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Law Talk in a Brief Advice Clinic

Linda F. Smith

LAW TALK IN A BRIEF ADVICE CLINIC

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ABSTRACT

Over three decades ago, Sarat and Felstiner published a ground-breaking ethnographic study of divorce client-lawyer conversations. They concluded that lawyers portrayed "a chaotic 'anti-system' in which [clients] cannot rely on the technical proficiency, or good faith, of judges and rival lawyers" but need to rely on their own lawyers' insider status to achieve reasonable outcomes.[1] Although lawyers initially described the law and procedure to their clients, they rarely referenced that rational description when explaining what had occurred or would occur in their clients' cases. This law talk may have gradually and ultimately persuaded the clients to reach reasonable settlements, but it did so at the cost of client distrust of and cynicism about the legal system.

Today most divorcing parties do not have attorneys providing full representation for them. Instead, clients represent themselves, often relying on brief advice from attorneys. This raises a question: How do attorneys today portray the legal system to clients attempting to navigate it themselves? Does their law talk fail to link law and procedure to what happens in the clients' cases, engendering cynicism? Are they similarly critical about judges, other attorneys, and the legal process? Do they suggest the clients need to have an "insider" attorney on whom to rely?

This study answers these questions by analyzing thirty-six attorney-client conferences and thirty-nine attorney-student consultations from a brief-advice clinic. These pro bono attorneys present – to both their clients and the law student volunteers – a rational legal system with understandable procedures and fair jurists. They provide candid advice even when the client is unlikely to achieve a particular goal, neutral information about how to

* James T. Jensen Professor of Law, S.J. Quinney College of Law, University of Utah. This research was made possible through the generosity of the Albert and Elaine Borchard Fund for Faculty Excellence and the American Bar Association Litigation Research Fund. The author is indebted to the many clients, lawyers and law students who agreed to be subjects for this study, and to Professors Jorge Contreras and Laura Kessler for their helpful comments on this article.

[1] Austin Sarat & William L. F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office,* 98 YALE. L. J. 1663, 1665 (1989) (hereinafter "*Law Talk*"); *See also* Austin Sarat & William L. F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC. REV. 93, 101 (1986) (hereinafter *"Law and Strategy*"); Austin Sarat & William L. F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction,* 22 LAW & SOC. REV. 737 (1988); AUSTIN SARAT & WILLIAM L.F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER & MEANING IN THE LEGAL PROCESS (1995) (hereinafter *DIVORCE LAWYERS*).

make any argument, and encouragement. They never intimate that pro se parties need an "insider" attorney who knows the idiosyncrasies and proclivities of incompetent judges and untrustworthy opposing attorneys.

This Article concludes by theorizing why there is such a sharp contrast between the 1980s study and this contemporary study of "law talk" between attorneys and their clients.

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I. INTRODUCTION

"Perhaps social science should begin its 'study of law with the proposition that law is not what judges say in the reports but what lawyers say – to one another and to clients – in their offices.'"[2] With this proposition in mind, in the 1980s Law and Society scholars Austin Sarat and William L.F. Felstiner undertook a unique study of "law talk" – discussions of the legal system – by recording and analyzing attorney-client conversations.[3] The first section of this Article reviews that iconic study and the disturbing conclusions those researchers reached – that lawyers portrayed a chaotic system driven by personal connections rather than law, engendering dependency and cynicism in their clients.

This Article then turns to describe this 2009 study, also looking at "law talk." But here, the attorneys are serving in a pro bono clinic providing brief advice to unrepresented parties and mentoring law student volunteers as well. How do these attorneys portray the legal system? Do they also describe a chaotic system in which judges and other lawyers cannot be trusted to follow law and procedure? Do they subtly suggest that these unrepresented parties need to hire an attorney in order to have someone with connections? This section answers these questions by analyzing recordings of pro bono attorneys counseling their limited scope clients and instructing law students who are also volunteering to help these clients.

The contrast is stark. The pro bono attorneys encourage the pro se parties that they will be able to bring their cases to court, and the law will be fairly applied. They speak respectfully of the judges, mediators, and opposing attorneys. They candidly tell the clients if their claims will likely be denied and why. When these attorneys recommend that a client seek representation, it is due to the unavailability of court forms or the challenging nature of the case (e.g., parental termination). They never suggest that a client needs an attorney with insider connections. The picture they paint is of a rational, fair judicial system.

Finally, this Article considers why this study finds such sharp contrasts with Sarat and Felstiner's classic study. There are various possible reasons, and more than one may be in play. It is possible that time and different locales have produced different legal cultures with different degrees of respect for the judicial process. Differences in judicial appointment processes and court structures, coupled with changes in the substantive law, may have made judicial decisions more consistent and predictable today. This may have

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[2] Sarat & Felstiner, *Law and Strategy*, *supra* note 1, at 94 (quoting Martin Shapiro, *On the Regrettable Decline of Law French: Or Shapiro Jette le Brickbat*, 90 YALE L. J. 1198, 1201 (1981)).

[3] Sarat & Felstiner, *Law Talk*, *supra* note 1, at 1669-70.

resulted in contemporary attorneys being better able to predict case outcomes based on the law.

Perhaps pro bono attorneys have a more positive attitude about the courts. Cognitive dissonance would make it unlikely that any attorney would speak one way about the courts to pro bono clients and a different way to paying clients. However, the pro bono attorneys were never called upon to explain a negative development by admitting they had made a mistake and had no reason to avoid giving these pro bono clients bad news about the weakness of their claims.

In contrast, the private attorneys in Sarat and Felstiner's study may have sought to save face by blaming the courts rather than admitting error or sought to protect the client's feelings by being less than candid about the weaknesses in the client's case.

Finally, the wave of pro se parties litigating their family law cases has brought many changes to the ways the courts operate. After some period of resistance, the bench and bar have taken up the challenge of rendering justice for self-represented parties. Perhaps, as a result, courts today are actually operating more rationally and consistently than ever before – the silver lining of an access to justice crisis!

II. BACKGROUND

A. Sarat and Felstiner Study

Almost forty years ago, Law and Society Professors Austin Sarat[4] and William L. F. Felstiner[5] embarked on an ethnographic study of divorce attorneys and their clients. Their project was to explore whether lawyers actually "communicate to their clients a traditional picture of law . . . that emphasizes the determinacy of legal rules, the objectivity of legal decision-making, and the fairness of legal judgments" which the organized bar would expect and which would provide justification for the professional authority of lawyers.[6] They recognized that much of the conversations between lawyers and clients is "educational," and lawyers "play an important role in shaping mass legal consciousness and in promoting or undermining the sense of legitimacy that the public attaches to legal institutions."[7] Indeed, they highlighted that the organized bar had imposed an ethical obligation on

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4 Austin Sarat was William Nelson Cromwell Professor of Jurisprudence and Political Science at Amherst College.

5 William L. F. Felstiner was Professor in the Law and Society Program at the University of California, Santa Barbara, and Distinguished Research Professor of Law at the University of Wales, Cardiff.

6 Sarat & Felstiner, *Law Talk*, *supra* note 1, at 1667.

7 *Id.* at 1664.

lawyers to "respect, and encourage respect for, law and existing legal arrangement."[8]

These scholars were influenced by the Critical Legal Studies (CLS)[9] movement that argued that the traditional picture of how law operated in society was mistaken; CLS wanted lawyers to "demystify and delegitimate law by exposing the inconsistency and arbitrariness of legal doctrine to their clients."[10] Sarat and Felstiner noted that CLS had mostly failed to "examine the actual behavior of lawyers"[11] and through their study, sought to remedy that:

> Whether the assumptions of the organized bar or of the critics bear any relationship to actual legal practice is currently unknown. To develop a clear understanding of lawyers' contributions to the maintenance or critique of legal legitimacy, and to assess the implications of what lawyers actually tell their clients about the legal process for a theory of mass legal consciousness and professional authority, we conducted an observational study of lawyer/client conferences.[12]

Over a period of 33 months, they observed and tape-recorded 115 lawyer/client conferences, following one side of forty divorce cases, ideally from initial interview to the conclusion of the matter.[13] The study involved twenty different attorneys from two different communities, one in Massachusetts and the other in California, which were chosen because they represented different legal cultures and had different laws governing divorce.[14][15]

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8 *Id.* at 1664-65 (citing the ABA Canons of Professional Ethics and the Preamble to the Model Rules of Professional Conduct as reminding lawyers to "demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials").

9 Critical Legal Studies scholars argued that law was inseparable from politics and was used as a tool for the elites to maintain power. *See generally* Robert Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARVARD L.REV. 561 (2015) (a discussion of the Critical Legal Studies movement); *see also* Duncan Kennedy & Karl E. Klare, *A Bibliography of* Critical *Legal Studies*, 94 YALE LAW JOURNAL 461 (1984).

10 Sarat & Felstiner, *Law Talk*, *supra* note 1, at 1668.

11 *Id*. at 1668.

12 *Id.* at 1669.

13 *Id.* (The study also involved observing court hearings, trials, and mediation sessions and interviewing both attorneys and clients).

14 *Id.* One site was a medium-sized city where the local university was a major force and employer, the other was a smaller locale but where higher education also played an important role. *See* SARAT & FELSTINER, DIVORCE LAWYERS *supra* note 1, at 8 (discussing location selection for client-lawyer observation study).

15 SARAT & FELSTINER, DIVORCE LAWYERS, *supra* note 1, at 9. The lawyers were recruited by a snowball method by asking judges, mediators and other lawyers to name possible subjects. The lawyers themselves selected the clients to be involved.

In conducting this research, one of the major objectives was "to describe the ways in which lawyers present the legal system and legal process to their clients."[16]

B. Findings of the Sarat and Felstiner Study

1. Significance of Legal Rules

According to Sarat and Felstiner, most case consultations began with the lawyer's formalistic description of the procedures, rules, and statutes.[17] But thereafter, "descriptions and characterizations of the legal system" mainly occurred when clients asked, "why a particular result occurred or what results might be predicted."[18] However, lawyers rarely linked their explanations or predictions for their clients' cases to the relevant law or procedure they had initially described. Instead, when legal rules did emerge in the conversation, they were "generally disparaged; contrary to the assumptions of both the organized bar and critical scholars, lawyers rarely defend[ed] the rationality, importance or efficacy of legal rules."[19] These lawyers disparaged rules ranging from protocols for calling cases, to rules for discovery, to filing deadlines, to the rules of evidence.[20] For example:

> *There really are no rules here, just people, the judge, the lawyers, the litigants. . ..* [21]

> *When you get heard is up to the court officer . . . he's the one who controls the docket. They don't have a list prepared and they don't start at the top and work down. They go according to his idea of when people should be heard.*[22]

Lawyers also denigrated rules by characterizing them as unnecessarily technical so that lawyers and even judges often did not know what they meant.[23]

A third criticism of the law focused on its inability to control behavior outside the legal process.[24] For example, one lawyer discouraged his client from pursuing a contempt order:

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16 Sarat & Felstiner, *Law and Strategy*, *supra* note 1, at 95-96.
17 Sarat & Felstiner, *Law Talk*, *supra* note 1, at 1671.
18 *Id.*
19 *Id*. at 1672.
20 *Id.* at 1673.
21 Sarat & Felstiner, *Law Talk*, *supra* note 1, at 1673.
22 *Id*.
23 *Id.* at 1674.
24 *Id.*

Lawyer: *Okay. So what you would like is what? You'd like phone calls if he needs to . . .*

Client: *Limited to concern of the children or medical bills, and, you know, never mind giving me all his heartache trouble.*

Lawyer: *You know, he' in violation of the court order [restricting contact with the spouse], but to take him to court, it can be done, I'm not saying that we won't do it or anything, it's a matter of proving contempt. We can prove it, but then what do you get out of that. You don't get anything . . ..*[25]

Another lawyer similarly told his client that joint legal custody was meaningless:

> *"There is no such thing as court ordered joint custody. In a realistic sense, real sense of joint custody . . . ."*[26]

2. Critique of Legal Officials

Lawyers also "regularly criticized judges for failing to pay attention to those [relevant] statutes or the case law interpreting them."[27] Instead, lawyers emphasized the importance of people over the law, portraying judges as having immense discretionary power so they could do what they chose to do.[28] When lawyers turned to evaluate "the behavior of actors in the legal process," they talked in a "critical, realistic mode," often explaining different outcomes based not on idiosyncratic fact patterns or particular needs "but as a reflection of the propensities of the individual judge."[29] While some judges were characterized as smart, experienced, savvy or reasonable, the "clear tendency of lawyers' talk about judges [was]. . . to call into question their skill, dedication, and concern."[30] Lawyers referenced judges' backgrounds and experiences as well as clients' dress and demeanor as possibly influencing judicial decisions.[31] At the same time, lawyers also suggested that judges may be "incapable of grasping the nuances and subtleties of legal arguments, uninterested in the details of particular cases" so that their decisions could be "difficult to understand."[32] Criticisms of judges included

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25 *Id.* at 1674-75.
26 *Id.* at 1675.
27 Sarat & Felstiner, *Law Talk, supra* note 1, at 1673.
28 *Id.* at 1674.
29 *Id.* at 1676.
30 *Id.*
31 *Id.* at 1676-78.
32 Sarat & Felstiner, *Law Talk, supra* note 1, at 1678.

comments on their intelligence, knowledge, motivation, and concern, and "suggest[ed] that the inattentiveness, insensitivity, and incompetence of judges must be taken into account in deciding how to process cases."[33] For example:

> *[j]udges are not tolerant of subtleties . . . . All they want you to do is, they want you out the door and the rulings are usually gross. They're gross rulings. They don't consider and factor in the subtleties of what the people are trying to do.*[34]

According to Sarat and Felstiner, lawyers' descriptions of the justice system as "idiosyncratic and personalistic" suggested that clients needed experienced lawyers who knew the "back corridors of legal institutions, the personalities of judges and how to present client desires in such a way as to appeal to the judges' proclivities."[35] This "private knowledge" of experienced lawyers that could not be shared with their clients served to keep clients dependent upon their attorneys.[36]

"Many of these same themes" arose with respect to opposing counsel.[37] The lawyers' most generous characterization was that the opposing lawyer was "reasonable;" in other cases opposing counsel were called "maniacs," excessively technical, unprofessional, and unethical.[38] Political agendas – particularly "feminism" – was also alleged to lead to unreasonable behavior:

> *What I know about Claire (the wife's lawyer) is that she can be very reasonable. On the other hand, it is my opinion that her feminism has been distorted in terms of how it relates to divorce law. Therefore, if there's any rhetoric from your wife (about) what spousal support is supposed to be, Claire will foster and cultivate that, rather than be reality with her . . . . Claire is also an ardent feminist and often confuses the issues of when to say enough is enough.*[39]

Sarat and Feltsiner claimed, "such condemnation of other lawyers occurs frequently and tends to promote client cynicism."[40]

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33 *Id*. at 1679.
34 *Id.*
35 *Id.*
36 *Id.*
37 Sarat & Felstiner, *Law Talk*, *supra* note 1, at 1679.
38 *Id*. at 1680-81.
39 *Id.* at 1681.
40 *Id.* at 1682.

3. Justice and the Legal Order

What do these lawyers say about the "efficiency, fairness and social utility" of this legal process? They "do not defend the legal order . . . as either the critics would predict or the organized bar would prescribe."[41] Instead, they often counseled that money was "the chief determinant of legal results," referencing unfairness driven by economic differences between the parties.[42] For example, one attorney counseled a client whose wife's wealthy family was paying for her lawyer:

> *I'm not just making this up. I'm telling you very frankly it appears as though he's (the wife's lawyer) doing a $10,000 case. That's just the way it is. Your – no matter who you go to – you can't afford a $10,000 case. Can't do it. And that's part of the injustice of the American legal system but I'm not going to do as much work as he is at the moment. I can't . . . I'm just not equipped to do it. If you were to give me $10,000 I would drop everything, drop everything, and work 40 hours a week, but I can't based on what you can afford.*[43]

The lawyers also pointed to delay as another unfortunate part of the process. Finally, lawyers recognized that the "ultimate justice" their clients sought might not be available from the legal outcomes that could be achieved in a divorce case.[44]

4. Defense of Professional Power – Insider Status

These authors concluded that as the lawyers' professional power changed from being based on knowledge of the law and legal rules to being based on insider knowledge, access, connections and reputation; they gave their clients reasons to rely on their lawyers even while they jeopardized their clients' trust in the legal system.[45] An illustration is provided by a case in which the client did not understand why a restraining order could have been issued against her:

Client:	*How often does a case like this come along – a restraining order of this nature?*
Lawyer:	*Very common. . . . Yeah, you know, I talked, I did talk to someone in the know – I won't go any further than that – who*

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41 *Id.*
42 Sarat & Felstiner, *Law Talk*, *supra* note 1, at 1682-83.
43 *Id.*
44 *Id.* at 1684.
45 *Id.* at 1685-87.

> *said that this one could have been signed purely by accident. I mean, that the judge could have – if he looked at it now – said, I would not sign that, knowing what it was, and it could have been signed by accident, and I said, well, then how does that happen? And he said, well, you've all this stuff going; you come back to your office, and there's a stack of documents that need signatures. He says, you can do one or two things: You can postpone signing them until you have time but then it may be the end of the day; the clerk's office is closing, and people who really need this stuff aren't going to get the order, because there's someone else that needs your attention, so you go through them, and one of the main things you look for is the law firm or lawyer who is proposing them. And you tend to rely on them.*[46]

In conclusion, Sarat and Felstiner assert that the common finding that people exposed to the legal process have a less favorable view of that process than the public at large may be partially explained by their findings: "Law talk in the divorce lawyer's office, as it interprets the internal workings of the legal system, exposes law as failing to live up to the expectations which people have about it."[47] "Lawyers construct a picture of the legal process, which creates individualized client dependency while it jeopardizes trust in the legal system and may damage the legitimacy of the legal order."[48]

III. THIS STUDY

Much has changed in the practice of family law since the mid-1980s when Sarat and Felstiner completed their study. Today, comparatively few divorcing parties have their own attorneys – instead, most parties represent themselves with occasional brief advice from lawyers.[49] This study seeks to compare Sarat and Felstiner's divorce lawyers' "law talk" with 21st Century family law attorneys talking to self-represented clients at a free brief-advice clinic.

As was true in the 1980s, the Model Rules of Professional Conduct still say a "lawyer should demonstrate respect for the legal system and for those who serve it. . ." though they also recognize that there may be deficiencies which the lawyer, as a public citizen, should seek to correct.[50] The Rules further state a lawyer should "work to strengthen legal education" and "further the public's understanding of and confidence in the rule of law and

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46 *Id*. at 1685.

47 Sarat & Felstiner, *Law Talk*, *supra* note 1, at 1687.

48 *Id.*

49 Linda F. Smith & Barry Stratford, *DIY in Family Law: A Case Study of a Brief Advice Clinic for Pro Se Litigants*, 14 J. LAW & FAMILY STUDIES 167, 168-69, 173 (2012).

50 MODEL RULES OF PROF'L CONDUCT Preamble [5] and [6] (AM. BAR ASS'N 1983).

the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[51]

Given that our ethical rules continue these exhortations, the question is whether today's attorneys, in this different context, also disparage the legal processes and the other actors in the legal system. Do these attorneys engender fear in clients who have no counsel and signal a need to hire an insider attorney? Do they engender distrust in and cynicism about the legal system? Because the brief advice clinic studied also involved law students interviewing and counseling clients under the supervision of attorneys, this study also includes analysis of the attorneys' "law talk" to the law students. Do the lawyers disparage the legal system to the students? Or do they present the traditional picture of objective legal decision-making and fair legal judgment? Do they "demonstrate respect for the legal system and for those who serve it" and further the students' and the public's "confidence in the rule of law and the justice system"?[52]

A. Methodology

This study involves a twice-monthly brief-advice clinic held in Salt Lake City, Utah, staffed by volunteer attorneys and law students providing free advice in family law matters.[53] Most of the clients were low-income individuals unable to afford private counsel. They were representing themselves (or preparing to do so), although many also sought referrals to agencies or attorneys who might represent them on a pro bono or "low bono" basis. While divorce cases were among the matters considered here, these clients presented a much wider array of family law concerns – from paternity to modifying or enforcing custody and support orders to adoption and termination of parental rights.

Over a period of six months in 2009, each night the clinic operated, clients were offered the opportunity to participate in the study by having their consultations recorded.[54] Attorney volunteers, typically members of the Utah

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51 *Id*. Preamble [6].

52 *Id*. Preamble [5] and [6].

53 Smith & Stratford, *supra* note 49, at 180-84. In addition to making recordings, this study collected demographic information and surveyed the clients, students and attorneys about the perceived efficacy of the project.

54 *Id.* at 182-83. We recorded attorney-client interview-counseling sessions, student-client interviews, student-attorney consultations, and student-client counseling sessions. The entire study was approved by the Institutional Review Board, and client confidentiality and privilege were protected by virtue of the fact that the author was also a volunteer at this brief-advice clinic. If clients were recorded, the protocol provided that the author or another experienced attorney would telephone them within two weeks to provide additional advice if necessary. This benefit no doubt enhanced clients' willingness to participate. *See* Linda F. Smith, *Community Based Research: Introducing Students to the Lawyer's Public Citizen Role*, 9 ELON L. REV. 67 (2017) (for a comprehensive

State Bar Family Law Section, and law student volunteers from the University of Utah College of Law, had previously been recruited to participate by email solicitation. There were over twelve different attorneys involved in these recorded conversations, all with expertise in family law. At least four were male and eight female; at least eleven were in private practice, and one worked for a legal service organization.

All of the recordings were transcribed, and certain identifying facts (e.g., names, places, age, or gender of child) were changed to protect confidentiality. This Article focuses on the thirty-six (36) transcripts of attorney-client counseling sessions and thirty-nine (39) transcripts of attorney-student consultations.

This Article uses a simplified method of reporting transcribed conversations, representing talk "as it is produced," though with proper spelling and some punctuation inserted for ease of reading.[55] The transcripts identify overlapping talk with slashes //, passive listening back-channel cues with brackets ["uhhuh"], pauses with a series of periods (one per second) or a note, and actions with chevrons <laughs>.[56] Various other conventions indicating speed, tempo, pitch, etc. were not included.[57] Bolded text is occasionally used to draw attention to issues being analyzed and does not indicate any emphasis in the recording.[58]

B. Results

The volunteer Utah attorneys, unlike the Sarat and Felstiner attorneys, did not disparage the significance of legal rules, procedures, or statues in determining outcomes in their clients' cases. Instead, they taught the clients what to do and encouraged them that they could be successful in their cases. While a few attorneys did agree that some aspects of legal rules – joint legal custody and contempt procedures – may be inadequate to control the other party's behavior, this was the only way in which the volunteers' comments comported with those of the Sarat and Felstiner attorneys. The volunteers said very little that could be understood as criticizing judges or other attorneys, and more frequently defended their actions in the clients' cases. In only one case was money mentioned as possibly impacting a proceeding, as it would make the case financially burdensome to the client and pressure

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discussion of the study, including copies of Informed Consent forms for clients, students and attorneys).

55 *See* Alexa Hepburn & Gelina B. Bolden, *The Conversation Analytic Approach to Transcription*, in THE HANDBOOK OF CONVERSATION ANALYSIS 57, 57-67 (Jack Sidnell & Tanya Stivers, eds. 2014); *see generally* Harvey Sacks, Emanuel Schegloff & Gail Jefferson, *A Simplest Systematics for the Organization of Turn-Taking for Conversation*, 50 LANGUAGE 696 (1974).

56 *Id*.

57 *Id*.

58 *Id*.

settlement. Often the attorneys encouraged the clients to continue with self-representation, even giving them scripts and ways to handle procedural mistakes they had made, suggesting that the court personnel were understanding. When the attorneys did recommend that these pro se parties consider hiring an attorney (or seeking Legal Aid), it was because the law or process was complicated, never because an attorney would have insider knowledge of unwritten rules or a judge's prejudices. In sum, the "law talk" heard here conveys respect for and trust in the judicial system.

1. *Significance of Legal Rules*

Felstiner and Sarat's attorneys rarely defended the rationality of the legal rules or linked them to case developments. They also focused on the limits of law in controlling behavior.[59] The Utah attorneys similarly stressed the futility of seeking contempt orders and the irrelevance of joint custody. But otherwise, they consistently linked their description of law and procedure with how it would play out in the clients' cases, never intimating that the legal rules were irrelevant. In fact, a large part of the counseling conversations were intense seminars about how to do the legal tasks necessary for the clients to advance their cases.

a. Commenting on the Limits of Law

The most dismissive comment about the limitations of the legal process arose in a case where the client had accused her husband (and his attorney) of falsifying documents for the court. Here the attorney instructed the law student about the legal process and the message to convey to the client:

Student:	*She just wanted to know if the fact that he's tryin' to trick the commissioner by representing one paper with another paper or a change document with the original document, if this was illegal and she could do anything about it.*
Attorney:	*Well, the court has the—has one in the court file. If she's worried about it, she can get a certified copy by going to the clerk's office [cross talk].*
Student:	*I think she wasn't worried about it. She just wants to know if he can get in trouble for it, if she can get him in trouble for it.*
Attorney:	*Yeah.* ***I mean, lying to the court can //be a problem.//***

[59] Sarat & Felstiner, *Law Talk*, *supra* note 1, at 1571-75.

Student: *//But the commissioner// didn't—*

Attorney: *Yeah.* ***They just blow it off. I mean, technically, yes, she could get him in trouble. Realistically****—*

Student: *How does she get him in trouble? How should she do that?*

Attorney: *She could* ***report him for misrepresenting something to the court. It's not gonna go anywhere****. [Cross talk****] is gonna blow it off** *[distorted audio]. What I'd do is save that as ammunition if something comes up again and incorporate it into something else.* ***Tell her, fighting things in court is never as emotionally satisfying as you think it is****.*

Another attorney, speaking to a law student, similarly disparaged the utility of bringing a contempt action without also seeking some tangible relief:

Student: *Okay. Okay, um, she had another question about enforcing a divorce decree once it's, once it's in place, say he doesn't live up to //his part of the bargain.//*

Attorney: *//Then you go back to court// on an Order to Show Cause.*

Student: *Order to Show Cause, okay.*

Attorney: *Or a Motion to Enforce. They're the same thing. The forms on OCAP are now "Motion to Enforce."*

Student: *Okay, how is that different from, um filing for contempt, is that?*

Attorney: *It's the same thing.*

Student: *Ok. Motion to //enforce//*

Attorney: *//The forms// allow you to ask for whatever you want: contempt, enforcement [Okay] and just check, check, check, check when you file the motion.*

Student: *Okay. Last question here. She would like—*

Attorney: ***Contempt doesn't give you anything but a warm fuzzy feeling in your heart*** *. .*

Student: *Because they, I mean, they, they fine the other person but they're not-*

Attorney: ***They find them in contempt but unless there's something to go along with it [Okay] it's just a warm fuzzy feeling in your bosom.***

Student: *<chuckles> I win.*

Attorney: *//Yeah right.//*

In a second case, the attorney explained the difference between "joint physical custody" and "joint legal custody" to the client, minimizing the importance of joint legal custody:

Attorney: *Well. Joint physical custody is the kid has to sleep with the secondary parent at least 111 nights, so we can—**joint legal custody doesn't mean anything. It means they both get to decide things, for the kids, which they would get to do anyway, so it's sort of meaningless**. She has joint physical—this is the joint physical custody decree, so officially she needs to modify it. . . .*

A different attorney told another client that agreeing to joint legal custody was not giving the opposing party "anything, anyway."[60]

In these three instances, the Utah attorneys, like the Sarat and Felstiner attorneys, identified limits of the law to govern the other party's behavior.

b. Citing Law to Predict Results in Clients' Cases

However, with respect to disparaging the law or ignoring it in predicting case outcomes, these volunteers differed markedly from the Sarat and Felstiner lawyers. Attorneys explained how to answer complaints, how to accomplish service of process, how to modify a decree, how to argue a case, and explained the legal standards (e.g., for custody). In each instance, the legal standard or procedural requirement was applied to the client's particular situation. In these conversations the attorneys also straightforwardly gave clients "bad news" when what the clients sought was likely impossible. The "bad new" counseling cases provide perhaps the best illustrations of these attorneys' expressed respect for the law.

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[60] There is a rebuttable presumption for joint legal custody. When joint legal custody is ordered a Parenting Plan must be written allocating decision-making authority and a process for resolving disputes, including possible counseling, mediation and court action. *See* UTAH CODE ANN. §§ 30-3-10, 30-3-10.9 (West 2020).

Perhaps the starkest example was with the client whose son was planning to run away from the custodial parent living in Maine.

Client	*Well, I'm currently divorced through the state of Maine. My son, he's 15 right now. He'll be 16 in April. He wants he wants to be here with me, and his mom says, "No way, no how." The current divorce order is actually joint shared physical and legal custody 'cause, at the time, I was livin' in the state of Maine, and it was week on, week off. That's never been changed.*
Attorney:	*The son is still in Maine.*
Client:	*Yes. I left Maine because I got mixed up in some . . . He wants to come here, but [background noise] He said that he can go to the airport and get on a plane by himself, which he can do at the age of 16, however, she's got him believing that, if that was to happen, that she could have me thrown into jail, even though we have current shared physical and legal custody. She's got him convinced that—*
Attorney:	***We're looking at parental kidnapping [background noise] custodial interference worries.***

The client went on to share that he had already purchased the ticket for the son to fly from Maine to Utah the day after his sixteenth birthday; the attorney wondered, "is there any agreement as far as that might be spring break?" to which the client said no. Then there was this exchange:

Attorney:	*Hmm, I'm worried about—*
Client	*He's wantin' to run away.*
Attorney:	*He's wanting to run away into safe arms. I'm-*
Client	*Exactly.*
Attorney:	***This brings up a lotta concerns on a lotta different levels. <Laughs>.***

This client also explained his plan to get the case registered in Utah, and the attorney explained that Maine would retain jurisdiction:

Attorney:	*Okay. **Well, here's the issue: Maine owns the case**. They have jurisdiction in the case, even though you live in Utah now. Because he lives in Maine and divorce took place in Maine,*

they have complete jurisdiction. So what you're gonna need to do is file everything in Maine. Pretty much, your son's done it.

Client: *I was told that I could get my case registered here and then file. That's what I was told at the clinic this morning.*
. . . .

Attorney: *Right, which you can do, and then that gives Utah—that makes your divorce order or your child custody order effective in Utah, but it's effective anywhere. Then what you would have to do is motion for Utah to take jurisdiction.*

Client: *Oh, I have to do that?*

Attorney: *Right. Because your son has all of his ties in Maine,* ***Maine's gonna maintain jurisdiction for all of that.*** *Now, what we can do is turn off that thing and let me go get somebody that's got a little bit more experience for the foreign orders to see if, maybe, there's something I'm not aware of as far as getting it switched around.*

Having given the client the bad news that he was proposing the crime of "parental kidnapping – custodial interference" and that Maine would retain jurisdiction, this attorney went off to seek a more experienced attorney to confirm her advice. (Unfortunately, this was not recorded.) For our purposes, this serves as an example of the attorney providing direct, candid bad news as necessary.

Another case involved a client wanting to pursue a divorce in Utah, but the attorney explained why Colorado would "pretty clearly" have jurisdiction:

Attorney: *Okay. What can I help you with?*

Client: *I am obviously getting a divorce<[laughter]>. We lived in Colorado for a year, and he has filed in Colorado while I was in the process of filling out the paperwork here in Utah. [ok] I don't wanna do it in Colorado. We have one son who was born in Utah. He's gonna be living back here in Utah in six months, so I just wanna take care of it all in Utah cuz that's where we're gonna be.*

Attorney: *Where does your son live now?*

Client: *Here in Utah. He is seven months old. He lived in Colorado for three months, and he's lived here for the rest of the time.*

Attorney: *When did you and your son leave to Utah?*

Client: *It was the end of October.*

Attorney: *Okay. The applicable law that's gonna govern this whole situation of where you're gonna litigate the divorce case is called the Uniform Child Custody Jurisdiction Enforcement Act, Jurisdiction and Enforcement Act, so it's called a UCCJEA. Long title. [um hm] The basic principle of that is that the state in which the child lived for the most recent six month period has the jurisdiction, or the authority to enter orders regarding custody and visitation and child support type issues. Well, at least custody and visitation. So I have a hard time counting, so October, November, December, January, February, March and until the child's been here for six months, jurisdiction would still lie in Colorado. If your husband has already filed a divorce case there, then you can file stuff here. But the courts would then confer, and the* ***courts will decide pretty clearly that Colorado has the jurisdiction.***

The client protested that conclusion, and the attorney listened to the client's claim, agreed that the client could try to argue it, but stayed firm in his opinion:

Attorney: *You guys had lived there in Colorado for about a year before you moved back?*

Client: *Right. Full intention that we'll be back [ok sure] here was only temporary. The paperwork I filed, filled out online [Mm hm] did say when it was talking about the child custody [Mmhm] and everything and filing in Utah, something along the lines of that the child has the most ties to Utah. [um]Even the child hasn't lived in any state for six months and is tied to Utah because of family legality. Is that—?*

Attorney: ***You can certainly make those arguments. I think that when- if the courts do that conference call with each other, it's more than likely that Colorado is going to keep jurisdiction***.

Client: *Sure.*

Attorney: *But since he's only seven months and it's the time split, the faster you would file here the better. [ok]* ***Right now Colorado has the prior claim. [sure ok] Until the child's been absent from that state for six months, they're gonna have the prior claim [sure] for what's called home state status. [right] Just know that****. Given that if you want to continue to proceed in Utah you can. And* ***you're now dealing with some pretty complex legal stuff****. I would highly recommend that if you can, to either retain an attorney, or if you're eligible for Legal Aid Society . . . . , that you apply for their representation and they can represent you.*

In another case, the grandparents wanted guardianship as well as "an emergency hearing before a judge" because the child's mother might get out of prison and come take their grandson.

Client-F: *We're past that. We're where Violet don't have nowhere to take him. We're where she's stealing and I want an emergency hearing with the judge. I mean this is serious. This isn't waiting and doing paperwork. This is serious.*

Attorney: *Well* ***there's what's called a temporary restraining order and you can ask for that.*** *That's where* ***you'd have to be able to show the court that there would be irreparable harm to the child if the court doesn't enter an emergency order. It's possible. They're almost never granted by the court.***

Client-F: *There's no way I can see a judge for an emergency hearing?*

Attorney: *Yeah, you can, and I'm saying that—*

Client-F: *How do I do that?*

Attorney: *Okay,* ***it's called a temporary restraining order. I don't recommend them because the courts really don't grant them.***

Client-F: *They're rare.*

Attorney: *I'll tell you what- they are. Right.*

Client-M: *We need to follow the steps in this.*

Client-F: *Yeah, I know, but—*

Attorney: *But again, you're gonna—I don't know the exact category or menu it's under, but what you're looking for is temporary restraining order. And that's an emergency order.* ***You can ask a court for 'em, I just don't think you're gonna get it. That's when somebody's bleeding to death. The possibility that Violet might come and get Ethan is probably not going to rise to that level****. B- You can do what you want. . . . .*

Attorney*: Again, if you want to try to get—****even if you try the temporary restraining order, you have to have an underlying case to file one of these. You're still gonna have to file the guardianship first.*** *You gotta do that and this, again, is questionable. But you gotta have the guardianship filed so you have a case number. You just can't go in and ask for a temporary restraining order.* ***You've gotta have an underlying case, like a divorce or a custody case***

> ***or a guardianship case, to ask for a temporary restraining order***. *So regardless, if you wanna do this, you still have to do this first. You can do it at the same time, but you can't do this without that is what I'm saying.*

This attorney advised these clients how to pursue a procedure he thought would not succeed, also explaining the general rule that a case must exist before one could seek a TRO.

A young man was seeking advice having "signed the petition" but not kept a copy. The attorney was very direct with him that he may have already agreed to everything his wife was requesting:

Attorney:	*Have you had any hearings?*
Client:	*No. I've just signed the petition and sent it back in.*
Attorney:	***What do you mean "signed the petition"?*** *She did the petition or she filed?*
Client:	*Yeah, she filed. I got some notification that I was being petitioned. I had to sign it in front of a notary and mail it back.*
Attorney:	***That's not part of the process***.
Client:	*Oh.*
Attorney:	*Let me see what you signed.*
Client:	*I sent it in. This is what else I have.*
Attorney:	*No, no, wait a minute. I'm more concerned with whatever you signed, because* ***there's no—there's no part of the process that requires you to sign anything.***
Client:	*Oh.*
Attorney:	*I'm wondering what you signed.*
Client:	*As far as I understood, that's what it was.*
Attorney:	*Yeah.* ***It doesn't work that way****. Now did she do the documents online? Is this what they call the OCAP program?*

The client then produced some papers he had received from the court, and the lawyer reviewed them and advised further:

Attorney: *Here it is, here it is**. If you signed this document you are up a creek without a paddle**. This says that she can have the divorce according to what's in this other paper. So you do not want to sign this document—*

Client: *Okay.*

Attorney: *-'cause you want to change it.*

Client: *Yes.*

Attorney: *Okay. Whatever you do, do not sign—Acceptance of Service, etc. You can sign a simple Acceptance of Service if it just means "yes, I got the papers," but this is the part you don't want to. **This Consent and Waivers says, okay,** you can waive the 90-day waiting period, and **you can do the divorce exactly the way that's in her papers, but you don't want that**.*

Client: *No.*

Attorney: *Okay, so don't sign this.*

Client: *Okay.*

In the end, the attorney advised the client to go to the court, ask for a copy of the document that he had signed, and then if necessary, file a document asking to withdraw his agreement.

In another case, the client disputed the child support arrearage that the Office of Recovery Services (ORS)[61] had calculated. Because he had missed the deadline to dispute that amount in an administrative hearing, the attorney advised him that he would have to go to court:

Attorney*: - an order to stop—well, if you do the adjudication child support arrears, whatever that number, they change it to or take it off completely, ORS is gonna honor that. By their calculations, probably with her information, they come up with this number. If you have a court hearing—see, **what needed to have happened, hindsight here, is, they send you this. You say that's wrong. They request a hearing. Then you go to this hearing**. You lay out all the information. Oh, it's not 2909; in fact, you've overpaid. **That's what should have happened. It didn't. Now we're at plan B. Now you're getting a court hearing to do that same thing.***

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[61] The Office of Recovery Services (ORS) is the governmental entity created to assist in the collection of child support. *See* UTAH CODE ANN. §§ 62A-11-101 – 111 (West 2020).

The attorney was matter-of-fact in explaining what the client should have done, and then what he needed to do at this juncture.

Explaining the standards for physical custody of children was also a typical topic. Here the lawyer gave the client the general legal standard, the client replied with relevant factual information, and the lawyer responded with practical advice in light of the client's particular circumstances.

Attorney:	***Sole would mean that primarily the kids would stay at your house****. She would get what's called at least minimum parent time and least minimum is every other weekend for the full weekend, one weeknight. There's a bunch of holiday schedules, all that stuff. Summertime, it's extended. Basically, you being in charge of making sure that they have a place to stay, they're fed, all that, except for some weekends.*
Client:	*Right. Actually, I think that's—*
Attorney:	***If that's what's happening now based on what Oscar told me, now's a good time to do it. Dads don't often get it, and the way to get it is by showing, "Hey, it's best for the kids right now because that's what they're used to, because that's what's happening. Mom's in rehab****."*[62]
Client:	*Right. Well, it's not really what's happening yet, because of the situation. She's in an outpatient thing. And the kids have been staying with her [ok] for the last four months, just because it's her house. It was her house to begin with. I was the one that got the boot.*
Attorney:	*You need a place to stay.*
Client:	*I'm workin' on the house right now.*
Attorney:	*Yeah, so you're gonna have to take care of all that.*
Client:	*Right. That's what I've been working on. I've been working up to this, and that's why—*
Attorney:	*Very good. Well, I'll give you the basic information. I know you wanted to talk about further information, but—*
Client:	*I do need to have a residence.*

[62] The attorney was relying on one of the factors for determining custody. "Previous parenting arrangements in which the child has been happy and well-adjusted in the home, school and community." UTAH CODE ANN. § 30-3-10(n) (West 2020).

Attorney: *Yeah.*

Client: *Yeah. I'm gonna do that.*

Attorney: *The standard is very vague on it.* ***The standard is, what's in the best interest of the children?*** *That's a vague one. It takes a lot. There is some things in the statute that would point us in the right direction, but a lot of it is just figuring out, what's a judge gonna go for in terms of what's best for these kids?* ***If they're used to sleeping at mom's house and they've been there for a while, we don't try to change around five-year-olds and three-year-olds. They don't like change****. We're gonna try to keep 'em there. On the other hand,* ***if there's a safety issue with mom, then we may have no choice but to jump them into a change.***

Client: *Borderline. Yeah. There's been incidences.*

Attorney: ***That sort of stuff you'd have to put together, but without a residence they can stay at, you're kinda out of the running.***

Client: *Right. Right. That's why I've been working so hard at this.*

Attorney: *To get into the running, yeah.*

These pro bono attorneys were consistently candid and forthright with the clients, explaining the law and procedure and then showing how it related to the clients' cases, even when telling the clients they would likely lose their argument.

2. Critique of Legal Officials

Where Sarat and Felstiner's attorneys described "a chaotic 'anti-system' in which [clients could not] . . . rely on the technical proficiency, or good faith, of judges and rival lawyers,"[63] such disparaging comments about judges, attorneys, and the court system were almost nonexistent in this study.

The only truly disparaging comment was reserved for the Office of Recovery Services (ORS), not a part of the court system itself, although often a party to such cases in order to collect child support:

Attorney: *Is ORS—were they a party to the hearing?*

Client: *Yeah, and I keep given 'em the information, and tryin' to get 'em—*

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[63] Sarat & Felstiner, *Law Talk*, *supra* note 1, at 1665.

Attorney: ***I hate ORS***.

Client: *They have been so—*

Attorney: ***I hate ORS.***

Client: *- bad for me.*

Attorney: ***They're bad for everyone if you ask me***.

Client: *An attorney, the General Attorney Olson that's assigned the thing, won't even let me go in and say, "Look at this stuff. //Are you serious?"//*

Attorney: *//**Yeah, they're nasty**,// but I was just thinking, they should be part of the case, and that might be one way to postpone things, if you're tryin' to postpone 'em, is, if they don't show up to the hearing, say they're a necessary party. They're garnishing wages. They should be up-and-up on the income thing. They're necessary to be here. You could get that thrown out of court and postponed if ORS isn't there. I'm just sayin', from a strategic standpoint.*

The client included the Assistant Attorney General (who represents ORS) in her criticism, and the attorney affirmed her negative opinion.

One attorney made a somewhat critical comment about a criminal court judge and District Attorneys in the context of advising a client facing both a juvenile court child abuse case and a felony case for having assaulted his teenage son. The juvenile court appointed an attorney for the client, but the judge in the felony case denied court-appointed counsel because the client earned $13 per hour. The attorney commented that this was "odd" and discussed various approaches to help the client obtain counsel, from asking for reconsideration, to approaching a public defender for assistance in making a case for appointed counsel, to paying his juvenile court attorney to handle this case as well. In explaining the need for representation, the attorney said:

Client: *What if I represent myself? Are you lookin' at me going, oh my gosh!*

Attorney: *Yeah. Bad idea.*

Client: *Okay*

Attorney: *I know people who work at Legal Defenders . . . . They regularly report that **sometimes prosecutors will offer a better deal to a represented person because the lawyer knows to ask for it than they will offer to an unrepresented person. Understanding the***

> ***rules of evidence and what's admissible and how to provide expert testimony, that's very, very challenging***. *I would recommend that you have – that you spend some money on counsel one way or the other. Most lawyers will do criminal cases on a flat fee basis, say $300, $3000 unless we go to trial, then it's $5,000 or something like that.*

The most critical comment about a family law judge was made in the context of urging a pro se client to carefully prepare his Affidavit for an Order to Show Cause hearing to enforce a provision of his Divorce Decree. As the attorney was providing strategic advice about what should be in the Affidavit, she included commentary about the commissioner (a quasi-judicial officer empowered to hear pre-trial matters in family law cases)[64] who would be hearing the case:

Attorney:	*I do think that you might want to supplement this. All you have to do is write something out like this, and explain to the judge her history.*
Client:	*Okay. Oh, I have a book of her history.*
Attorney:	*Right, but you need to—*
Client:	*She's mentally ill, she's been diagnosed. She has two broken restraining orders. She's been hospitalized once in a mental hospital. I have papers. I mean, I have a stack.*
Attorney:	*Right.*
Client:	*Should I include the whole thing?*
Attorney:	*I wouldn't.*
Client:	*Okay.*
Attorney:	*Between you and me, even though we're on tape—*
Client:	*Yeah.*
Attorney:	***Commissioner Dawson is not good at preparing for these hearings, and so you wanna make it very easy***. *You want to make it* ***as simple as possible*** *so that when he reads it, it's* ***very, very clear***. *You can attach those papers to your affidavit, but* ***I would summarize it, and I would summarize it in the easiest possible***

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64 *See* Rule 3-201 Utah Rules of Judicial Administration and UTAH CODE ANN. §78A-5-107 (West 2020).

***way**. I would say—I wouldn't focus on her mental health. I would definitely mention it, but further down, I would talk about the number of marriages.*

Client: *Okay.*

Attorney: *I would talk about the child abuse. I would talk about what she did in response to the child abuse. Was she the one who brought it to the attention of the authorities, or did she say—*

Client: *No, nothing ever happened.*

Attorney: *She never protected the child.*

Client: *No, she did not.*

In contrast, most of the comments about judges and attorneys were quite positive. Looking over the client's paperwork, one attorney commented:

Attorney: *So March 12th is your date, and **your commissioner is Thomas who is a great commissioner**. [good] So let's take a look at.*

At the end of this counseling session, the attorneys encouraged the client and his girlfriend, and again commented on the strengths of this judicial officer:

Attorney 1: *Well you're definitely doing the right stuff.*

Attorney 2: *Yeah.*

Client: *I'll let you know what happens.*

Attorney1: *Alright **and you've got a good judge. She's really nice**.*

Girlfriend: *She seems like it.*

Client: *//Yeah.//*

Attorney1: *//She is.// **She's smart**.*

Girlfriend: *We've been in there a couple of times.*

Client: *Yeah, she's kind of, woo.*

Attorney1: *Yeah //she is.//*

Client: *//Ha ha//*

Attorney1: *But you know what, you guys will be fine*

Even when clients complained about mediators or judges, attorneys often defended them. A client had mediated a custody order based on a plan to move out-of-state, but because that move did not take place, she needed to modify that order. In discussing the case, the client complained about the mediator. The attorney responded by reflecting the client's feelings, but then praising the mediator and explaining what a mediator's role should be.

Client:	*Yeah. He did. He filed a petition to modify. Then the mediator is like, "Yeah. Yeah. This is probably in your best interest. Blah, blah, blah, blah, blah."*
Attorney:	*Okay. Well, again, the only thing that you need to understand about mediation is it's a voluntary process.*
Client:	*Right.*
Attorney:	*That you only come to resolution if both parties agree to the solution. Generally, the mediators are neutral people. Chuck Evans, was he the mediator?*
Client:	*Yeah.*
Attorney:	*He's about the best in the state.*
Client:	*Is he?*
Attorney:	***You may feel that he was biased, but he's as good as they come.***
Client:	*Well, when he said he's like, "If I'm doin' this, then I have a lawyer represent one of you."*
Attorney:	*That's true. A good mediator will not only be a neutral party, but they will say, "Given what you've told me, here's what the court will probably do." One of the things that you said coming into this is that I'm moving to Alabama, and you want to revise the parent time. He can then say, as a good mediator, that knows [inaudible], "Okay. Well, Client, if you're moving and you're all able to do this new schedule, here's that schedule you'll want to put in there." **I know you don't like what the result was** especially as things turned out, **but they don't come any better than him**. **Not only is he a good friend of mine in that I've dealt with him for years and years he really is one of the best mediators in the state of Utah. Maybe nationally.***

This attorney empathized with the client's feelings ("you may feel that he was biased . . .I know you don't like what the result was") while also

explaining the process and asserting that the mediator she disliked was highly qualified.

Besides advising clients themselves, these pro bono attorneys also consulted with law students who had interviewed clients. In these attorney-student consultations, the attorneys explained the legal standards and processes to the law students while telling the students what advice to convey to the clients. There were only two instances where the attorneys spoke to law students characterizing a judge or attorney in somewhat less than flattering ways.

In a case where the client had a protective order issued against him, he had complained about the judge not listening to him, and the student conveyed the client's concerns to the attorney:

Student: *He said that at the hearing Judge Lincoln told him that in his written response he didn't address any of the—he ignored the issues [inaudible] which I find a little hard to believe because he very specifically says, "You do this, I did—" he categorically denies everything she alleged. I think he addressed it very appropriately. I don't know what that's about. I don't know anything about Judge Lincoln. [Yeah] I'm not sure what he or she was looking for. I don't even know if Judge Lincoln is a man or a woman.*

Attorney: *He's a guy.* ***Some lawyers think he's a little bit high and mighty as opposed to realistic****. Well—*

Another client had a very long and convoluted custody/visitation case and had complained about the attorney representing her ex-husband being "in cahoots" with the guardian ad litem representing the children. The attorney told the student the following:

Attorney: *Well whatever I mean that's, this is very fact specific about what did and didn't happen.* ***The other thing is I know Ken and he tends to be a very ardent advocate on behalf of his clients, but he's also on the self reps committee. He's very attuned to unrepresented parties. He's not inclined to be****—*

Student: *She actually brought that up.*

Attorney: ***Taking advantage of people just because he's a jerk. There are jerk lawyers out there, but Ken I put more in that he might be mistakenly overzealous****. What's her income situation? That's not much. Has she applied for legal services like legal aid?*

This same attorney commented that the guardian ad litem was "also a pretty capable lawyer." Finally, the client had asked about having the court

commissioner removed from her case, and the student-attorney dialogue on this point included the following:

Student:	*Okay so her question is, she's gone through this case with Commissioner Downs for five years and wants a change. My understanding is the likelihood of gettin' your commissioner or your judge changed is almost nothing.*
Attorney:	*Yeah.*
Student:	*Anything I can?*
Attorney:	*Yeah I've never. I think you probably could, but* ***you'd have to show a pretty compelling reason to get it switched.***
	. . . .
Student:	*Hopefully last question.*
Attorney:	*Oh yes.*
Student:	*What's the likelihood of somebody getting their commissioner assigned to their case changed?*
Attorney:	*You know, again,* ***when you're going forward saying the world is against me, it's unfair, the chances of winning that are not high. It takes a long while for a person that's making the decisions to be convinced that in fact the people they usually think of as competent and fair, just screwed you over. I mean strategically.***

In response to a client's complaints against everyone (opposing counsel, guardian ad litem, and commissioner), the attorney advised the student that the guardian is "competent," the opposing counsel is, at most, "over-zealous," and that removing a commissioner required "compelling" evidence. The attorney saw the case as one in which the client believed everyone was against her, and explained to the student that "the chances of winning" with that argument "are not high."

A second case involved another disgruntled client who wanted her commissioner removed. The attorney supervising the student consulted with another attorney:

Attorney 1:	*Have you ever heard getting a commissioner recused? Because that's one thing he is wondering about, because he feels that the commissioner has ignored some legitimate evidence that show-*
Attorney 2:	*That's not the way to do it. Only way you can recuse is if you'd show bias, inability to rule. There's a whole recusal statute, but*

you have to show bias. Basically unless there's a pre-existing relationship of some kind?

Attorney 1: *Otherwise it's just filing a motion again.*

Attorney 2: ***Just because a judge doesn't agree with you doesn't mean you kick him off.***

Student: *Okay, even if a guardian, like even if he didn't do the guardian ad litem's recommendation or the therapist's recommendation?*

Attorney 2: ***Just because a commissioner decides to go against a therapist or guardian ad litem that's their job // to make a call.//***

Student: *//That's their job?//*

Attorney 2: ***It goes to the weight of the evidence. They might weigh it differently than you would.***

As in the prior case, the attorney explained to the law student that it is not sufficient that a commissioner has ruled against a client or not accepted the recommendation of a guardian or a therapist to show that the commissioner has an impermissible bias. Instead, it is the commissioner's "job" to weigh the evidence and "make the call," and different people may legitimately reach different conclusions.

Where Sarat and Felstiner's attorneys blamed judges for a wide variety of personal failings, these attorneys taught students that judges sometimes rule against you based on "the weight of the evidence." They affirmed rather than undermined trust in the legal system.

3. Justice and the Legal Order

The Sarat and Felstiner lawyers did not defend the "efficiency, fairness or social utility" of the legal process, but often counseled that money was the chief determinant of legal results, pointed to delay in the process, and taught that "ultimate justice" might not be achievable.[65] What did the volunteer attorneys say to these unrepresented and typically poor clients?

There was only one case in which an attorney expressly discussed money with a client. Here the client was seeking to terminate the parental rights of an unwed father who had no relationship with the child in order to pursue a stepparent adoption. After explaining that getting the biological

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[65] Sarat & Felstiner, *Law Talk supra* note 1, at 1682-83.

father's consent would be the easiest way to proceed, the attorney discussed the possibility of litigating a contested case:

Attorney:	*Does his family or somebody who knows him have money that they would give him for legal proceedings?*
Client:	*Um, they have money but they wouldn't give it to him.*
Attorney:	*The reason I say that is cause sometimes parents, or grandparents, or other relatives uh have strong feelings and will loan a relative money to fight in court. And* ***while it shouldn't make a difference****, if you've got someone who has $20-30,000 to fight something, and you're scraping by, sometimes the tactics that are used can make a difference. They c'-* ***you can generate a lot of expenses.***
Client:	*Well even the grandparents, they don't . see him . ever. //They (inaudible)//*
Attorney:	*//Okay, I'm just, I'm// raising that just on the basis of experience, cause* ***when you have a discrepancy in finances, sometimes it can become a pressure point.*** *If for example, you're doing- taking all the money you can commit just to get it started, and he has got somebody who's gonna to do a lot of depositions and discovery, you can easily spend over $10,000 before you even see the inside of a courtroom. It is always a thing to keep in mind in the real world. How much money each side has. Um, what is he in jail for?*

This attorney looked at the issue from the client's (not the attorney's) perspective. She explained the problem with financial disparity (the other side could choose to do a lot of costly "depositions and discovery"), and this would create a "pressure point" (to settle).

There were no other discussions about money, although a substantial number of attorneys did discuss the value of retaining an attorney in the client's particular case. (See below).

None of the counseling sessions dealt with delays in the process. Similarly, there were no instances where an attorney advised a client that the "ultimate justice" the client sought would not be achievable. Instead, these attorneys were largely encouraging about the capacities of these clients to represent themselves and presented the law as if it would be applied straightforwardly to the facts they could prove. (See below.)

4. Defense of Professional Power – Insider Status

Sarat and Felstiner concluded that as their attorneys' professional power changed from being based on knowledge of the law to knowing "the ropes" – being based on "local knowledge, insider access, connections, and reputation," – they created client dependency on themselves. Did the pro bono attorneys speak – about the courts or themselves – in ways that might signal to the clients that the clients needed experienced attorneys, as insiders, to succeed in court? Did they make such comments to law students?

Basically, no.

In many instances, the attorneys encouraged the clients to forge ahead as self-represented parties, even when the clients had taken approaches that did not entirely fit with the required procedures. There were various cases in which the clients explicitly asked if they should have an attorney. While these pro bono attorneys agreed that representation could make the case easier, it was a small minority of cases where an attorney advised that a client would need an attorney's representation to pursue the case. These instances depended upon the nature of the legal case, and not upon any insider relationship an attorney would have with others in the system.

a. Encouraging Clients in their Self-Representation

The two attorneys above who told the client his commissioner was "nice," and "smart" also encouraged him to go forward, even though he had not pleaded his case entirely correctly:

Attorney 1:	*Okay. . . Okay so I think **you're actually doing a really good job here**. You know, asking for parent time.*
Attorney 2:	***Yeah you guys seem on top of it.***
Attorney 1:	*And you're being really specific, that you should have the minimum parent time under that statute and these are your requests.* . . . .
Attorney 1:	*//Well here's what could happen,// here's what could happen. You could get in front of a judge and the judge could say you know, you can't really do this by motion. What you really want, what you're trying to do is modify or change your Decree of Divorce. [hm hm] And so you need to file a Petition to Modify. So **the judge may or may not let you do this by motion,** does that make sense? Do you understand what I'm saying?*
Client:	*Ok. So basically I'll have to*

//inaudible//

Attorney 1: *//There's a possibility//.* ***She may say [//she may say//] oh you can do this by motion and I don't see why, you guys agreed to something and I don't see why we can't do it****. But,* ***under the rules, if you're going to change the Decree of Divorce, you do it by a Petition to Modify****—that's a whole new pleading that you file with the court. And you have to pay—I don't know how much it is—it's probably like three hundred and some?*

Attorney 2: *Yeah something like that, like two fifty*
//it's pretty expensive.//

Attorney 1: *//So with the petition// to modify you have to allege that there has been material change of circumstances – something has really changed (hmhm) since your divorce and that this supervised part should be taken off.* ***So I'm not sure whether the judge will let you do that by a motion or not, but it's good to try****.*

Client: *I've never had supervised visits, ever [Right] since we've been divorced, she's just dropped him off.*

Attorney 1: *And and that's certainly, and* ***I think that's how you can probably get in***
//by saying//

Attorney 2: *//Well and what's in// the divorce decree*
//though?//

Attorney 1: *//Supervised// visits.*

Client: *Supervised visits.*

Attorney 2: *Ok*

Attorney 1: *But he's saying he*
//hasn't even//

Client: *//I've never//.*

Attorney 2: *got them*

Client: *I've never had them*

Attorney 1: ***So this is a motion to enforce visitation 'and by the way judge, let's drop the supervised part.' And I think she'll allow you to do that. So I think you'll be okay, if you want to, going on your own. You know, if you want an attorney to represent you, it's***

not a bad idea *[Girlfriend: maybe if]* ***but you seem to be doing pretty well.***

Girlfriend: *So maybe if this doesn't work,[yes ye]) and the judge says go back [yes] and*
//then maybe look into it.//

Attorney 1 *//Yes I would agree with that//*

These attorneys' encouragement may have been influenced by the fact that the requirement of supervision had never been enforced, the statute promoted "frequent, meaningful and continuing access" to the noncustodial parent "absent evidence of real harm or substantiated potential for harm,"[66] and supervision was disfavored. [67] They encouraged an unrepresented client to make his argument to the commissioner based on the merits of his case.

A different attorney similarly encouraged a client to proceed with a motion to enforce parent-time, even though this client also needed a change in the existing order due to a change in relocation plans.

Attorney: *Okay. Okay. One of the things that—okay.* ***You might actually need two things. The problem is with a motion to enforce you actually are not—your objective is not to enforce the parent-time as the current order states.***

Client: *Right.*

Attorney: *Even though it's going to be a motion to enforce****, what you're going to ask the court is to clarify parent-time*** *to allow for—let me look at the order—let me see your decree. Is it the standard schedule? In here?*

Client: *Yeah.*

Attorney: *Yeah. Okay. For standard parent time pursuant to decree because Client does not relocate as anticipated in mediation.*

Client: *Yes.*

Attorney: *Because* ***technically, the court can't modify decrees on a motion. They can't change things. They can clarify. You're doing a bit of a back-door process to ask the court to grant***

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66 UTAH CODE ANN. § 30-3-32 (West 2020).

67 Courts rarely ordered supervision in a contested case, and five years after the study the legislature specifically required that any order for supervision "provide specific goals and expectations for the noncustodial parent to accomplish before unsupervised parent-time may be granted." UTAH CODE ANN. § 30-3-34.5(5) (West 2020).

you the parent time that was in the decree simply because you haven't relocated*, okay?*

Client 1: *Right.*

Attorney: ***This may or may not work***. ***That would be how I would do it*** *if I were your attorney representing you, okay?*

This attorney did not couch his encouragement as related to the commissioner being nice or smart. Instead, he gave the client language – "clarify" rather than modify an order – that the client could use, he believed, to achieve the desired end. He explained that this would be his approach as an attorney, intimating that clients should be able to use the same strategies that attorneys employ.

In another case, the attorney encouraged grandparents that they should be able to seek guardianship of their minor grandson by themselves:

Attorney*: Generally, in this type of situation what I would probably recommend is doing a guardianship. There are different levels of legal authority. Obviously if you're a parent you have parental rights to a child um and by the same token you can do an adoption. An adoption severs all the legal rights of the natural parent. Um When parents divorce, one parent or the other gets custody and the other one has residual rights of visitation and whatnot, but they still have parental rights intact. Guardianship is kind of one level down from that. That means that Violet still has all her parental rights regarding Ethan, [yes] but the day-to-day decisions and things like putting him on insurance and getting him enrolled in school are the prerogative of the guardian. That's oftentimes what happens in families when grandparents or aunts and uncles or older siblings step in when there's some type of incapacity or absence of the parent. So that's kind of what I hear you saying to me [yes] and that's what would seem to make the most sense. Fortunately, of all the types of family law cases,* ***guardianship of a minor is probably one of the easiest things that you can do. The forms are available on the court's website and the process, although there's several steps to it, it is one of the more simple things.*** *It's not multistep like a divorce or something like that.*

Later in the counseling session, the lawyer explained that the nonprofit Legal Aid Society does not "do guardianship for minors simply because it's pretty easy to do on your own." He concluded by again stating that the forms were on the court's website, and that "if you wanna hire an attorney to do this or if you wanna do it on your own, you can- that's your call to make."

Finally, a client whose lawyer had withdrawn was dealing with a case involving "child" support for her adult daughter with disabilities, a very unusual case. The attorney gave her extensive encouragement regarding strategies to obtain a guardian ad litem for her daughter, how to raise an issue (payment for "child" care and medical treatment) that may not have been raised in the pleadings, and the difference between objections and counter-arguments. Regarding the unpled issue, the attorney advised as follows:

Attorney:	*Then just go try to throw it in there. The court may do what French did, and say, not interested in hearing. It's not in the petition. It's not before the court today, but you can always try.* ***Sometimes, courts are nice, and sometimes, they let pro se people throw all kinds of crap in there they shouldn't, you know because they know they're not represented, and don't know what they're talking about****. I would go—*
Client:	*Would you bring that up first, before—*
Attorney:	*Bring up—*
Client:	*- you brought up the income?*
Attorney:	*No.*
Client:	*You wouldn't?*
Attorney:	*I wouldn't throw that out first, 'cause first, you wanna deal with the issues, then you wanna try to throw in stuff. If you start off the bat with, by the way, I wanna throw new stuff in, the commissioner's gonna be like, you know what? Now he's thinkin', this broad's all of a sudden in here wasting my time tryin' to throw in irrelevant issues. We're never even gonna get to the issues we should get to.*
Client:	*Start with the issues up first. Okay. That's what I needed to know on my presentation.*

Next, the client asked about how to "object" to what the opposing party or attorney said, and the attorney proffered an extensive lecture on the difference between evidentiary "objections" and counter-arguments, and how the client should comport herself in court:

Client:	*Okay. That was my thing, 'cause I was tryin' to figure out, how do you object to what they're saying, 'cause—*
Attorney:	*You can object if there's an objection, but* ***if you just disagree with what he's saying, that's not an objection.*** *That's—*

Client: *What's an objection?*

Attorney: *An objection is he's throwin' in evidence that is outside the rules of evidence. He's throwin' in hearsay. Those are objections. That means he can't be saying what he's saying. If you disagree with what he's saying, or he's lying, or you have proof that that's not true, that's an interruption, not an objection. You hold that. / /You wait.//*

Client: *//Don't do that.//*

Attorney: *You're gonna make your case.* ***You're gonna have your turn. He's gonna say his stuff, and you're gonna disagree with everything he says, but you just shut your mouth, and you wait,*** *and as soon as he's done spoutin' off, that commissioner or that judge is gonna turn, and then it's your turn. While he's spoutin' off, sayin' his bull, you're writing out what he's saying so that when it is your turn—'cause there's gonna be a list, and you're not gonna be able to interrupt and say, bull crap, bull crap, bull crap, so write your list so that, as soon as—then he's gonna turn to you and say, "I'm ready to hear your side." Then you can say, number one, he said this. That's wrong. I have proof of this. He said this. That's not true. I have proof of this. He said this. That's not true. You know what I mean?*

Client: *Yeah.*

In multiple ways, this lawyer tried to empower the client to represent herself, encouraging her to seek all the relief she thought she deserved while following proper courtroom etiquette.

b. Recommendations About Needing an Attorney

Many of the self-represented clients asked the attorneys directly if they needed to have counsel. The attorneys' responses were guided by the nature of the client's legal matter, whether there were court forms available, and the difficulty of arguing the client's position without representation. They never suggested that individuals need attorneys with insider relationships to navigate the legal system successfully.

The strongest responses regarding the need for an attorney arose in cases where the client wished to terminate the parental rights of the other parent, and/or pursue an adoption.

Attorney *What else did you say? Uh . . .* ***How do you go about this without hiring a lawyer? <laughs>***

Client *Yeah.*

Attorney *The last time I checked* ***there were not forms to terminate parental rights.***

The attorney returned to the topic later during the counseling session:

Attorney: *And when you get on the one form, it talks about once you, well different kinds of things. And I don't remember if terminating parental rights is its own category. There is a category for custody, but that's not what you want. And the other thing you need to know is that it's juvenile court, not district court. It's on the second floor of this building. It has its own set of judges, its own set of rules. And so those are the two things. Kind of a one-two process. Terminating the parental rights and then at some point in the future, a step-parent adoption.*

Client: *Okay.*

Attorney: *Okay? Two different procedures.* ***You want to know how to do it without an attorney. There is a new thing that they have just started. It's called bundling and unbundling services****. You don't have to hire a lawyer and pay a big retainer. What you can do is, for lawyers who do it,* ***you hire them just for a specific purpose****. Like, I'm not asking you to take on the whole case. I'm just asking you to draw up the initial papers. And so you can hire a lawyer just to do the first papers for you. Then if you want you can go back and just talk to that lawyer about what to do next if he answers or if he doesn't answer. So it's called unbundled services.* ***So it's not exactly not doing it, not using a lawyer. But limiting how much you would have to pay****. And so that's what you'd be looking for, is unbundled services. And they'll do just want you want, just draw up the first papers for terminating parental rights. Or draw up the first papers and giving you most of the steps that would be. Usually people who do it do it at the beginning and then if there's no answer, they'll hire the lawyer to draw up the papers at the end. That way you know it's getting done right, but you're not having to pay for a lawyer for all of that other stuff.*

Client: *Okay.*

Attorney: *Okay, so that's as close as I can come to 'not hiring a lawyer.'* ***I just don't think, you know, Jasmine's got so much riding on this, I don't know if you can do terminating***

parental rights without. *Maybe, maybe you know what you want to do is consult a lawyer and ask the lawyer, 'Do you think we could do this ourself?'*

Client: *Okay.*

Attorney: *And see what the lawyer says.* ***My opinion as a lawyer is 'no you can't.' But find a lawyer who disagrees****. There are lots of good lawyers out there with different opinions. Or you might want to just hire a lawyer to draw up the first papers.*

In the end, this attorney thought lay clients could not handle parental termination cases themselves, but encouraged them to check with other attorneys and explore "unbundled" legal services to minimize the cost.

A second case involving termination of parental rights resulted in a different attorney, also recommending representation:

Attorney: *Okay, how long has he been in prison?*

Client: *Since 2002.*

Attorney: *Oh, my goodness. That is a long time. Miriam Tims is bringing up the fact that you have a couple of options. You can do this parentage action which would adjudicate him as the father, and he'd have child support.* ***You can also terminate his parental rights.***

Client: *Okay. That was my second question, because* ***that's something that I would like to do, but I thought that I had to begin with the parentage****.*

Attorney: *No, you don't.*

Client: *Okay. Would it be something that I'd have to start from scratch again, or can I just—*

Attorney: *Yeah, it's a whole different petition. And You can terminate rights in either district, or juvenile court. I'm more familiar with juvenile court, so that's where I would do it if I were you. You're filing a petition, which is kind of similar to the petition—this parentage petition, but termination of parental rights, you'd have to read the statutes on it.* ***This might be a case where you'd want an attorney to assist you with it****, 'cause you'd have to read through the statutes. The length of time that he's been in prison, I don't see that you would have any problem with terminating his parental rights.*

The attorney did further interviewing and learned that the putative father has been abusive to and inappropriate with the child. She provided information about the law, but continued to recommend retaining an attorney:

Attorney: *When was the last time he contacted your daughter?*

Client: *Through letters.*

Attorney: *Does he stay in contact with her?*

Client: *Well, he tries, but I started sending back his letters.*

Attorney: *Because they were inappropriate?*

Client: *Yeah.*

Attorney: *Let's just take a look at the statute.* ***Now here's the thing about people doing their own legal work, it is difficult. There are a lot of statutes that you have to read and you have to comply with them. So. That's something to think about, whether you want to hire an attorney or do it yourself.*** *Let's see. I'm gonna give you the statutes. It'll just take a minute to pull them out here. (Pause to research statutes)*

Attorney: *Okay, so it's in 78A, A-6. It's a juvenile court act. We're gonna be looking at 507 and 508, so 507 is the grounds for termination of parental rights, and 508 is evidence of grounds for termination. You'd have to read through those and make sure that your petition for termination talked about these factors. [ok] I mean,* ***I think it's a little bit complicated****. Are you working right now?*

Client: *Uh huh.*

Attorney: ***You might wanna consider having an attorney help you with that.***

Client: *Is there anyone you recommend?*

Attorney: *I think there's a guy called Ken Lester, who's I think cheaper than a lot of other attorneys.*

Client: *Lester?*

Attorney: *Lester—it's Ken, K E N, L E S T E R. He's always, I think, willing to work with people and look at their individual circumstances. So. He might be an option.* ***I just think that termination of parental***

rights is a hard thing for an individual to do. *You gotta go through a trial.*

In a case where a relative sought to adopt a baby born in the Virgin Islands (where the birth mother continued to live) and to obtain a social security number for the baby and the rights to travel with the baby, the attorney advised the student the client should seek representation:

Attorney: *Yeah. I'm trying to think how she would be able to travel. She could go get another power of attorney. That's not a big deal. All she has to do is get it written up by a lawyer in American Virgin Islands and get her sister to sign it. That pretty much will give her—that might well give her what she needs to be able to travel. She's going to need to get all of the rights and privileges.* ***She's going to need to adopt the child, and that's kind of a complicated process that she needs to go to an adoption attorney to do.***

Student: *Not something that we can really advise her on here?*

Attorney: *No. I mean, it's a complicated process. [ok] Usually adoption attorneys—well, I take that back. There's a—****I know Utah Legal Services has kind of a do-it-yourself sort of thing for state adoptions in Utah.*** *I don't know if they have that paperwork here, so you might want to look at that. I mean, if she's in American Virgin Islands, I'm not sure that's gonna be completely kosher because you're dealing with federal laws. You're dealing with state laws. So It might be a little too complicated for what we do. I would tell her to go get power of attorney that doesn't expire that has in there specific things like a right to travel with this child, has the right to do this, that, make decisions, this, that, and the other.*

The attorney concluded the consultation with the student:

Attorney: *If she wants full—she never wants to have problems again with the kid, with the guardianship or anything like that,* ***she needs to go through the adoption process.***

Student: ***Okay. Get an attorney.***

Attorney: ***Right.***

Student: *From the Virgin Islands or from here?*

Attorney: *From here. She's going to finalize it here in Utah, so* ***she's gonna get a Utah attorney.***

These attorneys recommended against proceeding pro se not because

the courts were unfair to outsiders or attorneys had inside relationships with court personnel, but because there were no forms, there were statutes to comply with, the law was complicated, and the outcome was important to the child.

In a somewhat related case, a client, pregnant as a result of rape, sought to place the child for adoption, and the attorney advised that she rely on the adoption agency's attorneys:

Attorney:	*Here's the way things work. You're intending to put the baby up for adoption?* ***You're working with an agency****, or is this a private—*
Client:	*Yeah, we have social services.*
Attorney:	*Well,* ***they know how to do this. You don't need to—you don't need our legal advice.***

In other cases with contested issues or drafting challenges (custody, alimony, marital homes, a Qualified Domestic Relations Order to divide retirement benefits), attorneys recommended the client consider retaining an attorney. An attorney recommended the client explore a modification through a lawyer-mediator, advising that many lawyer-mediators will "do the drafting for you" if the dispute is resolved. Other attorneys recommended seeking limited scope representation where cases were contested or drafting court papers would be difficult. Similarly, when consulting with law students, in three cases, attorneys recommended that clients consider hiring an attorney due to the complexity of the issues (dividing marital home, hidden assets, adoption). Here is an example:

Student:	*She's also* ***worried about logistically trying to find out certain assets****. I guess he's kind of hidden the value of certain things, so she doesn't know what to claim for in the divorce.*
Attorney:	*Yeah that's a tough one. What you do in that- what you do there is you have to go it'd be—****shoot she's just not gonna know****. What you do is you go through a discovery process. He files the petition, say he files the petition. She answers the petition and says yes or no depending on //what he says.//*
Student:	*//Right, you mean// deny or—*
Attorney:	*Yeah, she makes a counter claim. She does all this kind of stuff* ***then it goes into what's called a discovery phase where you gather information. And that's when she has the opportunity to ask him*** *where all of his crap is.* ***He's obligated, legally***

> ***obligated to tell her the truth. Whether or not that happens is a totally different deal. And if she wants to make sure it happens, she needs to go get an attorney, otherwise he could just lie to her,*** *and she'll never to be able to. Unless she knows something, she's never gonna be able.*

In one case, the attorney described the benefits of using the court's computerized program to the client and her sister; then, when they raised the probability of a contested case, discussed hiring an attorney with the possibility that the other side could be ordered to pay her attorney fees:

Attorney:	*Okay, so it's called the online court assistance program. And the website is UTcourts—*
Sister:	*One word?*
Attorney:	*Uh huh—dot gov. And it looks like that you'll recognize it up there. And they have the forms available. They have lots of great information. It's kind of information overload, so just take some time and go over that um* ***if you want to do a divorce by yourself. A lot of people do,*** *it's called doing a divorce pro se, which means you're doing a divorce without an attorney.* ***And a lot of people, that's a great fit. Um one of the advantages is that it's very cost effective****, um.*
Sister:	*Okay what if it's probably not going to be an easy divorce?*
Attorney:	*And that's one of the things you might also want to do, is* ***meet with an attorney.*** *So um there's a lot of attorneys that you can call and* ***ask for a free consultation****. You can look in the phone book, um you can call the Utah Sate Bar, and you can call attorneys randomly and ask them for information, how much their retainers are. Um, depending on the the divorce, retainers can range.*
Sister:	*Well there's four kids involved.*
Attorney:	*Okay and and are, they're, they're all under 18?*
Client:	*Yeah.*
Attorney:	*Okay.* *//Okay//*
Sister:	*//So how// easy do you think it would be to do it yourself? With the custody?*
Attorney:	*It, will custody be contested?*

Client:	*Probably.*
Attorney:	*It's going* *//to get pretty complicated.//*
Sister:	*//Can't say No// to that <chuckling>*
Attorney:	*It's going to get pretty complicated. So I think the first thing is to understand what your rights are and* ***really make an informed decision on whether you want to do it without an attorney or whether you want to do it with an attorney****. You should also know that* ***attorneys are occasionally also able to ask for attorneys fees from the other side*** *if they're able, in a better financial situation to pay for um, that.*
Client:	*//Yeah that was my question.//*
Attorney:	*//However oftentimes,// they're not awarded, so you would, I don't want to get into the specifics on your case. But just know that that can sometimes happen. It is rare in a lot of cases, especially when there's just not a great deal of money one way or another. But that's something to keep in mind too when you're considering your options. . . .*

In complicated or contested cases, attorneys also often recommended Legal Aid, a nonprofit with expertise in family law. This recommendation occurred concerning a long-pending divorce case with many changed circumstances and a need for the pleadings to be amended accordingly; it occurred in a divorce with a house, debts, and custody contested. In four cases, attorneys told students to refer clients to Legal Aid. For example, regarding a Spanish-speaking client, this was the exchange:

Attorney	*She's living here in South Jordan. Is she here legally or not?*
Student:	*I didn't ask. I didn't know if that was a question I was allowed to ask. In the banking world I was not.*
Attorney	*It is, if you're gonna give people legal advice that is sensible.*
Student:	*That's good to know [background noise].*
Attorney	*Because it's all confidential****. If she is, then she could get Legal Aid to represent her, and that would be a lot easier than someone who doesn't speak English to do a divorce themselves.***

Student: *Okay, so legal [background noise].*

Attorney *If she's not, Legal Aid cannot, because they get state funds [background noise]. She's gonna have to do a divorce with OCAP and go onto the website and see how to use the OCAP forms.* ***Very difficult to do, if you don't have somebody to help you that speaks English.***

In contrast, attorneys recommended against retaining an attorney where the matter was uncontested or relatively simple to do with the court's computer program. Regarding the guardianship of minors, two different attorneys advised as follows:

Attorney 1: *Or you could do it yourselves.* ***If you're comfortable with computers and figuring out forms, you can do it yourselves****.*
. . . .[discussion of seeking direction from Legal Aid]

Attorney 1: *You could go and talk with them [Legal Aid]. It's just a couple doors down. My understanding is that* ***custody and guardianship papers are online. I've seen them generated. I think that's probably the way to go****.*
. . . [discussion of forms on line]

Client: *Okay, so you do not need an attorney to do that?*

Attorney 2*:* ***Actually, guardianships are some of the easiest ones that are pro se, a person without an attorney can do. One of the easier ones****. Especially if you have the consent of all the parties.*

Two students conveyed the clients' questions of whether they needed to have an attorney in a contested divorce and parentage case, respectively. Two attorneys responded:

Attorney: *Well, shoul- Will will will it help you? Will representation help you? Oh yeah. [Mnhm] But do you need it? No, you can proceed, but you know,* ***if it's a simple custody issue****, um and you don't have any weird custody stuff going on. Like weird accusations of abuse and neglect or other things, you know****, you can probably handle it on your own.***

Attorney: *They should be able to do it, I think.*

c. Explanations About Why Courts Make Mistakes

Sarat and Felstiner's clients sometimes complained about unfair procedures they believed they had suffered – including judges signing papers without reading them – [68] and their lawyers "explained" these situations by blaming the courts. Here the pro bono attorney explained how mistakes could be made without blaming the courts or judges for the process.

In a similar case, the Utah client complained that the court's order was inconsistent with what she had heard at the hearing. The attorney explained the process that lead to the error, trying to help the client understand that she had failed to object to the draft order the opposing party had prepared and sent to her, and explaining to her how to try to fix it now, months later.

Attorney:	*Now it's really interesting that the court process- the judge is gonna say, "This is my ruling but you prepare the order." What they did, the judge issued a ruling and prepared an order, but the order doesn't conform with what you're saying the judge ordered.*
Client:	*Yeah.*
Attorney:	*You need to let the judge know that. The judge is just gonna sign this, the judge—*
Client:	***He didn't read it? I mean he just signed it?***
Attorney;	***A lot of times they don't**, 'cause they wait for you to do your job. 'Cause if this is what- he doesn't go back and listen to the court hearing. He may say, "Oh yeah that doesn't sound right. I'm not gonna sign this, because that doesn't sound as I remembered." But **the way the process works is that you're responsible to look out for your interest, and you didn't object to it, so the judge is saying, "Well, she's not objecting to it, is that how it happened? I don't remember exactly. I might as well sign it 'cause she's not objecting to it."** If you think it's completely wrong, you need to file that motion to set aside the order entered February 15th.*
Client:	*Okay.*
Attorney:	*You're gonna have to plead with the court saying, "I didn't object to it because I didn't understand the process, but it's fundamentally unfair, and he's not following with what the court has asked him to do." The judge may deny that because you've waited three months, four months to do that. You have a chance, but the judge may do that. If you want to set aside, this is the ground rules for you guys—*

[68] Sarat & Felstiner, *Law Talk supra* note 1, at 1685.

Client: *Okay.*

While Felstiner and Sarat saw attorneys' critical comments about the courts as creating clients' dependency on those same attorneys, the pro bono attorneys did just the opposite. They regularly encouraged the clients' self-representation, especially if the matter was well supported by the courts' online resources, and sometimes even when the clients' approaches did not entirely fit within the required procedures. While there were cases in which the attorneys encouraged the clients to seek representation, this was because the matter itself – the legal standards that must be proven, the degree of conflict, the absence of court forms – would be difficult for a pro se person to handle. The pro bono attorneys never encouraged the clients to retain counsel because attorneys possessed inside information about judges' prejudices or habits. Indeed, the image of the justice system these attorneys portrayed was one of rationality and order.

IV. DISCUSSION

In almost every way, the volunteer Utah attorneys spoke differently – positively, respectfully, encouragingly – about the courts and the legal process than did Sarat and Felstiner's attorneys.

The one way in which there was some similarity was with respect to the desirability of clients pursuing certain remedies. Sarat and Felstiner's attorney advised against trying to undo a restraining order that perhaps should not have been issued. Utah attorneys advised against pursuing a contempt proceeding unless there was also an order to enforce. In these cases, the attorneys were encouraging the client to be forward-looking and to move past mistakes that had no discernable impact on the client. One Utah attorney advised the client to hold onto the issue and use it if another dispute arose. A different Utah attorney explained to a student that there were forms to enforce court orders, but simply finding someone in contempt "doesn't give you anything but a warm fuzzy feeling in your heart." It seems that these statements were less about the efficacy of the judicial process and more driven by the attorneys' desires to focus the clients on achievable outcomes. In another article based on this study, Sarat and Felstiner described the "most common pattern" of conversation they observed was "an exchange in which the lawyer persuades a somewhat reluctant client to try to reach a negotiated settlement."[69] They explain:

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[69] Sarat & Felstiner, *Law and Strategy supra* note 1, at 96.

> [M]any divorce lawyers understandably feel that they must constantly be on their guard against clients who seek what cannot be delivered. A major professional function therefore is to attempt to limit clients' expectations to realistic levels.[70]

While the Utah attorneys rarely tried to dissuade their clients from seeking remedies available under the law, they did discourage contempt proceedings that sought no related enforcement.

Similarly, both sets of attorneys disparaged joint (legal) custody as meaningless. This was less an admission of inadequacy of the courts and more a recognition of the limits of courts' abilities to enforce every aspect of behavior post-divorce. Law and Society scholars have debated the competence of courts to resolve various types of disputes, including familial disputes.[71] These attorneys were recognizing that it is the goodwill and cooperation of divorced parents that make or break joint custody arrangements, just as Sarat and Cavanagh recognize that many such interpersonal disputes might be better enforced by community norms.[72]

Except for these two ways in which all lawyers attempted to dissuade clients from pursuing certain legal remedies, the Utah volunteers spoke very differently about the courts, their processes, and their personnel.

The Utah volunteers did not disparage the significance of law or procedure in predicting outcomes in their clients' cases. In many instances, the Utah attorneys gave their clients bad news – that Utah courts would not have jurisdiction or that an emergency order would likely not be granted – because of the law that controlled. However, in many other situations, they instructed the clients, described the legal standards or procedures, and showed how they would apply to their clients' cases. Often the attorneys encouraged the clients to continue with self-representation, even when they had made procedural mistakes. They never suggested that anything other than the law would determine the outcome of their cases. In only one case was money mentioned as possibly impacting a proceeding, as it would make the case financially burdensome to the client and pressure settlement, but not that it would determine the outcome. In other cases, the attorneys agreed that having legal representation would make the case easier, but more often they told the clients that it was within their abilities to succeed on their own.

The volunteers rarely criticized a judge or another attorney; instead, they frequently defended their actions in the clients' cases. The only criticism of a family law judge was related to the need to be very clear and straightforward; it did not suggest the judge was arbitrary or favored insiders.

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70 *Id.* at 127.

71 *See* Ralph Cavanagh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC. REV. 371 (1980).

72 *Id*. at 413.

In recommending clients proceed pro se, even when they had made technical mistakes, the attorneys affirmed the reasonableness of the judiciary they would encounter.

When the attorneys did recommend that these pro se parties consider hiring an attorney (or seeking Legal Aid), it was because the law or process was complicated (e.g., termination of parental rights). It was never because an attorney would have insider knowledge of unwritten rules or a judge's prejudices. In sum, the "law talk" heard from these Utah volunteer attorneys conveyed respect for and trust in the judicial system.

What could explain the differences between the "law talk" that Sarat and Felstiner observed in divorce attorneys' offices in the 1980s and the "law talk" this study has unearthed in a brief advice clinic in 2009? Could the differences be explained by different locales, different legal cultures, different qualities of the judiciary? Or perhaps there have been changes in the substantive law that make 21st Century lawyers better able to predict outcomes in family law matters? Is the difference as simple as pro bono attorneys are less cynical with their pro bono clients than lawyers are with their paying clients? After all, pro bono attorneys have no need to convince low-income, self-represented parties that they need attorneys with insider knowledge. Or, perhaps, the change we observe here is related to the tsunami of self-represented parties in family law matters. Perhaps the courts and the bar have actually become more solicitous of clients and more devoted to applying the law to facts consistently and fairly. Or, at a minimum, perhaps the players in the legal system truly believe this to be the case and that even unrepresented parties can achieve access to justice. This section will explore each of these theories.

A. Culture of the Local Bar?

Sarat and Felstiner studied attorneys in two medium-sized cities, one in Massachusetts and one in California. The current study was conducted with attorneys practicing in Salt Lake City, Utah, a city of over 200,000 in a county of 1.16 million. It is certainly possible that legal cultures may have differed not only by virtue of time but also by place.

Massachusetts and California were, and are, liberal strongholds with diverse populations; Utah is a very conservative state with a homogenous, predominantly white population and a culture of individualism and self-reliance.[73] Over half the population are members of the Church of Jesus Christ of Latter-day Saints (Mormons),[74] a lay-lead church that teaches

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[73] Bob Burnick, Jr. *Utah Conservatives Put U.S. Peers to Shame*, DESERET NEWS, June 13, 2001, https://www.deseret.com/2001/6/13/19781277/utah-conservatives-put-u-s-peers-to-shame.

[74] *Adults in Utah*, PEW RESEARCH CENTER, RELIGION AND PUBLIC LIFE, https://www.pewforum.org/religious-landscape-study/state/utah/.

respect for authority.[75] It would not be surprising if Utah attorneys expressed greater respect for judges and trust in legal institutions.

B. Professionalism and Expertise of the Judiciary?

The Sarat and Felstiner attorneys spoke disrespectfully about the judges and the court processes. The pro bono attorneys in this study spoke positively about the judiciary and the clients' chances of fair treatment. Perhaps there were some actual differences in the quality of the judiciary across time and space.

One difference is the judicial appointment processes; a second difference is the degree of expertise within the judiciary.

Massachusetts judges are appointed for life by the Governor with advice from a twenty-one member judicial nominating commission.[76] California judges are appointed by the governor and confirmed by the commission on judicial appointments (attorney general, chief justice, and presiding judge of the courts of appeal).[77] The State Bar of California's commission on judicial nominees evaluation conducts a thorough investigation of prospective nominees, but the governor is not bound by the commission's recommendation.[78] California and Massachusetts nominating commissions were created in 1979 and 1975, respectively; thus, it is likely the Sarat and Felstiner attorneys were talking about some judges appointed before these merit-based processes were in place. The American Judicature Society and the Institute for the Advancement of the American Legal System categorize the judicial selection system in California as "gubernatorial appointment" and in Massachusetts and Utah as "commission-based appointment."[79] These non-partisan organizations state that "Americans expect and deserve to be treated fairly in court"[80] and argue for a merit-based rather than a political selection process.

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75 Mathew Bowman, *Priest to profit: How the Mormon church teaches priesthood holders to lead*, THE WASHINGTON POST (May 14, 2012), https:// www.washingtonpost.com/local/priest-to-profit-how-the-mormon-church-teaches-priesthood-holders-to-lead/2012/05/13/gIQAsYocNU_story.html.

76 *Judicial Selection in the States*: *Massachusetts*, NAT'L CTR. FOR STATE CT., http://www.judicialselection.us/judicial_selection/index.cfm?state=MA (last visited Mar 27, 2020). This nominating commissions has been in place since 1975.

77 *Judicial Selection in the States: California*, NAT'L CTR. FOR STATE CT., http:// www.judicialselection.us/judicial_selection/index.cfm?state=CA (last visited Mar. 27, 2020). The Bar's commission on judicial nominees' evaluation has been required since 1979.

78 *Id.*

79 AMERICAN JUDICATURE SOCIETY & INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, JUDICIAL SELECTION: HOW IT WORKS, WHY IT MATTERS, 9 (2008) http:// www.judicialselection.us/uploads/documents/JudicialSelectionBrochureemail_A2E54457CD359.pdf.

80 *Id.* at 2.

In Utah, "judges are chosen through a merit selection process [where] the governor fills all judicial vacancies from a list of candidates submitted by the judicial nominating commission [and then] the governor's appointee must be confirmed by a majority vote of the senate."[81]

Massachusetts family law matters are heard by a specialized court (Probate and Family Court)[82] , and California divorces are heard by the Superior Court, a trial court of general jurisdiction.[83] In Utah, divorces are heard by the District Court, a court of general jurisdiction; some cases (adoptions, parental terminations, child protective orders) are heard by the Juvenile Court. However, in Salt Lake City, Utah, quasi-judicial officers with expertise in family law matters – court commissioners – "hear most matters in domestic cases including divorce, custody and protective orders."[84] Family law commissioners are selected by the judges of the district court where they serve, based on merit and after assessment by a nominating committee consisting of the presiding judge, attorneys, and members of the public.[85] Commissioners undergo annual reviews by the presiding judge and periodic reviews involving surveys of attorneys appearing before the commissioner.[86]

It is possible that Sarat and Felstiner's 1980-era judges were more often political appointees and had less subject-matter expertise (and thus less consistency amongst different judges) than Utah's 21st Century judges and commissioners appointed through merit-based processes and, with respect to commissioners, high levels of expertise in family law.

C. Changes in the Substantive Law?

Between the mid-1980s and 2009 when the current study was conducted, there have been many changes in family law. These changes have often made outcomes more predictable and thus less likely to engender comments that the judge was influenced by personal preferences.

In 1979 noted family law expert Robert Mnookin commented that "existing legal standards governing custody, alimony, child support, and marital property are all striking for the lack of precision. . . ."[87] Since that

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81 *Judicial Selection in the States: Utah*, NAT'L CTR. FOR STATE CT., http://www.judicialselection.us/judicial_selection/index.cfm?state=UT (last visited Mar. 27, 2020). There are eight local nominating commissions in Utah, one for each District Court; *See* UTAH STATE COURTS, MANUAL OF PROCEDURES FOR JUSTICE COURT NOMINATING COMMISSIONS, 5 (2016), https://www.utcourts.gov/resources/rules/ucja/append/a_nomcom/appa.pdf.

82 *Judicial Selection in the States: Massachusetts*, supra note 76.

83 *Judicial Selection in the States: California*, supra note 77.

84 *Court Organization, Judges, Court Governance*, UTAH STATE CT., https://www.utcourts.gov/knowcts/#judges.

85 Rule 3-201, Utah Code of Judicial Administration.

86 Rule 3-111, Utah Code of Judicial Administration.

87 Robert Mnookin, *Bargaining in the Shadow of the Law*, 88 YALE L. J. 950, 969 (1979).

time, many standards have been made more precise. For example, once courts determined child support using open-ended standards, often reaching unpredictable results. Now, however, judicial discretion has been replaced by a new approach prompted by federal legislation, which requires that states use mathematical formulas called "guidelines" to determine child support. The Child Support Amendments of 1984 (Public Law 98-378) first mandated that states needed to have guidelines to determine child support. In the 1988 Family Support Act (Public Law 100-485) required that by 1994 all states implement presumptive, rather than advisory, child support guidelines. Since 1994 all states have guidelines that mathematically calculate child support based on the income of one or both parents.[88] Accordingly, the 1980s-era lawyers and judges dealt with law that may have been interpreted differently from place to place and courtroom to courtroom. The Utah attorneys were able to more definitively predict what would happen with respect to at least child support.[89]

Child custody law, too, saw changes between the 1980s (when joint custody was a rarity) and the 21st Century when many states had begun to enact presumptions as to joint custody or standards for visitation. It is likely that an outcome regarding custody would have been harder to predict in the 1980s than in 2009. For example, it was not until 1986 that the Utah Supreme Court rejected the "maternal presumption" for custody and set forth "function-related factors" that should control.[90] Since then, Utah statutes have outlined all the factors the judge must consider: Utah statutes that outlined minimum schedules for parent-time were passed by the legislature in 1993 and 1997,[91] adding predictability, and joint physical custody was defined by the legislature in 2003.[92] At the time of this study, the Utah legislature was in the midst of enacting a bill that would require the court "in every case, [to] consider joint custody."[93]

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88 45 C.F.R. §302.56 (2019).

89 Smith & Stratford, *supra* note 49, at 194.

90 Pusey v. Pusey, 728 P.2d 117, 120 (Utah, 1986). The "function-related factors" included the "identity of the primary caretaker during the marriage . . . the parent with greater flexibility to provide personal care . . . identity of the parent with whom the child has spent most of his or her time pending custody determination if that period has been lengthy . . . the stability of the environment provided by each parent." *Id.*

91 H. 2, 50th Leg., 1993 Gen. Sess. (Utah 1993) (codified as UTAH CODE ANN. §§ 30-3-34, -35 (West 2020)). A schedule for children under five years of age was passed in 1997. *See* S. 33, 52d Leg., 1997 Sess. (Utah 1997) (adding UTAH CODE ANN. § 30-3-35.5 (West 2020)).

92 S. 223, 55th Leg., 2003 Gen. Sess. (Utah 2003) (defining "joint physical custody" as the child staying with each parent for more than 30% of the year and both parents contributing to the expenses of the child in addition to paying child support) (codified at UTAH CODE ANN. § 30-3-10.1 (West 2020)).

93 H. 251, 58th Leg., 2009 Gen. Sess. (Utah 2009). Today Utah statute provides that "there is a rebuttable presumption that joint legal custody . . . is in the best interest of the child" but that there is "neither a preference for nor a presumption for or against joint physical custody or sole physical custody." UTAH CODE ANN. § 30-3-10(3), (8) (West 2020).

Some of the Utah cases concerned what state court would have jurisdiction over a case. Here, too, the law has become more predictable: The Uniform Child Custody Jurisdiction and Enforcement Act was drafted by the National Conference of Commissioners on Uniform State Laws in 1997 and adopted in Utah in 2000.[94]

In conclusion, the substantive law that governs family law matters has evolved since the 1980s with some issues – child support, custody, visitation, jurisdiction – becoming somewhat more predictable. Thus, the pro bono attorneys may have been able to more accurately predict what would happen in the clients' cases than the attorneys in the study from the 1980s. This may have explained some differences in the "law talk" they shared with their clients.

D. Difference Between Pro Bono and Privately Retained Attorneys?

Sarat and Felstiner saw their divorce attorneys' negative comments about judges and court processes as, ultimately, serving their own financial interests in encouraging clients to retain and depend upon their attorneys with their insider knowledge.[95] The 21st Century pro bono attorneys had no financial incentive to speak negatively about judges or court processes. Might the difference between pro bono and retained roles explain the differences in the law talk we observe?

There are a few nuances to this analysis. Are attorneys engaged in pro bono work simply more respectful in honoring the court personnel and processes? Alternatively, do these pro bono attorneys speak highly of the courts and processes when speaking to pro bono clients but then speak disparagingly to their private, paying clients? Finally, are the pro bono attorneys differently situated than the retained attorneys in explaining negative outcomes and making negative predictions?

The attorneys counseling clients at the brief advice clinic were all volunteers.[96] Perhaps there are differences between the attitudes such pro bono volunteers have about the courts and court processes and the attitudes of other attorneys. Initially, it must be noted that "the institutional foundation for pro bono work can be found within the ideal of professionalism . . . . formalizing lawyers' special responsibility to serve the public good."[97] Surveys of attorneys show the vast majority (81%) value pro bono and

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94 Uniform Law Comm'n, Child Custody Jurisdiction and Enforcement Act, Uniform Law Comm'n, https://www.uniformlaws.org/committees/community-home?CommunityKey=4cc1b0be-d6c5-4bc2-b157-16b0baf2c56d (last visited Aug. 12, 2020). Today, it has been adopted in all states except Massachusetts. *Id.*

95 *Law Talk*, *supra* note 1, at 1678.

96 Smith & Stratford, *supra* note 49, at 168.

97 Robert Granfield, *The Meaning of Pro Bono: Institutional Variations in Professional Obligations among Lawyers*, 41 LAW & SOC'Y REV. 113, 114-15 (2007).

perform pro bono work at some time in their careers; many fewer attorneys (52%) engaged in pro bono work serving the needy during the year of the survey, and they average 36.9 hours per year rather than the hortatory fifty hours.[98] The motivating factors for doing pro bono work include the desire to help people in need, ethical obligations, professional duty, participating in reducing social inequities, and feeling like a good person.[99] Discouraging factors included lack of time, family or personal obligations, and lack of expertise.[100] Other survey data shows that pro bono has different meanings depending not only on individual choices but on different organizational structures, cultural expectations, and market pressures.[101] Neither survey sought to identify whether attorneys who do pro bono work have different attitudes about the courts.[102] The author is unaware of any studies that address this question.

All the volunteer attorneys at the pro bono clinic[103] also had paid employment as family law practitioners. Is it possible that they displayed one attitude at the clinic and a different attitude with their paying clients? Social psychology suggests that the attitudes of these attorneys could not differ so significantly from setting to setting.[104] The principle of cognitive consistency holds that individuals have an inner drive to hold all their attitudes and behavior in harmony. Thus, the pro bono attorneys would be likely to hold the same attitudes about the competence of the judges and fairness of the judicial process, whether talking to pro se clients or paying clients. Expressing sharply different attitudes about the judicial system in different settings would produce cognitive dissonance and create tension for these attorneys.

However, circumstantial differences in the different counseling conversations may provide an explanation. Many of the Sarat and Felstiner attorneys' negative comments about judges and legal processes were made in the context of explaining why something unfortunate had happened in the

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98 STANDING COMM. ON PRO BONO & PUB. SERV. AND THE CTR. FOR PRO BONO, SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 1 (2018); *see* MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR ASS'N 1983).

99 STANDING COMM. ON PRO BONO & PUB. SERV. AND THE CTR. FOR PRO BONO, *supra* note 98, at 19.

100 *Id*. at 20.

101 Granfield *supra* note 97, at 117.

102 *Id.*; STANDING COMM. ON PRO BONO & PUB. SERV. AND THE CTR. FOR PRO BONO, *supra* note 98.

103 Smith & Stratford, *supra* note 49, at 168.

104 LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957); ROBERT P. ABELSON ET AL, THEORIES OF COGNITIVE CONSISTENCY: A SOURCEBOOK (1st ed.1968); Bertram Gawronski & Fritz Strack, *On the Proposition al Nature of Cognitive Consistency: Dissonance Changes Explicit but not Implicit Attitudes*, 40 EXPERIMENTAL SOCIAL PSYCHOLOGY 535 (2004); B. GAWRONSKI & F. STRACK EDS., COGNITIVE CONSISTENCE: A FUNDAMENTAL PRINCIPLE IN SOCIAL PSYCHOLOGY (2012).

clients' cases.[105] They did not point to the law or the factual anomalies of the clients' cases but blamed negative outcomes on the unpredictability and vagaries of judges.[106] In so doing, they may have been avoiding a "bad news" conversation[107] in which the attorneys had to admit their mistakes or weaknesses in advocacy, or negative facts about the clients' cases, or negative facts about the clients themselves. A candid "bad news" conversation is difficult and face-threatening.[108] It should not be surprising that some attorneys may wish to avoid such a conversation and blame other actors in the system rather than take responsibility themselves or candidly address the weaknesses of the clients' cases.

In contrast, the pro bono attorneys had no "skin in the game" with respect to the clients' matters.[109] They had not taken any action on behalf of the clients and had no occasion to admit mistakes.[110] Nor were they seeking to keep a paying client happy, and thus be deterred from a candid conversation that told the clients what the problems were with their cases or their strategies.[111] Indeed, the examples of "bad news" conversations above amply illustrate these attorneys' willingness to tell pro se parties hard truths. As a result, the Utah attorneys had no need to foist off any negative news to the incompetence of judges or the judicial system.

E. Rise of the Self-Represented Litigant?

A final possible explanation for the differences observed is the sea-change from mostly represented parties in divorces in the 1980s[112] to mostly unrepresented parties in the 21st Century. This change in access to attorneys may have actually improved the quality of the courts and may have changed the attitudes of attorneys about the quality of judges and the justice system.

In 1974-76, Deborah Rhode studied the judicial process for divorces and noted that only 2.5% of clients in two Connecticut divorce courts were

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105 Sarat & Felstiner, *Law Talk*, *supra* note 1, at 1683.

106 *Id.* at 1676-79.

107 *See* Linda F. Smith, *Medical Paradigms for Counseling: Giving Clients Bad News*, 4 CLIN. L. REV. 391 (1998) for a discussion of the techniques to be used in giving clients bad news.

108 *Id.* at 415 (discussing dealing with patients' anger upon hearing bad news). "When people interact, . . . [e]ach is interested in 'saving face' and in protecting the other's face. . .. [T]he tendency to be indirect [] advance[s] politeness but may harm clarity." Linda F. Smith, *Client-Lawyer Talk: Lessons from Other Disciplines*, 13 CLIN. L. REV. 505, 506 (2006).

109 *See generally* Smith & Stratford, *supra* note 49, at 167.

110 *Id.*

111 *Id.*

112 *See* Bruce D. Sales, Connie J. Beck & Richard K. Hann, *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?* 37 ST. LOUIS UNIV. L. J. 553, 594 (1993); *see also* Deborah Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L. J. 104 (1976).

unrepresented.[113] In the first comprehensive study of self-representation, Arizona, researchers charted the increase in pro se parties in family law cases from 24% in 1980, to 47% in 1985, to 88% in 1990.[114] A study of Massachusetts' Probate and Family Courts in 1997 "revealed that in over two-thirds of the cases examined, one or both litigants were pro se."[115] In 2005, Utah divorce filings showed 49% of petitioners, and 81% of respondents were self-represented, with 47% of all cases having no attorney, 35% having one attorney and only 17% having both parties represented.[116]

Bench and bar have responded to this reality of unrepresented parties in multiple ways.

"Judicial and legal policymakers have gradually come to the realization that there will never be enough affordable legal services to meet the demand for full legal representation for all eligible individuals."[117] While early responses of the courts included resistance to self-representation, over time, courts saw that resistance was ineffective and counter-productive.[118]

> As the new reality took hold, a growing number of judicial policymakers adopted the view that a fundamental requirement of access to justice is access to the courts and that access to lawyers, as articulated in the Sixth Amendment, is not sufficient by itself to ensure access to justice. This new outlook prompted a radical change in the willingness of courts to respond to the needs of self-represented litigants.[119]

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113 Rhode, *supra* note 112, at 160.

114 Sales, et al., *supra* note 112, at 571, 594.

115 BOS. BAR ASSOC. TASK FORCE ON UNREPRESENTED LITIGANTS, REPORT ON PRO SE LITIGATION 8 (1999), http://www.bostonbar.org/prs/reports/unrepresented0898.pdf.

116 UTAH JUD. COUNCIL STANDING COMM. ON RES. FOR SELF-REPRESENTED PARTIES, FINAL REPORT: 2006 SURVEY OF SELF-REPRESENTED PARTIES IN UTAH STATE COURTS 2 (2006), http://www.utcourts.gov/survey/FinalSurveyRepTo CouncilfrJVB2006-11-01.pdf. *See also* Smith & Stratford, *supra* note 46, at 169.

117 Paula L. Hannaford-Ager, *Helping the Pro Se Litigant*, CT. REV. 8, 9 (Winter 2003), http://amjudges.org/publications/courtrv/cr39_4/CR39-4Hannaford.pdf. That same year researcher John Greacen also noted: "By now everyone in the judicial branch in every state knows that we are experiencing an explosion of unrepresented persons appearing in the court of general jurisdiction in this country." John Greacen, *Self Represented Litigants and Court and Legal Services Responses to Their Needs – What We Know* 1 (2003). This study was conducted for the Center for Families, Children & the Courts, California Administrative Office of the Courts. Greacen, *supra*.

118 Hannaford-Ager, *supra* note 117.

119 *Id.* at 9 (citing CONF. OF CHIEF JUSTICES AND CONF. OF STATE CT. ADM'R, FINAL REPORT OF THE JOINT TASK FORCE ON PRO SE LITIGATION (July 29, 2002)). Utah's Constitution contains an "open courts" provision: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party." UTAH CONST. art. I, § 11.

The courts relied on consultants and researchers in formulating better ways to deal with this phenomenon.[120] Researcher John Greacen differentiated between "legal advice" and "legal information" and urged that "legal information" should be available to the public from any source – including court clerks.[121] Greacen noted that "the judiciary is investing substantial effort . . . on self-help programs" and argued that this should be done in the context of "careful and thorough research" to study the efficacy of such programs.[122] Greacen himself was involved in various research projects to do just that.[123]

The organized bar also took steps to address the influx of pro se parties. In 2002, the American Bar Association amended its Model Rules of Professional Conduct to facilitate pro bono representation, allowing attorneys to volunteer at nonprofit or court-annexed clinics to provide "short-term limited legal services" without a firm-wide conflict check.[124] More recently, the ABA adopted Standards for the Provision of Civil Legal Aid, including a standard on Assistance to Pro Se Litigants.[125] In concert, some in the bar have advanced the possibility of including limited scope representation within one's private practice.[126] These attorneys have noted the importance of having the judiciary supportive of "unbundled" representation.[127] In 2014, the ABA Standing Committee on the Delivery of

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120 Hannaford-Ager, *supra* note 117, at 10 (citing RICHARD ZORZA, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS (NCSC, 2002); John Greacen's work).

121 John M. Greacen, *Legal Information v. Legal Advice: Developments During the Last Five Years*, 84 JUDICATURE, 2001, at 198; John. M. Greacen, *No Legal Advice from Court Personnel? What Does that Mean?*, JUDGES J., Winter 1995, at 10; Greacen, *supra* note 117, at 1.

122 Greacen, *supra* note 100. Greacen observed that "the American Judicature Society's recent study of 25 self-help program noted none had an evaluation component" (citing Beth M. Henschen, *Lessons from the Country: Serving Self-Represented Litigants in Rural Jurisdictions*, AM. JUDICATURE SOC'Y (2001)).

123 *See* Greacen *supra* notes 117 and 121.

124 MODEL RULES OF PROF'L CONDUCT r. 6.5 (AM. BAR ASS'N 1983). *See also* Reporter's Explanation of Changes to Model Rules of Prof'l Conduct r. 6.5, AMERICAN BAR ASSOCIATION (2003) https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule65rem/.

125 Standing Committee on Legal Aid and Indigent Defense, AMERICAN BAR ASSOCIATION, (2006) https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/standards-and-policy/standards-for-the-provision-of-civil-legal-aid/standard-3-5-on-assistance-to-pro-se-litigants/ (showing the standards for the Provision of Civil Legal Aid, Standard 3.5).

126 FORREST MOSTEN, UNBUNDLING LEGAL SERVICES (2000); FORREST MOSTEN & ELIZABETH POTTER SCULLY, UNBUNDLED LEGAL SERVICES: A FAMILY LAWYER'S GUIDE (2017); Sue Talia, *Roadmap for Implementing a Successful Unbundling Program*, AMERICAN JUDICATURE SOCIETY (2005).

127 Talia, *supra* note 126, at 14.

Legal Services completed a comprehensive national study of state rules (of ethics and procedure) that allow attorneys to help self-represented parties.[128]

Since the turn of the century, across the nation, courts have pursued many innovations to help self-represented parties, including:

> [G]uides who give directions and offer general information . . . courthouse facilitators who assist with detailed procedural information and form preparation on a one-to-one basis. . . . desks staffed by volunteer lawyers who provide similar individual information . . . . and self-help centers. . . [that] provide forms, packets of information and sometimes technological tools to provide directions and answers for an array of procedural questions.[129]

In addition to these human resources, many courts also provide "downloadable forms and a few incorporate document assembly tools so that litigants can . . . answer questions that are used to assemble the forms needed for the litigant's matter."[130] Many states have established "Access to Justice Commissions."[131] Across the nation, the judiciary has affirmed the courts' obligations "to ensure that all litigants have meaningful access to the courts, regardless of representation status."[132]

Utah, where this brief advice clinic took place, had adopted many innovations by the time of this study. In 2000, Utah courts adopted the Online Court Assistance Program (OCAP), a computer interview program designed to prepare complete sets of documents for divorces.[133] Utah adopted the liberalized version of the Model Rules in 2005, permitting limited scope representation[134] and facilitating attorneys serving in limited scope clinics without firm-wide conflict checks.[135] In 2007, the Utah courts adopted a procedural rule permitting limited court appearances by attorneys.[136] "In 2005, the Utah Supreme Court created a Standing Committee on Resources for Self-Represented Parties, which, assisted by John Greacen, conducted a

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128 ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS: A WHITE PAPER (2014) available at: https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_white_paper_2014.pdf.

129 *Id*. at 1-2.

130 *Id*. at 2.

131 Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L. J. 37, 42-43 (2010).

132 *Id*. at 43, n. 19 (quoting CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADMINISTRATORS, RESOLUTION 31 (2002)).

133 *State Provides for Online Divorce Filing*, ABC NEWS (Jan. 7, 2006, 6:32 AM) https://abcnews.go.com/Technology/story?id=119240&page=1.

134 UTAH RULES OF PROF'L CONDUCT, R. 1.2.

135 UTAH RULES OF PROF'L CONDUCT, R. 6.5.

136 UTAH R. CIV. P. 75.

study of pro bono parties."[137] In 2007, The Utah State Courts established a Self-Help Center[138] and, in 2004, Utah Legal Services, Inc., the Legal Aid Society of Salt Lake, and the University of Utah S.J. Quinney College of Law Pro Bono Initiative established the brief advice clinic that was the subject of this study.[139] In 2006, the Utah State Courts conducted the first customer survey (of pro se parties) to assess the courts' accessibility and fairness[140] and the first Public Trust and Confidence survey to determine public perceptions of the Utah State Courts.[141]

Where Sarat and Felstiner report "the common finding that people who use legal processes tend, no matter how favorable the results of their encounter, to have a less positive view of the law than those with no direct experience,"[142] these Utah surveys suggest the opposite. The pro se parties assessed the courts' accessibility and fairness between high 80% to low 90% favorability ratings, while the general public who were surveyed had an overall positive opinion by 76% (in 2006) and 81% (in 2012) of respondents.[143]

Since the Sarat and Felstiner study, there have been vast changes in how people get into family law court – often by themselves – and many supports have been developed to help them. This has resulted in changes in how courts operate and in the roles many lawyers fill. This pro se revolution has necessarily made the courts, including in Utah, more responsive to the public. Might this also have changed the character of the judiciary and the bar? Is it possible that judges and lawyers in this century not only need to be, but actually are more fair, responsive, and grounded than they had been in the 1980s? If so, this could explain why the Utah attorneys in 2009 expressed more respectful and trusting attitudes to their pro se clients at the clinic.

At a minimum, the attorneys who chose to be part of the patch-work solution to the pro se situation through their pro bono work in this clinic may well have possessed more respectful and trusting attitudes toward the

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137 Smith & Stratford,, *supra* note 49, at 171 (citing UTAH JUD. COUNCIL STANDING COMM. ON RES. FOR SELF-REPRESENTED PARTIES FINAL REPORT: 2006 SURVEY OF SELF-REPRESENTED PARTIES IN THE UTAH STATE COURTS (2006)).

138 *Id.*

139 *Id.*

140 Surveys were conducted in 2006, 2007, 2008, 2011, 2013, 2015, 2017. *See Access and Fairness Survey Reports*, UTAH COURTS (May 15, 2018) https://www.utcourts.gov/performancemeasures/access.html. The survey results were very positive with satisfaction ranging from high 80% to low 90% rankings on a wide variety of topics. *Id.*

141 Surveys were conducted in 2006 and 2012. *See Public Trust and Confidence in Courts*, Utah Courts (May 15, 2018) https://www.utcourts.gov/performancemeasures/public.html. The overall opinion of the courts was good (76% positive in 2006 and 81% in 2012, second only to local law enforcement).

142 *Law Talk*, *supra* note 1, at 1687 (citing Austin Sarat, *Studying American Legal Culture*, 11 LAW & SOC'Y REV. 427 (1977)).

143 *See Access and Fairness Survey Reports*, *supra* note 140; *Public Trust and Confidence in Courts*, *supra* note 141.

judiciary, other lawyers, and the judicial process. The principle of cognitive consistency, which holds that individuals have an inner drive to keep all their attitudes and behavior in harmony, suggests that attorneys who saw the courts as unfair and unresponsive would be unlikely to volunteer to help self-represented parties. Attorney volunteers would experience uncomfortable cognitive dissonance if they were engaged in coaching clients how to navigate a legal system that they truly felt was impenetrable and governed by the power of "insider" lawyers and judges with unique personalities and quirks.

V. CONCLUSION

In the 1980s, Critical Legal Studies scholars saw the courts as highly political, favoring the powerful, and hoped practicing lawyers would realize this too. They hoped for a sea change (if not a revolution) in which the powerless were lifted up. It was with this backdrop that Sarat and Felstiner saw divorce lawyers speaking dismissively about the courts and the judicial process to their clients. These lawyers did not demonstrate to their clients that they were needed because of their technical understanding of complex laws and procedures. Instead, they portrayed the legal system as chaotic, populated by incompetent judges and untrustworthy opposing attorneys, navigable only by lawyers with insider knowledge. Thus, these attorneys rendered their clients dependent upon them, even while they made the clients distrust the judicial system.

This study was conducted more than two decades later, in a changed world where most people with family law cases represented themselves and occasionally interacted with attorneys for brief advice. Recording and studying attorney-client conferences (and attorney-student consultations) in a brief advice clinic reveals a much different picture of "law talk" than observed in the Sarat and Felstiner study. The volunteer attorneys in Utah did not portray a chaotic system in which parties needed attorneys who knew the idiosyncrasies of incompetent judges. Instead, these lawyers spoke about the law intimating it would be rationally applied to the clients' situations. Far from suggesting clients needed attorneys with insider connections, the volunteer lawyers encouraged the pro se parties that they could successfully represent themselves in most cases. Even when clients seem distrustful of judges, mediators, and opposing attorneys, the volunteer attorneys typically communicated their respect for these individuals. Their communication engendered trust in – not cynicism about – the judicial system.

Why these differences? Obviously, there are differences in both time and place. Attorneys in politically conservative Utah in 2009 may well think differently about the courts than did attorneys from the more liberal states of California and Massachusetts in the 1980s. The Sarat and Felstiner judges

may have been less predictable due to a more political appointment process and less specialization in family law. The substantive law itself has become clearer and more consistent in many areas of family law. It is possible that pro bono attorneys have more positive attitudes toward the judicial system than private attorneys – although the pro bono attorneys were also in private practice and would likely have expressed the same views to their private clients as they did to the pro bono clients. In any event, pro bono attorneys would not be deterred from giving clients bad news about their cases where retained attorneys might point the blame at unpredictable judges to avoid admitting mistakes or candidly explaining the weaknesses in their clients' cases. Yet, the most probable explanation for the difference in "law talk," is the pro se revolution that has taken place and the reactions of the bench and bar to it.

When low-income and even middle-income individuals began appearing as unrepresented parties, a few commentators thought this might be an empowering experience.[144] Others argued that these individuals were mostly unrepresented due to an inability to afford private counsel and the public's unwillingness to fund sufficient "legal aid" attorneys to meet the need.[145] However, the bench ultimately accepted its responsibility to provide access to the courts, and many attorneys accepted their public citizen responsibility to make pro bono legal services available to improve access to justice. In the end, lawyers' attitudes about the court may have improved because the pro se revolution resulted in improvements within the judiciary and the judicial process.

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144 *See* FORREST MOSTEN, UNBUNDLING LEGAL SERVICES, *supra* note 126, at 8-11.

145 *See* Engler, *supra* note 131, at 41; Sales et al., *supra* note 112, at 567.