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# When Lawyer And Client Meet: Observations Of Interviewing And Counseling Behavior In The Consumer Bankruptcy Law Office

GARY NEUSTADTER\*

## I. INTRODUCTION

What happens when lawyer and client first meet? How do they talk, how do they listen, what do they say, and what do they do? The answers to these questions are generated, and then lost, in thousands of law offices daily. There is thus a treasure of information, but it is mostly hidden from our view by legal barriers that protect privacy and confidentiality and by other barriers, economic, psychological, and logistical, that inhibit or preclude third party observation of lawyer-client contact.<sup>1</sup> This Article reports an exploratory journey in search of that treasure, a journey into six law offices in the metropolitan areas of two states.<sup>2</sup>

In these offices I observed the initial consultation between

\*Professor of Law and Associate Dean, Santa Clara University School of Law. I extend my special appreciation to the lawyers and clients who made this study possible. I also thank Lynn Lopucki, Kandis Scott, and Carrie Menkel-Meadow for their comments on an earlier draft, William Felstiner and Ken Manaster for early encouragement, Patty Rauch-Neustadter for support, and Ann Perrin for research assistance.

1. Rules of professional responsibility require lawyers to preserve the confidences of the client except when the client consents to disclosure or in other limited circumstances. *E.g.*, MODEL RULES OF PROFESSIONAL CONDUCT AND CODE OF JUDICIAL CONDUCT Rule 1.6 (1984). With some exceptions, rules of evidence preclude compelled disclosure in adjudicative proceedings of confidential communications between lawyers and clients. *E.g.*, CAL. EVID. CODE § 954 (West Supp. 1986). That privilege against compelled disclosure may be lost if the communications are not maintained in confidence. *E.g.*, CAL. EVID. CODE § 952 (West Supp. 1986). These rules substantially impair the feasibility of third-party observation of consultations between lawyers and clients where the third party is not directly assisting in the performance of the lawyer's task. These legal barriers to observation, as well as economic, psychological, and logistical barriers to observation, are discussed further in Appendix B.

2. A condition to observation in each law office was that anonymity of lawyers and clients be preserved. Accordingly, the identities of lawyers and clients and the locations of law offices will not be revealed.

consumer bankruptcy lawyers and individuals seeking legal assistance in connection with personal financial distress.<sup>3</sup> The report of my observations introduces Lawyers A through F, each of whom devotes a significant portion of their time to consumer bankruptcy counseling. It describes the general structural characteristics and pertinent details of the consumer bankruptcy law practice of each lawyer. The report also identifies the differing attitudes of these lawyers about the alternative solutions to the financial distress of their consumer bankruptcy clients and reveals significant differences in the structure, content, and style of their interviewing and counseling behavior. This prosaic description is complemented by samples of dialogues between the lawyers and clients whom I observed. The dialogues are reproduced in Appendix A.

The data reported support at least three hypotheses which are developed in Section V of this Article. First, the characteristics of the specific social system in which the lawyer operates shape or influence the lawyer's interviewing and counseling behavior in significant ways. For example, the process of interviewing and counseling a financially distressed individual for a fee is in most cases subject to pressure, limiting the time which lawyer and client spend together because the client can't afford to pay much for the lawyer's services. This pressure may compel the participants to routinized, efficient behavior in the law office which includes a considerable amount of controlling behavior by the lawyer. Generalized models of appropriate lawyer behavior, such as the "client-centered model," a current popular law school teaching model largely grounded on principles of the humanistic therapies,<sup>4</sup> are

3. "Consumer bankruptcy lawyer" is a convenient term to use to describe lawyers who devote a substantial portion of their time to consulting with and representing individuals experiencing financial distress as a result of debts incurred for personal, family, or household purposes. A hypothetical financial profile of such an individual is presented in Section II of this Article. This study does not encompass the work of lawyers who represent businesses in financial trouble or individuals whose financial distress stems largely from business failure.

4. The client-centered approach to legal interviewing and counseling is explicitly presented in a popular law teaching book from which I borrow the phrase. D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977). *See also* T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1976). My description of the essential attributes of client-centered interviewing and counseling is offered in Section IV of this Article. For a useful general summary of the humanistic therapies, see R. BURNS, *COUNSELLING AND THERAPY: AN INTRODUCTORY SURVEY* 135-203 (1983).

incomplete absent consideration of these kinds of influences exerted by the relevant system.

Second, even within the constraints of the relevant system, lawyer behavior is diverse. This diversity is not now and perhaps never can be communicated adequately to the consumers of legal services. As a result, it is difficult, if not impossible, for a potential consumer of legal services to make an informed choice of a lawyer in accordance with his or her particular needs and desires. This is a serious indictment of our system of delivering legal services, rivaling the long-standing criticism that there are not sufficient affordable legal services available to large segments of the population.

Third, the nature of the interaction between lawyer and client in the initial interview may often influence client choice among alternatives in ways not explained by existing data concerning the phenomenon of consumer bankruptcy. Existing studies of consumer bankruptcy rely on data gathered from examination of bankruptcy filing statistics, bankruptcy court files, or questionnaires sent to or interviews with debtors and other persons associated with the bankruptcy process.<sup>5</sup> None derive data directly from observation of the interaction between lawyer and client in the law office, and hence we know little about the ways in which lawyers help transform an individual's perceived need for help into a solution framed by debtor-creditor law.<sup>6</sup> The data reported here add pieces to this puzzle.

These hypotheses reflect both the diversity of perspectives

5. See U.S. GEN. ACCOUNTING OFFICE, 95th CONG., 2d SESS., REPORT TO THE CHAIRMAN, HOUSE COMM. ON THE JUDICIARY, BANKRUPTCY REFORM ACT OF 1978—A BEFORE AND AFTER LOOK 8-10, 75-79 (1983); D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 6-8 (1971); Schuchman, *The Average Bankrupt: A Description and Analysis of 753 Personal Bankruptcy Filings in Nine States*, 88 COM. L.J. 288 (1983); Siporin, *Bankrupt Debtors and Their Families*, SOC. WORK, July 1967 at 51; Woodward, Jr. & Woodward, *Exemptions as an Incentive to Voluntary Bankruptcy: An Empirical Study*, 57 AM. BANKR. L.J. 53, 60-62 (1983); 1 CREDIT RESEARCH CENTER, KRANNERT GRADUATE SCHOOL OF MANAGEMENT, PURDUE UNIVERSITY, CONSUMERS' RIGHT TO BANKRUPTCY: ORIGINS AND EFFECTS 17 (Monograph No. 23, 1982). Much debate about consumer bankruptcy policy proceeds from the use and criticism of this type of data. See, e.g., Warren, *Reducing Bankruptcy Protection for Consumers: A Response*, 72 GEO. L.J. 1333 (1984).

6. I borrow the "transformation" perspective and vocabulary from its use in literature describing the place of lawyers in the evolution of disputes. See Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980); Mather & Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775 (1980).

from which lawyer-client communication can be viewed and the inextricable relationship between the context, the content, and the process of interviewing and counseling. Further, the data in support of these hypotheses reveal patterns of behavior which likely transcend the legal specialty that served as the context for this study. Accordingly, this data should be interesting or useful not only to those specially interested in consumer bankruptcy policy, law, or counseling, but also to the broader audience of those interested in the nature and influences of communication between lawyer and client.<sup>7</sup>

To fully confirm these hypotheses would require a good deal more investigation. The necessary data is elusive, however, because looking into the law office is difficult business.<sup>8</sup> This study was only moderately successful in that pursuit, even though the goals were very modest. Appendix B addresses this problem by explaining the methodology of the study, but a few major methodological concerns merit attention here.

Many of the lawyers contacted declined to participate in the study. Where a lawyer agreed to participate, observation was frequently frustrated by the incompatibility of schedules, by the failure of clients to keep scheduled appointments, or by the refusal of a client to consent to observations. Accordingly, the sample of lawyers observed and the sample of observations for each lawyer are small in comparison to typical social science research. My observations were not replicated by others and were not recorded through means of validated observational instruments.<sup>9</sup> Moreover,

7. Stewart Macaulay has recently discussed three reasons to be interested in the study of interaction between lawyers and clients. Macaulay, *Lawyer-Client Interaction: Who Cares and How Do We Find Out What We Want To Know?*, Working Paper 1984-4, Disputes Processing Research Program, University of Wisconsin-Madison Law School (1984). His first is "the novelist's concern:" "The transaction [between lawyer and client] suggests something about people, social roles and values in society as it now exists. The interest is in . . . tacit assumptions about proper and expected behavior." *Id.* at 16. His second reason is "the consumer-protection concern:" "Do clients get value for the money they pay to see lawyers?" *Id.* at 19. His third reason is "a concern with larger social theory." He inquires whether lawyer-client interaction can be viewed as generally promoting integration and social harmony or rather as primarily serving to protect privilege and power. *Id.* at 21-31. My study, initiated before Macaulay published his work, coincidentally responds somewhat to what he terms the novelist's and the consumer-protection concerns.

8. Some of these difficulties are nicely described by Macaulay. *Id.* at 31-39.

9. Methods of observation here were akin to those of ethnographers rather than to those employed in the quantitative studies of many sociologists or other social scientists. Measured by traditional standards of quantitative social science research, the findings of

I chose to avoid video or audio recording of interviews. While it could have more fully assured complete and accurate recording of information and could have served as a more respectable research archive, such recording would have required more resources than were available for the study and would have greatly complicated the logistics of the observation. More importantly, recording could have increased the intrusiveness of the observation, would have decreased the willingness of some of the participants to be observed, and might well have affected the genuineness, candor and spontaneity of the participants.<sup>10</sup>

There is, finally, one particular source of difficulty in reporting of which the reader should be aware. This study was made possible only by the altruism and openness of a handful of lawyers. The difficulties of observation were considerably eased by their exceptional courtesy. It is therefore with reservation and concern that I express criticism of some of what I observed. I do not wish

this study may fairly be criticized as neither reliable nor valid. Reliability refers to the likelihood that the findings accurately depict the observed behavior. Replication of the findings by others is one method of establishing the reliability of the data. Validity refers to proof in some form that the behavior described is sufficiently linked to the hypothesis being tested. See D. NACHMIAS & C. NACHMIAS, *RESEARCH METHODS IN THE SOCIAL SCIENCES* 59-69 (1976). Appendix B offers both personal and practical defenses of the methodology chosen for this study.

I draw comfort from Stewart Macaulay's conclusion about studies of lawyer-client interaction that "[w]hile a perfect unflawed study probably is impossible, . . . [w]e must . . . do the best we can with the information we can gain, and be modest in our claims of scientific discovery." Macaulay, *supra* note 7, at 40.

10. The mere fact of my presence as an observer may alone have altered the behavior of the lawyer and client in some respects, but probably less so than if the behavior had also been recorded by mechanical device. The potential effects of the presence of an observer on the behavior of those being observed is considered in R. ROSENTHAL, *EXPERIMENTER EFFECTS IN BEHAVIORAL RESEARCH* (1966). He comments: "We don't know how pervasive are unintended effects of the experimenter on his research. There may be some experiments which are unaffected." *Id.* at 306.

William Felstiner has supplied me with a copy of a draft proposal to the National Science Foundation, outlining a potential study of lawyer-client interaction in divorce cases, in which this problem of reactivity is addressed. He and his associates surmise that reactivity will be minimal for three reasons: (1) much lawyer behavior in response to the stimuli received from clients is so ingrained that the lawyer would have difficulty in responding in any way other than his or her norm; (2) much lawyer behavior that the observer might consider undesirable might not be thought of as such by the lawyer, and hence the lawyer would make no effort to conceal or alter that behavior; (3) behavior reflects personalities, which for most people are stable phenomena. The proposal cites J. HENRY, *PATHWAYS TO MADNESS* 457-60 (1965) (studies of family life) and R. COLES, *CHILDREN OF CRISIS* 30 (1964) (desegregation study) in support of these conclusions. My intuitive sense from conducting this study is that these conclusions are correct.

to repay the generous contribution of these lawyers with insult and insensitivity, and I hope not to discourage these or other lawyers from participation in other studies that explore the largely private world of lawyer and client for our mutual benefit. This concern has led me to censor the reporting of some information which, though interesting and revealing, is peripheral to the central focus of the study. This concern has also motivated my scrupulous attention to preserving the anonymity of each of the participants.

These are important reasons to be cautious in evaluating the information reported here. Yet I have strived to observe carefully and to report faithfully. To the extent of my success in that effort, the descriptions of lawyer-client contact that follow offer a meaningful picture of interviewing and counseling behavior in the metropolitan<sup>11</sup> consumer bankruptcy law office.

To begin, one needs to understand the legal context in which this study was set. Accordingly, I first undertake to paint a picture of the legal and practical alternatives available to financially distressed individuals. Readers schooled in those alternatives may wish to proceed directly to the succeeding portions of the Article in which I first report and then analyze the data gathered in this study.

## II. A SURVEY OF SOLUTIONS TO PERSONAL FINANCIAL DISTRESS

An individual consumer debtor can abate or eliminate financial distress in several ways, some obvious and others understood only by those educated in debtors' legal rights. To fully appreciate what happens in the consumer bankruptcy law offices observed in this study, one needs to understand the full range of alternatives which, at least theoretically, could be the subject of the lawyer-client dialogue.<sup>12</sup> The alternatives can be sufficiently described

11. In each of the metropolitan areas where the lawyers of this study work, the population exceeds 500,000. One study concludes that the size and nature of the community in which the lawyer practices can significantly affect the nature of a lawyer's practice. Landon, *Lawyers and Localities: The Interaction of Community Context and Professionalism*, 1982 AM. B. FOUND. RESEARCH J. 459 (1982). It is conceivable, therefore, that consumer bankruptcy practice by lawyers in rural areas may differ considerably from that described here. Practical difficulties in the gathering of data, described more fully in Appendix B, dissuaded me from my original goal of including lawyers in rural settings among those observed.

12. This Section of the Article is addressed primarily to those readers unfamiliar with the basic alternatives for relief from financial distress that are available to consumer debt-

here through a somewhat simplified illustration.<sup>13</sup>

Consider the hypothetical circumstances of Jenny Martin. Jenny is forty-two. She lives in a two bedroom rented home with her daughter Amy. Jenny's husband died unexpectedly several months ago and Jenny, still grieving, must now attempt to make ends meet on her own. Her husband died without leaving any life insurance or any liquid assets other than a small joint savings account which he and Jenny had always earmarked for their daughter's college education. Jenny works at a telephone company and earns a net income of \$1,200 per month. She has worked at this job for five years and developed there a network of close friends. Jenny's daughter attends a private parochial school because Jenny and her husband were convinced that it offered an education superior to that available at neighborhood public schools. Amy, age fourteen, has been taking piano lessons for several years and has become quite an accomplished pianist. She aspires to a career in music.

Jenny's financial situation is desperate. Her necessary monthly living expenses, listed here, consume all of her available monthly income.<sup>14</sup>

Rent	\$600	Clothing	\$40
Food	\$300	Tuition	\$50
Gasoline	\$100	Piano Lessons	\$25
Utilities	\$75	Church	\$10

ors. Some references are less technical than in standard law review fare. Lawyers, scholars, and others familiar with this area of law may wish to proceed directly to Section III of this Article.

13. This illustration is created simply to help illuminate alternatives, not to suggest a typical profile of individuals in financial distress. For such a profile, consult D. STANLEY & M. GIRTH, *supra* note 5, at 41-69; Schuchman, *supra* note 5.

14. Of the amounts listed, one might quarrel with the characterization of private school tuition, piano lessons, and contributions to church as "necessary." They might not be considered necessary in relevant legal contexts. For example, were Jenny seeking to resist a creditor's garnishment of her wages under California law on the grounds that all of her wages were necessary for the support of herself and Amy, a court might conclude that such expenses are unnecessary. See *J.J. MacIntyre Co. v. Duren*, 118 Cal. App. 3d Supp. 16, 18-19, 173 Cal. Rptr. 715, 716 (1981); *Perfection Paint Prods. v. Johnson*, 164 Cal. App. 2d 739, 741, 330 P.2d 829, 831 (1958); CAL. CIV. PROC. CODE § 706.051 (West Supp. 1986). However, Jenny's values relating to education and religion may make these expenses seem necessary to her. The lawyer can try to respond to this perception in seeking solutions to her financial difficulties.



In addition, she is contractually obligated to pay some long-term installment debt. She owes a credit union \$2,400, a finance company \$750, and a bank \$500. The credit union financed the acquisition of the family automobile, now worth roughly \$4,000. The loan from the credit union is secured by the automobile.<sup>15</sup> The finance company lent Jenny and her husband some money to help finance a long overdue vacation last year. This loan is secured by all of the family household goods<sup>16</sup> except the piano, which was recently given to the family by Jenny's grandmother. The bank extended credit to Jenny and her husband by means of a credit card. The outstanding balance represents charges incurred during the past year. Jenny also owes an orthodontist \$3,000 for services rendered for Amy, and she owes her sister \$1,500 for an emergency loan which helped pay funeral costs for Jenny's husband. While Jenny's sister has insisted that Jenny need not pay back the money for "a long time," Jenny feels obliged to repay the loan as soon as possible because her sister has little money to spare.

Following her husband's death, Jenny was able to maintain payments on the automobile loan by drawing from the savings account. Should she default on this loan payment, the credit union would likely repossess the automobile within a few months.<sup>17</sup> She has been unable to make any payments to the orthodontist, the finance company, or the bank. While representatives of each creditor have been sympathetic and patient with Jenny for a few months, some are now firmly warning her that nonpayment will force them to initiate legal proceedings to collect the debts, and

15. When we say that the loan is secured by the automobile, that means, among other things, that the lender can repossess the automobile if Jenny fails to make her monthly payments on the loan. The lender can then sell the automobile to generate funds to pay off some or all of the remaining portion of the debt. If the proceeds of the sale are insufficient to entirely pay the debt, the lender can seek to recover the balance (known as a "deficiency") from the debtor. *See* U.C.C. §§ 9-501, 9-503, 9-504 (1977).

16. Because the debt is secured, the lender has a right to repossess the goods upon default in payment, sell them to satisfy some or all of the debt, and seek to recover any deficiency from the debtor. *See supra* note 15. The Federal Trade Commission recently promulgated a rule that severely restricts the kinds of household goods that can serve as security for this kind of loan. 16 C.F.R. § 444.2(a)(4) (1986). The hypothetical example is still current, however, because the rule does not affect such secured loans extended prior to the effective date of the rule. Credit Practices Rule: Statement of Basis and Purpose and Regulatory Analysis, 49 Fed. Reg. 7740, 7789 (1984).

17. *See supra* note 15.

the finance company has warned that they might repossess her household goods.<sup>18</sup>

The family's assets are minimal. There is the car, worth approximately \$4,000, though it is encumbered by a lien securing a \$2,400 debt.<sup>19</sup> The savings account has a balance of \$2,500. The piano is worth about \$3,000. Wearing apparel for Jenny and Amy would probably fetch no more than a few hundred dollars at a neighborhood garage sale or thrift store. The household furniture, appliances, and personal affects, encumbered by a lien securing a \$750 debt, would bring no more than \$2,000 by this type of sale. The only valuable piece of jewelry that Jenny owns is her wedding ring, worth perhaps \$500.

What is Jenny to do? If reasonably well educated and resourceful, Jenny might consider a number of options. If distraught, or if less well educated and resourceful, she may not consider any. An educated and experienced counselor could help Jenny consider each of the following potential alternatives:

1) *Increase family income or reduce monthly living expenses to generate funds to repay debts.* Jenny might increase the family income by requesting a promotion or a raise, by considering more lucrative employment elsewhere, by working a second job, or by asking Amy to earn money babysitting. She might qualify for government assistance.<sup>20</sup> She might even increase her net take home pay by claiming additional exemptions for purposes of income tax withholding.<sup>21</sup> Jenny might reduce expenses by moving to less ex-

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18. Such threats are frequently empty because the minimal resale value of most household goods makes the prospect of repossession and sale unattractive to the finance company. Nonetheless, the threat of repossession may be powerful because the cost to Jenny of replacing the furniture would be substantial and because Jenny probably doesn't know that the finance company really doesn't want to repossess the furniture. The conclusion that threats of this sort are unfair underlies the recent Federal Trade Commission rule restricting security interests in household goods for these kinds of loans. *See Credit Practices Rule: Statement of Basis and Purpose and Regulatory Analysis, supra* note 16, at 7762-65.

19. This is simply another way of saying that the credit union's loan is secured by the automobile. *See supra* note 15.

20. Jenny and Amy would be entitled to social security benefits following the death of Jenny's husband. 20 C.F.R. §§ 404.335, 404.350 (1985). They would probably not qualify for Aid to Families with Dependent Children or for food stamps because of the value of their assets and the amount of Jenny's income. 45 C.F.R. § 233.20(a)(3) (1985); 7 C.F.R. § 273 (1985).

21. An employee can claim exemptions in addition to those for self and dependents. With certain exceptions, a wage earner is entitled to at least one additional exemption. *Treas. Reg. § 31.3402(f)(1)-1(e)* (1984). An employee can also claim additional exemptions

pensive housing, by shopping more selectively for food and planning less expensive meals, by using public transportation more frequently, by transferring Amy to a public school, by discontinuing Amy's piano lessons, or by ceasing contributions to her church.

These changes in the life of the family could assist the resolution of Jenny's financial difficulties. Yet many of these life changes, either singly or collectively, could significantly and adversely affect the physical or emotional health of Jenny or Amy. By changing her job or residence, Jenny could lose precious contact with close friends at a time in her life when that contact may be especially important.<sup>22</sup> Taking Amy out of private school or ceasing her piano lessons could undercut important educational goals. Ceasing contributions to the church might burden Jenny with additional remorse. These are not necessarily reasons to avoid consideration of these possibilities, but the impact of these changes on Jenny and Amy must also be considered in evaluating alternatives.

2) *Liquidating assets.* Jenny could sell the piano and use the proceeds to pay the debt to the orthodontist. She could sell her car, the bank retaining \$2,400 of the proceeds to pay the loan and Jenny using the balance to purchase a used car. She could use her savings to almost fully repay her other debts—to the finance company, to the bank, and to her sister. Alternatively, she might take only one of these steps while also increasing income or decreasing expenses by the means described above to make long-term repayment of remaining creditors feasible.

Any of these actions to liquidate assets are also likely to affect Jenny or Amy seriously. Selling and buying a car can be a difficult chore, especially if attended by the anxiety of parting with a reliable late model car in exchange for a possibly unreliable used car that may require expensive repair. Selling the piano, a relative's treasured gift to Amy, or spending savings earmarked by Jenny and her late husband for Amy's education, could cause emotional

based on certain estimated allowable deductions and tax credits. Treas. Reg. § 31.3402(m)-1 (1984).

22. Much research has been undertaken to determine the extent to which stressful life events affect health and the extent to which social supports act as buffers against the adverse effects of such stress. See, e.g., Cohen & Hoberman, *Positive Events and Social Supports as Buffers of Life Change Stress*, 13 J. APPLIED SOC. PSYCHOLOGY 99 (1983); Thoits, *Conceptual, Methodological, and Theoretical Problems in Studying Social Support as a Buffer Against Life Stress*, 23 J. HEALTH & SOC. BEHAV. 145 (1982).

trauma. Thus, while these alternatives offer substantial opportunities for resolving the financial crisis, they carry potentially significant psychological costs to the family.

3) *Additional borrowing.* Borrowing funds to retire existing debt is probably not possible for Jenny unless she can borrow from relatives or close friends who might be willing to wait indefinitely for payment. Her income is not sufficient to enable repayment of a new loan large enough to consolidate and retire her existing debt, and she does not own property sufficient to secure any such loan. Such borrowing may be feasible for some debtors in financial distress, but the high interest rates usually charged for these loans make this alternative costly.

4) *Negotiating extensions or compositions with one or more creditors.* Jenny is free to approach each of her creditors with a proposal that repayment of the debt be extended over a longer period of time than originally agreed ("extension") or that the creditor accept, either immediately or over a period of time, less than full repayment in satisfaction of the debt ("composition"). She might, for example, persuade the credit union to refinance the balance of the automobile loan over three years, substantially reducing her monthly payment; the credit union might accede in view of her circumstances and because the collateral for the loan, the automobile, is worth considerably more than the remaining amount of the debt. She might also propose that the orthodontist accept \$1,500 (drawn from her savings account) in full satisfaction of the debt owed; the orthodontist might accede in view of Jenny's circumstances and the personal relationship that may have evolved between them. Jenny might also work out an extended payment plan with the finance company or the bank if she expects that she could afford reduced payments from increases in income or decreases in expenses.

Should Jenny be willing but unable to accomplish these objectives herself, either because she is not sufficiently skilled in financial matters or because creditors are unwilling to accede, she could hire a representative, such as a lawyer, to seek these objectives on her behalf. However, contacting and negotiating with individual creditors would be time consuming and thus expensive if performed by a hired representative. Because Jenny could ill afford this expense, a lawyer skilled in debtor representation would most likely propose that the objectives be sought through a chap-

ter 13 proceeding under the federal Bankruptcy Code.<sup>23</sup>

5) *Resisting and defending against collection efforts of her creditors.* While seeking ways to repay her debts, Jenny might refuse to pay some or all of her creditors for an indefinite time and resist their efforts to collect the debts. Their efforts, at least initially, are likely to consist of persistent letters and phone calls requesting payment or arrangements for payment. If she desires to be free from these contacts, she can demand that her creditors cease such collection efforts.<sup>24</sup>

Some of her creditors would soon be likely to take other action. The credit union could demand surrender of the automobile and repossess it if the demand were not honored.<sup>25</sup> Because of this special leverage and given a need for transportation, Jenny might continue to make payments on the automobile loan. The finance company could threaten repossession of Jenny's household goods. This threat may persuade her to continue payments on the loan unless she understands that finance companies are generally loathe to make good this threat.<sup>26</sup> Both the orthodontist, probably

23. 11 U.S.C. §§ 1301-1330 (1982 & Supp. III 1985). *See infra* notes 31-39 and accompanying text. In 1961, well before amendments to federal bankruptcy law liberalized chapter 13 relief, one well known bankruptcy lawyer urged consideration of extensions and compositions in consumer cases even though those alternatives would take the lawyer more time without the prospect of additional remuneration. He exhorted: "Nevertheless, counsel cannot overlook practical alternatives merely because they are less profitable to him." Treister, *Some Thoughts About Filing Bankruptcies*, 36 L.A. B. BULL. 304, 305 (1961). That exhortation flies in the face of systemic pressures on consumer bankruptcy lawyers that are discussed later in the text. *See infra* text accompanying notes 119-34. An individual may structure extensions or compositions through other institutional mechanisms that exist in some states. These mechanisms include "debt pooling" and wage-earner trusteeships. *See* D. STANLEY & M. GIRTH, *supra* note 5, at 70-73.

24. Federal law would prohibit all but limited additional contact by collection agencies if Jenny notifies the collection agency in writing that she refuses to pay the debt or that she wishes the collection agency to cease further communication with her. Fair Debt Collection Practices Act, 15 U.S.C. § 1692c(c) (1982). Communications in violation of this prohibition would subject the offender to potential civil liability. 15 U.S.C. § 1692(k) (1982).

State law may impose similar restrictions. In California, for example, all creditors (not only collection agencies) would be required to limit communication with Jenny were she to retain a lawyer to field subsequent inquiries from creditors. Jenny would lose that protection were the lawyer to fail to respond to such inquiries. CAL. CIV. CODE § 1788.14(c) (West 1985). Given systemic constraints on lawyer behavior discussed later in the text, *see infra* text accompanying notes 119-34, this avenue to freedom from creditor contact may be illusory; if lawyers will not provide this service without compensation, can Jenny afford to pay the lawyer to contact the creditor(s) and to field their subsequent inquiries?

25. *See supra* note 15.

26. *See supra* note 18.

through a collection agency, and the bank could file suit and quickly thereafter obtain default judgments.<sup>27</sup>

If unaware of the nature and value of Jenny's assets, each of these creditors could summon Jenny to court to disclose that information.<sup>28</sup> Learning of her employment, her savings account, and the piano, they could attempt to force satisfaction of the judgment, by garnishing Jenny's wages or savings account, or by forcing the sale of the piano.<sup>29</sup> Jenny might be able to forestall or even prevent these events by claiming that some or all of this property is exempt from forced disposition.<sup>30</sup> If it turns out that applicable law does not exempt this property, Jenny may then

27. A plaintiff in a lawsuit can obtain a default judgment when a defendant has failed to respond to the complaint within stated time limits. *E.g.*, CAL. CIV. PROC. CODE § 585 (West Supp. 1986).

Jenny would have no basis for response if she owed the debt. Conceivably, however, she might have some defense to the creditor's claim. For example, were the credit union to fail to sell her automobile following repossession in the manner required by law, the credit union might be barred from claiming any deficiency. *E.g.*, *Atlas Thrift Co. v. Horan*, 27 Cal. App. 3d 999, 1009, 104 Cal. Rptr. 315, 321 (1972). In response to a lawsuit seeking a judgment against Jenny for the amount of the deficiency, she could assert the credit union's defalcation as a defense.

She might also have some basis for a counter-claim against a creditor, such as for violation of laws prohibiting certain kinds of collection conduct. *See supra* note 24.

If the amount of a debt to which a consumer has a defense, or the amount of a counter-claim that a consumer may assert against a creditor, is large in proportion to the consumer's total debt burden, assertion (and subsequent negotiation or litigation) of the defense or claim may be the solution to the consumer's financial difficulties; freed of one large debt, or compensated for a counter-claim, the individual may be able to pay remaining debts. Accordingly, consideration of the merits of each creditor's claim to payment and of a debtor's potential counter-claims is an important aspect of consumer insolvency counseling. This point is more fully developed in Neustadter, *Consumer Insolvency Counseling for Californians in the 1980's*, 19 SANTA CLARA L. REV. 817, 826-28 (1979). However, careful attention by consumer bankruptcy lawyers to potential defenses or counter-claims is unlikely because of systemic constraints on lawyer behavior. *See infra* text accompanying notes 119-34. Such attention is also unlikely because of other impediments to a lawyer's facility with or use of consumer protection law. *See Macaulay, infra* note 67.

28. *E.g.*, CAL. CIV. PROC. CODE § 708.110 (West Supp. 1986).

29. For an understanding of the context in which creditors pursue such remedies, the reader may wish to consider the analysis of the consumer credit collection system offered in Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047.

30. The law of each state preserves to individuals certain property that cannot be reached by forced disposition at the behest of general unsecured creditors. In the absence of a bankruptcy filing, this is a matter of state law. Accordingly, the types and amounts of property exempted vary from state to state. For a useful discussion of the nature and purposes of such state law, see the UNIF. EXEMPTIONS ACT, 13 U.L.A. 365 (1980). Federal law restricts the amount of wages that most creditors can garnish. 15 U.S.C. §§ 1671-1677 (1982).

wish to reevaluate her alternatives, but she will at least have delayed the need for a decision by the several months it will have taken a creditor to reach this point. If applicable law does exempt her property from forced disposition, the creditor has no recourse other than to wait until Jenny earns income or acquires assets that are not exempt. Under these circumstances, Jenny would be considered "judgment proof." The creditor, if told this in advance by Jenny or her representative, might forgo the effort to force disposition of the property. If the creditor does not believe that Jenny is judgment proof, however, it might initiate proceedings to force disposition of property and thus require Jenny to invest time, energy and expense to assert her rights to the protection that the law provides.

Forestalling or resisting collection efforts requires energy, motivation, and resilience, qualities that may have been exhausted in Jenny's unwelcome journey to her existing financial crisis. Accordingly, this alternative, though potentially effective, may well be unattractive.

6) *Repayment plans sanctioned and enforced under federal bankruptcy law (chapter 13)*. Federal bankruptcy law affords shelter to individuals with regular and stable income who wish to repay creditors all or a portion of amounts owed over a period of as long as five years. This alternative is commonly referred to as chapter 13.<sup>31</sup> Subject to some constraints, a debtor can obtain court approval of a plan of repayment notwithstanding the desire of creditors for fuller or prompter payment.<sup>32</sup> From the moment a debtor files a petition for such relief with a federal bankruptcy court, and thereafter for the duration of an approved plan, most creditors are barred from taking any action to collect debts owed by the debtor.<sup>33</sup> Chapter 13 thus affords the debtor an opportunity to accomplish the goals of extending the time or reducing the amount of payment, even without cooperation from creditors.

Moreover, chapter 13 can often be a more efficient and inexpensive mechanism for accomplishing these objectives than negotiating with individual creditors, even though creditors might cooperate if asked. Negotiating with individual creditors and

31. Provisions of chapter 13 are found at 11 U.S.C. §§ 1301-1330 (1982 & Supp. III 1985).

32. 11 U.S.C. § 1325 (1982 & Supp. III 1985).

33. 11 U.S.C. § 362 (1982 & Supp. III 1985).

preparing even informal contracts for modified payment schedules can take a considerable amount of time. Because there is no assurance at the outset of such negotiations that enough creditors will accede to the proposed modifications, time or money (such as an hourly fee paid to a lawyer) invested in that effort is a gamble. Chapter 13 avoids the gamble. Consumer bankruptcy lawyers who offer chapter 13 representation are prepared to process a chapter 13 proceeding in a routine manner and for a standard fee.<sup>34</sup> They are thus likely to recommend chapter 13 without even mentioning the possibility of negotiations.<sup>35</sup>

A chapter 13 plan would not be feasible for Jenny without an increased income or a willingness to reallocate her discretionary income.<sup>36</sup> Suppose, however, that she could demonstrate an ability to commit \$75 each month to a repayment plan by either selling her car and purchasing an inexpensive replacement or by drawing funds from her savings account to pay the credit union for the automobile. Under these circumstances, Jenny could propose, and would likely obtain, court approval of a three-year plan to repay her creditors.<sup>37</sup> She would pay \$75 per month to a bankruptcy trustee (\$2,700 over three years).<sup>38</sup> The trustee would apply these funds to full payment of Jenny's remaining lawyer's fees, to payment of the trustee's fees, and the balance to the orthodontist, the finance company, the bank, and Jenny's sister in proportion to the amounts of their respective claims.

Should Jenny manage to make these payments for the full three-year period of the plan, she would then be entitled to a discharge of the remaining balances owed to each creditor at the end of this time.<sup>39</sup> She would have paid these creditors a significant portion of their claims, the most she could afford under the circumstances, and would be excused from further payment after the

34. See Section V of this Article.

35. In the interviews observed in this study, there was not a single instance in which a lawyer suggested the possibility that the lawyer negotiate with creditors on behalf of the client for modifications in the amount or timing of payments.

36. The bankruptcy court, at least in theory, cannot approve a plan of repayment unless it is feasible (i.e., the debtor can reasonably expect to be able to pay from anticipated income what the plan requires over the period of the plan). 11 U.S.C. § 1325(a)(6) (1982).

37. A three-year payment period is the normal maximum permitted by law, but the bankruptcy court is permitted to authorize a plan extending for as many as five years. 11 U.S.C. § 1322(c) (1982).

38. 11 U.S.C. §§ 1322(a)(1), 1326(a)(2) (1982 & Supp. III 1985).

39. 11 U.S.C. § 1328(a) (1982).



three years. She would remain free to pay the remaining balances owed if she desired but would not be obligated to do so.

7) *Discharge of debt under federal bankruptcy law (chapter 7).*

Jenny has a right to discharge her debts pursuant to provisions of federal law commonly referred to as "straight" or "voluntary" bankruptcy.<sup>40</sup> A discharge of debts frees her of responsibility for repayment and permanently prevents creditors whose debts are discharged from taking any action whatsoever, formal or informal, to attempt to collect the amounts owing and unpaid.<sup>41</sup>

As price for this discharge, Jenny would be required to surrender a portion of her assets to a bankruptcy trustee who, in turn, would liquidate those assets and distribute the proceeds to Jenny's creditors.<sup>42</sup> However, the bankruptcy law permits Jenny to retain certain property, known as exempt property, to preserve for her the necessities of life and to facilitate her fresh start.<sup>43</sup> The nature and amount of property that Jenny would be allowed to retain would depend on the law of the state in which her bankruptcy petition is filed.<sup>44</sup> With appropriate pre-bankruptcy counseling, Jenny might be permitted to retain a substantial portion, if not all, of her assets. Because this is the case for many debtors, it is the rare consumer bankruptcy in which the trustee distributes significant dividends to unsecured creditors.

Some secured creditors fare better. In Jenny's situation, the credit union will be entitled to repossess the car unless Jenny makes arrangements suitable to the credit union for repayment of the debt.<sup>45</sup> Following repossession, the credit union could sell the automobile and apply the proceeds of the sale to the debt.<sup>46</sup> Many debtors who file bankruptcy do so at a time when their automo-

40. Provisions of chapter 7 of the Bankruptcy Code permitting discharge of debt are found at 11 U.S.C. §§ 701-766 (1982 & Supp. III 1985).

41. 11 U.S.C. § 524(a) (1982 & Supp. III 1985). Some debts, such as certain income taxes, spousal support, or some student loans, cannot be discharged. 11 U.S.C. § 523 (1982 & Supp. III 1985). All of Jenny's debts, however, would be dischargeable. 11 U.S.C. § 727(b) (1982).

42. 11 U.S.C. §§ 521(4), 541, 704(1), 726 (1982 & Supp. III 1985).

43. 11 U.S.C. § 522 (1982 & Supp. III 1985).

44. 11 U.S.C. § 522(b) (1982).

45. *See* 11 U.S.C. § 521(2) (1982). In contrast, the finance company would probably be unable to enforce its lien on Jenny's household goods. The bankruptcy law allows Jenny to avoid such a lien to the extent that it would preclude her unfettered enjoyment of exempt property. 11 U.S.C. § 522(f)(2) (1982).

46. *See supra* note 15.

bile is similarly encumbered. In many such cases, the debtor and the creditor reach a mutually acceptable agreement for repayment and undertake the appropriate steps to make this reaffirmation of the debt enforceable notwithstanding the debtor's bankruptcy discharge.<sup>47</sup> Free of other debt, debtors will often be able to maintain these payments and thus retain their automobiles.

A chapter 7 solution to her financial difficulties may be attractive to Jenny for a variety of reasons. It offers her prompt relief with minimum effort. It allows her to avoid the difficult and probably burdensome process of repayment of debt over several years. It eliminates most of her debt without requiring her to invoke non-bankruptcy legal rights to resist or forestall collection. It permits her to retain most, if not all, of the assets that are important to her and her daughter. It would minimize necessary changes in lifestyle at a time when stability is probably very important. It would put a part of the past behind her and allow a fresh financial start. There are disadvantages as well—she may feel remorse for avoiding responsibility, and her ability to obtain credit in the future may be impaired—but the attractions of this solution may well outweigh them.

This completes the range of rational alternatives available to Jenny in her search for solutions to her financial crisis. If especially self-reliant and reasonably capable, she could discover, evaluate, and choose among these alternatives entirely on her own. Books to assist her in understanding and filing a chapter 7 bankruptcy or a chapter 13 repayment plan are well-written, inexpensive, and readily available.<sup>48</sup> Instead, or in addition, she might turn to others for help: to her relatives, friends, or employer, or to a local credit counseling organization. She also might turn to a

47. The debtor can keep the automobile free of the lien by paying the creditor the value of the automobile or the amount of the debt, whichever is less. 11 U.S.C. §§ 506(a), 722 (1982). For many debtors this lump-sum payment may not be possible. Alternatively, the debtor and creditor may negotiate a reaffirmation of the debt calling for payments over an extended period of time. *See* 11 U.S.C. § 524(c) (Supp. III 1985). Under such an agreement, the creditor will normally retain the lien on the automobile in order that it may repossess if the debtor is later unable to maintain payments.

48. Two excellent self-help books by Janice Kosel offer considerably more education about insolvency alternatives than was routinely offered by several of the lawyers observed in this study. J. KOSEL, *BANKRUPTCY DO IT YOURSELF* 21-29 (1984) [hereinafter *BANKRUPTCY*]; J. KOSEL, *CHAPTER 13, THE FEDERAL PLAN TO REPAY YOUR DEBTS* 34-41 (1982) [hereinafter *CHAPTER 13*]. The same is true of an earlier, now dated self-help book. A. MILBERG & H. SHAIN, *HOW TO DO YOUR OWN BANKRUPTCY* 98-104 (1978).

lawyer.<sup>49</sup> If she did, what might she expect to encounter?

### III. STUDIES OF LAWYER-CLIENT INTERACTION

Only a handful of published accounts describe observations of the dialogue between lawyer and client,<sup>50</sup> and there are no published accounts that describe observations of interviews between consumer bankruptcy lawyers in private practice and their clients.

Research on lawyer-client relationships is long overdue. . . . [W]hile there have been hundreds of studies of doctor-patient communication, including many which relied mainly on observation, there are hardly any parallel studies of lawyer-client communication . . . . Only about fifteen years ago did social scientists begin to investigate what lawyers do . . . . However, none of these studies emphasized direct observation of lawyers' handling of clients as the main topic and method of study.<sup>51</sup>

Research of this nature is scant primarily because of the difficulties of access to lawyer-client interviews. One interdisciplinary team of researchers proposed to observe and record conversations between private lawyers and clients from the time of the initial interview until the time of final disposition of the client's matter as part of a broader study of the role of language in the conceptualization and resolution of disputes.<sup>52</sup> Their study failed because too few lawyers accepted the invitation to participate and because arrangements for observation of those lawyers who were willing to participate simply could not be reliably made or implemented. Their report describes their effort and the obstacles that they encountered and comments on the reasons for failure. A subsequent team of researchers has been more successful, having gathered data from observations of interactions between clients and private divorce lawyers.<sup>53</sup>

The limited research to date offers contrasting pictures of the

49. There is only sketchy data informing us when and how many people turn to lawyers for assistance with financial difficulties. The data suggest that a substantial number of people do not turn to lawyers for such assistance. See B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* 134-36 (1977); D. STANLEY & M. GIRTH, *supra* note 5, at 53.

50. See *infra* notes 51, 53-55, 58, 63 and accompanying text.

51. Danet, Hoffman & Kermish, *Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure*, 14 *LAW & SOC'Y REV.* 905, 906 (1980).

52. *Id.* at 907.

53. Felstiner & Sarat, *Law and Strategy in the Divorce Lawyer's Office*, 20 *LAW & SOC'Y REV.* 93 (1986).

behavior of lawyers. Sociologist Maureen Cain, observing lawyer-client interactions in four law firms in England, found a common behavior pattern in lawyers to translate a client's stated objectives into appropriate legal discourse.<sup>54</sup> Her work did not detail the specific lawyer or client behavior underlying that conclusion. Nevertheless, from Cain's observations, we might imagine a hypothetical consumer client beginning an interaction with a lawyer by informing the lawyer of his desire to discharge his debts and thereafter expecting the lawyer to seek whatever information and perform whatever tasks necessary to accomplish that end.

In contrast, Carl Hosticka and Gary Bellow, in separate reports,<sup>55</sup> have described lawyer behavior with clients in legal aid offices as controlling of both forum and topic,<sup>56</sup> permitting the lawyer to define the client's problem in a manner suitable to the lawyer's preconceptions and established routine.

Problems presented by clients in legal services offices . . . are dealt with routinely and perfunctorily . . . . If the case is considered appropriate for a lawyer, it is typically "slotted" into a standardized pattern . . . Relationships with clients are dominated by . . . routines. The definition of the client's problems and the "best" available solutions are not mutually explored and elaborated; they are imposed by the lawyer's view of the situation and what is possible within it. In most discussions between lawyer and client, the lawyer does almost all the talking, gives little opportunity for the client to express feelings or concerns, and consistently controls the length, topics and character of the conversation. Insofar as the client must elaborate the facts,

54. Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, 7 INT'L J. SOC. LAW 331, 335, 339-42 (1979).

55. Hosticka, *We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 559 (1979) [hereinafter *Lawyer-Client Negotiations of Reality*]; Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 108 (1977) [hereinafter *The Legal Aid Experience*]. Hosticka's work was part of a more general exploration of the behavior of public servants who work in street level bureaucracies—schools, police departments, welfare departments, lower courts, legal service offices, and other agencies whose workers have wide discretion over dispensation of benefits or allocation of public sanctions. See M. LIPSKY, *STREET-LEVEL BUREAUCRACY* (1980). The methodology and conclusions of Hosticka's work are more fully reported in his doctoral thesis, C. Hosticka, *Legal Services Lawyers Encounter Clients: A Study in Street Level Bureaucracy* (1976) (unpublished manuscript).

56. Hosticka, *Lawyer-Client Negotiations of Reality*, *supra* note 55, at 605. For Hosticka, floor control was exercised "by indicating that it is time for another to speak or by taking the initiative to begin speaking in the absence of the other's indication that it is appropriate to do so." *Id.* at 600. "Topic control refers to control over topic of conversation. It is evidenced by the introduction of new subjects in the conversation, and continuation of topics initiated by others." *Id.*

they are obtained by a series of pointed, standard questions rather than any process that resembles a dialogue. Clients take this as "all they can expect" and are rarely aware that a different relationship with a lawyer is possible.<sup>57</sup>

The findings of sociologist David Sudnow, based on observations of initial interviews by public defenders of indigent criminal defendants,<sup>58</sup> appear comparable to those of Hosticka and Bellow. He found that the public defender, presuming the guilt of the accused and preparing for the routine of plea bargaining, sought only enough data to enable classification of a defendant within or outside a typical class of cases.<sup>59</sup>

Following his interviews in Toronto primarily of corporate lawyers, political scientist Herbert Kritzer offered one explanation for these different pictures of the lawyer-client relationship.<sup>60</sup> Kritzer described three dimensions of the relationship: a business dimension (the lawyer's need to earn income), a professionalism dimension (autonomous judgment and action by the lawyer), and a social dimension (social contact between lawyer and client which precipitates or accompanies contact in a legal context).<sup>61</sup> He concluded that the nature of the relationship between lawyer and client is likely to depend on which of those dimensions are "most salient."<sup>62</sup>

Studies of lawyer behavior that do not consider communication patterns in the initial interview offer additional useful perspectives on the lawyer-client relationship.<sup>63</sup> In *Lawyer and Client*:

57. Bellow, *The Legal Aid Experience*, *supra* note 55, at 108.

58. Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255, 266-70 (1965).

59. *Id.* at 268-69.

60. Kritzer, *The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and a Field Study*, 1984 AM. B. FOUND. RESEARCH J. 409 (1984).

61. *Id.* at 412-14.

62. *Id.* at 421-25.

63. One article concerning lawyer-client communication patterns, not described in the text, reports a student's observations of lawyer-client interviews occurring in a university legal aid program. Goldsmith, *The Initial Attorney/Client Consultation: A Case History*, 45 S. SPEECH COM. J. 394 (1980). Through actual observations and post-observation questionnaires, the student attempted to determine whether lawyers or clients believed that communication problems existed during the interview and whether levels of client satisfaction were correlated to the kind of questions used by lawyers.

Others have observed lawyer-client interaction but have not published reports of specific findings. See Menkel-Meadow and Ntephe, *Clients Are People—Or Are They?*, BARRISTER, Winter, 1983, at 12, 13 ("We observed lawyers actually performing these skills . . ."). *But cf.* L. BROWN & E. DAUER, PLANNING BY LAWYERS: MATERIALS ON A NON-ADVERSARIAL

*Who's in Charge?*, sociologist David Rosenthal argues that a client should assume an active role in problem solving and decision making rather than deferring exclusively to the lawyer's judgment.<sup>64</sup> His argument draws largely from the results of his study of the outcomes of selected personal injury claims asserted through lawyers.<sup>65</sup> In a more participatory relationship, he concludes, clients are likely to get better results (for example, greater recovery on a personal injury claim) than in a relationship characterized by professional dominance of problem solving and decision making.<sup>66</sup>

In *Lawyers and Consumer Protection Laws*, Stewart Macaulay describes the common behavior of approximately one hundred Wisconsin lawyers in private practice in responding to client complaints about consumer goods or services.<sup>67</sup> In contrast to Cain's findings that English lawyers serve as "translators," Macaulay concluded from extensive interviews that in such cases lawyers act as "counsel for the situation."<sup>68</sup> In situations involving consumer economic loss (as distinguished from personal injury or property damage), lawyers are likely to listen carefully and offer practical if not technically inspired advice, or they may act as an information broker, coach, or mediator. Generally, significant economic and other disincentives lead lawyers to discourage or decline adversary representation in such matters.<sup>69</sup>

LEGAL PROCESS 772-74 (1978) (reproduction of condensed version of dialogue between legal aid lawyer and client with financial difficulty).

64. D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974).

65. *Id.* at 29.

66. His argument rests on a critique of six propositions which, he claims, are urged in support of a model of professional dominance. He describes the propositions as follows: (1) the passive, delegating client gets better results; (2) ineffective professional service is rare; (3) professionals are capable of disinterested service which avoids conflict of interest; (4) problems have a best and relatively certain technical solution inaccessible to lay understanding; (5) high standards of professional performance are set, maintained, and enforced; and (6) information about and choice among professional services is readily available. *Id.* at 12-28. Based on his empirical study of a selected sample of personal injury claims, he argues that the first proposition is incorrect. Based on his other research, he argues that the other five propositions are also incorrect.

I share Rosenthal's preference for a participatory model of the lawyer-client relationship, but for reasons having to do more with my personal values relating to individual autonomy, responsibility and choice.

67. Macaulay, *Lawyers and Consumer Protection Laws*, 14 *LAW & SOC'Y REV.* 115 (1979).

68. *Id.* at 128.

69. Macaulay's conclusions about economic disincentives support the hypothesis developed later in this Article that systemic influences constrain the behavior of consumer bankruptcy lawyers. See *infra* text accompanying notes 119-34.

O'Gorman's study of the practice of New York matrimonial lawyers described the ways in which professional behavior is influenced by the lawyer's cultural and social context.<sup>70</sup> He found this behavior profoundly influenced by the rift between liberal public attitudes about divorce and the then restrictive New York law concerning divorce (the cultural context)<sup>71</sup> and by factors such as the length of time a lawyer had practiced and the class background of lawyers and clients (the social context).<sup>72</sup>

This literature offers glimpses of the nature of relationships between some lawyers and clients.<sup>73</sup> It leaves, however, a vast unmapped terrain, especially of the interactions between *private* lawyers and clients. One might set out to study such interactions in a variety of contexts given the great diversity in the composition and structure of the private bar and the clients it serves.<sup>74</sup> The possibilities for study multiply when one considers the innumerable qualities of personal interaction that could be the focus of observation.<sup>75</sup> The observations reported here, set in one context, take but a modest step in the necessary exploration.

70. H. O'GORMAN, *LAWYERS AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE* (1963).

71. *Id.* at 30-32, 77-80.

72. *Id.* at 48-52, 52-61.

73. There is a voluminous amount of other literature about lawyers from which one could gain more background for the subject of inquiry here. A useful door to that literature is provided in Abel, *The Sociology of American Lawyers: A Bibliographic Guide*, 2 *LAW & POL'Y Q.* 335 (1980).

74. One example of this diversity, based on data gathered in Chicago, is described and analyzed in Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 *MICH. L. REV.* 1111 (1978).

75. These include the physical setting for the communication, including the location and environs of the law office, its furnishings, decor, and physical appearance, seating arrangements, and physical accessories (such as note paper and writing implements) available for use by the interview participants; the non-verbal behavior of the participants, including body posture, gestures, facial expressions, and eye contact; the structural characteristics of verbal expression by the participants, including utterance length, the number and type of questions or statements, the number of interruptions, and the kinds of vocabulary; other characteristics of verbal expression of the participants, including the tone, pacing, intensity of voice, and the style of expression. With the assistance of audio or video recording, communication scholars, sociologists, and others could analyze these characteristics in great detail from the perspective of a particular discipline. *See, e.g.*, E. GOFFMAN, *FORMS OF TALK* (1981); E. GOFFMAN, *INTERACTION RITUAL: ESSAYS IN FACE-TO-FACE BEHAVIOR* (1967); *INTERPERSONAL COMMUNICATION: SURVEY AND STUDIES* (D. Barnlund ed. 1968).

## IV. SUMMARY OF OBSERVATIONS

Six lawyers, one female and the others male, consented to participate in the study. Each is identified here only by letter, assigned at random. For the purpose of preserving anonymity and as a matter of style, descriptions of the lawyers or law offices are not uniform in structure or in choice of subject and are sometimes intentionally vague. An example of lawyer-client dialogue for each of the law offices, reproduced in Appendix A, supplements the descriptions provided here.

*Lawyer A*

Lawyer A has been practicing law for nearly fifteen years. He established a solo practice approximately five years ago. He leases office space in a suite of law offices in a downtown office building. A library, the services of a receptionist, and a two-person secretarial pool are included under the terms of the lease. Accordingly, reception and secretarial services are shared with other lawyers in the suite. However, both secretaries are sufficiently versed in the type of service that he requires to provide efficient service with relatively minimal supervision. The reception area for the suite of offices resembles the kind of reception area one is accustomed to seeing in major law firms: a parquet floor at the elevators, a plush carpet, veneer wood paneling and wall paper on the walls, comfortable seating and attractive tables, and wall hangings and plants to add to the decor. His office is also tastefully furnished and appointed, with clean and freshly painted walls, some wall decor, an attractive desk, and plush seating for himself and his clients. His office, high in the office building, offers a pleasant view of a lovely church and other downtown office buildings. Thus, while this lawyer meets many clients of very limited means, these clients are greeted in an environment akin to that of large law firms that serve wealthy corporate clients. This environment contrasts sharply with those observed in most of the other law offices visited during this study.

Early in the history of his solo practice, Lawyer A began to explore possible areas of law practice that he thought would be marketable through advertising. He selected chapter 13 practice as a suitable vehicle and inaugurated an advertising program that now consists exclusively of weekly advertisements in the television



supplement of a Sunday edition of a major metropolitan newspaper. He estimates that his consumer insolvency practice accounts for approximately 30% to 40% of the total number of matters he handles, and that approximately 70% to 80% of those matters are generated by this advertising. He considers his consumer insolvency practice to be a staple of his practice. A like amount of personal injury matters account for most of his remaining legal work.

Lawyer A guides an estimated 85% of his consumer insolvency clients to chapter 13, a higher percentage than any other lawyer visited in the study. There appear to be at least two related reasons for this. First, because many of these clients seek him out in response to his advertising, and because his advertising speaks exclusively in terms of repayment plans rather than "straight bankruptcy," the clients tend to be self-selecting. The clients are already inclined to seek assistance that involves repayment plans. His heavy chapter 13 practice is thus partially a result of his deliberate choice to exclusively advertise the availability of repayment plans as a legal service that he renders. Second, he expresses a personal preference for chapter 13 relief for debtors for several reasons. He believes that debtors feel better about themselves when they can repay their debts and that creditors are easier to deal with when they get paid something of what they are owed. He also sees an advantage in that chapter 7 relief is preserved for possible later necessitous circumstances. It is not clear whether this preference influenced his initial choice of chapter 13 as an attractive area of practice, whether the preference evolved as a consequence of, or a rationalization for, his choice of that practice, or whether the preference and the choice were mutually reinforcing in more subtle ways.

In a typical case for Lawyer A, a client will call his office in response to his advertisement and the call will be forwarded to him if he is available. He inquires whether the potential client has a steady job and if debts are less than \$100,000.<sup>76</sup> Most clients respond in the affirmative. Given that response, Lawyer A suggests that the client make an appointment, free of charge and

76. He asks these questions to assure that the client qualifies for chapter 13 relief. To qualify for such relief, an individual must have a regular source of income and cannot owe more than specified amounts of unsecured and secured debt. 11 U.S.C. § 109(e) (1982). If the caller does not qualify, Lawyer A still may set an appointment with the client to discuss the possibility of seeking chapter 7 relief.

without obligation, to discuss a possible plan of repayment. He generally schedules several appointments together in blocks of time on one of several days of the week, including Saturday mornings. He does not ask that clients bring any documents with them to the initial appointment and he does not send any information in the mail to them prior to their visit.

Lawyer A will schedule as many as four or five clients for initial appointments during any one hour, based on his experience that some clients do not keep their appointments (and do not call to cancel) and upon the expectation that his pattern of interviewing and counseling will usually allow him to complete the initial interview in something less than half an hour. Of course, the scheduling of multiple appointments during one hour has the effect of reinforcing his pattern of relatively brief initial interviews because he is aware that other clients are waiting in the reception area.

When a client arrives in the reception area, the receptionist gives the client a one-page form, entitled "confidential client information," and asks the client to complete it. The form asks for some basic data about the client: name, address, phone, employment information, identification of deposit accounts, and identification of automobiles owned. The form also lists approximately twenty-five categories of "Problem or Service," including "Bankruptcy (personal)" and "Other." A statement on the form instructs the client to check the applicable category. The bottom of the form provides a small amount of room which allows the client to state the facts of his case and contains some information about the payment of fees. There is no other information that the client is asked to provide prior to the initial interview. Clients who arrive on a Saturday morning are not greeted by a receptionist. Rather, they will either first see an empty reception area or an area in which some other clients are waiting. Eventually, usually without undue delay, Lawyer A walks out to the reception area to greet any newly arriving clients and provides the client with the "confidential client information" form described above.

Following the client's completion of the initial information form, Lawyer A escorts the client from the reception area to his office, perusing the information form as he walks down the corridor or just after being seated behind his desk.

I observed seven initial interviews on three different days.<sup>77</sup> The interviews averaged approximately nineteen minutes, with the longest interview taking approximately thirty minutes and the shortest interview taking approximately thirteen minutes. While the life situations and financial difficulties of each of these seven clients were relatively diverse, the fundamental pattern for each of the interviews was similar. Typically, Lawyer A begins with an open-ended question such as: "How can I help you?"<sup>78</sup> Following a response by the client indicating financial difficulties, Lawyer A confirms that the client has a steady job and debts totaling less than \$100,000. He then asks the client to describe his debts. The client names creditors and amounts. As the client does so, Lawyer A notes the information in writing, acknowledges the client through nods of the head, and often asks for some clarification to assure that he understands the nature and amount of the debt. Most clients recite this information from memory because they have not been asked to bring with them a written list of their debts.

When the listing of debts is complete, Lawyer A describes the nature of chapter 13 relief, introducing this description by language such as: "Let me explain what we do here." This narrative description of chapter 13, generally uninterrupted by the client, consumes a few minutes. The explanation is clear, in plain and readily understood language, and is typically accompanied by the lawyer's hand gestures (one palm raised above the other) to illus-

77. Because statistically reliable information could not be generated from the small sample of clients observed in this law office and in other law offices, I did not attempt to correlate various client characteristics (such as age, gender, race, or marital status) with features of the interview.

78. I generally adopt the typology of questions advanced in BINDER & PRICE, *supra* note 4, at 38-40 (1977). They describe "open-ended questions" in the following manner: In general, questions can be classified in terms of the breadth of the information they seek to elicit. At one end of the spectrum are those questions which allow the client to select either: (a) the subject matter for discussion or (b) at least that information related to the general subject which the client believes is pertinent and relevant.

*Id.* at 38. Along the spectrum of question types, they identify three other major types of questions: leading questions (the lawyer sets forth relevant data and asks for affirmation, as in: "You're related to the defendant, are you not?"); yes/no questions (structured to allow a yes or no answer, but not leading, as in: "Have you ever seen that man before today?"); narrow questions (the structure of the question implicitly instructs clients to respond only in terms of the particular subject that the lawyer has chosen, as in: "What was the color of the car?"). *Id.* at 39-40.

trate the central concept that the debtor will pay to the chapter 13 trustee (which the lawyer refers to as a "trust fund") only the amount by which the debtor's net monthly income exceeds monthly living expenses. He closes this narration with an estimate of what the client would have to pay each month and an inquiry to the client about how that possibility sounds. Following the client's response, Lawyer A describes his fees and costs and the timing of payment.<sup>79</sup>

If the client seems interested in proceeding, Lawyer A then explains that he needs the client to provide additional information by completing a multi-page packet of forms.<sup>80</sup> The lawyer pulls this packet from his files, sets it on the desk facing the client, and moves with his pen down each page of the packet, explaining what information must be provided or need not be provided. He then asks if the client has any questions. He answers those which are asked and then concludes the interview by indicating that the client should return to the office for another consultation when the packet of forms is completed, at which time the lawyer will calculate the necessary monthly payment precisely. He then escorts the client out of the office to the reception room and, if another client is waiting, repeats the process.

There were, of course, deviations from this general pattern because of the particular circumstances of a client's situation or because of the need to respond to a client's questions. Nonetheless, the structure and content of the interviews was clearly identifiable. They reflected the lawyer's predisposition to use of the chapter 13 remedy and his assumption that most of the clients had

79. His fees for representing a client in a chapter 13 proceeding are \$90 per hour for work in the law office and \$110 per hour for court appearances. He estimates for clients that total fees at this rate will be something on the order of \$350 to \$400. The client must also pay \$60, the cost charged by the bankruptcy court for the filing of a chapter 13 petition. The lawyer typically tells the client that he can begin work preparing the necessary documents after the client pays \$410. Lawyer A does not charge the client at all if the client decides not to retain him, even in cases where the client makes this decision after meeting with Lawyer A a second time.

80. From the information provided in these forms, Lawyer A and one of his secretaries can prepare the forms that must be filed with the bankruptcy court in connection with a chapter 13 proceeding. Such forms include Official Bankruptcy Forms, Form 1 (Voluntary Petition) and Official Bankruptcy Forms, Form 10 (Chapter 13 Statement) 11 U.S.C. (1983). In addition, he must prepare and submit the debtor's plan of repayment. 11 U.S.C. § 1321 (1983). These and other forms required by statute, bankruptcy rules, or local court rules are typically prepared by a lawyer representing a client seeking chapter 13 relief.

scheduled appointments in response to an advertisement that refers exclusively to repayment plans. Unless prompted by inquiry from the client or by obvious circumstances, Lawyer A did not allude to or describe possible alternative solutions to the client's financial difficulties and did not compare the advantages and disadvantages of other solutions with the advantages and disadvantages of chapter 13 relief.

### *Lawyer B*

The pattern of consumer insolvency counseling practiced by Lawyer B contrasts sharply with that of Lawyer A. Lawyer B puts the overwhelming number of clients he sees into chapter 7 proceedings. He estimates that he files several hundred chapter 7 proceedings per year, more than any other single lawyer in the district, and that he files only about twenty chapter 13 proceedings per year. His philosophy of consumer insolvency counseling thus differs markedly from that of Lawyer A.

Lawyer B believes that most chapter 13 proceedings are not successfully completed and therefore should not be proposed, a view shared by the bankruptcy judge who conducts the chapter 13 confirmation hearings in the district.<sup>81</sup> Accordingly, he will recommend a chapter 13 filing only in a limited number of circumstances: where the client owns assets that cannot be protected in a chapter 7 proceeding; where the client owes a significant amount of debt, such as spousal or child support, which could not be discharged in a chapter 7 proceeding; or where the client insists upon making an attempt to repay his debts. While he may recommend chapter 13 as a means to enable a client to cure defaults on debts secured by a mortgage on real property,<sup>82</sup> his experience is

81. In a personal interview, this bankruptcy judge described most chapter 13 cases as "marginal" and indicated that many tended to fail within six months. This judge therefore treats most chapter 13 plans with skepticism and carefully probes the feasibility of proposed plans at chapter 13 confirmation hearings. A bankruptcy judge may not confirm a plan unless he finds that the debtor will be able to make payments under the plan. 11 U.S.C. § 1325(a)(6) (1983).

82. Suppose, for example, that Jenny Martin owned a home and, because of her husband's death, had been temporarily unable to make payments on the mortgage debt. To prevent the lender from foreclosing, Jenny could propose a chapter 13 plan in which she would pay arrearages and penalties within a reasonable time and also resume monthly payments. 11 U.S.C. § 1322(b)(5) (1983). Because so much is at stake, this is potentially an important tool for debtors, but Lawyer B believes that such a plan is rarely feasible.

that this use of chapter 13 is generally not fruitful because such clients are usually unable to maintain payments sufficient to fund the plan.

Lawyer B estimates that consumer insolvency clients constitute approximately 30% of his total client volume. A like amount of clients retain him in divorce proceedings, and the balance of his practice includes adoptions, wills, and plaintiff's personal injury work. The high volume of consumer insolvency and divorce work, both of which appear to be highly routinized, provides a stable source of income supplemented by irregular but considerably larger amounts of income from personal injury matters. Lawyer B characterizes his practice as "clinic-like," with an emphasis on speed and efficiency "rather than long, futile, fee-building 'bull sessions.' "

Lawyer B has practiced law for approximately eleven years. His earliest experience providing legal services to military personnel prompted the establishment of his own practice approximately eight years ago. Recently, he has hired an associate to handle increased client volume. The staff consists of one full-time person who serves as office manager and bookkeeper and two secretaries who each work a maximum of twenty hours per week. Most of the functions of staff—greeting clients, answering phones, filing documents, scheduling appointments—are performed interchangeably by any member of the staff or by Lawyer B or his associate.

His primary law office is located in an older office building that is dwarfed by modern high-rise office buildings in the surrounding blocks of a suburban business center. The door to his office is half way down a narrow and somewhat dark second floor corridor. Access to the second floor is through a single elevator or a staircase. Maintenance, modernization, or decoration of the public areas of the building do not appear to command high priority with the landlord. The reception area immediately inside the hallway door is small, with a few small tables and seating for about seven people. Furnishings are functional though not modern, plush, or expensive. There is no reception desk, but the configuration of work space past the reception area allows a member of the staff to notice a client's arrival and to greet him promptly. Lawyer B has another office, not visited during this study, in which his associate meets with clients on certain days of the week.

Lawyer B has advertised in several media since the Supreme

Court held that the first amendment protects some forms of lawyer advertising.<sup>83</sup> His most prominent advertising appears weekly in the television supplement of the Sunday edition of a major metropolitan newspaper. He also advertises in neighborhood newspapers and on buses, and has occasionally advertised on television. One column length form of the advertisement in the television supplement quotes fees for most of his areas of practice, including bankruptcy.<sup>84</sup> Another relatively large form of advertisement in the television supplement begins with the bold heading "Discharge Your Debts" and continues by asking several questions, the answers to which may lead a client to conclude that he would qualify for and could benefit from the filing of a chapter 7 proceeding. Notwithstanding the advertising, Lawyer B estimates that approximately 70% of his business comes from clients who he has previously served or who have been referred by previous clients.

The content of his advertising reflects his judgment that chapter 7 proceedings will constitute appropriate relief for most individuals experiencing severe financial difficulties. Unlike Lawyer A, Lawyer B does not actively seek clients who might be interested in repayment of debt, largely because he considers chapter 13 proceedings to be ineffective and appropriate only in a limited number of cases. Accordingly, there is no mention in his advertising about the possibility of repaying debts, and that possibility is not mentioned in the initial interview unless he perceives a circumstance warranting consideration of chapter 13, or unless the client inquires about the possibility of repaying debts.

As with Lawyer A, Lawyer B schedules clients in clusters on particular days of the week, including Saturday mornings and through 7:00 p.m. on weekdays. He also reports that many clients do not keep scheduled appointments and do not call to cancel. Accordingly, he may schedule a handful of clients during any one hour with the expectation that several will not keep the appointment.

In a typical case, a prospective client who calls the office

83. *Bates v. State Bar*, 433 U.S. 350 (1977).

84. His fees are less than \$175 for a chapter 7 petition filed on behalf of an unmarried person and less than \$275 for a chapter 7 petition filed on behalf of husband and wife. (To assure anonymity, I do not quote the exact amount of the fees.) In addition, a client must pay the \$60 bankruptcy court filing fee. He requires that clients tender fees and costs prior to preparing documents for filing.

speaks to one of the members of the staff. After the client refers to financial problems as the motivation for the call, a member of the staff offers to send the client a sheet of information prepared by Lawyer B that describes chapter 7 and chapter 7 procedure, quotes fees and costs, and describes how to complete an accompanying short questionnaire. The intent of the questionnaire is to elicit information about the client's debts and other pertinent items of information. The prospective client is informed by the staff that Lawyer B will not consult with the client until the questionnaire is completed. This message is repeated in the information sheet and is enforced by the staff member who, upon greeting a client in the reception area, asks to see the completed questionnaire. The information sheet does not refer to the possibility of chapter 13 proceedings or other forms of relief. Both the staff member and the information sheet invite the client to call to schedule an appointment once the questionnaire has been completed.

I observed five initial interviews conducted by Lawyer B in the space of two days. Four were initial interviews with clients in financial difficulty, and the fifth was a second meeting with a client for the purpose of reviewing and signing documents necessary for the filing of a chapter 7 proceeding. The four initial interviews averaged forty minutes in length, with the shortest interview taking thirty minutes and the longest interview taking forty-five minutes.

The four initial interviews were so similar that the pattern of interviewing and counseling behavior was clearly discernible without the need to observe further interviews. Lawyer B structured each interview on the basis of his assumption that the client had scheduled an appointment for the purpose of filing a chapter 7 proceeding. He explicitly articulated this assumption in one of our conversations with one another: "Clients who come to see me screen themselves. When they get here they know they want bankruptcy. They've read the brochure, filled out the questionnaire, and thought about it. I will sometimes spot problems and have them consider chapter 13."

After the client arrives and a member of the staff checks the questionnaire for completeness, Lawyer B greets the client in the reception area and escorts the client down a short corridor to his office. After the client is seated, Lawyer B scans the questionnaire



prepared by the client. After assimilating that information, he begins a long series of narrow questions.<sup>85</sup> Early questions elicit basic data about marital and employment status, address, and telephone numbers. Questions then track the questions in the "Statement of Affairs" which must be filed to initiate a chapter 7 proceeding.<sup>86</sup> When these questions are completed, Lawyer B continues with more narrow questions about the nature and value of the client's assets, the answers to which will be used to complete a schedule of assets that the client must file in a chapter 7 proceeding.<sup>87</sup> When that topic is exhausted, Lawyer B refers to the list of creditors that the client has completed and asks a third set of narrow questions intended to obtain additional or clarifying information concerning the client's debts.

Lawyer B asks these questions in rapid succession, simultaneously making copious notes of the responses. Because of the note taking, during which his head is bowed, he maintains little eye contact with the client during this first portion of the interview. He appears to keep notes in a standard format from which staff can easily work in preparing the documents necessary for the filing of a chapter 7 proceeding. The form and content of the questions are standardized; most of the questions asked in any one interview are asked in similar language and at similar times during other interviews. Of course, the varied responses to some of the questions lead Lawyer B to ask additional questions important for his understanding of the particular client's situation, and in this respect the interviews differ. However, when the necessary diversions are completed, he returns to the standard pattern.

When the final set of questions is answered, Lawyer B imme-

85. See *supra* note 78 concerning use of the phrase "narrow questions."

86. The "Statement of Affairs for Bankrupt Not Engaged in Business" is Official Bankruptcy Forms, Form 7, 11 U.S.C. (1983). Other forms typically completed by a lawyer and a lawyer's staff on behalf of a client seeking chapter 7 relief are Official Bankruptcy Forms, Form 1 (Voluntary Petition), and Official Bankruptcy Forms, Form 6 (Schedules of Assets and Liabilities), 11 U.S.C. (1983). These forms can be purchased in bulk from businesses that print them and also may be purchased from most stationary stores. A lawyer and a lawyer's staff usually will also prepare other forms required by the bankruptcy law, by the rules of bankruptcy, or by local court rules. These will include, for example, a statement by the debtor concerning his or her intentions with respect to the disposition of collateral that secures a debt, 11 U.S.C. § 521(2)(A) (Supp. III 1985), a schedule of current income and current expenditures, 11 U.S.C. § 521(1) (Supp. III 1985), and a statement of the compensation paid or to be paid to the lawyer, 11 U.S.C. § 329(a) (Supp. III 1985).

87. 11 U.S.C. § 521(1) (Supp. III 1985).

diately shifts to the issue of payment of fees by a statement such as: "How would you like to pay for this?" Typically, this question is followed by a short dialogue between the client and Lawyer B about different forms of payment and the timing of payment. If the client is willing to pay immediately, Lawyer B takes the money tendered and issues the client a receipt. If the client cannot or is not willing to pay immediately, Lawyer B explains that he will begin work on preparing the necessary documents once the fees are paid. Thereafter, he rapidly and briefly describes the nature and timing of events that will follow the filing of the chapter 7 petition, including the client's required court appearance and the documents that the client will receive in connection with the chapter 7 proceeding.

The immediate and seemingly abrupt shift from questions about the nature of the client's debts to the topic of how the client wishes to pay the fees reflects Lawyer B's underlying assumption, described above, that the client has read the lawyer's mailed description of chapter 7, has decided before visiting the law office to file a chapter 7 proceeding, and has decided to use the services of Lawyer B for that purpose. As a consequence, in the typical case, Lawyer B does not explore potential alternative solutions to the client's financial difficulty and does not use time during the interview to explain the nature of a chapter 7 proceeding or to discuss its advantages and disadvantages.

### *Lawyer C*

The law practice of Lawyer C implements his philosophical commitment to socialism. His practice, started some two years ago after approximately ten years of practice as a labor lawyer, is designed to attract and serve the needs of the poor. Advertisements quote low fees for representation in divorce, personal injury, workers' compensation, bankruptcy, chapter 13 proceedings, minor traffic offenses, and driving while intoxicated. His practice also includes some civil rights and labor law work. For interviewing clients, he has deliberately chosen five locations that are in close proximity to low income or blue-collar residential areas and within a short distance of major freeways. His staff schedules appointments at one of the five locations only on weekdays from 3:00 p.m. to 7:00 p.m. and all day on Saturdays, times which are most convenient to blue-collar workers.

Serving clients at low fees in several locations requires careful control of overhead expenses. The physical appearance of the four interviewing locations visited during my observations reflect that constraint. None of the locations is what one would identify as a law office in the traditional sense. Each location is used exclusively for interviewing clients. Staff, files, equipment, and work space are located exclusively at a central working office that clients do not visit.

One of the four interviewing locations is part of a basement set of office suites in a two story commercial office building. The other three interviewing locations are among offices on the second floors of suburban retail shopping centers. No signs or marquees visible from the outside identify any of the locations as law offices; Lawyer C does not attempt to cater to street traffic. The interviewing rooms are relatively small, averaging an estimated one hundred square feet. Each interviewing room is sparsely furnished, including only a plain metal desk, a chair behind the desk for Lawyer C, and one or two other plain chairs for clients. There are no tables, lamps, other furnishings, or wall decor. The carpet and window dressings are plain and sometimes worn. Because Lawyer C does not use any of these locations as a central work area, the desk tops are bare, save for a few current client files or a phone book. Lawyer C's carrying case, filled with documents needed for clients scheduled to arrive, sits on the floor beside the desk.

At three of the locations visited, the interview room is located a few steps down a short hallway from a reception area primarily used by another commercial enterprise. Lawyer C does not employ a receptionist for any of these locations mainly because his visits may be for only a few hours on a few days of each week. Furthermore, because most interviews are conducted after 4:00 p.m. on weekdays or during a Saturday, the receptionist for the other commercial enterprise is frequently not present when clients arrive. Clients know they are in the right place because of a handwritten sign posted on the door which reads: "Law Offices of [Lawyer C]." Clients know they are expected because they have been scheduled on the telephone for a particular time and location and because Lawyer C will emerge from the interviewing room, where he is waiting for clients or interviewing previous clients, to greet a new arrival. A fourth location does not share

space with any commercial enterprise and does not have a formal reception area. Rather, there is a small room adjacent to the interview room with seating for a few clients. A hand printed sign on the door that leads to these two rooms identifies the law office. The first client scheduled for this location on any given day may, if he arrives early, find no one waiting to greet him and might leave thinking that he is not expected.

Two other full-time lawyers and one part-time lawyer work with Lawyer C, but he conducts most initial interviews with clients himself, seeing them at any of the five office locations almost every weekday afternoon and evening and almost every Saturday. Three full-time secretaries and one part-time secretary constitute the rest of the staff.

Lawyer C advertises in several print media, the most prominent of which is carried by the television supplement to the Sunday edition of a major metropolitan newspaper. He has also briefly tried radio advertising and has considered, but not yet tried, television advertising. He estimates that 50% of his client volume is generated by advertising. Unlike the advertising of Lawyers A and B, which feature repayment plans and discharge respectively, advertising by Lawyer C is neutral as between chapter 7 or chapter 13 proceedings but also less descriptive of either. The newspaper advertisement simply lists bankruptcy and chapter 13 as two of several types of problems that Lawyer C will handle. Thus, he does not explicitly promote either solution to financial distress or cater to prospective users of either type of proceeding in his advertisement.

Lawyer C estimates that individuals seeking assistance with financial problems constitute approximately 25% of his total client volume and that he sees, on average, between five and ten such clients each week. Usually he finds that the financial difficulties of half of his clients each week can be resolved without resort to either chapter 7 or chapter 13 proceedings. He estimates having filed between seventy-five and one hundred such proceedings in each of the last two years, over 90% of which were chapter 7 filings. This constitutes a significant share of the total number of filings for the relevant district in each year.

When a client phones the central office location of Lawyer C and reports financial difficulties as the reason for the call, a staff member responds by asking a series of questions about the client's

situation which enable the staff member to provide the client with basic information about fees.<sup>88</sup> The staff member then offers to schedule an appointment at the client's most convenient location and time. The staff does not send any written material to the prospective client prior to the scheduled appointment and does not request that the client bring any information to the interview. The staff schedules appointments for any of the various kinds of problems that Lawyer C handles in fifteen minute intervals during consecutive hour long blocks of time.<sup>89</sup> This scheduling reflects the experience of Lawyer C that many clients will not keep appointments and will not call in advance to cancel;<sup>90</sup> it also reflects his expectation that many initial meetings with clients will be relatively short.

Soon after the client's arrival, Lawyer C emerges from the interviewing room and greets the client, confirming the client's appointment by reference to a daily appointment sheet kept folded in his shirt pocket. If the client has scheduled an appointment related to financial difficulties, Lawyer C retrieves a form and a clipboard from the interviewing room and immediately brings these to the client, asking the client to complete the form and telling the client that he will be back in a few minutes. He then returns to continue any ongoing interview or simply to wait until the new client completes the form.

88. He charges less than \$125 for a chapter 7 proceeding to be filed on behalf of an unmarried person, and less than \$225 for a chapter 7 proceeding to be filed on behalf of a married couple. He charges less than \$300 for a chapter 13 proceeding to be filed on behalf of a married couple. (To assure anonymity, I do not quote the exact amount of the fees.) The client must also pay the \$60 bankruptcy court filing fee. Lawyer C charges an additional amount of \$50 to negotiate and prepare a reaffirmation agreement or to file a motion to avoid a lien. A reaffirmation agreement binds the debtor to pay a creditor notwithstanding a discharge of the debt that is being reaffirmed. 11 U.S.C. § 524(c) (Supp. III 1985). *See also supra* note 47. Avoidance of a lien will permit the client to retain certain types of property notwithstanding a lien on the property held by a creditor whose debt is being discharged. 11 U.S.C. § 522(f)(2) (1982). *See also supra* note 45. Unless a prospective client articulates an interest in chapter 13 proceedings, the staff member assumes that the client is interested in chapter 7 and quotes fees only for such a proceeding.

89. For example, the staff may schedule appointments (including appointments for clients seeking assistance for other matters that Lawyer C handles) on a Monday from 3:00 p.m. to 4:30 p.m. at one location and from 5:15 p.m. to 7:00 p.m. at another location, and at similar times on a Tuesday at two other locations.

90. Lawyer C suggested that many of his clients are accustomed only to getting to work at the same time each day and are not generally accustomed to keeping scheduled appointments. Such clients, he said, will frequently call his office sometime after the missed appointment to schedule another.

The two-sided form, entitled "Bankruptcy Information Sheet," is duplicated from a typed original. It is intended to obtain a variety of information, including name, address, phone, and other identifying and demographic data, estimates of income and monthly living expenses, identification and estimated value of various common types of assets and the client's preferred disposition of those assets, and identification of any lawsuits initiated or judgments obtained against the client. The form also contains a listing and explanation of potential fees in a format that can be used during the interview to create a retainer agreement. Clients whom I observed used about five or ten minutes to complete the form and then awaited Lawyer C's return.

In my visits to Lawyer C's offices I observed five initial interviews on eight different days.<sup>91</sup> All of these were initial interviews of individuals seeking relief from financial difficulties. These interviews were, on average, thirty minutes long, but there was a wider disparity in the lengths of these interviews than in the observed interviews conducted by Lawyers A and B. Two interviews in which Lawyer C ultimately suggested a solution other than chapter 7 or chapter 13 lasted approximately fifteen minutes; two interviews culminating in tentative decisions to file chapter 7 proceedings lasted approximately thirty minutes; one interview, with a husband and wife, where client dialect made understanding difficult and where facts were complicated, lasted approximately one hour.

In contrast to the interviewing format of Lawyers A and B, the format of Lawyer C's interviewing does not reflect a predisposition to either chapter 7 or chapter 13 proceedings, notwithstanding his experience that chapter 7 relief would likely suit the largest percentage of his consumer insolvency clients. When he greets the client a second time in the reception area, he asks if the client has completed the form. If so, he escorts the client to the interview room. After each is seated, Lawyer C begins to look at the completed intake form and ask the client narrow questions<sup>92</sup> that clarify or supplement the information provided on the form. Typical questions at this stage probe the client's marital and em-

91. This ratio of observations to days on which interviews were scheduled dramatically illustrates the difficulty of gathering the type of data reported in this study. *See infra* note 184 for a log of my visits to the offices of Lawyer C.

92. Concerning the phrase "narrow questions," see *supra* note 78.

ployment status, the amount of the client's income from employment or other sources, the nature and value of the client's major assets, the composition of the client's family, and whether any creditors have been contacting the client or have filed suit or obtained judgments against him. He then asks the client to identify creditors and the amounts owed each. He records client responses on the intake form. From the beginning of the interview to this point usually takes about five minutes.

Lawyer C then begins a description of the options that he sees as available to the client. The options described generally include both chapter 7 and chapter 13 proceedings, unless he perceives that chapter 13 relief would clearly be unavailable under the circumstances. From time to time he also explains other options available to the client, including the possibility of forestalling collection efforts through communication with creditors or through use of judicial procedures to protect exempt property. Descriptions are relatively brief and focus on those aspects of a particular option relevant to the client's circumstances.

The language, tone, and style of Lawyer C's descriptions implicitly acknowledge client autonomy and decision making power. The following phrases that he uses during the interviews are examples: "O.K., let me tell you a couple of things to keep in mind if you file a bankruptcy;" "You might want to consider not filing a bankruptcy;" "So I'd say probably your best bet is to sit tight and do nothing, keeping in mind . . . ;" "You're probably in a position where you might want to file bankruptcy or you might not;" "With that in mind, do you still wish to file bankruptcy?;" "O.K., you've got several options. One thing you can do is file nothing. I think you could file bankruptcy and wipe out all of your debts and keep your property. The other thing you could do is to file a wage earner bankruptcy over three years."

When Lawyer C completes descriptions of the various alternatives, he asks what the client wishes to do. Where the client indicates a desire to file a chapter 7 proceeding, Lawyer C explains the amount of fees and costs and then asks if the client wishes to proceed. When the client wishes to proceed, Lawyer C retrieves a blank set of forms that must be filed in a chapter 7 proceeding<sup>93</sup> and commences a series of narrow questions that elicit informa-

93. See *supra* note 86.

tion required by these forms. He records responses on these forms and later delivers them to his staff for typing. This process generally takes about ten minutes.

When the process is complete, he provides the client with multiple copies of a creditor information form (calling for pertinent information about each debt owed by the client) and tells the client that one copy of this form must be completed for each creditor to whom the client owes money. He instructs the client that after the client mails these forms to his office, together with any fees not paid at the initial interview, the staff can then begin to prepare the necessary documents for filing. If the client is prepared to pay some or all of the fees at the time of the interview, Lawyer C collects those fees and issues a receipt. If the client has no questions, Lawyer C then terminates the interview and escorts the client to the reception area, where another client may be waiting.

#### *Lawyer/Paralegal D*

Lawyer D-1 and Paralegals D-2 and D-3 work in a law firm which has for many years provided consumer insolvency counseling and representation as virtually its exclusive service.<sup>94</sup> The central location of the law firm is in a downtown office building, and branch offices of the firm are located in a handful of different cities in the greater metropolitan area. The firm advertises extensively, including daily advertising in metropolitan newspapers and advertising on television. Lawyers and paralegals in the firm consult with a very large volume of clients, ranging from twenty to as many as eighty clients each day. Paralegals as well as lawyers conduct initial interviews with clients. This is the only firm I visited that employed paralegals for that purpose. Notwithstanding differences in personality and style among the three interviewers whom I observed, there is much similarity in their methodology and approach. It is very possible, therefore, that the methodology and approach described here characterizes the interviewing and counseling behavior of the other lawyers and paralegals in the firm.

The firm represents clients in both chapter 7 and chapter 13

94. The firm also provides a limited amount of insolvency counseling and representation for debtors engaged in business.



proceedings and advertises both. Chapter 7 filings constitute well over 75% of the firm's total filings each year. As with Lawyer B, interviewers in the firm will recommend chapter 13 proceedings to clients only in a limited number of circumstances: substantial debt that would not be discharged in a chapter 7 proceeding, imminent foreclosure on real property used as a debtor's principal residence, or a clearly expressed client preference for repaying debts. Unlike Lawyer B, however, interviewers in the firm do not express a generalized view about the limited utility or advisability of chapter 13 proceedings, although that view was implicit in much of the counseling observed.

The law firm in which Lawyer D-1 and Paralegals D-2 and D-3 work employs more lawyers and support staff, and leases more office space, than other offices visited during the study, a natural consequence of its higher volume of clients. Systems and routines for interviewing, counseling, and representing these clients are also considerably more elaborate than in other firms observed.<sup>95</sup> Nonetheless, when client volume is heavy, clients will often wait longer here for an initial interview than in the other law firms observed.

The downtown office reserves large areas for clients to sit and work, including a long row of seating against one wall and areas furnished with large tables and seating at which clients can complete the variety of forms that they are given. Staff and paralegal work stations are adjacent to client work areas. Lawyers' offices are enclosed and located on the perimeters of the office space. This configuration of work space contrasts markedly with that in most law firms where the confines of a formal reception area separate a client from staff and the confines of a lawyer's office separate clients from staff and from other clients. Here, a large expanse of space is uninterrupted by walls. Clients sit, work, and meet with paralegals or other staff in close proximity to other staff and other clients, separated from them only by movable space dividers. The arrangement is nonetheless sufficient to preserve confidentiality.

When clients call the law office, they are not given a specific

95. Concerning the development and use of systems in the law office see A.B.A., *HOW TO CREATE A SYSTEM FOR THE LAW OFFICE* (1975). "A system is a documented logical method or way of handling transactions, procedures, or work flow in a law office so as to minimize waste, conserve professional time, and optimize productivity." *Id.* at 5.

time for an appointment and are not assigned to a particular lawyer or paralegal for an interview. Instead, they are told that they may come to the office on any weekday during normal business hours. If a client knows that he will not be able to come to the law office for several days, the staff will mail a packet of forms to the client with the suggestion that the forms be completed in advance of the visit. This packet contains forms which all clients must complete prior to an interview; the mailing enables some clients to complete some of their work prior to the visit. The several forms in the packet, together with other forms given clients when they first arrive at the law office, call for a variety of information about the client's income, debts, property, monthly living expenses, and legal proceedings initiated against the client. This information provides a fairly complete profile of the client's financial situation and history. One form asks the client to identify one of several listed alternatives that reflects the client's preferred means for resolving his financial difficulties. Another form inquires how the client learned about or came to visit the firm. Another form explains procedure in the law office, including the possibility that a client may have to wait for services until emergency matters of other clients are handled.<sup>96</sup> All of the documents use language and format that facilitate comprehension.<sup>97</sup>

I observed twelve initial interviews in two days at this law firm.<sup>98</sup> Six interviews conducted by Paralegal D-2 averaged eighteen minutes in length, with the shortest taking ten minutes and the two longest each taking thirty minutes. Three interviews conducted by Paralegal D-3 averaged fifteen minutes in length, with the shortest taking ten minutes and the longest taking twenty-two minutes. Three interviews conducted by Lawyer D-1 averaged nineteen minutes in length, with the shortest taking twelve min-

96. Scheduled foreclosure on a client's home on the day of or the day after the client's visit would be one such emergency. Color coding of files allows lawyers and paralegals to know which clients should be seen on an emergency basis.

97. Concerning some subjects, the multitude of forms are intentionally repetitive. The intention is to ask for the same kind of information in several different ways to insure that the client realizes precisely what information is being sought. Lawyer B uses the same technique in oral questioning because he believes that some clients will not understand or answer a question until it is asked in several different ways.

98. This comparatively high ratio of interview observations to days spent at the office reflects the extremely high volume of consumer insolvency clients that the firm serves daily. This facilitated efficient observation. Contrast this to the inefficiency of observation of interviews conducted by Lawyer C. See *infra* note 184 and accompanying text.

utes and the longest taking twenty-five minutes.

A receptionist promptly greets all clients when they arrive. The receptionist is well versed in office procedure and is skilled in communicating efficiently and politely with large numbers of people. The receptionist provides each client with forms to complete, assembles completed forms in a numbered and color coded file set up for each client, and places each file in the sequence of the client's arrival in one of several file holders. When the lawyer or paralegal selects the next file in turn, he immediately calls the client's name and escorts the client to the interview location. The client may be interviewed within fifteen minutes of arrival or after as much as an hour or more from his arrival, depending on how much time the client requires to complete forms, how many other clients have arrived earlier, how many interviewers are available, and how many emergency cases are given preference.

When a client is seated, the lawyer or paralegal begins with a fairly standard set of narrow questions which elicit information about the client's marital status, the location of the client's residence, whether the client is renting or purchasing a home, whether the client is engaged in business, and how the client came to hear about the law firm.<sup>99</sup> The interviewer does not refer to the completed forms in the file for this purpose, and does not refer to the form on which the client chooses among various alternatives for solution to his financial difficulties.<sup>100</sup> The interviewer then looks at the forms that list the names and amounts of the client's debts and begins a set of narrow questions that seek to clarify, confirm, or supplement the information that the client has written on the form.<sup>101</sup> When these questions are completed, the

99. The firm wishes to keep account of the effectiveness of various forms of advertising.

100. The form that calls for expression of client preference is a useful and efficient method of helping the interviewer understand the client's perspective. It is curious, therefore, that interviewers do not regularly look at the form or engage clients in a discussion of the preference indicated. Interviewers also do not ask whether clients have listened to pre-recorded telephone messages explaining the nature of chapter 7 and chapter 13 proceedings or whether clients otherwise have been given information about alternatives for dealing with financial distress.

101. As the client responds, the interviewer notes responses on the form that the client has provided. Eye contact between interviewers and clients during this process varied among the interviewers observed. In some cases, the interviewer asks the client to note additional information or corrections in the client's own handwriting as a protection against later client claims that information was improperly recorded.

interviewer has a good sense of the total amount of the client's debt and the nature of each of the individual debts.

In a typical case, when the questions about debts are complete, the interviewer suggests to the client that most, if not all, of the debts can be eliminated by the filing of a chapter 7 proceeding. The client is then asked "how that sounds." Where the client indicates that such a solution is acceptable or pleasing, the interviewer quotes fees and a payment schedule to the client, and asks whether the client can pay any portion of the fee in cash at that time.<sup>102</sup> The interviewer also then informs the client that two or three hours of additional paperwork lie ahead and invites the client to either begin that work now or return another day to do so, whichever is most convenient.

In the typical initial interview, the interviewer does not explain the differences between chapter 7 and chapter 13 proceedings unless asked, and does not explore other possible solutions to the client's financial difficulties. Explanation about the nature of chapter 7 is generally limited to statements that some or all of the client's debts will be wiped out and that the client will have to pay some creditors to retain certain property. However, the law firm does advertise and provide prerecorded telephone messages that briefly outline for callers the nature of chapter 7 and chapter 13 proceedings.

When the initial interview reveals facts that strongly suggest the advisability of a chapter 13 proceeding, or where the client presses a wish to attempt a repayment plan, the interviewer asks the client to wait until a lawyer who specializes in chapter 13 is available.<sup>103</sup> The file is returned to the receptionist who places it in sequence among the files to be attended by such lawyers.

102. Fees are higher here than for any of the other law firms observed. Fees for a chapter 7 proceeding are between \$500 and \$1,000, payable in installments, plus the \$60 court filing fee. Chapter 13 fees are slightly higher. (To assure anonymity, I do not quote the exact amount of the fees.) There is an additional fee in the event a client wishes to avoid a lien. Concerning the avoidance of liens, see *supra* note 45. On occasion, the law firm will represent a client without fee as a public service. For example, Lawyer D-1 waived the fee for a single parent earning \$600 per month and supporting four children. In that case, Lawyer D-1 advised a chapter 7 filing as a means to prevent imminent wage garnishment.

103. This is not necessary when the initial interview is conducted by one of the lawyers who specializes in chapter 13. I did not observe initial interviews conducted by such lawyers in the firm, nor did I observe any of these "second" interviews conducted by such lawyers.

If the client chooses to proceed with chapter 7 relief, he is escorted by the interviewer back to the receptionist. The receptionist provides more forms for the client to complete. These additional forms, when completed, together with forms that were completed by the client prior to the initial interview, serve as the basis for what the law firm refers to as a "write-up." After the client has completed the additional paperwork and returned it to the receptionist, the receptionist again places the file in sequence for action by an interviewer. The person who originally interviewed the client, or some other interviewer, may pick up the file to complete the write-up. Much of the write-up consists of the interviewer transferring information from forms completed by the client to forms to be read by the secretarial staff.

Following the write-up, the same interviewer, or some other member of the staff, performs the necessary accounting work for the client (collection of fees, issuance of a receipt, and execution of a retainer agreement). The client is then asked to call within the next few days for an appointment to sign the forms to be filed with the court and to pay any additional installments that may then be due.

### *Lawyer E*

Lawyer E is a sole practitioner whose law office is located near a large retail shopping mall in one of the many cities in a major metropolitan region of the state. The city in which the law firm is located harbors middle and high income residential areas and light industry. His law offices are among a suite of law offices in a one-story office building that shares the block with single family residences and other one-story professional office buildings. He started his practice following a relatively brief apprenticeship with a lawyer who had for some time specialized in consumer insolvency counseling, and who had hired Lawyer E to assist in that work. Consumer insolvency counseling and representation constitutes approximately 50% of his client volume, and his work on behalf of such clients includes both chapter 7 and chapter 13 proceedings. He also represents business debtors and creditors in bankruptcy proceedings and does a small amount of personal injury work. He also devotes a portion of two afternoons each month to counseling debtors at a legal aid office as a public

service.<sup>104</sup>

Lawyer E employs one secretary and shares the service of one receptionist with other lawyers in the building. The office building is well maintained and the interior is pleasantly furnished and appointed. The reception desk is located almost immediately inside the front door to the office building. The offices of lawyers extend around the perimeter of a hallway that leads to the back of the building. Lawyer E's office is somewhat less than one hundred square feet. His desk and other furnishings are new and comfortable; the office is tastefully appointed with some art and plants, and a significant amount of natural lighting contributes to a comfortable and uplifting office environment.

Lawyer E does not advertise save for listing in the telephone directory and yellow pages. Unlike the firms and lawyers previously described, he does not actively seek a high volume consumer insolvency practice, though he would certainly welcome an increased number of clients. He schedules interviews with prospective clients at any time during normal business hours on weekdays, and normally reserves at least one hour for such interviews. Unlike the lawyers described earlier, he will not schedule multiple appointments during the same blocks of time, notwithstanding his experience that clients occasionally fail to keep appointments and fail to call in to cancel.<sup>105</sup>

An initial interview by Lawyer E differs markedly from those previously described. When a client calls to inquire about visiting Lawyer E to discuss financial difficulties, his secretary simply schedules an appointment. The secretary asks the prospective client to prepare and bring a list of his creditors, but does not mail the client any forms to complete or literature to read.

104. More than half of the initial interviews conducted by Lawyer E that were observed in this study were conducted at the legal aid office. Consequently, the context of these interviews differed in some respects from the private law-office context described in the text. However, the manner in which he conducted interviews at legal aid was sufficiently similar to interviews conducted at his law office to justify the general characterizations given in the text.

105. The sample of clients for this study is too small to support the conclusion that cancellations at this office are less frequent and more likely communicated than cancellations at other law offices visited during the study. However, Lawyer E does not find cancellations to be a problem for him. He speculates that the low rate of cancellations may result from the care that his secretary takes in discussing the initial appointment with a prospective client, including a specific request that the client call in advance if the appointment must be canceled or rescheduled.

Lawyer E greets his clients in the reception area shortly after their arrival and escorts them to his office. After the client is seated, he tells them that he first wishes to get some basic preliminary information. He then asks the client a series of narrow questions to elicit the following: the client's full name, address, and telephone number; where the client is employed, if at all, and the amount of the client's monthly net income, including income from other sources; the number and ages of the client's dependents; whether the client rents or is purchasing housing, whether the client is current in housing payments, and the estimated fair market value of any housing that is being purchased; the make and year of any automobiles that the client owns and their estimated value; the amount of any debt secured by the automobiles, and the amount of monthly payments in connection with such secured debt. He records the responses to these questions on a yellow legal pad but maintains much eye contact with the client during the process.

When these questions have been answered, Lawyer E will say something to the effect of: "Let me give you a chance to talk. Tell me about your situation and what brought you here." At this invitation, clients generally embark on a narrative description of their financial difficulties, sometimes including part of the history leading to those difficulties.<sup>106</sup> Narrative complete, the lawyer resumes with some additional narrow questioning, including questions about the nature and amount of debts owed, the identity of creditors, whether debts are secured by collateral, and other miscellaneous questions prompted by information provided in the client narrative.

In the typical interview, Lawyer E next sets out to educate the client in general terms about the nature of chapter 7 and chapter 13 proceedings and to explain how each might function in the context of the client's particular circumstances. These explanations consume as much as five or ten minutes and are usually uninterrupted by the client. The explanations are framed in plain language and often include a few simple examples. When he feels the

106. Lawyer E listens attentively to these narratives. In contrast, Lawyer D-1 routinely cuts off such narratives with remarks such as: "That's ancient history. Let's talk about what we can do now." Lawyer B indicated that he too cuts off narratives of this sort which he labeled "war stories" not generally relevant to providing the specific assistance needed by the client.

client's circumstances dictate it, Lawyer E will also explain other possible solutions to the client's financial difficulties, including, for example, the possibility that the client cease trying to pay debts and request that creditors discontinue collection efforts because the client is unable to pay and is judgment proof. During or following these explanations, Lawyer E frequently uses phrases such as: "One possibility for you to consider is . . .;" "You need to choose what you want to do, . . . it's your life, and you have to look at yourself in the mirror the next day;" "In your situation I think you need to consider . . . [a specific alternative]."

At the conclusion of these explanations, Lawyer E asks for the client's thoughts about the alternatives described and answers questions that clients may then ask. Where the client expresses a preference for one alternative, Lawyer E either reinforces the choice by expressing his views as to its advantages or points out a particular disadvantage of which the client may not be fully aware. He will often then offer the client additional time to think about the decision. Thereafter, he will quote fees and explain the timing of payment.<sup>107</sup> If the client decides to initiate a chapter 7 or chapter 13 proceeding, Lawyer E obtains forms from his secretary's office, explains the forms to the client, and tells the client that when the forms are completed and returned to his office he can prepare the appropriate documents to be signed and filed with the bankruptcy court.

### *Lawyer F*

Lawyer F is a partner in a firm of several lawyers. Her work consists almost exclusively of insolvency counseling and representation, mostly on behalf of individual consumer debtors but also including work on behalf of some small business debtors and some creditors. Other members of the firm advise and represent clients in connection with commercial disputes, business planning, and personal injury, but leave insolvency representation exclusively to Lawyer F. The law offices of the firm occupy most of one story of an older downtown office building in a large metropolitan area.

107. His fees for a chapter 7 proceeding are \$500 for an unmarried individual and \$650 for a joint filing by husband and wife. Fees for a chapter 13 proceeding, prescribed by the local bankruptcy court, depend upon the amount of debt to be repaid by the debtor. A typical fee is \$600. These fees do not include the \$60 bankruptcy court filing fee.



Lawyer F has practiced law for approximately seven years, initially on her own and thereafter as a partner in her present law firm. Her early interest in consumer insolvency practice developed partially through association with and referrals from a lawyer who counseled consumer debtors at a legal aid office. She has continued this type of work primarily because she derives satisfaction from providing immediate and dramatic help to people in distress and because she enjoys the camaraderie of the relatively small group of lawyers that constitutes the local bankruptcy bar.

Lawyer F represents clients in both chapter 7 and chapter 13 proceedings, but chapter 13 representation predominates. Her advertising consists only of references to and brief descriptions of "credit counseling services" in telephone directories. One advertisement describes chapter 13 as debt consolidation without borrowing, describes chapter 7 as providing a fresh start, and indicates that lawyers' fees are court controlled and that there is no charge for an initial consultation. The advertisement provides a phone number to call but does not list the name or address of Lawyer F. The secretarial and administrative assistant to Lawyer F, who initially screens most calls, reports that most callers inquire about chapter 13 relief. This self-selection may result in part from the description of chapter 13 in the advertisement.

The assistant to Lawyer F plays a significant role in the lawyer's service to clients. When initial calls are forwarded to the assistant, she may spend several minutes responding to questions and explaining the nature of chapter 13 or chapter 7 relief. She will also explain office procedure, describe fees, and request that the client bring a list of creditors to the initial consultation. She will also explain that the client will be asked to view a videotape concerning chapter 13 and chapter 7 upon arrival at the law office. In the event that Lawyer F represents a client in chapter 13 or chapter 7 proceedings, the assistant remains a ready resource of information for the client. The assistant also performs much of the necessary clerical work associated with chapter 13 or chapter 7 representation.

In visiting the law offices of Lawyer F, a client will encounter a physical environment marked by contrast. The office building, apparently once elegant, is old, and has not been refurbished or lavishly maintained. Common public areas of the building, including a narrow stairway, are not well lighted. Yet the reception area

and the individual office of Lawyer F, on an upper floor of the building, tastefully blend wood paneling, antique furnishings, attractive carpeting, comfortable seating, and art. These areas are warm, comfortable, and attractive.

A full time receptionist seated behind a desk in the reception area greets each client and reports the client's arrival to Lawyer F's assistant. The assistant comes to the reception area from her office, introduces herself, and informs the client that Lawyer F would like the client to view a videotape presentation before the consultation. In this videotape, approximately one-half hour long, Lawyer F speaks generally about the nature and procedures of both chapter 13 and chapter 7 relief. She considers the videotape an efficient means of educating clients, in advance of their personal consultation, about the legal alternatives that are available. She also feels that it helps to allay client anxiety about the initial consultation by allowing the client to "meet" and "size up" Lawyer F before actually meeting her. Because Lawyer F believes that the videotape presentation is an important and useful part of the office procedure, her legal assistant firmly, though politely, persuades clients to view the videotape even if they express reluctance to do so. Only on rare occasions, therefore, does the initial consultation begin without a client first having viewed the videotape.

The videotape is displayed on a television monitor in a small and less attractively furnished office a few steps removed from the reception area and immediately adjacent to the office in which the assistant works. The assistant escorts the client to this office and starts the videotape. The videotape consists of two distinct segments. The first segment, considerably longer and more detailed than the second, describes the nature of chapter 13 relief. The second segment more briefly describes chapter 7 relief, beginning with a description of bankruptcy as a very serious remedy, somewhat akin to the seriousness of an amputation in the medical context.<sup>108</sup> Thus, by sequence, length, detail, and content, the videotape conveys that chapter 13 relief is a more appropriate remedy than chapter 7 in most circumstances. When the videotape presen-

108. Lawyer F retaped this part of the presentation following my initial observation, largely in response to amendments to federal bankruptcy law that became effective in October, 1984. The new tape drops the analogy to amputation but still describes chapter 7 as a serious remedy.

tation concludes, the assistant escorts the client back to the reception area there to be greeted by Lawyer F and escorted to her office.

I observed six initial interviews conducted by Lawyer F. The length of these interviews, on average, were considerably longer than those at the other law offices described. Three interviews lasted approximately seventy-five minutes and another lasted approximately ninety minutes. Two shorter interviews lasted approximately forty-five minutes and twenty minutes. The average length of the interviews was, therefore, approximately sixty minutes.

While one can discern common threads in the interviews conducted by Lawyer F, there is considerably less of a routine, identifiable pattern here than for the other lawyers observed. Prompted by caring and tactful inquiry from Lawyer F, significant portions of each of the interviews consist of extended and sometimes intimate conversation concerning part of the client's personal history and the client's feelings about his or her existing situation. Through consistent expressions of interest and encouragement, Lawyer F appears as friend, confidant, and supporter, as well as technical assistant. Such conversation surfaces at different times during the interview, often diverting the normal agenda. It is, therefore, not possible to describe a routine sequence for the interviews conducted by Lawyer F.

There are some common features of the initial interviews, however. Lawyer F will usually ask the client whether he understands the nature of chapter 13 and chapter 7 relief from viewing the videotape, and whether the client has any questions about either. She therefore relies on the videotape as a primary source of client education, to be supplemented by answers to particular questions that the client may ask. She also inquires about the nature of the client's employment, the amount of the client's income, the number and ages of the client's dependents, and the nature and value of the client's assets. She will also look at the list of creditors that most clients bring to the consultation and ask questions to clarify or supplement the information on the list.

When she concludes from her ongoing assessment of the information provided that chapter 13 relief is possible, Lawyer F, with list of creditors in hand, turns to a desk top calculator located behind her desk to prepare a rough calculation of a possible chap-

ter 13 plan. As she turns, she says to the client something like: "Let's see what a chapter 13 plan might look like." She will enter figures on the calculator for both a full and a partial repayment plan. The time for calculation rarely exceeds one minute and is sometimes accompanied by casual conversation with the client. Calculations complete, Lawyer F turns back to the client and places the calculator tape on her desk with the figures face up to the client. She then quickly explains what the figures mean, emphasizing the length of the plan and the amount of the required monthly payment to the trustee. In pointing to the figures on the tape, she also mentions for the first time the lawyer and trustee fees that would be paid under the terms of the plan.<sup>109</sup> She then invites the client to react to the possibilities proposed or, in some cases, suggests that even minimum required payments under a chapter 13 plan appear to be more than a client could reasonably afford.

If a client decides to proceed with chapter 13 relief, usually after additional discussion generated by client questions or comments (and sometimes after considering the matter further at home) Lawyer F will select some forms from her desk and begin a lengthy series of narrow questions designed to obtain information required for the preparation of documents necessary to initiate a chapter 13 proceeding. These include a series of questions designed to develop for the client a budget of monthly living expenses. Lawyer F builds this budget around the proposed monthly payment to the chapter 13 trustee and around other known fixed expenses.<sup>110</sup> She leaves monthly food expense until last because she believes that this is a useful way to assist the client in determining whether a repayment plan is feasible.<sup>111</sup> Once all this in-

109. Lawyer F quotes fees for a chapter 13 proceeding in accordance with a local bankruptcy court fee schedule. This schedule permits higher fees for a larger number of creditors. Usually, Lawyer F charges the minimum fee, an amount somewhat in excess of \$600, not including the \$60 bankruptcy court filing fee. Unlike Lawyer A, Lawyer F takes payment of these fees from the trustee after the client begins making payments under the chapter 13 plan. Lawyer F usually charges a minimum of \$300 for a chapter 7 proceeding, plus the \$60 filing fee. She prefers to receive those fees in advance of filing the petition, but in cases of hardship she will often agree to take payment of those fees in installments following the filing of the petition.

110. Fixed expenses include payments for housing, utilities, transportation, and insurance.

111. If, for example, the client's budget allows only \$50 each month to feed a family of four after considering all other fixed monthly expenses and the proposed amount of

formation is obtained, Lawyer F describes any remaining information that the client will need to submit to the lawyer's assistant before the documents can be prepared for filing with the court. She will then briefly sketch an agenda for future action. In closing the interview, she usually provides the client with a written description of the law firm and a small brochure prepared by the state bar that provides basic information about chapter 7 and chapter 13 proceedings.

In cases where Lawyer F or the client perceive that a chapter 13 proceeding is not appropriate or feasible, Lawyer F will propose the possibility of chapter 7 relief and advance reasons for that suggestion. If the client decides to pursue that alternative, the lawyer will, as in the case of chapter 13, retrieve some forms from her desk and ask the client a series of narrow questions which, together with other information later to be supplied by the client, will enable the assistant to prepare documents required for filing.<sup>112</sup>

Lawyer F views chapter 13 as appropriate relief for clients in a wide variety of circumstances. She openly expresses that view to clients in the initial interview, either at her first mention of chapter 13 relief as a potential solution or in support of a client's expressed preference for that solution. Beyond the description in the videotape, Lawyer F gives only passing mention to chapter 7 unless relief under chapter 7 is clearly indicated by the client's circumstances.

## V. AN APPRAISAL

What can be made of these observations? At a minimum, they offer insights and a basis of comparison for lawyers, especially consumer bankruptcy lawyers, interested in evaluating their own

payment to the chapter 13 trustee, the client can see that the plan would not be feasible. Lawyer and client might then consider a smaller payment to the trustee, if possible, or the alternative of filing for relief under chapter 7.

112. This standard series of questions is drawn largely from the official forms that must be filed with the bankruptcy court. *See supra* note 86. Lawyer F relies on questions on these forms as a means to assure that she has not overlooked information that could render chapter 7 relief inappropriate. For example, the answer to one question will tell her if and when the client has previously used a bankruptcy remedy. If the client has obtained a discharge in a chapter 7 proceeding that was filed within the preceding six years, the client could not obtain a discharge of debts by filing another chapter 7 petition now. 11 U.S.C. § 727(a)(8) (1982 & Supp. III 1985).

processes for dealing with clients.<sup>113</sup> The observations also contribute, at least incrementally, to our knowledge about the manner in which legal services are delivered, about the extent to which lawyers influence the decisions of their clients, and about the ways in which clients may understand and interpret their encounters with lawyers. The contribution is more than incremental, however, if these observations accurately depict a range of lawyer behavior that is representative of the behavior of other consumer bankruptcy lawyers or of lawyers in other areas of practice. The relative congruence of some of these observations with those reported by Hosticka and Bellow<sup>114</sup> suggest that the behavior described here may well be representative.

Much of the behavior of the lawyers and paralegals (hereafter "lawyers" for convenience) in the client interviews observed followed routine patterns. In all but two of the law offices, lawyers exercised virtually exclusive control over the structure, sequence, content, and length of the dialogue with clients. Most of the lawyers did not explain their design for the interview to the client at any point. Most did not invite clients to discuss various ways in which the lawyer might serve the client. Except for Lawyer C, lawyers did not regularly discuss solutions to financial distress other than solutions offered by federal bankruptcy law. However, the amount of information offered by the lawyers about the bankruptcy solutions, the degrees of influence exercised by lawyers over the client's choice between solutions, and the systems adopted by the lawyers for gathering and dispensing information and implementing chosen solutions varied more widely. Other behavior observed, though not the focus of study, warrants comment. Each lawyer appeared to be extremely well versed in relevant legal rules and procedures and was thus well equipped to render the proficient technical service due clients.<sup>115</sup> Each was

113. Information gathered from these observations may provide both a useful supplement and a foil to published advice from some consumer bankruptcy lawyers on how to interview and counsel a consumer insolvency client and how to run a bankruptcy practice. See, e.g., H. SOMMER, CONSUMER BANKRUPTCY LAW AND PRACTICE 46-51 (2d ed. 1985); Horsted, *You and Your Bankruptcy Client*, CASE & COM., Mar.-Apr. 1983, at 37; Sommer, *Counseling the Consumer Debtor*, PRAC. LAW., Jan. 15, 1983, at 19; Sommer, *Gathering the Facts in a Consumer Bankruptcy Case*, PRAC. LAW., Apr. 15, 1982, at 11.

114. See *supra* text accompanying notes 55-57.

115. A critic of an earlier draft of this Article has asked me whether the lawyers whom I observed "got it right." This inquiry is similar to Macaulay's "consumer-protection

courteous to clients. Each lawyer was forthright about assessments of the clients' situations and about potential solutions. It is important that the focus of this study on other characteristics of lawyer-client interaction not obscure the obvious value of these qualities in a lawyer.

To appraise the behavior that was the focus of study, it is useful to set it in the context of conceptual models of lawyer behavior that offer benchmarks for judgment. I have chosen to stereotype two such models that can fairly be characterized as representing polar extremes on a continuum. For ease of reference I shall refer to one as the product model and to the other as the client-centered model.<sup>116</sup> While the client-centered model is more consistent with my values, I think neither model lays greater a priori claims to validity in all contexts.

#### A. *Models of Lawyer Behavior*

In the product model, the lawyer offers and sells a product consisting exclusively of his or her technical service in attaining assumed or stated goals for the client. There is some anomaly in calling service a product,<sup>117</sup> but the analogy is revealing. Consider the person who wishes to purchase a home appliance from a large volume discount retail outlet. This consumer may seek information about different brands and models of the appliance prior to visiting the retail outlet. How much information the consumer seeks will largely depend on such factors as the consumer's habits, mood, education, resources, or the degree of urgency in procuring the appliance. The consumer ultimately will visit the retail outlet, write down a catalogue number of the appliance that he

concern" with the study of lawyer-client interaction (are clients getting value for their money?). *See supra* note 7. As Macaulay notes, that is a particularly value-laden and hence difficult question to answer. Macaulay, *supra* note 7, at 19-21. Nevertheless, as a teacher of bankruptcy law, I noticed enough about the content of the lawyers' questions and advice to reach the conclusion voiced in the text.

116. *See supra* note 4.

117. *Cf.* C. GILSON, L. CAWLEY, & W. SCHMIDT, *HOW TO MARKET YOUR LAW PRACTICE* 91 (1979):

It may take a considerable leap of faith on your part to think of the legal services your firm performs as "products," since this word may conjure up chilling images of detergents and breakfast cereals. However, "product" is used here in its very proper marketing context to describe whatever you provide by way of services to meet a consumer client's needs.

desires on a form provided by the outlet, and deliver the form to a clerk. The clerk or another employee will then retrieve the appliance from the storeroom, make it available to the customer for inspection, and take the consumer's money if the consumer wishes to make the purchase. While most such retail outlets are presumably interested in developing goodwill with the consumer, the essence of the transaction is the sale of a product rather than the establishment of a personal relationship.

The relationship between lawyer and client can be much the same. Here too a client may or may not seek information from a variety of sources about goals, solutions, and lawyers prior to visiting a lawyer. When a client approaches a lawyer, both may be content for the lawyer simply to gather information necessary to attain the client's stated or implicit goals rather than first describing for the client the variety of services that the lawyer could provide. In appropriate circumstances, the lawyer would also indicate where a goal is not attainable or a solution is not feasible. The product offered is incorporeal, but it is a product rather than a relationship that is the essence of the transaction.<sup>118</sup> This model fairly well characterizes the behavior of Lawyer B, much of the behavior of Lawyer A, and some of the behavior in the law firm that includes Lawyer D-1 and Paralegals D-2 and D-3.

Lawyer B sells chapter 7 bankruptcies. His advertisements and information sheet refer exclusively to that remedy and he therefore presumes that individuals seeking his assistance for financial difficulties have come to purchase that remedy. His standardized format for the interview allows him to gather all the information needed to implement that remedy as well as information that will tell him if the remedy is appropriate. He doesn't want to hear "war stories" or engage in "long, futile, fee-building bull sessions." If the product is inappropriate, only then will he suggest a possible alternative. If he determines the product to be appropriate, he simply inquires how the client wishes to pay. In those instances he doesn't influence choice among alternatives because he presumes that clients have already chosen. His interviewing behavior is entirely consistent with this presumption and with his conception of the type of service he can afford to offer

118. This description of lawyer function appears to be akin to what Cain has termed the translation function. *See supra* text accompanying note 54.



for his very low fee. He controls the structure, content, sequence, and length of the interview, does not invite discussion or negotiation about his role, and does not discuss other potential solutions to the client's financial difficulties until he perceives the chapter 7 solution to be unworkable or imprudent.

Lawyer A sells chapter 13 plans. His advertisement refers exclusively to repayment of debt, and his initial explanation to the client of "what we do here" refers exclusively to chapter 13. His interviewing behavior, however, may be characterized as slightly removed from the product model. He immediately makes eye contact with the client and begins interviews by asking the client to describe the problem that has motivated this visit. He usually inquires how the client feels about the chapter 13 solution. These qualities of Lawyer A's interviewing style invites inquiry from and discussion with the client. To some extent, therefore, Lawyer A appears to invite a relationship that goes somewhat beyond the furnishing of product for a price.

The law firm of Lawyer D-1 and Paralegals D-2 and D-3 sells both chapter 7 and chapter 13. Both are advertised and both are briefly explained in pre-recorded telephone messages. Forms that the client must complete inquire which solution a client prefers and seek information relevant to both. The extensive use of forms, valuable in several respects, is an early, subtle, though likely unconscious signal of the lawyer's definition of and control over the discussion of the client's situation. In these forms, the law firm has identified the categories of information it deems most relevant to the anticipated content of the client's situation. The process implicitly instructs the client to respond exclusively in the terms of such categories. Of course, experience generates these categories; the length, volume, and breadth of the law firm's experience, reflected in periodic amendments to the forms, continually increases the likelihood that the information sought is related to the purpose of the client's visit and to the feasibility of a solution. The forms are nothing less than an extension of the lawyers who craft them. They are the interviewer's constant companion. They standardize process, dictate the format and content of the initial interview, and memorialize solutions. Through use of these forms, interviewers control the structure, sequence, content, and length of the interview and generate information that supports standard solutions. Where, as for many, the standard solution is

chapter 7, the process does not invite discussion and comparison of alternatives, though it does provide for the rerouting of a client to a chapter 13 specialist if the client's self-generated interest in that possibility is persistently expressed.

A client-centered model of lawyer behavior is quite different. A particular type of relationship between lawyer and client accompanies technical service. In this relationship, the lawyer attends to a wider range of the client's experience, including the client's feelings about and perceptions of the events that have precipitated the visit to the lawyer's office. The lawyer invites the client to become an equal partner in deciding how to use the lawyer's time and what course of conduct to pursue. This relationship requires that the lawyer share information with the client, thus casting the lawyer in the role of a teacher. In this model, lawyers share control of the structure, sequence, and content of the interview, brainstorm with the client about potential solutions, provide ample information about competing solutions, and help the client weigh advantages and disadvantages of competing solutions. By this type of behavior the lawyer enshrines client autonomy, power, and self-esteem.

Lawyers E and F act in ways consistent with several elements of this model, evident in both institutional mechanisms in their practice as well as in the tone and style of their contact with clients. Through verbal and non-verbal cues, both invite clients to share parts of their experiences that put financial difficulties in a broader context. Both spend significant amounts of time teaching, one largely through use of videotapes and the other through verbal explanations. Institutional attention to alternative solutions, however, is absent here as elsewhere. Lawyer E explicitly encourages informed client choice between chapter 7 and chapter 13 through even-handed explanation of both followed by an invitation to the client to indicate and discuss reasons for a preference. Through use of the videotape, Lawyer F implicitly invites client choice between chapter 7 and chapter 13; however, Lawyer F does not generally encourage choice in an interview until she concludes that chapter 13 may not be feasible or appropriate. As a consequence of the attention to a broader range of client experience, the emphasis on teaching, and the invitations to mutual decision making, each of these two lawyers share control of the content, sequence, and length, though not the general structure, of

the interview.

Lawyer C acts in ways consistent with some elements of each model. He controls the structure, sequence, and length of the interview. By not inviting (though also not refusing to entertain) discussion of a broader range of client experience, he controls most of the content of the interview. He explicitly invites client choice among alternatives, often more than once during an interview, after briefly explaining the fundamental characteristics of each. As with Lawyer F, he ventures opinions as to which alternative might be more desirable for the client only if his invitation to choose prompts client questions or expressions of preference. Unlike any of the other lawyers observed in the study, Lawyer C regularly considers and, where appropriate, offers information about potential solutions other than chapter 7 or chapter 13 relief. Clients pay for that information because Lawyer C, unlike each of the other lawyers observed, charges \$15 for an initial interview if the client chooses not to retain him for purposes of obtaining chapter 7 or chapter 13 relief.

A summary of these characterizations of observed lawyer behavior in terms of the two models of lawyer behavior may be graphically represented by the following continuum:

Product Model		Client-Centered Model	
X	X	X	X
Lawyer B Lawyers D-1, D-2, and D-3	Lawyer A	Lawyer C	Lawyer E Lawyer F

There is certainly room to question my descriptions of these models, my characterizations of the behavior observed (which the reader is invited to modify from the raw material reported), or my placement of each lawyer on the continuum stretching between the models. The results of a dialogue about these lawyers would likely render useful modifications or refinements. There is also enormous room for additional observation and data. In the interim, particularly before valuing the respective behaviors, it is important to consider the systemic pressures that help shape the behavior of these consumer bankruptcy lawyers and to identify potential implications of their behavior for both the delivery of

legal services and the formulation of federal bankruptcy policy.

### B. *Systemic Pressures in the Consumer Bankruptcy Lawyer Subculture*

The client-centered model of lawyer behavior occupies center stage in the clinical education courses of many of the nation's law schools. Teaching materials and other legal literature describing and promoting elements of that model abound.<sup>119</sup> The model borrows heavily from interviewing and counseling skills and from attitudes about personal responsibility and choice that are characteristic of mental health professionals who are influenced by principles of humanistic psychology.<sup>120</sup> Indeed, this borrowing reflects the elusiveness of the boundaries between the domains of the lawyer and the mental health professional.

In my view, this model is not yet sufficiently informed by consideration of the highly differentiated nature of law practice or by the economic, psychological, and other pressures of working in the legal marketplace. The model focuses on interpersonal relationships without enough attention to the social systems in which those relationships must function. The description of consumer bankruptcy law practice offered here allows us to consider interviewing and counseling models in the context of a relevant system.<sup>121</sup>

119. *E.g.*, D. BINDER & S. PRICE, *supra* note 4; T. SHAFFER & R. REDMOUNT, *LEGAL INTERVIEWING AND COUNSELING* (1980) (including a useful bibliography of related literature); T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1976).

120.

The basis for this borrowing from psychology principles is not simply intuitive. [R]esearch in the field of counseling and social psychology has made it clear that useful generalizations can be drawn about any help-centered, two-person (dyadic) interaction. . . . Many of the behaviors of the interviewer which make for a mutually satisfying conclusion in one of these relationships will also contribute to mutually desirable outcomes in the others.

Appel & Atta, *The Attorney-Client Dyad: An Outsiders' View*, 22 OKLA. L. REV. 243, 243 (1969). A useful selection of materials revealing this borrowing is offered in L. BROWN & E. DAUER, *supra* note 63, at 97-111 (1978). An especially explicit example of such borrowing is suggested in Elkins, *A Counseling Model for Lawyering in Divorce Cases*, 53 NOTRE DAME LAW. 229 (1977).

121. This contention should not be confused with a drastically different contention advanced by William Simon in Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980). He criticizes a psychologically grounded jurisprudence and a psychologically grounded philosophy of law practice for the reason, among others, that they celebrate a "community of two" (lawyer and client) retreating from the difficulty of political and social commitment into the refuge of exclusively subjective personal experi-

The lawyers observed in this study undertake insolvency counseling and representation in the context of metropolitan legal subcultures. In each of the metropolitan areas selected for the study, a relatively small cadre of lawyers engage in the practice of consumer bankruptcy law. In each area, this small group of lawyers files the overwhelming number of both chapter 7 and chapter 13 cases. Bankruptcy and non-bankruptcy lawyers alike consider this practice a specialty given the complex and technical legal rules and procedures that govern outcomes. The consumer bankruptcy lawyers in town mostly know one another, because they meet frequently in bankruptcy court or at continuing education functions that address their specialty.

This subculture is part of a more inclusive subculture consisting of all those who earn at least part of their livelihood by responding to the needs of individuals in financial distress. This broader subculture includes lenders, non-profit debt counseling agencies, non-lawyers who offer assistance in the preparation of the forms required for chapter 7 or chapter 13 filing,<sup>122</sup> and authors and publishers of self-help books that provide information about legal rights as well as instructions and forms for preparation of chapter 7 and chapter 13 cases.<sup>123</sup> Consumer bankruptcy law-

ence. I argue that techniques borrowed from therapeutic contexts may not be able to work in the same way, as well, or at all in the context of the particular, determined structure of a lawyer's working environment. However, I believe that judicious borrowing from therapeutic contexts can improve the quality of legal interviewing and counseling, and that this can happen without the retreat that Simon seems to see as the inevitable consequence of a "psychological vision." James Elkins elaborates this type of response to Simon in Elkins, *"All My Friends Are Becoming Strangers: The Psychological Perspective in Legal Education"*, 84 W. VA. L. REV. 161 (1981).

122. To more meaningfully evaluate the services offered by consumer bankruptcy lawyers, it would be useful to learn how many individuals consult non-lawyers who charge a fee for assistance in the preparation of these forms and to learn the precise nature of the services rendered. Such service may respond to an existing demand for low-cost assistance. Two valuable empirical studies consider whether this type of assistance by non-lawyers, primarily in a divorce context, is or should be punishable by state authority as the unauthorized practice of law. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981); Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976). In this latter study, the author attributes to others (and implicitly supports) the contention that bankruptcy and debt collection are two areas "where lay specialists might provide routine advice and document preparation services at a level of competence at least equal to that of lawyers." *Id.* at 89.

123. See, for example, the publications identified *supra* note 48. The scope of the self-help movement is described in Rhode, *supra* note 122, at 2-3 nn. 5, 6.

yers compete for survival with each other and with those in this broader subculture.

The competition is partially waged through lawyer advertising of low cost bankruptcy services.<sup>124</sup> Most of the advertising emphasizes price. Most in the audience for this advertising simply cannot afford to pay high fees. Accordingly, one assumes them to be particularly attracted by price advertising. In the struggle to survive, consumer bankruptcy lawyers therefore must carefully consider whether or how much to advertise and what fees they should charge.<sup>125</sup>

The forces of competition are not the only constraint on the amounts a lawyer may charge for consumer bankruptcy services. In addition, fees are subject to scrutiny by the bankruptcy judge.<sup>126</sup> Some bankruptcy courts promulgate fee schedules that

124. For examples of advertising by consumer bankruptcy lawyers, consult the appropriate section of the classified advertisements of a major metropolitan newspaper or consider the two sample advertisements for personal bankruptcy found in SECTION OF ECONOMICS OF LAW PRACTICE, A.B.A., LAWYER ADVERTISING KIT (1978) (not paginated). Marketing of legal services through advertising is concisely discussed in A.B.A., EFFECTIVE MARKETING OF LEGAL SERVICES THROUGH ADVERTISING: A PRACTICAL GUIDE FOR LAWYERS (1985). A fairly recent Federal Trade Commission staff report summarizing the results of surveys of lawyer advertising in 17 cities throughout the United States concludes that the reduction of legal restrictions on lawyer advertising, including advertising of consumer bankruptcy services, has resulted in lower prices for legal services. F.T.C. STAFF, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING 111, 114 (1984).

125. For a survey of fees charged by consumer bankruptcy lawyers before lawyer advertising was sanctioned, see D. STANLEY & M. GIRTH, *supra* note 5, at 183-86. A more recent estimate puts standard fees for chapter 7 cases in a range between \$200 and \$500. H. SOMMER, CONSUMER BANKRUPTCY LAW AND PRACTICE 250 (2d ed. 1985).

A 1984 Federal Trade Commission staff report found the average price among 17 cities in the United States for "simple," non-business bankruptcies for husband and wife to be \$395, ranging from a low average of \$273 in Boston, Massachusetts, to a high average of \$485 in Fresno, California. F.T.C. STAFF, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTION ON LEGAL ADVERTISING 84, 100 (1984).

Of the lawyers observed in this study, the firm employing Lawyer D-1 and Paralegals D-2 and D-3 charged the highest fees and Lawyers B and C charged the lowest fees. See *supra* notes 79, 84, 88, 102, 107, and 109. None of the lawyers observed in the study compete in the same metropolitan area as the firm employing Lawyer D-1 and Paralegals D-2 and D-3, although there are many other lawyers in that area who charge considerably lower fees. The continuing success of the law firm employing Lawyer D-1 and Paralegals D-2 and D-3 in the face of such price competition may be explained by its large amount of advertising and its good reputation.

See *infra* note 138 concerning lawyer advertising more generally.

126. 11 U.S.C. § 329 (1979 & Supp. 1985); Bankr. Rule 2017, 11 U.S.C. (1984). The rationale for limiting lawyer's fees is "premised on the need . . . to protect the creditors of

set the maximum fee that the judge will permit a lawyer to collect in routine cases. In the absence of such schedules, consumer bankruptcy lawyers still know from experience what fee the sitting bankruptcy judge is likely to consider too high.<sup>127</sup> Thus, even absent competitive pressures, the consumer bankruptcy lawyer simply cannot afford without subsidy or sacrifice to operate inefficiently or spend large amounts of time with clients given the tasks traditionally required of a lawyer in a routine chapter 7 or chapter 13 case.<sup>128</sup>

the estate and the debtor against overreaching by an officer of the court who is in a peculiarly advantageous position to impose on both the creditors and his client." Bankr. Rule 2017, Advisory Committee Note, 11 U.S.C. (1984).

127. One example comes from West Virginia. A bankruptcy judge there does not require detailed justification of lawyer's fees charged to consumer debtors if no objection is raised to the fee, if the lawyer has performed all required services, and if the fee does not exceed: \$400 for an individual chapter 7 proceeding, \$450 for a joint chapter 7 proceeding, and \$500 for an individual or joint chapter 13 proceeding. Flowers, *Attorney Fees: Handling Bankruptcies Without Getting There Yourself*, 84 W. VA. L. REV. 669, 681 (1982). In Maryland, a bankruptcy judge recently limited lawyer's fees to \$650 for services rendered in connection with a chapter 13 proceeding. The judge's written opinion describes the documentation required of a lawyer to justify the fee and the factors to consider in determining how much to award. *In re Morgan*, 48 Bankr. 148 (D. Md. 1985). One consumer bankruptcy lawyer in San Diego complained about the zealous review of lawyer fees by some bankruptcy judges and suggested that such fee constraints hurt the consumer by encouraging lawyers to do merely the minimum amount of work necessary to earn the standard fee. Ritner, *Court Regulation of Consumer Bankruptcy Fees: How It Hurts the Consumer*, 82 COM. L.J. 247, 248-49 (1977). That criticism was voiced prior to the inauguration of extensive lawyer advertising. The complaint might now be that advertising and competitive pressure rather than judicial scrutiny of fees unduly influence lawyers to spend less time with a client.

128. The consumer bankruptcy lawyers observed in this study offer the following "package" of services to clients in a routine case: preparation of all documents that must be filed to initiate a chapter 7 or chapter 13 proceeding; review of the documents with the client prior to filing in order to assure accuracy; filing of the documents; appearance with the client at the first meeting of creditors; and, in the case of a chapter 13 proceeding, appearance with the client at a confirmation hearing (which, in some bankruptcy courts, is held concomitantly with the creditors meeting). This package of services is common. See H. SOMMER, *CONSUMER BANKRUPTCY LAW AND PRACTICE* 249-50 (2d ed. 1985). Most of the lawyers observed charge additional fees for other services that are sometimes required. Such services may include a motion to avoid a lien, negotiation and preparation of a reaffirmation agreement, and response to a complaint to determine the dischargeability of a particular debt. Concerning dischargeability, lien avoidance, and reaffirmation, respectively, see *supra* notes 41, 45, & 47.

While general rules of law require competent professional service to clients, no rules prescribe the specific tasks that a lawyer must undertake for a consumer insolvency client. The lawyer and client are free to negotiate which tasks the lawyer should perform, the manner in which the lawyer is to contribute to the accomplishment of each task, and the price for the lawyer's service (subject to judicial scrutiny as described in *supra* text accompanying notes 126-27). None of the lawyers or clients observed suggested the possibility of

Economic constraints may explain the absence from the law offices observed of institutional mechanisms for consideration or implementation of potential non-bankruptcy solutions to financial difficulty. None of the lawyers had adopted routines for representing clients in resisting wage garnishment, for claiming exemption from execution, or for asserting protections afforded by debt collection laws. The most that any of the lawyers was prepared to do for clients who might benefit from such solutions was to tell them to inform creditors of the situation and demand that creditors cease non-judicial collection efforts. None of the lawyers routinely discussed with clients the possibilities of increasing income or reducing expenses, and only one mentioned the possibility of selling an asset as a means to cope with financial difficulties. None of the lawyers suggested negotiation of a composition or extension agreement with creditors. None routinely considered the possibility that clients might have defenses to payment of debts, or claims against the creditors seeking collection.<sup>129</sup>

Some of these solutions are not as encompassing, and none of them are as swift and certain, as relief under chapter 7 or chapter 13. Moreover, these solutions are not feasible for many clients; a visit to a lawyer is often the last stop on the road after some of these other possibilities have been exhausted. The lawyer, compelled by competition or fee ceilings to process a high volume of cases for a standard low fee, may not be able to afford to institutionalize preparation for what the client will often consider futile, interim, or incomplete solutions. Even where non-bankruptcy solutions are desirable, the lawyer may be unable to charge or the client unable to pay for services rendered. Solutions that the client might implement without assistance<sup>130</sup> will leave the lawyer uncompensated for the initial interview unless the lawyer is willing to charge for that service in a market filled with advertisements of free initial interviews.<sup>131</sup> Solutions that are difficult for the client

such negotiation. Compare the hypothetical dialogue suggested in the text following *infra* note 138.

129. The possibility of considering defenses and claims is discussed more fully in *supra* note 27.

130. Such solutions would include increasing income, reducing expenses, liquidating assets, and contacting creditors to assert rights under debt collection laws.

131. Lawyer C charges \$15 for an initial interview when the client does not choose to seek chapter 7 or chapter 13 relief. That charge is not mentioned in Lawyer C's advertising. None of the other lawyers observed charged for an initial interview when the client



to implement without the lawyer's assistance would likely require the lawyer to quote a somewhat open-ended fee, based on an hourly rate, that many clients could not afford and that would often be out of all proportion to the objective sought.<sup>132</sup> Hence, chapter 7 or chapter 13 relief may be the only products that fetch adequate return for the lawyer.

For some of the lawyers observed in this study, the failure of many clients to keep scheduled appointments or to call in advance to cancel appointments reinforces economic constraints. Lawyers in three of the offices observed respond to this by scheduling appointments for several clients during the same relatively short time period to maximize the possibility that time set aside for initial interviews will not be wasted if some clients fail to appear. When all or most clients do appear, however, the lawyers must certainly experience psychological pressure to minimize time spent with all but the last client so as not to keep the others waiting too long.

There are likely other psychological influences that work to constrain the interviewing and counseling behavior of consumer bankruptcy lawyers. Financial profiles of most clients in a given geographical region conform to a few categories familiar to the lawyer. In each category, clients report similar assets and debts and similar amounts of monthly living expenses and income. Lawyers know the names of most of the institutional creditors mentioned and communicate regularly with their representatives. The high degree of similarity in the financial profiles of many clients coupled with large client volume is likely to influence lawyers toward a stereotyped conception of the categories of client situations and toward routine procedures for and solutions to categories of cases. However, lawyers still must gather a wide variety of

did not retain the lawyer. When a client retains any of the lawyers to seek chapter 7 or chapter 13 relief, the standard fee for such relief includes compensation for the initial interview.

132. Such solutions would include negotiating an extension or composition with creditors, and forestalling judicial collection efforts by resisting a wage garnishment or by claiming exemption from other types of execution. It would be difficult for a lawyer to quote a specific fee for these services because of the difficulty of estimating the time required to accomplish the desired result. For example, it would be difficult to predict the time necessary to negotiate and consummate an extension agreement with ten creditors or to predict the time required for a court hearing and other activities related to a claim of exemption from execution. One reason why these predictions are difficult is that lawyers rarely engage in these activities on behalf of consumer clients.

information from each client to assure that a particular solution is in order. Without adequate information, lawyers risks malpractice. The need to gather all of the required information accurately and efficiently provides an additional strong incentive to routinize.

The particular combination of economic, psychological, and other constraints on consumer bankruptcy lawyers distinguishes the system in which such lawyers operate from systems in which other lawyers and other counseling professionals operate. The system is especially different from the system of counseling by mental health professionals from which models of legal counseling have been drawn.<sup>133</sup> Mental health counseling, whether aimed at specific behavioral objectives, greater emotional stability, improved personal relationships, or simply personal growth, will usually be very open-ended and hence time consuming.<sup>134</sup> As a consequence, mental health counselors in private practice will typically meet with clients during an extended and sometimes indefinite series of 50-minute counseling sessions one or more times each week. Fees typically range from \$30 to \$100 per session. This expense is sometimes partially covered by the client's medical insurance. If it is not, the client must be able to draw on his excess income or assets.

Overhead expenses for these counseling professionals are considerably lower than those for lawyers. The counselor's tasks require a minimum of paperwork. There are thus minimal requirements for secretaries, equipment, and supplies. As a result, a smaller amount of office space than used for law offices is suffi-

133. The ensuing description in the text of the system in which mental health professionals operate is primarily drawn from my discussions over many years with friends and acquaintances who are mental health professionals in California.

134. Notwithstanding this common sense distinction between the roles of lawyers and the roles of mental health professionals, I find it difficult to precisely delineate the boundaries between the two professions. Those in the mental health profession trace their work to Freud, which at one time gave rise to a stereotype that their services were exclusively in the nature of treatment of pathology. That stereotype no longer fits many mental health professionals who are interested in helping people cope with normal and recurring problems of living. Lawyers are mostly trained in law schools where curriculum and teaching methodology still largely derive from the 19th century Harvard Law School educational model suited to staffing Wall Street law firms with the resources to serve business. The stereotype of the lawyer generated by that educational model does not adequately describe the many lawyers who strive to respond to the common legal needs of individual citizens.

cient. The need to communicate with persons outside the counselor's office is small in comparison to the need of lawyers to communicate frequently with others whose work touches the lawyer's client. Thus, for the mental health professional, answering equipment or services are suitable in lieu of a receptionist, and telephone expense is considerably lower.

Those of us who would urge lawyers to learn from the skills and attitudes of mental health professionals must temper that message through an understanding of these fundamental differences between the systems in which mental health counselors and legal counselors operate. Such an understanding can generate realistic ideas to assist lawyers interested in expressing values of the client-centered model in their relationships with clients.

For example, three ideas seem possible within the context of the systemic constraints on consumer bankruptcy lawyers. First, the use of brochures, videotapes, charts, or other means of visual and graphic explanation of alternative solutions would offer more information to clients without a lengthy time commitment from the lawyer. Time permitting, printed material could be mailed to prospective clients in advance of the interview. This or other informational means such as videotapes could also be offered to the client upon arrival at the law office prior to the initial interview. In some of the offices observed, this procedure would make good use of client time otherwise wasted waiting for the interview, and would relieve some pressure on the lawyer to hurry previous interviews in the interest of reaching the next client. In preparing this educational material, the lawyer may wish to retain the services of professional consultants with expertise in these forms of communication. The costs of preparing these materials could probably be recouped through no more than a nominal addition to the lawyer's basic fee.

Second, appropriate use of some type of written decision making form during the interview could personalize general educational information, offer the client greater clarity about advantages and disadvantages of various alternatives, and explicitly invite client participation in the process of choosing among alternatives. To promote efficiency, the form could be printed to list the requirements and typical advantages of both a chapter 7 and chapter 13 proceeding, with room left for the lawyer to list and briefly describe other alternatives appropriate to the particu-

lar client.

Third, lawyers could also prepare a variety of suitable form letters that a client could use or adapt in response to dunning from creditors or collection agencies. These forms could suggest suitable language for requesting a moratorium on certain collection conduct including reference to appropriate sections of state or federal law governing debt collection conduct. The lawyer might offer copies of such forms as part of the initial consultation service or for a nominal additional fee. Together with brochures educating the client as to available options, these forms can generate for the client a sense of having choices and time to choose.

These examples illustrate an attempt to accommodate some norms of a client-centered model to the constraints of the specific systems in which consumer bankruptcy lawyers operate. Some lawyers, however, including some of those observed in this study, may reject these suggestions either because they do not agree with the underlying premises of a client-centered model or because they think the suggestions are not feasible or useful. This reminds us that interviewing and counseling behavior by lawyers is likely to remain differentiated in important respects, even among lawyers practicing the same specialty. This differentiation carries with it an important implication for the delivery of legal services, the subject to which this Article now turns.

### C. *The Delivery of Legal Services*

Each of the lawyers observed in this study operates within the context of a system that generates pressures that impinge upon the possibilities for relationships with clients. Nonetheless, the behavior observed in the six law offices was clearly differentiated.<sup>135</sup>

135. Lawyers behave in different ways as a result of a complex calculus of personality, style, values, attitudes, experience, and formal or informal education about the nature of counseling. Concerning the impact of lawyer personality on the nature of lawyer behavior, including counseling behavior, see Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972 (1961). The differences in lawyer attitudes toward chapter 7 and chapter 13 as vehicles for relief from financial distress have been noted in D. STANLEY & M. GIRTH, *supra* note 5, at 75-76 (1971).

This calculus also includes the amounts of personal remuneration that each lawyer wishes or needs to earn from the consumer insolvency portion of his or her practice. A lawyer wishing or needing to earn as much remuneration as possible from a consumer insolvency practice would experience the economic constraints most intensely. A lawyer willing and able to forego all personal remuneration, or whose time spent counseling insol-

One suspects, from anecdote and folklore, that many potential consumers of legal services are unaware of the full nature and extent of the differences in lawyer behavior. If so, this ignorance does both lawyers and consumers a grave disservice. When deciding to see a lawyer, or when selecting one, consumers of legal services would benefit from knowing about differences in lawyer interviewing and counseling behavior as well as about differences in price.<sup>136</sup> To borrow from a popular theme of advertising by airlines, the consumer might then be able to choose, roughly speaking, between "frill" and "no-frill" legal services.

In the context of financial distress, for example, some consumers might simply wish to pay the lowest possible price for a professional's technical service in executing a consumer's well informed or unalterable choice to file either a chapter 7 or chapter 13 petition. Some consumers, exhausted or defeated by their financial distress, might wish to rely upon the lawyer to recommend and execute an appropriate solution for the lowest possible price. Others might be willing to pay somewhat more if they knew that their dollars purchased a caring listener or assured them personalized education about the array of solutions available to them.

Unfortunately, unlike information about price, information about lawyer behavior that could facilitate these choices is not disseminated in any institutional fashion. Dissemination of this type of information would be problematic even if lawyers had access to it and thought it useful to potential clients. Suppose, for example, that a lawyer wished to compare his or her somewhat more expensive client-centered counseling with the less expensive services of another lawyer who routinely acted only as technician in imple-

vent debtors is subsidized by income from other legal work, would experience economic constraints only to the extent necessary to defray expenses. Finding out precisely where on the continuum between these extremes Lawyers A through E fall would require a detailed inquiry into the professional and personal finances of each. That important inquiry, which would be difficult and perhaps too intrusive, was beyond the scope of this study.

136. One author urges the potential consumer of legal services to consider other factors before deciding which lawyer to retain. These factors include the location of the law office, the appearance of the waiting room, the appearance of the staff, and the lawyer's appearance, speech, and bearing. The author also suggests that clients interview lawyers to determine the extent of their experience, how well they keep abreast of the law, and whether they have an adequate library, an adequate staff, and adequate malpractice insurance. P. HERMANN, *DO YOU NEED A LAWYER?* 105 (1980). In view of the control of initial interviews exerted by some of the lawyers observed in this study, only an unusually assertive client could implement some of that advice.

menting clients' choice of chapter 7 relief. It is difficult for a lawyer to fully convey a sense of this difference to the public without either spending inordinate sums of money for the advertising necessary or settling for punchy phrases that would make the lawyer appear to be a shallow huckster.<sup>137</sup> Moreover, such advertising might well violate extant legal rules governing the format and content of lawyer advertising.<sup>138</sup>

The lack of information for both consumers and lawyers about the range of possible lawyer behaviors, together with routine patterns of lawyer behavior, probably contributes substantially to the virtual absence of negotiation about the lawyer's role from the interviews observed in this study. Clients did not inquire about and lawyers did not volunteer description of the types of service that the lawyer potentially could offer. Thus, among the interviews observed, there were none that even remotely resem-

137. Imagine these awful possibilities: "Client-Centered Lawyer;" "A Caring Lawyer;" "A Lawyer Who Listens and Cares, Not Just a Lawyer Who Fills Out Forms;" "Mutual Decision Making;" "Services Tailored to Fit You;" "More Expensive, But Worth It." One lawyer in Santa Clara County, California, offers this advertisement: "Let an Understanding, Experienced, Woman Attorney Handle Your Divorce, Support or Custody Problems: Also, Bankruptcy, Drunk-Driving, Personal-Injury . . ." This claim implies caring but falls well short of describing other aspects of client-centered counseling.

138. The format and content of lawyer advertising is regulated by state law, but such regulation may not interfere with a lawyer's federal or state constitutional right to freedom of expression. The American Bar Association suggests the following model for regulation:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it: (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; (b) is likely to create an unjustified expectation about results the lawyer can achieve, . . . (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

MODEL RULES OF PROFESSIONAL CONDUCT AND CODE OF JUDICIAL CONDUCT Rule 7.1 (1983). This proscription, particularly the proscription of comparisons that cannot be factually substantiated, might well discourage any disposition of a lawyer to distinguish "client-centered" counseling from "no-frills" counseling.

Such comparisons would even more likely be discouraged by much extant state regulation limiting what a lawyer may advertise to an itemized list of information that does not include information about the way in which a lawyer counsels a client. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 2265 (1985) (considers Ohio disciplinary rule concerning lawyer advertising).

For a concise review of the history of regulation of lawyer advertising and of the constitutional issues posed by such regulation, see Devine, *Lawyer Advertising and the Kutak Commission: A Refreshing Return to the Past*, 18 WAKE FOREST L. REV. 503 (1982). For a broader survey of the history, motives, techniques, and impact of lawyer advertising, see L. ANDREWS, *BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION* (1980).

bled the following hypothetical dialogue, for which *L* indicates the lawyer and *C* indicates the client.

*L*: Hello Ms. Jones. I understand from my assistant that you have been experiencing financial difficulties. Let me suggest that you take one or two minutes to tell me briefly about your situation, and then I can tell you the kinds of things I might be able to do for you. O.K.?

*C*: O.K. Well, I just can't afford to pay all of my bills. I was laid off work for about six months and really fell behind. I'm working now but I just can't seem to catch up. A friend of mine mentioned bankruptcy to me, and that's why I came to see you.

*L*: Ms. Jones, this kind of thing happens to a lot of people, and I'm sure it has caused you considerable anguish. [Pause] I can probably help you in a number of different ways. I could simply explain to you what your rights are and let you go home to think about what you want to do, and maybe you could take care of the problems yourself. That would take us about half an hour, and I would charge you twenty-five dollars for my time. If, after we talk, you decide that you want me to do something specific for you, like filing bankruptcy, I can do that, and I can tell you exactly what that will cost you in a little while. If you think you would like me to help you in some other way, we can talk about that also. How does that sound to you?

*C*: Well, I think I've already decided to file a bankruptcy and I'd just like you to do it for me.

*L*: O.K. I can do that. Before we decide finally to do that, let me get some more specific information about your situation to see if a bankruptcy is the best thing for you. O.K.?

*C*: O.K.

*L*: You've given me a lot of information on these forms that I asked you to fill out in the reception area. Let me see if I understand this information fully. You are single and live in a rented apartment in Newtown? [Etc.]

In this dialogue, the lawyer shares power with the client, demonstrates respect for the client's assumed capacity to make decisions, and gives the client information about the first crucial decision—how to use the lawyer.<sup>139</sup> At the same time, the lawyer

139. In her self-help publications, Kosel suggests three possible ways for the financially distressed individual to use the services of a lawyer: (1) consult the lawyer for advice on

preserves some control over the structure of the interview to facilitate its orderly progress and does not sacrifice the obligation to provide a fully informed legal assessment of the client's situation. Of course, this dialogue would have to be based on the lawyer's willingness to offer the variety of services described and to take the varying amounts of time necessary in the initial interview to respond to the different client choices for the lawyer's role. It is difficult to know the extent to which this is possible without a good deal more specific information about the economic constraints on the lawyer's practice.<sup>140</sup>

A traditional criticism of our legal service delivery system focuses on the shortage of affordable legal services for the lower and middle classes. Criticism of this system must be broadened if the data reported here correctly imply the highly differentiated nature of legal practice even within specialties and the absence of lawyer-client negotiation about the lawyer's role, and if consumers of legal services are unaware of the range of lawyer behavior from which they may choose. The delivery system is faulty where the consumers of its services are not sufficiently empowered to use it in the ways that best fit their needs.

There is no obvious solution to this problem. More information and education about lawyer behavior, for both lawyers and clients, is one possible response. Courses in interviewing and counseling and other clinical courses offer education about lawyer behavior to some law students, but scarce resources limit such educational opportunities. Most continuing education programs offer courses that focus exclusively on the content of law, with little or no attention paid to lawyer-client interaction. It is likely, therefore, that the education of lawyers about their range of possible behavior with clients will be slow and uneven unless consumers begin to demand something different.

Educating consumers of legal services is also problematic. As previously noted, lawyer advertising is an unlikely source. Clients might benefit, however, from education available from law offices such as through concise, plainly worded brochures that explain

particular issues; (2) ask the lawyer to review and critique bankruptcy forms that the individual has already prepared to make sure there are no mistakes; or (3) hire the lawyer to handle the entire chapter 7 or chapter 13 case. *BANKRUPTCY*, *supra* note 48, at 8-9; *CHAPTER 13*, *supra* note 48, at 9-10.

140. *See supra* note 135.



ways in which the lawyer is prepared to act and that encourage clients to discuss what the lawyer's role is in responding to the client's problem. More general education about lawyers from professional educators in our nation's schools is another possibility, but this must await the commitment of time and resources necessary to make it a reality. Intervention by government to provide or mandate disclosure of information about lawyer behavior is another possibility, but it is one fraught with difficulty and uncertain to work.<sup>141</sup>

Absence of information about the differentiated nature of legal services clashes with ideals about individual autonomy and choice, just as shortage of available legal services to the poor and middle class clashes with the ideal of equality of access to justice. Accordingly, it remains important, notwithstanding difficulties, to seriously and imaginatively attend to the flaws in the delivery of legal services to which this study points, particularly if the range of behavior described here also characterizes the delivery of other types of legal services.

#### D. *Lawyer Behavior and the Implementation of Social Policy*

Conventional wisdom informs us that we may hope to implement social policies, such as a policy to encourage debtors to repay debt as fully as possible, through lawmaking that generates rules and sanctions that will induce particular kinds of human behavior. We rely partially upon lawyers to communicate the content of those rules and sanctions to clients so that clients may make decisions about future conduct. These premises are a prominent underpinning of recent lawmaking designed to implement federal debtor-creditor policy through the bankruptcy law.<sup>142</sup> The observations reported here suggest an important refinement to these premises: the impact of legal rules and sanctions cannot be fully understood without knowing how lawyer interviewing and counseling behavior in specific contexts is shaped and without considering the impact of such behavior on client choice. In the context of debtor-creditor policy, for example, the lawyer's inter-

141. A more promising approach might be informational campaigns conducted by state or local bar associations. *See generally* THE RESEARCH GROUP INC., STUDY ON INSTITUTIONAL ADVERTISING (1980) (report submitted to the American Bar Association Commission on Advertising).

142. *See infra* note 145 and accompanying text.

viewing and counseling behavior may well skew debtor choices in ways unintended by lawmakers and thus undermine the social policy that bankruptcy and other debtor-creditor law was intended to effectuate.<sup>143</sup> Thus, we need to explore the process, not just the content, of lawyer-client interaction to more fully understand how client behavior is shaped. This should not be a surprising proposition given the important role lawyers play in helping people to understand, use, and comply with legal rules.<sup>144</sup>

One recent amendment to federal bankruptcy law affords a basis for illustrating these points. Congress mandated in 1984 that a lawyer representing a client in a chapter 7 or chapter 13 proceeding file a declaration or affidavit with the bankruptcy court stating: "I have informed the petitioner that [he or she] may proceed under Chapter 7 or 13 of [the Bankruptcy Code], and have explained the relief available under each such chapter."<sup>145</sup> This Congressional mandate that lawyers add some prescribed content to pre-petition consultations with the clients might alter the choices made by some clients consulting with lawyers who have heretofore informed clients only about chapter 7 or only about chapter 13. The efficacy of the required lawyer explanations cannot be meaningfully predicted, however, and reliable improvements on the requirement cannot be proposed without knowing the process of communication between lawyer and client. If, for example, the lawyer influences the client's choice of chapter 7 relief through control of topics of discussion at an initial interview, it would likely accomplish little for the lawyer to add a few sentences describing chapter 13 at the end of the interview.<sup>146</sup>

143. This differs from but is consistent with a contention that lawyer attitudes about chapter 7 or chapter 13 may skew choice. The process of interaction between lawyer and client can be affected by such attitudes, but I argue in this Article that the process is also affected by a variety of other factors.

144. The significance of the lawyer, or of the law office, as a social institution is certainly not an original theme. See L. BROWN & E. DAUER, *supra* note 63, at 49-52; *Developments in Law and Social Sciences Research*, 52 N.C.L. REV. 969, 1083-84 (1974) (remarks of Professor Levy); Redmount, *supra* note 135, at 972.

145. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 322, 98 Stat. 333, 357.

146. The lawyer is required to give explanations of both chapter 7 and chapter 13 relief only to clients for whom the lawyer files a chapter 7 or chapter 13 petition. It is therefore possible, if not likely, that the lawyer will give the required explanations only after sensing that the client is likely to retain the lawyer for purposes of filing a petition. The lawyer may not sense that until well into the interview. If the client chooses to file a

Well informed decisions by clients are the result of a process of communication in which information is given and decisions are invited. A process characterized by lawyer control cannot be miraculously transformed by requiring the lawyer to speak a few additional prescribed words.

This amendment to the bankruptcy law also does nothing to ensure the efficacy of other state and federal debtor protection measures, such as exemptions from wage garnishment or protections against abusive collection conduct. For many individuals—uninformed, intimidated, or worn out—the complexity of these measures demands thorough professional assistance. This assistance may not be as readily available as lawmakers seem to assume, because systemic influences on consumer bankruptcy lawyers and limited financial resources of clients tend to exclude advice or representation unrelated to the filing of a chapter 7 or chapter 13 petition.<sup>147</sup>

In view of these points, it is tempting to suggest renewed consideration of previous legislative proposals that some portion of the responsibility for counseling financially distressed individuals be assigned to personnel associated with the bankruptcy court. In 1973, the Commission on the Bankruptcy Laws of the United States<sup>148</sup> recommended creation of a new administrative agency, the United States Bankruptcy Administration, one function of which would be the counseling of all petitioners with regular incomes.<sup>149</sup> The Commission perceived that this counseling function

petition without the assistance of the lawyer, there is no assurance that the explanations will have been given in any consultation with the lawyer. Where an individual whose debts are primarily consumer debts files his or her own petition, the bankruptcy law requires only that the clerk of each bankruptcy court give each such individual written notice of the types of relief available before accepting the filing of a petition and that this petition contain a statement to the effect that the individual understands the relief available under both chapter 7 and chapter 13. 11 U.S.C. § 342(b) (Supp. III 1985).

147. See *supra* text accompanying note 129.

148. The Commission on the Bankruptcy Laws of the United States was established by Congress in 1970 for the purpose of studying, evaluating, and recommending changes in the existing federal bankruptcy law. Bankruptcy Study Commission, Pub.L. No. 91-354, 84 Stat. 468 (1970).

149. COMMUNICATION FROM THE EXECUTIVE DIRECTOR, COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, TRANSMITTING REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, PART I, H.R. Doc. 137, 93d Cong., 1st Sess. 103 (creation of U.S. Bankruptcy Administration), 122 (counseling function) (1973) [hereinafter COMMISSION REPORT, PART I, or COMMISSION REPORT, PART II]. A similar recommendation had been earlier advanced in D. STANLEY & M. GIRTH, *supra* note 5, at 204-05.

would provide greater education about and foster greater use of chapter 13 relief.<sup>150</sup> The report of the commission explained the context in which such counseling would occur:

[A]ny debtor with regular income should not specify the relief he seeks in the initial petition he files . . . [and] the selection of relief should be postponed until after he has received counseling that familiarizes him with the available options. The petitioner would not of course be precluded or discouraged from consulting an attorney before filing an open-ended petition, and it is contemplated that he should be free to consult his private attorney before making a choice after he has been counseled . . . .<sup>151</sup>

The Commission contemplated that performance of the counseling function would consume, on average, four hours for each petitioner,<sup>152</sup> and that it could occur before an individual filed a petition.<sup>153</sup> It contemplated the following qualifications for counselors:

They will need to be familiar with difficulties that lead to consumer insolvency and hinder recovery from it, with the kinds of relief available under the Act to debtors with regular income, with the rights and duties of the petitioner who chooses one kind of relief over another, and with other consequences of the debtor's exercising his choice of relief. However, it is not contemplated that consumer counselors should be attorneys.<sup>154</sup>

The recommendation of the Commission was not adopted by Congress in its major reform of bankruptcy law in 1978.<sup>155</sup> However, concerned with a rising number of chapter 7 petitions following that bankruptcy reform, Congress advanced an analogous proposal in a 1983 Senate bill,<sup>156</sup> again intended as a means to foster greater use of chapter 13 relief.<sup>157</sup> Provisions of the bill provided that individuals would file a petition conditionally designating the type of relief sought.<sup>158</sup> Thereafter, the bankruptcy trustee was to analyze the income and expenses of each individual debtor, explain the relief available under both chapter 7 and chapter 13, and inform the debtor of the consequences of

150. COMMISSION REPORT, PART I, *supra* note 149, at 157-60.

151. *Id.* at 160.

152. *Id.* at 122.

153. COMMISSION REPORT, PART II, *supra* note 149, at 73.

154. COMMISSION REPORT, PART I, *supra* note 149, at 122.

155. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

156. S. 455, 98th Cong., 1st Sess. § 204 (1983).

157. S. REP. NO. 65, 98th Cong., 1st Sess. 3-4 (1983).

158. S. 445, 98th Cong., 1st Sess. § 202 (1983).

either in the individual's particular financial circumstances.<sup>159</sup> The trustee was to make no recommendation as to the relief the debtor should choose, and the presence of the debtor's lawyer was to be required unless waived by the debtor.<sup>160</sup> Following such counseling, the debtor was to finally elect the nature of relief to be sought under the petition.<sup>161</sup> The bill was not passed by the Congress, and no similar proposal was incorporated into the bankruptcy reform law ultimately enacted in 1984.<sup>162</sup>

There are several reasons to greet this type of solution with skepticism. Unless such counseling is prominently offered and available to individuals early in the history of their financial difficulties, they may well have visited a lawyer prior to the counseling and already decided what action to take. In such instances, all parties concerned, including the counselor, might come to view the process as a useless and tiresome formality, and the counselor might be tempted to significantly truncate the process. The counseling would therefore largely fail to serve its ostensible purpose of promoting certain socially favored choices. Unless broadened in scope, it would also fail to alert individuals to potential non-bankruptcy solutions to financial distress and fail to assist them in avoiding the recurrence of financial difficulties.<sup>163</sup>

159. *Id.* at § 204.

160. *Id.*

161. *Id.* at § 207.

162. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

163. In the initial interviews observed, only two of the lawyers attended to clients' future financial planning. When asked about future credit, Lawyer D-1 offered to refer clients to another business in the same building which specialized in "credit repair" (assisting individuals in removing adverse credit information from credit reports maintained by credit reporting agencies and assisting in obtaining extensions of credit). Lawyer F routinely referred to the importance of procuring automobile or medical insurance prior to seeking relief under chapter 7, to protect against potential uninsured post-petition liabilities that could not be discharged during the six years following the filing of a chapter 7 petition. I do not know the extent to which any of the lawyers observed routinely discuss post-petition financial planning with clients in meetings subsequent to the initial interview. I suspect, however, that because of economic constraints discussed earlier, none consider the client's financial future to the extent implied in a respected law school coursebook that discusses the work of lawyers in the law office: "One aspect of counseling the insolvent . . . is that of structuring the future—specifically, diagnosing the causes of insolvency, and structuring future affairs so that those causes are avoided." L. BROWN & E. DAUER, *supra* note 63, at 775 (1978).

In Lee, *The Counseling of Debtors in Bankruptcy Proceedings*, 45 AM. BANKR. L. J. 387 (1971), a bankruptcy judge describes and lauds post-petition counseling of individual debt-

A well publicized and readily available program of government financed counseling to financially distressed individuals, staffed by counselors conversant with all remedies to financial distress, would require a large amount of public funding. Political prospects for such a program are dim at present, especially absent substantially more empirical evidence than this study presents about what the market provides. Moreover, there is evidence that this type of solution would simply replace the existing set of systemic constraints on private lawyers with another set of constraints on those public officials designated to undertake such counseling.<sup>164</sup> As such, the solution might do little to facilitate the type of autonomy and fully informed decision making promoted by the client-centered counseling model. Finally, to the extent that such a program would encourage financially distressed individuals to forego seeking the assistance of lawyers, it would risk depriving these individuals of the confidentiality and diligent, independent representation commanded of lawyers by rules of professional responsibility.<sup>165</sup>

## VI. AN AGENDA FOR FUTURE INQUIRY

The findings of this field study offer but a brief glimpse of the totality of client experience with lawyers. The interviewing and counseling behavior of the lawyers observed in six consumer bankruptcy law offices is different in significant ways. These lawyers promote their services differently, charge different fees, gather information from and disseminate information to clients differently, spend different amounts of time with clients, and emphasize different options for relief from financial distress. Two of the lawyers attend in some ways to the psychological dimensions of a client's experience and at least partially engage clients in dia-

ors through the auspices of the bankruptcy court as a means to assist bankruptcy judges in assessing the feasibility of repayment plans and to assist debtors in future money management.

164. LIPSKY, *supra* note 55; *But see* R. Meadow & C. Menkel-Meadow, *Personalized or Bureaucratized Justice in Legal Services: Resolving Sociological Ambivalence in the Delivery of Legal Aid for the Poor*, 9 LAW & HUM. BEHAV. 397 (1985) (evidence that legal-aid lawyers perceive themselves as autonomous professionals delivering personalized justice, mixed with evidence that their actual work reflects the constraints of bureaucratic influences).

165. *E.g.*, MODEL RULES OF PROFESSIONAL CONDUCT AND CODE OF JUDICIAL CONDUCT Rule 1.6 (confidentiality), Rule 1.3 (diligence and promptness), and Rule 5.4 (independence) (1983).

logue that implicitly encourages mutual decision making. The other four lawyers do so less or not at all. Yet there is no institutional mechanism for conveying accurate information to clients about the nature of these differences.

The behavior of each lawyer is routinized. Some of this routinized behavior is similar, probably because of the constraints of the relevant system and because of the commonality to the types of client problems that they encounter. All save one lawyer generally introduce only the options that are available under the Bankruptcy Code. Each lawyer provides a standard package of service that invokes an option under the Bankruptcy Code, and none invite discussion of different types of service (such as resisting wage garnishment) that they theoretically could provide.

These findings leave at least three sets of questions unanswered.

How accurate and complete are the observations of behavior reported here? The lawyers whom I observed believe that the foregoing descriptions of their behavior are accurate.<sup>166</sup> Yet, a more intense system of recording and measurement would refine the perceptions of a single unaided observer.<sup>167</sup> If accurate, are these behaviors generally representative of the ways in which hundreds of other consumer bankruptcy lawyers in this country act in their daily encounters with clients? Observations of many other consumer bankruptcy lawyers together with reactions to the information provided here would help us know.

How much is the behavior of these or other consumer bankruptcy lawyers affected or compelled by economic constraints operating in the relevant system? Additional detailed financial information could help provide the answers. What standard of living does each lawyer want or need to support? How much revenue does the consumer insolvency portion of each law practice generate? At what cost (including the cost of supporting a necessary or reasonable standard of living for staff)? Does or could remuneration from other legal services offered by the same law office subsi-

166. Prior to submission of this Article for publication, I requested that each lawyer observed in this study review the respective portions of Section IV and Appendix A dealing with them for completeness and accuracy. Three of the six lawyers suggested a few minor changes in the text. I incorporated those changes in the final draft because they were not inconsistent with my observations. The other three lawyers suggested no changes.

167. See *supra* note 9 and accompanying text.

dize any part of the cost of consumer insolvency representation?

How much do different consumers of legal services know about the differences between lawyers? If some know very little, how might that kind of knowledge be effectively conveyed to them? What do individuals in financial distress expect from the lawyers that they consult? Do these expectations differ measurably from client expectations in other legal contexts?<sup>168</sup> How much should client expectations influence a lawyer's interviewing and counseling behavior? In the consumer insolvency context, the answers to these questions will also require us to know more about precisely when and why individuals in financial distress consult lawyers. Do they come, generally, after a long and painstaking process in which they have exhausted other resources? What resources?<sup>169</sup> How much have they already learned? How much have they already decided? Or do they come, generally, much sooner and less well educated? If so, are there common patterns in their decision making processes of which lawyers should be aware?<sup>170</sup>

168. A study in the late 1960's concerning the nature of counseling sought information about client expectations of lawyers, doctors, and clergy, as well as information on related issues. H. FREEMAN, *COUNSELING IN THE UNITED STATES* 203-260 (1967). This study offers a particularly useful statement of some of the issues involved for clients seeking counseling:

For some reason this man or woman who now enters the office has taken steps to become a client. Why seek counsel? Why this profession? Why this counselor? Why now? Why for this problem and not others? Driven by what forces? With what expectations? How ready? How certain? How able or likely to interrelate with and benefit?

*Id.* at 23.

The findings of a 1977 study of the legal needs of the public, based on interviews with a sample of the adult population of the United States, offer indirect evidence concerning client expectations. The study reports the public's rankings of lawyers on the basis of seven professional characteristics, B. CURRAN, *supra* note 49, at 210-11, and the public's views about characteristics of lawyer-client interaction. *Id.* at 230. Curran reports that opinions and perceptions of lawyers vary among different groups in the population, *id.* at 239-54. In a simulation study of lawyer behavior, researchers reported a high correlation of certain interpersonal skills of lawyers to client satisfaction and to client perception of the lawyer's expertness and trustworthiness. Feldman & Wilson, *The Value of Interpersonal Skills in Lawyering*, 5 *LAW & HUM. BEHAV.* 311 (1981). Others assert that clients expect lawyers to be equipped with interpersonal skills. See Clawar & Rivlin, *Are Clients Getting the Most Out of You?*, *WIS. B. BULL.*, May 1983, at 17.

169. In one survey, 44% of all respondents opined that a lawyer is to be used when all other resources fail. B. CURRAN, *supra* note 49, at 228-29 (1977). Concerning other resources to which a financially distressed individual might turn, see *supra* text accompanying notes 122-23.

170. One study found differences in certain decision making characteristics based on



All of these questions can and should be transposed to the diverse environments in which lawyers and clients meet. Our picture of how lawyers and clients actually interact in any environment, and hence our conceptualization of why they interact in certain ways, is terribly incomplete. Knowing more about these interactions will significantly enhance our understanding of the nature and quality of legal services. It will help us understand and interpret the ways in which consumers of legal services perceive lawyers, a perception which, if we believe frequent polls, has generated enormous popular disdain of lawyers. It will enlighten those who create and reshape legal rules, helping them understand how the forms and contexts of lawyer-client dialogue influence client behavior in response to legal rules. Knowing more may provoke thoughtful reexamination by lawyers and law teachers of the objectives and techniques appropriate for interviewing and counseling by lawyers in the variety of contexts in which they serve clients.

## Appendix A

### *Lawyer A*

The client is a woman who appears to be in her late twenties. She has completed a short client information form in the reception area which the lawyer glances at while escorting the client to his office. The lawyer learns from this form, among other things, that the client is employed by the post office at a moderate salary, that she has two children, and that she lives in rented accommodations. Neither the form nor the interview reveal information that explains the source of her financial difficulties. The interview takes fourteen minutes. For the purposes of this and the following

differences in personality, social class, gender and context. O. BRIM, D. GLASS, D. LAVIN, & N. GOODMAN, *PERSONALITY AND DECISION MAKING PROCESSES* (1962).

[L]ower class respondents in their decision making seem to be concerned to a greater extent only with considerations of short-run pleasures, rather than with giving attention to the more distant consequences and/or the possible unwanted outcomes of their behavior . . . [M]iddle class couples . . . have learned to consider a broader range of possible outcomes of behavior, which involve deferred gratification and attention to the less pleasant possibilities of circumstance.

*Id.* at 137. See also I. JANIS & L. MANN, *DECISION MAKING, A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT* (1977).

dialogues, *L* indicates the lawyer, and *C* indicates the client.

*L*: What can I help you with?

*C*: I saw the ad about debt relief.

*L*: O.K. Give me an idea of where you stand as far as debts go, and let me see what we can do.

*C*: Well, I owe \$900 on my car.

*L*: O.K. [Lawyer enters amount on small pocket calculator and does the same for each ensuing debt that client mentions].

*C*: \$2175 to Visa.

*L*: O.K. [Name of department store]? [Name of another department store]?

*C*: \$810 to [name of furniture store].

*L*: O.K. Any for gas or taxes?

*C*: \$172 to [name of gasoline company]. \$133 for [name of state] taxes. I didn't know you could use that.

*L*: This applies to everyone.

*C*: \$1026 to [name of airline].

*L*: O.K.

*C*: \$112 to [name of doctor] and \$55 to [name of another doctor]. Let's see, who else?

*L*: Do you have a list?

*C*: No.

*L*: Now how much do you owe on your car?

*C*: About \$900.

*L*: How much per month?

*C*: \$120.

*L*: What kind of car is it?

*C*: A 1978 Plymouth. I bought it new in 1979.

*L*: [Looking at calculator] So we have a total of about \$5,500.

*C*: I also owe \$65 to the hospital.

*L*: Was that for an illness or an injury?

*C*: I had to take my son to the emergency hospital when he got sick. That's all.

*L*: Well, I'll ask you for a more complete statement later. Let me explain to you what we do here. Then if you have any questions we can talk about those. [In a few of the interviews observed, the lawyer provided this explanation prior to obtaining specific information about the client's debts.]

There is a federal law that allows you to reorganize your

debt. All that it requires is that you have a steady income and that your debts be less than a certain amount. Under this law, we look at your income [holds one hand at eye level] and your expenses [holds other hand at chest level], and we take this difference and pay it into a trust fund every month. Then that trust fund pays your creditors. A lot of people try to pay more than they can really afford to their creditors. They end up robbing Peter to pay Paul. This law allows you to set up a plan to pay them what you can afford. Basically it's the same thing as a reorganization for business which you might have heard about. We pay your creditors from your future income. This is not a bankruptcy. In a bankruptcy you get rid of your debts. What we're doing is repaying your debts.

Now there are some other rights which this law gives you. First, there is a restraining order. That means that when you file, none of your creditors can do anything more to collect their debts. They have to take what the trust fund pays them. Second, this law stops interest running on your debts. On some of your debts you may be paying a lot of interest. Finally, you pay only what you can afford. We try to pay 100 % of your debts but if you can't afford that much we can pay 70 % or 30%.

Now, in your situation for about \$150 each month for three years you could pay everyone off. [Lawyer had previously calculated this amount by dividing estimated total debt by thirty six months.] Do you think you can afford that?

C: Yes. It's better than what I was paying.

[In another interview observed, where the client's response indicated that a monthly payment of any sort would at best be very burdensome and at the worst impossible, Lawyer A proceeded to briefly explain that the client might wish to consider the alternative of filing bankruptcy to discharge debts entirely. Because the client was not immediately inclined to pursue that possibility, there was no ensuing discussion of chapter 7.]

L: Alright. Let me explain the fees. I charge \$90 an hour for work in the office and \$110 an hour for work in court. I ask for a retainer of between \$350 and \$450. There probably will be a little more due, but that would be paid to me from the trust fund. Also there is a \$60 filing fee which we pay the court.

[Lawyer reaches into desk and pulls out a small stapled packet of forms.] Now I'm going to give you some papers. Take these

home and fill them out. When you come back we can then work out the details of your plan. I figure you'll be paying somewhere between \$130 and \$160 per month.

[Lawyer places packet of forms on desk facing client and moves down each page with his pen pointing to and explaining the information required and crossing out areas in the forms where no information is needed. This process takes about one minute.]

C: [Interrupting lawyer while lawyer is explaining forms] I filed a bankruptcy before. I forget when. Does that make a difference?

L: Not if you can pay \$150 each month.

C: [After lawyer completes explanation of forms, client takes the packet and puts it on her lap.] In the meantime, what do I do?

L: About what?

]C: If someone calls me.

L: Well, how long do you think it will take you to complete these forms?

C: By Monday [two days after the interview].

L: Call me then. We can set up an appointment for noon and get this done by the middle of next week.

C: Another thing. When do I pay the fees and when do I go to court?

L: [Lawyer explains timing of court appearances.] I'll need about \$350 plus \$60 for the filing fee before I can file this. You don't owe me anything until you tell me to go ahead with this. There is no charge for what we've done so far. [When a client returns with forms completed, the lawyer calculates the details of a plan and then inquires again about payment of fees. Thus, the lawyer will work with the client through a second interview before payment of fees but will not have his secretary prepare the documents for signature until payment is made.]

C: [Client shakes head affirmatively.]

L: Is Monday or Tuesday O.K.?

C: Yes.

L: Here is my card. If you have any questions, give me a holler.

C: O.K. If this doesn't work, would I file bankruptcy?

L: That would discharge all your debts. We could do that now, but let's see if we can't do it this way first. Let's not foreclose

any options.

[Lawyer rises and escorts client down hall to reception area, exchanging pleasantries and good-byes.]

*Lawyer B*

The client is a young woman who appears to be in her mid-twenties. The client is married and has two children, one of whom is handicapped in a manner not described in the interview. The client has been separated from her husband for nine years. She does not know where he presently resides and receives no support from him. The client and her children live with the client's mother, and the mother has accompanied the client to the interview. The mother sits quietly through most of the interview but is consulted by the client toward its end. The client is not presently employed and does not express an intention of seeking employment. The interview lasts approximately thirty minutes, the last ten of which are used by the lawyer to obtain information that would be required if the client later decided to initiate a divorce action.

C: Here are all my bills [offering to hand a packet to the lawyer.]

L: I don't want to see your bills. I just want to see your list of creditors [prepared by the client on the lawyer's form prior to the client's visit to the office].

[Lawyer looks for about ten or fifteen seconds at the list.] Are you married or single?

C: Married, but I've been separated nine years.

L: Any children?

C: Two.

L: They live with you?

C: Yes.

L: You get any support from the father?

C: No.

L: What do you want to do with him?

C: I don't know where he is.

L: We can run an ad in the paper to serve him.

C: What would that cost?

L: [Lawyer quickly explains the fees and procedures for obtaining a divorce and explains that it might be useful to obtain a divorce because it might prevent the husband from returning one

day, beating the door down, and injuring the client and her children.]

L: Do you have a phone number?

C: [Client provides number.]

L: Your full name.

C: [Client provides name.]

L: Your social security number.

C: [Client provides number.]

L: Have you used any other name during the past six years?

C: No.

L: You live with your mother?

C: Yes.

L: You're unemployed?

C: Yes.

L: You don't operate any business?

C: No.

L: You receive S.S.I.?

C: Yes. My son is handicapped.

L: How much?

C: \$314 a month and \$209 welfare.

L: Anything else?

C: No.

L: Have you worked in the last two years?

C: No.

L: And you've gotten no tax refunds?

C: No.

L: Do you have any bank accounts?

[Lawyer continues with rapid sequence of questions which elicit information required to complete the "Statement of Affairs of Person Not Engaged in Business," a form required to be filled in connection with a chapter 7 filing. This series of questions ends roughly as follows:] Have you made any gifts or payments to anyone within the past year?

C: No.

L: No payments to anyone?

C: No. But I do want to pay the loan which my mother cosigned.

L: But you haven't made any payments?

C: No.

L: Have you seen any other lawyers in the past year?

C: Yes. I have a lawsuit in a personal injury case.

[Client briefly describes lawsuit, and lawyer determines after a few questions that, although the lawsuit has been filed, service over the defendant, residing out of state, is very unlikely.]

L: [Lawyer begins a series of questions designed to determine the nature and value of all the client's assets. Part of that questioning is as follows:] Do you own any real estate?

C: No.

L: Are you buying any real estate?

C: No.

L: You have no interest in any real estate whatsoever? No land, no interest in land, no name on any relatives' deeds?

C: No.

L: Do you carry any cash with you?

C: Only a few dollars.

L: Do you have any money in the bank or a savings and loan or any other account?

C: No.

L: How many rooms of furniture are there where you live?

C: Five.

L: Do you have a T.V.?

C: Yes.

L: Buy it more than two years ago or less than two years ago?

C: More.

L: Do you have a stereo?

C: Yes.

L: Buy it more than two years ago or less than two years ago?

C: More.

L: Do you have a video tape recorder?

C: No.

L: Do you have any other individual item worth more than \$200?

C: No.

L: How many cars do you own?

[This line of questioning continues for a few more minutes and concludes as follows:] Do you have any other property other than the furniture in your house, the T.V. and the stereo, your clothes, a few dollars in cash, a 1964 Chevy pick-up, and a 1975

Suzuki motorcycle?

C: No.

L: No other property of any kind other than the property I have mentioned?

C: No.

L: [Lawyer looks again at list of creditors prepared by client and asks a short series of narrow questions to clarify, confirm or supplement information on the form. That questioning ends as follows:] You don't owe money to anyone else?

C: No.

L: You've listed everyone here?

C: Yes.

L: Now, did you want to pay for this all today or in installments?

C: I'll pay [states amount of lawyer's advertised fee] today.

L: O.K. I'll take that now. [Client hands lawyer cash. Lawyer counts the money, issues the client a receipt, and puts the money in his pocket.]

We'll need \$60 more for the filing fee before we can begin. As soon as you send that in, we'll type up the papers. That will take about ten days. Then you'll come in again and sign them. Then we'll file the papers with the court. About three weeks later you'll get a notice from the court telling you when to appear in court. I'll also send you a letter telling you when the court day is. It will usually be about eight weeks after we file the papers. On the day you are to appear in court, I'll meet you in the hallway outside the courtroom a half-hour ahead of time and we'll talk about what will happen. Don't pay your creditors any more money. If any of them call you, tell them that you're filing bankruptcy and that I'm your lawyer. Tell them to call me.

C: Can I keep paying the loan which my mother cosigned?

L: Yes.

[Lawyer puts the materials he has been working with in connection with the bankruptcy to one side and pulls another sheet of paper in front of him.] Since you're here today, do you want to give me information for a divorce?

C: [After brief discussion with lawyer concerning the fees if she undertakes a divorce and after consulting briefly with her mother, the client assents to giving information. The lawyer undertakes a regularized sequence of questions which the client an-



swers. When those questions are near completion, the client inquires as follows:] Am I going to lose my car and motorcycle?

*L:* No. But I do want to talk to the lawyer who is handling your personal injury action and find out about your personal injury claim.

Now to do the divorce we need [states amount of money]. As soon as we get that from you, we can file the divorce and serve your husband. [Rising] That's all.

[Client rises and lawyer escorts client and mother out of the office.]

### *Lawyer C*

The client is a young woman who appears to be in her early twenties. She is single, supports one child, and works part-time as a sales clerk in a retail clothing store. Her net income is approximately \$350 each month, her assets are minimal, and her debts, all unsecured, total approximately \$4,000. The interview takes approximately twenty-five minutes.

*L:* Hello. I'm [name of lawyer]. You've got some financial difficulties, and that's why you're here, correct?

*C:* Yes.

*L:* O.K. Well, let me ask you a few questions first and then we'll see if bankruptcy is appropriate for you.

*C:* O.K.

*L:* [Continually shifting glances between the client and the form that the client has completed in the reception area] You're working?

*C:* Yes.

*L:* And your approximate net pay is?

*C:* About \$350 per month.

*L:* Where?

*C:* I'm a retail sales clerk at [name of clothing store].

*L:* I notice you have a car worth about \$500? And you don't owe anything on it?

*C:* Right.

*L:* And you don't own any real estate?

*C:* Right.

*L:* What furniture do you own?

*C:* Very little. I have a bedroom set.

*L:* Do you have any other assets? Money in the bank, stocks,

jewelry, or anything else?

C: No.

L: Now, you have some debts and that's why you're here, right? Can you tell me approximately how much you owe?

C: About \$3,000.

L: Do you have any student loans?

C: No.

L: Do you owe any taxes?

C: No.

L: How many children do you have?

C: One.

L: Who do you owe \$3,000 to?

C: [Client lists about a half dozen creditors. One creditor financed her purchase of some relatively inexpensive jewelry. Lawyer C determines through a few questions that the creditor did not have a security interest in the jewelry. All other creditors were also unsecured.]

L: Now, what have they done to try to collect their debts?

C: Well, they've called me. They call me at my job. Especially [name of creditor], they bother me a lot.

L: No lawsuits have been filed?

C: No.

L: How much do you owe to [name of creditor that is bothering client]?

C: About \$2,500. I guess my total debts are more like \$4,000.

L: O.K. There are some things you can do to keep them off your back. Do you have a stable job?

C: Yes.

L: O.K. You're probably in a position where you might want to file bankruptcy or might not want to file bankruptcy. I usually have a cut off of \$2,500. If you owe less, I suggest that you consider not filing bankruptcy. If you owe more, then I suggest that you consider filing bankruptcy. You're a little over. You're in a position where your wages could be garnished. Now, there are ways to stop harassment by your creditors even without filing bankruptcy. You can write them a letter and tell them that you can't afford to pay and that they should stop calling you. Now, after that they can still take certain action, like filing a lawsuit, but you can get them to stop bothering you.

If bankruptcy is what you want to do . . .

C: It is. I know.

L: O.K. Well there are two types of bankruptcy available for you. One is a chapter 7 bankruptcy. You wipe out your debts, they're gone for good, but you can only do that once every six years and it has an effect on your credit. Of course, each creditor has its own rule of thumb. It doesn't mean that you wouldn't ever get credit, just that it would be more difficult.

There is another choice—chapter 13. It's not actually a bankruptcy at all. It's a court supervised repayment plan. The courts here like three years. For you, payment would be relatively high, about one quarter of your income each month, and you might want to consider that. [Lawyer advanced this rough approximation based on his estimation of the minimal monthly payment that would be permitted by the bankruptcy judge in the relevant district.] So you have two choices. Chapter 7, which will wipe out your debts, and chapter 13. Or you could do nothing and let creditors try to come after you and do what they will. So, with that in mind, what is your pleasure?

C: Bankruptcy. Otherwise I'll be paying off my debts forever.

L: O.K. Well, let me tell you about the fees. It will cost you [states amount] plus \$60 for the filing fees. Your total will be [states amount] plus \$60 for the filing fees. Now, you don't have any lien on your car or on any of your furniture?

C: No.

L: O.K. So that's what the fee would be. [Lawyer would have quoted additional fees for lien avoidance or reaffirmation agreement.] The other consideration is that you can keep your car and your furniture. You don't have a lot of property. Actually, even without filing a bankruptcy, you could keep your car and your furniture and protect most of your wages from being garnished. With that in mind do you still want to file a bankruptcy?

C: Yes.

L: O.K. Can you pay the fees today?

C: No. The secretary said I could send in the money.

L: That's fine. I'll give you this envelope and you mail it in.

C: How long will this take?

L: The whole thing will take two to three months. We can get your papers filed in twenty to thirty days. We could do it

sooner but there is no immediate rush for you because none of your creditors have filed a lawsuit.

[Lawyer pulls packet of forms from his briefcase. These forms are the same forms that, when retyped, will be filed with the bankruptcy court. He proceeds to ask a series of narrow questions which elicit from the client information required by the forms that he has not already obtained. He records responses on these forms as the client answers. One form requires an itemization of all the client's property. In questions prompted by this form, the lawyer discovers that the client was recently involved in an automobile accident. Concerned that this might constitute a non-exempt asset of the estate, the lawyer asks several questions to determine the nature of the potential claim. He learns that the claim has already been settled by another lawyer and that the client has spent the minimal settlement proceeds on monthly living expenses. He then completes the remainder of this questioning process. The process lasts approximately eight minutes.]

O.K. There is one item of work you'll have to do for us.

C: O.K.

L: How many creditors do you have? How many separate people do you owe money to?

C: Seven.

L: O.K. I'll give you about ten of these [hands client ten sheets of paper, each of which requires specified information about a creditor]. Take these home. Fill one out for every debt you owe. Think of every one and list them all. If you remember a debt after we've filed your bankruptcy for you, it will cost you \$25 for us to add them. Do that as soon as you can and mail it in to us with your fees, understanding that we won't start until we get these and the fees, and that we can't file until we get another \$60 for the filing fees. O.K.?

C: O.K.

L: Well, that's all for now. Have a nice weekend [rises].

C: You too. I'll get this back to you as soon as possible.

### *Paralegal D-1*

The client is a man in his late twenties. He is married, but has visited the law office without his spouse. He and his wife are employed and jointly earn in excess of \$2500 each month. On one intake form providing a series of statements that might reflect the

client's preference for a solution for financial difficulties, he checks the item that reads: "I want to pay all of my debts, no matter how long it takes me. However, I need a 'breathing spell' so I can pay my creditors over a period of time." He is interviewed by one of the paralegals in the law office. The interview takes between fifteen and twenty minutes. For the purposes of this and the following dialogue, *P/L* indicates the paralegal and *C* indicates the client.

*P/L*: [After removing a few forms from the file folder prepared for the client and looking initially at the form on which the client has listed creditors and amounts owing] These are all your creditors?

*C*: Yes.

*P/L*: It's very important to list them all.

*C*: I'll add one.

*P/L*: O.K. Do that here. [Paralegal hands client a pen and points to place on form where client should add information. Client does so.]

How did you hear about us?

*C*: [Client mentions name of newspaper in which law firm advertises.]

*P/L*: Are you married?

*C*: Yes.

*P/L*: Do you live in [name of metropolitan area in which law firm is located]?

*C*: Yes.

*P/L*: Are you in business for yourself?

*C*: No.

*P/L*: Do you rent or own your home?

*C*: We rent.

*P/L*: [Paralegal asks a short series of narrow questions to elicit information which will clarify or supplement information on the form listing creditors, and he notes some information on the form as client speaks. He closes with three questions to determine whether the client owes any other debts, such as debts for student loans, taxes, or medical services. The client indicates that he owes no further debts.]

We can wipe all of these debts. That sounds good, doesn't it?

*C*: Super.

*P/L*: O.K. We need some more information [pointing to

some blank spaces on the form listing creditors].

*C:* What does this column mean?

*P/L:* [Paralegal explains the information required.]

*C:* Can I mention the rent? [One of the debts listed was money owed to a landlord for rent.] They went to court. I gave them a check for some of the money but it bounced. Now I think the landlord is going to go back to court to get me evicted. Can they evict me?

*P/L:* Yes.

*C:* I want to prevent that.

*P/L:* Well, they can go to court and get a writ to evict you. After they get the writ, they can do that within [states number of days]. If that happens, come back here before the [stated number of days] are over. Are you and your wife going to file?

*C:* Just me.

*P/L:* She could be subjected to wage garnishment if there are debts that she owes separately. Also, we could increase certain exemptions when your spouse is added to the petition. I suggest you both file if she is going to work again. It doesn't cost any more.

*C:* O.K. We'll both file.

*P/L:* O.K. The fees will be [states amount], including \$60 for the filing fee. We can take some of that money down and have you pay the rest in installments.

*C:* O.K.

*P/L:* Do you have \$60 with you?

*C:* Yes.

*P/L:* Do you have another \$50 for the down payment?

*C:* I'd prefer to wait until my next payday.

*P/L:* That's fine. I'll put you down for payments starting March 20.

*C:* Do we list my wife's debts for the time before we got married?

*P/L:* Yes. List everything. [Pause] Do you have a few hours today or do you want to come back another time to fill out the paperwork?

*C:* Well, I need to go home to get more information and then I'll come back another day to fill out the forms.

*P/L:* O.K. That's fine. [Paralegal notes information on some forms indicating that client intends to return another day to com-

plete paperwork.]

C: I don't want to be evicted.

P/L: Well, we can slow down the eviction process. [Paralegal rises and client follows. Paralegal and client exchange closing pleasantries and good-byes as they jointly walk the few steps back to reception area. Paralegal returns file to receptacle, picks up another file, and calls the name of another client.]

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The same paralegal interviews another male client on the afternoon of the same day. The client is Hispanic and appears to be in his mid-thirties. The client is not employed. The interview takes about ten minutes.

C: I don't speak very good English. [In fact, client speaks well enough that no communication difficulties surface.]

P/L: O.K.

C: How much will you charge?

P/L: I don't know yet. We'll tell you in a few minutes. [Paralegal has glanced at a few of the forms in the file prepared for this client.] You're separated?

C: Yes.

P/L: How long?

C: A few years.

P/L: When were these debts [pointing to form on which client has listed creditors]?

C: After we separated.

P/L: Are you renting?

C: I'm living with a friend.

P/L: Do you have any income?

C: I'm not working now.

P/L: But you do make \$150 per month?

C: Some loans from my friends keep me going.

P/L: Are you going to get a job soon?

C: I hope so.

P/L: Do you still have the furniture from [name of furniture store]?

C: No.

P/L: Where is it?

C: It was no good anymore. I don't have it.

P/L: These [pointing at list of creditors] are personal loans?

C: Yes.

P/L: We can't help you without any income. When you have a job, we can help you. Come back then and we'll do this bankruptcy.

C: What do I do? These people are calling me a lot.

P/L: They can't do anything.

C: Can they take me to court?

P/L: Yes, but they can't get anything from you because you don't have any income. [Paralegal notes some information on forms as he speaks.] They can't send you to jail.

C: Then I don't have to file bankruptcy?

P/L: Right. And, if you get a job, you won't need to file either, if you could pay them.

C: What can I tell these people?

P/L: Tell them the truth. You haven't got a job and they'll have to wait.

C: They'll wait?

P/L: They'll have to.

C: What do I tell them if they take me to court?

P/L: [Rising to indicate that interview is over] Tell them that you don't have a job and that you'll pay them when you get a job. [Paralegal escorts client to reception area, exchanges good-byes, places file in receptacle, and takes another client's file.]

### *Lawyer E*

The clients are husband and wife in their late thirties or early forties. Several months earlier, they discussed their financial difficulties with Lawyer E at a legal aid office. They have made an appointment with him now because their financial difficulties have not abated. Their financial difficulties stem primarily from a disabling illness which, until recently, has prevented the husband from being gainfully employed. The consultation takes approximately one hour and fifteen minutes. For the purposes of this dialogue, *L* indicates the Lawyer, *H* indicates the husband, and *W* indicates the wife.

L: It's nice to see you again. How have you been?

H: Not too good. That's why we've come back to see you.

L: I'm sorry to hear that. I'll see what we can do. But first, I need to get some basic information from you. I got some of this when I saw you at legal aid, but I need to get it again because it



has been a while since I saw you.

*H:* O.K.

*L:* [Lawyer asks for each clients' full name, address, telephone number, place of employment, and monthly take home pay, for the identity and value of automobiles owned and whether they secure any loans, and whether the clients are renting or purchasing housing. Clients furnish this information and lawyer records the information on a yellow legal pad.]

O.K. Now that I've got that, let me tell you what I remember about your situation from the time we visited at legal aid. You [speaking to husband] were disabled and off work, and you had fallen behind in a lot of your debts. Is that right?

*H:* Yes.

*L:* Well, what is your situation now?

*H and W:* [Husband and wife jointly describe their present circumstances and lawyer listens, maintaining steady eye contact, nodding his head affirmatively and occasionally saying "uhhmm." Clients' narration includes some description of husband's disability, including seizures, of accumulating medical bills, of husband's loss of driver's license because of his disability, of husband's memory loss, and of the stress and tension that has been their daily companion. Clients close narration with a comment that they have begun to learn to cope emotionally with their situation.]

*L:* [Lawyer asks a half dozen narrow questions to clarify and supplement information provided in the clients' narration.]

Tell me what your debts are.

*W:* We wrote them all down on this list. [Client hands list to lawyer. List is prepared on bankruptcy forms sold to client at stationary store. Clients had begun to prepare these forms following their visit to legal aid in anticipation of the possibility of filing a bankruptcy proceeding on their own.]

*L:* [Lawyer looks at list. He then explains that some of the debts are secured and some are unsecured and describes the difference between the two through use of some clear and colorful examples. The clients nod their heads indicating their understanding.]

You've done a really good job filling out these forms on your own. Let me take over now if I may. You've made a lot of progress from the time I saw you at legal aid. Now I'd like to describe two approaches that are possible for you. One is known as a chap-

ter 7 proceeding, and the other is a chapter 13 proceeding. I'd like it to be your decision as to which one you choose.

[Lawyer then spends about five minutes outlining the basic features of chapter 7 and chapter 13, using several examples. He describes the "basic elements" of chapter 7 as being a discharge of most debts and an ability to keep most property, and he describes the court procedure and the timing of court appearances. He concludes by explaining the purpose of chapter 7 to be that of giving people a fresh start and indicates that a chapter 7 would be a suitable solution to the clients' financial difficulties. He then explains chapter 13 as involving a three or four year repayment plan in which the clients would pay income to a trustee who would, in turn, pay creditors. He also explains that chapter 13 would stop the accrual of interest on unsecured debt. Throughout the lawyer's explanation, the clients listen attentively, nodding their heads in gestures of understanding.]

*W:* For chapter 13 you need to have a reliable income, don't you?

*L:* Yes. The law requires that you have enough income and that it be regular so that you can pay the trustee a certain amount each month. [Pause] What are your ideas as to what is best?

*W:* We have some questions.

*L:* O.K.

*W:* How will this affect our credit?

*L:* That's a good question, and it's a little bit difficult to answer. [Lawyer takes one or two minutes to explain how chapter 7 and chapter 13 might affect the clients' future ability to obtain credit, including a concluding statement that some creditors tend to look at what efforts the debtors have made to pay their debts.]

*H:* We have been trying to cope with these problems for a long time, and we used to be very concerned about trying to work with the creditors. We've done our best, but sometimes they haven't been very helpful, and my difficulties haven't disappeared. So after a while we have gotten very tired and frustrated. We've decided that chapter 7 is the better way for us. It's not working any way else.

*L:* Do you feel the same way, Mrs. [client]?

*W:* Yes.

*L:* So you're both leaning to chapter 7?

*W:* Yes, and we want your input.

*L:* Well, you have to live with your choice, so I want your ideas. I think you've lived through some difficult circumstances, and I know that you've agonized. I guess my leaning is also to chapter 7 for a couple of reasons. First, chapter 13 basically requires a wage earner, and that is just going to contribute to more stress for you. Second, your total debt is very high so that it would require a very high monthly payment to pay off the debt or otherwise not paying very much to your creditors. A chapter 7 will get rid of most of those debts and protect your assets. So I tend to lean toward chapter 7. I think it might be the better idea. But there is no need for you to make a snap decision.

*H:* We were really grateful for your help at legal aid. We really had hit the depths.

*W:* Yes you really helped.

[Clients then ask about whether they were entitled to receive certain insurance benefits under a policy of credit insurance. A brief discussion ensues and the lawyer requests that the clients furnish a copy of the insurance policy so that he may consider the matter. Clients also then ask what to do about a court order that they appear in court to answer questions in connection with a judgment that Sears had obtained against them. Lawyer explains why they are required to appear in court and suggests how they should discuss the matter with the lawyer for Sears.]

*L:* [Continuing] But once you have retained me to represent you, you can refer all your creditors to me. [Pause] At this point, let me tell you what my fees would be. I would charge you \$300, and you would need to pay \$60 for court costs. When I have received that money from you, I would then prepare the papers we need to file in court and file them for you. [Pause] Would you like some time to think about it?

*W:* No. We want to start now.

*L:* Well, I'll tell you what. I'll give you the forms I need you to fill out now, but you can still change your mind.

[Lawyer exits office to retrieve forms and promptly returns.] Here are the forms I need you to fill out. [Lawyer proceeds to briefly explain what kinds of information clients must supply on various forms. Clients nod understanding and ask an occasional clarifying question.] Let's set an appointment for you to come back. I'd like to accommodate you and don't want you to jeopardize your job.

*H:* [Client suggests and agrees on a date with wife and lawyer.]

*L:* What is your pleasure regarding the fees?

*W:* We'd like to pay you in full when we bring back the forms.

*L:* That's fine. Well, I think that does it for now. I'll see you then in a week, and we can go from there. I think that you are really on your way back from your problems.

*W:* Well, we feel really good now, and we're inspired. Thank you.

*H:* Yes, thank you.

[Lawyer escorts clients out of office to reception area and says goodbye.]

### *Lawyer F*

The client is a young woman, approximately thirty years old. She was recently divorced and has one young child. She has suffered several major medical problems recently which account for the largest portion of her debts. The interview lasts approximately ninety minutes. Immediately prior to the interview, the client viewed the half hour videotape described in the text.

*L:* [Following initial greeting and pleasantries exchanged in the reception area] I understand that you were referred to me by one of your creditors. That's rather unusual. Tell me what's bothering you now.

*C:* Well, I owe about \$5,000. I don't have a steady income. I'm behind in paying, and there doesn't seem to be any way out.

*L:* You've just gone through a divorce? [How lawyer knows this information is unknown.]

*C:* Yes, and there were a lot of delays.

*L:* I can assure you that there won't be any delays here.

[Lawyer proceeds with a series of narrow questions to determine whether client has children, the amount of support that she receives from her former spouse, the nature of employment and the amount of income earned by her former spouse, and the amount of the client's earnings from her present employment. This prompts a casual and somewhat extended conversation about the client's former employment, her aspirations, and her prospects for future employment.]

One of the reasons I've been talking with you about this is

because it helps me understand how much this \$5,000 in debt amounts to in your situation.

[Lawyer proceeds to ask a series of narrow questions which gather basic data about the client's assets and debts. Many of the questions are prompted from a handwritten list of creditors that the client has prepared and given to the lawyer. All debts save one appear to be unsecured. Several of the questions concern the amount of the one debt secured by the client's automobile, the amount of monthly payments on that debt, and the value of the client's automobile [for which the lawyer also refers to the most recent edition of the Kelly blue book]. The questions and client responses are twice punctuated by collateral conversations each lasting a few minutes: one concerns the client's interest in becoming a medical receptionist, and the other concerns the client's anxiety about her daughter's health, and the reticence of her former spouse to assist in paying for the daughter's medical care. This segment of the interview concludes with the lawyer's question and the client's response concerning the value of the client's automobile.]

You saw the videotapes. Did you understand them? Do you have any questions?

C: Yes, but I have a few questions. How long is a chapter 13, and what happens if I marry someone else and we want credit?

L: [Lawyer responds to these questions.] You could file a chapter 7 and discharge \$3200 of your debt, but if you wanted to keep your car you would still have to pay [name of secured creditor]. Or you could use chapter 13.

Let me add up your bills. [Lawyer turns to calculator behind her desk and enters figures. After approximately fifteen seconds, the lawyer tears a tape from the calculator, turns back to the client, lays the tape on the desk so that the figures are facing the client, and explains as she points to figures on the tape.] At \$120 per month for forty-eight months, you could pay all of your debts including the debt to [name of secured creditor]. At \$80 per month you could pay [name of secured creditor] in full and all of your other creditors 10% of what you owe them. This would also include a 10% fee for the trustee and my fees of \$600.

C: I can pay only 10%?

L: You can pay 100% or 10% or 70%. [Pause] I like chapter 13 because it is flexible. If you get a better job in the future, you

could change your chapter 13 plan to pay more. It provides a lot of flexibility. Paying 100% in your case wouldn't be that much different for you than paying 10% because the difference, \$40 per month, is slight. Do you have any other bills?

[Client and lawyer discuss several topics raised by the answer to this last question, including possible liability of client for dental bills of former spouse, possible liability for dishonored checks, the manner of treating tax debts in a chapter 13, and a secured creditor's requirement that the client obtain car insurance as a condition to retaining her automobile.]

We've been talking as if chapter 13 is a sure thing. That depends on your attitude toward it. [Lawyer gestures to client inviting response.]

C: I don't have very much pride left. And now I'm worried about getting jobs.

[Client and lawyer converse briefly about client's background.]

L: You've been carrying a large burden. Let's do something to help.

C: This week I'm taking several steps to get my life back in order. This is one of them. I am not independent because of these financial problems.

L: That's what the bankruptcy law is for. It's there to help people like you, to help take the burden off of you, and let you get on with your life. [Pause] What do you think you want to do? Do you want some time to think about it?

C: Yes.

L: O.K. Take some time. Go home and think about it. Then if you decide to go ahead, give me a call. Do you have any other questions?

C: No.

L: O.K. Here are a couple things I'd like you to read. One is a brochure that talks about chapter 13, and the other is a little pamphlet that describes our firm. Take them home and read them over.

C: I think I know now that chapter 13 is what I want.

L: Does anything bother you about chapter 13 versus chapter 7?

C: No, not really. \$80 per month is what I want.

L: Let me tell you why I think that's a good choice. First, it

will let you pay your tax bill, which you have to pay anyway. Second, it's flexible. \$3,000 is not a lot to have to pay to your unsecured creditors, and maybe you can pay all of it in the future. This keeps your options open. [Pause] O.K. Let's do the paperwork.

[During the next fifteen or twenty minutes, Lawyer F asks the client a long series of narrow questions to elicit information needed to prepare a budget and to complete other documents that must be filed in a chapter 13 proceeding. The lawyer records responses on forms that she has retrieved from a file behind her desk. The questions and answers are again punctuated by naturally occurring conversations between the two, including considerable self disclosure by the client about her loss of self esteem. When the questions are concluded, the lawyer briefly reviews the proposed budget with the client, emphasizing that the monthly payment to the trustee must be made every month.]

Now here is what I need you to do. I need the complete name and address of all of your creditors, including their zip codes. Once you get this to us, my secretary will type up all these documents. My staff is also always available to answer your questions, so please call them if you have any. Chapter 13 is a long term relationship between you and me and between you and your creditors, so call me or my staff when you need to.

C: O.K.

[Client and lawyer exchange closing pleasantries, lawyer gives brochures to client to read, and lawyer escorts client out of office.]

## Appendix B

### METHODOLOGY

The methodology for this study is a topic likely to be as or more interesting for some than the content of the behavior reported, especially given the need and room for additional comparable research. I therefore take time here to expand my discussion of the methodology of this study beyond that offered in Section I.<sup>171</sup> This will also facilitate your judging the meaningfulness of the observations reported.

The study evolved from a curiosity born of my interviewing

171. See *supra* text accompanying notes 8-10.

and counseling of consumer debtors at the Legal Aid Society of Santa Clara County: How do other lawyers do this, and is there something I can learn from them to help me do or teach it more effectively? A formal study of the behavior of other consumer bankruptcy lawyers seemed a useful vehicle for satisfying this curiosity and for generating knowledge useful to others.

I launched the study with a formal proposal for sabbatical leave which described the research as a survey, evaluation, and critique of the procedure, style, and personality of consumer insolvency counseling practiced by a representative sample of consumer bankruptcy lawyers. Two days of experimental and unfocused observation in one law office, discussion with colleagues in several academic disciplines, and review of some of the literature describing methods of social science research compelled me to refine the inquiry and to confront difficult questions of methodology.

There were two basic and related methodological concerns. First, how was I going to gain access to the initial interviews? Significant obstacles stood in the way. There was nothing to offer lawyers or clients in return for their favor of granting access. I needed to rely on their altruism. I also feared that disclosure of my specific objectives might unduly alter the behavior that I wished to observe. Accordingly, I needed to frame the request for access in general, yet not misleading, terms.<sup>172</sup> Finally, observation required that the lawyer, client, and I confront and resolve problems posed by the lawyer's ethical duty to preserve the confi-

172. My experience in narrowing the focus of research and in seeking to gain access to initial interviews is aptly captured by this commentary on the problems of gaining access in field research:

Our analysis of traditional field-research literature recognized an unexamined paradox concerning the problem of gaining entree: namely, that one's proposed project must make sense to those empowered to grant or deny access to the setting, yet the foci of the investigation emerge only after some portion of the research has been accomplished. We argue that such a paradox is inevitable in a field-research project. The key to resolving the paradox, . . . is the cover story, the claims made by an investigator in his research proposals and letters of introduction by which he legitimizes his request for access to the setting. The language of science as well as the powerful symbols of academic respectability are used rhetorically for this purpose. In this respect, then, the solution to the problem of entree in social research may be properly conceived of as political rather than normative in nature.

J. JOHNSON, *DOING FIELD RESEARCH* 77 (1975).



dences of the client and by the rule of evidence permitting compelled disclosure of confidential lawyer-client communications that have been shared with third parties.

The second concern was to choose and justify a particular method of observing and recording data. Here I faced a choice between "two distinctive research traditions."<sup>173</sup> One tradition, grounded in scientific positivism, relies heavily on quantitative measurement insulated from potential biases of those who formulate the hypotheses for study and those who record the data.<sup>174</sup> A competing tradition of qualitative research relies primarily upon "an in-depth, detailed, descriptive account of social actions occurring at a specific place and time"<sup>175</sup> by a participant-observer who is not formally insulated from the influences of his or her own thinking and feeling.

Several factors led to my rejecting a quantitative method. I was influenced by John Johnson's critique of scientific positivism and by his candid and disarming description of his own participant-observer study of child welfare social services.<sup>176</sup> My intellectual enthusiasm for his theoretical perspective was reinforced by the immense practical difficulties of generating a statistically valid sample of observations of lawyer-client interviews, even with resources beyond those at my immediate disposal. I consider myself fortunate, in retrospect, to have gained access to a limited number of interviews conducted by six lawyers in diverse settings. I attribute this limited success partially to the lawyers' knowledge of my position as an academic and lawyer schooled in consumer bankruptcy law, and partially to my relatively unobtrusive method of recording data.<sup>177</sup> It is unlikely that I would have obtained even this limited amount of data from lawyers in private practice had I sought to arrange observation by delegates. The use of delegates also would have undermined claims of privilege and complicated the task of establishing and maintaining lawyer and client trust in the researcher(s). My presence as the only observer minimized these difficulties. In these respects, the method of observing and recording data was inextricably related to the problem of gaining

173. *Id.* at x.

174. *Id.* at 6-7. *See generally* E. BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* (1975).

175. J. JOHNSON, *supra* note 172, at x.

176. J. JOHNSON, *supra* note 172.

177. *See supra* text accompanying note 9.

access.

There was, finally, a very personal influence on the choice of method. I wanted to enjoy this opportunity to satisfy my curiosity. For me, the joy of discovery was more likely to come from trying to absorb the flavor of lawyer-client communication through first-hand observation than from collecting or having others collect and analyze statistics.

Settled upon the path, I identified twenty-seven lawyers or law firms in four metropolitan areas as potential participants in the study.<sup>178</sup> I wrote and, shortly thereafter, phoned nineteen of those lawyers or law firms requesting that they consider participating in the study. I enclosed with each letter a copy of a memorandum addressing issues of confidentiality and privilege and a proposed form of client consent to observation that had been approved by the Human Subjects Committee of the University of Santa Clara.<sup>179</sup>

Three lawyers declined following my personal interviews with them, one because he worried that my interview was a covert attempt by a state bar association to discredit his high-volume, heavily advertised practice, one because he believed that clients would feel uncomfortable, and a third because price competition which

178. I knew of or was acquainted with a few of the lawyers. I discovered others by consulting advertisements and from references provided by other bankruptcy lawyers. Because I was to lay no claim to statistical validity, I did not choose the sample entirely at random. I speculate, nonetheless, that the study may well have been based on a fairly representative sample of consumer bankruptcy lawyers because of the differences in the nature, structure, and size of the practices of each of the six lawyers observed and because of the diversity in the lawyers' attitudes and procedures. More information about the method of selecting the sample would jeopardize the anonymity of the lawyers who are the subject of the study.

179. I shall not prolong the Article by outlining here the analysis of problems of confidentiality and privilege set forth in the memorandum. Suffice to say that a client may consent to the presence of a researcher during a confidential communication with a lawyer, and the lawyer will not be violating ethical obligations if that consent is fully informed and voluntary. Whether the presence of a researcher during such a confidential communication deprives the client of a privilege against compelled disclosure in a future court proceeding is a more difficult question to which there is not a certain answer. As a consequence, the consent form included the following:

If you consent to this observation, there is a possibility that someone might compel Professor Neustadter, you, or us to divulge information exchanged during the interview in some future court proceeding. We think this possibility is very unlikely for reasons which we can explain, but we cannot guarantee that it could not happen. You may wish to discuss this small risk with the attorney before deciding whether to consent.

he was unwilling to meet had completely dried up his consumer insolvency practice.<sup>180</sup> Four lawyers declined by phone, citing lack of time or interest, or concern about the interruption or scrutiny of their practice. Three declined by letter, one because he was "too busy," and the other two because their practices no longer included consumer insolvency counseling. One lawyer agreed to a personal interview to discuss the matter, an opportunity that I did not pursue,<sup>181</sup> and another lawyer never responded to the letter or to the phone messages left with his answering service.

Seven lawyers consented. I decided not to include one lawyer for logistical reasons. I began the process of observations in February, 1983, and concluded observations in July, 1984.<sup>182</sup> The number of visits required to each law firm to observe a suitable number of initial interviews varied widely, largely because of the

180. This lawyer charges clients an hourly fee. In the early 1960's, he charged \$30 per hour based on a bar association schedule of suggested fees. Today he charges close to \$100 per hour. In the past he would typically spend 10 to 15 hours representing an individual in financial distress. That time would consist of up to two hours in an initial interview reviewing all bills and other documents with the client, preparation of all forms himself because he believes them too difficult for clients to complete accurately and completely, and personal out-of-office searches of relevant public documents (for example, to determine what lawsuits, if any, were pending against a client). At his current hourly charge, that type of representation would generally require a fee in excess of \$1,000. Many other lawyers in the same metropolitan area charge considerably less than \$500 for this type of service. Following the introduction of lawyer advertising in the late 1970's, his consumer insolvency practice, in his words, "dried up." He likened the difference between his former consumer insolvency practice and the practice of lawyers today who handle a large volume of these matters to a difference between a custom suit and a suit taken off the rack. He commented that individuals who are financially pressed are understandably likely to choose a suit from the rack.

181. It was difficult, initially, to find a mutually satisfactory time to meet. With success in gaining access elsewhere and a need to devote my time to attending interviews, I abandoned the attempt to meet with this lawyer.

182. My decision to conclude observations after having visited six lawyers was influenced by several factors. During the summer of 1984, I began to write more formally about the observations theretofore concluded. In the process of writing, it began to feel as if prosaic description of the behavior of more than a handful of lawyers would become redundant and lose some of what I hoped could be the charm of the descriptions. This feeling was ultimately reinforced by my conclusion that I had gathered enough data to be useful in the context of the methodology that I had chosen. In addition, the sensitive task of gaining access, the difficulties of arranging compatible times for observing interviews, the frustration of waiting in vain for clients who did not keep appointments, and the stress associated with conducting the observations were beginning to weigh heavily. In confronting these feelings, I was reassured by Johnson's frank acknowledgment of the inevitable fusion of cognitive and affective processes in social science research. J. JOHNSON, *supra* note 172, at 145-76.

way in which the practice of each lawyer was structured.<sup>183</sup> I was able to observe eight initial interviews by Lawyer A in visits on three days during a three week period. I was able to observe four initial interviews by Lawyer B on a Saturday morning and a following Tuesday morning. To observe five initial interviews by Lawyer C, I needed to visit his offices on eight different days within a sixteen-day period.<sup>184</sup> I was able to observe twelve initial interviews conducted in the law firm employing Lawyer D-1 and Paralegals D-2 and D-3 on two consecutive days. Observations of initial interviews by Lawyers E and F took considerably longer.<sup>185</sup> I observed eight initial interviews conducted by Lawyer E in four separate visits, the first visits in October, 1983, and the last in August, 1984. I observed six initial interviews by Lawyer F in eleven separate visits beginning in November, 1983, and ending in May, 1984.

In each instance of observation, the lawyer or paralegal would introduce me to a client, explain the purpose of my visit, and solicit the client's consent to the observation. I took extensive notes of each interview, some verbatim, and much through a personal form of shorthand. While waiting for the arrival of clients, I made notes of observations concerning the physical environment and

183. I concluded attempts to schedule further observations in each law office when it became clear to me that my observations were becoming redundant and that I could accurately describe the typical initial interview in each law office.

184. Some detail here will illustrate the difficulty for observation posed because some clients fail to keep scheduled appointments and fail to call to cancel. As described earlier, Lawyer C interviews clients at four different locations. An associate interviews clients at a fifth location. Three of the four locations at which he conducts interviews radiate about ten miles in different directions from the fourth location. Here is a log of my visits during the sixteen day period:

Day 1	4:45 p.m.	Location #1	Client did not appear
Day 2	4:00 p.m.	Location #2	Client did not appear
Day 6	4:30 p.m.	Location #1	Observation
Day 8	4:45 p.m.	Location #1	Observation
Day 8	6:45 p.m.	Location #1	Observation
Day 9	9:00 a.m.	Location #3	Client did not appear
Day 9	10:15 a.m.	Location #3	Client did not appear
Day 14	5:45 p.m.	Location #4	Client did not appear
Day 14	6:15 p.m.	Location #4	Observation
Day 15	4:15 p.m.	Location #2	Observation
Day 15	4:30 p.m.	Location #2	Client did not appear
Day 16	3:30 p.m.	Location #3	Client did not appear

185. Explaining the reasons might jeopardize the anonymity of the lawyers.

other obvious features of procedure in the law office. I also talked with each lawyer about his or her background, the nature of his or her practice, and his or her procedure for handling a consumer insolvency client. I clarified and embellished notes as soon as possible after the initial observations and used both the original and subsequent notes as the basis for drafting the text of this Article.

I had originally intended to interview clients immediately after the consultation with the lawyer in an attempt to learn a variety of information, including their reasons for visiting a particular lawyer, the expectations that they held for consultation, and some of their reactions to the consultation. I prepared a questionnaire for this purpose but soon abandoned the attempt. Clients generally were anxious to leave the office after the consultation. They had not anticipated and were not enthusiastic about a second interview with me for research purposes that they had no interest in comprehending. Moreover, in some law offices, initial interviews followed immediately upon one another. Because I was perpetually uncertain of being able to observe a reasonable number of initial interviews, I preferred seizing the immediately available opportunity to observe another interview in lieu of trying to interview a client who was intent on departure.<sup>186</sup> This preference reflected my conclusion that perceptions of the typical behavior of each lawyer could be fairly reliably captured from a limited number of observations if, as turned out to be the case, the behavior of each lawyer toward each client was largely repetitive. By contrast, meaningful measurement of client reactions to the initial interview would require gathering data from a much larger sample of clients than I expected to interview.

186. I experimented briefly with later telephone interviews but abandoned the experiment because of difficulty in making contact and because of clients' lack of interest and poor recall.