the Justice Broker

Lawyers & Ordinary Litigation

Herbert M. Kritzer

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HERBERT M. KRITZER

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To Amy

Preface

The data that form the basis of the analysis described in this book were collected by the Civil Litigation Research Project (CLRP) during 1979–1980. CLRP was a unique undertaking, both in purpose and in scale. The funding for the project came initially from the Office for Improvements in the Administration of Justice in the U.S. Department of Justice (Contract No. JAOIA–79–C–0040); after the political winds shifted in 1981, responsibility for the project was transferred to the National Institute of Justice (Contract No. J–LEAA–003–82). Over the years since funding from the Department of Justice came to an end, support for specific pieces of work and analysis were provided by the National Institute for Dispute Resolution (NIDR) and the National Science Foundation (Grant No. SES-8320129). Substantial supplemental support has been forthcoming from the University of Wisconsin Graduate School and the University of Wisconsin Law School. With additional support from the National Science Foundation (Grant No. SES-8511622) data collected by the project (and on which this book is based) have been archived for use by other researchers; data and accompanying documentation are available from the Interuniversity Consortium for Political and Social Research (ICPSR), University of Michigan, P.O. Box 1248, Ann Arbor, Michigan, 48106.

Bits and pieces of the work in this book appeared previously in a variety of sources, and I would like to thank those sources, and my original coauthors, for permission to use those materials.

Herbert M. Kritzer, Austin Sarat, David M. Trubek, Kristin Bumiller, and Elizabeth McNichol, "Understanding the Costs of Litigation: The Case of the Hourly-Fee Lawyer," *American Bar Foundation Research Journal*, 1985, pp. 559–604.

Joel Grossman, Herbert M. Kritzer, Kristin Bumiller, Austin Sarat, Stephen McDougal, and Richard E. Miller, "Dimensions of Institutional Participation: Who Uses the Courts and How?," *Journal of Politics, 44*, February 1982, pp. 86–114 (Table 3, p. 99; Table 4, p. 102; and Table 5, p. 102). Reprinted by permission of the University of Texas Press.

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Herbert M. Kritzer, Austin Sarat, David M. Trubek, and William L. F. Felstiner, "Winners and Losers in Litigation: Does Anyone Come Out Ahead?," Paper presented at the 1985 Annual Meeting of the Midwest Political Science Association, Chicago, Illinois.

The work that I describe in this book reflects substantial contributions by a number of people. David M. Trubek (professor of law, University of Wisconsin, and director of the Institute for Legal Studies) served as project director, taking on the burden of the day-to-day administration of the project during the years when so many people were involved on a daily basis. Along with David Trubek, William L. F. Felstiner (American Bar Foundation), Joel Grossman (professor of political science, University of Wisconsin), and Austin Sarat (professor of political science, Amherst College) collaborated in thinking through the design of the research and planning the data collection and the early analyses. I regret that for various reasons the exciting collaboration of the early years of the project could not be continued to the completion of this book. The intellectual debt that I owe to Dave, Bill, Austin, and Joel is deep, and they will influence my future work.

Most of the survey data were collected on our behalf by Mathematica Policy Research in Princeton, New Jersey. The work of Lois Blanchard and Joey Cerf insured that the data collected would meet our requirements; Paul Planchon supervised the work in Princeton. The court records data were coded by the law students working under the direct supervision of Stephen McDougal and Judith Hansen; additional aspects of work in the field were researched by Jill Anderson. In Madison, Laura Guy, Richard Miller, Kristin Bumiller, Elizabeth McNichol, Mary Pfister, George Brown, and Dan Krymkowski carried out much of the processing and management of the large data set that we assembled. More recently, I have had excellent assistance from several other graduate students: Karen Holtz, Tom Schmeling, and Jung Il Gill.

Many other persons, both students and nonstudents, worked on the project over the years. I appreciate the hard work of all of them. Finally, Jeanette Holz saw that people got paid, plane tickets got purchased, and reports got prepared

for distribution. No project of the scale of CLRP could possibly succeed without the tireless efforts of someone like Jeanette.

The first complete draft of this manuscript was finished while I was enjoying the benefits of a sabbatical leave from the University of Wisconsin (which allowed me to escape from committees, students, and telephone calls long enough to complete the analysis and writing that went into that draft); during that leave, University College, London, and the Institute of Advanced Legal Studies, London, provided me with library resources and facilities that permitted me to complete the work. I benefited from comments by Herbert Jacob and Stuart Scheingold on portions of that draft. Comments and direction from John Flood at several important junctures helped clarify the focus on brokerage.

My family—Amy, Naomi, Abigail, and Than—has lived with this project much longer than any of us ever expected. Their tolerance, support, and good humor have helped us all survive it.

While my debts to colleagues, collaborators, and funding sources are great, as always the responsibility for what is said in the book rests solely with me.

Madison, Wisconsin H.M.K.

Contents

Part I Introduction

1. Brokers and Professionals: The Roles of Lawyers in Ordinary Litigation 3
   - *The Professionalism Perspective* 5
   - *The Brokerage Perspective* 12
   - *Summary* 19
2. The Data 20
   - *The Civil Litigation Research Project* 20
   - *Data Sources* 20

Part II Cases and Lawyers

3. The World of Ordinary Litigation 27
   - *What Are the Cases About?* 27
   - *What's at Stake in the Ordinary Case?* 28
   - *Who Goes to Court?* 34
   - *Summary: The Ordinary Case* 36
   - *Appendix 3A: Area of Law Codes and Groups* 38
4. Lawyers Who Litigate 40
   - *Background* 40
   - *Nature and Style of Practice* 43
   - *Attitudes Toward Legal Practice* 46
   - *The Ordinary Litigator: A Sketch* 49
   - *Brokers and Professionals* 50

Part III Lawyers and Their Relationships

5. Lawyers and Their Clients 55
   - *Finding Lawyers and Taking Cases* 56
   - *Establishing the Business Relationship* 57
   - *Allocating Control and Responsibility* 60
   - *Discussion: Lawyers and Clients* 66

6. Lawyers and Their "Workgroup" 68
The Opposing Counsel 69
The Opposing Party 71
The Judge 72
Discussion: The Lawyer's Working Relationships 76

Part IV Litigating Ordinary Cases

7. The Work of the Litigator in Ordinary Cases 79
The Activities in Court in Ordinary Litigation 80
How Much Time Do Lawyers Devote to Ordinary Cases? 85
What Do Lawyers Do in Civil Cases? 90
Discussion 104
Appendix 7A: Level of Court Activity by Stakes for Individual Event Types 106

8. The Impact of Relationships on the Lawyer's Work in Ordinary Civil Litigation 108
The Amount of Lawyer Effort 108
Relationships and the Content of the Lawyer's Work in Ordinary Litigation 121
Discussion 126
Appendix 8A: Description of Variables 127
Appendix 8B: Regression Results for Hourly and Contingent Fee Lawyers 133

9. Winning and Losing in Litigation: Does the Lawyer Deliver? 135
Outcomes 136
Success from the Lawyer's Point of View 137
Success from the Defendant's Perspective 143
Success from the Plaintiff's Perspective 146
Discussion 155
Appendix 9A: Multivariate Analyses 158

Part V Conclusions

10. Lawyers and Litigation: Images and Implications 165
Professionals and Brokers 166
The Role of Lawyers in Litigation: The Implications for Change 168

Notes 177
References 211
Index 227

I

INTRODUCTION

1

Brokers and Professionals: The Roles of Lawyers in Ordinary Litigation

Lawyers are intermediaries between the American public and the judiciary, the third independent branch of government in the United States. In this role lawyers find themselves in a love–hate relationship with the citizenry; they are cursed as troublemakers while remaining the dominant choice of the public for key elective positions in the legislative and executive branches of state and national government.[1] In recent years, we have come to know a great deal about the role of lawyers in the operation of the criminal justice system.[2] However, while most people think first about the criminal courts—when they think about the courts at all—a much greater proportion of the resources of our justice system is devoted to processing the noncriminal, or civil, side of the courts' dockets.[3] We know remarkably little about what lawyers actually do in this larger judicial arena.

If we are to understand the role of courts in American society (Council on the Role of Courts, 1984) and if we are to seek systematic improvement in the functioning of our courts, we must understand how lawyers perform their functions in our civil courts. The goal of this book is twofold. First, I describe the realities of lawyering in civil litigation: the backgrounds and experiences lawyers bring to their work, and how they go about their daily work. Second, I show that we need to go beyond traditional images of professionalism if we are to understand why lawyers do what they do and why they achieve the results that they achieve.

In pursuing these themes, I am not concerned with the big, newsworthy case such as that growing out of the Buffalo Creek disaster (Stern, 1976) or with the work of the "kings" of the tort bar (Jennings, 1989; Grescoe, 1978; Jenkins, 1988) or the "megalawyers" (Galanter, 1983b) of Wall Street (Steven, 1987; Stewart, 1983; Smigel, 1964), Washington (Laumann et al., 1985; Green, 1975; Goulden, 1972), and big firms generally (Nelson, 1988). Instead, I look at the lawyers who deal with the bread-and-butter work of America's civil courts—the ordinary, modest cases, such as a lawsuit over injuries suffered in an auto accident, a dispute over the failure of a remodeling contractor to

complete the job to specifications, litigation over who has title to a piece of property, an allegation of unlawful discrimination in hiring or promotion, the fallout from a denial of a rezoning request, or a lawsuit that comes in the wake of a denial of an application for disability payments.[4] The kind of case I am concerned about is the one that usually involves $25,000 or less—what I call "ordinary litigation." Thus, this book is about "ordinary lawyering" in "ordinary cases."

Lawyers have attracted considerable attention from scholars in recent years:

- Heinz and Laumann (1982) have examined stratification in the large city bar.
- Nelson (1988) has described recent developments in the world of the corporate law firm.
- Landon (1982, 1985, 1988) has brought attention to the world of lawyers practicing in small towns and rural settings.
- Eisenstein (1978) and Horowitz (1977) have looked at lawyers employed by the federal government.
- Kessler (1987), Katz (1982), and Johnson (1978) have looked at lawyers working for government-funded legal services programs, and Erlanger (1978) and Rabin (1976) have looked at public interest lawyers.
- Spangler (1986) has focused on the situation of lawyers working as employees (in law firms, corporations, the federal government, and legal services organizations), and Rosen (1988–1989) has examined the specific situation of lawyers employed by corporations.
- Slovak (1979, 1980, 1981a) has studied lawyers working on behalf of the elite in the business, social, and cultural worlds of one large city.
- Halliday (1987), Foster (1986), and Powell (1988) have analyzed the efforts of leaders of the profession to extend and enhance the profession's power, regarding both its own economic interests and its role in the larger sociopolitical system.
- Abel (1986b, 1988a, 1989a) has painted a broad portrait of the development of the American legal profession (and the profession in England and Wales as well—1987, 1988b[5]), with a specific concern on the profession's efforts to "control the production of producers" and to "control the production by producers"—that is, to control in most, if not all, dimensions the marketplace for legal services.

The theoretical issues motivating most of this research come from the area of inquiry called the "sociology of the professions" and reflect both general themes in sociology (e.g., stratification and social hierarchies) and themes specific to analyzing professions (market control and professional training and socialization). By and large this has led to a focus on the macro sociology of the profession: the relationship of the profession to the larger social system (how the profession as a corporate body has sought political power, economic control, and social influence) and the internal structure of the profession (practice structures, stratification and divisions, socialization, and self-regulation).

The ideas underlying the work come from diverse theoretical traditions, including Weber, Durkheim, and Marx, as well as from contemporary theorists who have interpreted and extended those ideas, such as Parsons (1939, 1954, 1968), Johnson (1972), and Larson (1977). Research and analysis in that tradition have been more concerned with the *profession* (i.e., the *institutional* aspects of the lawyer's existence) than with the actual *work* of lawyers,[6] although frequently scholars have discussed the implications of the institutionalized profession for the work lawyers do (e.g., Heinz and Laumann, 1982; Spangler, 1986; Landon, 1982, 1985, 1988; Nelson, 1988).

This book reverses the focus. I examine the work of lawyers in one specific realm (ordinary civil litigation) and draw from the resulting analysis the implications for both the profession and the larger society. I argue that one must move beyond ideas associated with the sociology of the professions to understand the work of lawyers in ordinary litigation, and that an enlarged framework brings both the work of lawyers and the litigation process into clearer focus. I do not discard the insights suggested by the *professionalism* framework, but propose that one must overlay this sociological tradition with a theory of *brokerage* that is more typically associated with political analysis. The resulting dual framework highlights aspects of the litigator's work overlooked by either of the approaches taken singly, and it makes clear some of the tensions and contradictions that are a pervasive part of the litigator's existence. In the balance of this chapter, I discuss the professionalism and brokerage frameworks as they can be applied to understanding litigators and litigation. In subsequent chapters I discuss in detail lawyering in ordinary litigation.

The Professionalism Perspective

Lawyers are members of one of the three archetypical "learned" professions (physicians and the clergy comprise the other two). Much of what we know about the legal profession comes from the work of sociologists who take "the professions" as the focus of their study. The body of research on this subject is substantial[7] and reflects many different specific topics of study. As is true with most areas of the study of human affairs, there is substantial disagreement over definitions and boundaries (i.e., what is the definition of a "profession"?), yet many of the themes in this literature form the framework for the way we think about the legal profession, its work, and its role in society.[8] In fact, while scholars disagree on what constitutes a profession (see Freidson, 1983), and even on whether or not one should seek to define this concept (Freidson, 1983; Johnson, 1972: 24–25),[9] the common themes found in efforts at definition have provided a focus for much of the empirical research on professions in general and the legal profession in particular.

The characteristics typically used to define a profession include (but are not necessarily limited to):

1. "Possession of esoteric but useful knowledge and skills, based on specialized training or education" (Moore, 1970: 6).[10]

2. An orientation toward service in the interest of an identifiable client.
3. Autonomy of action, with regard both to the specific action (i.e., the professional is in control of the relationship with the client) and to the definition and enforcement of standards of professional behavior.
4. The existence of one or more organizations to serve the internal and external needs of the profession.[11]

In one sense, the concept of professionalism as applied to the legal profession is a normative concept that provides an ideal that lawyers should strive to meet (Nelson, 1988: 18); in the words of one recent commentary on the legal profession, "legal practice is . . . idealized as a self-directed calling, informed by the spirit of a public service" (Rhode, 1985; 592, quoting in part Pound, 1953: 14).[12]

But professionalism is more than a goal for practitioners (American Bar Association, 1986; Morgan, 1985). The conceptual elements comprising it guide and frame much of the empirical research on lawyers (Rueschemeyer, 1986; 442; see also Simon, 1985). This can easily be seen in the importance in much of the research on the legal profession of the definitional themes just listed; in addition to the broad issues referred to previously, we have specific studies of:

- The ways in which new lawyers come to be socialized to the profession through law school and the early years of practice (Abel, 1979a; Rathjens, 1976; Zemans and Rosenblum, 1981; Erlanger and Klegon, 1978; Stover, 1989).
- The relationship of lawyers to the social and political structure of their local and larger communities (Podmore, 1980; Szanton, 1973; Eulau and Sprague, 1964).
- The ways in which lawyers as professionals serve their clients and communities (Handler, 1967; Kagan and Rosen, 1985; Cain, 1979; Mungham and Thomas, 1983; Etheridge, 1973; Hosticka, 1979; Moore, 1970: 97–102; Reed, 1969; Sarat and Felstiner, 1986, 1988).
- The relationship of lawyers to the various work settings in which they find themselves (Smigel, 1964; Carlin, 1962; Johnson, 1974; Handler, Hollingsworth, and Erlanger, 1978; Spangler, 1986; Katz, 1982, 1985; Johnson, 1978; Menkel-Meadow and Meadow, 1982; Landon, 1982, 1985, 1988).
- The role of professional organizations in the adoption and enforcement of standards of behavior (Carlin, 1966; Schneyer, 1989).
- The nature and impact of stratification within the profession (Heinz and Laumann, 1982; Galanter, 1983b).

Recently, students of the legal profession have devoted substantial attention to the key concept of autonomy (Cain, 1979; Heinz and Laumann, 1982; Kagan and Rosen, 1985; Heinz, 1983; Nelson, 1988). This research has raised questions about whether lawyers in fact enjoy autonomy of action, particularly with regard to work specifically requested by a client. Concern about this

question is central to the analytic concept of the professions because of the way the expected autonomy is derived from the other components of the definition of what constitutes a professional, and because it is this autonomy that differentiates the work situation of the professional from that of other members of the labor force (Daniels, 1973; Rueschemeyer, 1983; Johnson, 1972; Freidson, 1960, 1970: 23–46; Moore, 1970: 87–108); in Freidson's words, "autonomy of technique is at the core of what is unique about the profession" (1970: 44–45). While other workers have significant amounts of autonomy, that autonomy typically derives from employment status (i.e., self-employment) rather than from the nature of the tasks to be completed. Many workers have relatively little autonomy; the extreme example is the person working on an assembly line. Thus, what sets the professional's work situation apart from that of other workers is both the existence of autonomy of action and the basis of that autonomy.

The autonomy of the professional derives from two sources. First, it reflects the specialized, abstract knowledge of the professional, obtained through a formal process of higher education. That specialized knowledge is often accompanied by a technical language. The unique knowledge and language establish a particular kind of relationship between the professional and the consumer of the professional's services; the consumer, or client, is not in a position to instruct the professional on the services to be delivered but, instead, depends on the professional to determine what services (and how much of those services) will be rendered. Obviously, this dependence creates a situation that might easily lead to abuse if professionals were to take advantage of their *superior* position vis-à-vis the client.

Such abuse is avoided, at least in theory, because of the second reason that the professional is granted autonomy. A person working in a professional capacity is seen as engaging in that work not primarily for personal gain; the primary motivations are a combination of a commitment to service for the client and a love of the work in which the professional is engaged. This combination leads to an image of the professional as the clients' dispassionate "alter ego"—doing for clients what the clients would choose to do if they had the professional's expertise and were able to look "objectively" at their own situations. In the words of James Boswell (quoted in Megarry, 1962: 53), "A lawyer is to do for his client all his client might fairly do for himself if he could." Furthermore, according to Roscoe Pound, while "gaining of a livelihood is involved in all callings, in a profession [such as law] it is incidental" (Pound, 1953: 6); in fact, "the best service of the professional man is often rendered for no equivalent [i.e., fee] or for a trifling equivalent and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward" (Pound, 1953: 10). As Richard Abel (1989a: 27) notes, this leads to "the widespread convention that lawyers and physicians do not discuss fees in advance."

This rejection of a profit motive for the lawyer as a professional can be observed historically in several ways. First, entering a profession was linked to the religious idea of a "calling" for which recompense was almost an insult;

naturally, some compromise was necessary to secure a livelihood, and various devices, such as the hood worn by academics into which students at medieval universities placed fees paid to their professors (Abel, 1989a: 27), bridged the gap between ideal and actual. Second, the tradition for barristers in England (the "senior" branch of the legal profession in that country) and for *avocats* in France was that they were not paid fees but received honorariums in appreciation for their work (see Abel-Smith and Stevens, 1968: 43; Le, 1982: 68–79;[13] that is, the payments received for "intellectual activities . . . were considered to be manifestations of the client's gratitude, since no price could be set on such intellectual services" (Le, 1982: 69). One implication of this is the rules in England and France that bar the English barrister and the French *avocat* from suing clients who fail to pay for the lawyer's services.[14]

Obviously, the preceding description is a "model," an abstraction from the real world. While much of what I have stated concerning the professional could easily be applied to occupations not usually considered by those who study the professions—the auto mechanic is a good example—the focus on autonomy arising from the combination of specialized knowledge, selfless motivation, and a particular type of relationship between professional and client is central to perceptions of how lawyers are supposed to go about their work. However, there is substantial research that calls into question all three of these components—autonomy in client relations, the reliance on abstract, specialized knowledge derived from formal training, and motivations unrelated to personal financial gain—especially as they relate to the work of lawyers in ordinary litigation. This research comes at a time when the premier institution of the profession, the American Bar Association (1986; see also Rotunda, 1987; Moore, 1987), has been voicing much concern about professionalism. An examination of the research challenging explicit and implicit assumptions in the professionalism framework will show us how the brokerage framework places into perspective many of the apparent inconsistencies and contradictions.

Autonomy

The literature dealing with the autonomy of the lawyer as a professional examines the implications of that autonomy and/or the variations in autonomy, often relating those variations to stratification within the legal profession. Heinz and Laumann's study, *The Chicago Bar* (1982), is an important examination of these related questions. A central dimension of stratification in Chicago distinguishes between lawyers who provide services to large corporations (the "corporate services" lawyers) from those who serve the needs of individuals and small businesses ("personal services" lawyers).[15] According to the portrait drawn by Heinz and Laumann, the corporate services lawyer is typically a person who attended an elite law school (and performed well academically there) and has a social background that parallels that of the dominant elite. The personal services lawyer is more likely to have attended a local law school (perhaps part time) and to be a member of an identifiable ethnic group. Corporate services lawyers, by definition, serve high-status clients and are paid sub-