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TAKING IT TO THE STREETS: PUTTING DISCOURSE ANALYSIS TO THE SERVICE OF A PUBLIC DEFENDER'S OFFICE

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This working paper describes a project initiated at Washington University in March 1995 to analyze and improve the way lawyers interview clients. Although this project is informed by the increasingly rich literature on attorney-client discourse,¹ it will differ from any pre-

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¹ See, e.g., GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974) (hereinafter, ROSENTHAL, *WHO'S IN CHARGE?*); Anthony V. Alfieri, *Reconciling Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *YALE L.J.* 2107 (1991); Bryna Bogoch & Brenda Danet, *Challenge and Control in Lawyer-Client Interaction: A Case Study in an Israeli Legal Aid Office*, 4 *TEXT* 249 (1984); Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 *MICH. L. REV.* 2459 (1989) (hereinafter, Cunningham, *Tale*); Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 *CORNELL L. REV.* 1298 (1992) (hereinafter, Cunningham, *Translator*); Brenda Danet, Kenneth B. Hoffman & Nicole C. Kermish, *Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure*, 14 *LAW & SOC'Y REV.* 905 (1980); Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 *NYU L. REV.* 1635 (1991); Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 *HASTINGS L.J.* 971 (1992); William L. F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 *CORNELL L. REV.* 1447 (1992) (hereinafter, Felstiner & Sarat, *Enactments of Power*); Gay Gellhorn, Lynne Robins & Pat Roth, *Law and Language: An Interdisciplinary Study of Client Interviews*, 1 *CLIN. L. REV.* 245 (1994); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 *HASTINGS L.J.* 861 (1992); Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 *SOCIAL PROBLEMS* 599 (1979); Douglas E. Rosenthal, *Comment on "Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure,"* 14 *LAW & SOC'Y REV.* 923 (1980) (hereinafter, Rosenthal, *Comment on Obstacles*); Austin Sarat, ". . . The Law is All Over": *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 *YALE J.L. & HUMANITIES* 343 (1990); Austin Sarat & William L. F. Felstiner, *Legal Realism in Lawyer-Client Communication*, in *LANGUAGE IN THE JUDICIAL PROCESS* 133 (Judith N. Levi & Anne Graffam Walker eds., 1990) (hereinafter, Sarat & Felstiner, *Legal Realism*); Austin Sarat & William L. F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 *YALE L.J.* 1663 (1989)

vious work of which we are aware. In particular, although our project design has been greatly assisted by the thorough and thoughtful report of an interdisciplinary study of attorney-client interviews at the District of Columbia Law School by Gay Gellhorn, Lynne Robins and Pat Roth in a recent issue of the *Clinical Law Review* (hereafter referred to as "the DC Professional Discourse Project"),² it significantly differs from their study in the following respects:

- The interviews observed will be conducted by experienced attorneys, not law students.
- Data on the interviews will include not only sociolinguistic analysis but also input from the clients.
- Because the project site is a public defender's office, the project has been designed within the constraints necessary to preserve fully the attorney-client privilege.

Part I of this paper will describe the origins of our collaboration on this project. In Part II, Cunningham will present his analysis of the legal implications of having McElhinny, a sociolinguist, observe attorney-client interviews. In Part III, McElhinny will draw on current debates within linguistics and anthropology about the ethical role of researchers to develop her own standards for participating in the project. Part IV reveals how the guidelines we individually take from our separate disciplines converge into a complex and evolving ideology that causes us to continually rethink the purpose and utility of the project from the perspectives of the public defenders and their clients, and to share control of the project. We conclude in Part V by sketching the current design of the project and the subjects on which we hope to receive trenchant criticism and suggestions from readers for our further work on the project.

The Client Interview Project as currently designed has the following features:

1. The project is designed to benefit public interest lawyers in their day-to-day practice. We hope the project will yield useful insights for clinical education and the academic study of professional discourse, but these benefits will be secondary as a matter of design. The project has been designed in collaboration with

(hereinafter, Sarat & Felstiner, *Law Talk*); Austin Sarat & William L. F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 *LAW & SOC'Y REV.* 737 (1988) (hereinafter, Sarat & Felstiner, *Vocabularies of Motive*); Austin Sarat & William L. F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 *LAW & SOC'Y REV.* 93 (1986) (hereinafter, Sarat & Felstiner, *Law and Strategy*); Linda F. Smith, *Interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centered" Interview*, 1 *CLIN. L. REV.* 541 (1995); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1 (1990).

² See Gellhorn et al., *supra* note 1.

- and will be under the control of the director of the public defender's office.
- 2. Attorney-client interviews will be observed and analyzed by a trained sociolinguist.
- 3. These interviews will be conducted by experienced attorneys who have agreed to participate in the project and are fully informed of its purposes and methodology.
- 4. The project will be conducted in a manner that fully protects the attorney-client privilege. Information gathered from interviews will not be used outside the public defender's office (such as for teaching or publication) without fully informed client consent and express permission from the attorney of record.
- 5. The sociolinguistic analyses will be combined with data from post-interview discussions with the clients to assess the effects of the interview on them, record their perceptions, and solicit their suggestions.
- 6. Because the goal of the project is not only to analyze but to improve client interviewing, a feedback loop will be created to enable attorneys to alter their interviewing methods in response to the findings of the researchers and then measure the effects of those changes through continued sociolinguistic analyses and data from clients.
- 7. The primary measure of project success will be improved satisfaction on the part of public defender clients.

We hope that this pilot project can serve as a model both for evaluation systems initiated and operated by law firms and for clinical legal education.

I.

THE ORIGINS OF THE CLIENT INTERVIEWING PROJECT

Our collaboration on this project has its origins in a course called "Law in Context" that we co-taught at Washington University Law School in the Fall of 1994. Cunningham has taught law school clinics for the past eight years as well as classroom courses on pretrial litigation, legal ethics, and "Law as Language." Before becoming a law professor, he worked as a legal services attorney, in a private law firm representing employment discrimination plaintiffs, and (before and during law school) as a tenant organizer in the inner city of Detroit. McElhinny is trained as a sociolinguist, taught for two years in an interdisciplinary program called "Social Thought and Analysis," and is currently on the faculty of an anthropology department. Her Ph.D. dissertation was based on a year of fieldwork spent observing police officer interactions with citizens in Pittsburgh. Using that data, she has written about the relationship between gender and occupational

discourse and on cross-cultural communication.³

Although Cunningham has researched and written about the relevance of linguistics and anthropology to the practice of law,⁴ he has been struggling for years about how to integrate theories and methodologies of the social sciences into his clinical teaching. Studies of attorney-client discourse (and relationships in general) seem to indicate that gender, culture and professional socialization have such a powerful negative influence on the ways lawyers talk with and listen to clients that he has felt at a loss as to how to improve his own professional discourse, much less teach law students on the subject.⁵ And although he believes that feedback from clients could be an invaluable resource for understanding and improving professional discourse,⁶ he has yet to build such feedback into his clinical courses. Cunningham proposed "Law in Context" as a one-time experimental course at his law school in part as a way of teaching himself more about how social science methods and theory could be applied to understand (and improve) the legal system and legal practice. McElhinny agreed to help him design and teach those portions of the course based on discourse analysis.

Sociolinguists use the technique called *discourse analysis*⁷ to investigate and describe the distinctive communication skills required of people in varying cultures and settings. Sociolinguists are interested not only in *what* is said (though they *are* interested in that) but also *how* it's said. How someone talks—softly or loudly, with hesitations or without, with an undercurrent of laughter—all affect our understanding of what that person is saying. As anyone who has ever

³ Bonnie S. McElhinny, *You Don't Smile A Lot: Gender, Affect and the Discourse of Pittsburgh Police Officers*, in *LOCATING POWER: PROCEEDINGS OF THE 1992 BERKELEY CONFERENCE ON WOMEN AND LANGUAGE* (Kira Hall & Birch Moonwomon eds., Univ. of California, Berkeley: Dept. of Linguistics 1992); *We All Wear the Blue: Language, Gender and Police Work* (1993) (unpublished Ph.D. dissertation, Stanford University); *An Economy of Affect: Objectivity, Masculinity and the Gendering of Police Work*, in *DISLOCATING MASCULINITIES: COMPARATIVE ETHNOGRAPHIES* (Andrea Cornwall & Nancy Lindisfarne eds., 1994).

⁴ See Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment*, 73 *IOWA L. REV.* 541 (1988); *Plain Meaning and Hard Cases*, 103 *YALE L.J.* 1561 (1994) (with Judith N. Levi, Georgia M. Green, & Jeffrey P. Kaplan); *Bringing Linguistics into Judicial Decisionmaking*, 2 *FORENSIC LINGUISTICS: INT'L J. OF SPEECH, LANGUAGE & LAW* 81 (1995) (with Jeffrey P. Kaplan, Georgia M. Green & Judith N. Levi). See also Cunningham, *Tale and Translator*, *supra* note 1.

⁵ See Cunningham, *Translator*, *supra* note 1.

⁶ *Id.* at 1302, 1383-87.

⁷ We use the general term "discourse analysis" to refer to a combination of approaches to the analysis of discourse that are differentiated by sociolinguists, namely (1) interactional sociolinguistics, (2) ethnography of speaking, and (3) conversation analysis. See DEBORAH SCHIFFRIN, *APPROACHES TO DISCOURSE* (1994). We will be drawing on all three of these research traditions in the Client Interviewing Project.

learned a foreign language knows, being a skilled speaker goes considerably beyond learning the grammar of a language. To be a skilled speaker means being able to know what is expected of us in interaction. One needs to know when to speak formally and informally, what counts as polite and what counts as impolite. One needs to be able to figure out when one is simply chatting, or when one is seriously exploring an issue. What counts as a story, or a joke, or a question, or a command differs from culture to culture. Some cultures value silence; others value speaking.

Because very small details of interaction can significantly affect people's interpretations of what's going on, sociolinguists use video- or audio-tapes to record interactions, and they make transcripts that indicate in significant detail everything that occurs in an interaction (e.g., where exactly simultaneous speech begins, words that get stretched out (as in "I loooove it!"), the length of pauses, the loudness of talk, in-breaths and sighs, discourse markers (like "yeah," "umhm," "oh, well," "you know," and "like") and gaze direction). This distinguishes such transcripts from court reporters' transcripts, which focus on what is said by speakers. This attention to detail also distinguishes sociolinguists from other researchers who study human interaction. Anthropologists, for instance, may simply take field notes on an interaction to capture a general summary of what was said rather than the exact words. Oral historians and folklorists, psychotherapists and journalists may tape-record interviews but they focus on what people say rather than how they say it.

Sociolinguists use recordings and transcripts to identify individual and cultural differences in interactional style. For example, in Finland it is not at all unusual for a fifteen-second pause to occur between speakers' contributions to an ongoing conversation. A pause of this length is not seen as awkward or uncomfortable by Finns, though many Americans would rush to fill such a silence after about 3 seconds. Differences in interactional style can lead to cross-cultural communication problems: Finns may perceive Americans as rude, loud or conversation-dominating when they rush to fill a pause, while Americans may perceive Finns as socially awkward, rude or cold. Cultural and regional differences in communication style also exist within a single nation. Some Native American groups (e.g., Navaho) also have an interactional norm like that of Finns that tolerates long silence. Most mainstream white Americans, however, orient towards the 3-second norm, while many African-American, Caribbean, and New York Jewish speakers are comfortable with a much more rapid pace of interaction that leaves few pauses and may even result in significant amounts of simultaneous talk that speakers with other inter-

actional norms may perceive as loud, rude or disruptive.

The sociolinguistic approach, finally, is distinguished from that of speech therapists, and some psychotherapists, in that there are no moral or normative judgments made about the appropriateness or inappropriateness of different speech styles. Sociolinguists are concerned with describing styles and bringing them to people's awareness so that inadvertent miscommunications do not arise. However, many sociolinguists *do* believe that relatively more powerful individuals (e.g., physicians dealing with patients, teachers dealing with students, attorneys dealing with clients, welfare workers dealing with applicants) have a particularly strong responsibility to become familiar with, and subsequently adapt institutional procedure to, interactional diversity.

The first two classes in "Law in Context" were devoted to discourse analysis. In the first class we viewed a videotape of an actual jailhouse meeting between an African-American felony defendant and his two white public defenders (one male, one female) who were preparing him to testify at trial.⁸ We focused on an interchange lasting less than two minutes which was rich with sociolinguistic details including: an extended pause by the defendant and reaction by one attorney who explicitly interpreted that pause, in a certain manner, laughter by the defendant, repeated interruption of the defendant by one or the other public defender, and a statement by one lawyer to the other, commenting on the defendant's immediately preceding statement and framed as if the defendant were not present ("I think that is good when he explains it like that"). For the second class, students wrote up their own discourse analysis of an audiotaped interaction between two white police officers and two African-American women in which an altercation that the women wanted to report as an assault was dismissed by the officers as "merely" a domestic dispute.

The "Law in Context" course involved fieldwork by the students. Several students were also participating in the Criminal Justice Clinic, also being taught by Cunningham at a public defender's office, and used that experience for their fieldwork. In addition, several students conducted discourse analysis of attorney-client interviewing; one team compared an actual patient-doctor consultation with an attorney-client interview, both of which they recorded. All these student projects helped guide us toward this endeavor. We were particularly influenced in developing the concept for this project by one student paper that followed the same attorney through a series of client interviews. Because the student gave the attorney periodic feedback based on the

⁸ The excerpt was taken from the two-hour documentary, *The SHOOTING OF BIG MAN*, which was jointly produced by Harvard Law School and ABC News.

discourse analysis of previous interviews, future interviews were potentially affected by the feedback and the student's analysis had the benefit of the attorney's own reaction. There was also a written assignment completed by all students to propose an evaluation system for a public defender office.

The "Law in Context" course thus focused our attention not only on discourse analysis of attorney-client interviewing generally but on the initial interview by a public defender on the day of arraignment. This interview is typically very short (15 minutes is the target duration because of caseload pressures and demands of the court and jail personnel) and is burdened by the mandate to screen for financial eligibility. The interview is frequently conducted by law students or other student interns (e.g., criminal justice undergraduates) and so an interview form is heavily relied upon to assure that standard information is obtained and recorded. This interview format typifies much of what has been described by both social scientists and critical lawyering scholars as problematic in attorney-client discourse.

The public defender office and we agreed that the initial interview is both a real challenge to good lawyering and an important feature of practice where improvement could yield significant benefits to both lawyer and client. However, one of the first significant challenges we faced before even beginning the project was the problem of whether observations by McElhinny could take place without abrogating the attorney-client privilege.

II.

PRESERVING THE ATTORNEY-CLIENT PRIVILEGE

Fifteen years ago the *Law & Society Review* published an article by sociolinguist Brenda Danet and several others entitled *Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure*.⁹ The article reports how, despite admirable persistence, the authors were unable to secure the assistance of even one attorney in the greater Boston area for their project of observing and tape-recording lawyer-client interviews. In commenting on the article, Douglas Rosenthal¹⁰ offered this assessment:

Perhaps the most important reason the research . . . failed is that it underestimated the risks to the participants. . . . [T]he law is very unclear as to whether social investigation of lawyer-client interaction can be deemed to have waived the privilege and thus provide an adversary the very access to one's confidences that may lose the

⁹ Danet et al., *supra* note 1.

¹⁰ Rosenthal himself had given up on directly observing interviews in the research that led to his influential book, *LAWYER AND CLIENT: WHO'S IN CHARGE?*, *supra* note 1.

case.¹¹

Since 1980 a handful of studies based on social scientists' observations of attorney-client interviews have been reported. Until Gellhorn, Robins and Roth published their report last year, however, not one of these researchers even mentioned the problem of preserving the privilege.¹² And even though Gellhorn, Robins and Roth devote several pages of their report to an excellent discussion of the privilege issue in the abstract, they did not address it in their own project. Because their cases only involved requests for reconsideration before the Social Security Administration, they concluded that, even if the privilege were lost, the risk of harm to the clients was minimal due to the absence of an opposing attorney and the lack of discovery procedures.¹³ They also acknowledge that they were concerned that attempts to obtain informed consent from the clients for the potential loss of the privilege might, like the unsuccessful Danet project, make their procedures "so cumbersome as to derail our project before it left the station."¹⁴

In contrast, the problem of attorney-client privilege has been the threshold issue for our project and thus shapes the fundamental design and function of our work.

Cunningham's review of the law of attorney-client confidentiality in Missouri (which appears to be consistent with the law in other states) has led to the conclusion that the privilege will be preserved if the sociolinguistic observer is acting as a consultant to the attorney and not as an independent researcher. This constraint imposed by the law fortuitously converges with the ideological position we choose to take as researchers: empowerment research where an important criterion is utility for the subjects of the research.¹⁵

The privilege of keeping attorney-client communications confidential belongs to the client. This legal right prevents the attorney

¹¹ See Rosenthal, *Comment on Obstacles*, *supra* note 1, at 927.

¹² See Bogoch & Danet, *supra* note 1; Sarat & Felstiner, *Law and Strategy, Vocabulary of Motive, Law Talk, and Legal Realism*, *supra* note 1; Sarat, *supra* note 1 (Sarat does state that "[a]s a condition of access I assured lawyers and clients that the location and identity of [the offices studied] would not be disclosed," *id.* at 349); Bryna Bogoch, *Power, Distance and Solidarity: Models of Professional-Client Interaction in an Israeli Legal Aid Setting*, 5 DISCOURSE & SOC'Y 65 (1994); John Daniel Goldsmith, *The Initial Attorney/Client Consultation: A Case History*, 45 SO. SPEECH COMMUNICATION JOURNAL 394 (1980) (Goldsmith apparently functioned as a paralegal administrator for the volunteer lawyers in his study and thus his presence would have come within the employee/consultant exception discussed below, although this issue is not analyzed in his article.). See also Hosticka, *supra* note 1.

¹³ See Gellhorn et al., *supra* note 1, at 272 n.83.

¹⁴ *Id.* at 272.

¹⁵ See *infra* Parts III and IV.

from revealing the communications to anyone else by any means, including but not limited to testimony in court;¹⁶ it also protects the client from being compelled to testify about those communications.¹⁷ The seminal Missouri case on attorney-client privilege is *State ex rel. Great American Insurance Co. v. Smith*,¹⁸ in which the state supreme court explicitly rejected arguments to restrict the privilege:

As long as our society recognizes that advice as to matters relating to the law should be given . . . by lawyers, anything that materially interferes with that relationship must be restricted or eliminated, and anything that fosters the success of that relationship must be retained and strengthened.¹⁹

This expansive view informs other Missouri cases deciding whether the presence of a third person affects the privilege. For example, in one case an intermediate appellate court declared that the attorney-client privilege is to be construed broadly to encourage its fundamental policy of encouraging uninhibited communication between the client and his attorney.²⁰

Although it is customary to describe the presence of a third person as "waiving" the attorney-client privilege,²¹ it would be more precise to say that the presence of the third person prevents the privilege from arising in the first place because the definitive characteristic of the privilege is that "it is limited to those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended."²² Thus, as a *general* rule, "the privilege is destroyed by the presence and hearing of third persons, on the ground that the communication was never intended to be confidential."²³ However,

¹⁶ There is also a Missouri statute that states: "The following persons shall be incompetent to testify: . . . An attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of such client." MO. REV. STAT. § 491.06(3) (1994).

¹⁷ There are a number of exceptions to both the client's right to prevent the attorney from revealing communications and the client's protection against compelled testimony. See 1 MCCORMICK ON EVIDENCE 4TH § 911 at 333 (1992).

¹⁸ 574 S.W.2d 379 (Mo. 1978) (stating general rule that all communications from attorney to client are privileged).

¹⁹ *Id.* at 383 (approvingly quoting Robert Allen Sedler & Joseph J. Simeone, *Privileges in the Law of Evidence: The Realities of Attorney-Client Confidences*, 24 OHIO ST. L.J. 1 (1963)). The court rejected Wigmore's position that the privilege should apply only selectively to communications from the client to the attorney. The court also construed the Missouri statute on the privilege (*supra* note 16) as merely declaring existing common law without limiting or diminishing the privilege. *Id.* at 382.

²⁰ *State v. Longo*, 789 S.W.2d 812, 815 (Mo. App. 1990) (privilege attached to statement to attorney in presence of close friend who was also an attorney).

²¹ See, e.g., Rosenthal, *Comment on Obstacles*, *supra* note 1, at 927.

²² MCCORMICK, *supra* note 17, at 333.

²³ McCaffrey v. Estate of Brennan, 533 S.W.2d 264, 267 (Mo. App. 1976) (statement to

as pointed out in *State v. Fingers*:²⁴

It is . . . overly broad to declare that the attorney-client privilege is destroyed because the attorney-client communications were made in the presence and hearing of third persons. There is no destruction of the privilege by reason of the presence of a third person if the circumstances surrounding or necessitating the presence may be such that the communication still retains its confidential character and the attending privilege.²⁵

The court in *State v. Fingers* went on to list three different factors that, if present, would allow the privilege to arise in the presence of a third person: (1) the person was the confidential agent of either the attorney or the client; (2) the person's presence was intended to aid or protect the client's interests; or (3) the person's presence was required for any reason that would render the meeting confidential.²⁶

There is no reported case in Missouri finding the privilege to be inapplicable to statements made directly to an attorney on the grounds that an employee or consultant retained by the attorney was present. Indeed, our research has only uncovered one reported case in the entire country denying the privilege in such a circumstance, and that case is more than 40 years old and is clearly contrary to current law.²⁷ The more difficult situations arise either when the third person

attorney in presence of client's bookkeeper: privileged). Thus the mere possibility that the communication could be disclosed by the third person prevents the privilege from arising, with the result that either the attorney or the client can be forced to testify as to what was said between them. See, e.g., *State v. Shire*, 850 S.W.2d 923 (Mo. App. 1993) (statement to attorney in presence of daughter: not privileged).

²⁴ 564 S.W.2d 579 (Mo. App. 1978) (statement to attorney in presence of father: not privileged).

²⁵ *Id.* at 582.

²⁶ *Id.* The case of *State v. Longo*, 789 S.W.2d 812 (Mo. App. 1990), makes clear that not all three factors must be present, and further demonstrates how far Missouri courts are willing to go to protect the privilege. In *Longo*, the state sought to compel testimony about incriminating remarks the defendant told his defense lawyer in the presence of another lawyer who was both an assistant prosecutor and close friend of the defendant. Even though the assistant prosecutor told the defendant she could not represent him and was only present for "moral support," and even though defense counsel told defendant that nothing said in front of the prosecutor would be privileged, the court held that the privilege still applied because the prosecutor's conduct in the meeting could have led the defendant to believe the prosecutor was assisting defense counsel in pursuing the client's interests.

²⁷ The aberrant case is *Himmelfarb v. United States*, 175 F.2d 924 (9th Cir. 1949), which denied the privilege to statements made to an attorney in the presence of an accountant retained by the attorney to assist on the client's taxes. The court said that the accountant's presence was a mere "convenience." *Id.* at 939. Precisely the opposite position was taken by Judge Friendly 12 years later in the leading case on this subject, and Judge Friendly's view has been followed in a wide variety of jurisdictions. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (statement to accountant retained by attorney: privileged). See Michael G. Walsh, Annot., *Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Third Persons*, 14 A.L.R.4TH 594 (1982). See also McCORMICK, *supra* note 17, at § 91 ("The Confidential Character of the

is an employee or consultant to the client or when the attorney is not present and the statement is made to the employee/consultant alone. However, even under these circumstances, Missouri courts have upheld the privilege consistent with the express policy of construing the privilege broadly.²⁸ The existence of an employment or consulting relationship between the third person and the attorney relates to all three factors listed in *State v. Fingers*:²⁹ (1) the relationship gives the attorney control over the third person's potential disclosure of the communication; (2) the person's presence is in aid of the attorney's representation; and (3) the relationship to the attorney instills confidence in the client that communications will not be disclosed.

Not surprisingly, we have found no case specifically on the use of a sociolinguist by an attorney to help the attorney fully understand a client's communication and improve the attorney's future client interaction. However, in the leading case of *United States v. Kovel*,³⁰ Judge Friendly reasoned that communications made in the presence of an accountant retained by the client's law firm were still privileged by analogizing to a situation in which a lawyer with limited knowledge of a client's language has a linguist "in the room to help out":³¹

Hence the presence of an accountant . . . while the client is relating a complicated tax story to the lawyer ought not destroy the privilege, any more than would that of the linguist . . . ; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privi-

Communications: Presence of Third Persons and Agents"); 2 WEINSTEIN'S EVIDENCE ¶ 503(a)(3)[01] (1995) ("Lawyer-Client Privilege: Representative of the Lawyer").

²⁸ See *McCaffrey v. Estate of Brennan*, 533 S.W.2d 264 (Mo. App. 1976) (statement to attorney in presence of client's bookkeeper: privileged); *State ex rel. Cain v. Barker*, 540 S.W.2d 50 (Mo. 1976) (statement to adjuster for defendant's insurance carrier: privileged). See also *Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12, 19-21 (D. Neb. 1985) (statements to attorney in presence of experts and consultants retained by client: privileged). Cf. *Mississippi Valley Trust v. Begley*, 275 S.W. 540 (Mo. 1925) (representatives of plaintiff hired an attorney's stenographer, who also did outside work, to dictate affidavit and bond which were then presented to defendant; documents were not intended as communications to attorney and attorney-employer of stenographer was not retained to represent plaintiff: not privileged); *State v. Carter*, 641 S.W.2d 54 (Mo. 1982) (report of psychiatrist who examined defendant at attorney's request: not privileged because privilege was waived by raising insanity defense and because psychiatrist was independent contractor who did not assume fiduciary duty to defendant or counsel simply by accepting fee to examine); and *State v. Panter*, 536 S.W.2d 481 (Mo. App. 1976) (statement to private investigator recommended by attorney but retained by defendant: not privileged). Significantly, in each of the foregoing cases in which the court found the privilege inapplicable, there was no relationship between the third person and the attorney.

²⁹ 564 S.W.2d 579, 582 (Mo. App. 1978).

³⁰ 296 F.2d 918 (2d Cir. 1961) (statement to accountant retained by attorney: privileged).

³¹ *Id.* at 921.

lege is designed to permit.³²

The presence of a sociolinguistic observer at the initial public defender interview would, we have concluded, fall well within the range of services that would "foster the success" of the attorney-client relationship. Given the Missouri Supreme Court's commitment to "retain[ing] and strengthen[ing]" that relationship and the court's consequently broad construction of the privilege,³³ we believe the Missouri courts would find the privilege applicable to communications to an attorney in the presence of an independent researcher. Certainly the privilege is preserved if the sociolinguist is in a consulting relationship with the attorney and the purpose of her presence is to assist the attorney in representing the client more effectively. The privilege is presumably at greater risk if the observer is primarily governed by her own research agenda and the information gathered at the interview is not under the attorney's control.³⁴

Having examined the ethical and legal issues raised by the question of preserving attorney-client privilege, and having defined the role that an observer might take without threatening this privilege, the question for us then became whether and how this consulting role can be squared with the ethical obligations of a social scientist. The following section reviews these obligations and in the process identifies some problems in existing ethical models for sociolinguists. We conclude by developing some ethical guidelines within which a sociolinguistic observer might function while undertaking projects such as this one.

III.

ETHICAL OBLIGATIONS OF SOCIOLINGUISTS

The minimum standard to which natural and social science researchers must adhere when doing research with human subjects is that their research be ethical — that is, research must be conducted in a way that does not bring harm to subjects. Social science researchers connected with universities typically must obtain approval for their

³² *Id.* at 922.

³³ State ex rel. Great American Insurance Co. v. Smith, 574 S.W. 2d 379, 383 (Mo. 1978).

³⁴ Consider, for example, the following frank admission by the Danet research team: "With our special focus on language and communication, we felt that we could present ourselves as communication experts who could discuss cases with lawyers and perhaps offer new insights into the ways they were handling their cases. Admittedly, however, this was not really a goal of our research, and it was by no means clear whether we had anything to offer the attorneys along these lines." Danet, *supra* note 1, at 909. They also indicate they were unwilling to agree to the request of one attorney that he retain ownership of any tape recordings. *Id.* at 913.

research from a University Human Subjects Committee. Such committees review research proposals to assure that risks to subjects are outweighed by "the sum of the benefits to the subject and the importance of the knowledge to be gained as to warrant a decision to allow the subject to accept these risks";³⁵ that the welfare of subjects is adequately protected; that sufficient provisions have been made to keep information gained through research confidential or anonymous;³⁶ and that satisfactory procedures have been put in place for obtaining the informed consent of subjects.³⁷ The guidelines on "Research Involving Human Subjects" used by Washington University state that "Not only the rights of the subjects to be protected against injury or invasion of their privacy, but their interests as members of a free society in preserving their dignity, are recognized as of major concern and must be considered."

These standards constitute the bare minimum for most social scientists. Clearly the human subject guidelines described here would

³⁵ RESEARCH INVOLVING HUMAN SUBJECTS: INFORMATION AND INSTRUCTIONS (Washington University, St. Louis 1994). Risk is broadly defined to include the possibility of any physical, psychological, legal, economic or social injury. *Id.*

³⁶ "Anonymous" research procedures do not record the identity of subjects because it is not required for follow-up. "Confidential" research procedures code data with a series of numbers and letters that can be identified with a particular individual in some point at time. Subjects are not identified by name but by code number. The project director is charged with keeping the key to the code in locked storage. However, it should be noted that the law does not recognize a social scientist/informant privilege, and so "there is no way that a fieldworker can protect tape recordings or notes from legal seizure unless he or she is willing to go to prison for contempt of court. Thus, a simple assurance that the fieldworker will not use the informant's name in papers or publications does not constitute a full guarantee of confidentiality of records." Donald Larmouth, *The Legal and Ethical Status of Surreptitious Recording in Dialect Research: Do Human Subjects Guidelines Apply?*, in LEGAL AND ETHICAL ISSUES IN SURREPTITIOUS RECORDING 1, 7 (Monograph 76, American Dialect Society, University of Alabama Press, 1992).

³⁷ Informed consent means "the knowing consent of an individual or his or her legally authorized representative, so situated as to be able to exercise free power of choice without undue inducement or any element of force, fraud, deceit, duress or any other form of constraint or coercion." Washington University, *supra* note 35. Of particular concern to Human Subjects committees are groups with "limited civil freedom" such as prisoners, clients of institutions for mentally ill or mentally retarded persons, and persons subject to military discipline, or groups which may be understood as not being able to give knowing consent, such as viable fetuses, newborns and minors. Typically, informed consent is signalled by the signing of a consent form, although this may be supplemented, when appropriate, by an oral explanation in front of a third-party witness. Consent forms should include a clear explanation of the procedures to be followed, a description of attendant discomforts and risks to be expected, a description of benefits that can reasonably be expected, a disclosure of alternative procedures that might be beneficial for the subject, an offer to answer any questions concerning inquiries and an offer to tell subjects how to contact a Human Subjects Committee if they have questions or complaints, and a statement that the person is free to withdraw consent and discontinue participation in the project at any time. It is understood that even an "informed consent" cannot allow subjects to waive any of their legal rights.

militate against any research activity that would threaten the attachment of the attorney-client privilege. However, these guidelines do not suggest what role a researcher can play in a consultant or contract position. Furthermore, a group of sociolinguists has recently argued that merely adhering to the ethical norms laid out by Human Subjects' Committees often leads to the objectification of subjects.³⁸ Researchers — rather than the researched — ultimately decide the limits of the research (by, e.g., deciding what counts as “innocuous” deception), and researchers are not obligated to produce any positive benefit to participating subjects.³⁹ These sociolinguists also note that often human subjects' guidelines merely protect universities and researchers from legal or other liabilities arising from research by ensuring that subjects sign consent forms, but that the meaning of “consent” and indeed the purposes of “research” may not be clear to non-academics.

Most disciplines have developed ethical codes to address the specific concerns of their research. Sociolinguists tend to come from two disciplinary backgrounds—linguistics and anthropology—and ethical discussions have developed along significantly different lines in these two disciplines. In linguistics, the delineation of ethical responsibilities to subjects has not proceeded much beyond these general principles.⁴⁰ In anthropology, however, as we shall see, there has been a much more complex, sophisticated and extended analysis of ethical responsibilities in situations such as that faced here—when a social scientific observer is asked to undertake a kind of confidential research and has responsibilities to two or more different groups (in this case, public defenders, clients, and professional colleagues). We will begin by reviewing the one extended discussion of ethics available in linguistics and then turn to anthropology.

The sociolinguists who have been critical of the limitations of simply following human subjects' guidelines — that is, doing “merely” ethical research — have proposed that the goal of sociolinguists should instead be the practice of *advocacy* or *empowerment* research.⁴¹ An *advocacy* approach to social science argues that an ethical approach to social science is necessary, but not sufficient. This approach says that social scientists have two additional ethical obligations: the obligation to correct errors and the obligation to satisfy a

³⁸ Deborah Cameron, Elizabeth Frazer, Penelope Harvey, M.B.A. Rampton, & Kay Richardson, *Ethics, Advocacy and Empowerment: Issues of Method in Researching Language*, 13 LANGUAGE & COMMUNICATION 81, 86 (1993).

³⁹ *Id.* at 83.

⁴⁰ For discussion of ethical considerations affecting linguists, see Cameron et al., *supra* note 38.

⁴¹ *Id.*

debt incurred to a community with which they have worked.⁴² Although social scientists generally understand their work as “correcting errors,” often their results are only made available to professional colleagues. The advocacy approach argues that where false or damaging or stereotypical ideas are widely circulated, a social scientist has a responsibility to take her research to audiences outside the academy. It also argues that when a community needs help, researchers have a duty to use their knowledge and expertise for that community. The classic example of advocacy research in sociolinguistics is the example of the “Black English” trial in Ann Arbor, Michigan. A number of African-American students in the public educational system had been identified as having learning disabilities. A group of parents brought a lawsuit against the school system, arguing that its failure to recognize the distinctive linguistic variety (African-American Vernacular English, or AAVE) used by the students had led to their miscategorization as well as to other educational disadvantages. The trial pivoted around the issue of whether AAVE was a distinctive linguistic variety. A number of linguists provided advice, support and expert testimony on behalf of the plaintiffs. (The defendants were unable to find linguists willing to testify on their behalf). The case resulted in a judgment for the plaintiffs.⁴³

The advocacy approach is not without problems. In particular, it continues to maintain inequities in knowledge between specialists and non-specialists. Cameron, et al. point out that “where *only* the expert advocate has access to specialist knowledge about a community's language variety. . . . [s/he] retains some very significant powers.”⁴⁴ Because communities rarely speak with one voice, the specialist decides whose interests she will support. Sometimes (as in the project described here) the people with which a researcher has worked belong to two distinct groups (public defenders and clients), and may have very different agendas and needs, some of which are opposed. Members of the affected communities may not have the information they need to engage in informed internal debate.⁴⁵ One solution proposed to these problems is an *empowerment* approach to social science research.

Empowerment research is distinguished from both the “merely ethical” and “advocacy” approaches in that the subjects of research play a greater role in setting the research agenda. Such empowerment

⁴² William Labov, *Objectivity and Commitment in Linguistic Science: The Case of the Black English Trial in Ann Arbor*, 11 LANGUAGE IN SOCIETY 164 (1982).

⁴³ *Id.*

⁴⁴ *Supra* note 38, at 85.

⁴⁵ *Id.*

calls for the use of interactive research methods, acknowledgment of subjects' own agendas, and sharing of expert knowledge.⁴⁶ Such research is designed *with* human subjects, in contrast to research *on* them. It emphasizes feedback techniques, that is, "the presentation of findings to the researched in an effort to get more informed consent to what you will eventually say about them."⁴⁷ An even more radical school of empowerment research argues that the only criterion for doing research should be its utility for the researched.⁴⁸ In this approach, researchers would not strive to empower subjects (a formulation which implies that it is still the researchers who have the power, and that they can then decide whether or not to relinquish it to subjects), but instead the researchers' power would be limited to the choice of subjects with whom to work. Once the subjects are identified and chosen, they — and not the researcher — would decide what should be the topics, methods and end result of the research. However, few researchers are willing to yield such control over a project, for both ethical and practical reasons. For instance, the researcher committed to such a research agenda might find herself empowering subjects to exercise power over others in ways the researcher might not approve.

Because most researchers design projects to address theoretical and substantive issues and not to test new research methodologies, there are few clear examples of empowerment research in sociolinguistics and the problems that accompany such research have not yet been fully considered.⁴⁹ For example, if one is working with a very disadvantaged group, empowerment research may require the researcher to help subjects obtain certain basic skills (literacy, English as a second language, accounting skills) *before* group members can be enlisted as research partners.⁵⁰ When working with people from a markedly different culture or subculture, one may find that "the very idea of research . . . might be so far from their sphere of experience as

⁴⁶ *Id.* at 87.

⁴⁷ *Id.* at 90. See also Cunningham, *Translator, supra* note 1, at 1383-87.

⁴⁸ See, e.g., Esther Figueroa, *Research and Empowerment: Who's Empowerin' Who?*, 13 LANGUAGE & COMMUNICATION 101 (1993).

⁴⁹ Cameron et al., *supra* note 38, at 88.

⁵⁰ For instance, Gayle Haberman was hired by a group of largely illiterate, Spanish-speaking immigrant women in California to train them in running their own economic collective. She trained them in how to put together an annual budget. Subsequently, she was criticized by an outside consultant who said that she had imposed her own view of what was important upon the group. Haberman persuasively argued that what it means to be disadvantaged is to be kept in ignorance of basic tools (including literacy, computer skills and budgeting) that are necessary to run a business effectively. GAYLE HABERMAN, HEAVEN SENT HOUSECLEANING COOPERATIVE: THE ROAD TO SELF-MANAGEMENT AND WORKPLACE DEMOCRACY: REPORT AND TRAINING MANUAL (Palo Alto, CA: Heaven Sent Housecleaning Cooperative 1994).

to render them unable to make those informed decisions."⁵¹ For instance, McElhinny found that some police officers, even those who had already agreed to be audiotaped, were still baffled by the notion of participant observation. A year spent living with and observing the lives of others had no place in their experience. "What do you *really* do?" they repeatedly asked her.

Finally, and perhaps most critically for this project, the empowerment approach may seem to imply that power is a sort of thing that individuals and groups can have more or less of and thus that researchers should be largely working with powerless groups. However, Cameron et al. emphasize that power is never simply monopolized by one group. They argue that researchers should think about the many simultaneous, interacting dimensions of power when planning research.⁵² Within the context of the criminal justice system, for example, public defenders exercise a fair amount of power over the fate of their clients. However, while public defenders may appear relatively powerful in comparison with their clients, they are not necessarily powerful figures within their field at large. Unlike most other attorneys, they cannot choose the clients they will represent and cannot withdraw from representation if the client fails to take their advice or wants the attorney to pursue goals that violate the attorney's own values. They also cannot control the number of clients they represent or the scope of the litigation and so are chronically overburdened. Ideally, a researcher studying the defender-defendant relationship would try to find ways of improving conditions for both attorneys and clients (by, for instance, finding ways to revise intake interviews so that clients would be better able to tell their stories and public defenders would be better able to get the detailed and accurate information they need). In practice, however, conflicts may well arise, in which case an independent researcher would be forced to decide which of the subjects she was trying to empower (and why she was making those choices).

In the field of anthropology, as in many academic disciplines, there is an ongoing discussion about the relative needs, contributions and status of applied and academic practitioners. There has also, recently, been a discussion of the different ethical concerns that face academic and applied (or practicing) anthropologists. This discussion has been made more intense in the past decade or so by the decline in academic positions available for anthropologists, with a concomitant rise in the number of applied anthropologists. In 1986, for the first

⁵¹ Kate Howe, *Unanswered Questions, Unforeseen Dangers*, 13 LANGUAGE & COMMUNICATION 113 (1993).

⁵² Cameron et al., *supra* note 38, at 88.

time since the founding of the American Anthropology Association (AAA) at the turn of the century, there were more anthropologists employed outside the academy than inside it.⁵³ Partly as a result, a number of anthropologists have voiced concerns that the Principles of Professional Responsibility, the ethical guidelines of the AAA, do not adequately serve the needs of a changing discipline. For example, intense attention was focused on a section of those guidelines censuring secret research. Prior to 1990, the guidelines stated: "Anthropologists should undertake no secret research or any research whose results cannot be freely derived and publicly reported."⁵⁴ Applied anthropologists asserted that this proviso was not compatible with doing contract research, and so should be eliminated. They argued that the emphasis on the principle of academic freedom over all other considerations might reflect academic anthropologists' work in theory-building and the general advancement of knowledge, but was not compatible with the policy-related and action-oriented work in which they were engaged. In particular, they argued that applied anthropologists need to be sensitive to the confidential needs of other disciplines, governmental agencies and corporate employers in certain circumstances.⁵⁵ Applied anthropological work may have commercial value, may be legally or politically sensitive, and may even have strategic military significance. The National Association of Practicing Anthropologists subsequently developed a separate ethical code that did recognize the concerns of applied anthropologists.⁵⁶ In particular, the NAPA guidelines state that:

As practicing anthropologists, we are frequently involved with employers or clients in legally contracted arrangements. It is our responsibility to carefully review contracts prior to signing and be willing to execute the terms and conditions stipulated in the contract once it has been signed. . . . We will carry out our work in such a manner that the employer fully understands our ethical priorities, commitments and responsibilities. When, at any time during the course of work performance, the demands of the employer require or appear to require us to violate the ethical standards of our profession, we have the responsibility to clarify the nature of the conflict between the request and our standards and to propose

⁵³ Carolyn Fluehr-Lobban, *Introduction, ETHICS AND THE PROFESSION OF ANTHROPOLOGY: DIALOGUE FOR A NEW ERA* 3, 5 (Carolyn Fluehr-Lobban ed., 1991).

⁵⁴ STATEMENT ON ETHICS: PRINCIPLES OF PROFESSIONAL RESPONSIBILITY (American Anthropological Association 1971).

⁵⁵ Erve Chambers, *Acceptable Behaviors: The Evolving Ethos of Ethics Talk*, in *ETHICS AND THE PROFESSION OF ANTHROPOLOGY: DIALOGUE FOR A NEW ERA*, *supra* note 53, at 153.

⁵⁶ ETHICAL GUIDELINES FOR PRACTITIONERS (National Association of Practicing Anthropologists 1988).

alternatives that are consistent with our standards. If such a conflict cannot be resolved, we should terminate the relationship.⁵⁷

The NAPA guidelines also note that "[t]he cross-disciplinary nature of the work of practicing anthropologists requires us to be informed and respectful of the disciplinary and professional perspectives, methodologies and ethical requirements of non-anthropological colleagues with whom we work."⁵⁸

The American Anthropological Association did revise its Principles of Professional Responsibility in 1990 and, in a move to accommodate the changing needs of the discipline, dropped the censure of secret research.⁵⁹ However, the NAPA guidelines remain the strongest positive statement about the responsibilities and rights of practicing anthropologists, and they are the ones most useful in structuring the involvement of McElhinny in this project. Furthermore, the NAPA guidelines emphasize the positive ethical responsibility of applied anthropologists to communicate disciplinary perspectives to non-academics and to enhance the role of anthropology in public life and policy-making.⁶⁰ In practice this partly means producing data that has pragmatic value and finding clear ways, free of jargon, to describe anthropological methods so that they can be assessed, used and perhaps ultimately respected by the public.⁶¹

McElhinny, then, enters this project with ethical views that are most closely aligned with an empowerment approach and structured by the ethical guidelines of the National Association of Practicing Anthropologists. She believes that it is possible to conduct research in a way that empowers subjects without turning over control of the investigative agenda, and while attending to the ethical and legal concerns of public defenders and clients. Therefore, any tensions between the needs and desire of the researcher and the two primary subject groups (clients and public defenders) that may arise should be openly acknowledged and actively negotiated.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ REVISED PRINCIPLES OF PROFESSIONAL RESPONSIBILITY (American Anthropological Association 1990).

⁶⁰ See ETHICAL GUIDELINES, *supra* note 56. This responsibility is also noted in the new AAA guidelines, *supra* note 59.

⁶¹ M. Jean Gilbert, Nathaniel Tashima & Claudia Fishman, *Ethics and Practicing Anthropologists' Dialogue with the Larger World: Considerations in the Formulation of Ethical Guidelines for Practicing Anthropologists*, in *ETHICS AND THE PROFESSION OF ANTHROPOLOGY: DIALOGUE FOR A NEW ERA*, *supra* note 53, at 198.

IV.

PARTNERSHIP BETWEEN PRACTITIONERS AND ACADEMICS

Rosenthal began his critique of the unsuccessful attempt to record attorney-client interviews by Danet and her colleagues with the following quote: "many suppliers and users of social science research are dissatisfied, the former because they are not listened to, the latter because they do not hear much they want to listen to."⁶² Speaking from the valuable perspective of both experienced attorney and social scientist,⁶³ Rosenthal went on to give this advice:

To get the attention of lawyers and their cooperation in social research, the first critical step is to define an issue that is meaningful to lawyers: an issue they can understand; an issue they care about; one they feels merits some investment of their time. . . . One reason the [Danet] research may have aborted is that the authors planned the research fully in advance. . . . They did not do enough interactive exploration with their lawyer subjects and potential client subjects of how the inquiry might go forward.⁶⁴

Ironically, the same year that the Danet team published the report of their failed experiment, another article, largely unnoticed by legal scholars, was also published, describing a very modest but apparently successful study of attorney-client interviewing.⁶⁵ We find this project, undertaken and reported by John Goldsmith, a college undergraduate communications major at the University of South Florida, to be an encouraging and useful model for our project.

At the time of his research, Goldsmith was director of the Legal Advocate's Program, a service sponsored by the university's student government that arranged for local attorneys to provide limited free legal advice to college students. Each volunteer attorney donated one afternoon (3 hours) every term to meet with students; each student was allocated a fifteen minute appointment.⁶⁶ The student clients frequently complained to Goldsmith afterwards that they were not being helped adequately, typically referring to "communication" problems. Many of the attorneys were also dissatisfied and quit the program.

Combining his role as program director with his academic interest

⁶² Rosenthal, *Comment on Obstacles*, *supra* note 1, at 923 (quoting CHARLES LINDBLOM & DAVID K. COHEN, *USEABLE KNOWLEDGE: SOCIAL SCIENCE AND SOCIAL PROBLEM SOLVING* 1 (1979)).

⁶³ Rosenthal worked for a private law firm and served as Chief of the Foreign Commerce Section of the Justice Department's Antitrust Division. He also holds a Ph.D. in Political Science and authored a leading empirical study of the legal profession. See ROSENTHAL, *WHO'S IN CHARGE?*, *supra* note 1.

⁶⁴ *Id.* at 923, 925.

⁶⁵ See Goldsmith, *supra* note 12.

⁶⁶ Fifteen minutes is likewise the target length for the initial intake interview that our project will analyze.

in communications, Goldsmith designed the following research project. It was already his practice to attend the attorney-client interviews as a silent observer.⁶⁷ He began recording and coding each question asked by the attorney into one of three categories: Very Specific, General Specific, or Broad.⁶⁸ Immediately after each interview he asked the following questions of the attorney:

1. In which category would you rank yourself as to how you believe you were able to help the client:
 - a. very helpful
 - b. helpful
 - c. not very helpful
 - d. didn't help at all.
2. Did you perceive any communication problems between yourself and the client?
3. If there were communication problems, what were they and how did they affect your ability to help the client?

Within forty-eight hours he contacted the client (usually by telephone) and asked the following questions:

1. In which category would you rank the attorney helping you:
 - a. very helpful
 - b. helpful
 - c. not very helpful

⁶⁷ Goldsmith apparently functioned as the program's paralegal. Students initially contacted him; he "screened" them "to make certain that they in fact have legal problems" and then scheduled appointments. Goldsmith, *supra* note 12, at 398. His function seemed quite similar to that of the secretary/paralegal who handles intake in many legal aid programs. See Hosticka, *supra* note 1, at 602-03. Under Missouri law, he would seem clearly to function as a confidential agent of the attorney, and his presence would not prevent the privilege from arising.

⁶⁸ A *Very Specific* question called for an answer of three words or less; a *General Specific* question called for an answer limited to a specific statement or account (e.g., "What were you doing in the house that night?"); and a *Broad* question allowed the interviewee to define the parameters of the response (e.g., "What can I do for you today?"). There are some problems with Goldsmith's coding scheme. First, it mixes several different criteria (e.g., length of response and degree of control over topic that the client had). A client could produce a short response, but feel s/he had said all that was appropriate. More subtly, what counts as a question is solely defined from the attorney's point of view. One problem in attorney/client communication could be that clients may not always be able to tell when they're being asked for information and when they're being offered some. Goldsmith does not define how he identified questions. Linguists have devoted a great deal of ink to this problem, which is by no means straightforward. (See, e.g., E. Goody, *Toward a Theory of Questions*, in *QUESTIONS & POLITENESS* 17-43 (E. Goody ed., 1978). For instance, a speaker could say "My name is Eagles?" and although the utterance sounds like a question, of course he knows his own name. He may be checking to see if other speakers understand what he's saying. A similar phenomenon occurs when someone who is an expert is explaining a complex task to a novice. "You need to take this form? And go down the hall and to the right, and then around the corner?" The questions check to see if the person understands. These kinds of utterance could be quite common in attorney-client interactions, but should be carefully distinguished from information-gathering questions.

- d. didn't help at all.
2. Did you perceive any communication problems between yourself and the attorney?
3. If you did perceive communication problems, what were they and how did they affect the attorney's ability to help you?

Goldsmith was successful in contacting 56 out of the 65 clients whose interviews he studied.⁶⁹

The results of this simple but rather elegant study were quite interesting. Almost the same number of attorneys (20/64) as clients (22/64) identified the encounter as not helpful. However, significantly *more* attorneys (46/64) than clients (38/64) indicated encounters as displaying communication problems.⁷⁰ Attorneys and clients differed strikingly as to *what* they thought caused communication problems. Clients complained that "they felt cheated" because the attorney did not seem interested in how they felt, that the question-and-answer format did not allow for complete explanations, that the attorney interrupted too often, and that the attorney was not speaking plainly enough. Particularly interesting was the complaint from more than one client that during the interview they remembered additional facts not included in their initial explanation but did not tell the attorney unless asked directly because they did not know if the additional facts were important.⁷¹ An overall impression from the clients was that they had a difficult time expressing themselves to the attorney in a clear and coherent manner.⁷²

Attorneys described client statements as "incoherent" but generally attributed the problem to the client's emotional state (and never to their own method of interviewing). For example, after meeting with a woman whose husband had become senile, an attorney offered this analysis to Goldsmith:

She was so frantic that she failed to tell me what she wanted. When I asked her specific questions, like "Do you want a divorce," she would go right on talking about what she was saying before. I don't think that she needed to talk to an attorney; she just needed to talk to someone. . . . [H]er main problem is her misunderstanding of the role of an attorney.⁷³

Attorneys also frequently complained that clients "appeared upset"

⁶⁹ Goldsmith, *supra* note 12, at 399-400.

⁷⁰ *Id.* at 401.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 402. Compare this complaint reported by a client to Goldsmith: "He helped me with the problem . . . in a way. The legal problem. But he didn't put himself in my place. . . . He was only interested in what my legal remedies were and didn't act as if this situation happened to him. . . . Maybe I don't understand the functions of lawyers, but I always thought their main job was to help people." *Id.* at 400.

when told that the complexities of their situation did not permit a straightforward "yes or no" answer for advice or action. Goldsmith makes an acute observation: "It appears the attorneys didn't recognize that what *they* wanted (a "yes or no" answer to a complex *emotional* problem) was the same thing they were NOT prepared to give the client (a simple answer to a complex *legal* problem)."⁷⁴

Goldsmith correlated the results of the client responses with his coding of attorney questioning patterns. He found that 78% (32/41) of the interviews where most questions were Broad or General Specific were identified by the client as helpful, while only 43% (10/23) of the interviews with frequent use of Very Specific questions were identified as helpful.⁷⁵ He also offered some interesting conclusions about the effects of how types of questioning are sequenced. Interviews rated "helpful" by clients seemed to be marked by the following pattern of questioning: "Broad Question . . . General Specific . . . Broad Question." Goldsmith rated as less helpful the pattern: "Very Specific Question . . . Broad Question," which typically happened when the attorney would realize after a series of narrow questions that more background information was needed. Least helpful was this all too frequent pattern: "Broad Question . . . Very Specific Question," which usually occurred when the attorney interrupted a client's explanation. Goldsmith suggested that such questioning patterns made clients uncomfortable because they were unsure when the attorney was going to interrupt. As one client explained:

The lawyer never really understood what I was saying. . . . I would be trying to explain what happened and he'd interrupt me with a totally irrelevant question. He threw me so much off track that I forgot what I was saying and started over . . . which he didn't like very much.⁷⁶

As a result of his study, Goldsmith succeeded in making several changes to the program. With the help of the local bar association, he was able to increase the number of volunteer attorneys to the point that he could double the interview period from fifteen to thirty min-

⁷⁴ *Id.* at 403 (emphasis added).

⁷⁵ Goldsmith divided interviews into two categories: Very Specific questions used (A) less than 30% of the time and (B) more than 30% of the time. He does not explain why he used the 70% breaking point.

⁷⁶ *Id.* at 405. This client's comment suggests to McElhinny that what was problematic for clients wasn't necessarily a movement from open-ended to specific questions, but rather a movement from one question to another (say from one open-ended question to another) where the relationship between the questions was opaque to clients. This is an important distinction. This interpretation, if accurate, would suggest that attorneys should offer fuller explanations to clients about why they need certain information, rather than simply using a different sequence of questioning.

utes.⁷⁷ He also implemented a suggestion *made by a number of attorneys* that clients write out their problem before coming in for the interview.⁷⁸

With the exception of the DC Professional Discourse Project,⁷⁹ Goldsmith's project seems unique among reported studies of attorney-client discourse in the degree to which it conforms to the contours of Rosenthal's advice. Goldsmith defined an issue that was meaningful and important to those he observed and planned his research in response to the concerns expressed by both clients and lawyers about the existing interviewing system. Because he was already an integral part of the legal services delivery system, his presence was not disruptive and did not undermine the confidentiality of the interview. And the two reforms he implemented based on his research met with attorney cooperation because both the problem and remedy made sense to them.⁸⁰

Unlike Goldsmith's project and the DC Professional Discourse Project,⁸¹ in this project we are not supervising the legal work we will observe.⁸² Therefore, as discussed in Part II, in order to make sure the attorney-client privilege is not undermined, both of us must participate under the direction of the attorney and in the service of the client. For Cunningham, there is virtue that arises from this necessity. In order to gain entry to study the attorney-client interview, we must offer services that the attorney is convinced are beneficial to the client and the attorney's representation of that client, and that do not

⁷⁷ It is interesting that at the beginning of the article Goldsmith acknowledged that the "15 minute interview" was an "impossible mission" for the attorney but declared that "expansion of appointment times was *not possible* because of the small number of attorneys donating their services and the extensive use of the program by students." *Id.* at 398-99. (emphasis added). However, the conclusion of the article makes clear that it *was possible* to expand appointment times by increasing attorney resources. Presumably Goldsmith made effective use of his data to persuade the local bar to help him increase those resources; in other words, the social science research changed a real world option from *not possible* to *possible*. Another possibility might have been to reduce the number of students using the program, perhaps by Goldsmith's using the data to persuade the student government to lower their expectation of how many students could be served. He could have pointed out that it was better for half as many students to be served with a high rate of satisfaction than the existing number at a high rate of dissatisfaction.

⁷⁸ *Id.* at 406.

⁷⁹ Gellhorn et al., *supra* note 1.

⁸⁰ What is missing from Goldsmith's report is whether attorneys observed by him learned about either the client responses or his analysis of question patterns, and, if they did, whether any altered their interviewing methods accordingly.

⁸¹ Gellhorn and Roth, as clinical law professors, were supervising the law students observed by Robins and her anthropology students. It was the presence of the anthropology students that raised potential problems of preserving the attorney-client privilege.

⁸² Actually Cunningham plans to conduct a number of interviews acting as a volunteer public defender, observed by McElhinny, but this will be more for his own benefit than as a significant part of the project, which focuses on the regular staff of the PD office.

threaten any harm to the client or the professional relationship. This very necessity forces us, if we were not already so inclined, to conceive and structure our research in terms meaningful and valuable to the attorney, as Rosenthal urged 15 years ago. The potential payoff is at least two-fold. First, in the particular context of this public defender office, the results of our research have a real possibility of affecting the way these attorneys practice, and in any event will be regularly tested against that standard—a standard that previous studies of attorney-client discourse have generally not tried to meet. Second, if this project as designed and redesigned is ultimately understood as valuable by this public defender's office, it may offer a model that will gain acceptance elsewhere within the legal profession, and not just in the academy.

The very process of writing this working paper is forcing each of us to be very explicit about what we hope will arise out of the project. Thus McElhinny is realizing that there are important differences between (1) an empowerment research agenda, (2) a contract research situation and (3) a consultant position. Our agreement with the Public Defender's office commits her to the role of a consultant. A key issue for her is whether that role will prove to be consistent with her ethical aspirations to empower the subjects she will research as a consultant. The action and empowerment researchers worry about diversity of opinion in communities served, but they know that their ultimate goal is serving the community they've defined as the group they're helping. A contract researcher/consultant might find herself realizing that there are multiple communities, as in the case of this project, and that she is contractually obligated to one group but concerned about the other. Anthropologists have not thought enough about what action or empowerment research would look like when working with relatively privileged groups like attorneys.

Despite the best intentions of the public defenders, who are professionally committed to serving their clients' interests, there will inevitably be situations where client and public defender interests may not coincide. It is at that point that the perhaps rather arcane discussion of whether McElhinny views herself primarily as empowerment researcher or consultant becomes important, because if she found herself in a place where she was consciously being asked to assist the Public Defender's office in ways that she clearly thought were against client interests, and there was very little room for negotiating or talking about that, then she would withdraw. Because her consulting is being done on a voluntary basis, she has greater freedom to engage in continuing negotiation over the goals and methods of the project. She hopes, therefore, that her values as an ethical researcher can fully co-

incide with her duties as a consultant.

A copy of our memorandum of understanding with the public defenders office appears as Appendix One. It is likely that this understanding will change as the project develops, perhaps in part in response to comments that readers of this paper provide to us.

V.

THE PROJECT THUS FAR

In keeping with this project's aim to be responsive to the various communities it affects, we began by producing a version of this working paper and circulating it for comment to attorneys, law school professors and social scientists. Drawing on a suggestion received from this process, we decided to meet with the public defenders whom McElhinny would be observing and introduce them to the project by viewing with them the videotape of the jailhouse meeting between a felony defendant and public defenders (described above in Section I), and discussing the videotape and project aims. This meeting intentionally included rather experienced public defenders (*i.e.*, public defenders with 5 or more years of experience).

In the following weeks McElhinny received orientation at the public defender's office comparable to that received by law school students serving as interns in the office. This included introductions to judges, prosecutors and other public defenders, a tour of the courthouse, an introduction to and practice in filling out forms regularly used by the public defender, observation of several intake interviews, participation in several intake interviews under appropriate supervision and regular Socratic quizzing familiar to most law school students on what she had learned.

McElhinny then moved to the intensive observation of a small number of public defenders who had volunteered to participate. Also in keeping with a suggestion offered in one of the consultations described above, Cunningham drafted an introduction (*see* Appendix Two) which public defenders could use in explaining McElhinny's presence to potential defendants and in obtaining their consent to her presence. McElhinny quickly discovered that it seemed more socially natural to introduce herself, and to use a somewhat abbreviated form of Cunningham's draft (which is maximally explicit, but also more natural as a written document than a spoken monologue). Thus far she has observed four experienced public defenders.

At this point in the project, we can only describe results in very general terms. The study is still taking place and observation results are still in the process of being shared with the public defender's office. Moreover, we are constrained by the ethical considerations de-

scribed earlier. Determining what has been useful about this process is in itself something that must be determined by the public defenders and clients. However, some of the areas of emerging interest include the following:

- (1) the importance of greeting strategies for shaping the tone of the subsequent interaction;
- (2) the effects of different strategies of self-introduction and of different ways of addressing clients (first name vs. last name);
- (3) terms that are unfamiliar to clients which may be perceived as "ordinary language" by attorneys;
- (4) figuring out when and why clients cry;
- (5) considering the ways that forms used by the public defenders at intake structure attorney-client interactions, and asking (a) if this is desirable and (b) to the extent that it is desirable or necessary, how to design forms that are more user-friendly for all parties concerned;
- (6) considering the challenges faced by serving the bureaucratic/policing role of determining whether clients qualify financially for public defender services while at the same time serving the advocacy/legal role of beginning to represent a client;
- (7) the importance of providing background information on what comes next and the legal significance of certain terms and decisions, which may have become routine to public defenders;
- (8) strategies for dealing with clients whose first language is not English;
- (9) topic control in the course of an interaction (*e.g.*, who interrupts whom and how, who asks questions and how); and
- (10) the effects of nonverbal communication (eye gaze, seating positions, handshakes, claps on the back, and the like).

At the time that this article is going to press, McElhinny has met with one of the public defenders and carefully reviewed findings thus far, seeking ideas about what that attorney finds useful and novel. The above list has been included partly with this attorney's comments in mind. This meeting has led to several suggestions for further investigation, and several important and constructive observations about the role of intake interviews as opposed to other forms of contact in the process of working with a client, and questions about how other offices structure the whole intake process and relative amount of client satisfaction with these processes. Plans for the future include the following possible directions:

- (1) further investigation of the domains that are identified by the authors and the Public Defender's office as of interest, through the observation of additional intake interviews;
- (2) comparing the intake processes in other professions that op-

erate under similar constraints (for example, medical clinics offering free services to patients who qualify on the basis of a financial eligibility determination);⁸³

(3) developing a method for follow-up contacts with clients to determine how they perceived the intake interviews.

We plan to proceed by talking to clients in unstructured ways to develop ideas about what questions would be meaningful and appropriate to them. By making their input an important component and seeking their guidance in the methods for soliciting client input, we hope to literally "give voice" to the clients in a way that both serves the needs of the public defender office and empowers its clients.

We encourage readers to provide us with feedback, comments, suggestions and criticisms.

APPENDIX ONE

TO: [DIRECTOR, PUBLIC DEFENDER OFFICE]
 FROM: PROFESSOR CLARK D. CUNNINGHAM
 RE: CLIENT INTERVIEWING PROJECT
 DATE: February 24, 1995

Dr. Bonnie McElhinny, a linguist visiting this year in the Anthropology Department at Washington University, has volunteered to serve as an unpaid consultant to the — Public Defender's Office, working in collaboration with me. The purpose of her consulting would be to assist you and your staff in better understanding clients and in improving interviewing skills. She has particular expertise in observing and interpreting subtle speech events like pauses, changes in intonation and volume, sounds like "uhm," and patterns of conversation such as the form of questions and interruptions. Much of her research has been based on a year long study of citizen-police officer interactions in Pittsburgh. She has also researched differences among ethnic groups in the United States in the way they speak: for example African-Americans typically pause for shorter periods of time and overlap speech more than most white Americans. Failure to be aware of such cultural differences may cause an attorney to misinterpret a client's behavior or miss an important cue.

The following methodology would be used for the project. Dr. McElhinny would be enrolled as a volunteer paralegal and receive the same orientation and training as student interns, such as undergradu-

⁸³ See, e.g., Monica Heller & Sarah Freeman, *First Encounters: The Role of Communication in the Medical Intake Process*, 10 DISCOURSE PROCESSES 369 (1987).

ates from —. This orientation would include the usual observation of client interviews by various experienced attorneys. Following the orientation, she would conduct initial and confined interviews following the same guidelines as govern all interns, thus familiarizing herself with the interviewing system now in place. After this initial phase, she would observe initial interviews conducted by selected senior attorneys, including myself and you, probably for a period of 2-4 weeks. She would develop a system, approved by you, for obtaining information from the client about the client's own perceptions of the interview and combine this information with her own linguistic analysis. Her analysis would be furnished to you as a confidential communication. If based upon her analysis you decided to experiment with alternative methods of interviewing, she would arrange for similar analysis to evaluate the effects of the experiment. She is willing to assist you and your staff in developing educational programs based on the results of this project that could be used both for training of new interns and attorneys and for continuing legal education.

At all points in time she would be identified to the client as a confidential agent of the public defender's office, governed by the same confidentiality requirements as interns and investigators. She would preserve the confidentiality of all notes and records of her observations, disclosing them to no one outside of the Public Defender's office without your express permission.

The procedures and work product of the Client Interview Project would be subject to your control in the same way as if you had contracted and paid for such consulting. Although both Dr. McElhinny and I may have some interest in using examples from this project for teaching and/or scholarly research, no information taken from an attorney-client interview would be used without your express permission and of course would not be used in any way that might bring harm to the client. The standard procedure in making any teaching or research use of an example from an attorney-client interview would be to edit the example to remove anything that might identify the particular client and further to use such information only after the individual client's case had been fully concluded.

APPENDIX TWO

PROPOSED "SCRIPT" TO INTRODUCE DR. McELHINNY

Good morning, my name is _____. I am a lawyer with the Public Defender's Office. This is Dr. Bonnie McElhinny; she is an anthropology professor at Washington University. She is working as a consultant with our Office to help us improve the way we communicate with our clients.

Everything you say in this meeting to me, as your lawyer, is confidential. Anything you want kept secret that we say to each other can not be told to anyone outside the Public Defender's Office, unless you give permission.

Because Dr. McElhinny is working with our office, the same rules about confidentiality apply to her. She cannot talk to anyone outside our Office about what she hears in this room. She is here to help me do a better job of being your lawyer. But if you feel uncomfortable saying anything in front of her, now or later, you can just ask that she leave, and she will.

Do you have any questions about what I have just said?