OBSTACLES TO THE STUDY OF LAWYER-CLIENT INTERACTION: THE BIOGRAPHY OF A FAILURE*

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This paper reports on an attempt by an interdisciplinary team to observe and record on tape lawyer-client interaction in the metropolitan Boston area in 1975-77. Current pressure for greater accountability to the public on the part of the legal profession makes the empirical, observational study of lawyer-client relations a timely, important topic. Despite the investment of much time and energy in creating conditions suitable for such a study, the project team failed to gain access to private lawyer-client encounters. The goal of the paper is to try to account for this failure, to analyze the nature of the obstacles encountered, and to stimulate speculation on how these obstacles might be overcome in the future. It is suggested that the doctrine of attorney-client privilege is the major obstacle which researchers must overcome. The idea of paying attorneys for their cooperation is also considered.

I. BACKGROUND

This is the story of a failure, told in the hope that it will contribute toward the eventual success of others in carrying out what is still a novel enterprise: the empirical study of lawyer-client relationships. Between 1975 and 1977, we attempted to observe and tape-record private lawyer-client conversations in the metropolitan Boston area, as part of a larger study of the role of language in the legal process. With funds from the Law and Social Science Program of the National Science Foundation, we tried to set up a research design for following the evolution of a set of civil cases from start to finish—that is, from the very first encounter between a lawyer and client to the final disposition of the case in court. Although we knew that in attempting to penetrate the inner sanctum of an attorney's office we were treading on largely new and,

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indeed, forbidden ground, the difficulties we encountered far surpassed our expectations. The goals of this paper are to lay out the obstacles we encountered and to stimulate speculation on some of the ways in which these obstacles might be overcome by others in the future.

Research on lawyer-client relationships is long overdue. It cannot be mere accident or oversight that while there have been hundreds of studies of doctor-patient communication, including many which relied mainly on observation, there are hardly any parallel studies of lawyer-client communication. Reviews of relevant literature by Waitzkin and Stoeckle (1972) and by Adler (1977) document the myriad studies of doctor-patient relations. In contrast, general reviews of literature on the legal profession and on the sociology of law contain few references which could be classed as studies of lawyer-client relations (Maru, 1972; Rehbinder, 1972). Only about fifteen years ago did social scientists begin to investigate what lawyers do. Studies by Carlin (1962), O'Gorman (1963), Smigel (1964), Wood (1967), Johnstone and Hopson (1967), and Donnell (1970) are among those which broke ground in attempting to examine lawyers' work empirically. However, none of these studies emphasized direct observation of lawyers' handling of clients as the main topic and method of study. Rosenthal's more recent pioneering research (1974) made lawyer-client relations its main focus, but it too employed interviews as the primary source of data.

It is increasingly recognized that most of what lawyers do is not in the formal setting of the courtroom at all, but rather on the telephone or behind a desk, or even in a coffee shop—not litigating but counseling, interviewing, negotiating, manipulating, and so on (cf., Goodpaster, 1978). In a 1974 conference on Law and Social Science sponsored by the National Science Foundation, Robert Levy observed:

> [I]n the effort to get facts about the law in action, we have concentrated entirely too much on what courts do and what administrators do and not enough on what lawyers do when they are not in court. . . . For sociological as well as legal reasons we have to find out how lawyers are advising clients and how lawyers conceptualize the problems (*North Carolina Law Review*, 1974: 1083-1084).

With all the recent public criticism of the professions generally, and specifically of the legal profession (e.g., Illich, 1977a, 1977b; *Time* cover story, April 10, 1978; Nader and Green, 1976; Tisher *et al.*, 1977; Auerbach, 1976; Lieberman, 1978; Haug, 1975; Abel, 1979a, 1979b), the legal profession is being forced to make itself more accountable to the public. The current debate

over the advantages and disadvantages of different ways of delivering legal services inevitably leads to the conclusion that the evaluation of services, however delivered, must include some scrutiny of either process variables (e.g., observation of what goes on in lawyer-client interaction) or outcome variables (like client satisfaction) or both (cf., Brickman and Lempert, 1976, especially the papers by Carlson and Rosenthal). Rosenthal (1976) argues persuasively that evaluation of the competence of attorneys can best be done only by direct observation of attorney-client interaction.

A related question which begs to be studied is whether clients understand their lawyers. "Legalese" is all too often incomprehensible to the lay person. To the extent that it has been the object of discussion in the past, various commentators have focused on the written language of the law (cf., Mellinkoff, 1963), and not on what Probert (1972) calls "law talk." The key issue is to what extent the technical language of law talk is necessary and functional, and, alternatively, to what extent it is dysfunctional—a means by which the legal profession unnecessarily mystifies the public and maintains its power and status in society (Edelman, 1977; Danet, 1978, in preparation).

The goal of our projected research on lawyer-client interaction was neither to evaluate the competence of lawyers nor to determine whether clients understand their lawyers, but to carry out basic research on the role of language in the conceptualization and resolution of disputes. Specifically, we were interested in questioning as a communicative process, both in private lawyer-client interviews and in the courtroom. Although the difficulties which we encountered may have been partly a function of the way in which we went about selecting cases, we believe that most of our difficulties were of a type which will be encountered by any social science team trying to gain access to the lawyer-client relationship.

II. THE BIOGRAPHY OF A FAILURE

The Need for a Lawyer-Researcher as Mediator

From the very beginning, it was quite clear that a social scientist alone, with no connections to the world of the legal profession, would not get far in attempting to organize a project like ours. Danet, a sociologist and sociolinguist, needed a lawyer-collaborator both in order to have him/her explain legal matters and to help her gain an entree into that world. We assembled an interdisciplinary research team. Hoffman, a

lawyer and law teacher, became co-principal investigator.[1] We hired three research assistants, each with a different background, and Bruce Fraser, a linguist, also worked with us part-time.

The mediator function of the lawyer in the team was extremely important. As workers in the field of law and social science know, the legal profession is almost by definition unsympathetic to the needs and interests of social scientists. By training, practicing lawyers are pragmatic and often anti-theoretical; they are trained to speak decisively and apply general rules to particular cases. Social scientists, on the other hand, are more likely to be speculative, skeptical, and oriented toward contributing to general understanding of how things work in the world, rather than toward the concrete solution of specific problems. Moreover, the stance of the social scientist is typically one which tends to overturn received notions of how social arrangements work (cf. Berger, 1963). Although lawyers have very little understanding of or sympathy for social science research, they recoil almost instinctively at any intrusion into their autonomy. In part this is the natural response of any of us who may feel uncomfortable at the thought of having someone look over our shoulder. Early on, then, we understood that the lawyer member of our team, Kenneth Hoffman, would have to play a critical role in persuading lawyers to participate in our study.

Attorney-Client Privilege: A Major Hurdle

From the inception of our project, we knew that a second major hurdle we would have to overcome was the attorney-client privilege. This is a rule of evidence, at both the federal and state levels, specifying that confidential communications between a lawyer and client made in the course of legal representation may not be revealed. They are not admissible in evidence in court unless the client waives the privilege and chooses to admit them. The opposing side in a lawsuit has no right to hear what transpires between a lawyer and client in

[1] Danet, then a novice in the world of law and social science, first submitted the research proposal to the National Science Foundation as solo principal investigator. Following preliminary evaluation of the proposal she was invited to resubmit, providing she obtained a lawyer-collaborator and proved in at least a preliminary way that an observational study of lawyer-client relations was feasible. Both conditions were eventually met; Hoffman joined as co-principal investigator, and helped to obtain the commitment in writing of two attorneys to participate in the study. Only later did we come to understand how little such written commitment meant, when it came to the test.

confidence. However, if the communications are not made in confidence, they are not privileged, and may therefore be admitted against the client in court. Thus, a very important question which must be dealt with by any researcher studying lawyer-client encounters is whether tape recordings made by the researcher in a lawyer's office are covered by attorney-client privilege, or whether the privilege is destroyed either by the presence of the researcher during the interview, or by the mere fact of tape recording, even if the researcher is not actually physically present. Thus, the problem is not merely ethical, as is the case for doctor-patient or psychotherapist-client encounters, but *legal* as well.

The presence of persons reasonably necessary for a lawyer to conduct the interview is not considered to destroy the attorney-client privilege. Secretaries, investigators, and interpreters are among those covered by the privilege. It is an open question, however, whether researchers are also within the privilege. In 1974 Rosenthal reported:

> So far as I have been able to discover, a social researcher has never been used in this way (i.e., required to testify in court on conversations heard), nor has any court ruled explicitly on the question of whether allowing a qualified researcher to observe consultations for a valid research purpose necessarily waives the attorney-client privilege (Rosenthal, 1974, Appendix A: 179-180).

The theory on which researchers would be covered (i.e., would not violate the privilege) views researchers as agents of the lawyer for the purpose of preparing the case. With our special focus on language and communication, we felt that we could present ourselves as communication experts who could discuss the 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.

Although the problem of confidentiality is still an unsettled question, we felt that it would not come up in practice if cases were carefully selected. We argued that the lawyers would have the ability to stop the tape at any time during the interview if highly explosive material appeared of a type likely to induce the opponent to take the drastic measure of subpoenaing the tapes.

One suggestion of a way to get around the problem of confidentiality of the tapes was to ask the other side in each case to sign a waiver stating that they would not seek to use the tapes. We realized, however, that this idea had several weaknesses. For one thing, it would be difficult if not

impossible to identify all potential adversaries in the early stages of each case. For another, the innate caution of most litigators would inhibit them from waiving their rights to use any potentially available evidence in their case. Most of all, lawyers probably would not even want to reveal to the other side that tape recordings of privileged conversations existed.

The Clinical Research Review Committee

These days, universities and research institutions and foundations are increasingly screening the conditions under which research is carried out on human subjects. The National Science Foundation, which funded our research, leaves it up to the individual institutions awarded its grants to perform this function, rather than carrying it out itself. Thus, in the early planning stages of our project, we appeared before Boston University's Clinical Research Review Committee. While we are basically sympathetic to the ethical concerns of committees like the one at Boston University, we encountered some difficulties in our dealing with them which we felt were unnecessarily inflated.

The committee was most accustomed to reviewing medical research, and therefore viewed the proposed research according to a medical model, in which the client is the subject of the research. We felt that this was awkward and inappropriate. First, the subject of the study was to be the lawyer, far more than the client. We were interested in studying how lawyers transformed lay versions of events into legal categories. Second, the relationship between the lawyer and client differs in important ways from that between physician and patient. The typical medical researcher is also involved with the patient as clinical practitioner. In contrast, it is extremely rare for trained lawyers engaged in practice, simultaneously to conduct social science research on their own activities.

Whereas physicians involved in research might encourage patients to take a certain medication because of research interests, rather than because it was clinically the best thing for the patient, we felt this could not happen with attorneys. On the contrary, as we have already suggested, the rule of attorney-client privilege predisposes lawyers to be extremely reluctant to allow a research function to intervene at all. Thus, we argued before the Clinical Research Review Committee that since lawyers would have a strong interest in protecting their clients' rights independently of the research, the clients in the

proposed study would be in *less* need of protection than were the subjects of medical research.

Nevertheless, the Clinical Research Review Committee was concerned with the consent of the client to the research, and believed the burden should be on the researcher to explain all the risks to the client. In our view, this requirement was inappropriate in that it interfered with the relationship between the lawyer and client. Furthermore, we felt that the lawyer would be in a much better position to know all the risks in each case than would the researcher. This risk of damage to the client's interests by disclosure of the contents of recorded conversations varies from case to case. In some cases, the client could make all his or her statements publicly without damaging the underlying claim, while in other cases the value of confidentiality would be much greater. We argued, among other things, that the problem of secrets appearing on the tape would be greatly diminished by the lawyer's ability to turn off the tape at any time during an interview. The Clinical Research Review Committee was not impressed with these arguments. They had a deep distrust of lawyers, and were skeptical of the responsibility they would exercise toward their clients.

Another concern of the committee was the eventual disposition of the tapes. Originally, they wanted the tapes destroyed after the completion of the proposed research. However, we felt that the tapes would be very valuable tools for research and education. Since the type of material we would record was so difficult to obtain, we felt that it should be preserved in some form for future research and training purposes. As a compromise, the committee provided that the tapes could be preserved if the anonymity of the clients was protected by the elimination of all mention of the clients' names on the tapes. In accordance with the requirements of the Clinical Research Review Committee, we prepared an informed consent form to be signed by both the lawyer and the client.[2]

The Massachusetts Bar Association

Anticipating that some of the lawyers we planned to contact would ask whether the Massachusetts Bar Association

[2] We would be glad to share our informed consent form, worked out after much thought and with the help of other attorneys, with others planning studies of lawyer-client interaction. Interested persons may write to the senior author of this paper.

approved of our research, we requested an opinion from its Board of Bar Overseers about both the legal issue of confidentiality and the ethical one of participating in the study. We were told that their policy was not to issue written opinions; but in a telephone conversation with a member of the staff of the Board, we were informed that the research would be proper and ethical, provided that the lawyers obtained the informed consent of each client, and that we reviewed the conduct of each lawyer in doing so, to determine the quality of consent on a case-by-case basis. Consent was to be "truly informed." Factors to be used in judging the quality of a client's consent were left rather vague. We were to examine the description of the research provided by the lawyer and relative degree of sophistication of the client.

The Lawyers Contacted

Knowing that it would be difficult to find lawyers willing to cooperate in our research, we sought a means to motivate them to participate. We decided to appeal to the institutional loyalties of alumni of Boston University's School of Law. A letter requesting participation in our study was sent to a random sample of 400 alumni. The goals of the study were described in a very general way. We also suggested that some monetary compensation would be available, but did not specify the amount. We anticipated that, as in mailed surveys, the response rate would be very low, but it was far lower than we expected. We received a total of only 31 replies; thus, less than one percent of those contacted even bothered to reply. Of the 31, half, or 16 refused outright to participate. The reason given most often was the confidentiality of lawyer-client conversations.

One lawyer said that it might be an aspect of either his personality or his tax practice, but that he would feel very uncomfortable allowing us to tape-record his interviews. Another indicated that he had discussed participating with two of his clients, and that both had reacted quite negatively to the idea of having their lawyer-client interviews recorded. One response, from an attorney with the Boston Legal Assistance Project, indicated that there was already a group of researchers involved with that office, and that the staff did not have any interest in becoming involved with a second research project. Several lawyers expressed interest in the project but said they were involved in unsuitable types of practice such as insurance

practices, in-house counsel for corporations, probate work, publishing, and generally noncontentious legal practice.

Of the 15 favorable replies, three were rejected as potential participants at the outset. One was located in Pittsfield, Massachusetts, a distance of over two hours from Boston. We sent him a polite thank-you letter, and dropped him from our list (perhaps ill-advisedly, considering the small number of potential participants remaining). Two other attorneys were dropped, following preliminary telephone conversations with them. One revealed that he was willing to allow us to record only those portions of each case which were not confidential, thereby foreclosing us from studying lawyer-client interviews which we considered integral to the study. A third attorney imposed conditions which we were unable to meet, including a requirement that the lawyer retain ownership of the tapes and that we indemnify the lawyer for any damages resulting from an alleged breach of confidence.

We made an active attempt to obtain the participation of the remaining twelve attorneys. One was out of town whenever we attempted to contact him, and we never got to speak to him at all. Danet and Hoffman met individually with each of the remaining eleven lawyers, over lunch (at our personal expense; our budget did not cover this expense), and discussed the project with each at great length. Each of the eleven expressed willingness and sometimes enthusiasm about participating in the research. We mentioned to each that we could offer symbolic compensation of approximately $20 in exchange for a half-hour consultation at some point during the recording of one or more cases. We had originally requested funds to pay the lawyers a larger amount, but the National Science Foundation had not authorized the requested sum. Hence it was clear that lawyers would have to participate not because of the money but because of the interest or some other motivation. Only one lawyer asked openly about the fee; in all other cases, we were the ones who raised the issue.

To our great disappointment, we never recorded interviews with clients in the offices of any of the remaining attorneys. Over time, of our own initiative, we dropped three more of them from our list, each for different reasons. Although we had originally planned to study only civil cases, we had become convinced that criminal cases were appropriate too, and that we were unnecessarily limiting the possibilities for recording by restricting outselves to civil cases alone. One lawyer handling primarily criminal cases was willing to participate in

the study, but we rejected him for a very specific reason: he was seeking employment as an instructor with Hoffman in the latter's capacity as Director of the First-Year Program at Boston University School of Law. Thus, we doubted his motives in cooperating in the study. It was important to us that the lawyers involved in the research maintain their independence from the researchers in order to protect their clients' interests. We had reason to doubt that this lawyer would do so.

We decided to drop a second lawyer after we had lunch with him because, although he was somewhat interested in the research, he appeared primarily interested in the payment, and we could not pay him at the rate he expected. He had a civil practice concentrating on personal injury cases, which would have made him quite suitable for our purposes. However, he informed us that his rate was fifty dollars an hour and that he expected to be compensated for all time he spent with us. As our budget did not permit such a heavy expense, we did not contact him further.

The third person whom we dropped was over seventy years old, and his faculties seemed to us somewhat impaired. He was eager to help and actually invited us to a deposition, which we attended. However, he seemed very slow to grasp the ideas behind the project, and made irrelevant comments. We doubted the quality of the consent he would be able to procure from his clients. He too had a civil practice, including personal injury cases. Reluctantly, we eliminated him too from our list. By now, only eight potential participants remained.

A Telephone Survey

Months went by and we did not hear from the attorneys. As we had arranged things, they were supposed to contact *us* when they had an appropriate client coming in. Occasionally we made reminder phone calls, and even prepared a chatty newsletter, both to keep them informed of project developments and to keep the channels of communication with them open—to no avail.

It was time to acknowledge our failure, and to try to account for it. We developed a brief, standard telephone interview, and Hoffman then telephoned the eight attorneys to find out how they had reacted over time to the idea of participating in the study. It was agreed that he alone should do this interviewing, since he was the only full-fledged attorney

on the project staff, and, presumably, the attorneys would be most frank with him.

The first of these eight remaining lawyers had a criminal practice, and said that he had *not* asked any of this clients to participate, though he thought the research was a good idea. He said he had no problems with the lawyer-client privilege, provided the identity of the client remained private, but that the research had just not been on his mind at times when he could have approached the subject with clients. He said that he would have screened his cases by type in order to choose appropriate cases for us to study, but that he had simply not thought of it at the right time. The second attorney had a practice comprised of some criminal and some civil cases. He informed us that he had asked two clients whether they would participate, but that both had had reservations about participating when he went over the declaration of informed consent with them. It is not known whether these two clients were involved in civil or criminal cases.

The third attorney was a solo practitioner in a small town in the metropolitan Boston area. He expressed a strong interest in participating in the study and asked many perspicacious questions. He told us several months later that he had asked five clients whether they would be willing to cooperate with the study. Three had said they would not be willing, one indicating that he would feel uncomfortable, and the other two not giving any reason. Two of the clients said they would be interested, but in one case the client had since broken off the relationship. With the other, there were scheduling problems. This lawyer said he would try to arrange for us to record later interviews if a good case came up, but we never heard from him again.

The fourth remaining lawyer had a civil practice including divorce work. He expressed interest in participating in the study, provided we modified our informed consent form to allow for the destruction of the tapes automatically whenever the lawyer or client exercised the option to withdraw. He said after a few months that he had asked a half dozen clients whether they would be willing to participate and that although they had been a bit reluctant, they had agreed because their trust in their lawyer was so complete that they would agree to whatever he recommended. He said he had not asked some of the clients because he "could find nothing of value for us" in their cases, and that he had no doubts about the advisability of participating. However, he had never asked us to attend any of

his interviews, although he did invite us to attend a trial. It is unclear why he never contacted us about the clients whom he asked to participate.

The fifth lawyer had a practice consisting mostly of workmen's compensation cases. He said he had asked about twenty clients to participate but that none had felt comfortable with the idea. The sixth lawyer, with a general civil practice, showed little concern over the problem of the confidentiality of lawyer-client communications and asked very few questions about our efforts to keep the tapes confidential. He said he was very interested in the problem of communication between lawyers and clients and was sensitive to the issues since his wife was a psychiatric social worker. However, we never did record any interviews. He reported that he had asked two clients and that both had declined. One had said it was too personal, and the other, involved in a domestic relations case, wouldn't allow it. This lawyer claimed that he had no doubts about the desirability of participating, but we sensed a negative note underlying his comment. Also, he indicated that he had discussed it with other lawyers, and that they had "doubted his sanity" to participate in such a study. This might have planted a seed of doubt, although he said that if we had pressed him harder for his cooperation, he might have made more of an effort. He selected those cases which he thought would be useful to us and rejected those in which much of the lawyer-client contact was over the telephone. He also decided that his domestic relations cases were more appropriate for us than his other cases.

The seventh lawyer, also with a general civil practice, said he had asked two or three clients whether they would participate, that one had refused and the others agreed, but that he had simply not followed up by calling us. He said he had had a couple of criminal cases in which the clients would have had no objection to participating, but that they were young and trusted totally in him so that they would not be operating with independent judgment in consenting.

The eighth lawyer tried hardest to cooperate. He spent a great deal of time preparing a list of cases for us which he thought might be appropriate. He had a general civil practice, and we felt that if we had cultivated the relationship with him to a greater extent, he might have provided us with some suitable interviews. However, we soon realized that the list he had prepared for us was of cases already in progress, and we would not have been able to obtain material from the very

beginning of any of them. Moreover, by the time we had established a good relationship with him we encountered two problems which would have probably arisen with all the lawyers. One was the extremely long time it normally takes for the completion of a civil case, especially since the waiting time for a civil case to go to trial in the Boston area at the time was approximately three years (our grant was for a two-year period). Another problem was that cases were more often settled out of court, while we had unrealistically hoped to follow cases into the courtroom.

To sum up, the large majority of the original sample of 400 attorneys had failed to respond to our initial letter. Of the 31 who did respond, 16 had refused outright. Of the remaining 15, we had felt obliged to eliminate seven. Of the remaining eight, despite intitial willingness to cooperate, only one stood the test of time. Reluctantly, we decided to abandon the attempt to study lawyer-client interaction altogether, and instead to concentrate all our energies on the study of questioning in the courtroom.[3]

III. THE OBSTACLES IN RETROSPECT

In an Appendix to his study of lawyer-client relations, Rosenthal (1974) confesses that his initial plan for an empirical study of patterns of client participation in negligence cases was to observe how lawyers and clients actually behave with each other. He approached 18 experienced lawyers, asking permission to be present during consultations with clients, whose agreement to be observed would also be obtained. Clients were to be free to decline involvement. Rosenthal also wanted to interview lawyer and client separately, following the encounter, and guaranteed to write up all results in a manner which preserved the anonymity of participants. "Politely, every lawyer refused" (Rosenthal, 1974: 179).

Rosenthal's analysis of the reasons lawyers refused to cooperate corroborates some of our own conclusions and experiences. He identifies four reasons why lawyers were reluctant to participate: (1) the matter of attorney-client privilege; (2) lawyers' reluctance to impose on their clients, to displease them by merely suggesting that they sacrifice their privacy (not necessarily because of the privilege but because of

[3] Since trials are in principle open to the public, the problems of access were far less formidable and, in fact, we were able to make good progress in the study of the language of trials (see, e.g., Danet and Kermish, 1978; Danet *et al.*, 1980; Danet, in press).

the ethical value accorded to privacy); (3) the lack of incentive for lawyers to cooperate in a venture which could only cause them trouble; (4) the reluctance to be observed.

A Privilege for Researchers

Probably the major obstacle to serious research on lawyer-client relations is the matter of attorney-client privilege. Until a privilege for researchers is recognized, social scientists will always have trouble gaining access to the inner sanctum of lawyers' offices. In his paper on evaluation of the competence of lawyers, Rosenthal has noted that a responsible weighing of the pro's and con's of this privilege:

> [H]as received almost no scholarly attention. It is sometimes forgotten that [this doctrine is] primarily justified as protection for the client. If applied inflexibly to prevent any access by evaluators, clients may be defenseless against continued widespread lawyer incompetence. Clients must be given great opportunity to waive their privilege of confidentiality in the interest of justice and in the interest of knowledge (Rosenthal, 1976: 281-282).

In a footnote, he adds that a recent case may have provided the first step towards reform: in *Richards of Rockford, Inc.* v. *Pacific Gas & Electric Company et al.* (1976), during discovery, the plaintiff moved to compel a third-party social scientist to testify concerning certain interviews with the defendant's employees. The court denied the motion in "a closely reasoned opinion which may be the first step in revising existing law" (Rosenthal, 1976: 282, n. 20). At the same time, he cautions, we ought not to grant social scientists *carte blanche*, but rather to specify the obligations of the researcher in situations where he or she is a party to otherwise privileged communication, and the sanctions to be applied for violations of these obligations.

Should We Pay Lawyers or Clients?

We mentioned earlier that the Law and Social Science Program at the National Science Foundation was willing to approve only a small sum as symbolic compensation for attorneys cooperating in our study. Although we tried to persuade its director to approve a larger sum, we ourselves had reservations about offering the attorneys a larger sum of money. We felt, for example, that it would be unethical for an attorney to receive payment from two parties for the same time—that is, if the client were already paying her or him for an hour's consultation, it would not be ethical for the attorney to receive payment from a researcher as well for that same hour.

Whatever one's position on this point, we suggest rethinking the whole issue of payment. If planners and program directors for research in law and social science seriously wish to promote observation of lawyer-client interaction in the future, they may have to consider offering attorneys a sizable sum in return for cooperation in research. Although we may personally find objectionable the prominence of money as a motivation among many lawyers in private practice, to be realistic, we may have to do business with them on their own terms—to contract with them for access not to specific cases, but to some general aspects of their practice, in exchange for a sizable fee.

We should also consider whether we might also offer payment to clients for cooperation in research on lawyer-client relations. In general, researchers interested in pursuing projects on this topic would do well to check the experience of those who have studied other types of professional-client interaction, starting with physician-patient interaction.

Whatever the utility of paying the people we want to observe, we should remember that money alone will not solve all the problems. For one thing, to the extent that the goals of the research have to do explicitly with evaluation of competence, it is not reasonable to expect that any lawyer will be eager to be "graded" in exchange for a sum of money, however large.

How Should We Sample What Lawyers Do?

In retrospect, we realize that a major factor accounting for our difficulties was that, independent of lawyers' subjective feelings about cooperating with us, there were objective constraints on the flow of their work which made it difficult for them to cooperate. Even if a lawyer remembers to telephone a researcher to invite him or her to be present for a particular consultation, a client may fail to show up for a first or later appointment, or may withdraw from the relationship with the lawyer altogether. Second, lawyers' days are often quite hectic, with last-minute changes made to allow for unexpected appearances in court.

In part, sampling must be dictated by the particular needs of any given research project. For some purposes it may be necessary to sample cases, for others, work days. In general, both because we need descriptive data on how lawyers spend their time, and because it is probably best to start with more feasible research plans, given all the difficulties, it may be wise

to start by carrying out what are often called "anthropological" observational studies, intensive observation of how lawyers spend their work days over a relatively long period of time. This approach also has the advantage of gaining greater trust and goodwill on the part of the attorney, without requiring him or her to take the initiative every time to contact the researcher and invite him or her to come to the office.

How Can We Make Lawyers More Sympathetic to Social Science Research?

Regardless of the tactics chosen to motivate lawyers to participate in research or to improve the researchers' control over the situation, there remains the long-term question of how to make the legal profession more sympathetic to the needs and interests of social science. One approach is to train more graduates of law schools as social scientists; there are a number of joint J.D.-Ph.D. programs, as at the University of Nebraska. Although having social scientists who are also lawyers might help create rapport with attorneys, this approach will not solve the problem altogether, since the number of graduates of these programs will always be relatively small.

More and more graduates of law schools are turning to work in public interest firms or group plans, where the pursuit of social justice is at least as important as the pursuit of financial gain, and we may find that practitioners in such settings will be more sympathetic to the social scientist. Graduates of law school programs with a heavily clinical or behavioral emphasis may also be more willing than the average attorney to allow researchers to observe what they do.

Looking back over our experience in attempting to observe lawyers and clients in private conversations, we believe that only a small part of our difficulties was unique to our project. In part, our difficulties may have stemmed from the fact that Danet was then a novice in the field of law and social science. We should have taken better account of the fact that civil cases are more often settled out of court than in, and that civil litigants wait years for their day in court. But these objective constraints can only help to explain why we were unable to tape-record the *final* stages of complete cases, not the early stages. Thus, most of the problems we encountered were of a general nature which anyone planning an observational study of lawyers will have to face. We have no easy solution to these problems of access to the lawyer-client relationship, though we hope that this paper will stimulate further thought and

discussion about the issues. In particular, we hope that it will spur social scientists to lobby for reform of what appears to be the major obstacle so far, the restrictions imposed by the norm of attorney-client privilege. We suspect that only when these restrictions are lifted or modified will we be able, at last, to open up the inner sanctum of the legal profession.

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