CHAPTER 10

Lawyering for the "Mad": Social Organization and Legal Representation for Involuntary-Admission Cases in Poland

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In an interview with this author, a lawyer pointedly remarked that no one takes these legal aid cases willingly "because they require a lot of time, and the remuneration … is simply laughable" (interview with attorney, January 22, 2013). Behind this comment is a very worrisome reality—namely, that Polish attorneys[1] experience legal aid lawyering in involuntary-admission cases as a burdensome and unproductive undertaking—all of which inevitably impacts negatively on the clients themselves. Attorneys commonly share the perception that remuneration is inadequate given the degree and quality of service required. In Poland, legal aid attorneys receive 120 Zloty—roughly this translates into $30 US for an entire case—at the first instance of a proceeding, which is at a district court. For representing claimants at the appeal court, they receive an additional 50 % of the lower court tariff. Consequently, lawyers often have to put a significant number of pro bono hours into involuntary-admission cases.

Moreover, attorneys frequently struggle to balance legal aid cases with the private practices from which they derive their living. Indeed, such cases imposed mandatorily on attorneys in Poland can constitute up to 20 % of an attorney's entire legal practice. Although some lawyers are able, willing, and have the resources to take seriously their legal aid responsibility in involuntary-admission cases, this in spite of the low remuneration and a significant commitment of time and energy; others perform only the bare minimum required by law—purporting only to *advocate* for their "clients."

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Further contributing to the conundrum is the fact that it is almost impossible to challenge any arguments put forward by psychiatric "experts." Moreover, many lawyers feel that judges dismiss the work they put into these cases, both in preparing and in delivering "sound" arguments. Advocacy for their clients' interests that involves new facts and evidence puts them in conflict with the court, which prioritizes quick adjudication of involuntary-admission cases. Correspondingly, departure from the judicially set role of a "figurant" carries adverse consequences.

All of which—even for those lawyers committed to their legal aid duties—only adds to the already burdensome nature of the work. The key issue here is that the involuntarily admitted—that is, *the very persons who need spirited lawyering*—may not receive appropriate advocacy. In this context, a right to representation, a key guarantee of "due process" under the inherently coercive procedure of involuntary admission, may be nothing more than a formalistic legal institution with no substantive meaning.

This story of lawyering for involuntarily confined people is told from the perspective of lawyers in order to shed light on the "experiences of clients and lawyers in concrete legal contexts" (Bellow and Minow 1996, p. 1) and to provide a firsthand account of the workings and limitations of the law and legal institutions. The objective of this chapter is not to defend lawyers or the quality of their work, especially as these can vary. Nor is it to address lawyers' attitudes toward their involuntarily committed "clients" and their often uncritical acceptance of the concept of "mental illness," which can also be troublesome. Rather, the objective here is to present a fuller picture of lawyering in cases deemed of lesser importance for attorneys and judges and to illustrate how this marginal position of involuntary-admission cases is operationalized by means of various "boss texts" organizing legal aid in Poland. Of particular significance are the Polish Mental Health Act of 1994 (MHA 1994) and the 2002 Ministry of Justice's Decree on Tariffs for Attorneys and Responsibility of the State Treasury for Unpaid Legal Aid Fees (Decree of Ministry of Justice, September 28, 2002).

This chapter shows how social relations embedded in legal and executive texts organize the everyday work of legal aid lawyers involved in involuntary-admission cases. Because these cases tend to be relegated to the margins of lawyers' work, it will be argued that these features of the legal aid system determine how much effort lawyers put into them. When explained in a systematic way, law stories provide not only "insights into how the legal workers and those affected by law make their choices, understand their actions, and experience the frustrations and satisfactions they entail" (Bellow and Minow 1996, p. 1) but also reveal institutional priorities that organize/restrain those choices and actions.

The basis for this discussion is an institutional ethnographic study conducted by the author over a period of 18 months (between August 2012 and February 2014) in Polish psychiatric hospitals and courts. The study included extensive observation at those sites, numerous interviews with legal and psychiatric professionals and staff, informal conversations, and extended analysis

of laws and legal and administrative documents. Institutional ethnography (IE) was the main approach (Smith 2005, 2006) and was particularly suitable for this endeavor. Its focus is on people's engagement with institutional complexes and how this engagement shapes the experiences of individuals receiving and/or providing services. IE takes professional concerns seriously, grounded in the practical experience of working in the healthcare and legal systems (or the not-for-profit sector), about what does not work for the people they serve.

While IE explores people's everyday experiences and the disjuncture between people's needs or intentions and what institutions offer (Smith 2005), and while other pieces in this particular anthology begin by looking at the disjuncture for "clients" and survivors, in IE, professional workers also can be approached as sites of disjuncture. Insofar as professional workers are the location of the disjuncture, investigations of this ilk link the "troubles" of professionals to the specific features of systems and their trans-local organization, showing how the working of the system constrains the ability of professionals to best support their "clients" or "patients" (Rankin and Campbell 2006). That is precisely the intent of this chapter's study.

I begin my discussion with an overview of the Polish Mental Health Act of 1994 concerning the regulation of involuntary admission and the procedural rights regime, with an emphasis on the right to representation.

Poland's Involuntary-Admission Procedure

In Poland, the Mental Health Act of 1994 (MHA 1994, Ch. 3) regulates involuntary admissions to psychiatric facilities. That MHA established substantive grounds for involuntary admission and a procedural framework for issuing and controlling the legality of involuntary-admission decisions. Involuntary admission is an inherently violent procedure, featuring, as it does, seriously uneven power relations between psychiatrists and admitted persons. In Poland and elsewhere, reformers involved in mental health reforms envisioned procedural rights as remedies, at least to some extent, to the power imbalance and saw them as contributing to the well-being of "patients" (Dabrowski and Kubicki 1994; Arben 1999). Reformers thought that "[s]ubstantive improvements in the lot of the mentally disordered would follow from a recognition of their rights" (Rose 1986, p. 177).

Equipped with procedural rights, "patients" of psychiatric institutions were seen to be in a position to "demand and obtain" their substantive rights accordingly (Rose 1986). For example, a "patient" could challenge the legality of an admission decision pertaining to the commitment. For substantive and procedural rights were precisely there to ensure that nobody is kept confined in psychiatric institutions "illegally." The Polish Mental Health Act of 1994 was enacted after more than 20 years of meticulous work drafting and legislating it. It introduced a system of legal control over admission decisions that is more extensive than that seen in other jurisdictions (Burstow 2015; Carver 2011).

First, the 1994 MHA introduced a strict time frame for psychiatrists to decide about involuntary admission and subsequently for the reviewing of those decisions by an "independent" judicial body. Within 72 hours of involuntary admission, the director of a psychiatric facility needs to notify a district court about it. Within the next 48 hours, a district court judge from the court's family division is obligated to come to the facility and meet with the admitted person. If the judge finds no grounds for recommending a discharge of the committed person from the facility (because of unmet substantive grounds for an involuntary admission), the case goes for a full review to a district court at a courthouse. The hearing needs to be held within two weeks of the judge's visitation.

Second, the Act ratified a comprehensive legal framework for controlling admission decisions. As Figure 10.1 shows, the admission decision is reviewed by at least one, potentially two, courts at least twice (by the lower court) and once (by the upper court) in addition to a review conducted by the supervisor of the psychiatric facility. The Act ratifies two types of review: (1) a system of mandatory review of all involuntary-admission decisions by a supervising authority of the facility, by a district court judge, and by a district court in the

Figure 10.1 Review of involuntary-admission decisions in Poland

jurisdiction of the hospital; (2) a system of review by an upper court that is undertaken upon the "patient's" motion. Finally, the appeal decision can be reviewed in the form of a *cassation* document submitted to the Supreme Court of Poland.

Third, the MHA 1994 and provisions of Polish civil procedure ratified that a "patient", is a party to this controlling procedure and thus is guaranteed all the rights accorded to such a party. Specifically, the person has rights such as: to participate in case hearings, to make claims, to submit new evidence, to respond to evidence provided by the opposing party, and to appeal the lower court decision. A person can undertake all of these activities personally or through an appointed representative. Thus, a right to representation (i.e., an extension of a person's privilege to exercise his or her legal rights) emerges as a significant aspect of "due process" in Poland, a breach of which can invalidate the entire legal proceeding in a case.

In the next section, I will show that in their realization of these procedural rights, persons who are involuntarily committed to psychiatric facilities in Poland heavily rely on legal assistance provided by legal aid attorneys. This is due to the particular circumstances in which they find themselves.

Access to Legal Representation in Involuntary-Admission Cases

Involuntary psychiatric admission is an emergency event that may catch people by surprise. People are thus often financially unprepared and are frequently entirely unaware of their need for a lawyer. Hiring a lawyer requires resources, which the admitted person may not have at her disposal or may not have with her in the ward. Yet, retaining a lawyer in Poland typically necessitates upfront payment for legal service.[2]

Even when the admitted person has the financial resources necessary, there are several barriers to accessing them when one is locked in a closed ward. Confinement in such a place significantly curtails a person's contact with the outside world, including access to banks and ATMs. For instance, in the psychiatric facility where I conducted my research, a bank and an ATM machine are located in hospital lounges or outside of the building, inaccessible to psychiatric patients. Moreover, the confined person would need permission to leave the ward; however, such permission is not given to anyone viewed as aggressive or deemed an escape risk, which is a common assumption about those admitted involuntarily.

For other medically related instances, family may facilitate access to financial resources if needed; however, in the context of involuntary admission, family members tend to be less helpful because they have often initiated the involuntary hospitalization in question. According to my research, the only case in which a lawyer of choice was willing to step in without advanced payment was when the admitted person had an ongoing relationship with that lawyer, or that lawyer had represented her in other cases.

In Poland, any person who cannot afford to hire a lawyer can ask for legal aid representation.[3] Still, the person must demonstrate that he does not have

the financial resources to hire a lawyer. This is not true, though, for proceedings that fall under the scope of the MHA of 1994. These are "cost-exempted," meaning that neither is a filing fee charged for starting a legal action (e.g., submitting an appeal) nor is legal aid conditional on the financial needs of the requesting person.

This, along with less formal requirements for document submission, is supposed to facilitate access to justice for civilly committed persons given the precarious context in which they find themselves. Nonetheless, lawyers' participation in civil commitment procedures is minimal. I encountered only rare instances where committed persons appointed the lawyer of their choice, or requested a legal aid lawyer, regardless of their financial means. One significant factor related to the low frequency of attorney appointments became clear during my research: Involuntarily admitted persons are often confused about the nature of their admission, its duration, and its possible consequences. Instead of seeing court involvement as a practice that is to "guarantee" their rights, a judge's visit to the hospital for the initial assessment tends only to further confuse the admitted persons.

What I noticed, additionally, is that even when the committed person requests a lawyer, this information does not necessarily reach the decision-making authority responsible for such an appointment. For example, a field note stated:

> [A] young woman was admitted without consent to a psychiatric facility. Since the very beginning, she was vocal that she disagreed with the admission and that she was going to challenge it by legal means. She was aware of both of the grounds, which need to be met for an involuntary admission, and of her procedural rights. She informed her leading doctor that she would like to consult a lawyer and asked for one. Yet, the doctor never passed this request to the court that makes the decision in that matter. Nor did the judge who came to meet her note her request in her patient files. The woman was not appointed a lawyer until she once again requested one, this time in writing, directly submitted to the court. In the meantime, however, the hearing proceeded and the lower court adjudicated the case. She was granted the lawyer only after she submitted an appeal, and after she had been discharged from the hospital by a medical authority.

Although this finding cannot be generalized, persons who tend to request legal aid lawyers are those familiar with the legal system. Through their education, work, or previous admissions, they have knowledge of their rights regardless of whether a judge informs them. They may, however, still struggle to access legal aid.

In general, I have not witnessed a single judge providing meaningful information to "patients" about the nature of the legal procedure, not to mention the total lack of information provided to involuntarily admitted persons about their right to professional representation. Indeed, the admitted persons may not even be aware that a lawyer's help and assistance is available to them.

Nonetheless, one of the key guarantees of a patient's right to representation stems from the MHA of 1994, Art. 48:

> The Court can appoint a legal aid lawyer, for a person whom the procedure concerns, even if the person does not request it, but due to her mental health the person is not capable of submitting such a request, yet the court conceives lawyer's participation as necessary.

Thus, a judge is obligated to appoint a lawyer for a civilly committed person who is unable to undertake his or her own representation. Yet, district judges tend to apply this article narrowly limiting such an appointment to two kinds of situations, when:

(a) According to a psychiatric assessment the person is "incapable" to consent to an admission and thus participate in the procedure consciously; or
(b) The admitted person is less than 16 years old.

In these two instances, the MHA of 1994 requires a "supported" decision-making procedure for which the presence of a lawyer is mandatory. Otherwise, the judge risks the decision being overturned on appeal on the grounds of invalidity of the proceeding—specifically that the admitted person was deprived of the privilege to defend her rights. In the preceding instances, an admitted person needs to have a legal representative acting on her behalf to ensure validity of control of the involuntary admission decision. Indeed, those appointments are the most common when it comes to legal aid representation in the context of an involuntary admission procedure.

A judge also can appoint a lawyer in any involuntary-admission case when she or he recognizes that *participation of a legal professional in the case is necessary*. Yet, here the matter of priorities becomes clearly visible, as well as the gap between the practice as it happens at actual local sites and the Polish Supreme Court's recommendation for such a practice. The disparity between the right to legal aid representation for persons who cannot participate and what actually happens in practice will become clearer as the chapter proceeds. For the time being, suffice it to say that district court judges predominantly appoint legal aid lawyers in situations where they are required by law to do so. This is in spite of the Supreme Court's recommendation for treating legal representation as a mandatory element of a "due" review procedure of an involuntary admission decision (Supreme Court… in II CZ 2/12, 2012).

Although recent decisions of the Supreme Court are problematic in some aspects because the Court represents a formalist take on the issue of legal representation, ignoring its reality and promoting representation over patient's participation—their significance lies in the recognition that patients face multiple barriers in realizing their procedural rights. Existence of these barriers renders legal assistance necessary. In actuality, legal aid lawyers are commonly not appointed until the case reaches the appeal stage.

The next two sections discuss two features of legal aid services in Poland that significantly determine how much time and energy lawyers can and are willing to put into involuntary-admission cases.

Legal Aid in Poland

Although marginal in number, legal aid representation still predominates in involuntary-admission cases. Yet, attorneys perceive legal aid cases as distinct from other legal work because of their mandatory character, the urgency of the action required of a lawyer, the potential mismatch between the scope of the case and attorneys' specializations, and the low remuneration. It is important to understand how this legal representation is organized as being distinct from other types of lawyers' work to reveal implications of this organization. What follows, accordingly, is a discussion of: (1) the mandatory and urgent character of these legal aid appointments as well as their inconsideration of lawyers' specialization and (2) the internal hierarchy of legal aid cases that affects lawyer's remuneration for legal aid work.

"Forced" Cause Lawyering

In Poland, legal aid service is mandatory and as such, contributes to lawyers' experiences of seeing it as burdensome—an unwelcome duty. Every practicing attorney and in-house council is obligated to take legal aid cases in addition to his or her private practice (Bar Law 1982). Attorneys are duty-bound to provide quality representation, for which they are professionally and financially responsible. This leaves no room for professional choice and voluntarism based on a personal and/or moral commitment to a case or its cause. An attorney generally cannot refuse a legal aid case because of insufficient time or a scheduling conflict with other hearings. The only justifiable grounds on which an attorney can refuse a legal aid appointment is in cases of a conflict of interest—for instance, where the lawyer has represented or advised or is representing the opposing party.

Once the lawyer is appointed, he or she is immediately duty-bound and the appointment continues for the duration of the case, including any appeal. Civil commitment cases, more often than other types of legal aid cases, may require a lawyer to take action immediately. Interviewed attorneys reported facing certain difficulties in providing quality lawyering in such cases while maintaining the regular workload integral to their private practices.

To accommodate this mandatory duty, appointed attorneys often need to make significant adjustments to their regular workload; this is possible when lawyers do not carry extensive private practices, or in those instances where they do but have help from articled students. Still, the work attorneys face in negotiating mandatory lawyering in legal aid cases, and specifically in civil commitment cases, requires a significant amount of time and attention, which

presents them with an equally significant challenge in trying to make a living out of lawyering.

Moreover, legal aid appointments, at least at the level of a district court, have an urgent quality. Because civil commitment cases are structured around tight deadlines, the appointed lawyer generally begins work immediately. Right away, she is faced with tight time frames that require psychiatric and legal work within the first week of a person's admission to ensure that nobody is kept confined unnecessarily or illegally. Most commonly, judges appoint lawyers after the initial hospital visit, or when the "patient" submits an appeal that reaches the appeal court. This appointment procedure, however, requires coordination and interaction between a court and a local bar because the bar council holds the power to assign an individual lawyer to a case. Given that, the time between the court's appointment decision and the hearing date may be less than two weeks. If this is added to the time needed for the appointment procedure at the bar council and for notification, the appointed lawyer may have as little as two days to prepare for a hearing.

Given the considerable urgency of civil commitment cases, the appointed lawyer may not be able to participate in the hearing because of a scheduling conflict. Some lawyers report having as many as six legal aid cases scheduled for the same day and approximate time. In this situation, the appointed lawyer needs to find a substitute lawyer who can appear in her stead. This usually requires several phone calls, delivering of case files to the substitute, and often providing remuneration out of her own pocket. Along with tariffs accepted in a community, in fact a one-time substitution at a hearing may cost more than what the appointed lawyer will receive from the government for providing representation in the entire involuntary-admission case.

The suddenness of appointments is not the only problem for lawyers faced with trying to merge them with their regular workloads. Another issue is the utter lack of attention paid to a lawyer's specialization. Because appointments in civil commitment cases are assigned randomly from a list, a lawyer's field of specialization becomes irrelevant to the procedure.[4] Adding to the problem is the fact that, in Poland, attorneys are not typically trained in mental health law, nor are there many who specialize in this field.

This means that appointees require additional time to prepare for cases that they may encounter only on very rare occasions. For instance, the lawyers I interviewed had been involved in as few as one, or at most several involuntary-committed cases in their professional careers. This, in combination with tight deadlines and the marginal position of these cases in attorneys' overall practices, contributes to the mistaken perception that civil commitment cases are unproblematic and straightforward. One consequence is that, while lawyers were ostensibly representing the interests of their clients, they were in fact—perhaps unintentionally—utterly silencing their clients' voices. To understand more fully how this happens, these challenges need to be placed in the broader context of recent neoliberal changes to the organization of lawyers' work.

The economic relations in which a lawyer's work is embedded and to which it responds, contribute to the relegation of civil commitment cases to the margins of lawyers' work (within which private cases occupy the principal position). Since the mid-2000s, legal professionals in Poland, specifically attorneys and in-house councils, have undergone a significant professional shift because of the opening of their profession to a greater number of law graduates. Because of these changes, between 2004 and 2013 the number of attorneys in Poland increased from about 6000 to almost 13,000 practicing attorneys.[5] With that increase, the general pauperization of Polish society, and broader access to online legal services and legal information, many lawyers find themselves struggling, in the face of financial difficulties, to uphold their private practices. Given these changes, fierce competition for clients becomes an everyday reality for lawyers, who are often forced to decrease fees to make themselves more competitive and to seek more cases to meet their financial needs.[6] Thus, to ensure financial stability, or even sometimes to simply maintain their practices, many lawyers prioritize cases that are financially profitable and allocate their time and energy accordingly.

Working for "Free" or Money for "Nothing"?

While attorneys treat state-appointed lawyering as a fulfillment of their public service obligation, Bar Law 1982, some cases are less welcome than others. Whether an attorney feels his work is adequately remunerated and his arguments are adequately heard plays an important role in how the attorney experiences legal aid cases and, more broadly, the amount of work he does as a lawyer. Involuntary-admission cases are located at the far end of this spectrum as they involve a significant time commitment.

Remuneration for attorneys' work in Poland is regulated by the Ministry of Justice's Decree on Tariffs for Attorneys and Responsibility of the State Treasury for Unpaid Legal Aid Fees (Ministry of Justice, 28 September 2002). Once the 1964 "Code of Civil Procedure" determined how to distribute the costs of proceedings between parties, the 2002 Decree on attorney's fees set up how much a winning party would be reimbursed for legal representation, for example. For cases in which a legal aid lawyer was appointed to represent a party, the 2002 Decree regulates how much the attorney will be paid for the work. Because determination of costs is an integral part of any legal decision in Poland, judges refer to the 2002 Decree on attorneys' tariffs on a daily basis.

Although on the surface the 2002 Decree appears to be a technical act ratifying tariffs, it does far more than that. It performs an important piece of ideological work that organizes how judges practice law, how much attention they pay to specific cases, and how lawyers' work in those cases is valued and accordingly reimbursed. The point here is, the 2002 Decree on attorneys' fees constructs involuntary-admission cases as less important and the attorney's work put into those cases of no value unless it aligns with priorities held by judges.

Next I will show how this 2002 Decree established a hierarchy of cases, of work, and of knowledge—and consequently contributes to the marginalization

of involuntary-admission cases in lawyers' practices. Specifically, the Decree's paragraphs 4.1 and 4.2, as well as paragraph 19, are essential in organizing legal aid lawyering in involuntary-admission cases as marginal. They are discussed in the following section.

Hierarchy of Cases

Paragraph 4.1 of the 2002 Decree directly sets the framework for the practice for delineation of cases and placing them in a hierarchical order by differentiating attorneys' tariffs according to types of cases. It reads:

> *Cases are remunerated according to the value of an object or a service under litigation, or a type of case, or value of claim in court execution proceedings.*

Thus, there are two groupings of cases for the purpose of remuneration. In cases, such as torts, contract-related claims, and court execution proceedings, the remuneration that lawyers will receive is decided based on the value of object/service criteria. In all other cases the remuneration is based on the case type (e.g., whether it is a custody case, an incapacitation case, etc.).

There are significant disparities in remuneration for the two distinct groupings of cases. Cases related to the protection of goods and rights related to market economy are at the top of the case hierarchy and, accordingly, lawyer's tariffs are the highest in those cases. Correspondingly, cases related to patents or other types of intellectual property, which are important to a competitive liberal market—although placed in the second grouping of cases—are still assigned higher tariffs than, for example, family law cases in the same groupings.

Now, for attorney services in cases where the value of the exchange object exceeds Zl 200,000 (around $70,000 US), an attorney would receive remuneration that is as much as *60 times* higher than what she would receive for services in a civil commitment case. Because the 2002 Decree does not ratify fees, mental health law cases *are not directly specified in the act* (par. 5). Thus, by convention, courts in this situation apply the fee assigned for the most similar case. Commonly, judges apply a fee for *other undefined cases*, and this fee is Zl 120—around $40 US. Lower fees are typically applied to civil commitment cases, and more generally to cases that deal with personal liberties (e.g., incapacitation).

This hierarchy of tariffs creates a hierarchy of importance. The cases for which remuneration is higher are constructed in this text as more important and more complicated. Not surprisingly, those cases ranked toward the top of the tariff hierarchy tend to be more welcomed by legal aid lawyers as they are better remunerated than those cases lower on the scale (e.g., involuntary-admission cases). The internal hierarchy of cases established by the Decree places involuntary-admission cases—the very ones that need spirited lawyering—at the bottom of the hierarchy, which directly influences how much lawyers receive for their services.

Hierarchy of Work

Paragraph 2.1 of the 2002 Decree further shapes the ideological foundation of the text by setting a causal link between the hierarchy of cases and the work needed to protect certain goods/rights. This section is located at the beginning of the Decree, before specific fees are even listed. It provides a discursive frame for reading the following articles of the Decree, including articles specifying legal tariffs. Paragraph 2.1 reads:

> *Deciding upon the remuneration for a lawyer for the representation, court takes into consideration necessary labor input of the attorney, nature of the case, and attorneys' input in the resolution of the case.*

This paragraph fosters an assumption that tariffs assigned for specific cases that are listed in Chapters 3–5 of the Decree are an adequate remuneration for the activities involved in lawyering in those cases as they take into account complexity and the "nature" of them. Subsequently, the necessary labor input in lawyering in a case is constructed accordingly.

The 2002 Decree on attorney's tariffs established a presumption that the complexity of cases is related to the value of the subject matter. Yet, the implications of this presumption are enormous for lawyers and their "clients." By setting the frame as they do for the necessary amount of work involved in cases, all other work activities undertaken are rendered invisible and subsequently disregarded. As a result, all those activities that are not seen by a judge as a necessary labor input remain unpaid. The point here is that provisions in the Decree guide judges in determining what is considered necessary labor input, while overlooking the actual amount of work needed for quality of service. As such, the Decree provides a direct link between the fees and the complexity ("the nature") of the case in a way that structures involuntary-admission cases as less important and not involving a significant amount of work because the tariff applied as adequate to these cases is around $30 US. To understand the extent of the disparity, it is important to take into account the actual activities needed to provide proper legal representation in such cases.

Although the amount of work involved in the representation can vary depending on the precise timing of an appointment, it includes many interconnected activities. The result is that the actual amount of work legal aid lawyers put toward good lawyering stands in stark contrast with the 2002 Decree's scheme of remuneration. For a lawyer appointed at the district court stage, work may involve participation in a number of hearings, meeting with a "client," collecting case documents, writing an appeal, participating in appeal hearing(s), waiting for those hearings, and so forth. The amount of work in cases for which an attorney would receive $30 US may not differ, sometimes may even exceed the amount of work necessary for lawyering in cases remunerated at 60 times more.

Nevertheless, activities that are not undertaken in front of the court, but are integral to lawyering (e.g., reading court files), are invisible to the judges who

handle lawyers' remuneration. They are invisible because the institutional discourse embedded in the 2002 Decree constructs a judge's consciousness in such a way as to reflect the priority of Poland's legal system. It sets specific tenets of remuneration and guides the attention of judges to interpret lawyers' legal aid representation work not only very narrowly but also according to economic and formalistic priorities, oriented toward the functioning of the juridical system in Poland.

Hierarchy of Input

The 2002 Decree on attorneys' tariffs further opens space for regulating attorneys' legal work, along with the state's financial and ideological interests, through equipping judges with the discretionary power to determine whether a lawyer contributed to the resolution of the case, and which kind of input justifies an increase in remuneration for her. Based on this determination, a judge can increase the minimal fee set for a case if the judge decides that the fee is not adequate to *the labor input of an attorney, the nature of the case, and attorney's input in the resolution of the case*. Paragraph 2.2 reads:

> *The basis for remuneration for attorneys' service […] is the minimal tariff listed in [the Decree's] Chapters 3–5. This remuneration cannot be higher than six fold of the minimal tariff nor it can exceed the value of the case.*

Additionally, Paragraph 19 specifies the increase of the minimal tariffs in regards to legal aid representation. It reads:

> *Unpaid expenditure for a legal aid service is covered by the State Treasure and this expenditure includes:*
>
> (1) *Remuneration in the amount up to 150 % of the minimal tariff listed in [the Decree's] Chapters 3–5.*
> (2) *Necessary and documented expenses of an attorney.*

The preceding listed provisions related to the potential increase in an attorney's fee are troublesome for at least three reasons.

First, by setting up this strict limit to which tariffs can be increased, the Decree still allows very low remuneration in cases that are located at the bottom of the hierarchy of importance. Second, it directly devalues the work even more when the work is pursued as legal aid work. Third, the Decree legitimizes the judge's decision as to what kind of contribution, and further, knowledge is valuable in the context of legal proceeding. Accordingly, this creates a significant barrier for lawyers engaged in meaningful lawyering that aligns with their "clients'" interests.

The term "contribution to the resolution of the case," which guides a judge's assessment of the value of a lawyer's work, allows institutional priorities (e.g., procedural economy) to enter judicial practice and structure what is considered valuable input into the case and, more generally, what knowledge input is

valued. Consequently, the lawyers that I interviewed reported that judges consistently dismiss well-grounded legal arguments when those arguments contest the legality of involuntary admission, specifically, and the psychiatric opinion that speaks to its legality. Indeed, judges tend to dismiss arguments advanced by lawyers, except in those cases when they point to formal problems already noted by judges. So for lawyers, it is challenging to engage in a meaningful representation of an involuntarily admitted person not only because of the courts' often uncritical reliance on psychiatric expert opinions but also because their attempts to engage are interpreted by judges as mere delaying tactics.

My data suggest that the practice of increasing lawyer's fees for work in involuntary-admission cases is nonexistent. On the contrary, judges believe that even this $30 US is more than what lawyers deserve for their work. They see lawyer's work as participation in a "5-minute" court hearing (*sic!*). This speaks to the mistaken perception, shared among judges, that attorneys get "money for nothing." What goes along with this, because commitment cases are structured in such a way as to be of lesser importance in the hierarchy of legal protection, and assumed uncomplicated, any attempt of a lawyer to contest some of the "scientific" "facts" is treated by judges as "unnecessary prolongation of a case" that rather should be punished not remunerated (Figure 10.2).

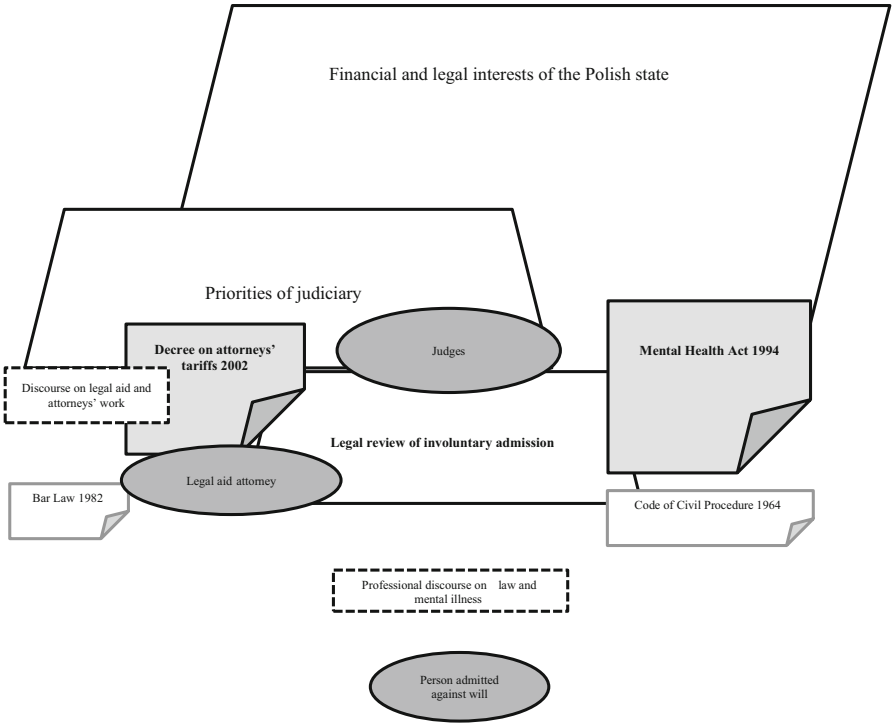

Figure 10.2 Organization of legal aid lawyering in involuntary-admission cases in Poland

Lawyering for the "Mad"

This section follows an actual legal aid case to see what legal aid representation *really* involves. It will become clearly visible how the textually mediated practices of judges and the organization of the legal aid system in Poland, instead of fostering the quality of lawyering received by involuntarily admitted persons, in fact impedes it. The case also illustrates how inadequate the Polish system of legal aid is in encouraging lawyers to undertake and pursue quality work. It also shows how lawyers and their clients' interests are subsumed under the interests and priorities of the judiciary and that of the state.

A young attorney was appointed as a legal aid lawyer for an involuntarily admitted person. The person had been assessed as "suffering from a mental illness" and as posing a "danger to others," specifically to his family. The lawyer was appointed only after the committed person had submitted an appeal. Thus, the lawyer's representation involved preparation before and participation at the appeal hearing. This appeal submitted by the "client" had formal deficiencies and so the lawyer was obligated to fix them. The appeal was not professionally written. The lawyer's task was to correct the defects and to prove all facts supporting the client's stance. Along with the civil procedure, the attorney was given seven days to correct the formal defects. The case required urgent intervention.

First, the attorney went to the court to read case files. He became familiar with the case. Then he drove to the hospital to meet with his client, whereupon he learned that the "client" did not want to be in the hospital. The client also provided him with new information that contextualized the moment and events that led to the admission. On the basis of the information so gleaned, the attorney prepared a draft of a motion with new facts and evidence. Then he went back to the client to consult about the accuracy of this draft. After gaining his client's approval, the attorney submitted the document to the court. This all consumed a lot of time. On the hearing date, he participated in the hearing in the absence of his client for the person had not been transported to the courthouse. He was thus the only one there to defend his client's interest and represent his stance. The judge went on to dismiss the appeal. For all the work that he did for the case, the attorney received $30 US.

This case clearly speaks to the amount of work needed to do meaningful and engaged lawyering and to the inadequacy of the remuneration, and it highlights the inherent contradiction—that judges see only those activities they personally can observe; namely, presence at the hearing and submission of a document. The point here is, often lawyers' work is only understood in terms of how many hearings they participate in or how many documents they submit. Yet, as this case makes clear, there is a huge spectrum of activities that are integral to lawyering that are rendered invisible to judges. In this case, these activities included, for example: "reading case files," "meeting with the client," "preparing documents for court submission," and so forth. Moreover, what is crucial to understand here, general terms (e.g., "reading files") consist of

a broad spectrum of other activities that are subsumed under those terms, all these made and constructed as "nonexistent."

Take as an example the activity of "reading files." This term, in lawyers' parlance, covers all of the intermediate steps necessary just to get to the point of actually reading files. First, one needs to arrange with court staff a time and date for obtaining files. This requires making a phone call to determine whether the files are in the courthouse, and then scheduling a time with the courthouse's reading room. Sometimes attorneys need to call several times to schedule this reading because the files may be circulating between court staff and judges. Making notes on case files or making photocopies requires additional time. Even though a number of attorneys currently use their own digital cameras to photocopy file documents, some still rely on the court to copy documents for them. In the latter instance, they need to schedule a pick-up time for those photocopies and then physically retrieve them.

On top of all that, there is the actual reading of the text files; extracting evidence and facts; making strategic decisions about the case; and deciding what needs to be elaborated on, which challenges to bring, and what new evidence to present to the judge. These activities comprise, and are enmeshed in, the process of "reading files." Thus, there is a significant discrepancy between what is viewed as indispensable work involved in lawyering in civil commitment cases and what happens in real life, or how much lawyers need to do for the cases.

In addition to activities related to the preparation of legal documents, legal aid attorneys need to participate in court hearings. In criminal cases, they are paid for attending each hearing, *over and above their base case fee*; however, in civil commitment cases lawyers are paid *only the base fee* regardless of how many mandatory hearings may occur. A lawyer's participation in hearings additionally involves other time-consuming activities. Polish courts are notoriously in a constant state of delay. According to a report prepared in 2014 by the nonprofit Court Watch Poland Foundation, such delays usually range between 30 minutes and three hours (Pilitowski and Burdziej 2013/2014). This time is usually spent, or rather wasted, in a hallway in front of the courtroom. Time spent waiting for the hearing counts as part of the lawyer's work on that specific case, as he or she obviously cannot engage in work on any other. Thus, the term "participation in a hearing" renders invisible all activities that require time and effort (e.g., waiting). When we take into account all those activities involved in actual lawyering, we see quite a different picture of a lawyer's work than what is constructed by judges practicing using the 2002 Decree.

What further complicates the picture, the amount of time and energy lawyers can and are willing to give to these cases, depends on the workload they face in their regular practices. Note, in this regard, the following interchange that I had with an attorney during an interview on February 10, 2013:

> *Agnieszka:* Given what you told me at this interview, that that legal aid case was at the beginning of your legal career, as a more seasoned attorney with more clients, would you be able to engage to that same extent if you got this case now?

> *Attorney:* I think that now I would limit myself to only one visit. This is because those cases require a lot of time. Yet, everything depends on the stage of the legal procedure to which I would be appointed.

Although in the case just presented, the attorney performed a significant amount of work and made an effort to meet with his "client," many attorneys predominately rely on case documents while pursuing representation of their legal aid clients. This carries an inherent danger of marginalizing the voices of those they are supposed to represent. For example, one attorney interviewee, whose engagement in the case could not be questioned because he devoted significant time and effort to his lawyering, stated:

> I did not need [to see] the client to defend his rights. I think that arguments that I formulated [based on case files] were sufficient (January 22, 2013).

Despite the fact that lawyers with sufficient time may visit the patient in the hospital, those who do not, or cannot incorporate such a visit into their regular workload, rely on their clients' textual representations put together in case documents. This, of course, has a direct and negative impact on the person being represented, particularly as it affects what can be known about her. It is important to point out here that, in general, hearings are held in a courthouse in the absence of the committed person. Thus, attorneys' detailed knowledge of their clients and the circumstances of admission are crucial—something seriously compromised if such visits never take place. I would add too that the above-mentioned lawyer was not even aware that his client's rights were violated in another way—that is, all the correspondence was sent to an incorrect address, preventing him from participating in the hearing concerning his client on a personal level.

This case also makes visible the disparity of assessing lawyers' work through the judicially informed notion of the "contribution to the resolution of the case." The young lawyer clearly provided essential facts and evidence that should have been considered as an important contribution to the resolution of the case as he contextualized the facts of his "client's" admission. For example, he provided information regarding the context and the nature of so deemed "aggressive" and "dangerous" behavior of his client, which happened in the context of a family dispute. Correspondingly, in an effort to prove the facts of his case, the lawyer issued a request to call witnesses present at the incident. Yet a court, without an explanation of the decision's rationale, rejected his motion. Besides the unfavorable consequences and what this shows about the short shrift given the rights of involuntarily committed persons, this example speaks to the low status, which is intimately connected with low remuneration and lack of recognition of work, afforded lawyers in such cases.

By contrast, the value of the contribution of "experts" is clearly demonstrated through the system of remuneration for their opinions. Contrary to the way lawyers are treated, experts appointed by courts are paid by the number of

hours of work spent on the production of their opinions, and those hours may include all the necessary activities that precede them (Grabowska et al. 2014). Moreover, the amount claimed by experts is taken for granted by judges (even when their remuneration is very high) and hardly ever reassessed, which makes it very difficult for that expenditure to be contested by parties to the case.

These are a few of the barriers that constrain meaningful engagement of a legal aid lawyer in lawyering for civilly committed people in Poland.

Concluding Remarks

As can now be clearly seen, the procedures surrounding a legal aid appointment and remuneration for legal aid lawyers' work relocates legal aid civil commitment cases to the margins of attorneys' work. To ensure that the right to legal representation has meaning and is not a mere formality, conditions of work involved in legal aid in Poland need to change. First, the system of appointment and remuneration needs to be altered. Lawyers also need more time to critically engage in those cases that are not prioritized by the Polish state. Specifically, in those cases regarding personal liberty and bodily integrity, such as involuntary-admission cases, people need spirited lawyering. Those cases are much more complex than even lawyers initially tend to perceive them and how judges treat them.

What goes along with this, to allow lawyers to deliver quality service, which is a key element of substantive justice, the state cannot shift the costs of legal aid onto the shoulders of attorneys and take advantage of their provision of an obligatory public service. Too often in public discourse, attorneys' work is construed as a public service they are compelled to undertake despite low remuneration. Contrary to what the Polish Constitutional Tribunal (Constitutional Tribunal in Ts 263/13, 2013) has insinuated, attorneys are not "missionaries," and their "cause" lawyering is a work that deserves adequate remuneration.

Moreover, as with other experts, lawyers appointed by state authority to undertake certain tasks should be remunerated for *all the activities* this job involves. Instead of assuming that cases (e.g., an involuntary-commitment case) require less work, lawyers should be given an opportunity to bill for the time actually spent on these cases. This is accepted legal practice for any other experts. Thus, remuneration should be altered to make it hour-based, not case-based.

Finally, the system of mandatory work is an oppressive one and does not ensure quality legal service. It undermines lawyers' choice to engage in legal aid work willingly and for the cause in which they believe. Furthermore, as an imposed obligation that stands in conflict with lawyers' legal practices, legal aid cases, specifically those located toward the bottom of the hierarchy, tend to be marginalized and usually do not receive the attention they need. Although it is beyond the scope of this chapter to provide an exact solution, clearly a change that allows for choice is necessary.

In the absence of such changes, the lawyer suffers. And what goes along with this, in the absence of such changes, despite the discourse of rights, the involuntarily committed person will continue to have compromised represen-

tation. Hopefully, more IE work will be done in this area. All being well, the study that figures in this chapter, the chapter itself, and future work of this ilk will set the stage for a sorely needed reevaluation.[7]

Notes

1. Although legal aid service attorneys and in-house council are equally obligated as professional groups, I focus here (as I did in my research) on attorneys and their legal aid service because they are proximately appointed to deliver legal aid service, at least in civil commitment cases. On the Adwokatura Polska Blog (see http://www.adwokatura.pl/), it has been reported that the ratio of obligatory annual legal aid lawyers' cases to the number of cases taken on by in-house council is around 20:1. Moreover, the specificity of the work of attorneys and in-house council differs. For example, an in-house council may work on a regular employment contract while an attorney in Poland cannot.
2. Legal fees are usually significantly higher than tariffs for professional representation of choice, suggested in the 2002 Decree on attorneys' tariffs. Therefore, depending on the complexity of the case and on the amount of work required, an attorney of choice tends to charge up to several times more than what is defined in the Decree for the type of case.
3. There is an ongoing discussion about whether the courts are the right system in which decisions about granting a claimant legal aid should be made. This is an important concern because certain political priorities (e.g., the focus on expedited case processing and budgetary restrains of courts) do influence whether a client or potential client receives, or is even informed about, his or her rights to legal aid representation. See http://www.adwokat-mierzejewska.pl/doc/Pomoc_prawna_z_urzedu.pdf (Anonymous n.d.).
4. In this way, an appointment in a civil or administrative case also diverges from one in a criminal case. It is more likely that a lawyer with a specialization in criminal law would be appointed to the case by the court because a different system of legal appointments exists for legal aid criminal cases. The main difference has to do with *which legal authority*, either a court or a local bar council, has the power to appoint an individual attorney. While in criminal cases, legal aid lawyers are retained by the criminal court, in the other types of cases the local bar council retains this power. Now, in criminal cases judges tend to appoint lawyers whom they know, and who have experience representing people in criminal cases. By contrast, in civil commitment cases (as well as in other noncriminal cases), the names of attorneys are drawn from a list.
5. See http://blog.naveo.pl/2014/07/11/prognozy-rynku-uslug-prawniczych/ (Sowinski and Sek 2014).
6. Antkowiak (2010) points out that legal services in Poland are provided not only by attorneys and in-house lawyers but also by financial advisers, executors, notaries, and patent experts. In 2010, this added about 25 % to the total number of legal professionals (the total number of attorneys and in-house lawyers). Yet, the duty of legal aid service is imposed on attorneys and in-house councils only.
7. *Note:* The author would like to point out that subsequent to the submission of this chapter, the 2002 Decree was substituted by a new decree that is to take effect in 2016 (Decree of the Ministry of Justice, 22 October 2015). The new Decree, alas, changes nothing with respect to remuneration for mental health cases.

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