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# 25 Divorce Attorneys and 40 Clients in Two Not So Big but Not So Small Cities in Massachusetts and California: An Appreciation

David L. Chambers

AUSTIN SARAT and WILLIAM L. F. FELSTINER. *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process*. New York: Oxford University Press, 1995. Pp. xii + 191. \$35.00.

JANE: How often does a case like this come along—a restraining order of this nature?

PETER: Very common.

JANE: It's a very common thing. So how many other people are getting the same kind of treatment I am? With what, I presume, is very sloppily handled orders that are passed out.

PETER: I did talk to someone in the know—I won't go any further than that—who 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," and it could have been signed by accident. I said, "Well, then, how does that happen?" And he said, "You've got all this stuff going; you come back to your office, and there's a stack of documents that need signatures. . . ."

—Sarat and Felstiner, p. 89

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Jane is meeting with her lawyer Peter. She has been complaining bitterly about a restraining order obtained *ex parte* by the lawyer for her husband Norb. The order bars her from entering the home that she still owns jointly with Norb and that Norb has continued to live in. She moved out voluntarily, as a gesture of good will, a short while before only to have her husband's lawyer run to court and secure the order she abhors. Readers first met Jane back in 1986 when Austin Sarat and William Felstiner published the first article growing out of their massive project to observe the meetings between divorce lawyers and their clients in the lawyers' offices. That article and the three that followed have now been expanded into *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process*.

Jane and her lawyer talk and talk, and, thanks to Sarat and Felstiner, we get to listen. Over a period of three years, the two authors sat in 25 lawyers' offices in California and Massachusetts, tape-recording lawyer-client conversations in 40 divorce cases. They give us more about Jane's and one other case than any of the others, but we read snippets from dozens of cases and learn the authors' general observations about them all.

In the extended treatment of Jane and Peter, Jane finds herself in a dilemma. Peter keeps reassuring her that she is appropriately angry about the *ex parte* order, but he also repeatedly asserts that pursuing her just complaint about Norb's high-handed conduct will almost certainly stand in the way of working out a "satisfactory disposition" of the property issues. Peter sees a final settlement as the only relevant goal. Peter and Jane's conversations are engrossing. Jane is perceptive, self-absorbed, funny, angry, and blunt. Peter is vague and circuitous but tenacious in his efforts to persuade her of the futility of seeking justice. Their conversations are engrossing most of all because they and the other conversations we read were culled from the most extensive transcriptions of lawyer-client conversations ever gathered by American social scientists.

The originality of this research and its promise for future scholarship by others has determined the shape of the essay that follows. I begin by tracing briefly what the authors found as they listened to the conversations of the divorce lawyers and their clients. Then, because Sarat and Felstiner tell us so little in their book (or in any of the articles that preceded it) about their research design or methods, the next section reports on interviews I conducted with the authors. I focus on methodology in part to convey the scale of their achievement and in part to inform others who may be attracted (and ought to be attracted) to such research. Then in the final parts of the essay, I ruminate on what we know and do not know on the basis of this research and on some limits of their findings. Twenty-five lawyers, forty clients: so much learned, so much left to learn.

## I. A SUMMARY OF THE FINDINGS

Sarat and Felstiner's central mission is to reveal the ways that "meaning gets constructed" and "power enacted" by the client and the lawyer in their meetings in the lawyer's office. In each of four central chapters, the book identifies different prominent subjects of lawyer-client conversations and traces the complex unfolding of lawyer-client discourse about them.

In the first of these chapters, the authors describe the absorption of nearly all clients with their grievances against their spouses. Clients commonly attribute the breakup of their marriage and unfortunate events during the divorcing process to their spouse's flawed character. They talk about these failings in part to gain their lawyer's loyalty and in part because they seek justice. The lawyers are uninterested in the failings of their clients' spouses, because they regard them as irrelevant to a successful resolution of their client's case. Thus, they respond by listening politely and noncommittally ("mmn-uh," says the first lawyer whose words we hear). "Client and lawyer are like performer and bored, dutiful audience—the lawyer will not interrupt the aria, but she will not applaud much, either, for fear of an encore" (p. 37). Lawyers support their clients' negative views about the spouse only when they want to shore up the resolve of a wavering client to carry through on the divorce.

The next three chapters shift from what does not count to the lawyers to what does. In each, lawyers and clients behave in somewhat different ways than might have been expected. In the first of these, the most important message to clients is to be realistic, realistic about the futility of saving the marriage or reforming the spouse and realistic about the arrangement of their financial affairs. Clients expect that lawyers can do more for them than they can. "Clients," the authors say, "tend to reason upward from their needs rather than downward from resources." Lawyers need clients to understand what is reasonably attainable so that the lawyers can achieve a negotiated settlement. While other researchers have also learned from lawyers about this effort to instill realism (p. 54), Sarat and Felstiner seek to show, largely through an extended presentation of a single case of the lawyer Wendy and her client Cathy, that this process of "negotiating realism" is far from linear and far from easily managed by the lawyer. Conversations begin, wander, and peter out. Clients fail to acquiesce, become silent, change topics, and reintroduce earlier topics in different forms. Both lawyer and client engage in tactical procrastination, delay not being used in its familiar fashion as a tool to wear down the other side but rather as a tool to wear down one's own supposed ally. The power of lawyers to control the direction of the case is more fragile and contingent, Felstiner and Sarat argue, than has been previously observed.

The next chapter deals with the ways that lawyers talk to their clients about the law and the legal process and the ways that clients respond. Sarat and Felstiner do not find that lawyers serve as enthusiastic apologists for the legal system and the existing order. Lawyers tend to emphasize not law's evenhandedness or predictability but rather its accidental, haphazard qualities, the arbitrariness of judges, and the salience of local norms and of insider knowledge and influence. Clients react with resistance and suspicion but usually in the end with acquiescence. It is in this chapter and the next that Jane and Peter's conversations are reported. Peter, as we've seen, trades on his information from "someone in the know—I won't go any farther than that." He makes clear that Jane will not receive "ultimate justice" from the courts. In this world, lawyers' professional power rests less on expert knowledge of statutory or appellate law than on insider information and connections. The unfairness of spouses and the messiness of life that the lawyers reject as irrelevant when the clients talk about their own marriage are replaced in the lawyers' own discourse by a different unfairness and a different messiness—the callous and capricious behavior of judges and others in the legal process.

The final substantive chapter describes the ways that lawyers and clients discuss the terms of a specific agreement with the other side, the move "from adversariness to resolution." The lawyers nearly all encourage settlement rather than trial, contrary to the image of the lawyer as fomenter of conflict. They do so not by claiming that they can anticipate what the judge will do but by making the client fearful of the worst that the judge might do. They emphasize the flexibility and creativity that negotiations offer over litigation. The course of moving their clients toward a proposed agreement is tortuous. Clients are ambivalent about settling, and lawyers must assure them that they remain loyal advocates for their interests. Jane, for example, is still caught up in her fury over Norb's underhanded act of securing an order excluding her from their home. She admits being wary of placing her trust in anyone, including Peter, her lawyer. She resists settling but seems to know that she must yield:

JANE: One of the things I'm feeling is a tremendous discontent that some sort of negotiation is going to now begin without any act from Norb that establishes trust. . . . It doesn't seem that I have a lot of options. I simply will have to accept that, and I guess I will have to live with that pain. I think it's dreadfully unfair. But it doesn't seem that I can get any satisfaction.

PETER: That's not entirely true. You can litigate. Strongly we can litigate.

JANE: Well, I think the only question then is whether or not an overture is even possible before litigation. I'm not sure. I have these things separated in my mind, but how can I trust this human

being to do anything? I don't know if I can. I feel that pretty strongly.

PETER: I don't blame you. I don't blame you at all. (P. 130)

Peter says she can litigate but knows that she won't. Resolution lies in negotiation, and the client comes to accept that reaching the resolution will occur between the lawyers. Preparing their clients, lawyers describe a negotiating process in which the lawyer will rely on insincerity and bluff, on inflated demands and on inappropriate requests that the lawyer hopes the other side won't catch. Norms do guide the negotiation—expectable starting points, for example, for dealing with the family home and for a noncustodial parent's visitation schedule—but the client must rely on the lawyer's insider knowledge to get the benefits.

Throughout these core chapters, "meaning" and "power" are the two themes that Sarat and Felstiner stress. The meaning of the failed marriage, of law itself, and of the legal process is constructed, they argue, through the conversations between client and lawyer. Clients and lawyers "negotiate" over meaning in a different shadow of the law than that which Mnookin and Kornhauser (1979) modeled for the negotiations between opposing parties. Each comes with predictable sets of perceptions and goals, and each engages in subtle tactics to induce the other to adopt their views. Lawyer and client exert power over the meanings that become accepted and, secondarily, over what actions the lawyer and clients "agree" to take. In the writing of others, power in the lawyer-client relationship in cases of individual service is typically understood as straightforward and as lying largely with the lawyer, but within the conversations Sarat and Felstiner monitored, they find "power" more evanescent and (a word they use often) "fragile." Power, in their view, "is continually enacted and reenacted, constituted and reconstituted" (p. 22; see also pp. 24, 59, 63, 70, 73, 83). It is fragile because it is "contested" (p. 23). "It is fluid and dynamic, rather than solid, stable and centralized" (p. 83). They end the book as follows:

Far from embodying the majestic pretensions of law itself, lawyer-client interaction reflects the conflict and chaos that typifies the construction of meaning on those mundane occasions on which people seek to create meaning and promote their own interests under conditions of stress and uncertainty. By attending to those interactions we see both the fragility of power as it is exercised and the elusiveness of meaning as it is constructed. (Pp. 152–53)

## II. THE ACHIEVEMENT, AND THE RESEARCH METHODS THAT MADE IT POSSIBLE

Sarat and Felstiner's pathbreaking tape recordings permitted them to review, with care, what was actually said between lawyers and clients. As a result, they have expanded dramatically a body of knowledge that previously rested on interviews with lawyers and clients well after the events and on court records of settlements and court decisions. The tapes were fresh juice, not reconstituted. Of course, we the readers cannot actually listen to what was said, but the excerpts from transcripts are fresher than anything we've ever had available.

Sarat and Felstiner brought to the inquiry long years of research on litigation and other legal disputes and rich acquaintance with the writings in legal sociology. For this project, they drew on the interpretivist scholarship of Clifford Geertz and of writers about law and society such as Barbara Yngvesson and use the transcripts to illuminate aspects of the lawyer-client relationship that cannot be adequately examined through interviews after the event—the little moments of interchange between the lawyer and client in which techniques of control are unreflectively deployed; the ways that discussions meander seemingly beyond the control of either participant; the messages about the law or about courts or about the settlement process that lawyers and clients may not remember at all or may report as they wish they had said or heard them. Sarat and Felstiner do not crow about the uniqueness of their achievement. I'd like to do so for them and tell more than they do about why their project succeeded.

The research method used in this study holds enormous power for illuminating lawyer-client relationships, yet it is dauntingly difficult research to carry out. There are reasons to fear that their project may suffer the fate of America's voyages to the moon: long praised and fondly remembered but unrepeatable—at least for many decades. Two others who attempted similar projects before them failed. Douglas Rosenthal (1974), who wrote a pioneering study of client participation in the handling of personal injury cases, initially sought to sit in and observe the meetings of lawyers with their clients (p. 179). Every lawyer refused. And just at the point that Sarat and Felstiner were writing a grant proposal to undertake this project, Brenda Danet, Kenneth Hoffman, and Nicole Kermish (1980) published an essay in *Law & Society Review*, "Obstacles in the Study of Lawyer-Client Interaction: The Biography of a Failure." Danet and her colleagues had hoped to attend lawyer-client meetings in order to study the role of language in the "conceptualization and resolution of disputes." They wrote letters to more than 400 lawyers but, in the end, abandoned the enterprise when few lawyers signaled a willingness even to consider participating and the few who nibbled either turned them down later or proved to have practices that did

not lend themselves to the inquiry. Many lawyers worried that the presence of an observer would lead to a loss in the privilege for confidential communications between them and their client. Some worried about offending their clients. Others wanted to be paid.

Sarat and Felstiner succeeded,<sup>1</sup> but for all the novelty of their achievement, they devote only a single paragraph in the book to the ways they secured the cooperation of the lawyers and their clients and only two pages to all other matters related to methodology—to describing the cities they studied, their sampling methods, and the representativeness of the sample of lawyers and clients they observed (pp. 8–10).<sup>2</sup> Readers of the book who are social scientists or who are lawyers with interests in social science research need to know more, in part for the traditional purpose of permitting them to appraise whether the authors have an adequate foundation for what they claim and in part to identify the sorts of further research needed in the future.

Here is what I learned from interviews with the authors, augmented by the information in the book and in the earlier articles. Sarat and Felstiner began the project in 1980 in order to study the process by which lawyers take the raw stories of clients and convert them into legal terms, the subject of “dispute transformation.” They intended to build on their own prior research,<sup>3</sup> while remaining open to taking the research in whatever directions the actual lawyer-client meetings led them.

The two decided early on to study lawyers who handle divorce cases because, as they put it, divorce “is a serious and growing social problem in which the involvement of lawyers is particularly salient and controversial” (p. 155, n.7). After seeking guidance from divorce attorneys in a couple of cities that they knew they would not study, they chose for their study one town in Massachusetts and another in California. Sarat took principal responsibility for Massachusetts, where he and Felstiner selected a “smaller” than “medium-sized city.” (In order to help protect the identities of participants, they do not reveal the names of the either town.) There, Sarat began

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1. One of the few researchers who had succeeded in sitting in on a significant number of lawyer-client meetings was Carl Hosticka (1979), who sat in on 50 initial interviews in one legal services office serving poor clients. His was an important study, but it did not involve tape recording of the interviews or the reporting of what was actually said.

2. The description in the book of their sample and research methods appeared in closely similar form in the first article Sarat and Felstiner (1986, 94–95) published about the study. No substantial additional information appeared in any of the later articles.

3. See, e.g., Felstiner, Abel, and Sarat (1980–81). For other contemporaneous research, see Mather and Yngvesson (1980–81). Sarat and Felstiner described their plans in somewhat more expansive form in the first article in which they published any of their findings (1986, 95–96):

Our major objectives were to describe the ways in which lawyers present the legal system and legal process to their clients, to identify the roles that lawyers adopt in divorce cases, to describe the actual content of legal work, to analyze the language and communications patterns through which lawyers carry out these functions, and to examine the ways that lawyer-client interaction affects the development and transformation of divorce disputes.



by approaching the single judge who heard all divorces, telling him that he and Felstiner believed that divorce lawyers had a difficult job and that they wanted to understand the complexity of it. The judge agreed to endorse the project. Sarat and Felstiner selected a larger city in California—"medium sized"—and Bill Felstiner secured a similar endorsement from the chief judge there.

Through the judges and through later conversations with mediators and lawyers, Sarat and Felstiner identified the lawyers in each community who performed substantial amounts of divorce work. In each place, they compiled a list of about 40 practitioners, stopping when they ceased hearing new names. They wrote short letters to each lawyer and followed up the letter with meetings. In the meetings, they requested permission to sit in on and tape-record all meetings with clients in one or two of the lawyer's divorce cases. They told the lawyers that they would leave the choice of the clients up to them, though they did ask the lawyers to focus on cases "that promised to involve several lawyer-client meetings." They did not offer money to the lawyers or the clients for their participation.

Nearly 90% of the lawyers they met with agreed to find one or two clients willing to participate. In the end about 30% of the lawyers—12 lawyers in the Massachusetts town, 13 in California—actually provided at least one case. Sarat and Felstiner asked the lawyers to give their clients only a bare introduction to the study, leaving to Sarat and Felstiner the opportunity to describe the project to the clients directly. Some clients (whom the authors never met) declined to participate when asked by their attorneys, but all the clients who met with Sarat and Felstiner agreed to participate. In some respects, these moments when the lawyers and clients signed on are the most significant events of the entire study, for they mark the points of greatest contrast with the failed efforts of Rosenthal and of Danet and her partners. Sarat and Felstiner both believe that little should be concluded from the 90% initial positive response from the lawyers, because the lawyers could say that they were willing to participate (and thus appear cooperative) but never intend to find a suitable client. They may be right. The miracle lies nonetheless in the 25 lawyers and their 40 clients who did come forward.

Why were Sarat and Felstiner successful where others had failed? They attribute their success to several factors. They credibly conveyed to the endorsing judges and the lawyers that they were not approaching the study with an axe to grind or a plan to criticize the lawyers' performance. They were respectful toward practitioners and sympathetic to the difficulties they face. They were sophisticated but pragmatic. For the lawyers, at least in Massachusetts, an additional factor was probably crucial: the project had the support of the very judge before whom the lawyers appeared on a regular basis. Sarat also believes that many of the lawyers felt flattered to be asked.

They were practitioners from small and midsized towns, without prestigious practices, who were gratified that anyone cared about what they did. Felstiner also believes it was important that he worked to develop a personal relationship with the lawyers, taking some of them to lunch. He believes that that encouraged them to come up with clients: as he put it, the Golden Rule of relationships is reciprocity.

Sarat and Felstiner were also successful in stilling concerns about confidentiality, although they believe that some of the lawyers who never provided clients may have had concerns they did not express. They had both worried that attorneys would fear that permitting an outsider to sit in on their meetings would cause the loss of the attorney-client privilege, just as they appeared to have deterred the lawyers approached by Danet and colleagues. After much discussion, Sarat and Felstiner came up with what they called the "waiver waiver" solution: in their initial meetings with the lawyers, they suggested that when the lawyer identified a client for the study, she write the lawyer for the other side telling him of the study and asking him to waive in advance any claim he might have that the presence of the interviewer constituted a waiver of the privilege. In the end, almost none of the participating lawyers chose to make the suggested request of the other side. The lawyers seem to have concluded that the judges, who had endorsed the study, would continue to protect the confidentiality of communications.

Sarat and Felstiner also, of course, assured the lawyers that, in any publications, they would not use the lawyers' or clients' names and would otherwise keep descriptions vague enough to protect identities. They further told both lawyer and client that they would turn off the tape recorder or leave any meeting at any point if requested to do so and that they would not involve themselves in the case in any way by consulting with either the lawyer or the client or by commenting to the client on the lawyer's handling of the case. It was important to the lawyers that the researchers do nothing that threatened their rapport with their clients.

Over the 33 months after securing the attorneys' consent to participate, Sarat and Felstiner waited for calls from the attorneys who had agreed to participate and, when they received them, reworked their schedules to sit in on lawyer-client conferences. They never missed a meeting that they were informed about, and they did all the observing and taping themselves. Wherever feasible, they began each case with preliminary meetings with the lawyer alone and the client alone. They then attempted to sit in on all meetings between the lawyer and the client and any court hearings that occurred. They set as a goal interviewing the client and the lawyer briefly after each meeting, and they interviewed each lawyer after a case was concluded. For the 40 clients whose cases they followed, they attended 115 client meetings and conducted 130 interviews. They were able to live up to

their plan of meeting separately with lawyer and client after each meeting only about half the time. They were also, not surprisingly, unable to listen in on or tape-record the telephone conversations between the lawyer and client, though they believe that important decisions rarely occurred over the phone.

Only a few clients asked either researcher to leave a session while it was in progress, and no client or lawyer ever asked them to destroy any tape or refrain from using any material. In two cases, for differing reasons, they were unable to follow the case all the way to the end. Sarat attributes the high level of client and lawyer cooperation that they sustained through the project to the trust that developed between the researchers and both the lawyers and the clients. On occasion, Sarat would drive clients to and from their meetings with their lawyers. Felstiner remembers meeting one client at a dentist's office and another at a laundromat. Most of the client meetings were held at the clients' homes.

The 33 months of work in the field was, of course, just the beginning. Secretaries transcribed all the lawyer-client sessions and interviews. The lawyer-client transcripts alone ran some 6,000 or 7,000 pages. Then came years of reading, coding, and analysis. Sarat and Felstiner developed a coding scheme for marking themes, working out the scheme as they started reading.<sup>4</sup> As they read, they detected other themes, which required going back to the beginning and recoding the parts already covered. Sarat did not, for example, begin the coding with hypotheses about the ways that lawyers spoke to clients about judges and the legal process. That emerged from reading the transcripts. After they each read once through all the transcripts, they decided to hire a few graduate students to go back through applying the revised coding scheme that they had developed. In the end, the authors found the lawyer-client conversations so complex and intriguing that in the book they rarely mention the separate interviews with the attorneys and clients.<sup>5</sup>

Fifteen years have passed between the beginning of the planning in 1980 and the publication of the book in 1995. Over a decade has passed since the completion of the fieldwork. The first article growing out of the project appeared in 1986. Three others followed—in 1988, 1989, and 1992. The project has required an awe-inspiring amount of work. After the thousands of hours devoted to setting up the project and conducting the fieldwork, years more were necessarily devoted to reading, coding, and absorbing the transcripts. Themes revealed themselves, Sarat believes, through

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4. As I understand it, they coded the themes in the observed conversations directly onto the disks on which the meetings were transcribed, thus making it possible to access easily all places where a certain theme was indicated.

5. The only place in the book where the authors quote from their interviews with the lawyers or clients or describe what they learned in their interviews is in chap. 3 in relating the story of the lawyer Wendy and her client Cathy.

a process of repeated revisiting of the raw material. The transcripts had to ferment.

There is a risk that an undertaking such as this becomes not just a project but a career. And even as it was, the project was possible, in the authors' view, only because they approached it with "judicious realism." In the ideal, one of them suggested, a researcher might begin with each lawyer by reviewing a random sample of her files and then taping cases from that attorney only when they seemed reasonably representative of the attorney's caseload by some criteria. But to secure the cooperation of lawyers, the researchers had to let the lawyers pick the cases. Moreover, to complete a project within a human lifetime, the authors had to limit the number of cases and work in only two cities rather than in many.

Seeking ways to make such a project more manageable, I asked the authors whether they thought they could have omitted sitting in on the lawyer-client meetings, by arranging, for example, for the lawyer to start the tape recorder at the beginning of each meeting. This suggestion might seem odd, since being in the room permits the observer to take in more than the bare words that are spoken. Yet, in the book, the authors virtually never refer to what they *saw* in the room: the position of lawyer and client in relation to each other; gestures or expressions; visual clues that the client was or was not listening to what the lawyer was saying. Sarat nonetheless thought that his attendance at meetings was indispensable, not primarily because of what it gave him an opportunity to observe, but rather because, if he hadn't been there, no one would have remembered to start the tape machine or put in new tapes. And Felstiner believes in addition that being there was critical to sustaining the cooperation of the attorneys. There are few shortcuts.

### III. HOW MUCH DO WE NOW KNOW ABOUT DIVORCE LAWYERS AND THEIR CLIENTS AFTER READING *DIVORCE LAWYERS AND THEIR CLIENTS*?

With the culmination of Sarat and Felstiner's project, students of lawyering suddenly have a great deal more information than we ever did before about lawyer-client interactions in a specific area of practice. In the concluding chapter, Sarat and Felstiner make many generalizations about "divorce lawyers," implicitly inviting the reader to conclude that they have divined general truths about the universe of divorce lawyers and their clients in the United States, or at least in the places they studied. For a few pages, I want nonetheless to challenge this claim, asking questions about the ways the authors reach conclusions even about the 40 cases they sat in on and more broadly about the probable applicability of their findings to

the larger universe of divorce lawyers and their clients. I want to do so for a constructive reason: to identify what we know and do not know, in order to encourage other researchers in the future.

### The Problem of the Observers' Presence

My initial question is one about the observational method employed in the book, a method that appears indispensable to its success but one which inevitably poses problems. Nowhere in the book do the authors reflect on the ways, if any, that their presence in lawyers' offices may have affected the conversations that took place. I asked the authors about the possibility of such an effect, and they responded that at the first conference that either attended in each case, the lawyer and client were attuned to their presence, but they believe that the impact subsided quickly. Sarat believes that if his presence were having a distorting effect, lawyers would probably have displayed more "socially desirable" conduct, making more, for example, of the sorts of highminded statements expected of members of the bar. They both believe that they witnessed "deep-seated routines" that would have displayed themselves in much the same manner if they hadn't been there. In their support, they point to the abundant research by others in which researchers have observed professionals, particularly medical and mental health professionals, in interactions with clients (see, e.g., Mishler 1985).

I am less certain than the authors of the impact of their presence as it applies to the subtle interactions they were seeking to observe. As a consumer of social science research, I have a strong need to believe that there is little distorting effect, because the researchers' known presence (at least the known presence of a tape recorder) is unavoidable. My hunch, like Sarat's, is that he and Felstiner did in fact observe many deep-seated patterns of interaction. Still, I am left with some questions that seem impossible to answer. The lawyers in California knew that the listening observer was another lawyer, in fact a lawyer they may have perceived as of higher status than they. In Massachusetts, the lawyers knew that the observer was a sophisticated social scientist from a well-regarded institution of higher learning. The lawyers, according to Sarat, were flattered by being studied. If so, the lawyer in both states may have had a stake in what the observers thought of them. Thus, we cannot know if some lawyers exaggerated their statements about their insider knowledge or about judges' arbitrariness, not to impress the client with their skills but to impress the observer with their worldliness. Nor can we know whether some lawyers were less aggressively domineering in their meetings than they might otherwise have been because they believed that openness would impress their cultured observers.

About the impact of the observers' presence on the clients, I have fewer doubts. From the transcripts, the clients seem highly focused on their

grievances and needs. To them, the observer may well have been seen as just another professional, much like their lawyer. Still, it seems possible that some clients (who by this time had come to trust the researchers and may have thought of them as allies) felt emboldened to assert themselves more than they would have otherwise. We just cannot know.

### The Problem of Insufficient Information about Setting and Context

A second difficulty with the book may be entirely one of presentation and not of substance. The authors simply do not tell readers enough about the lawyers and clients who are the subject of the book or about the frequency of the various patterns of attorney-client conduct they observed. Sarat and Felstiner provide surprisingly little descriptive information about the clients as a group. They do not tell us, even approximately, how many were men and how many were women, how many had minor children or how many disagreed about custody. They provide no general descriptions of the clients' ages or the lengths of their marriages and tell us nothing about the range of occupations of the clients or their spouses or estimates of the value of assets being divided. The authors acknowledge that fees have a bearing on the responsiveness of lawyers to their clients<sup>6</sup> but never describe any of the fee arrangements. They do tell us a good deal about the two clients whose stories they relate at greatest length but not about whether other clients seemed similarly situated. Thus, clients when quoted seem to stand for Everyclient and their lawyer for Everylawyer.

A similar difficulty for readers concerns the authors' statements about the frequency of the observed patterns of interaction between lawyers and clients. In describing particular sorts of interactions, they use terms like "most" and "typically" or "commonly," but only rarely provide more specific information about frequency. It is hard sometimes to determine whether they found a dominant pattern and several subsidiary patterns, for usually only one pattern is described. Consider, for example, one of their most interesting observations: that lawyers press clients toward realism in settlement and that clients, unrealistic in their expectations, resist in a variety of ways. The authors offer no counterexamples of cases in which the client arrived in the lawyer's office with a realistic sense of what the law provides or a realistic set of expectations—cases, that is, in which no serious client-lawyer "negotiation" of realism was necessary. Were there no such cases? Or few? Or were such cases common but simply less common than the pattern

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6. Referring to clients who project blame on their spouses, the authors say, "Their vocabulary serves to add sympathy to fees as a way to command their lawyers' energies" (p. 50). The authors know a lot about this subject. See Kritzer et al. (1985).

they describe? In my interviews with Sarat and Felstiner, they told me of the coding done by graduate students, but in the book they do not mention it—let alone explain the degree to which they relied on the results of the coding when making generalizations.

Consider, by contrast, their own critique of Sally Merry's wonderful book, *Getting Justice and Getting Even*. Merry observed neighborhood and family disputes in a city's lowest-level agencies and tribunals, but Sarat and Felstiner, who also admire her book, question some of her conclusions. To do so, they attempt to tally from Merry's book the number of occasions in which judges and court officials succeeded in an effort to persuade litigants in a certain manner (see n.27, pp. 159–60). They identify Merry's sample size and try to calculate the number of cases in each of several categories. Nowhere do they provide their readers with similar numerical guidance for their own study or even arm readers with the ability to make calculations on their own.

To be sure, the authors faced a dilemma. If they had reported patterns in terms of percentages—30% of the lawyers did such and such—they might have appeared to be claiming to have a representative sample from which conclusions of statistical significance could be drawn. Still, they (and others doing similar, small-sample research) need to develop a methodology of presentation that permits the reader to learn more about the people and the patterns that were observed, while alerting the reader to the limits of the conclusions that can be drawn. Their approach in telling so little about their sample or about the frequency of particular patterns leaves readers both ignorant and dependent. In many ways I felt in the position of the clients they report—forced to rely on the lawyer, unwilling to trust her fully, resistant to her suggestions which were often made without adequate explanation. Much like the clients, I fought back as I read, looking for the counterargument and the counterexample. To some degree, I must admit, my fighting back was prompted by my own experience as a researcher, an experience that alerts me to two dangers in using interview materials: one is that when I start perceiving an interesting pattern, I am less alert than I should be to contrary patterns that are less interesting, and the other is that, when I select passages for quotation, I am attracted to those that provide the clearest illustrations of the point I wish to make, even though my belief in the generalizability of my point often rests on more ambiguous passages that I do not quote.

The problem for readers is magnified by the authors' manner of presenting quotations from the lawyer-client conversations. They report the words each said but virtually never indicate pauses or repeated or emphasized words and rarely indicate when one person interrupts the other or

when the two are speaking simultaneously.<sup>7</sup> Although indicating such aspects of conversations can make the transcripts harder to read, doing so permits readers to draw their own conclusions about the likely “meanings” of what was said.

## The Problems of Sample Representativeness

My concerns about the presentation of findings are deeper than simply a matter of style. I also have some questions of substance.

In their final chapter, Sarat and Felstiner include a brief, helpful discussion of the application of their findings about “divorce lawyers” to lawyers practicing in other fields. They identify reasons why lawyer-client relations in divorce practice might be unusual (because, for example, of the highly discretionary nature of many of the legal rules that apply to divorce) as well as reasons why lawyer-client relations in divorce practice may share many similarities with those in other forms of practice (since, for example, lawyers and clients in other settings “must [also] negotiate a fit between the client’s goals and expectations and the results achievable through legal process”). Through this useful speculation, they identify the sorts of questions that future researchers should explore and alert the reader to be cautious about generalizing from their findings to the universe of lawyers.

Regrettably, they do not offer the same ruminations about the ways in which the 25 divorce lawyers (or the 40 clients) might be different from most or many other divorce attorneys and clients in the United States. On the contrary, in the concluding chapter, they speak repeatedly about “divorce lawyers” as a group, inviting readers to conclude that they believe that they have identified general patterns likely to apply to other divorce lawyers and their clients. The authors’ only effort to situate their attorneys or clients into a larger universe of divorce attorneys and clients is a brief passage in the introductory chapter. There Sarat and Felstiner identify two ways that the lawyers in their sample might not be fully representative of the divorce lawyers in the two towns they studied. There was, they report, a slight overrepresentation in their sample of women lawyers, and there were few lawyers “high in income, experience or status” (p. 9). They also say of these lawyers’ clients that they included few doctors, lawyers, businessmen, and others with substantial incomes and assets and few clients whom the lawyers considered to be “crazy.” Those are helpful warnings, especially about the clients, for a national sample of divorcing clients would include some high-income clients and some disturbed clients. I have a few other

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7. See, for example, the elaborate system for reporting conversations developed by Mishler (1984).



concerns about their clients beyond those they describe, ones that may have a bearing on their findings.

My largest question is about the clients' social class. The authors point out that their lawyers had few of the highest-status clients. My guess from the text is that they also had few at the lower end or even in the lower middle. Only one client is described as "working class." Our friend Jane, quite the opposite, was a woman with a graduate degree who worked full time and owned stocks and limited partnerships in real estate. Throughout the book, the most common subject of contention in the vignettes is the jointly owned home, some described as fairly expensive. Millions of divorcing Americans have no equity in a home. In fact, a very large proportion of divorcing couples have almost no assets at all.<sup>8</sup> A tilt away from lower-middle-class families, if it did occur, may have been unintentionally promoted by Sarat and Felstiner's request of their cooperating attorneys to provide them with cases "likely to involve several lawyer-client meetings," for such meetings are more likely in cases with some financial complexity and in cases in which the lawyer has a client paying enough to justify "several" meetings.

If it does prove to be the case that the study included disproportionately few cases of lower-middle-class or poor clients (and few extremely well-heeled clients either), what difference might it have made in their findings? Perhaps none. Yet the research of others into attorney-client relationships in government-funded legal services programs suggests that lawyers are more domineering and that clients are more passive when the clients are poor (Hosticka 1979) and that the lawyers are least domineering when the clients are rich and the lawyer wants repeat business from them (see Heinz and Laumann 1982). It seems possible that Sarat and Felstiner's findings about the subtle diffusion of power between lawyer and client and clients' efforts to resist their lawyers' messages are significantly tied to class and that the 40 cases (taken as a group) represent an unusual parity of assertiveness between a particular group of reasonably well-off clients and a particular group of not so high-status attorneys.

A second way that the client group (and the 40 cases studied) may have been distinctive is closely related. The text implies, and the authors confirmed in their conversation with me, that in nearly all the cases they studied, both spouses were represented by an attorney. I do not have figures for the cities they studied or for Massachusetts and California as a whole, but I am confident that in a high percentage of divorce cases in the United States neither spouse or only one spouse is represented by an attorney. In a

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8. See Melli, Erlanger, and Chambliss (1988, 1141 n.26), who report that in a sample of divorcing families in Dane County, Wis., in 1979, 68% of families had net worths of less than \$30,000; Garrison (1991, 658-59), who found in samples from two New York counties that, in 1984 dollars, divorcing couples had a median net worth of \$23,000 and that 63% had net worths of less than \$50,000.

recent study of divorce cases in Maine, for example, the researchers found that 12% of divorcing persons had no attorney at all and in about half the remaining cases, only one spouse was represented by an attorney (McEwen, Mather, and Maiman 1994). The fact that in the Sarat-Felstiner sample both parties were represented by attorneys itself suggests that the clients had, as a group, above average resources among divorcing couples—or that, if no better financially endowed, they were more than usually embattled over some issue that led each to hire a lawyer.

If Sarat and Felstiner's sample *had* included many cases in which only one party was represented by an attorney, might their findings have been significantly different? Again, perhaps not. It seems likely, for example, that little, if anything, would differ in lawyers' responses to clients' efforts to focus on their spouse's misdeeds and low character. On the other hand, the authors' findings might well have been quite different with regard to what lawyers say to their clients as they move to the final negotiation of a settlement. Sarat and Felstiner depict a world in which lawyers arrogate to themselves the responsibility for negotiating with another lawyer and clients feel excluded from the process. Attorneys might well discuss the final negotiation differently, and the negotiation might have a different "meaning" to clients, if the lawyer and client expected that the client was going to do the negotiating directly with the unrepresented spouse. In cases in which there is no lawyer on the other side, the earlier discussions between lawyer and client about what is "realistic" to expect in the property settlement might also have a different texture.<sup>9</sup>

I have several other such questions about representativeness but will touch on only two. Sarat and Felstiner's samples are, as they describe it, from one affluent mid-sized city in California and one smaller city in Massachusetts, both with substantial academic communities. In America's smallest towns, and even in larger cities in some states, lawyers might not be so indifferent to claims by clients about their spouses' past misconduct if the judges in these places remain receptive to such claims (and if allegations of sin could thus be useful in negotiation). In the largest cities—in New York or Los Angeles, for example—it seems possible that lawyers in cases with two attorneys would adopt more confrontational negotiation styles than the attorneys Sarat and Felstiner studied and thus reinforce the clients' desire for a fight. These differences, or others, could in turn affect the meaning to the client of the failed marriage or of the divorcing process.

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9. One of their two extended stories is about Cathy, a woman whose husband was unrepresented by an attorney for much of the case. During much of the lawyer-client interchange quoted in the book, the lawyer and client assume that Cathy, a woman who is plainly cowed by her husband, is going to be doing the talking with her husband. Here is a case in which far from the norm they describe of a lawyer trying to prepare his client to accept less than that to which she feels entitled, the lawyer is trying to steel the client to demand more than the client is inclined to demand.

Finally, I wonder about the applicability of the findings to a significant subgroup of divorcing adults common in the United States but not discussed in their book. No cases in the sample were described as involving physical abused of a spouse or a client fearing such abuse. (It may be that the attorneys in the study purposely avoided such cases in picking clients for the researchers to observe.) Sarat and Felstiner deserve no criticism for failing to make such cases a focus of their inquiry, but a reader needs to remain alert that their generalizations about “divorce lawyers and their clients” may not fully apply to such clients. I wonder whether the woman who has been physically abused would resist her lawyer’s assertions of power in the way that the book’s clients do. Here also is a context in which the attorney’s gender might play a significant role in the attitudes of both lawyer and client and in the transference process between clients and their lawyers. Corresponding differences might also be observable, of course, in cases in which the client is the person who has been the abuser.

In commenting on ways that Sarat and Felstiner’s sample of attorneys and clients might be unrepresentative, I may appear to be suggesting that they should have called their book “25 Divorce Lawyers and Their 40 Clients in Two Not So Big but Not So Small Cities in Massachusetts and California.” Of course, if I’d written the book, I wouldn’t have chosen such a boring title. Still, it is precisely because I am profoundly impressed by their insights into lawyer-client discourse that I am inclined to be so cautious. It is precisely because their findings are so engrossing that we need their help in identifying the groups to which the findings can be generalized.

### On Meaning and Power

My last point about the limitations of the findings concerns an aspect of the work that is in one sense its greatest strength. Just as I have quibbled with whether the principal title *Divorce Lawyers and Their Clients* conveys more than it can deliver, so, too, I wish to quibble with their subtitle, *Power and Meaning in the Legal Process*. For it turns out that what they have studied (and all that they would claim to have studied) is the exercise of power and the construction of meaning within the limited space of the lawyer’s office.

In their concluding chapter, Sarat and Felstiner comment on other studies of divorcing couples:

These traditional studies direct attention less to the construction of meaning and more to the allocation of tangible resources, the “who gets what” of law. They are less interested in readings of law than in understanding what accounts for variation, change and distribution in the material outcomes of the legal process. In contrast, we believe that the production of meaning in and through law is both independently

significant and inseparable from the social relations in which meaning is made. "Who says what" is as important as "who gets what" in revealing law's power. (P. 145)

I admire greatly the attention to the small moments of lawyer-client discussions, which form the complex, continuously provocative heart of this book. We now know much more about what clients of a certain sort say to their lawyers in their offices and what lawyers of a certain sort say to their clients and the meanings that these lawyers and clients seem to negotiate for the moment. We know about techniques that clients use to retain some control over the discussion and the ways they try to persuade the lawyers to see the world their way. This is extremely valuable information, but what we do not yet know is whether clients absorb and internalize what the lawyers say to them, whether the "meanings" that are constructed vanish when the client leaves the room, and whether the power that already seems so "fragile" within the room leaves any trails outside of it.

In the end, the reader is left uncertain how much power clients actually exercise, other than evanescent power over the direction of a conversation. At the end of the last substantive chapter, on resolution through settlement, the clients seem powerless (and seem to feel powerless) in almost every conventional sense: the lawyers control the negotiation with the other side, the clients feel excluded, and the clients' efforts to control "meaning" in the earlier discussions seem to have had only modest effect on the terms of the negotiation the lawyers pursue. The book convincingly demonstrates that during their meetings with their attorneys, clients "resist the power that lawyers seek to exercise" (p. 139) in ways that have not been previously appreciated. Yet, it remains unclear whether the clients would believe that they had exercised power in any way that was meaningful to them.

What we are left to understand after this remarkable book is the relation between the inside and the outside, between what goes on within the lawyer's office and what is carried by the client or the attorney outside of it.

#### IV. HOW COULD WE LEARN MORE?

My focus on the limits of Sarat and Felstiner's research has a benign purpose: to emphasize how much more we need to know that this study encourages us to want to know. My strongest hope is that others have the curiosity and energy to undertake similar research in the future. Bringing tape recorders and a tutored ear into the offices of other sorts of lawyers than divorce lawyers would have great value. As to divorce lawyers and their clients, studies in the future could usefully replicate Sarat and Felstiner's research while being attentive to the inclusion of the sorts of attor-

neys or clients who seem underrepresented in their sample—clients who are poor or lower middle class; clients whose spouses are unrepresented; clients who have been physically abused or are physically abusive. Even more ambitious research would undertake to bring together two quite different sorts of research. Sarat and Felstiner have amply demonstrated that “who says what” is as interesting for the purposes of social scientists as “who gets what.” What would be valuable now is to explore the ways that “who says what” in the lawyer’s office affects “who gets what” in the negotiations that follow. Equally interesting would be a study of the extent to which what is said in the lawyer’s office shapes the enduring meanings for clients of law, legal processes, and professional services. To what extent, for example, do clients absorb their lawyers’ depictions of a legal system indifferent to fairness?<sup>10</sup>

It is easy enough to daydream about such research but intimidating to contemplate carrying it out. Sarat and Felstiner’s success in obtaining consent from lawyers and clients in two towns should embolden researchers to try again in other places, but the years the project took may lead even the boldest to have second thoughts. Even more intimidating to consider are projects on a substantially larger scale than this one, projects with samples large enough to test for systematic differences based on gender or class or region, or that carry on in time beyond the final settlement to look for enduring sequelae of “who says what” in the lawyer’s office.<sup>11</sup> My hope is that researchers have the courage to undertake such projects, but I recognize that few researchers are likely to be willing to devote as much time and able to acquire the funds to support them. We who are interested in lawyer-client relationships are forever in Sarat and Felstiner’s debt for taking on as much as they did.

Which leads me, in the end, to the most plausible research that might be immediately available: further research with the very materials that Sarat and Felstiner have already amassed. Sarat and Felstiner promised their research subjects that only they and people working with them would have access to their data. They both believe that it would be impossible now to find their original group and secure their consent to wider use of the data. I nonetheless hope that they will have the energy to continue to work with their data, perhaps by bringing aboard as co-researchers persons with particular research interests for which the data especially lends itself. For example, since their sample included many persons of both genders as lawyers and

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10. Again other research by the authors may be relevant. See Lind et al. (1990), reporting that litigants’ satisfaction is more affected by their perceptions of procedural fairness than by the dollar outcomes.

11. Projects lasting well beyond the divorce and that seek to identify the impacts of lawyer-client interactions on the views clients hold of law or lawyers or the legal system face all the difficulties of trying to tease out the effects of any one event in people’s lives from all the other events that have also occurred—the divorce itself, other life changes, other external events involving contact with the law.

clients, study of the transcripts and the audiotapes would permit an exploration of gender-linked differences in the conversations of lawyer and client and, particularly, in the ways they sought to exercise power. Similarly, Sarat and Felstiner make little use of the transcripts of their own separate meetings with the clients or the lawyers, but those transcripts might offer an opportunity to look at the ways clients made sense of what had happened in a meeting shortly after the meeting, a starting point in understanding the enduring meanings of the “negotiations” of lawyer and client that had taken place. But perhaps I am asking too much. This project began 16 years ago. I would hardly blame Sarat and Felstiner if they never wanted to think again about Jane or Peter or that despised *ex parte* order.

## REFERENCES

- Danet, Brenda, Kenneth Hoffman, and Nicole Kermish. 1980. Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure. *Law & Society Review* 14:905–22.
- Felstiner, William L. F., Richard L. Abel, and Austin Sarat. 1980–81. The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming . . . . *Law & Society Review* 15:631–54.
- Felstiner, William L. F., and Austin Sarat. 1992. Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions. *Cornell Law Review* 77:1447–98.
- Garrison, Marsha. 1991. Good Intentions Gone Awry: The Impact of New York’s Equitable Distribution Law on Divorce Outcomes. *Brooklyn Law Review* 57:621–754.
- Heinz, John, and Edward Laumann. 1982. *Chicago Lawyers: The Social Structure of the Bar*. New York: Russell Sage Foundation; Chicago: American Bar Foundation.
- Hosticka, Carl. 1979. We Don’t Care about What Happened, We Only Care about What Is Going to Happen: Lawyer-Client Negotiations of Reality. *Social Problems* 25:599–610.
- Kritzer, Herbert, William L. F. Felstiner, Austin Sarat, and David Trubek. 1985. The Impact of Fee Arrangement on Lawyer Effort. *Law & Society Review* 19:251–78.
- Lind, E. Allan, Robert J. MacCoun, Patricia A. Ebener, William L. F. Felstiner, Deborah Hensler, Judith Resnick, and Tom Tyler. 1990. In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System. *Law & Society Review* 24:953–89.
- McEwen, Craig, Lynn Mather, and Richard Maiman. 1994. Lawyers, Mediation and the Management of Divorce Practice. *Law and Society Review* 28:149–86.
- Mather, Lynn, and Barbara Yngvesson. 1980–81. Language, Audience and the Transformation of Disputes. *Law & Society Review* 15:775–821.
- Melli, Marygold, Howard Erlanger, and Elizabeth Chambliss. 1988. The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce. *Rutgers Law Review* 40:1133–72.
- Mishler, Elliot. 1984. *The Discourse of Medicine: Dialectics of Medical Interviews*. Norwood, N.J.: Ablex Publishing Corp.
- Rosenthal, Douglas B. 1984. *Lawyer and Client: Who’s in Charge?* New York: Russell Sage Foundation.

- Sarat, Austin, and William L. F. Felstiner. 1986. Law and Strategy in the Divorce Lawyer's Office. *Law & Society Review* 20:93-134.
- . 1988. Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction. *Law & Society Review* 22:737-70.
- . 1989. Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office. *Yale Law Journal* 98:1663-72