RESOLUTION OF MINOR DISPUTES

JOINT HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY

AND

SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

RESOLUTION OF MINOR DISPUTES

JUNE 6, 7, 14 AND 18, 1979

Serial No. 25

(Committee on the Judiciary)

Serial No. 96-78

(Committee on Interstate and Foreign Commerce)

Printed for the use of the Committee on the Judiciary and Committee on Interstate and Foreign Commerce

RESOLUTION OF MINOR DISPUTES

JOINT HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY

AND

SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

RESOLUTION OF MINOR DISPUTES

JUNE 6, 7, 14 AND 18, 1979

Serial No. 25

(Committee on the Judiciary)

Serial No. 96-78

(Committee on Interstate and Foreign Commerce)

Printed for the use of the Committee on the Judiciary and the Committee on Interstate and Foreign Commerce

52-434 O

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1979

COMMITTEE ON THE JUDICIARY

PETER W. RODINO, JR., New Jersey, *Chairman*

JACK BROOKS, Texas
ROBERT W. KASTENMEIER, Wisconsin
DON EDWARDS, California
JOHN CONYERS, JR., Michigan
JOHN F. SEIBERLING, Ohio
GEORGE E. DANIELSON, California
ROBERT F. DRINAN, Massachusetts
ELIZABETH HOLTZMAN, New York
ROMANO L. MAZZOLI, Kentucky
WILLIAM J. HUGHES, New Jersey
SAM B. HALL, JR., Texas
LAMAR GUDGER, North Carolina
HAROLD L. VOLKMER, Missouri
HERBERT E. HARRIS II, Virginia
MIKE SYNAR, Oklahoma
ROBERT T. MATSUI, California
ABNER J. MIKVA, Illinois
MICHAEL D. BARNES, Maryland
RICHARD C. SHELBY, Alabama

ROBERT McCLORY, Illinois
TOM RAILSBACK, Illinois
HAMILTON FISH, JR., New York
M. CALDWELL BUTLER, Virginia
CARLOS J. MOORHEAD, California
JOHN M. ASHBROOK, Ohio
HENRY J. HYDE, Illinois
THOMAS N. KINDNESS, Ohio
HAROLD S. SAWYER, Michigan
DAN LUNGREN, California
F. JAMES SENSENBRENNER, JR.
Wisconsin

JOSEPH L. NELLIS, *General Counsel*
GARNER J. CLINE, *Staff Director*
FRANKLIN G. POLK, *Associate Counsel*

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

ROBERT W. KASTENMEIER, Wisconsin, *Chairman*

GEORGE E. DANIELSON, California
ROMANO L. MAZZOLI, Kentucky
LAMAR GUDGER, North Carolina
ROBERT T. MATSUI, California
ABNER J. MIKVA, Illinois

TOM RAILSBACK, Illinois
CARLOS J. MOORHEAD, California
HAROLD S. SAWYER, Michigan

BRUCE A. LEHMAN, *Chief Counsel*
TIMOTHY A. BOGGS, *Professional Staff Member*
GAIL HIGGINS FOGARTY, *Counsel*
MICHAEL J. REMINGTON, *Counsel*
THOMAS E. MOONEY, *Associate Counsel*
JOSEPH V. WOLFE, *Associate Counsel*

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

HARLEY O. STAGGERS, West Virginia, *Chairman*

JOHN D. DINGELL, Michigan
LIONEL VAN DEERLIN, California
JOHN M. MURPHY, New York
DAVID E. SATTERFIELD III, Virginia
BOB ECKHARDT, Texas
RICHARDSON PREYER, North Carolina
JAMES H. SCHEUER, New York
RICHARD L. OTTINGER, New York
HENRY A. WAXMAN, California
TIMOTHY E. WIRTH, Colorado
PHILIP R. SHARP, Indiana
JAMES J. FLORIO, New Jersey
ANTHONY TOBY MOFFETT, Connecticut
JIM SANTINI, Nevada
ANDREW MAGUIRE, New Jersey
MARTY RUSSO, Illinois
EDWARD J. MARKEY, Massachusetts
THOMAS A. LUKEN, Ohio
DOUG WALGREN, Pennsylvania
ALBERT GORE, JR., Tennessee
BARBARA A. MIKULSKI, Maryland
RONALD M. MOTTL, Ohio
PHIL GRAMM, Texas
AL SWIFT, Washington
MICKEY LELAND, Texas
RICHARD C. SHELBY, Alabama

SAMUEL L. DEVINE, Ohio
JAMES T. BROYHILL, North Carolina
TIM LEE CARTER, Kentucky
CLARENCE J. BROWN, Ohio
JAMES M. COLLINS, Texas
NORMAN F. LENT, New York
EDWARD R. MADIGAN, Illinois
CARLOS J. MOORHEAD, California
MATTHEW J. RINALDO, New Jersey
DAVE STOCKMAN, Michigan
MARC L. MARKS, Pennsylvania
TOM CORCORAN, Illinois
GARY A. LEE, New York
TOM LOEFFLER, Texas
WILLIAM E. DANNEMEYER, California

W. E. WILLIAMSON, *Chief Clerk and Staff Director*
KENNETH J. PAINTER, *First Assistant Clerk*
JOHN H. ALLEN, *Professional Staff Member*
NANCY A. NORD, *Associate Minority Counsel*

SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE

JAMES H. SCHEUER, New York, *Chairman*

RICHARDSON PREYER, North Carolina
RICHARD L. OTTINGER, New York
DAVID E. SATTERFIELD III, Virginia
THOMAS A. LUKEN, Ohio
HARLEY O. STAGGERS, West Virginia
(Ex officio)

JAMES T. BROYHILL, North Carolina
MATTHEW J. RINALDO, New Jersey
SAMUEL L. DEVINE, Ohio
(Ex officio)

EDMUND ROVNER, *Staff Director*
EDWARD H. O'CONNELL, *Counsel*
MARGARET T. DURBIN, *Minority Staff Assistant*

CONTENTS

HEARINGS HELD

WITNESSES

Additional Statements

Appendixes

Appendix 1.—Bills

Appendix 2.—Additional Materials Submitted by Witnesses

Appendix 3.—Additional Materials

Appendix 4.—Additional Correspondence

LAWYERS AND CONSUMER PROTECTION LAWS: AN EMPIRICAL STUDY*

Stewart Macaulay
Professor of Law
University of Wisconsin Law School

*This study is part of a larger project dealing with consumer protection and the automobile industry, the Magnuson-Moss Warranty Act, and the consumer protection policies of the Federal Trade Commission, which was funded by the National Science Foundation Law and Social Science Division, SOC 76-22234. Dr. Kenneth McNeil and Professor Gerald Thain are carrying out other parts of the project; some of Dr. McNeil's findings which are related to this study are reported in Appendix II, infra.

As always, a study is a collaborative effort, and I owe thanks to many people. Dr. Jacqueline Macaulay edited all of the many drafts of the manuscript and was a challenging and helpful critic. Kathryn Winz spent a summer interviewing lawyers, and her own experience in the Office of Consumer Protection of the Wisconsin Department of Justice was most valuable. Marc Galanter, Robert Gordon, Stuart Gullickson, Joel Grossman, Kenneth McNeil, Richard Miller, Ted Schneyer, Gerald Thain, David Trubek, Louise Trubek and William Whitford all read a draft of the manuscript and made very helpful comments. Able research assistance was provided by Jill Anderson, Jane Limprecht and Daniel Wright. At the invitation of Professor John Schlegel, I presented my ideas at a seminar of the Faculty of Law and Jurisprudence at SUNY Buffalo, and I took away important ideas. Yet after all this help, of course, I am still responsible for all errors.

PRECIS

A traditional model of the practice of law, found both in the bar's public relations efforts and in drama and fiction, paints the attorney as one primarily concerned with the application of the law and as a relatively passive reflection of the client's wishes. This picture is an oversimplification, and accepting it as accurate has a number of costs. It distorts our view of what lawyers do. Apparently, it has misled those who draft reform legislation so that they rely on attorneys to assert individual rights in situations when they are not likely to be willing or able to do so. A case study of the response of Wisconsin lawyers to consumer protection laws is reported which calls attention to how often lawyers act with little or no knowledge of the applicable laws, how they play conciliatory rather than adversary roles, and how their self interest importantly influences their decisions about whether to take cases and what tactics to pursue to resolve those they do take. Theories explaining lawyers' behavior in terms of factors of personality or ethics are questioned on the basis that they omit important structural constraints on behavior.

LAWYERS AND CONSUMER PROTECTION LAWS: AN EMPIRICAL STUDY

In Western culture the lawyer has been regarded with both admiration and suspicion for centuries. Both evaluations seem to rest on a widely held image of what it is that lawyers do or ought to do. The basic elements of the stereotype of the practice of law probably are nearly the same now as they were in the seventeenth century. Lawyers have long held out a picture of their usefulness to justify their position. (See, e.g., Bloomfield, 1976; Nash, 1965). Novels, plays, motion pictures and television programs convey images of lawyers as important and powerful people. On the other hand, a debunking tradition--recently reinforced by the Watergate episode--shows lawyers as those who profit from the misfortunes of others, as manipulators who produce results for a price without regard to justice, and as word magicians who mislead people into seeing what is wrong as acceptable. Yet even much of this writing accepts the traditional picture of lawyering if only as a yardstick against which actual practice falls short. While this stereotypic picture may serve the profession's claims for legitimacy, the dramatist's need for conflicts of principle, and even the muckraker's need for a villain, we are coming to see that it is an oversimplification which may cost us understanding.

In the classical model of practice, lawyers apply the law. They try cases and argue appeals guided by legal norms. They negotiate settlements and advise clients largely in light of what they believe would happen if matters were brought before legal agencies. Lawyers represent clients. They take stock of a client's situation and desires and then

seek to further the client's interests as far as is legally possible. Sometimes the boundaries of this role are indicated by saying that a lawyer is a "hired gun" who does not judge his or her client but vigorously asserts all of the client's claims of right. The lawyer cannot go too far and interfere with the interests of others, however, because of the operation of the adversary system. These competitive claims of right will be decided by legal agencies or through settlements based on predictions of the likely outcome if the case were processed formally. Moreover, lawyers will place their clients' interest ahead of their own because of the demands of legal ethics and professional custom.

Perhaps only the most innocent could think that this classical model describes professional practice. While the model reflects something of what goes on, it is at best a distorted picture of much of what most lawyers do. Both Wall Street and Main Street lawyers often operate in situations where they know little about the precise content of the relevant legal norms or where those norms play only an insignificant part in influencing what is done. Lawyers regularly engage in the politics of bargaining, seeking to work out solutions to problems, which reflect some balance of all of the interests important in the situation. Rather than playing "hired gun," lawyers often serve as mediators who stand between the client and others who are not represented by lawyers, seeking to educate, persuade and coerce both sides to adopt the best available compromise rather than to engage in legal warfare. Many lawyers find themselves acting as therapists and counsellors, helping clients deal with problems by coming to understand them differently. I will call these activities non-legal or non-adversarial

roles to distinguish them from the familiar picture of the lawyer who argues in court and does research in a law library. Of course, these more conciliatory roles are not completely non-legal and non-adversarial. Lawyers by their very position never act without at least some tacit threat that they could cause trouble by learning some law or going to a legal agency if either or both were called for. Also most American lawyers are socialized into a legal culture so that their expectations will reflect legal norms, many of the assumptions of an adversary system and styles of legal reasoning. Nonetheless, I call these conciliatory roles non-legal and non-adversarial to emphasize that the chance of directly invoking legal norms and procedures is slight.

While lawyers sometimes do act as a "hired gun", it seems likely that they do this only in certain kinds of cases for certain kinds of clients. Usually lawyers have great freedom to choose whether or not to take a case and how far to pursue those they do take. In playing all of their roles, ranging from arguing a case before the Supreme Court of the United States to listening to an angry client in their offices, lawyers are influenced by their own values and their own self interest. It is hard to see how it could be otherwise. Lawyers earn their living by selling services. Their values and interests are, of course, influenced by the overlapping and interlocking relationships involved in the practice of law. In short, legal ethics and the assumptions of the classical model are important but so are the need to pay the rent and do things the lawyer finds satisfying and not distasteful.

Finally, when attorneys reject potential clients and when they act for those they do accept, their professional efforts involve attempts

to transform or convert views and characterizations of the situations in ways which profit them and, usually, their clients. We are familiar with the complicated process whereby a lawyer tries to convert only some of the factors involved in an automobile accident into a winning cause of action for negligence. There is another equally important kind of transformation that is less familiar. Lawyers often must try to convert a client's desire for vindication and revenge into a willingness to accept what the lawyer sees as the only reasonable settlement that can be obtained with the effort the lawyer is willing to invest in the case. As we will see, this kind of alchemy may prompt much of the negative view of the profession held by clients and by the public at large. The rhetoric and manipulation that must be used to gain settlements and sell them to clients may be tolerated as a necessary evil, but it also often is seen as hypocritical misrepresentation. To some it seems that truth and justice are put to one side so that a deal can be made.

The emphasis placed on the lawyer's business as being in the courtroom or in the law library has a number of costs. People tend to expect action from lawyers which they cannot or should not get, and when these expectations are defeated, they are likely to be angry and suspicious. At least some people expect lawyers to apply the law in their behalf at trial or in counselling only to discover that things will be worked out through personal contacts and informal arrangements. Some people may expect lawyers to be available and willing to fight for a client's rights only to discover that they cannot afford to pay for competent legal advice or, at best, they can afford to make only a

deal instead of doing battle for justice. This tends to make the practice of law appear, in Blumberg's (1967) phrase, as a "confidence game." Yet from some points of view, conciliatory solutions which make the best of a bad situation may be far preferable to spending one or more expensive days in court from which one party will emerge as the loser.

The classical emphasis on the lawyer as an adversary applying legal norms may have blocked serious thought about the ethics of counselling, mediation and negotiation. Some people may be disappointed when they discover that their lawyer will not bribe officials or use some magical form of influence to make all their troubles go away. (But see Fair and Moskowitz, 1975). Simon (1978) has brilliantly set out the many difficulties with a system of professional ethics based on the assumptions underlying the view that the lawyer is a "hired gun" in the adversary system--what he calls the positivist theory of practice. He points out that most of the writing on the role of lawyers in our legal system rests on variations on this positivist theme. However, insofar as the theory is based on an incomplete or distorted picture of what lawyers commonly do, it is irrelevant to large areas of practice. At present we have little normative basis for judging how the non-legal and non-adversarial roles of lawyers are played. (See Brown and Brown, 1976).

Another cost of our oversimplified picture of practice is faulty legal engineering. We must recognize that lawyers often play an important part in making reform laws more or less effective. Particularly during the past twenty years, reformers have sought to right what they saw as wrong by advocacy before legal agencies. When reformers win in areas such as civil rights, sex and racial discrimination, and consumer

protection, their victories often come in the form of cases, statutes or regulations which, along with other things, grant rights to individuals. (See, e.g., Case Western Law Review, 1978; Cohen, 1975; Field, 1978; Frenzel, 1977; Scheingold, 1974). However, for the most part, individual rights remain words on paper unless people can get a court or agency to enforce them or can make a credible threat to do so. Here is where lawyers enter the picture, serving as gatekeepers to the legal process. On one hand, some lawyers, representing those the reforms seek to regulate, work hard to make it difficult to vindicate these new rights. On the other hand, the lawyers approached by those who want to assert their new rights are free to reject these cases or if they do accept the client, they are free to decide how aggressively to pursue what tactics. Lawyers have barred many people from using the rights reform laws created on paper. (See Friedman, 1967).

In short, barriers to using legal rights in litigation or negotiation serve to make many reforms largely symbolic. While symbolic laws may be important steps toward challenging accepted views of what constitutes common sense and justice, both reformers and some of those who were supposed to benefit from the new laws have been dissatisfied with symbolism. This has prompted various proposals for further reform--some want to change the system for delivering legal services and others want to remove problems from the domain of lawyers. (See, e.g., Abel, 1979; Danzig, 1973; Felstiner, 1974; 1975; Danzig and Lowy, 1975; Johnson, 1974; Johnson and Schwartz, 1978; McGillis and Muller, 1977). Whatever solutions to the problems of implementing individual rights are advocated, a clear picture of the structure of the practice of law is an essential starting

52-434 O - 80 - 33

point for argument and planning. Without it, we risk missing the mark again or, worse, prompting unintended and harmful consequences.

This article will develop these ideas about an expanded picture of the practice of law through a case study. I will consider the roles played by lawyers in connection with a number of consumer protection laws which create individual rights. While these laws have some of their own peculiar characteristics, they also reflect an important trait of most reforms of the 1960s and 1970s: their basic approach is to create a cause of action for an aggrieved individual. This will not be a complete study of the impact of these laws since that would require me to move away from lawyers and look at such things as the effect of the activity of government agencies, the threat of more drastic laws which might be passed in the future, and public relations considerations involved in the publicity gained by the consumer movement. In short, the subject of the study is lawyers and the focus on consumer laws serves as a way of looking at the behavior of several kinds of attorneys.

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

However, it quickly became apparent that the focus of the study was too narrow. Most lawyers in Wisconsin knew next to nothing about the Magnuson-Moss Warranty Act--many had never heard of it--and when asked about it, they tended to respond with comments on consumer protection laws generally. Moreover, it was extremely difficult to find lawyers who knew much about any specific consumer protection law other than the Wisconsin Consumer Act , Wis. Stat. §§ 421-427(1975)--a law largely concerned with procedures for financing consumer transactions and collecting debts. And while a few lawyers were extremely well informed about the WCA, what others knew about it consisted of some "atrocity stories", (See Dingwall, 1977), about debtors who had used it to evade honest debts.

In spite of this ignorance of the specific contours of consumer protection regulation, most lawyers had techniques for dealing with complaints voiced by clients, or potential clients, who were dissatisfied with the quality of products or service or could not pay for what they had bought. And these techniques will be a major focus of this article.

What follows is based on in person and telephone interviews conducted by a research assistant and by me during the summer of 1977. (See Appendix I for a more detailed discussion of the research.) We talked with about 100 lawyers in five Wisconsin counties and a representative of each of the state's ten largest law firms, of the legal services program in Milwaukee and Madison, of Wisconsin Judicare--a program for paying private lawyers to handle cases for the poor in the northern and western parts of the state (See Brakel, 1973; 1974)--and of all the group legal service plans registered with the State Bar of Wisconsin.

(See Alpander and Kobritz, 1978; Case, 1977; Colvin and Kramer, 1975; Conway, 1975; Freedman, 1977; Harris, 1977). In addition, a questionnaire concerning experiences with the Magnuson-Moss Warranty Act was sent to all lawyers attending an Advanced Training Seminar sponsored by the Bar, which dealt with the statute. While in no sense is this study based on a sample representative of all lawyers in Wisconsin, there was an attempt to seek out lawyers whose experiences might differ. Most importantly, there is great consistency in the stories that this very diverse group of lawyers had to tell. This suggests that almost any sample would have served in this study. Even at points where very divergent interpretations were offered by the lawyers interviewed, their description of practice was consistent. Moreover, the information I gathered was consistent with, and indeed helps explain, the findings about lawyers and consumer problems of the American Bar Association-American Bar Foundation study of the legal needs of the public. (See Curran, 1977). The ABA-ABF study was based on a random sample of the adult population of the United States, excluding Alaska and Hawaii.

However, my study has some obvious limitations. I cannot offer percentages of the lawyers who have had certain experiences or who hold particular opinions. Often the lawyers themselves could say no more than they get a particular kind of case "all of the time," or that they "almost never" litigate. Since the lawyers have no reason to compile statistics, usually they offer only general estimates of their caseload. Many of the more informal contacts and telephone calls never appear in the lawyer's own records, the lawyer is unlikely to have a very precise memory of them, and one would have to follow the lawyer around and log

what s/he did all day long as well as at social events on weekends and in the evening. Few lawyers are likely to be that cooperative, and even if they were, the cost of collecting data this way would be very high.

Also my conclusions are based on what informants told my research assistant and me, and so we face all of the problems of hearsay. Many of the lawyers interviewed were former students of mine, and they were extremely helpful. Other lawyers also seemed eager to cooperate with a University of Wisconsin Law Professor. This effort to be helpful, which was very appreciated, may have introduced some distortion. On one hand, these lawyers may have been willing to go along with the interviewer's definition of the situation, which is implicit in the questions, rather than to challenge the entire basis of the inquiry. On the other hand, a few may have modified a fact here and there to present a good story to entertain their old professor or to make themselves look good. While I cannot be sure that this did not happen, again the consistency of the stories over 100 lawyers suggests that this was not a major problem. Finally, this article reports the author's interpretations of what he was told by these lawyers, and not all of them were asked exactly the same questions since the information gained as the study progressed changed its focus from the Magnuson-Moss Warranty Act to consumer protection laws and then finally to the practice of law itself. The study then is much closer in spirit to a law review essay than a report of the practice of the more quantitative variety of social science. All in all, this should be viewed as a preliminary study, offering suggestions the author thinks are true enough to warrant reliance until someone is willing to invest enough to produce better data and lucky enough to find a way to get it.

I. The Impact of Consumer Protection Statutes on the Practice of Law.

A. Lawyers for Consumers.

In this section I will consider the roles played by lawyers who represent or who might be expected to represent individuals attempting to assert rights under various consumer protection laws. First, I will consider how often such people make any contact with lawyers, and, since so few do attempt to see lawyers, why and how any of them manage to bring their problems to members of the bar. Next we will consider how lawyers react when they encounter these cases or how they avoid seeing them in the first place. Finally, I will sketch the reasons why lawyers tend to play no role or only limited roles in consumer dispute processing despite the modern outpouring of consumer protection statutes and regulations.

1. When and How Do Lawyers See Consumer Cases?

Probably lawyers see but a small percentage of all of the situations where someone might assert a claim under one or several of the many consumer protection laws. (See Mayhew and Reiss, 1969). Of course, it is impossible to be sure how many potential cases exist where consumer protection rights might be asserted and what percentage of them come to lawyers. Some claims are never asserted because consumers fail to recognize that the product they received is defective, that the forms used in financing the transaction fail to make the required disclosures or that the debt collection tactics used by a creditor are prohibited. (See Best and Andreasen, 1977). Many other potential claims are recognized but resolved in ways which do not involve lawyers. Some consumers see the

cost of any attempt to resolve such a problem as not worth the effort, and they just "lump it." Others decide not to buy a particular product again or not to patronize again a seller of goods or services who leaves them dissatisfied. (See Best and Andreason, 1977; Haefner and Leckenby, 1975; Mason and Himes, 1973; Warland, Herrmann and Willits, 1975.) Some fix the defective product themselves while other complain to the seller or the creditor and receive an adjustment which satisfies them. It is likely that most potential claims under consumer protection statutes are resolved in one of these ways. (See Curran, 1977: 109-10, 140, 196.)

A few consumers go directly to remedy agents without consulting lawyers. For example, they may turn to the Better Business Bureau in Milwaukee or to one or more of the several state agencies which mediate consumer complaints. (Compare Steele, 1975).[1] A few may go directly to a small claims court. Others contact the local district attorney who, in at least the smaller counties in Wisconsin, often offers a great deal of legal advice or even a rather coercive mediation service to consumers who might vote for him or her in the next election. In short, there is a wide variety of remedy agents available in Wisconsin which do not require one to purchase the services of a lawyer. However, we cannot be sure how many consumers know of all of the options which are available; such knowledge probably is not too widespread.

Many lawyers in private practice reported to us that they never saw a case involving an individual consumer. Those who represent businesses and practice in the larger firms were likely to say this. Other lawyers talked about encountering such cases only now and then. Those few cases that survive the screening process that routes most

potential consumer disputes away from attorneys may have special characteristics which determine that lawyers see them. Some lawyers said that they occasionally represented a consumer seeking to avoid repossession of a car or a mobile home. Very few saw situations where a consumer was complaining about a defective product or poor service where there had been no personal injury. However, cases where personal injuries were caused by a defective product were another matter; they were not seen as consumer protection cases but were called "products liability" problems. Many lawyers dealt with products liability, and there is a specialized group of attorneys who are expert in the techniques of asserting or defending these cases. Most lawyers knew the products liability specialists and sometimes referred cases to them. No similar network of access to specialists in consumer protection matters seems to exist. Several attorneys mentioned one lawyer they thought was an expert in consumer protection, but when I interviewed that lawyer, he said that he now tried to avoid such cases after handling several a few years ago.

Lawyers working for programs providing legal services for the poor or for members of groups entitled to receive them under a benefit plan seem to see more consumer protection cases than attorneys in private practice. However, I have no good data on the frequency of these cases since lawyers for plans and lawyers in private practice keep no statistics and can offer only inexact estimates. Both lawyers dealing with poor clients and those dealing with union members entitled to receive legal services as a fringe benefit said such things as "we see these cases all the time, but there are not as many as you might think." Lawyers in the group legal services plans of school teachers' unions and those of

cooperatives reported that they seldom were called on to provide advice about consumer protection matters.

In summary, we can say that only a small proportion of the problems covered by consumer protection laws come to lawyers in Wisconsin. Since potential clients could be expected to hesitate before taking any but the most dramatic or expensive consumer problems to a lawyer, if we are to understand the impact of consumer protection laws, we need to ask how any of these less dramatic or inexpensive cases do get to attorneys. First, some people will bring cases to lawyers which others might see as trivial but which the clients see as matters of principle. Even if only $300 or $400 is involved, people who feel they have been cheated may be angry and think there is a wrong which ought to be redressed. Second, we found that debtors are often pushed into a lawyer's office by the actions of a creditor. While many debtors surrender gracefully to an action to repossess a car, others want to fight. If an expensive recreational vehicle or mobile home is involved, the debtor is not likely to accept repossession passively. (Compare Landers, 1977.)

A third kind of person who takes consumer problems to lawyers are those who are regular clients of the lawyer. The lawyer may attempt to handle some matters in order to keep a client's good will; one lawyer called this a kind of "loss leader" service. For example, another lawyer in a small county had drafted a wealthy farmer's estate plan and had set up a corporation to handle some of his dealings in land development. The farmer was dissatisfied with a Chevrolet dealer's attempts to make a new car run satisfactorily. The farmer called the lawyer and told him to straighten out matters, the lawyer negotiated with the dealer, and

the lawyer sent the farmer a bill for only a nominal amount which in no way reflected all of the time the lawyer had spent on the case. Sometimes officers of a corporation that has retained a lawyer with a specialized business practice will ask for personal advice when they are dissatisfied with an expensive product. Not surprisingly, they usually get plenty of free advice, and they may even receive substantial help in complaining effectively without being charged a fee.

Another way consumer cases are brought to the attention of lawyers is through informal social channels. Many lawyers responded to questions about consumer matters by pointing out that they had friends, relatives and neighbors as well as clients who asked for their advice. People who would not retain a lawyer to handle a consumer matter, often raise their problems with lawyers they see at church suppers, PTA meetings, and cocktail parties. One lawyer noted that it was hard to have a drink at a bar in Madison on a football weekend without being called on for free legal advice. Few of these problems ever become cases, but occasionally lawyers find one that demands more than a few minutes of free advice.

Decisions about whether or not to see a lawyer hinge on personal factors. One lawyer remarked that many people seem to need reassurance that it is legitimate to complain and make trouble for others by going to a lawyer. (Compare Sniderman and Brody, 1977). Others are hesitant about appearing foolish before an educated professional or, perhaps, admitting to their spouse that they were taken by a retailer or manufacturer when they should have known better. These people will avoid a trip to a lawyer when they fear that it may expose their stupidity. Some people have these concerns about seeing lawyers answered by friends

and associates who encourage them to seek advice. (See Ladinsky, 1976; Locher, 1975). Some lawyers said that most of their clients--both those who come to their office and those who ask for advice during informal contacts--come to them through friendship networks. A former client may talk with a friend at work or at a bar and end up sending him or her to the lawyer. (See Curran, 1977: 202, 203.) There is a "folk culture" that defines, among other things, what kinds of consumer cases one should take to a lawyer, what kinds of situations call for solutions not involving lawyers, and what kinds of complaints should be just forgotten. Those facing aggressive debt collection procedures are likely to be told to see lawyers; those with complaints about the quality of a product are usually told just to forget it.

How do those who decide to see a lawyer choose one? Many pick their lawyer on the basis of a friend's recommendation, but some would-be clients seem to pick their lawyers at random from the yellow pages of the telephone directory. One lawyer whose last name begins with "An" was amused by how often he was called immediately after one of his partners whose name begins with "Ab" had refused to take a case. Alternative systems of delivering legal services attempt to make use of these more casual ways of contacting lawyers. The legal services office in Milwaukee, for example, is located in a low income neighborhood and tries to attract people as clients who walk into the office from the street. Group plans sponsored by unions often offer the right to call the plan's lawyers for advice, and union leaders may try to encourage members to use the service. Legal services and group plan lawyers often talk at community meetings, and people raise individual problems informally after the program is over.

2. What Do Lawyers Do With the Consumer Cases They Encounter?

a. A catalogue of possible responses: Many lawyers seek to ward off potential clients with consumer protection problems. (See Curran, 1977: 204.) Large firms that specialize in representing businesses encourage some potential clients but discourage others by the location, decor, and atmosphere of their offices. Everything about these firms tends to communicate the idea that these are expensive professionals who deal only with important people. Their offices are often in the financial district of a large city and have a magnificent and obviously expensive view, expensive furnishings, and fine art on the walls. One waiting to see a member of the firm may be served coffee or tea in a cup and saucer made of china. While waiting, the potential client can see sophisticated word processors and other costly and impressive office equipment. Secretaries, paralegal workers, and lawyers dress as if they were accustomed to dealing with wealthy people. One who is not to the manner born would hesitate to waste the time of this highly professional establishment with a mere personal matter.

Even lawyers who are more accessible to individuals have techniques to avoid cases they do not want to take. Some lawyers' receptionists try to screen cases so that minor personal matters will not waste their boss' time. Some lawyers try to brush off individuals by talking briefly to them on the telephone in order to keep them from coming to the office with a consumer or other individual problem.[2] Some listen to people who come to the office for only a few minutes and then interrupt to spell out the cost of legal services. These attorneys see their role as that of educating would-be clients so that they will see that they cannot

afford to pursue the matter. Some lawyers are subtle and skilled at getting rid of unwanted clients without losing their good will; others are blunt and accept that the person will leave unhappy. Even legal services lawyers feel the need to reject some potential clients or to deal with them quickly so that they can apply their efforts to what they see as more worthy cases.

If the potential client with a consumer matter is not rejected out of hand, lawyers may still limit their response to playing non-adversary parts in the drama. One role played fairly often might be called that of the therapist or the knowledgeable friend. The client is allowed to blow off steam and vent his or her anger to a competent-seeming professional sitting in an office surrounded by law books and the other stage props of the profession. By body language and discussion, the lawyer can lead the client to redefine the situation so that s/he can accept it. What looks to the client to be a clear case of fraud or bad faith, on close examination comes to be seen as no more than a misunderstanding not worth a great deal of emotion. The lawyer may try to focus the client's general annoyance and help the client consider the practical options open in the situation. Of course, attempts to deescalate anger and redefine situations may not be welcomed by clients. Also, in those few cases where it seems practical, the lawyer may encourage the client to fight a consumer matter. Indeed, on occasion, it may be necessary to encourage clients to be more assertive about their rights and openly angry.

Often the lawyer will take a further step and combine the therapist role with that of a broker of information or a coach. It may be easier

to hear the complaint and then refer clients elsewhere for a remedy than to attempt to ward them off. This gets the would-be client out of the office less unhappy than had the lawyer just rejected the case and offered nothing. These people can be sent to state agencies which mediate consumer claims or to private organizations such as the Better Business Bureau. Some lawyers go a little further and try to coach clients on how to complain most effectively to a seller or creditor or how to handle a case in a small claims court without a lawyer. They may offer a few suggestions or attempt to write a script for a would-be client. Sometimes consumers need to be reassured that they have a legitimate complaint, to be given the courage to complain, to learn where to go and whom to see, and to be given a few good rhetorical ploys to use in the dispute resolution process. This information and coaching may be of more help in some cases than formal legal advice. Sometimes, however, it does not help much, and the process of being sent elsewhere only serves to prompt the client to give up and drop the matter. Most lawyers have little idea whether referring a particular case to a state agency or sending a client alone to complain to the seller actually helps because the client rarely will return to tell the attorney what happened. Of course, this may not be the case if the potential client was a friend or neighbor, and perhaps lawyers in small towns hear about outcomes indirectly. Nonetheless, it is not a system with reliable feedback.

Attorneys who become more involved in a case may find themselves playing the role of go-between or informal mediator. They may telephone or write the seller or creditor to state the consumer's complaint. The very restatement of that complaint by a professional is likely to make

it a complex communication. On one level, the attorney is reporting a version of the facts which may be unknown to the seller or creditor even in cases where consumers have complained to them on their own. Lawyers can organize facts so that the basis of the complaint is more understandable. On another level, the fact that the report comes from a lawyer is likely to give the complaint at least some minimal legitimacy. The lawyer is saying that s/he has reviewed the buyer or debtor's story, that the assertions of fact are at least plausible, and that the buyer or debtor has reason to complain if these are the facts. The lawyer is more likely than the consumer to get to talk to someone who has authority to do something, rather than someone at the bottom of the chain of command. For example, the consumer may have talked with the sales person while the lawyer will deal with the manager or the owner of the business. Also the lawyer is likely to speak as at least the social equal of the representative of the seller or debtor, which may not be the case for the consumer. This may be an important factor. Many retailers, for example, may not care too much about the opinions of factory workers, but they probably do not want professionals to think ill of them. Finally, the attorney's professional identification conveys at least some tacit threat that an unsatisfactory response could be followed by something the seller or creditor might find unpleasant. Indeed, the vague threat of unpleasantness may be more powerful than precise knowledge of what an attorney could do if s/he were not satisfied with the creditor or seller's response--in light of the cost barriers to litigation, the attorney is a paper tiger in many consumer matters, but sellers and creditors cannot be sure that this is the case.

Thus sellers and creditors are more likely to make conciliatory responses to lawyers than to buyers or debtors, as long as the lawyers do not ask for too much. And it is part of a lawyer's stock in trade to know how much is too much. (Compare Ross, 1970). If the seller or creditor does not offer some sort of conciliatory response, the lawyer may suggest it. One lawyer told us:

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

A seller or creditor's representative may try to persuade the consumer's lawyer that it has behaved reasonably and that the client has little cause for complaint. The representative may assert that the client has just misunderstood the situation or has told the lawyer only part of the story. Two lawyers with wide experience in handling consumer matters reported that at this stage an attorney often discovers that the client's case is far less clear cut than the attorney assumed after hearing only one side of the story. There are almost always facts that the client neglected to tell the lawyer, and often the facts have been slanted to make the client's story look good.

The seller or creditor is likely to make some kind of gesture to show good faith so that the lawyer will not have to return to client empty handed. The simplest gesture is a letter of apology, explaining how the problem occured and accepting some or all of the blame. A

superior may attempt to blame an employee with whom the consumer dealt, perhaps remarking that it is difficult to find good sales people or mechanics. Manufacturers often blame dealers, and dealers, in turn, seem eager to pass the blame to manufacturers. In addition to an apology, the merchant may also offer something which will make the apology easier to accept. For example, a seller might offer to make minor repairs; a manufacturer may send the consumer free samples of its products.

In a few situations, a lawyer may be able to persuade a seller or manufacturer to offer the consumer a refund or a replacement for a defective product. Sometimes the lawyer can gain this remedy for a client even where the flaw in the item originally delivered was not so material as to warrant "revocation of acceptance" under the Uniform Commercial Code. U.C.C § 2-608. Lawyers are not likely to gain refund or replacement remedies from new car dealers or fly-by-night merchants who operate on the borders of fraud. New car dealers are tightly controlled by manufacturers, who seem to value cost control more than consumer good will, (See Whitford, 1968.) while fly-by-night operators seldom worry about repeat business. Sears, Wards, J. C. Penney and many large department stores have an announced policy of consumer satisfaction. One can get his or her money back without having to establish that there is something wrong with the product. (See Ross and Littlefield, 1978). Other retailers and manufacturers do not announce this as their policy but will grant refunds or replacements selectively when their officials think the customer has reason to complain or if repeat business is valued. One lawyer suggested that many consumers think that they have a right to return any product to any store for a refund or replacement

52-434 O - 80 - 34

as a result of the practices and advertising of stores such as Sears. Some disputes may arise because other businesses will not or cannot match the customer satisfaction policies of the large retailers. However, if a manufacturer or retailer offers refunds or replacements in some cases but not others, a telephone call from a lawyer may be enough to swing the balance in favor of the complainant--it probably seems easier to make a refund than to argue with a lawyer.

The lawyer's view of the acceptability and adequacy of the gesture or remedy offered by the merchant will turn importantly on the lawyer's reappraisal of the client's case in light of the other side's story. For example, a used car dealer might offer to contribute $100 toward the cost of repairing a car; this might look very generous if the client had misrepresented the condition of a car traded in as part of the deal. The lawyer's appraisal also will turn on the ease or difficulty of taking any further action against the merchant and on the consumer's likely reaction to what has been offered.

At this point, the lawyer has to persuade the client to see the situation as now defined by the lawyer in light of the seller or creditor's response. Part of the task is to get clients to see the problem as one where there is something to say on both sides rather than as something justifying fighting for principle, and part of the task is to get clients to accept the gesture as the best one could expect given the amount of legal work they can afford. At all levels of law practice, this is a difficult task. The client tends to want vindication while the lawyer is talking about costs balanced against benefits. It is even a more difficult task when the client is very angry but has what the lawyer sees

as a questionable case that involves too little money to warrant even drafting a complaint let alone litigation. This is often the situation when consumer protection laws are involved.

Only in rare instances will lawyers go further than conciliatory negotiation in a consumer matter and play the classic adversary bargainer-litigator role. In this classic role, the lawyer makes more explicit threats of unpleasant consequences if the antagonist fails to offer a satisfactory settlement. Some lawyers report that once overt threats are made, one is likely to have to draft and file a complaint before any offer of settlement will be received. One reason is that serious threats from a lawyer are likely to prompt sellers or creditors to send the matter to their lawyers. But even at this point, the lawyers for both sides have every reason to settle rather than litigate. Some consumer cases do go to trial--we can even find appellate opinions to put in law school casebooks[3]--but I suspect that they are likely to be unusual and atypical of the mass of consumer complaints.

b. Explanations for the responses: There are a number of reasons why lawyers either refuse to take consumer protection cases or tend to play only nonadversary roles when they try to help a client with such a complaint. The most obvious explanation is that the costs of handling these cases in a more adversarial style would be more than most clients would be willing to pay. Few consumers can afford many hours of lawyers' time billed at from $35 to $50 an hour just to argue about a $400 repair to their car or even a repossession of a $5,000 used car. Such items as toasters, hairdryers and cameras cost enough to concern many consumers but do not involve enough to warrant the investment of any professional

time. And few lawyers can afford to spend time on cases that will not pay. One lawyer in northern Wisconsin emphasized that "after all, I am self employed." Another lawyer from one of Wisconsin's more important firms commented,

> A lawyer in private practice has to earn money. He has to take a very hard look at the cases that are brought to him, and he must reject those which will not pay. It is very hard to have to tell a potential client that she or he has a meritorious case and would likely win but that there is not enough involved to make it worth taking. As you get older, you have to carry your part in covering your share of the overhead. When I was younger, I could take just about any case. The firm could always chalk it off to training a young lawyer. Now I am an experienced lawyer, and I must invest my time where there is enough money involved to help the firm.

Consumer product quality cases are very similar to products liability litigation absent the factor of personal injury. But the factor of personal injury is what yields the chance of very large damages, and this chance is what prompts lawyers to work for contingent fees.

Not only are consumer protection cases unlikely to warrant substantial fees, (See Curran, 1977: 208), but many, if not most, lawyers would have to make a major investment of professional time to litigate one or to negotiate in light of a serious threat to litigate. Those lawyers most expert about consumer laws are the attorneys who counsel businesses and draft documents for them in view of the requirements of these laws. Yet these are the lawyers least likely to see an individual consumer's case--except, perhaps, as a favor to a friend. As I noted at the outset of this article, most lawyers in Wisconsin know very little about any of the many consumer protection laws, perhaps with the exception of the Wisconsin Consumer Act, and detailed knowledge about even this statute is not common. Moreover, it would be very difficult for most lawyers to

master all of the relevant statutes, regulations and cases in this area. Most of them did not study consumer law in law school. Either they graduated before most of it was passed or they did not take elective courses in the area when they were in law school. These statutes, regulations and cases do not come up often enough in practice so that a lawyer is likely to know someone to call on for help who is an expert.

An even more important part of the explanation for avoiding an adversarial approach is that most lawyers in Wisconsin lack easy access to the text of consumer protection law. Most are unlikely to own the necessary law books themselves. It is part of the folk wisdom of private practice that one must avoid going bankrupt by buying law books that are not used often. The books must pay for themselves. Typically, lawyers have access to the Wisconsin statutes and the opinions of the state's supreme court. Some, but not all, own or can borrow copies of the state administrative regulations without difficulty. Fewer have access to federal materials that deal with statutes such as Truth in Lending (15 U.S.C. § 1601, et seq. (1970)) or the Magnuson-Moss Warranty Act. The great majority of the bar does not have ready access to loose leaf services dealing with trade regulation. County law libraries outside of the largest cities seldom fill the gap, although they are likely to have at least a set of the Wisconsin administrative regulations. Many lawyers rely primarily on practice manuals and continuing legal education handbooks for most of their legal research. However, there are not many of these in the area of consumer protection, and many lawyers do not think that it is worth buying those that have been published.

Of course, lawyers in Milwaukee and Madison have access to

relatively complete law libraries, and there may be reasonably good law libraries in other cities as well. Any lawyer in the state can travel to one of the large cities and do research or can hire a lawyer who practices there to do the work. But often this is not practical, particularly if the potential recovery in a case is not high. Lawyers in Milwaukee or Madison also would have to leave their offices--or send an associate--to use the collections in their own cities, and the time invested would be too much for a client who can pay only a modest fee.

Even a lawyer who was expert in consumer protection law and had easy access to a good law library would face difficulties because of the qualitative nature of these laws, their complexity and problems in their application. Consumer protection laws often rest on uncertain concepts and involve piecing together a number of laws and regulations. For example, suppose a consumer were dissatisfied with a newly purchased car and wanted to return it for a refund. Approached legally, one would probably have to overturn the warranty disclaimers and limitations of remedy found in the form contracts under which the car was sold. To do this, a lawyer would have to apply the Uniform Commercial Code and the Magnuson-Moss Warranty Act, arguing such things as whether "circumstances [had] cause[d] a . . . limited remedy to fail of its essential purpose . . ." This concept is not well defined in the Code or in the cases interpreting it. (See Eddy, 1977b). A lawyer might also have to argue about whether the remedy limitations were "unconscionable," or whether the regulations governing remedy limitations issued by the Federal Trade Commission under the Magnuson-Moss Warranty Act applied in a breach of warranty action brought in a state court by an individual or whether they were

limited to enforcement by the FTC in federal court. (See Schroeder, 1978). One might seek to cast the cause of action as one for innocent misrepresentation but couple that action to all of the UCC's remedies for breach of warranty under the little known section 2-721. These are all matters of debate, and any decision won before a trial court would be vulnerable to an appeal. Many other consumer protection laws present similar problems.

Apart from the nature of the law itself, consumers often face difficult burdens of proof under these laws. The buyer in our example who wants to return the car would have to establish that it was defective when it was delivered or that the seller or manufacturer was in some way responsible for a defect that appeared later. This kind of evidentiary problem often is faced in products liability litigation where personal injuries put several hundred thousand dollars at issue, and there the matter usually is established by expert testimony. (See Rheingold, 1977). Indeed, a recent issue of the Trial Lawyers Quarterly (Winter, 1978) carried an advertisement for a consulting service which claimed " a quarter century's experience" in testifying in cases where a client had been "maimed by a lawn mower." Products liability supports a high degree of specialization. But experts are expensive, and one cannot afford to use them in the typical action arising under a consumer protection statute or regulation. One office offering legal service to the poor was able to use expert testimony in cases involving complaints about automobiles because it could call on a program which trained poor people to be automobile mechanics, but this kind of access to experts is rare.

We were told about a case where all of these difficulties were

surmounted which will serve as an example of how rarely one might expect this to happen. A wealthy doctor ordered a $500,000 custom-made yacht from a boat yard. He refused to accept delivery, asserting that the boat was defective in many respects. He sued to recover his downpayment, and he also asked for a large sum as damages. His complaint reflected the highest degree of creativity in marshaling a blend of traditional and newly developing contract and consumer protection theories. Only the wealthy can afford to pay for this kind of expert lawyering and for the necessary testimony about the condition of the boat. Here private rights can be invoked without compromising the quality of the lawyer's work, but the example suggests that consumer protection laws may be limited in application to the wealthy who can afford to pursue their individual rights in dealings with sellers of yachts and other luxury goods. Perhaps this is an overstatement, but it does suggest that to some extent the reformers may have aimed an inadequate weapon at the wrong target.

Problems of cost and difficulty in litigation have not gone unnoticed by those who draft consumer protection legislation. Some of these statutes seem based on the assumption that individual rights will be enforced by plans that provide lawyers at low or no cost to various beneficiaries. Other statutes award attorneys fees to consumers who win, and many of these rights could be the basis of a class action. Magnuson-Moss even makes a bow toward encouraging suppliers of consumer goods to set up informal arbitration schemes. All of these techniques may have had some effect, but none of them singly nor all of them together offer a complete solution. We will briefly consider why this is so.

Low cost or free legal service plans employ lawyers who will deal with consumer problems. Legal Action for Wisconsin (LAW), a program to supply legal services to people with low incomes in Milwaukee and Madison, probably sees as many consumers as any group of non-governmental lawyers in the state. However, LAW's services are limited, and they must be rationed carefully. LAW's attorneys may make a telephone call or write a letter seeking relief if either strategy looks appropriate, but most often its lawyers refer the client to the consumer mediation service of the Department of Justice or to the Concerned Consumers' League, a private organization which trains low income consumers to complain effectively or to use the Small Claims Court. However, the LAW lawyers sometimes will attempt to work out complicated consumer financing problems which loom large in the life of a poor person, and they frequently attempt to use the federal Truth in Lending law or the Wisconsin Consumer Act to strike down some or all of a transaction. Sometimes, they assert a highly technical defense based on these statutes as a surrogate for bankruptcy or for fighting a breach of warranty claim. For example, often it is easier to find a clause in a form contract which violates statutory requirements than it would be to prove that the goods were defective and the seller had some responsibility to the buyer for defects. (See Cerra, 1977; Landers, 1977). Occasionally, LAW lawyers will make an appearance in the Small Claims Court on a consumer matter, but they try to avoid this.

Wisconsin Judicare pays private lawyers to take cases for the poor in northern and western Wisconsin. However, poor people rarely bring cases involving consumer protection laws to these lawyers. Lawyers who

take Judicare cases said that they have referred consumer complaints to officials of the state Department of Agriculture, Trade and Consumer Protection who ride circuit around the state to mediate complaints. Occasionally, these lawyers have written letters for poor people to retailers or businesses which repair cars, snowmobiles or mobile homes. These lawyers explain that Judicare fees for consumer matters rarely are high enough to make taking such a case attractive, and they often do not bother submitting a bill to Judicare for giving advice over the telephone or dictating a short letter.

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

The use of these plans by members with a consumer dispute varies. Members of cooperatives almost never bring consumer matters to the lawyers who serve their plans, and members of elementary and high school teachers' unions also make almost no use of their plans for these kinds of problems. Lawyers employed by these plans believe that members take care of their problems themselves and face few consumer disputes which they cannot resolve by complaining to sellers. One lawyer reported that members of the plan he served tend to read Consumer Reports, to shop carefully both for price and the cost of financing, to be able to borrow from a credit union rather than paying high rates to a loan company or

an automobile dealer, and to buy goods that need servicing only from businesses likely to be able to provide it. In short, model consumers need little legal advice. On the other hand, another lawyer suggested that many members of cooperatives and school teachers were the type of people who are unwilling to admit that they had made a bad purchase or had been fooled or cheated. Those who deny they have problems also have little need for legal advice.

The members of the few condominium group plans also brought few consumer problems directly to their lawyers. However, these lawyers attended condominium association meetings and often made presentations about how to avoid common consumer frauds and what to look for in consumer contracts. Before or after these meetings, individual members often asked for informal advice about consumer matters.

When we turn to student plans we see a very different picture. Students at several campuses of the University of Wisconsin are entitled to legal service, and many of them use these benefits. Typically, plan employees train the students to handle their own case before a small claims court or tell them how to invoke the complaint procedure of the state agency that mediates consumer complaints in the area in question. Often, they prefer to sue rather than to compromise. Some students seem to delight in battling local landlords and merchants in whatever forum they can find. When a pattern of unfair practice by a particular retailer or landlord is discovered, the plan's lawyers attempt to find a general remedy for the students to prevent future abuses.

Members of plans that benefit industrial unions fall somewhere in between cooperative members and the students in terms of using their

services in the consumer area. Industrial union plans usually are framed so that the lawyers cannot get rich off them, and these plans tend to face problems of overload. As a result, their services are strictly rationed. One firm which provides legal services to many union locals' plans, will write letters to merchants or refer members with consumer complaints to a small claims court or the mediation service of a state agency, but the firm will do little more. One of their attorneys said that he only writes letters, and he would never telephone the seller. If one telephones, s/he has to listen to the seller's side of story, and there is never time to do this. This lawyer sees consumer matters as less important than the many other kinds of cases that plan members regularly bring to him. On the other hand, members of another law firm that represents union plans sometimes pour much time and effort into consumer protection matters. The lawyer who handles most of these cases negotiates directly with manufacturers, retailers, sellers of services, record and book clubs, health and dance studios and the like. If he cannot get a good settlement, he takes the case himself to a small claims court. He does not think that clients can handle cases by themselves in a small claims court. This lawyer has a good working knowledge of consumer protection law and ready access to the firm's large law library which has the materials needed for this work. However, this firm is not typical. Group legal services are viewed as a cause by its partners, and while there may be long run benefits to the firm, in the short run they are not being paid fully for all of the services they provide. One can wonder how long the firm will be able to devote this much energy to individual cases and whether we can expect other firms to

follow their pattern. Moreover, it is not clear how popular group legal service plans generally are with union leaders and members. Even if a law firm can offer a high level of service, union locals may not continue to bargain for legal services as a fringe benefit. If the plans fail to grow to cover more members, they will not serve to deliver very much consumer protection law to individuals.

Some consumer protection statutes have followed the pattern set by civil rights acts and allowed successful consumers to recover reasonable attorneys' fees. One might expect this to be an incentive for lawyers to handle these matters. However, there are major problems. Few lawyers know about the attorneys' fee provisions in consumer protection statutes. Moreover, those who do know about them point out that these really are contingent fees because one must win the case in order to benefit from these statutory provisions. As a result, the statutes are unlikely to be very attractive in close cases since they do not give lawyers the opportunity to win large fees in some cases to offset the cases they lose where they gain nothing for their effort. Finally, such statutes almost always leave the amount of recovery in the discretion of the trial judge. Many trial judges do not like awarding bounties to lawyers who bring certain types of cases. As a result, these judges will often award fees at a rate far below that usually paid in the community for lawyers' services. In one recent Wisconsin civil rights case won by the complainant, the size of the lawyers' fees request was the subject of critical newspaper comment. (See Kendrick, 1978). A large award of fees acts as a penalty, and many judges do not see the conduct regulated by consumer statutes as warranting punishment. Moreover, elected judges

may worry about the reaction of the voters to awards of large sums as attorneys' fees.

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

All of these problems are thrown into sharper focus by looking at one statute that solves them in many situations. The Wisconsin Consumer Act deals with procedures for extending credit and collecting debts. (See Crandall, 1973). However, as I have noted, it can serve as a surrogate for the complex laws dealing with product quality if a seller has failed to follow the procedures required by the WCA for extending credit--instead of arguing about warranty, the buyer can base a claim on the failure of the contract to meet statutory requirements. The WCA often is easy to use because it establishes many relatively clear-cut

per se violations, thus avoiding the problems of qualitative complexity so often found in other consumer statutes. The WCA also provides bounties to the consumer for bringing certain kinds of cases. A . . . consumer who establishes certain WCA violations may keep the goods and recover all that s/he has paid. Wis. Stat. §425.305. Other violations call forth a penalty of twice the amount of the finance charge up to $1,000. Wis. Stat. §425.304. Moreover, the statute provides for reasonable lawyers' fees for winning consumers. Wis. Stat. §425.308. It was easier to use the WCA in its early days before lenders and those who sell on credit learned to avoid problems with the statute. Nonetheless, one still finds large stores and banks that make important mistakes in their procedures, and out-of-state creditors who try to collect debts from Wisconsin consumers very frequently run afoul of the WCA.

The WCA's provisions that overcome many of the usual cost barriers to legal action may seem to be a model of how to solve some of the economic problems inherent in so much of the consumer law which creates individual rights. However, the unusual circumstances that allowed it to pass and its unpopularity among many Wisconsin bankers, business people and lawyers suggest that it is a model of limited utility. The WCA was passed after the J. C. Penney case , 48 Wis. 2d 125, 179 N.W. 2d 64 (1970), had labelled revolving charge accounts as usurious. This could have subjected many retailers to large penalties. The Governor and organized labor traded their support for a statute reversing this decision and retroactively suspending the penalties in exchange for the support of the business and banking communities for the WCA. (See Davis, 1973). One who wanted to extend this approach of per se

violations, penalties and attorneys fees to problems of defective products, deceptive trade practices, or the like would have to find another case that affected important sectors of the business community as drastically as did the J. C. Penney case. Today even another J. C. Penney case might not be enough in view of the hostility of many business people and lawyers to the WCA in particular and to consumer protection law in general.

There are other important elements besides the economic ones we have discussed that make Wisconsin lawyers reluctant to take consumer cases and that affect the way they handle the ones they do take. The catalogue of disincentives which follows is more speculative than the cost-benefit story told up to here. It should be read as applying to some but not all lawyers and as applying in varying degree since it rests on piecing together bits of information gained in interviews rather than on any uniform pattern of answers. Nonetheless, it is important to describe these possible disincentives because the evidence suggests that there are problems with an individual rights strategy which would not be solved completely if these cases were made only a little more economically attractive.

Many attorneys represent such clients as banks, lenders, the local Ford dealer or even General Motors when it is sued in a local court. These lawyers would face a pure conflict of interest if they were to take a consumer protection case against one of the clients, and, as a result, they are not part of the market for legal services for consumers with such problems.[4] Most lawyers have some less direct ties to their local business community or even to a regional or national one. An

overly aggressive pursuit of a consumer claim might require a lawyer to risk losing the good will of existing and potential clients or endangering his or her network of contacts. At the same time, these very ties to a segment of the business community may enable a lawyer to be more effective in working out reasonable settlements or at least gaining a gesture.

Lawyers who would face no direct conflict of interest think it important to avoid offending business people unnecessarily. (Compare Brakel, 1974). One lawyer in northern Wisconsin stressed that, "you can always get a merchant's name in the newspaper just by filing a complaint. However, this will make him bitter, and you will pay for it in the future." Even lawyers who realistically would not expect to gain the local Ford dealer or the General Motors Corporation as clients, may want to retain their good will. Lawyers' contacts are part of their stock in trade. They know, for example, where to get financing or who might want to invest in a business deal their client is interested in. Lawyers also often get clients through referrals and recommendations, and bankers and retailers frequently serve as experts who can tell you where to find a good lawyer. In short, most lawyers in private practice work hard to become and stay members in good standing of the local business and political community. Perhaps this is a more common concern in smaller communities than in larger ones, but many lawyers in Milwaukee and Madison carefully guard their contacts with those who count in these cities.

We cannot expect lawyers concerned with the reaction of business people to take a tough approach to solving consumer problems. It is safer to refuse these cases or to refer them to a governmental agency

52-434 O - 80 - 35

which mediates consumer complaints against business. It is also reasonably safe to call an influential business person to try to work out matters in a low key conciliatory manner. Not only is this course often the most economically feasible approach for the consumer, but if the lawyer handles the situation skillfully, such an approach can even gain the appreciation of the business person against whom the consumer is complaining. The lawyer can explain the view of the business to the client, giving it some legitimacy just by stating it as something to be considered seriously and not to be rejected out of hand. Clients who begin by feeling defrauded and wronged may change their mind and come to see the situation as a simple misunderstanding which has now been cleared up. The client not only feels better but the reputation of the business will not be attacked constantly by the client. Whether or not the consumer is cooled out successfully, the lawyer serves at least the short run interest of the business complained against if the client is persuaded to drop the matter and go away.

The local legal community recognizes legitimate and not so legitimate ways of resolving various types of problems. For example, most lawyers feel strongly that one does not escalate a simple dispute into full scale warfare which will benefit neither the parties nor the lawyers. With this in mind, lawyers interested in the good opinion of other members of the bar and bench will follow accepted, routine, and simple ways of dealing with consumer problems. Many lawyers see an adversary stance in this area as wholly inappropriate unless one is doing a public service by going after a fly-by-night company or a firm that employs overly aggressive door-to-door sales people. Some lawyers

who take this view are hostile to consumer protection laws and to those who assert their rights under them. They view business people--at least local business people--as honest and reasonable. While misunderstandings are always possible, these lawyers doubt that serious wrongs are ever committed by the local bank, Chevrolet dealer, or appliance store. Consumers who complain often are seen as deadbeats trying to escape honest debts or as cranks who are unwilling to accept a business' honest efforts to make things right. For example, one lawyer who practices in a large city said,

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

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

> There has to be some way of handling the deadbeats, who are the only ones who benefit from all the consumer laws anyway. The administrative costs of consumer protection laws are a major cost of business to firms out here in smaller communities because they are always operating on a shoestring.
>
> . . . We feel sort of grimy representing consumer clients. In

> one recent case, a young man was being sued for a legitimate $700 debt. We negotiated in light of consumer protection laws and got the guy a settlement for $500. It was really a $200 robbery, just as if the guy had gone into the store with a gun.

Undoubtedly these are accurate descriptions of some consumers who lawyers encounter. The views expressed are not held by all members of the bar. Another lawyer in the same small town said that "local people are being ripped off by local merchants every day. . . .Attorneys in town can't believe that these guys whose fathers went to the country club with their fathers could be dishonest. They consider these ripoffs just 'tough dealing.' But the local merchants have absolute power--people have to deal with them, and merchants just can't resist the temptation to use this power for all they're worth." Nonetheless, as Abel (1979: 27) puts it, "Lawyers inevitably identify with those they serve; law practice would be intolerable otherwise, whatever we may say about the importance of objectivity . . ."

Many lawyers also have personal reasons for hostility to consumers and consumer protection laws. Lawyers are engaged in small businesses themselves. They may face problems when they try to collect fees from clients. (See Granelli, 1979). They see and read about dissatisfied clients who have been bringing enough malpractice suits to drive up the malpractice insurance rates for all lawyers. Moreover, most lawyers have little reason to see consumer problems as something serious which they or their friends or family might face. Attorneys tend to be affluent enough and sufficiently well connected so that businesses make efforts to keep them happy. Some lawyers make many major purchases from or through clients. Lawyers generally understand the

consumer contracts that they sign. While they may not read a particular contract, the provisions of, say, a conditional sales contract will involve variations on a well-known theme. Lawyers pay their debts or know how to negotiate with their creditors to avoid collection procedures and trouble. And if there is a problem, lawyers tend to be assertive people who complain directly to the seller and get their defective stereo or camera fixed or replaced. Lawyers are likely to experience what might be called consumer problems that flow from computer and data processing errors, and even those lawyers who represent the largest corporations have their "war stories" about trying to straighten out their credit card accounts or bills from the telephone company. Yet these tend to be viewed as frustrating annoyances and not as major problems. Most lawyers see no reason why nonlawyers should encounter consumer problems either. One attorney reflected a common position when he said,

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

As I have suggested, a lawyer who holds such a negative view of consumer laws and consumers who complain is likely to find wholly inappropriate an aggressive pursuit of the remedies granted by these laws. A number of attorneys suggested that a lawyer has an obligation to judge the true merit of a client's case and to use only reasonable means to resolve problems. Indeed, these lawyers seemed to be saying that an attorney should not aggressively assert good cases under ill-

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

Those attorneys who often press consumer rights were called such things as members of the "rag-tag bar" who had no rating in Martindale-

Hubbel and who ignored the economic realities of practice. An older lawyer commented that many younger lawyers are very consumer minded and seem to be "involved emotionally with clients when the word consumer comes up." One attorney, who characterized himself as an "establishment lawyer," explained that in Madison and Milwaukee there now are many lawyers who do not depend on practice for their total income or who live life styles in which they need far less than most people. He was particularly concerned about women lawyers who live off their husband's income and thus are freed to play games and crusade without recognizing the economic realities of practice. Still another attorney pointed out that consumer cases were often brought by young lawyers just beginning practice. Since they had few cases and wanted to gain experience, these beginners often refused to accept reasonable settlements and filed complaints. Similar objections were made to some legal services program lawyers who failed to go along with the customs of the bar about the range of reasonable settlements, and who were seen as far too aggressive in asserting questionable claims against established businesses. Some older "establishment" lawyers were annoyed by the mavericks while others viewed the younger lawyers with amusement, predicting that they would learn what to do with such cases as they grew up. One lawyer explained that the local judges were all experienced lawyers, and so he could end consumer cases without much difficulty by simple motions; the judges just were not going to let these cases go to juries or even to trial.

A number of other lawyers also report--but more critically--that many Wisconsin judges and their clerks are not sympathetic to an adversary handling of consumer protection laws. These judges and clerks

are said to do all they can to see that their time is not wasted by cases which they think never should have been brought to them. Many judges will help consumers handling their own cases in a small claims court reach some kind of settlement, but if a consumer wants to try the case, some judges respond by applying the rules of procedure and evidence very technically so that they will not have to reach the merits. These lawyers tell stories about trial judges who refuse to enforce individual claims based on Wisconsin administrative regulations designed to protect consumers. The judges seem to view these regulations as something illegitimate enacted by liberal reformers in Madison who are out of touch with conditions in the rest of the state. The judges also are unfamiliar with these regulations and with federal materials. Most judges did not master these laws when they were lawyers in practice, and they seldom see them in cases brought before them. Also they may lack ready access to copies of these laws or to articles explaining their various provisions. A lawyer for a local retailer, it was reported, successfully defended a consumer case on the ground that the Wisconsin Administrative Code lacked a good index. Another lawyer remarked that he would not use the Magnuson-Moss Warranty Act in a case brought in a state court because "as soon as you throw federal law at a state judge, they freak out since they have no familiarity with federal law. You would have to spend an hour and a half convincing them that they had jurisdiction." Still another attorney commented "judges hate consumer cases because they simply do not understand the law. The courts are just now getting used to the Uniform Commercial Code. If you try to use consumer laws, you are letting yourself in for a lot of briefing to educate the judges."

One trial judge gained some measure of local fame among the bar by threatening to declare the Uniform Commercial Code void for vagueness. Other trial judges or their clerks flatly tell lawyers that consumer cases just will not be tried in their courts. Of course, a lawyer who wanted the formal state or federal law to penetrate into a county in which such a judge sat would always be free to appeal, but the cost barriers before this route assure trial judges a large degree of freedom to do justice as they see it in the teeth of consumer protection laws which displease them.

Perhaps these lawyers' "atrocity stories" (See Dingwall, 1977) about judges are not entirely accurate, but insofar as they are repeated among lawyers, they are likely to affect the strategy any attorney will pursue. For example, few lawyers would look forward to arguing that a contract was "unconscionable" under Section 2-302 of the Uniform Commercial Code before the trial judge who was so unhappy with the open texture of much of the UCC. Young lawyers who have mastered the administrative regulations designed to protect consumers will learn to hesitate to display their wisdom before a trial judge who has never heard of such laws and who is unlikely to sympathize with their goals. Reformers and law professors often assume that laws published in the state capital automatically go into effect in all the county courthouses in the state. Experienced lawyers know better.

Lawyers who are not so tied to the local business and legal establishments also face disincentives to using consumer laws beyond the obvious economic ones. These lawyers also recognize the difficulties of trying to litigate newly created individual rights before unsympathetic

judges. Those involved with various causes face this problem all the time. These lawyers too must select carefully the cases they take which may turn out to be charity work. They are not free to treat every potential client who walks in from the street as the bearer of a major cause. They must balance their good works with enough paying clients so that they can meet payrolls and pay the rent and utility bills. Many who call themselves "movement" lawyers and who are engaged in representing various causes do not honor consumerism any more than do establishment lawyers. Consumer protection is viewed by many of these "progressive" lawyers as a middle class concern. It just us not as important as criminal defense of unpopular clients or battling local governmental authorities in behalf of migrant laborers. This attitude is reflected in the following comments of a person who regards himself as a progressive lawyer and who has represented a number of unpopular clients:

> You want to avoid filing complaints and trying consumer law suits. Partly this is economic, but we cannot overlook another important reason. What have you done when you win one of these cases? You have saved a guy a couple of bucks in a minor rip-off. It just isn't fun. It would be a boring hassle. If you win, the client gets only a marginal benefit, and he won't be grateful. So this kind of case will fall to the bottom of the pile of things to do. There are many cases that are far more satisfying. We take these cases sometimes, but they are not the things we really enjoy.
>
> You may feel funny about even negotiating consumer cases. A lawyer often can get his client something he is not really entitled to. For example, one client had a contract with a health club. There was nothing really wrong with it. The client was just tired of the club. We wrote a letter on our letterhead, and the club folded and let him out of the deal. This isn't the way the case should have come out, but it is the way it works. You do not get a great deal of satisfaction out of such a case, and you will try to avoid doing this sort of thing when you can.

Even "movement" lawyers report that they must distrust consumer

clients who complain. They say that many are "nuts" or "freaks" who simply do not understand the situation or who will omit or make up "facts" and get the lawyer out on a limb. These clients often are a little "flakey." Many of them have mistaken ideas about their legal rights and will not accept the lawyer's attempt to tell them that they are wrong. It is not worth the time it takes to argue with them about what the statutes say. Many are seen as people projecting their anger onto a single dispute in an attempt to get even. They will not accept a compromise since the case involves a matter of principle, but they cannot afford to wage a real vendetta. "You just have to try to ward off those potential clients who are overreacting or are crazy."

B. Lawyers for Business.

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

Lawyers working for manufacturers, distributors, retailers and financial institutions are likely to be present at the creation of any law that purports to aid the consumer. For example, the decision of the Supreme Court of Wisconsin that found the revolving charge account plan of the J. C. Penney Company to run afoul of the state's usury statute was a major chapter in the story of consumer protection in Wisconsin.

Lawyers from several of the state's largest and most prestigeous law firms were involved in defending revolving charge accounts in the challenge before the courts and in the complex negotiations which led to legislation reversing the Supreme Court's decision in exchange for support of what became the Wisconsin Consumer Act. (Davis, 1973).

Perhaps less dramatically, lawyers representing both state and national businesses have been involved in the process of administrative rule-making that has produced such consumer protection regulations as those that govern warranties on mobile homes, the procedures for authorizing repairs on automobiles, and door to door sales. During recent sessions of the Wisconsin legislature all kinds of measures purporting to protect the consumer have been introduced, and business lawyers have been there attempting to block passage or to modify these proposals.

Not surprisingly, the role of lobbyist for business is a specialized one, usually played by a small number of lawyers from the larger firms in Milwaukee or Madison, or by lawyers employed by industry trade associations. Lawyers who are former state officials or former legislators also lobby as do many non-lawyers. Smaller businesses seldom hire a lobbyist. They rely on being represented by larger businesses or trade associations, or officials of these businesses directly contact their representatives in the Legislature. Indeed, legislators who are lawyers may find themselves representing home town businesses before state agencies as a matter of constituent service. The lobbying role is a familiar one. (See Horsky, 1952). Lawyer-lobbyists alert their business clients to what consumer advocates are proposing in the legislature and before various administrative agencies. These lawyers then

attempt to influence the shape of the statutes and regulations so that their clients can live with them. This can involve drafting and advocacy, but it is also likely to involve bargaining and mediation. In an era when consumer protection is generally popular, business lawyers usually take a cooperative stance. Their key argument involves painting their clients as honest people who want to do the right thing and who should not be burdened by regulations aimed at a few bad actors. They also play on traditional anti-regulation arguments about red tape and the cost of meaningless procedures and forms.

Many of these lawyer-lobbyists are more than mere advocates. In order to gain concessions from those pushing consumer protection, business has to give something. These lawyers make judgments about which regulations are reasonable, acceptable or inevitable, and then they sell their view to their clients. Undoubtedly, there is an interchange of ideas at this point. Only a few lawyer-lobbyists have the power to make final decisions without consulting their clients, and some clients will not accept their lawyers' opinions about what is reasonable and what is not. Nonetheless, the lawyers generally have great influence on the decisions about which laws must be accepted and which ones can be fought. One reason for this is that they control much of the information necessary for making such judgments. (Compare Prottas, 1978; Ross, 1970). For example, to a great extent they are the experts both about the political situation facing the agencies and legislators and about the intensity of the commitment to a particular proposal of those who speak for consumers. Of course, some manufacturers, financial institutions and trade associations use non-lawyers as lobbyists and some use

both lawyers and non-lawyers working together. When non-lawyers are on the scene, the lawyer-lobbyist may have less control over the flow of information and thus less power over the client.

After consumer laws and regulations are passed, business lawyers help their clients cope with them. Much of the work involves drafting documents and setting up procedures for using these forms. For example, both the federal Truth in Lending Law and the Wisconsin Consumer Act required a complete reworking of most of the form contracts used to lend money and sell things on credit. The Magnuson-Moss Warranty Act demanded that almost every manufacturer, distributor and retailer selling consumer products rewrite any warranty given with the product and create new procedures to make information about these warranties available to consumers. (See Fayne and Smith, 1977, for a description of how national manufacturers' lawyers have coped with this statute). The Wisconsin administrative regulations governing automobile repairs required a form be drafted on which consumers could authorize repairs and demand or waive an estimate before the work was done. This is very traditional lawyers' work, demanding a command of the needs of the business, a detailed understanding of the law, and drafting skills. Moreover, the uncertainties and complexities of many consumer protection laws calls for talented lawyering if the job is to be done right.

While the average Wisconsin lawyer does not often counsel business clients about consumer protection laws and attempt to draft the required forms, this is the stock-in-trade of the largest firms in the state and of a group of other lawyers with a predominantly business practice. Some large corporations that have dealings with consumers have their own

legal staff which does the necessary document drafting and reviewing of procedures. (See McConnell and Lillis, 1976). Some of this work can be mass produced, and lawyers for trade associations have worked on standard forms to be used by all of their members. Lenders, retailers and suppliers of services in smaller cities tend to rely on forms supplied by these trade associations which retain specialists to produce them. Smaller manufacturers of consumer products and smaller financial institutions often send problems concerning consumer protection laws to lawyers in Milwaukee or Madison. They may do this difectly or their local attorney may refer the problem to a larger law firm. However, there may be a "trickle down" effect: lawyers who do little business counselling and are not expert in consumer law often produce variations on forms written by more expert lawyers. Sometimes these forms are just copied and no independent legal research is attempted. The less expert lawyers collect copies of the work product of the more expert in a number of ways. Some receive them from clients who get them from trade association; some can call on friends who work for the larger law firms for help in unfamiliar areas.

Of course, the size of the firm alone does not determine whether lawyers will offer drafting and counselling services to business nor whether a lawyer will be skilled in dealing with consumer laws. Some individual lawyers, with perhaps an associate or two, do counsel business clients and draft contracts, and some individuals do it very well. But several lawyers commented that the flood of regulation of the past ten years has made it hard for a smaller firm to keep up with all the new law and to maintain the resources needed to advise business. Lawyers

who specialize in representing business must be primed to alert their clients to changes in the law which require review of practices. These lawyers usually have their own libraries with copies of both federal and state administrative regulations as well as the expensive loose-leaf services necessary to keep them up to date. The large law firms and corporations with house counsel can afford to send their lawyers to continuing legal education programs put on at the state or national level. The large firms can afford to have someone in their office specialize in the various consumer laws. Indeed, many of these law firms face the problem of coordinating their large staff so that all of their lawyers will recognize a problem of, say, the Truth in Lending Act and then call on the resident expert in the area. The consumer law specialists in these firms often can call on people working for the various administrative agencies for informal advice about how the agency is likely to respond to particular procedures or provisions in form contracts; of course, any lawyer can call on the agency, but often these expert lawyers and administrative officials will know each other from their continuing contacts or from participation in continuing legal education programs.

Some of the attorneys who have been involved in this redrafting of forms and fashioning of new procedures saw the task as one of making the least real change possible in traditional practices while complying with the new laws or regulations. They tried to design new forms which would ward off both what they saw as the unreasonable governmental official and the unreasonable consumer in the unlikely event that matters ever came close to going to formal proceedings before agencies

52-434 O - 80 - 36

or courts. Other business lawyers, however, used the redrafting exercise as a means to press their clients to review procedures and teach their employees about dispute avoidance and its importance. In some cases the lawyer's views significantly influenced the client's response to a new law. For example, many business people are proud of their product and service and want to give broad warranties, but their lawyer is likely to convince them that this is too risky. The Magnuson-Moss Warranty Act attempts to induce manufacturers of consumer products to create informal private processes for mediating disputes. At least some business people have expressed interest in taking such steps to avoid litigation and in experimenting with new procedures for dealing with complaints by consumers. However, lawyers in at least two of the largest firms in Wisconsin strongly advise their clients to avoid creating private dispute resolution processes. These lawyers see the benefits as unlikely to be worth the risks, and they are in the position to have the final word with many clients about mediational institutions. While their advice may be sound, it is not based on experience with consumer mediation and arbitration. Whatever its soundness or basis, however, this advice is likely to decide the matter for most clients.

Finally, some consumer protection laws call on business lawyers to become directly involved in the process of settling particular complaints when other methods fail. For example, lawyers throughout the state, in both large and small firms, represent banks and other creditors in collections work. At one time this was a routine procedure that yielded a default judgment and made clear the creditor's right to any property involved. However, many of the traditional tactics of debt collection

have been ruled out of bounds or are closely regulated by state and federal laws passed in the past few years. Lawyers who do collections describe what seems to be a new legal ritual to be followed whenever a debtor who is armed with legal advice resists a collection effort. The lender first attempts to collect by its own efforts, and then it files suit, often in a small claims court. The debtor responds, asserting that something was wrong with the credit transaction under the Truth in Lending Act, the Wisconsin Consumer Act, or both or asserting that the creditor engaged in "conduct which can reasonably be expected to threaten or harass the customer . . ." or used "threatening language in communication with the customer . . ." as is prohibited and sanctioned by the Wisconsin Consumer Act. Wis. Stat. §§ 427.104 (g), (h) (1975). The lender then has to respond, either by offering to settle or by claiming to be ready to litigate the legal issues. Then the lawyers on both sides play an important role in deciding whether to settle or fight. However, at the same time, many bankers and managers of lending institutions are themselves becoming expert in at least the more common applications of these statutes. While immediately after the Wisconsin Consumer Act was passed many bankers could not believe that what had always been accepted practice was now prohibited, today many bankers and lenders are more expert about many consumer protection laws than lawyers who are not specialists.

Large retailers who sell relatively expensive products or services face a regular flow of consumer complaints. Almost all of them are resolved without the participation of lawyers, but a lawyer sometimes must enter the picture to deal with the small number of these disputes that

cannot be resolved by officials of the retailer. This may not happen until the consumer files a complaint in court. Often the manufacturer's or retailer's lawyer will be facing an unrepresented consumer in a small claims court. Several of these business lawyers commented that the consumer was only formally unrepresented since the judge often seemed to serve both as judge and attorney for the plaintiff, particularly in pre-trial settlement negotiations. These are expensive cases for a retailer or manufacturer to defend if the consumer gets a chance to present the merits of his or her claim to the court. One law firm in Madison represents one of the largest automobile manufacturers in such matters, but it sees only three or four such cases a year. Interestingly, these cases almost never involve an application of any of the many consumer protection laws or even the Uniform Commercial Code; the real issue is almost always one of fact concerning whether the product or service was defective. The law firm's recommendation about whether to settle is almost always final. Their recommendation will be rejected only where the manufacturer wants to defend a particular model of its automobiles against a series of charges that it has a particular defect.

Another situation that brings out lawyers involves consumer complaints which prompt a state regulatory agency to start an enforcement action against a business. Typically, this situation calls for the business lawyer to work out a settlement rather than litigate, but, of course, the possibility of formal action affects the bargaining position of both sides. Here, too, the lawyer has great influence on the client's decision about whether to settle. The lawyer's advice is likely to involve a mixture of his or her predictions about the practical

consequences of the proposed settlement order of the agency, the outcome of a formal enforcement proceeding, and the risks of adverse publicity if the matter went to a public forum.

It should be stressed that most of these lawyers for business who deal with consumer laws do not see themselves as hired guns doing only their clients' bidding. In playing these traditional roles and exercising high professional skill, there is room for a good deal of influence on what are thought of, usually, as the client's choices. Some business lawyers concede that occasionally they must persuade their clients to change practices or to respond to a particular dispute in what the lawyers see as a reasonable manner. For example, these lawyers may tell their clients that they must appear to be fair when they are before an agency in order to have any chance of winning in this era of consumer protection. In this way, they may be able to legitimate sitting in judgment on the behavior of their clients and occasionally manipulating the situation to influence the choices which the clients think they are making.

While business lawyers do try to influence their clients' behavior, most of our sample stressed that their clients are responsible people, trying to do the right thing. Members of the elite of the bar seldom see any but the most reasonable people in business, at least when it comes to consumer problems. Of course, it is not surprising that these lawyers tend to see their clients as reasonable for business attorneys are likely to share their clients' values. Business lawyers tend not to be sympathetic toward most consumer protection legislation. They concede that these laws make more work for them, and thus increase their

billings, (See Beal, 1978; Dickinson, 1976; Galluccio, 1978), but they also see their clients as being swamped by governmental regulation and paper work which serve little purpose. (Compare Bugge, 1976). They are unhappy because they cannot explain these laws to their clients in common sense terms. Some business lawyers are concerned about common easy credit practices and how easy it is for some consumers to evade their debts when they become burdensome. They worry that the importance of keeping promises and paying one's debts is being undermined by reforms directed at problems which politicians invented. Several remarked that when they left law school, they were strongly in favor of consumer protection, but after a few years in practice they saw matters differently. Advocacy of a business point of view is thought to be legitimate by those whose opinion matters most to these lawyers, and these clients pay well. In short, as we might expect, Wisconsin business lawyers are not radicals and are comfortable representing business.

A few of the lawyers we interviewed reported having to act to protect their own self interest when dealing with a business client. One prominent lawyer, for example, described a case where he represented an out-of-state book club in a proceeding before one of the state regulatory agencies; he took the case as a favor to a friend who had some indirect connection with the club. As the case unfolded, the lawyer discovered that the book club had failed to send books to many people who had paid for them. It was not clear whether the situation involved fraud or merely bad business practice. The lawyer insisted that the book club immediately get books or refunds to all of its Wisconsin customers and sign a settlement agreement with the agency which bound

the club to strict requirements for future behavior. The attorney explained that the business had been trading on his reputation as a lawyer when it got him to enter the case on its behalf. Once it became clear that the administrative agency had a good case against the client, the lawyer felt that the client was obligated to help him maintain his reputation as an attorney who represented only the most ethical businesses.

In conclusion, even though Wisconsin business lawyers seldom objected to the stance taken by their clients in consumer matters and seldom found their self interest infringed by their clients, there is evidence of the continuing truth of Willard Hurst's (1950: 344-5) observations about the historical role of the bar:

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

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

II. Of Gaps Between Normative and Empirical Pictures: The Consumer Statutes, Classical Views of Lawyering and This Study.

This story of lawyers' responses to consumer protection laws differs from what an innocent student of the text of these statutes and regulations might have anticipated if s/he knew about the practice of law only from literature or television. Probably it also differs from what those who wrote these laws expected as well. Impact studies almost always discover a significant gap between normative and empirical pictures; it is not news that the law on the books differs from the law in action. Indeed, there is no reason to assume without further thought that such gaps should be closed. Nonetheless, often we can learn something important about the legal system by explaining why the is differs from the ought. Also, we may gain some understanding of how to make reforms more effective, or we may come to see why they are impossible.

The law of consumer disputes has several not totally consistent goals. Much of this law seems aimed at producing an informed consumer who will avoid problems by making rational choices. Many laws and regulations seek to prompt sellers to offer more and better information about just what is being sold, how far it is guaranteed to do what, and for how long, and at what total price--including financing charges. Consumers with this information, it is assumed, can avoid bad deals and take good ones, and this will prompt more competition which then will make more good deals available. (But see McNeil, Nevin, Trubek and Miller, 1979). Still another goal of these laws is dispute avoidance through improved quality control and prompt repair of defects.

Automobiles that run properly produce few disputes, when there are defects; satisfactory repairs at acceptable prices are preferable to causes of action. The last goal is more complicated. On one level, most consumer protection statutes offer individual rights so that those who do not receive what they bargained for can gain a remedy in a court. But, perhaps more importantly, causes of action are created to provide support for attaining the goals of adequate disclosure and better product quality and repair. If the possibility of costly litigation prompted all manufacturers to improve both their products and their contracts so that there were no disputes, these laws would be magnificent successes although not one case ever came to a lawyer's office, a court or an administrative agency. Of course, a lack of complaints in these channels does not necessarily indicate that these laws have been this successful.

It is hard to measure with any precision how close the consumer product quality dispute laws have come to meeting any of these goals. For one thing, too many factors besides the laws are also at work. But lawyers for manufacturers and sellers of consumer goods, prompted by federal and state statutes and regulations, do work hard to help their clients comply with the disclosure requirements. For example, most manufacturers and sellers of any substantial size have revised their warranties to meet the demands of the Magnuson-Moss Warranty Act. Of course, there is reason to doubt whether disclosure regulation of this type actually benefits consumers--we can wonder, for example, how far consumer behavior is influenced by the now common disclosure, mandated by the statute, that the seller offers a "limited warranty."

(See Whitford, 1973). But that is the disclosure the drafters of the Magnuson-Moss Warranty Act demanded, and business lawyers have seen to it that their clients have made it.

I cannot say much about the goal of improved quality control or better service. This study was not designed to determine whether manufacturers of consumer goods have improved their products and service in response to these laws. A number of business lawyers interviewed said that their clients were very concerned about quality, but many thought that their clients were just as concerned before all of the laws were passed. Moreover, consumer protection laws may only reflect a general dissatisfaction with modern consumer goods and services, and this dissatisfaction itself may be what has prompted the efforts of many manufacturers to increase quality and avoid complaints. Also, laws that require recalls of consumer products for safety-related defects (See, e.g., Apcar, 1978; Grabowski and Vernon, 1978; Stuart, 1977; 1978.) and multimillion dollar products liability judgments in cases involving personal injuries (Perham, 1977), may have far more impact on corporate decisions than laws that merely create new causes of action for individuals who have not suffered personal injury. Nonetheless, other studies suggest that laws such as the Magnuson-Moss Warranty Act did play some part in placing the issues of product and service quality on the agenda of top management of the corporations that manufacture consumer goods. If nothing else, these corporations have been challenged to do something before a legislature or administrative agency drafts still more law; if it looks as if

business is putting its own house in order, more law may not be seen as needed.

Whatever the situation concerning these first two goals, we do find a gap when we turn to the third. Those with complaints about the quality of consumer products or services and those who are unhappy with the terms of a conditional sales contract or the debt collection tactics used by a vendor are likely to be treated very differently than the text of consumer protection laws suggest. The major differences can be highlighted by summarizing the conclusions I drew from interviewing attorneys and comparing them with the characteristics of many consumer protection statutes.

First, as I have emphasized, not many consumers with a complaint will have effective access to the legal system. To a large extent, lawyers act as gatekeepers, turning away many potential clients, encouraging a very few others to fight for their rights, and offering some but not too much hope to still others. Consumers can seek self help before small claims courts or one of the several state agencies that mediate consumer complaints, but many do not know of these possibilities and others are unsure about using them. Those who take these routes probably would do better with some advice.

Second, those consumers who get to see a lawyer are likely to have their situation judged by different norms than are found in the formal law. At the outset, they will be judged by the lawyer to see that they are not "flakey" or people projecting their anger onto a single dispute in an attempt to get even. Then the lawyer probably will appraise the case quickly in terms of some common sense notion of

reasonableness as well as the likelihood that the business complained against will want to please this particular customer and avoid wasting time in negotiations. Both the consumer's lawyer and the person who speaks for the manufacturer, seller or creditor are likely to have only a vague idea about the specific contours of the relevant area of consumer protection law. Instead, they will operate on the basis of generally accepted norms about a seller's responsibilities, perhaps influenced by a general idea that some consumer law might be available if it were worth anyone's time to look for it. Equally important, a very different law of evidence is likely to apply. The question of whether the product or service was defective is likely to be answered, not by expert judgment, but by the consumer's ability to tell a plausible story which the lawyer is willing and able to sell to the business person.

Third, I have described the remedies likely to be gained, if any, and it is clear that they differ from those called for in the text of these laws. Some consumers get little more than the chance to discover that nothing can be done. At best, they are reassured that they are not foolish to drop their claim because it is weak legally or because it is not worth the cost of pursuing it. Others may gain apologies and token gestures. A few receive repairs, replacements or refunds. Almost no one gets more.

These remedies are unlike those offered by most consumer protection laws. (Compare Ross and Littlefield, 1978). On one hand, consumers may recover something even when they cannot prove there was a defect for which the business would be legally responsible. For example, we have

noted that sometimes a lawyer can gain a refund or replacement for a client even where the flaw in the item originally delivered was not so material as to warrant this remedy under the Uniform Commercial Code. On the other hand, consumers are likely to recover less than the remedies created by these statutes. We have also seen that the Wisconsin Consumer Act in some cases offers penalties and the right to keep goods without paying for them, a much greater remedy than anyone is likely to gain through negotiation. The Uniform Commercial Code coupled with the Magnuson-Moss Warranty Act says that in an appropriate case one can recover consequential and incidental damages for breach of warranty (U.C.C. §§ 2-715) or, perhaps, even for innocent misrepresentation. (U.C.C. §§ 2-721). However, these remedies are blocked in most cases by the terms of the form contract used in the transaction; if a consumer is able to get around the disclaimers and limitations, difficult problems of proof probably will deny recovery. Lawyers negotiating for consumers seldom gain anything like these remedies. Consumers who have to wait a month or two for a manufacturer to ship a part needed to repair their stereo receiver will receive nothing for the loss of use and enjoyment; drivers whose cars break down on vacation trips will not have the expense of awaiting repairs paid by the manufacturer. Indeed, while the UCC's basic remedy is "cover" (See U.C.C. §§ 2-711)--buying or renting a replacement and suing the seller for any amount more than the contract price which this costs--lawyers for consumers seldom can persuade a dealer to pay the cost of renting a car while the customer awaits a repair, and few dealers will loan customers cars because of insurance problems.

Appliance stores do not pay the cost of the coin operated laundry which a customer is forced to use while awaiting repairs to a defective washing machine. Whatever the merit of common law and UCC remedy system in commercial cases, in consumer disputes they are such ill fitting garments that they are seldom worn.

Turning from consumer laws to lawyers, we encounter another gap. What I have called the classic model is a picture of the practice of law which has both normative and descriptive elements. In telling us that this is the way things should be, it seems to imply that this is the way things are. On one hand, this model of practice emphasizes the lawyer as advocate, both standing before the courts and seated in the law library doing research. And in both places, the lawyer is primarily concerned with the law. On the other hand, the classical model paints a picture of the lawyer as largely subordinate to the client's ends as long as those goals and the means for achieving them are within the rules of the game. The lawyer, for example, owes fiduciary obligations to the client and attorneys must be careful to avoid a conflict of interest in trying to serve several clients. It is questionable whether a lawyer should ever try to represent both parties involved in a dispute. (But see Hagy, 1977; Paul, 1976). Whatever the precise boundaries of these obligations, the lawyer's own self interest is muted in this classical picture, and it might not be noticed at the first viewing. This study suggests that model does not match much of the day-to-day practice of many, if not most, lawyers.

As I have noted, most lawyers are unlikely ever to be found in a courtroom arguing a consumer protection case, and only those who specialize in counselling businesses are likely to be found in a law library doing research on these laws. Most lawyers deal with any consumer complaints they encounter without much real knowledge of the statutes, regulations and cases in this area. Perhaps as time passes, lawyers will become more and more aware of these laws. It may take a generation or two for new areas to penetrate into the knowledge held by most members of the bar. Perhaps as new forms of delivering legal services develop and old areas of practice are reformed out of existence, lawyers will turn to consumer protection law as an unmined resource and find ways to make its exploitation economically feasible. (See Falk, 1978; Ross, 1976). Nonetheless, today in handling these cases, attorneys are much more likely to play roles other than that of advocate. Their posture is much more likely to be conciliatory than adversary--their role is likely to be closer to that of a mediator than that of a "mouth piece."

In attempting to resolve disputes through conciliatory strategies, lawyers engage in techniques of conversion or transformation of attitudes. At the outset, lawyers could simply reject a potential client whose case they did not wish to take, but too blunt a rejection risks creating ill will and damage to their reputation. In trying to avoid annoying would-be clients whom they turn away, lawyers can plead that they are overloaded with work or they could refer the case to a specialist if they know of one. Many will try to transform the potential client's

view of the situation, using some mixture of at least three types of arguments. The client may be told that s/he has no legal case; the problem may be the doctrine, the evidence or some mixture of the two. Of course, this argument may be more persuasive if a lawyer knows what s/he is talking about. The client may be told that it is against his or her interest to pursue the matter; legal action may cost more than it is worth, either directly or in terms of the client's long run interests. The client may be told, often very indirectly, that whatever the legal situation, s/he is being unreasonable to complain as judged by some standard other than the law. These arguments may anger the potential client, make him or her feel foolish for being upset and bothering the lawyer or serve as a kind of therapy in those instances when the would-be client accepts the situation and views it differently.

These same kinds of arguments are used by lawyers when they contact the seller or lender on behalf of the consumer and attempt to work out some kind of settlement which is acceptable to all concerned. Yet, as I have suggested, the legal style of argument tends to fade into the background. Either the attorney is not too sure of the precise legal situation or s/he hesitates to appear to coerce the other party. An attorney is likely to appeal to some mixture of the interest of the seller or lender and standards of reasonableness apart from claims of legal right. Then, if there is a settlement offer, the lawyer must sell it to the client. Once again appeals are likely to be made primarily in terms of reasonableness or interest rather than legal right.

Lawyers have a great deal of independence from clients--far more than we might assume from the classic model. (Compare Reed, 1969;

Rosenthal, 1974). They usualy have a choice whether to take a case. Of course, marginal lawyers and beginners may have to accept almost anything that comes through the door and established lawyers may feel obligations to regular clients and friends. Nonetheless, more often than not lawyers can and do judge the potential client, the case, and what they might have to do in order to resolve the matter before they agree to represent an individual or an organization. For all practical purposes the lawyer makes the decisions about how to handle the case. Sometimes lawyers will act as experts, telling the client authoritatively what must be done. If they must persuade their client to accept the approach they recommend, their standing as expert professionals and their skill as advocates usually make them very effective sales people. The major differences between lawyer and client seem to arise at the point when the lawyer tries to sell a specific agreement to the client. Clients often find it hard to believe that they cannot do better than the lawyer says they can. The study reported here also suggests that clients are unlikely to be able to prompt a change in tactics when lawyers feel they cannot afford to invest more time in the solution of a problem. Curran (1977:214) reports that "persons consulting lawyers on . . . consumer difficulties . . . are more likely to be negative about the lawyer-client exchange." The client may leave the lawyer unsatisfied, but the client leaves.

At each stage of a case, lawyers judge both clients and their claims in terms of such things as the economics of practice, the likely impact on their professional reputation, professional satisfaction coming from dealing with the case, and identification with the client. Lawyers are

52-434 O - 80 - 37

likely to be happy to represent large organizations in multimillion dollar transactions, and such clients will have important influence on their lawyer's judgments about tactics. When individuals or relatively weak political action organizations bring lawyers consumer, discrimination or environmental cases, usually the attorneys are doing the clients favors if any help at all is offered. As a result, in these situations lawyers are more likely to be in command and tactical choices will reflect their judgments colored by their values and interests. Wealthy and high status individuals bringing lawyers cases involving significant amounts of money are likely to fall in between these extremes, particularly if the nature of their claim is more economic than political. (See Galanter, 1974).

The self interest of lawyers is particularly important when we consider lawyers playing other-than-adversary roles. P. H. Gulliver, (1977:34) the anthropologist, notes that a mediator "inevitably brings with him certain ideas, knowledge and assumptions, as well as certain interests and concerns, his own and those of the people who he represents." Gulliver goes on to point out that when a mediator acts as a go-between with the parties physically separated and not in direct communication, the mediator's ideas and interests are given scope to operate. Mediators can control information. They convey messages, but they also can change the content, emphasis and implication. They can add interpretations or include additional messages because neither party is able to monitor the mediator's activities. Mediators are likely to evaluate each party's position if, for their own reasons, they want to affect the settlement reached.

To a great extent, lawyers drafting a new warranty clause in light of various statutes and regulations act as mediators between the legal system and their clients. In the guise of telling the clients what they must do, lawyers have power to tell them what the lawyers think they ought to do. A lawyer telephoning a seller about a consumer complaint plays Gulliver's go-between role with all of the opportunities to manipulate the result which Gulliver describes. And, importantly, lawyers are repeat players likely to have some concern that what they do in this case will affect their relationships in the business and legal communities in the future.

Lawyers value being "professional." If a case cannot be handled by "real lawyers' skills," it is unlikely to be taken or given much time and attention. (Compare Katz, 1978; Laumann and Heinz, 1977. See also Heinz, Laumann, Cappell, Halliday and Schaalman, 1976.) Lawyers also believe in the legitimacy of business and the related values of self reliance and anti-paternalism. Lawyers tend to understand the problems of manufacturers and sellers. They believe that if one signs a contract, one ought to perform; they think that debts ought to be paid. As a result, consumerism is not seen as a major cause, and consumer protection legislation frequently is indifferently or hostilely received by many lawyers. These views are reinforced by the reactions of many judges who do not want to have their time wasted by lawyers bringing consumer protection cases before them.

Redmount (1961), a psychologist and a lawyer, suggests that some lawyers, as a matter of personality, are likely to be assertive while others are more conciliatory. While this study did not attempt to assess

personality variables, it does seem likely that a conciliatory lawyer who knows almost no consumer law, has only minimal sympathy for consumer problems, associates regularly with business people and recognizes that a consumer's case will justify only a minimal fee at best will do little more than attempt to work something out in a five-minute telephone call to the seller. Even a lawyer who likes to fight will prefer other kinds of cases that offer bigger and better pay offs.

All in all, this study adds another instance to our growing catalogue of other-than-adversary roles played by lawyers. (See Shaffer, 1969). For example, recently legal literature has paid some attention to the problems lawyers face in proceedings for involuntary commitment of a client to a mental institution when the lawyers themselves believe that their client needs treatment. (See, e.g., Cyr, 1978; Dawidoff, 1975; Galie, 1978; Zander, 1976. But see Yale Law Journal, 1975, arguing for an adversary role.) Other articles have considered the problems of lawyers who learn that their clients are violating the regulations of the Securities and Exchange Commission now that the SEC is trying to impose a duty on these lawyers to blow the whistle. (See Lorne, 1978; Miller, 1978; Williams, 1978.) Still other articles look at the problems of lawyers assigned to represent young children in child custody disputes--one cannot just ask a four year old whether s/he wants to live with mommy or daddy and seek to carry out that preference using all of the skills involved in evidence gathering and cross examination. (See, e.g., Church, 1975; Deutsch, 1973; Elkins, 1977; Spencer and Zammit, 1976; Yale Law Journal 1976; 1978).

In the consumer product quality situation, as in these other instances, lawyers are often pushed into a role Justice Brandeis called the "counsel for the situation." Geoffrey Hazard (1978:64) notes that such lawyers must be advocate, mediator, entrepreneur, and judge all rolled into one. They are called on to be experts in problem solving, asked to produce a solution which will be acceptable over time rather than to produce immediate victories for their own clients. To do this, they often must persuade or coerce both the client and the other party to reach what the lawyer sees as the proper solution, often "translating inarticulate or exaggerated claims . . . into temperate and mutually intelligible terms of communication."

III. Evaluation.

How should we evaluate what Wisconsin lawyers do to fashion solutions to consumer problems? Our story tells us something about both the impact of a body of reform laws and about the practice of law. We can sketch both a positive and a negative evaluation; the choice between them rests largely on one's values and one's assumptions about facts beyond the scope of this study.

On the positive side, one might view the practices of the lawyers I studied as yielding a kind of rough justice. Lawyers guard an expensive social institution--the legal system--from overload by relatively minor complaints. Consumers who are dissatisfied with such things as warped phonograph records, defective hair dryers, or inoperative instant cameras can return them to the seller. Usually, the seller will replace them or offer a refund if they cannot be fixed. If the seller refuses, the buyer

can shop elsewhere next time, and the buyer has an "atrocity story" with which to entertain friends which, in turn, may affect the seller's reputation. In short, many problems can be left to the market. (See Diener and Greyser, 1978; Ramsay, 1978; Ross and Littlefield (1978); Wilkes and Wilcox, 1976). At the other extreme, consumers who have suffered serious personal injuries as the result of defective products have relatively little difficulty in finding lawyers who will aggressively pursue their cases, and the growing law of products liability offers what some see as exceedingly generous remedies if not too much protection. Moreover, products liability and government ordered product recalls together give manufacturers a great incentive to pay attention to quality control so problems will be avoided.

The problem is to sort out claims falling between these poles. Defects in automobiles and mobile homes, for example, probably warrant buying at least a little of a lawyer's time, especially when manufacturers and sellers fail to remedy the problem after a customer makes a complaint. But a full scale war using elaborate legal research and expert testimony would be a waste of resources--it would parallel sending a brain surgeon to stitch up a minor cut. A telephone call or a letter or two shaped by rough notions of fairness is all the claim is worth. Only if all those clients who have cases which will support substantial fees were forced to subsidize the consumer cases involving only small sums of money, could lawyers buy all of the necessary law books and learn all the details of consumer law. Alternatively, lawyers could be subsidized by governments to master consumer law and litigate, but there are probably better uses for tax revenues.

Moreover, those lawyers who are willing to do anything at all for clients with a consumer case often are deliberately or unknowingly defending the values of social integration and harmony. In Laura Nader's (1969) phrase, they are seeking "to make the balance" by restoring personal relations to equilibrium through compromise. They do this by clearing up misunderstandings and promoting reasonableness on both sides rather than fighting for total victories and aiding consumers wage vendettas. They can offer their clients their status and contacts which allow them to reach the person who has power to apologize, offer a token gesture or make a real offer of settlement. In some situations, the fact that a manager or owner accepts the blame and apologizes may be as effective in placating the client as a recovery of money. The real grievance may rest on a sense of being taken, insulted, or treated impersonally. Lawyers can help their clients accept the situation and see themselves not as victims but as people with minor complaints; they can help them get on with the business of living rather than allowing a $200 to $300 problem to become the focus of their lives.

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

> It is probably not coincidental that the United States the country with the highest proportion of lawyers in its population, is the most litigious country in the world. All those lawyers are looking for work, and they are sure to find it among a self-centered, demanding, dissatisfied

population which has grudges--real or imagined against institutions or individuals.

(9 Behavior Today 3, 4 (No. 4, Oct. 16, 1979)

Rather than pour gasoline on the fire of indignation in members of a "self-centered, demanding, dissatisfied population which has grudges," almost all of the lawyers interviewed in this study seem far more likely to use some type of fire extinguisher. Even lawyers who see themselves as progressives and those who work for group legal services plans try to push aside potential clients who they judge to be "crazy," to want something for nothing, or to be acting in bad faith.

It would be difficult to deliberately plan and create a system such as the one I have described. Perhaps it could only have arisen in response to laws that created a number of individual rights which could not be fully exercised. By relying on lawyers as gatekeepers, we get enough threat of trouble to prompt apologies, gestures and settlements which are acceptable but not enough litigation to burden legal or commercial institutions. We avoid having to reach complete agreement on the precise boundaries of the appropriate norms governing a manufacturer's and seller's responsibility for quality defects and for misleading buyers short of absolute fraud. And such agreement would be difficult to attain. We avoid having to live with inappropriate norms about these matters which might result from the confrontation of interest groups in the legislative and administrative processes. We avoid having to resolve difficult questions of fact concerning the seller's responsibility for the buyer's expectations and for the condition of the goods. Finally, we offer some deterrence to consumers who want to defraud sellers or to those eager to get something

for nothing. (See Wilkes, 1978).

On the negative side, one could highlight the fact that many consumers with problems lack effective access to the system because of the barriers of cost and the structure of the legal profession. As I point out, people hesitate to bring problems to lawyers for reasons often not related to the merits of their case. They may think they cannot afford high legal fees, and they may not know that some lawyers often write letters or make telephone calls for little or no fee. (See Curran, 1977:208). Of course, lawyers may be able to offer such services only because they are not asked to do it too often; if more people knew about the practice, lawyers might have to reject even more people with consumer claims in order to guard their time for more profitable legal work. Middle class and rich consumers are likely to be able to get more of the various kinds of services offered by lawyers than are the poor. The more affluent are likely to purchase products where unresolved disputes will be serious enough to warrant seeking professional help; lawyers are likely to want to please these clients and offer "loss leader" services; attorneys are more likely to be successful in persuading a merchant that a middle class or rich person's good will is worth some substantial gesture.

Much of the case favorable to present practices rests on a judgment that most consumer claims are trivial. But should we be satisfied with the judgments of individual lawyers--typically white, middle class males who are nicely integrated into their communities--about whether an individual who wants to assert his or her legal rights is reasonable and responsible? In an era of inflation, perhaps, the $400 many consumers spent to replace four defective Firestone 500 steel-belted radial tires may seem trivial to

a successful lawyer, but it was not trivial to the many car owners faced with this problem. Many buyers of such defective products do not have "the balance" restored; they feel taken or cheated, and they are upset by a sense of "near miss" since defective tires might have killed or injured them or their families. They will have suffered an injury to their expectation interest which will not be redressed. (Compare Bernacchi, 1978). They may be seeking some measure of retribution, and they are not going to be satisfied to be turned away from a lawyer's office after the person at the counter at the Firestone store had denied any responsibility for the problem. In the case of the buyers of Firestone tires, they were likely to have been even more unhappy with lawyers and their lack of remedy when they watched the General Counsel of Firestone testify before a congressional committee that the problems were entirely the consumer's fault. Somehow, it does not seem enough just to avoid ever again buying Firestone products or to enjoy seeing Firestone steadily losing ground in the stock market despite the efforts of an aging actor to prop up its reputation in television commercials. Of course, Congress and an administrative agency ultimately induced Firestone to offer a remedy to some of the buyers of the 500 steel-belted radial, but that does not serve to legitimate the system described in this study because this happy outcome for some consumers was not prompted by lawyers handling individual claims.

While a sense of being taken and the loss of a few hundred dollars may be viewed as too trivial to be of concern, the Firestone case illustrates the possibility that even more important interests are at stake. Even if a lawyer had obtained some gesture from Firestone before

the wave of bad publicity forced it to recall the 500 steel-belted radial tire, it is likely that Firestone would still have been rewarded for its incompetent engineering and production techniques unless the settlement had been for significantly more than Firestone was offering when the defects in the tire were first discovered. Conciliatory settlements which a consumer accepts as the best that can be gained still may be subverting the purposes of consumer protection law if we take these statutes at face value and not as exercises in symbolism. Such a lawyer simultaneously convinces clients that they are getting all they can hope for reasonably while shielding socially harmful practices from effective scrutiny by the public or some legal agency. While the Firestone affair eventually did come to light, it took time while many passengers in cars equipped with these tires were at risk, and we can wonder whether there are other serious problems still being suppressed and shielded from scrutiny because of our system of warding off consumer problems where large sums of money are not involved. Conciliatory tactics may block the degree of market correction called for by consumer protection legislation and deny the public of awareness that markets are not being corrected.

While some individuals find a lawyer to act as an effective go-between when they encounter a consumer problem, others may find lawyers who, in large measure, act in their own self-interest. Clients may find themselves manipulated and fooled. Many clients probably do not come to lawyers seeking to have their situations redefined through therapy or their problems solved by apologies and token gestures. At least some consumers do not want a "counsel for the situation" but are looking for a lawyer to

take their side. The settlement worked out after a five-minute telephone call may be the best possible in light of the lawyer's and the business' interest, and an objective observer might be able to defend it as serving some social interest. But do clients know how their interests are regularly offset by all of the others involved?

Conciliatory strategies require little investment of professional time as compared to more adversarial ones. Mediation does not require much knowledge of consumer law, and a lawyer can negotiate a settlement after filing a complaint based on generalities rather than hard legal research. However, lawyers get an exclusive license to practice because they are supposed to be expert in the law. Many who have never seen the inside of a law school might be better conciliators than lawyers since legal education does little to train students for this part of practice, but non-lawyers are not given the privilege of representing clients. In theory, lawyers are qualified to negotiate and mediate because they can assess the legal position and work from it as a baseline. Lawyers who know almost nothing about consumer law are operating from a different baseline. Earlier I quoted Geoffrey Hazard's (1978:152) comment that people go into corporate law because they have the opportunity to "give their technical best to the problems they work on." Hazard continues by saying that the "rest of the bar ordinarily has to slop through with quickie work or, as one lawyer put it, make good guesses as to the level of malpractice at which they should operate in any given situation." Indeed, an official of the Federal Trade Commission who was concerned about the success of the Magnuson-Moss Warranty Act, condemned Wisconsin lawyers who were not fully acquainted with that statute two

years after it had become effective as being guilty of serious malpractice. He thought that perhaps a malpractice action or two might wake up the Wisconsin bar, but he conceded that he thought lawyers in other states were no more aware of the law. Several lawyers interviewed in this study commented that many lawyers do not know enough consumer law to recognize that it offers a good legal theory and that if they did see this, it might change the course of their negotiations.

On the other hand, it is hard to blame lawyers who almost never see a consumer case involving more than a few hundred dollars for not mastering a complicated and extensive body of law and for not purchasing expensive loose-leaf services to keep up to date. There is no way that any lawyer can know much about all branches of the law; lawyers naturally become far more expert in the areas they see regularly. Furthermore, lawyers are involved in complicated networks of relationships which both grant them opportunities for using conciliatory strategies and curb their freedom to be too aggressive and litigate or threaten to do so. Legal services are delivered by a market system, and while perhaps we can ask lawyers to do some charity work, they cannot provide free services for every case that comes in the door. (Compare Schneyer, 1978).

The lawyers studied seem to be responding predictably to the social and economic structures in which the practice of law is embedded. Liberal reforms, such as the consumer protection laws, often create individual rights without succeeding in efforts to provide the means to carry out those rights. Grand declarations of rights can be personally rewarding to those who struggle for legislative and appellate victories. But justice is rationed by cost barriers and even lawyers working for

CONTINUED

1 OF 2

lower income clients must pick and choose where to invest their time and how much of their stock of good will to risk investing in a particular case.

We could see most individual rights created by consumer protection laws as primarily an exercise in symbolism. The reformers gained the pretty words in the text of the statute books and some indirect impact while business practice is affected only marginally because the new rights often cannot be implemented. And since there are so many new consumer protection statutes and so much time has passed since the consumer movement became news, the issue becomes less and less fashionable. As a result, we may be left with little more than the public relations gestures that some manufacturers of consumer products have found useful for their purposes. (See Stuart, 1979).

There is probably some truth in all of my interpretations. One's judgment about the situation will turn importantly on his or her view about whether the quality of consumer products, repairs and bargains is an important social problem, and that is a judgment resting on facts which this study was not designed to gather. But one could rephrase the problem to bring it closer to this study: We could ask whether consumer product, service and bargain quality is an important problem which could be solved to any significant extent at an acceptable cost by having lawyers attempt to enforce the individual rights created by these laws. At least some might see the solution to any problem that exists as resting outside the laws discussed here. On one hand, manufacturers could be required or given incentives to improve product, service and bargain quality so that problems just would not arise. To some extent

this has been done with regard to products such as automobiles, tires and drugs. But there is a limit on how far we can go in this direction. Quality control costs money and pushes up prices. On the other hand, others might advocate wealth redistribution so that more people would find more problems concerning consumer products to be less important to them or so that more people would be sufficiently important customers so that business would be more attentive to their satisfaction. Or we could provide more subsidized lawyers for more of the population so that rights created by these statutes could be tested in litigation more often. Or we might conclude that the present solution, with perhaps some marginal adjustments, is the best that could be attained without investing resources which would be better spent elsewhere. Whatever judgment one may make about these alternatives, it seems clear that anyone interested in reform cannot continue to press for statutes granting individual rights in situations where there are unlikely to be large amounts of money as damages unless such a person is satisfied with the kind of conciliatory counsel-for-the-situation approach described here.

Whatever we conclude about consumer laws, it is still worth looking at the non-legal, non-adversary or only semi-adversary roles played by lawyers which I have described. The response of the bar to consumer laws is but one example of what goes on all the time in the practice of law. Indeed, the "hired gun" going full speed ahead to fight for whatever clients want when they walk into the lawyer's office probably is uncommon except in a few routine situations. Few clients are powerful enough to snap their fingers and have their lawyer jump. However, if

non-legal, non-adversary or semi-adversary roles are common, we are right to be concerned about how they are played.

Often lawyers in such roles are forced to decide how the problem they face should be resolved and then to sell their solution to all affected parties, including their own client. But many of the affected parties may not be represented by lawyers; some may be represented by lawyers who do not understand the law, the situation, or both. Many of those affected may not be able to see all of the likely consequences of the lawyer's proposed solution, and they may have to rely on the lawyer to fashion a solution which is the best for them, for the group or for society. While lawyers usually can persuade themselves and argue to others that they are only seeking their client's long run best interest or the right solution to the problem, their judgments about appropriate solutions necessarily reflect their own values and perceptions of fact. For example, lawyers who respect university faculty members, honor a university, enjoy teaching part time in the law school, and doubt the reality of discrimination against women are not likely to be willing to take a case against the university for a woman denied tenure. If such a lawyer does take the case, s/he is likely to handle it very differently than a lawyer who is also a feminist. For example, the non-feminist lawyer is unlikely to press very hard for language in a settlement agreement that might help the women's movement in addition to seeking a payment of money to end the proceedings.

Lawyers who play "counsel for the situation" may leave the rest of us a little uneasy. (See Frank: 702). What qualifies these lawyers as experts in problem solving? Certainly, this was not the approach of

their law school training, and we can only wonder if their professional experiences have produced wisdom in finding good solutions. And why should the views of a particular lawyer about consumer protection, sex discrimination or any other area play such an important part in influencing what is done in so many situations? Is a lawyer really selecting the best solution or does s/he just dislike negotiating aggressively? Do clients a lawyer likes and identifies with get more than other people? Of course, all of this raises the problem of legitimacy. As is true in the case of so many empirical studies, once again we have stumbled on the problem of discretion and the expert whose skill rests on experience rather than on training and science. (See Macaulay and Macaulay, 1978). And, apart from the chance of a malpractice action, a counsel for the situation has little accountability to much beyond his or her own conscience.

Several writers have criticized the relationship between lawyers and their clients as being impersonal and technical. Lawyers, they say, are quick to turn matters of emotion into causes of action. (See, e.g. Allen, 1964; Appel and Van Atta (1969); Fey and Goldberg, 1978; Greening and Zielonka 1972; Saxe and Kuvin, 1974. Compare Redmount, 1959.) They thus often solve the legal problem and leave the real problem untouched. They keep professional distance and avoid such things as anger, rage, guilt, a sense of injustice, or self deception. It has been charged that law schools train students to avoid emotion and broad solutions to problems by transforming human situations into legal categories. (See, e.g., Himmelstein, 1978). Perhaps there is truth in this charge, but it does not seem to fit the way many of the lawyers

52-434 O - 80 - 38

interviewed in this study try to practice law. And it is likely that the realities of practice exert a far more powerful influence than what happens in, say, a first year course in contracts. Counselling and therapy are very time-consuming, and professional time costs money. This study has emphasized that perceptions, values, personality, and indoctrination all operate within the framework of the structure by which this society provides legal services. When faced with a problem, lawyers will be rewarded only for some responses and not others; we should not be surprised when they offer those responses that produce rewards. As we have seen, a consumer case involving only a few hundred dollars in damages is likely to prompt an impersonal, but not very technical, quick solution from a lawyer. It is an open question whether clients end up satisfied and see their situation in a new light. However, it is hard to see how much more could be offered within the present system.

One response to all this is to call for a return to the adversary model of the practice of law. (See, e.g., Yale Law Journal, 1975.) A lawyer who aggressively asserts only his or her client's interests rather than looking for the right solution would seem to avoid many of the difficulties I have sketched. But adversary ethics may be incomplete and ultimately unsatisfactory. For example, lawyers would have to give up many of the roles sketched in this article and turn would-be clients away. Many would see the conciliatory stance of these lawyers as socially useful. (See Griffiths, 1977. Compare Abel, 1978; Crowe, 1978). Most non-lawyers likely would question the desirability of attorneys acting as hired guns rather than as problem solvers.

President Carter, for example, said, "Mahatma Gandhi, who was himself a very successful lawyer, said of his profession that 'lawyers will as a rule advance quarrels rather than repress them.' We do not serve justice when we encourage disputes in our society rather than resolving them." (Carter, 1978). If anything, we may be witnessing pressure to move even further from adversariness with current demands for lawyers and other professionals to assume responsibility for their clients' compliance with the law. The counsel for the situation role, as troublesome as it is, is unlikely to fade away. Therefore, it makes sense to think seriously about how the values, personality traits and structural constraints of the bar influence the choices that are made. Perhaps as a very small first step it might be worth considering whether non-lawyers could be made more aware of what is going on and whether this would influence the choices that are made. It might help if all clients recognized that they were hiring a counsel for the situation to fashion as good a solution as was possible within the time the lawyer could give to the case. It might help if all clients recognized that lawyers must be influenced by their own values, personality and self-interest. Over-inflated pictures of lawyers acting without self-interest in pursuit of a result dictated by the pure reason embodied in the law can only add fuel to the cynicism about the bar which goes so far back in our history.

Appendix I

A Description of the Research

Between us, Kathryn Winz and I interviewed 106 practicing lawyers, four district attorneys, six paralegal workers and an official of the Office of Consumer Protection of the Department of Justice of the State of Wisconsin. Interviews ranged from one which took an entire morning with four lawyers meeting together in their office to telephone conversations of only a few minutes. At the outset of the study, discussions with friends who practice law and colleagues on the University of Wisconsin Law Faculty made it seem likely that while some lawyers in the state might often encounter consumer protection laws, many or most would never see them. As a result, we thought that a random sample of all lawyers in the state of a size feasible to interview with our limited resources was likely to miss too many lawyers with experience in this area and thus be misleading. However, we could not think of an easy to use principle of selecting a stratified sample. We tried several strategies to try to discover lawyers with the experience we sought with little success. What the lawyers we interviewed told us caused us to conclude that few lawyers in the state spend a great deal of their time dealing with consumer protection matters, and that the sample we had been seeking did not exist.

We began by interviewing lawyers in Door, Douglas, Iowa, Richland and Rock Counties. We hoped to learn enough in these smaller counties so that we could deal with much larger ones. Door County is in the northwest part of the state and it relies on agriculture, ship and boat building and tourists for its income. At the time of the study, its

population was about 20,000. Douglas is in the far northwest corner of the state, Superior is its largest city, and the population was 43,400. Iowa and Richland are contiguous relatively prosperous agricultural counties in the southwestern part of the state with populations of 18,650 and 16,900. Rock County is both agricultural and urban with important manufacturing. It is in the south central part of the state and borders on Illinois; Janesville and Beloit are its two largest cities; its population is 137,200.

We attempted to interview one member of each law firm and all the solo practitioners in each county. Within each firm we tried to contact someone we hoped would talk with us and had experience with consumer protection laws or who would refer us to an appropriate partner or associate. After two unsuccessful attempts to contact a solo practitioner or a representative of a firm, we abandoned our effort to interview them. Generally, Wisconsin lawyers were very cooperative and many gave us a great deal of their time. We understood that the practice of law can involve working under time pressure, and many lawyers had more important things to do than answering our questions. We found it easier to interview lawyers in the smaller counties than lawyers in Rock County where they were busier. Lawyers who had no experience with consumer laws and little if any contact with consumers sometimes did not see any value in wasting their time to tell us that and explain why it was the case; sometimes we got only a sentence or two from a lawyer before s/he cut off the conversation. A few lawyers thought that our study was an invasion of their privacy, and they told us so in no uncertain terms.

Our interview schedule was simple: we asked the lawyers we were

able to interview if they or their partners and associates encountered consumers with problems, if so, what they did with these cases, and whether they were familiar with the Magnuson-Moss Warranty Act, the Wisconsin Consumer Act or the various administrative regulations which are designed to protect consumers. The following table indicates what we found. It should be stressed that in this table we credited both lawyers who were real experts and those who had but slight knowledge as being familiar with these laws because we saw no way to test and grade the level of skill held by our respondents.

Table I About Here

At this point in the study, I tried to find attorneys with more experience in using consumer laws; we had learned a good deal about why cases seldom came to lawyers and how they quickly handled most they encountered in a conciliatory fashion, but we had come across few lawyers who knew much about the rules and used them in their practice. I thought that lawyers who worked for legal services programs of various kinds might make more use of consumer protection laws; they offer legal services at no extra cost to those who are the beneficiaries of these plans, and so cost barriers seemed likely to be less of a factor. I interviewed one or more lawyers from each of the 66 group legal services plans registered with the State Bar of Wisconsin. These plans are benefits for members of groups such as unions, cooperatives, condominiums and university student associations. 39 of the 66 plans are represented by just five different law firms, and one of these firms represents 21 different plans and another performs services for six. These lawyers did see more

consumer problems and were somewhat more familiar with consumer protection laws as is shown by Table 2.

Table 2 About Here

I also talked with representatives of Legal Action for Wisconsin (LAW), a federally funded program with staffed offices in Milwaukee and Madison that deals with problems of low-income clients, and a representative of Wisconsin Judicare, a federally funded program which pays private attorneys in the northern and western parts of the state for legal services to clients with low incomes. The representative from the Milwaukee office of LAW saw many cases where consumer protection laws were relevant, and he was an expert on many of these laws. The Madison office does not see as many of these cases, and its representative was not as expert as the lawyer in the Milwaukee office. Wisconsin Judicare seldom handles consumer cases.

Next I continued to try to find lawyers who might be knowledgeable about consumer protection laws by asking my colleagues on the Law Faculty and friends in practice for suggestions. I was referred to several lawyers who had taken a consumer protection seminar in law school and had also worked for the Office of Consumer Protection of the Wisconsin Department of Justice. After I interviewed these lawyers, I asked them for the names of other attorneys who might be expert in consumer laws, talked with these lawyers to whom I had been referred, and then asked them for more names, and so on. In this way, I "covered" Dane County, the home of the state capital, Madison, which has a population of about 300,000 and about 1,400 lawyers. This referal network sent me to 18 lawyers in

Madison, one in Columbus, Wisconsin and two in Milwaukee. By the time I had talked with everyone in this group I was being referred back to people I had already seen, and so I concluded that I had found nearly all the experts there were to be found in this manner. Nine of the twenty one lawyers knew a great deal about consumer law because they represented businesses or trade associations rather than individuals. The other twelve represented both individuals and businesses--and three of these lawyers were truly expert in these laws. However, two of the three had become expert while working for the Office of Consumer Protection of the Wisconsin Department of Justice and seldom used their knowledge in their practice.

I next turned to the ten largest law firms in the state to learn more about the legal advice given to the larger manufacturers, financial institutions and trade associations. I had been told that these firms did most of the drafting of contracts and other business forms which reflected the influence of consumer protection laws. I talked with twelve lawyers from these firms, nine in Milwaukee and three in Madison. All but one firm had a great deal of experience in helping business cope with consumer protection, and the one firm without this experience specialized in labor relations law. Lawyers in these firms were very generous with their time and help; many were my former students and some, possibly because they were former editors of a law review were very interested in the research project.

In June of 1977, Wisconsin Advanced Training Seminars, a continuing legal education program of the State Bar of Wisconsin, sponsored a two day meeting in Milwaukee on the Uniform Commercial Code. The first

morning session involved a discussion of consumer product warranties under the UCC and the Magnuson-Moss Warranty Act by Professor James White of the University of Michigan Law School. I hoped that the lawyers who had attended this program had some interest in this branch of consumer protection law since they took the time away from their practice to attend; however, the program also dealt with other matters unrelated to consumer problems, and some lawyers attended largely just to get their continuing legal education credit. Whatever the case, I hoped to test what I had been finding against the experience of a large group of lawyers practicing in Milwaukee since I assumed that most of those attending the ATS program would come from there. At this point, I had talked only to lawyers who represented group legal service plans in Milwaukee about both their group and non-group practice, and they had told me just the same story I had heard from lawyers practicing elsewhere.

Thus, in the fall of 1977, I sent a one-page questionnaire with a stamped self-addressed envelope to the 173 attorneys who had attended the Uniform Commercial Code-Magnuson-Moss seminar. The mailing list was kindly provided by David B. Mills, the Program Attorney for ATS-CLE. 110 (63%) responded. 86 of the questionnaires were sent to addresses in Milwaukee or its suburban communities; 49 replies came in envelopes postmarked from Milwaukee or these suburbs. 14 questionnaires were sent to addresses in Madison; 8 replies came from there. The rest of the questionnaires were scattered all over the state, somewhat to my surprise. Of course, a lawyer who practiced in one community might mail his or her response from anywhere s/he happened to be near a mailbox, but is seems reasonable to assume that most lawyers would fill out the questionnaire

at their desk and send it back with the rest of their professional correspondence for the day. Fourteen respondents were house counsel for corporations; 24 were in general business practice primarily representing financial institutions, manufacturers and retailers; 60 were in general practice, which included substantial representation of both business and individuals. Twelve described their practice as "other," since they worked for such organizations as trade associations, units of government or corporations in non-legal capacities.

These lawyers were asked whether they had drafted warranties "and considered the Magnuson-Moss Warranty Act." They were asked if they had considered that statute in connection with a claim by a consumer while representing the business against which the claim was made or while representing the consumer making, or considering making, the claim. The useable responses are described in Tables 3 and 4.

Tables 3 and 4 About Here

None of these lawyers knew of any litigation in the courts in their area in which the Magnuson-Moss Warranty Act was involved.

Appendix II

[This appendix was prepared by Richard E. Miller, Department of Sociology, University of Wisconsin-Madison]

Survey Data on Lawyer Contacts by New Car Buyers with Problems

The interviews with attorneys which are reported in this paper were part of a larger project on the impact of consumer protection laws, particularly the Magnuson-Moss Warranty Act, on the automobile industry. As part of a survey of new car buyers, dealers and manufacturers under the direction of Dr. Kenneth McNeil, questions were asked buyers about contacts with lawyers. The information gained by this study reinforces the conclusions drawn from the interviews with attorneys.

The survey of new car buyers involved a sample of purchasers of 1977 model domestic cars purchased in Dane (Madison) and Milwaukee Counties. These people were interviewed by telephone, once shortly after their purchase and again a year later. A total of 1,537 complete interviews were obtained, which represents 77 percent of all buyers sampled. In the second interview, buyers were asked about experiences with their new cars; those who reported both "troublesome experiences" and "some problem or delay" in resolving these difficulties were asked further questions about their most serious problem and what they did to resolve it. 26.7 percent of all buyers had both some repair problem and some delay in resolving it or did not get the problem resolved at all. The data reported here are from this subgroup.

Table 5 gives the percentages of those in this group who complained to or contacted the dealer, the factory, a public remedy agent, or an attorney and the percentages who ultimately had their problem resolved.

Table 5 About Here

Complaint rates were somewhat higher for those with problems which they considered major. For example, 56.0 percent of those with major problems complained beyond the service manager, while 46.2 percent of those with what they saw as a minor problem did so. Over half of those with a problem registered their complaint with the dealership, and almost a quarter went further and contacted the factory. Relatively few buyers contacted attorneys or public remedy agents. The low usage of public remedy agents is particularly striking because about half the sample live in Dane County where the three state agencies that handle new car complaints are located--these are the Consumer Protection Division of the Wisconsin Department of Agriculture, Trade and Consumer Protection; the Motor Vehicles Division of the Department of Transportation; and the Office of Consumer Protection of the Wisconsin Department of Justice.

Many of those who complained contacted several people or organizations. All of those who contacted the manufacturer, lawyers or public remedy agents had already complained to the dealer. Of those contacting an attorney, 37.2 percent also contacted a state agency or a private consumer complaint organization such as the Better Business Bureau or a local television station. Conversely, 26.6 percent of those who contacted a public remedy agent also discussed their problem with an attorney.

Table 6 indicates the sources of legal advice.

Table 6 About Here

Of those who were not themselves lawyers, about half the buyers who

experienced problems and a delay in resolving them and who talked with a lawyer saw a lawyer as a client, while the other half talked with friends or relatives who were attorneys or with an attorney employed by one of the state's consumer protection agencies.

Table 7 shows the rates that members of different income groups used attorneys.

Table 7 About Here

While 33.9 percent of all the new car buyers who had problems had incomes below $15,000, only 19 percent of those contacting a lawyer were in this lower income group. Those in the $15,000 to $20,000 group contacted lawyers at a somewhat higher rate while those in the $20,000 to $25,000 group saw attorneys at a much higher rate. This pattern probably reflects both economic resources and the availability of lawyers through social networks. The low rate of contacting lawyers for the highest income group is difficult to explain. It may represent chance variation or lower felt needs for assistance. Table 8 shows the rate of attorney use by education. A pattern similar to that for income emerges, with high usage only among those with some college education.

Table 8 About Here

Table 9 shows the rates of usage of lawyers by age.

Table 9 About Here

High usage rates are found only for the 25 to 29 year old group. These

people were in high school and college during the height of the consumer movement, the early 1970s. They may, then, be the only age group well educated in asserting consumer rights. They may also have naive expectations about the efficacy of attorney aid.

Because of time constraints, detailed information about what lawyers told the respondents was not obtained. However, respondents whose problems were not resolved at all and who had consulted a lawyer were asked if the attorney had encouraged them to continue complaining, suggested that they give up, or something else. From these responses and from marginal notes on the interview form, it was possible to determine the nature of the advice offered by the lawyer to most respondents. Table 10 reports these results.

Table 10 About Here

Those buyers who saw a lawyer and whose problem was resolved were asked if the attorney helped in obtaining a solution. One third replied affirmatively. Of the nine respondents who contacted lawyers as clients, four had their problems resolved and two of these credited their lawyer with helping them. One of these two merely sent the client to a state agency and the client found the agency to be "worthless"; thus, the basis for the client's judgment that the lawyer had been helpful is unclear. The other 'helpful' attorney coached the client in writing complaint letters and in dealing with the manufacturer and also suggested contacting the Motor Vehicles Division of the Wisconsin Department of Transportation.

While no lawyer actually contacted an automobile dealer on behalf of a respondent, 9.9 percent of those buyers who had a problem reported

using the threat of hiring an attorney when they complained at the dealership. Forty-five percent of those threatening to see a lawyer had their problems resolved (of course, we cannot be sure of the impact of the threat), which is about the same rate of success as achieved by those who actually did talk to a lawyer. A minority followed up their threat; 35 percent of those who threatened to see a lawyer actually did so. Fully 86 percent of those who did discuss their problem with a lawyer had threatened to do so when they complained to the dealer or the factory.

FOOTNOTES

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

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

The Motor Vehicle Department also mediates consumer complaints, particularly those involving used cars. It is given authority to enforce

the requirements that used car dealers disclose on a standard sticker placed on the window of cars on their lot all defects they know about. It has 14 field investigators, most of whom are former members of the state highway patrol. These investigators mediate consumer complaints, dispensing justice based on their view of the condition of the car and the degree of compliance with the sticker law. (See [Madison] Wisconsin State Journal (Feb. 11, 1979), sec. 3, 4.)

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

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

3. White (1977: 1272) found that the warranty and warranty disclaimer sections of the Uniform Commercial Code were heavily cited in reported cases from California, New York and Ohio published in the late 1950s and early 1960s, and these sections comprised a substantial plurality of all the citations to the Uniform Commercial Code from each of the three states studied. He explained this result by noting that "many of these warranty

52-434 O - 80 - 39

cases are brought by an allegedly injured consumer-buyer against the seller, with whom he has no continuing relationship. Unlike the businessperson, the consumer-buyer pays no added litigation cost in the form of injured or severed business relationships." (Compare Macaulay, 1963.) However, White does not indicate how many of the warranty cases he found involve consumer-buyers and how many involve business buyers. Moreover, he does not indicate how many of the cases involving consumer-buyers reflected situations where the consumer-buyer alleged that a personal injury had been caused by a defective product. It would seem that while a consumer's litigation costs might be lower in terms of severed or injured relationships, the potential benefits of litigation to a consumer-buyer also would be less in cases where there was no personal injury to prompt a large claim for damages. For example, recovery of the purchase price is likely to yield much less in a case involving a defective automobile than in one involving a defective machine tool or needed raw materials.

Jane Limprecht, my research assistant, collected all of the reported cases in 1977 which involved a breach of warranty theory from the Modern Federal Digest, the U.C.C. Reporter, and West's General Digest. Of the 147 cases she discovered, 82 involved business purchasers and 65 involved consumer-buyers. 30 of the consumer cases had personal injuries prompting substantial damage claims; 35 did not involve personal injuries. Included within these 35, were 9 involving a new car, 3 concerning a new pick-up truck and 4 relating to used cars. In 9 of these automotive cases the damages sought were reported. The lowest claim was for $1050 and the greatest was for $9000. Six more of the 35 consumer-buyer cases

where there was no personal injury involved mobile homes where the lowest claim was for $5,400 and the highest was for $14,395. Four more involved boats and yachts; the lowest claim here was $950 and the highest was $37,000. The other consumer-buyer but no personal injury cases involved such things as an inflatable mammary prosthesis, a vault for a child's casket, a home sewage treatment system and a stove which exploded and destroyed a house. Of course, as White recognizes, reported cases can be but a distorted reflection of what goes on at trial, in pre-trial negotiations, in lawyers' offices and in attempts by consumers to exercise self-help. Nonetheless, these reported decisions suggest that consumer product quality cases which involve no personal injury are likily to be prompted by only certain kinds of products--particularly yachts, cars and mobile homes--and we might guess that they are likely to involve consumers who can both afford these products and lawyers.

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

REFERENCES

ABEL, Richard L. (1978) "From the Editor," 12 Law & Society Review 189.

_____ (1979) "Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?" 1 Law & Policy Quarterly 5.

ALLEN, Richard C. (1964) "The Dynamics of Interpersonal Communication and the Law," 3 Washburn Law Journal 136.

ALPANDER, Guvenc G. and Jordan I. KOBRITZ (1978) "Prepaid Legal Services: An Emerging Fringe Benefit," 31 Industrial and Labor Relations Review 172.

APCAR, Leonard M. (1978) "Chrysler's Woes: Publicity on Recalls, Stiffer Competition Hurt No. 3 Car Maker," Wall Street Journal (January 18) 1.

APPEL, Victor H. and Ralph E. VAN ATTA (1969) "The Attorney-Client Dyad: An Outsider's View," 22 Oklahoma Law Review 243.

BEAL, Dave (1978) "Big Boom at the Bar," Milwaukee Journal (Oct. 29), part 9, 4.

BERNACCHI, Michael D. (1978) "A Behavioral Model for Imposing Strict Liability in Tort: The Importance of Analyzing Product Performance in Relation to Consumer Expectation and Frustration," 47 Cincinnati Law Review 43.

BEST, Arthur and Alan R. ANDREASEN (1977) "Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress," 11 Law & Society Review 701.

BLOOMFIELD, Maxwell H. (1976) American Lawyers in a Changing Society, 1776-1876. Cambridge: Harvard University Press.

BLUMBERG, Abraham S. (1967) "The Practice of Law as Confidence Game: Organizational Cooptation of a Profession," 1 Law & Society Review 15.

BRAKEL, Samuel J. (1973) "Free Legal Services for the Poor--Staffed Office Versus Judicare: The Client's Evaluation," 1973 Wisconsin Law Review 532.

_____ (1974) Judicare: Public Funds, Private Lawyers and Poor People. Chicago: American Bar Foundation.

BRICKEY, Kathleen F. (1978) "The Magnuson-Moss Act--An Analysis of the Efficacy of Federal Warranty Regulation as a Consumer Protection Tool," 18 Santa Clara Law Review 73.

BROWN, Louis M. and Harold A. BROWN (1976) "What Counsels the Counselor? The Code of Professional Responsibility's Ethical Considerations--A Preventive Law Analysis, " 10 Valparaiso University Law Review 453.

BUGGE, Lawrence J. (1976) "Is Consumer Protection Becoming Legal Polution?" Wisconsin Bar Bulletin (June) 15.

BUSINESS WEEK (1975) "Regulators: The Guesswork on Warranties," July 14, 1975, at 51-2.

CARTER, James E. (1978) "Speech to the 100th Anniversary Luncheon of the Los Angeles Bar Association," New York Times, (May 6) 11.

CASE, Karen A. (1977) "Legal Service Plans--The Newest Tax Benefits to Employees," 50 Wisconsin Bar Bulletin 9 (January).

CASE WESTERN LAW REVIEW (1978) "Note: Private Enforcement Under the Fair Debt Collection Practices Act," 28 Case Western Law Review 710.

CERRA, Frances (1977) "Dispute Grows on Truth-in-Lending Act," New York Times (July 4) 22.

CHURCH, Virginia Anne (1975) "Innovations in Legal Counseling," 49 Florida Bar Journal 10 (January).

COHEN, Dorothy (1975) "Remedies for Consumer Protection: Prevention, Restitution, or Punishment," 39 Journal of Marketing 24 (October).

COLVIN, Diane Tremmel and Victor H. KRAMER (1975) "Group Legal Service Plans in Wisconsin," 48 Wisconsin Bar Bulletin 47 (February).

CONSUMER REPORTS (1975) "Product Warranties: Congress Lends a Helping Hand," (March) 164.

CONWAY, Gregory B. (1975) "One Firm's Experience With a Group Legal Service Plan," 48 Wisconsin Bar Bulletin 8 (October).

CORNELL LAW REVIEW (1977) "Note: Consumer Product Warranties Under the Magnuson-Moss Warranty Act and the Uniform Commercial Code," 62 Cornell Law Review 738.

CRANDALL, Thomas D. (1973) "The Wisconsin Consumer Act: Wisconsin Consumer Credit Laws Before and After," 1973 Wisconsin Law Review 334.

CROWE, Patricia Ward (1978) "Complaint Reactions to the Massachusetts Commission Against Discrimination," 12 Law & Society Review 217.

CURRAN, Barbara A. (1977) The Legal Needs of the Public: The Final Report of a National Survey. Chicago: The American Bar Foundation.

CYR, Joseph (1978) "The Role and Functions of the Attorney in the Civil Commitment Process: the District of Columbia's Approach," 6 Journal of Psychiatry and Law 107.

DANZIG, Richard (1973) "Toward the Creation of a Complementary, Decentralized System of Criminal Justice," 26 Stanford Law Riview 1.

DANZIG, Richard and Michael J. LOWY (1975) "Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner," 9 Law & Society Review 675.

DAVIS, Jeffrey (1973) "Legislative Restriction of Creditor Powers and Remedies: A Case Study of the Negotiation and Drafting of the Wisconsin Consumer Act," 72 Michigan Law Review 1.

DAWIDOFF, Donald J. (1975) "Commitment of the Mentally Ill in New York: Some Comments and Suggestions," 3 Journal of Psychiatry and Law 79.

DEUTSCH, Phyllis Z. (1973) "The Family Law Practitioner as Legal Psychiatric Worker," California State Bar Journal (March-April) 158.

DICKINSON, Ernest (1976) "Lawyers Proliferate and Prosper: Workload Raised by Regulation and Delays," New York Times (January 25), Section 3, 7.

DIENER, Betty J. and Stephen A. GREYSER (1978) "Consumer Views of Redress Needs," 42 Journal of Marketing 21 (October).

DINGWALL, Robert (1977) "Atrocity Stories and Professional Relationships," 4 Sociology of Work & Occupations 371.

EDDY, Jonathan A. (1977a) "Effects of the Magnuson-Moss Act Upon Consumer Product Warranties," 55 North Carolina Law Review 835.

_____ (1977b) "On the 'Essential' Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)," 65 California Law Review 28 (1977).

ELKINS, James R. (1977) "A Counseling Model for Lawyering in Divorce Cases," 53 Notre Dame Lawyer 229.

FAHLGREN, George W. (1976) "Unconscionability: Warranty Disclaimers and Consequential Damage Limitations," 20 Saint Louis University Law Journal 435.

FAIR, Daryl R. and David H. MOSKOWITZ (1975) "The Lawyer's Role: Watergate as Regularity Rather than Aberration," 2 Journal of Contempory Law 75.

FALK, Carol H. (1978) "Legal Upheaval: Lawyers Are Facing Surge in Competition as Courts Drop Curbs," Wall Street Journal (October 18) 1.

FAYNE, Steven N. and Marsha J. SMITH (1977) "Dealing with Magnuson-Moss," 8 Cumberland Law Review 205.

FELSTINER, William L.F. (1974) "Influences of Social Organization on Dispute Processing," 9 Law & Society Review 63.

_____ (1975) "Avoidance as Dispute Processing: An Elaboration," 9 Law & Society Review 695.

FENDELL, Bob (1975) "'Lemon Law' Effect Uncertain," New York Times (October 12) 13.

FEY, Steven G. and Steven GOLDBERG (1978) "Legal Interviewing from a Psychological Perspective: An Attorney's Handbook," 14 Willamette Law Journal 217.

FIELD, Thomas G., Jr. (1978) "Appraising Private and Public Roles in Returning Small Economic Losses to Consumers: A Comparative Inquiry," 29 Mercer Law Review 773 (1978).

FRANK, John P., (1965) "The Legal Ethics of Louis D. Brandeis," 17 Stanford Law Review 683.

FREEDMAN, Audrey (1977) "Legal Services--The New Fringe Benefit?" 14 Across the Board 60 (May).

FRENZEL, Lawrence D. (1977) "Fair Credit Reporting Act: The Case for Revision," 10 Loyola of Los Angeles Law Review 400.

FRIEDMAN, Lawrence M. (1967) "Legal Rules and the Process of Social Change," 19 Stanford Law Review 786.

GALANTER, Marc (1974) "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 Law & Society Review 95.

GALIE, Lawrence P. (1978) "An Essay on the Civil Commitment Lawyer: or How I learned to Hate the Adversary System," 6 Journal of Psychiatry and Law 71.

GALLUCCIO, Nick (1978) "The Rise of the Company Lawyer: Government Red Tape Costs American Consumers Plenty But it is Creating New Opportunities for Law School Graduates," Forbes (September 18) 168.

GRABOWSKI, Henry G. and John M. VERNON (1978) "Consumer Product Safety Regulation," 68 American Economic Review 284.

GRANELLI, James S. (1979) "The Client as Deadbeat: When to Sue," The National Law Journal (January 8) 1.

GREENING, T. C. and W. ZIELONKA (1972) "Special Applications of Humanistic Learning: A Workshop on Attorney-Client Relationships," 2 Interpersonal Development 194.

GRIFFITHS, J. E. (1977) "The Distribution of Legal Services," 4 British Journal of Law and Society 260.

GULLIVER, P. H. (1977) "On Mediators," in Ian Hamnett (ed.), Social Anthropology and the Law. New York: Academic Press.

HAEFNER, James and John LECKENBY (1975) "Consumers' Use and Awareness of Consumer Protection Agencies," 9 Journal of Consumer Affairs 201.

HAGY, James C. (1977) "Simultaneous Representation: Transaction Resolution in the Adversary System," 28 Case Western Law Review 86 (1977).

HARRIS, Roy J., Jr. (1977) "Prepaid Legal Insurance is Seen Becoming Unions' Next Big Fringe-Benefit Demand," Wall Street Journal (July 29) 24.

HAZARD, Geoffrey C., Jr. (1978) Ethics in the Practice of Law. New Haven: Yale University Press.

HEINZ, John P., Edward O. LAUMANN, Charles L. CAPPELL, Terence C. HALLIDAY, and Michael H. SCHAALMAN (1976) "Diversity, Representation, and Leadership in an Urban Bar: A First Report on a Survey of the Chicago Bar," 1976 American Bar Foundation Research Journal 717.

HIMMELSTEIN, Jack (1978) "Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law," 53 New York University Law Review 514.

HORSKY, Charles A. (1952) The Washington Lawyer. Boston: Little, Brown and Co.

HURST, James Willard (1950) The Growth of American Law: The Law Makers. Boston: Little, Brown.

INDIANA LAW JOURNAL (1976) "The Magnuson-Moss Warranty Act: Consumer Information and Warranty Regulation," 51 Indiana Law Journal 397.

JOHNSON, Earl, Jr. and Elizabeth SCHWARTZ (1978) A Preliminary Analysis of Alternative Strategies for Processing Civil Disputes. Washington, D.C.: Government Printing Office.

JEFFRIES, James (1974) "Protection for Consumers Against Unfair and Deceptive Business," 57 Marquette Law Review 559.

KATZ, Jack (1978) "Lawyers for the Poor in Transition: Involvement, Reform, and the Turnover Problem in the Legal Services Program," 12 Law & Society Review 275.

KENDRICK, Rosemary (1978) "$31,000 Fee for Bias Suit," The [Madison, Wisconsin] Press Connection (August 10) 3.

LADIES HOME JOURNAL (1976) "Ralph Nader Reports," Oct. 1976, at 66.

LADINSKY, Jack (1976) "The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channeling of Clients," 11 Law & Society Review 207.

LANDERS, Jonathan M. (1977) "Some Reflections on Truth in Lending," 1977 University of Illinois Law Forum 669.

LAUMANN, Edward O. and John P. HEINZ, (1977) "Specialization and Prestige in the Legal Profession: The Structure of Deference," 1977 American Bar Foundation Research Journal 155.

LOCHNER, Philip R., Jr. (1975) "The No Fee and Low Fee Legal Practice of Private Attorneys," 9 Law & Society Review 431.

LORNE, Simon M. (1978) "The Corporate Securities Adviser, The Public Interest, and Professional Ethics," 76 Michigan Law Review 423.

MACAULAY, Jacqueline and Stewart MACAULAY (1978) "Adoption for Black Children: A Case Study of Expert Discretion," in Rita J. Simon (ed.) Research in Law and Sociology. Greenwich: JAI Press.

MACAULAY, Stewart (1963) "Non-Contractual Relations in Business: A Preliminary Study," 28 American Sociological Review 55.

MC CONNEL, Jon P. and Charles M. LILLIS (1976) "A Comment on the Role, Structure, and Function of Corporate Legal Departments," 14 American Business Law Journal 227.

MC GILLIS, Daniel, and Joan MULLEN (1977) Neighborhood Justice Centers: An Analysis of Potential Models. Washington, D.C.: Government Printing Office.

MC NEIL, Kenneth, John R. NEVIN, David M. TRUBEK, and Richard E. MILLER (1979) "Market Discrimination Against the Poor and the Impact of Consumer Disclosure Laws: The Used Car Industry," 13 Law & Society Review.

MASON, Joseph and Samuel HIMES (1973) "An Exploratory Behavioral and Socio-economic Profile of Consumer Action About Dissatisfaction

with Selected Household Applicances," 7 Journal of Consumer Affairs 121.

MAYHEW, Leon and Albert J. REISS,Jr. (1969) "The Social Organization of Legal Contacts," 34 American Sociological Review 309.

MILLER, Judith (1978) "What a Lawyer Owes His Client: A.B.A., S.E.C. Study Change in Corporate Law Standards," New York Times (December 17), section 3, 1.

NADER, Laura (1969) "Styles of Court Procedure: To Make the Balance," in L. Nader (ed.), Law in Culture and Society Chicago: Aldine.

NASH, Gary B. (1965) "The Philadelphia Bench and Bar, 1800-1861," 7 Comparative Studies in Society & History 203 (1965).

PAUL, Roland A. (1976) "A New Role for Lawyers in Contract Negotiations," 62 American Bar Association Journal 93.

PERHAM, John C. (1977) "The Dilemma in Product Liability," 109 Dun's Review 48 (January).

PROTTAS, Jeffrey Manditch (1978) "The Power of the Street-Level Bureaucrat in Public Service Bureaucracies," 13 Urban Affairs Quarterly 285.

RAMSAY, Iain D. C. (1978) "Empirical Study of Edmonton Retailers' Policies for Dissatisfied Consumer Purchases," Unpublished study, The Institute of Law Research and Reform, The University of Alberta, Canada.

REDMOUNT, Robert S. (1959) "Psychological Discontinuities in the Litigation Process," 1959 Duke Law Journal 571.

_____ (1961) "Attorney Personalities and Some Psychological Aspects of Legal Consultation," 109 University of Pennsylvania Law Review 972.

REED, John P. (1969) "The Lawyer-Client: A Managed Relationship?" 12 The Academy of Management Journal 67 (March).

RHEINGOLD, Paul D. (1977) "Tackling Corporate Defendants in Product Cases," 1 Journal of Product Liability 33.

ROBERTS, Barry S. (1978) "The Magnuson-Moss Federal Warranty Act and Failure of its Essential Purpose, Uniform Commercial Code 2-719(2)." 33 The Business Lawyer 1845.

ROSENTHAL, Douglas E. (1974) Lawyer and Client: Who's In Charge? New York: Russell Sage Foundation.

ROSS, H. Laurence (1970) Settled Out of Court: The Social Process of Insurance Claims Adjustments. Chicago: Aldine.

ROSS, H. Laurence and Neil O. LITTLEFIELD (1978) "Complaint as a Problem-Solving Mechanism," 12 Law & Society Review 199.

ROSS, S. D. (1976) "The Role of Lawyers in Society," 48 The Australian Quarterly 61 (Mar. 1976).

ROTHSCHILD, Donald P. (1976) "The Magnuson-Moss Warranty Act: Does It Balance Warrantor and Consumer Interests?", 44 George Washington Law Review 335.

RUGABER, Walter (1974) "Federal Warranty Standards and Consumer Aid Agreed On," New York Times (Dec. 11) 1.

SAXE, David B. and David I. BLEJWAS (1976) "The Federal Warranty Act: Progress and Pitfalls," 22 New York Law School Law Review 1.

SAXE, David V. and Seymour F. KUVIN (1974) "Notes on the Attorney-Client Relationship: A Psycholegal Overview," 2 Journal of Psychiatry & Law 209.

SCHEINGOLD, Stuart A. (1974) The Politics of Rights: Lawyers, Public Policy and Political Change. New Haven: Yale University Press.

SCHNEYER, Theodore J. (1978) "Uncharitable Thoughts on Mandatory Pro Bono: Internal Subsidy, External Subsidy, and Professional Ideology as Ways to Affect the Market for Legal Services," Presented at Law & Society Association Meeting, Minneapolis (May 18th).

SCHROEDER, Milton R. (1978) "Private Actions under the Magnuson-Moss Warranty Act," 66 California Law Review 1.

SHAFFER, Thomas L. (1969) "The 'Estate Planning' Counselor and Values Destroyed by Death," 55 Iowa Law Review 376.

SIMON, William H. (1978) "The Ideology of Advocacy: Procedural Justice and Professional Ethics," 1978 Wisconsin Law Review 29.

SNIDERMAN, Paul M and Richard A. BRODY (1977) "Coping: The Ethic of Self-Reliance," 21 American Journal of Political Science 501.

SPENCER, Janet Maleson and Joseph P. ZAMMIT (1976) "Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents," 1976 Duke Law Journal 11.

STEELE, Eric H. (1975) "Fraud, Disputes, and the Consumer: Responding to Consumer Complaints, " 123 University of Pennsylvania Law Review 1107.

STUART, Reginald (1977) "Number of Recalled Vehicles Nears 8-Million Mark," New York Times (November 16) A 18.

STUART, Reginald (1978) "Detroit Stunned by Recall Blitz," New York Times (March 12) section 3, 1.

STUART, Reginald (1979) "Hot From Detroit: Service Warranties," New York Times (February 16) D 1.

TIME (1976) "Marketing: Anti-Lemon Aid," (February 9) 76.

WARLAND, Rex H., Robert O. HERMANN and Jane WILLITS (1975) "Dissatisfied Consumers: Who Gets Upset and Who Takes Action," 9 Journal of Consumer Affairs 148.

WHITE, James J. (1977) "Evaluating Article 2 of the Uniform Commercial Code: A Preliminary Empirical Expedition," 75 Michigan Law Review 1262.

WHITFORD, William C. (1968) "Strict Products Liability and the Automobile Industry: Much Ado About Nothing," 1968 Wisconsin Law Review 83.

WHITFORD, William C. (1973) "The Functions of Disclosure Regulation in Consumer Transactions," 1973 Wisconsin in Law Review 400.

WHITFORD, William C. and Spencer KIMBALL (1974) "Why Process Consumer Complaints? A Case Study of the Office of the Commissioner of Insurance of Wisconsin," 1974 Wisconsin Law Review 639.

WILKES, Robert E. (1978) "Fraudulent Behavior by Consumers," 42 Journal of Marketing 67 (1978).

WILKES, Robert E. and James B. WILCOX (1976) "Consumer Perceptions of Product Warranties and Their Implications for Retail Strategy," 4 Journal of Business Research 35.

WILLIAMS, Harold M. (1978) "Corporate Accountability and the Lawyer's Role," 34 The Business Lawyer 7.

YALE LAW JOURNAL (1975) "Note: The Role of Counsel in the Civil Commitment Process: A Theoretical Framework," 84 Yale Law Journal 1540.

YALE LAW JOURNAL (1976) "Project: The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis," 86 Yale Law Journal 104.

YALE LAW JOURNAL (1978) "Note: Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce," 87 Yale Law Journal 1126.

ZANDER, Thomas (1976) "Civil Commitment in Wisconsin: The Impact of Lessard v. Schmidt," 1976 Wisconsin Law Review 50.

52-434 O - 80 - 40

TABLE 1

INTERVIEWS WITH LAWYERS IN FIVE COUNTIES

County	No. of lawyers and firms: In County *			Interviewed			Frequency of consumer clients				Familiarity with:		
	Total Lawyers	Firms	Solos	Total Lawyers	Firm reps.	Solo	None	Few	Some	Many	Mag.-Moss	WCA	Wis. Regs.
Door	24	5	8	6	4	2	1	5	0	0	1 **	3	3
Douglas	30	6	12	9	6	3	1	8	0	0	0	8	2
Iowa	20	4	12	9	2	7	1	7	1	0	0	3	2
Richland	12	4	5	5	3	2	3	2	0	0	0	2	1
Rock	164	27	55	22	11	11	5	12	5	0	0	13	3
Totals				51			11	34	6	0	1	29	11

* Source: Wisconsin Legal Directory 1976-1977.

** The lawyer who was familiar with Magnuson-Moss taught consumer education classes in a local adult education program.

TABLE 2

INTERVIEWS WITH REPRESENTATIVES OF GROUP LEGAL SERVICE PLANS

No. of lawyers interviewed	Frequency of consumer clients				Familiarity with		
	None	Few	Some	Many	Mag.-Moss	WCA	Wis. Regs.
19	1	9	2	7	3	4	3

TABLE 3

DRAFTED WARRANTIES CONSIDERING MAGNUSON-MOSS

	House counsel	Lawyers for Business	General Practitioners	Total
Never	4 (29%)	12 (50%)	36 (60%)	52 (53%)
Once	0	2 (8%)	10 (16%)	12 (12%)
Several times	7 (50%)	9 (38%)	14 (23%)	30 (31%)
Frequently	3 (21%)	1 (4%)	0	4 (4%)
Totals	14	24	60	98

TABLE 4

CONSUMER COMPLAINT CONSIDERING MAGNUSON-MOSS

	For business				For consumers			
	H.C.	Business	G.P.	Total	H.C.	Business	G.P.	Total
Never	10 (71%)	19 (79%)	46 (82%)	75 (80%)	13 (100%)	21 (88%)	43 (77%)	77 (83%)
Once	0	0	3 (5%)	3 (3%)	0	1 (4%)	4 (7%)	5 (5%)
Several times	4 (28%)	5 (21%)	6 (11%)	15 (16%)	0	2 (8%)	9 (16%)	11 (12%)
Frequently	0	0	1 (2%)	1 (1%)	0	0	0	0
Totals	14	24	56	94	13	24	56	93

Table 5

Complaint and Success Rates Among New Car Buyers with Problems

	Percent Complaining	(N)[1]	Percent of Problems Resolved[2]
Complained beyond service manager (eg. to general manager or dealer)	53.1%	(183)	51.8%
Complained to manufacturer	23.4	(70)	56.4
Contacted state or private remedy agent	6.5	(29)	45.6
Discussed problem with lawyer	4.6	(17)	46.0
Buyer was a lawyer	1.0	(4)	0.0
Did not complain beyond service manager	46.9	(193)	42.6

---

1. The number of buyers in each category is given in parentheses. Percentages total more than 100% because some buyers did more than one thing. The percentages cannot be directly derived from the numbers in each category because a weighted sampling design was used.

2. The resolution rate does not necessarily reflect the effectiveness of a particular complaint avenue; those who consulted a lawyer, for example, may have resolved matters themselves apart from any help offered by the lawyer.

Table 6

Channels to Contact With a Lawyer

	Percent	N
Lawyer was the spouse or other relative of buyer	9.5%	2
Lawyer was friend, neighbor or coworker of buyer	23.8	5
Lawyer was employee of state agency contacted by buyer	9.5	2 [1.]
Lawyer was private attorney contacted by buyer as client	42.8	9
Buyer was a lawyer	19.0	4
		22 [2.]

---

1. This figure represents those who identified their attorney as a state employee. It is probably an undercount, since some others who contacted state agencies may have talked to lawyers without knowing it.

2. One respondent both talked to lawyer friends and consulted an attorney as a client. The percentages are calculated using 21 as a base and do not reflect sampling weights.

TABLE 7

Contact with Lawyers by Income Group (N = 17)

Income	Percent in income category	Percent of those contacting attorney	Percent of income group contacting attorney
Less than $10,000	13.4%	8.3%	2.7%
$10,000 - $15,000	20.5	10.6	2.3
$15,000 - $20,000	35.2	34.3	4.3
$20,000 - $25,000	12.6	36.4	12.7
Over $25,000	18.4	10.3	2.5
	100%	100%	

Table 8

Lawyer Contact By Education (N = 17)

Education	Percent of those with delay in solving problem	Percent of those contacting attorney	Percent of educational group contacting attorney
Less than 11 years	10.9%	2.1%	0.8%
High school graduate	39.7	21.7	2.2
Some college	23.5	65.2	11.2
College graduate	14.8	8.1	2.2
Some post-graduate	11.1	2.9	1.1
	100.0	100.0	

TABLE 9

Lawyer Contact By Age (N = 17)

Age	Percent of those with delay in solving problem	Percent of those contacting attorney	Percent of age group contacting attorney
18-24	13.4%	1.6%	0.5%
25-29	16.8	63.1	15.2
30-39	25.1	17.8	2.9
40-49	15.2	7.8	2.1
50-59	17.2	7.6	1.8
Over 60	12.3	2.1	0.7

TABLE 10

Advice or action	Number of attorneys offering
Urged to continue complaining to dealer or manufacturer	6
Referred to state agency	2
Told to return if no resolution	2 1.
Coached in complaining	1
Wrote or telephoned seller	1 2.
Could not help	2 3.
Advice could not be determined	$\frac{5}{19}$ 4.

1. One client was going back to see his attorney again the day after the interview.

2. The attorney wrote the factory but was "too slow."

3. One attorney was a coworker in a state consumer protection agency who had the same problem and also could not get it resolved. The other attorney refused the case because he represented a former owner of the dealership. This respondent, following his dealer's advice to "sue me," was preparing to represent himself in a small claims court and was the only buyer interviewed who reported using or planning to use that remedy.

4. Two respondents were given two sorts of advice each. Actually, 17 had contacted an attorney, and 9 did so as clients.

DPRP Working Papers—Titles in Print

1979–1 *Lawyers and Consumer Protection Laws: An Empirical Study*, by Stewart Macaulay, 124 pages.
1979–2 *Toward an Economic Theory of Conflict Choice*, by Neil S. Komesar, 39 pages.
1979–3 *The Milwaukee Dispute Mapping Project: A Preliminary Report*, by Jack Ladinsky Stewart Macaulay, and Jill Anderson, 73 pages.
1979–4 *Justice in Many Rooms*, by Marc Galanter, 59 pages.
1979–5 *Thinking About Courts: Traditional Expectations and Contemporary Challenges or The Crisis of the Courts as a Social and Political Crisis*, by Austin Sarat and Ralph Cavanagh, 97 pages.

END