and determining whether those needs are a product of our legal system—a restatement in question form of Marc Galanter's thesis.

The fourth area is that of access. We are interested here in research into the factors that inhibit access and ways in which access can be enhanced. What would the effects be of educating consumers? Or organizing them via check-off procedures for utility consumers as Ralph Nader suggested yesterday? Of allowing lawyers to advertise? What role do intermediaries play in guiding clients to lawyers? And, finally a question on which research has been mandated: how do alternative mechanisms for delivering legal services affect utilization rates?

6. For helpful sociolegal introductions to various Western European approaches, see the essays (in German) by Knoppke-Wetzel *et al.* in the proceedings of a conference on "Compensatory Models of Legal Advice and Representation," organized by the Sociology of Law Section of the German Sociological Association, Oct. 9—11, 1975. The proceedings were published in the fall of 1976 by the Bertelsmann publishing house (Bertelsmann Universitätsverlag, Düsseldorf & Gütersloh, Germany) as part of its series entitled *Jahrbuch für Rechtssoziologie und Rechtstheorie* (Yearbook of Sociology of Law and Legal Theory).

The fifth area may be denoted as "impact". We are concerned here with developing knowledge about the likely impact which expanding legal services will have upon individuals, groups and institutions. The various discussions of a "voucher" project should be recalled.

MR. LEMPERT: Over the next decade new programs for providing legal services are going to be springing up around the country. These will involve various combinations of specialization, funding devices, advertising, use of paraprofessionals, etc. One expensive but very worthwhile endeavor would be to fund some clearinghouse group that would encourage those starting new programs to build evaluative systems into their programs, that would develop a set of comparable but not overly complex measures which program personnel can be trained to use in routine fashion, and that would collect and analyze these data every six months or every year, and provide the different groups with reports of what they found. The clearinghouse group could also develop more specialized schemes of research where the payoff appeared great and it should publish a newsletter reviewing the research of others and disseminating its results.

MR. BARON: That is something which the Resource Center is very anxious to do, and we would appreciate any suggestions that people might have regarding this.

MR. BRICKMAN: The determination of the feasibility of developing record-keeping and data gathering systems for legal services delivery groups which will enable the assembly on a regular basis of comparable data is one of the objectives of the NSF grant that made this conference possible.