

JUSTICE TALKS:
AN ETHNOMETHODOLOGICAL APPROACH TO COURTROOM INTERACTION

by

TERESA E. WISE

(Under the Direction of Linda Harklau)

ABSTRACT

Institutions of all types, such as those that provide medical, legal and educational services, throughout the United States face the challenge of dealing with an increasingly diverse population. This study, informed by an ethnomethodological approach, examines and analyzes portions of transcripts from two medical malpractice cases tried in Kentucky in 2001 and 2002. It addresses questions concerning how institutional roles are instantiated and how social order is constructed and practiced. In each case the defendant physician was born and educated in India and came to live in the United States shortly after completing medical school. The study analyzes the endogenous social organization of courtroom practices with these specific defendants.

The study extends and broadens current work in conversation analysis and membership categorization analysis by examining both a unique institutional setting, the courtroom, and a largely ignored population of interlocutors within it, non-native English speakers. The application of conversation analysis and membership categorization analysis to the data in these cases shows that social roles and activities are deployed on a moment-to-moment basis and are not rigidly fixed by the institution.

The main findings concern: a) *Reconstituting institutional space*: The institutional space is a constantly reconstituting one based on the talk-in-interaction that occurs within it; b) *Portraying the participants*: Attorneys use multiple and intricate interactional techniques to portray themselves and their clients and to establish their mutual roles within the interaction; and c) *Problematizing the non-native speaker category*: The category of “non-native English speaker” is one that can function in a variety of ways and that deserves more “problematizing” within institutional settings.

INDEX WORDS: conversation analysis, membership categorization analysis, ethnomethodology, Sacks, Garfinkel, talk-in-interaction, non-native English speaker, institutional discourse, institutional review board (IRB), naturalistic data, turn design, courtroom interaction, legal language

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DEDICATION

This work is dedicated to the following:

Luis A. Davila, my husband and friend, who, in the spirit of conversation analysis, on a daily basis shows me how extraordinary is “ordinary” love.

Agustina Lizardi, my very much missed mother-in-law, who valiantly tried to teach me to dance with my feet but was more successful with my mind. She is now dancing somewhere over her beloved Isla del Encanto with Roberto Clemente.

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CHAPTER 1

INTRODUCTION: COURTROOM ENCOUNTERS

Institutional Bookings

“I’m sorry, I don’t recognize that book.” These words, spoken by a Muslim non-native English speaker witness, bring proceedings to a halt in Judge Eduardo Padro’s New York courtroom (Pickel, 2005). Why is this person ‘*sorry*’? How do we know that ‘*that book*’ is a bible? How do we make sense of this statement? More importantly, the social order in the courtroom having been disrupted, how do the local players in this setting proceed with the institutional work at hand? How do they understand, instantiate and enact the institutional roles they are given? What methods do the members of this scene employ to construct coherent social actions and practices?

Harold Garfinkel’s ethnomethodology and its progeny, membership categorization analysis and conversation analysis, provide a means of engaging with and answering these questions. In Garfinkel’s terms, the witness in this example has suddenly breached or bracketed the taken for granted coherence of the scene. The members of the social group (the ethno) are confronted with a challenge to the practices (the method) that they normally use to create a particular type of social action or activity. This witness, by stepping outside of those taken for granted and customarily unexamined practices, was no longer playing by “the book;” was no longer enacting the usual role, the “booking,” assigned by the legal institution within the courtroom.

Informed by an ethnomethodological approach, this study examines and analyzes portions of transcripts from two medical malpractice cases tried in a county in eastern Kentucky in 2001 and 2002 and thereby addresses similar questions concerning how

social order is constructed and practiced. In each of these cases the defendant physician was born and educated in India and came to live in the United States shortly after completing medical school. This study analyzes the endogenous social organization of courtroom practices with these specific defendants.

The courtroom provides a unique context for examination of social organization as created through language. “The conduct of cases in open court, a court’s ordinary business, is managed largely through verbal interaction” (Drew, 1985, p. 133). In few other settings are there such overt participant roles combined with specifically stated, indeed mandated, rules regarding language use. It is the interplay of these roles and rules and their application to the particular “facts” in dispute that determine the outcome for the plaintiff and defendant. In this milieu, the power of language is intensified and explicit, and its nuances worthy of detailed examination. Silverstein has stated that the law is "practicing linguistics without a license" (as cited in Matoesian, 2001, p. 8). This study examines that assertion along with the question that provides its natural counterbalance on the mythical scales of justice: “How does language practice law without a license?” How is the social order of the law enacted in the moment-to-moment institutional work of the courtroom?

Institutional Ubiquity: Rationale for the Study

While many exchanges within daily conversations are at least ostensibly between peers with relatively equal power positions, such is frequently not the case in institutional discourse where one party often holds more power than another, and the speech exchange system reflects this power distribution. Drew and Heritage (1992, pp. 21-25) provide three characteristics of institutional talk: 1) it is goal oriented in institutionally relevant

ways; 2) it frequently involves special and unique constraints on what may be contributed; and 3) it may be associated with inferential frameworks and procedures that are unique to particular institutional contexts. All three of these characteristics are plainly part of the courtroom context. In fact, the courtroom is in many ways a "naturally occurring experiment" (Woodbury, 1984, p. 197) for examination of institutional discourse—a rule bound and site confined linguistic environment.

In contemporary Western society, formidable institutions of all types impact and shape important aspects of our lives on a daily basis. Considerable amounts of time are occupied in various institutional contexts---government offices, educational establishments, workplaces, and service settings (Hutchby & Wooffitt, 1998, p. 145). Some institutions, such as schools and the media, are encountered on an almost daily basis and are engrained in our "normal" day-to-day lives. The significance of institutions that are encountered less frequently, such as the legal and health care systems, may well become prominent in our consciousness only on those sporadic occasions when we confront their infrastructure and internal nuances. In all of these settings verbal exchange or talk-in-interaction (Psathas, 1995), is a crucial activity creating, affecting and sometimes altering the outcomes of the institution's "real" activities or goals. Richland says that “[b]eyond the (rather uncontroversial) claim for some significance of language and its use in legal institutions, operations, and products, most ... studies also concur on a basic vision of language use as a medium not only for reference *to*, but fundamentally for construction *of*, social realities and orders” (2005, p. 236).

Institutional talk-in-interaction, between varying speakers and in multiple environments, deserves close and repeated examination. Talk is a central activity in all

institutions. Hutchby and Wooffitt (1998) give two primary reasons that examination of institutional contexts is important. First, these institutional settings not only consume a significant portion of our time, but often quite vital information is conveyed and important decisions are made within them. In some cases these decisions impact small numbers of individuals; in others the repercussions can ultimately affect many members of society. This is particularly true in legal cases where the decision in any particular case can serve as precedent for all similar cases and situations. The interpretation given to particular factual situations or to particular statutes can come to impact the lives of many people beyond those involved in the original case. In 1966, when the U.S. Supreme Court issued a ruling in *Miranda v. Arizona*, it was dealing with the arrest of a single individual, but the decision forever altered arrest procedures throughout the United States and mandated that police provide arrestees with particular warnings about answering questions and waiving their right to an attorney.

Second, close examination of institutional talk can reveal how "the 'institutional' nature of institutions themselves" (Hutchby & Wooffitt, 1998, p. 145) is created. Gee (1999) refers to this as the "boot strap" nature of language and institutions with each contributing to the existence of the other in a "reciprocal process through time" (p. 11). Thus, examining institutional talk reveals not just information about the talk, but also about the institution, how it may have changed over time, and perhaps how it might be transformed in the future. A rigorous focus on the details of institutional talk can "uncover new ways of identifying and estimating the dynamics of institutional process and evaluating the causes and consequences of its many asymmetries" (Heritage, 2005, p.

141). These detailed examinations can ultimately benefit the public who are “a silent audience for the oral work of the trial” (Dingwall, 2000, p. 899).

Success or failure in dealing with institutions is often heavily influenced by individuals' abilities to present themselves and their needs in a linguistic manner that conforms to the norms and expectations of the institutions and the actors within them. As Drew and Heritage point out, talk-in-interaction is the primary means by which “lay persons pursue various practical goals and the central medium through which the daily working activities of many professionals and organizational representatives are conducted” (1992, p. 3). The most successful interactants are those who can “on the spot” recognize both the concreteness and variability of the institutional social scene -- what Garfinkel called the haecceity, the “just-thisness” of social phenomena. Orderly social scenes by members must proceed “just here, just now, with just what is at hand, with just who is here, in just the time that just this local gang of us has” (Rawls, 2002, p. 38).

“This Local Gang of Us”: Significance of the Study

This study is at least partly motivated by the fact that “this local gang of us” is one that is undergoing significant and rapid change. It is undeniable that institutions of all sorts, including courts, are facing an increasingly diverse clientele. Interpreting the terrain of “just here” and “just now” is becoming more challenging and difficult. A growing community of immigrants with widely varying English skills and of first generation citizens with limited English abilities creates tremendous challenges for bureaucracies and institutions within the United States. The sheer numbers of minority language speakers has increased dramatically in recent years (Schmid, 2001, p. 55).

During the 1990s, speakers of languages other than English grew at seven times the rate of English-only speakers (Del Valle, 2003, p. 59). According to the U.S. Census Bureau, in March of 2003, there were 33.5 million foreign born individuals in the U.S., representing 11.7 percent of the U.S. population. In Census 2000, 47 million people (18% of the population) reported that they spoke a language other than English at home. Fifty-five percent of this group self-reported that they spoke English “very well.” The remaining forty-five percent reported speaking English “well,” “not well,” or “not at all.” As the census report states “the ability to communicate with government and private service providers, schools, businesses, emergency personnel, and many other people in the United States depends greatly on the ability to speak English” (United States Census Bureau, 2000, p. 1). Institutions of all types are just beginning to recognize their responsibility toward this significant and increasing portion of the populace and to grapple with effective and appropriate responses and approaches to new demands.

For some of the players within this changing “local gang” the difficulties of understanding and negotiating institutional speech exchange systems and of discerning the subtleties of power positions between speakers may be compounded. White (1990), based on her own experiences in representing minority groups in courts and before administrative bodies, asserts that there is a disjuncture between our vision of democratic participation and equality under the law and “the conditions in our society in which procedural rituals are actually played out. These conditions—the web of subterranean speech norms and coerced speech practices that accompany race, gender and class domination—undermine the capacity of many persons in our society to use the procedural rituals that are formally available to them” (p. 4). This assertion has

considerable intuitive appeal; however, the first step in determining the validity of such a statement is to carefully examine the local practices of social order when certain persons are participants. A generalization concerning institutional impositions can only be derived from local particularities.

While there is a growing body of work involving institutional talk-in-interaction in contexts as varied as private doctor-patient encounters to public news interviews (Frankel, 1990; Heritage & Greatbatch, 1991; Perakyla, 1996; Zimmerman, 1992), there has been relatively little recent work done on courtroom practices from an ethnomethodological perspective – particularly with the type of defendants involved here. This study provides "insights into the detailed procedural foundations of everyday life" (Have, 2001, p. 1) in the unique setting of the courtroom. The study contributes to and expands our understanding of this peculiar and important context and the interaction of particular defendants within it, while also providing insight into how context is constituted through language and how social order is constructed.

Research Questions

“Relatively few of the complex legal and factual issues that arise due to language or cultural differences have been thoroughly examined by the courts, resulting in a lack of clear guidance as to the exact contours of the rights implicated” (Cole & Maslow-Armand, 1997, p. 228). Ultimately, the contours of the communicative context implicate and shape the rights and outcomes of the courtroom. This study examines these contours in two civil courtrooms with non-native speaker defendants and addresses the following questions:

1. What are the actors in this legal setting *doing*? What members' practices and activities take place in these courtrooms?
2. How does the institutional talk-in-interaction contribute to and create the local social order? How are the defendants portrayed within that social order?
3. Given these particular actors, these particular defendants, at this particular time, in this particular setting, how does *justice talk*?

Scope of the Study

In this study, the social order of the courtroom is examined during three institutionally imposed turns of discourse: jury selection (*voir dire*), opening statement, and direct examination of the defendant. These turns each provide important opportunities for the work of *doing* or *talking justice* because they are the first opportunities for sketching the identities of the defendants and for outlining the principal components of their cases.

Of particular interest in this study is how the defendants are portrayed and described in the courtroom proceedings. As their professional positions would suggest, both are highly proficient users of English; however, both would most typically be labeled non-native speakers (NNSs) of English. The spread of English around the world has complicated the issue of how to define "native speaker" and "non-native speaker." As Valdes (2000) points out, there are now not only monolingual varieties of English such as British English, American English, Canadian English, and Australian English, but also varieties such as Indian English, Singaporean English, Nigerian English, Malaysian English, and Philippine English. While I recognize this definitional dilemma, I will nonetheless use the term NNS to refer to these defendants because they are speakers of

English for whom the issue of their “relationship” to English becomes clearly contextualized in the talk. As the data here reveal, these defendants’ non-native (or perhaps more accurately non-mainstream) speaker status and their birthplace are key topics of the institutional talk-in-interaction. This local *in situ* rendering of such status is the area of concern for this study, not an abstract definition of the term.

In the coming chapters, I first provide background information on non-native English speakers in legal contexts in Chapter 2; this chapter supplies a framework to understand the current status and treatment of NNSs in such contexts. Chapter 3 describes the data used in this study and discusses its collection and analysis. This is followed by a discussion of the theory and methodology of ethnomethodology and conversation analysis in Chapter 4. The unique structure of courtroom interaction as an institutional space is discussed in Chapter 5. Chapters 6, 7, and 8, through detailed examination of the courtroom interaction, discuss major findings of the study. In the final chapter, I suggest implications for future research, for the legal community, and for practitioners in other institutional settings that routinely work with non-native speakers.

CHAPTER 2 BACKGROUND: NON-NATIVE ENGLISH SPEAKERS IN LEGAL CONTEXTS

Introduction

As stated in the previous chapter, there has been a steady increase in the number of non-native and minority language speakers in the United States over the last fifteen years. Given the size of the United States, its vast number of government entities and the intricacies of their overlapping areas of jurisdiction and responsibility, it is inevitable that practically all individuals encounter a variety of policies and practices as they interact with various institutions within the educational, legal and medical systems. For the NNS these policies and procedures may be particularly perplexing. This chapter provides an overview of the rights and treatment of non-native speakers of English in legal contexts, particularly courtrooms.

“With the growing racial, ethnic, and linguistic diversity of the United States, issues of language and cultural barriers to equal justice are increasingly confronting prosecutors, defense counsel, and the courts” (Cole & Maslow-Armand, 1997, p. 193). Even for those individuals who speak some English, they

may not communicate or comprehend English adequately for a legal proceeding.

In order to avoid significant misunderstandings, a hurdle of constitutional importance, the defendant or witness may need an interpreter. This is not due solely to the legal terms and more sophisticated forms of English used in courtrooms, but also because many persons who use English as a second language have difficulty speaking or comprehending English in a pressured or highly

charged situation, or in a location that is not part of their common experience, such as in a courtroom or at a police station (ibid.)

To understand how courts have handled the presence of NNSs, this chapter first provides an overview of the rights of NNSs in legal settings and then turns to a review of various studies that have looked at courtroom interaction involving NNSs.

Policies and Perceptions

Potential problems for minority speakers who are interacting in various institutional contexts are compounded by the fact that at no point in its history has the United States federal government articulated, developed or implemented a comprehensive national policy dealing with language use, rights, diversity, promotion, planning or problems. Such issues have generally been ignored on the federal level while state and local governmental entities have found themselves left with the task of toiling in the “linguistic trenches” with day-to-day challenges and difficulties. According to Crawford (2000, p. 1), the U.S. “government hardly ever saw a need for legislation, or any other action, to regulate language usage. Its standard policy was to have *no policy* on language, explicitly defined and national in scope.” This stands in contrast to other countries that have predominantly English speaking populations such as Canada and Australia. Canada passed an Official Languages Act in 1969 and Australia has a National Policy on Language (1987) and a Language and Literacy Policy (1991) (Ricento, 1998, p. 86).

The United State’s *laissez-faire* attitude toward language issues is a reflection of the fact that until quite recently “America’s profusion of tongues has made her a modern Babel, but a Babel in reverse” (Haugen as cited in Crawford, 2000, p. 1). “Like no other

nation, the United States has exhibited a power to attract diverse peoples and to acculturate them rapidly” (Crawford, 2000, p. 1). From a linguistic standpoint, this capacity to absorb and reshape immigrants of diverse backgrounds, cultures and languages remains no less true today than it was at the country’s founding. The “reverse Babel” is as powerful now as it was in previous decades.

The overall number of minority language speakers has increased significantly in recent years, particularly since 1965 (Schmid, 2001, p. 55). As noted in chapter 1, in the 1990s, speakers of languages other than English grew at seven times the rate of English-only speakers (Del Valle, 2003, p. 59); however, there is no evidence that these speakers are failing to learn English. In fact, there is evidence that they are learning English more rapidly than those who immigrated during earlier periods (Veltman, 1983, 1988; Waggoner, 1995). A long-term study of second generation immigrants in South Florida and Southern California found that English was entirely unthreatened as the language of choice. By high school, 88 per cent of the children of Hispanic and Asian immigrants preferred to communicate exclusively in English (Dugger, 1998). There appears to be no real threat to the hegemony of English in this country.

Nonetheless, discussions and debates about immigration, perceived failures to adequately monitor U.S. borders, and “accommodations” for non-English speakers have intensified since the events of September 11, 2001—the attacks on the World Trade Center in New York City and the Pentagon in Washington D.C. U.S. immigration laws and monitoring systems have been tightened. The very creation of a Department of Homeland Security indicates a modified national dialogue regarding concepts of citizenship and foreignness. In fact, one of the attorneys in these cases overtly evokes the

connotations of 9/11 during the process of jury selection. These discussions mean that it is more important than ever to understand how non-native and minority language speakers are portrayed and treated within institutional frameworks.

Criminal and Civil Proceedings

Interactions within the complex local and federal civil and criminal justice systems may present serious difficulties for non-native English speakers.

Nowhere is the need for the protection of the language rights of minority groups more pointed than in contacts with the legal process. Many non-English speakers are recent arrivals to this country; here, they face not only a new language, but a complex criminal justice system that may be just as new and strange as the language (Dery, 1997, p. 837).

Del Valle says that non-English speakers are “at a frightening disadvantage when entangled within the U.S.’s criminal justice machinery” (2003, p. 160).

Right to an Interpreter

This study does not directly address the legal and linguistic complexities of determining a litigant’s or a witness’s right to an interpreter or the impact of using an interpreter in the courtroom. Nor does the data used in this study include the participation of an interpreter. Nonetheless, it is important to understand the rather tortured and often contradictory and ambiguous approaches that U.S. courts have taken to dealing with non-native English speakers and the numerous obstacles faced in this setting.

Many people assume that a non-English speaker automatically has a right to an interpreter when he or she is in court. In fact, this is not the case. The United States

Supreme Court has never ruled on the constitutional right to have an interpreter in either criminal or civil proceedings. Laws, practice and implementation remain mixed across the country. “Federal and state constitutional and statutory protections as well as old-fashioned common law parallel, overlap and intersect with each other creating a complicated pastiche of rights and limits...which are rarely well-articulated by the courts” (Del Valle, 2003, p. 165). Federal protections dealing with the right to an interpreter are derived from the Fifth and Sixth Amendments of the U.S. Constitution and from the Court Interpreter’s Act (CIA) of 1978.

The Fifth Amendment provides that no person shall be “deprived of life, liberty, or property, without due process of law.” While the Sixth Amendment says, “In all criminal prosecutions, the accused shall enjoy the right to...be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.” The full implications of these Constitutional rights for a non-English speaking defendant were first decided in 1970 in a case called *United States ex rel. Negron v. New York*.

Negron, a native of Puerto Rico who spoke no English, was accused of murder. He was tried and convicted after having been assigned an English-only speaking attorney. During the trial he was given only brief translated summaries of the testimony against him. The federal Second Circuit Court of Appeals found that the trial violated Negron’s Sixth Amendment rights to confront the witnesses against him. The court stated that as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded. Particularly inappropriate in this nation

where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy (p. 390) (Crawford, 1992, p. 238).

Eight years later in 1978, the Congress passed the Court Interpreter's Act. This Act requires that federal trial courts use competent interpreters in "judicial proceedings" initiated by the United States. Interpreters are to be made available for defendants or witnesses who are hearing-impaired or are persons "who speak only or primarily a language other than the English language ... so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer so as to inhibit such witnesses comprehension of questions and the presentation of such testimony" (28 USC §1827). Nonetheless, there remain "gaps" in how the statute is interpreted in individual courts and who ends up with an interpreter. The determination "as to whether a particular applicant is entitled to the appointment and the manner of proceeding through the use of an interpreter is still committed to the trial court's discretion" (Piatt, 1990, p. 83). The trial courts still decide the important questions of: a) who gets an interpreter? and b) who can serve as an interpreter?

On the first question, it is clear that the burden is on the defendant to ask for an interpreter. Reviewing courts have held that "to allow a defendant to remain silent throughout the trial and then upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse" (*Valladares v. U.S.*, 1989). After a defendant has requested an interpreter, the court is to conduct an inquiry in to the defendant's ability to speak and understand English. Courts seem to give a liberal interpretation to the meaning of "speak and understand." They have refused to provide

an interpreter where the defendant talked to an officer and a jailer in English, where judges or witnesses overhear the defendant talking to others in English or where the defendant was known to operate a store in an English speaking community (Gonzalez v. People of Virgin Islands, 1940; People v. Annett, 1967; State v. Topete, 1986). Although the first two cases are pre-CIA cases, they reflect a certain bias against providing an interpreter and “slowing down” the judicial process.

Baker (1999, p. 603) says that judges “face strong perceived incentives to find litigants competent in English.” These include 1) costs; 2) concerns about efficient management of the trial, including docket control and internal trial delays; and 3) apprehensions that interpreter errors or mistakes will affect the accuracy of the fact-finding process. Baker also asserts that “most judges are ill equipped” (1999, p. 602) to determine whether litigants need an interpreter or whether an interpreter is competent. Distinctions between survival English and the more sophisticated English skills that are necessary in the courtroom setting may be overlooked or disregarded due to the pressing exigencies of the legal process.

Nonetheless, sometimes a court’s discretionary determinations regarding the right to an interpreter are reviewed and overturned. In *United States v. Mayans* (1999), the defendant, a Cuban who had lived in the U.S. since 1971, started the trial with an interpreter; however, when he began to testify in his own defense in Spanish, the judge asked him to try and testify without the interpreter. The judge complained that the testimony would take twice as long with the interpreter and said that Mayans had lived in the U.S. longer than he had lived in Cuba, perhaps implying that Mayans should have learned English by this point. The court then refused to allow the use of the interpreter.

This ruling was appealed and the higher court said that this decision was a violation of the CIA: “the trial court’s error was in its insistence on evaluating [Mayans’] language skills in the course of the trial itself, and in front of the jury, where the consequences of miscomprehension would have been grave indeed. Because this clearly undermined the purpose of the interpreter statute, we conclude that the statute was violated in this case” (p. 1180).

These and other cases underscore the recipe for mixed results, if not disaster, when it is left up to judges with little, or more likely, no training in language learning and education to determine a litigant’s level of English competency. This is well illustrated by the following example provided by Del Valle (2003, pp. 173-174):

Judge: Would you tell me what your understanding of Count 1 of the indictment is; that is, the conspiracy charge? What do you think they are charging you with by alleging you participated in the conspiracy?

Defendant’s Attorney: He is asking you on the conspiracy what does that mean. What are you charged with? What did you do?

Defendant: With the telephone call?

Judge: What did you do? Did you work with other people to buy drugs and sell them?

Defendant: I used the telephone.

Judge: The point is, if you enter a plea of guilty now, you can’t withdraw it later because you don’t like the sentence that you get.

Defendant: Yes.

Then later in the trial:

Judge: Do you understand?

Defendant: Yeah, little bit.

Judge: What is your problem, language problem?

Defendant: Well, no. I don't know how to read that much. I understand. I understand.

The court decided that there was “some language difficulty but not a major one.” On appeal this decision was upheld, the higher court saying that even if the defendant's responses were “brief and somewhat inarticulate” there was no need for an interpreter.

The National Center for State Courts recommends that judges conduct a short preliminary examination of litigants to determine if they need an interpreter. Among the suggested questions are: “How did you come to court today?” “Tell us your birthday, how old you are, and where you were born.” and “Please describe for me some of the things (or people) you see in the courtroom.” (Hewitt as cited in Baker, 1999, p. 603). As Baker rightly points out, questions such as these fail to distinguish between an individual's abilities in basic English versus the more complex English that is demanded in the courtroom (p. 602).

There are significant differences between being able to communicate in every day circumstances and the communicative skills necessary in a courtroom situation. Even native speakers are sometimes perplexed and confused by courtroom rituals and questioning procedures. As Baker (1999) says:

Many non-English speakers have enough proficiency to communicate in English at a very basic level, but lack the proficiency to function in English at a trial.

Judges who are not trained to assess language competence frequently overlook the distinction between “survival English,” which many non-native English speakers have and the more sophisticated language skills that a party or witness requires in

order to describe person, places, situations, and events accurately and completely; give chronological narratives; and request clarifications when questions are vague or misleading (pp. 602-603).

If a court does determine that an individual lacks adequate English language skills, then for certain types of cases they must appoint an interpreter.

In Kentucky (the site of data collection for this study), courts are required to appoint an interpreter for “persons who cannot communicate in English” (KRS 30A.410 to 435). In December of 2004, the Kentucky Supreme Court adopted extensive rules detailing procedures and standards for appointment, qualifications and duties of interpreters. (Amended Order: Amendments to the Rules of the Administrative Procedures AP Part IX. Procedures for Appointment of Interpreters of the Court of Justice). However, there is little guidance as to how a court should construe the phrase “cannot communicate in English” and as in the federal courts, judges have wide discretion in determining when and for whom an interpreter is appointed. As one attorney said, “I represented many non-native speakers during my 4 and half year stint at [the county legal aid office] and there were many times I feared that those clients did not have a clue what was going on. It’s one thing for a non-native speaker to understand “Stand over there” in English, but it is entirely different to understand “you have the right to remain silent.” The non-native speaker does not always get the concept” (A. Sneed, personal communication, August 26, 2004). Kentucky courts have also given broad interpretation to “understand English” when reviewing a criminal defendant’s waiver of his rights and admission of guilt (*Bautista v. Commonwealth*, 2003; *Torres v. Commonwealth*, 2003).

Judicial insensitivity to language issues has been apparent in some recent cases. In February of 2005, a judge in Tennessee made headlines across the country when he ordered a Mexican mother to learn English or to risk losing custody of her child. “Setting a court date six months away, the judge told the woman she should be able to speak English at a fourth-grade level by that meeting.” (Barry, 2005, p. A14). In supporting the judge’s ruling, one local resident said, “I know if I was in Mexico I would make an effort to learn Hispanic” (p. A14).

Selection of an Interpreter

Even when it is determined that an interpreter should be used, courts may make selections that seriously call into question the fairness of the proceedings. Under the CIA, the U.S. Administrative Office of the Courts certifies court interpreters based on results of criterion-referenced performance exams. Only if a certified interpreter is not reasonably available, can an otherwise qualified interpreter be used (Del Valle, 2003, p. 211). However, it is left up to the courts to determine who “an otherwise qualified interpreter” is. In some cases bilingual attorneys have been required to act as interpreters for their clients, close friends or relatives have been selected as interpreters, and in one instance in Texas an assistant district attorney was allowed to interpret for his own witness (Piatt, 1990, p. 85). It should go without saying that all of these circumstances pose serious conflict of interest questions that undermine the language rights of the litigants.

Piatt (1990) relays the following story regarding interpreters in courtrooms. During Piatt’s time in law school, a nearby federal district court called his school looking for a Spanish interpreter. Piatt’s friend volunteered. He went to the court and was told to

ask of the witness “Do you solemnly swear or affirm under penalty of perjury that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?” He turned to the witness and in Spanish asked: “You’re not going to lie, are you?” (p. 79). While this anecdote has certain comical aspects, it also underscores the many problems that non-native English speakers face in judicial proceedings and raises serious questions about how courts can best deal with linguistic issues.

Recent ethnographic work by Berk-Seligson shows that even when interpreters are used in the courtroom “inattention to pragmatic aspects of language results in a skewing of a speaker’s intended meaning” (2002, p. 2). For example, she found frequent changes of verb tenses from passive in the source language to active in the target language. In addition, the official court records and transcripts produced from court hearings and trials are in English only, so there is no means of reviewing the accuracy and possible harmful effects of erroneous interpretation. Who serves as an interpreter, and when and how interpreters are used in the courtroom is a serious societal issue for the working of the legal system.

Testimony by Non-Native Speakers and Cultural Defenses

Today it is unthinkable to consider denying someone the right to testify in a trial based on his or her native language, nationality, race or gender; however, prior to the Civil War this was quite common in the United States. “Most states had statutes which forbade peoples of color (usually African Americans, Native Americans, people of mixed race and Asians) from testifying against whites in courts of law. These statutes did not necessarily bar the targeted groups from testifying in matters involving other members of the same group” (White, 1990, p. 9). In one California case (People v. Hall, 1854)

involving the testimony of three Chinese men, the blunt and racist language of the court makes society's and the law's attitudes toward the Chinese and the Chinese language quite clear: "[it would be an] anomalous spectacle...[if a] distinct people ... whose mendacity is proverbial, differing in language, opinions, color, and physical confirmation ... is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our government. No harm would follow if they were allowed to speak among their own kind in their strange primitive languages. But their talk must not command any power in the world of white people" (White, 1990, p. 10).

Today, most issues concerning the competence of witnesses are left to evaluation by the judge or jury members. Witnesses are scrutinized individually to ascertain the reliability of their testimony. Competency is generally defined as the ability to perceive and remember accurately, to have an actual recollection of events, to be able to distinguish truth and falsehood and to be able to provide clear testimony. However, this "rational approach" to witness competency is a paradigm that "correlates with the typical language habits of socially privileged speakers; its effect is to transform the speech style of the dominant group into the norm against which the value of all testimony is assessed" (White, 1990, p. 13). Work by Conley, O'Barr and Lind (1978) has confirmed that presentational style in the courtroom has a profound affect on jury members and that "relatively subtle variations in courtroom speaking styles can influence jurors' reactions and deliberations" (p. 1395).

Despite the repeal of prohibitions against testimony by particular individuals, "some defendants, victims, or witnesses from different cultures may be misunderstood, or

their actions, appearance, or demeanor misinterpreted by police, parties, jurors, or the court itself. This is because social and behavioral norms of persons from a foreign country may appear suspect because they are not within the common experience of native-born Americans.” (Cole & Maslow-Armand, 1997, p. 195). “Jurors from dominant groups will sometimes find subordinate speakers to lack credibility *not* because of the substance of their testimony, but rather because of the non-dominant linguistic and narrative conventions that they use” (White, 1990, p. 18; Bennett & Feldman, 1981). Cole and Maslow-Armand argue that an accurate evaluation of a defendant’s demeanor and behavior in interactions with the police, and an assessment of credibility of a witness may require an understanding of cultural norms (p. 196).

Courts are traditionally unsympathetic to arguments by defendants that rest on cultural differences, conflicts or misunderstandings. For example, claims by defendants from China, Cuba, Mexico and Vietnam (to name only a few) that at the time of arrest they understood the translated versions of the Miranda rights (which allow an accused person to remain silent and to request an attorney), but considered it unimaginable to refuse to cooperate with police have been rejected. “Telling people in another language that they have the right to remain silent could well come across as suggesting that they do not need to volunteer information, for instance, but it might not advise them that they can refuse to answer questions, a practice that is regarded as rude in ordinary life” (Solan & Tiersma, 2005, p. 84).

Litigants Between the Letters

While most concerns and appeals arise around the denial of the appointment of an interpreter, there are instances of “partially-proficient defendants who feel their right to

testify will serve them best if they are permitted to waive their court-acknowledged right to a witness interpreter and to speak to the jury in English” (Dery, 2002, p. 561). In one such case from a California state court an Ethiopian husband accused of murdering his wife was denied the right to waive the services of an interpreter during his testimony. This case is a poignant illustration of the dramatic intersection of cultural, linguistic and legal issues in the courtroom.

Dery discusses the specifics of this case and argues that the right to testify (as derived from the Sixth and Fourteenth Amendments of the U.S. Constitution) should be expanded to include the defendant’s choice of language. Israel Wendemagengehu admitted stabbing his wife to death. The prosecution argued his acts were premeditated and therefore he was guilty of first-degree murder. The defense asserted that his acts were committed in the heat of passion thereby reducing the offense to manslaughter. Wendemagengehu had been assigned an interpreter during the proceedings, but after the prosecution began presenting its case the defense requested that Wendemagengehu be allowed to waive a witness interpreter and testify in English. This request was denied. According to Dery, this denial “effectively rendered [him] mute at his own trial and unknown to the jurors who ultimately convicted him of second-degree murder” (p. 545). The defense counsel tried to convince the judge that it was “vital to her client’s defense that he testify in his own ontological narrative” (p. 564).

This is a case where our defense is that [Wendemagengehu] acted in the heat of passion. And, I think to use an interpreter will have the effect of basically acting as a filter between what he is saying and what the interpreter says.

The interpreter cannot interpret it and give the same passion and meaning and feeling and emotion to the words as Mr. Wendemagengehu would give. And we're willing at this time to make a waiver of whatever the court requests that for the purposes of his testimony we're waiving all rights to the interpreter; that this will not, we will waive all issues on appeal dealing with the interpreter.

The defense counsel was prevailing upon the judge to realize that preventing Wendemagengehu from telling his story in English displaced him as a participant at his own trial and further marginalized him as a non-English-speaking immigrant in the dominant culture (p. 564).

This unusual case highlights what Dery calls the dilemma of "Truth versus Accuracy, which is fundamental to the nature and purposes of the American justice system" (p. 597) while also powerfully illustrating that courtroom language issues are more than academic exercises in staring at the nuances of nouns – they change lives; they change our institutions; they change our society. "In a court case, abstraction comes crashing into reality" (Shuy, 1993, p. xxii).

Courtroom Language

Legal language and more specifically courtroom language, the embodiment of this "crash of reality," have been analyzed from a number of perspectives. Beginning in the 1970s, legal discourse began to be studied on various fronts--by social scientists, linguists and sociolinguists. In 1974, Probert advocated concern for "law talk." "There

needs to be greater concern in the law, of all places, with language behavior, not just language, but language behavior” (Probert cited in Danet, 1980a, p. 448). In one of the earliest comprehensive articles on the topic, “Language in the Legal Process,” Danet stated that the study of legal discourse is concerned with "the nature, functions and consequences of language use in the negotiation of social order" (1980a, p. 449). Danet noted that there had been a shift from prior work on legal language which was largely philosophical and normative to the empirical study of legal discourse. She accounted for this shift in part as a “response to the call for greater accountability of social institutions *vis-à-vis* the individual in modern society” (p. 1).

Danet did not look at interactional data, but rather pulled together work from a number of disciplines to provide a description of linguistic concepts key to legal language, such as speech acts, pragmatics, presuppositions, and lexical, syntactic, discourse-level, and prosodic features. She also examined how legal language can function to effectuate social control and to present disputes. Subsequent work began to look more directly at empirical data from language in the courtroom and other legal settings. Studies have focused on: speech styles of witnesses (O’Barr, 1982; Conley & O’Barr, 1990); questioning sequences and question forms (Atkinson & Drew, 1979; Caesar-Wolf, 1984; Drew, 1990; Penman, 1987; Pomerantz & Atkinson, 1984; Woodbury, 1984); narrative structures (Bennett & Feldman, 1981; Maynard, 1990); jury deliberations (Manzo, 1993); and issues of power and patriarchy (Conley & O’Barr, 1998; Cotterill, 2003, 2004; Drew, 1992; Matoesian, 1993, 2001; Stygall, 1994).

Non-Native English Speakers in the Courtroom

Despite the large number of studies dealing with courtroom language from different perspectives, there have been relatively few studies that specifically deal with NNSs in the courtroom. The studies that have examined courtroom discourse involving non-native speaker or non-standard speaker participants have most frequently been in settings outside of the United States. For example, Eades and Cooke have looked at exchanges involving Aboriginal witnesses in Australia. Their findings indicate that the preference for stylized question-answer sequences over more elaborative narratives often clashes with the cultural styles of witnesses who are not part of the dominant culture (Cooke, 1996; Eades, 1994, 1996, 2000). Eades has documented communication problems involving Australian Aborigines in legal contexts over the last fifteen years, and conflicts that arise between Standard English (SE) and Aboriginal English (AE). She says that while there are a “number of communities in the remote northern and central areas of Australia where people speak ‘traditional’ languages as their first language, for the great majority of Aboriginal people, their first language is either Aboriginal English, or one of the English-lexified creolies, Kriol or Torres Strait Creole” (Eades, 2004, p. 491).

“My work over more than a decade has shown that even where the grammatical differences between SE and AE are not great, there are significant pragmatic differences, which have implications for intercultural communication” (Eades, 2004, p. 492). In fact, her work led to a handbook for attorneys called *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal*

Practitioners, and in at least one instance to the overturning of a murder conviction against an Aboriginal defendant.

Much of Eades' sociolinguistic and intercultural communication work focuses on various cultural asymmetries that may be exacerbated in the courtroom setting. As she points out, "just because Aboriginal English speakers share a lot of grammar, vocabulary, and pronunciation with other Australians, this does not mean that people always understand each other" (Eades, 2003, p. 1112). For example, unlike the courtroom examination system which depends on question-answer sequences, in Aboriginal societies direct questioning is regarded as rude, answering is not obligatory, silence is often an acceptable and appropriate response, narratives are valued, and direct eye contact may be considered rude or threatening (Eades, 2002). All of these assumptions run counter to those that are mandated in the courtroom and often in other institutional settings as well. "The fundamental assumptions and strategies of the one-sided interview, which are central to many Australian institutions, such as the law, are quite contrary to the assumptions and strategies involved in Aboriginal ways of seeking information" (Eades, 2003, p. 1118). Even in cases where an Aboriginal witness was being examined by his or her own attorney (direct examination), they were effectively silenced in a number of ways, including the structure of specific questions, interruption, and explicit metalinguistic directives and comments about how to respond (Eades, 2000, p. 168).

Gibbons has also examined communication issues in the Australian context. Based on his work with NNS in legal settings (mainly police interviews), Gibbons (2003, p. 211) has identified five indicators of possible communication problems in interaction. These are overt statements of incomprehension, asking what to say, responding with

apologies, asking for clarification, and absent or inappropriate responses. For example, in a case involving a Tongan-Australian man charged with murder the police asked “Do you agree that earlier tonight you told us that it was your idea to rob these men?” The man responds, “What do you want to say?” A later assessment of his spoken English on the Australian Second Language Proficiency Rating Scales determined his level of proficiency to be 1+ to 2 on a 5 point scale; yet, his prosecution was continuing based on confessions obtained during the police interview.

Lane (1993) examined data from New Zealand courtrooms involving communication between New Zealanders of European and Polynesian origin. He was specifically looking at commonly held beliefs about miscommunication arising from differences in the use of “yes” and “no” in response to questions of various kinds, particularly questions containing negatives. His findings did not confirm many of the commonly held beliefs he was examining. For example, he did not find that Polynesian origin respondents more often use ‘yes’ in responses to negative questions where European questioners would expect a ‘no’ (e.g. ‘You don’t want to lose your coat, do you?’ ‘No, I don’t’). Nonetheless, he did conclude that there were numerous instances of either misunderstanding or miscommunication between these speakers. He based this conclusion on the frequency of long repetitive questioning sequences that did not occur between native speakers. There was a “clear difference between the cross-examinations of native and second-language speaking witnesses in the occurrence of ‘long’ repetitive questioning sequences” (p. 175). The main problem for Polynesian second-language speakers in court was a general one of difficulty in comprehending the lawyers’ questions.

Lane asserts that “yes/no” responses create a serious problem in that they “can give the appearance of understanding when the second-language speaker has in fact misheard or misunderstood the question” (p. 180). He further concludes that these misunderstandings are processing or comprehension problems probably resulting from the syntactic complexity of the questions posed and that the easing of production difficulties facilitated by “yes/no” questions serves to mask and increase comprehension difficulties. There are “inherent ambiguities and indeterminacies surrounding the use of these two particles by speakers of English” (p. 173). The use of yes/no is not always so clear cut for native speakers either, and in fact, can have multiple meanings besides simply answering a question or agreement or disagreement with a statement—for example, as acknowledgement. Lane concludes:

Previous studies of native speaker/second-language speaker interaction (as opposed to cross-cultural or interethnic communication) have been in the context of co-operative, non-conflict situations. The results of this study suggest that in a situation where there is conflict between native speaker and second-language speaker, and the native speaker is in a controlling position with greater power and status than the second-language speaker, the conflict can exacerbate the miscommunication that arises from language difficulties, to the detriment of the second-language speaker (p. 186).

Similar intercultural communication issues exist for immigrant and indigenous communities within the United States. Phyllis Morrow (1993) has examined how speech and intercultural communication styles of speakers of the Alaskan Yup’ik language and of local Yup’ik influenced English might affect their interactions with the legal process.

“[A]s countries like Australia and the United States become increasingly culturally and linguistically diverse, the potential for miscommunication with immigrants intensifies. The area of intercultural communication with Native-American, African-American, and immigrant groups in the legal system is an important one for future sociolinguistic and sociolegal research” (Eades, 2003, p. 1132).

Two studies have specifically looked at cases involving foreign-born medical personnel in U.S. courts. Gumperz (1982) examined the case of a Filipino doctor who was working in Southern California as an emergency room physician. He was accused of perjury in a child abuse case. Comparing the doctor’s testimony in transcripts of pretrial hearings with his testimony during the actual trial, the district attorney concluded that the doctor had perjured himself to cover-up a misdiagnosis of the severity of the child’s burns. Gumperz and his colleagues concluded that although the doctor was highly fluent in English there were certain aspects of his answering style that caused his testimony to be viewed suspiciously by monolingual English speakers. These included: tense problems, unusual uses of coherence markers and pronouns, a high degree of verbal mitigation and indirectness, and prosodic qualities that seemed “unnatural” in U.S. English.

The case analyzed by Bresnahan (1991) originated at a Veteran’s Administration (VA) hospital in Michigan. After a marked increase in deaths due to respiratory arrest and an investigation by the Federal Bureau of Investigation (FBI), two Filipina nurses were indicted on multiple counts of murder. Both nurses were fluent in English although it was their second language. Segments of the transcript from the nurses’ trial were identified as “conflictive” based on four conditions: 1) repeated but unsuccessful

attempts by attorney or defendant to provide information; 2) verbal hostility or confusion on the part of the defendant; 3) impatience or vexation expressed by prosecutor; and 4) objection by judge, attorneys or the defendants. Bresnahan, using Goffman's framework concerning replies and responses, concludes that in response to questions from the prosecutors these defendants used low acceptability, high cost, noncongruent response strategies that challenged the right of the prosecutors to make negative suggestions and challenged the content of the suggestions. However, because they were not completely familiar with the linguistic, social and cultural rules of ordinary English and certainly not of legal exchanges in the courtroom, these response strategies were unsuccessful. They were seen as combative, evasive, uncooperative and not credible.

In an earlier study of the same case, Bresnahan (1981) looked at the types of questions directed to one of the nurses. She analyzed three question types from least to most coercive using a scale for coerciveness derived by Danet, Kermish, Rafn and Stayman (1976): *wh* questions; yes/no questions; and declarative questions. There was a clear correlation between the level of coerciveness of the question and the degree of responsiveness of the NNS, unlike the testimony of native speakers which did not show this correlation. In other words, the NNS was unable to successfully counter the more coercive questions and thus appeared uncooperative and unresponsive. She concluded that jurors should be instructed that "differences and difficulty in expression for the defendant, who does not speak English as a native language, should not be interpreted as evasiveness" (p. 571).

In a more recent case from a U.S. court, Bernstein (2002) discusses a bankruptcy case in which the debtor is a native-English speaker and the creditor (Kim) is a Korean

immigrant who asserts that he was not given adequate notice that the debtor had filed for bankruptcy. Kim, therefore, asserts he should be able to fully collect on the loan he advanced. Kim testified that he was told by the creditor “I go bankrupt.” Bernstein discusses how the law assumes that the concept of actual notice in this institutional setting is unproblematic; however, the “very concept and linguistic structure of the giving and receiving notice of an institutional fact is open-ended, rather complex, and often ambiguous” (p. 214) between this native and non-native speaker. In all of the cases mentioned above linguistic disparities between the institutional players have been examined. In this case the disparities between the two litigants were particularly highlighted because the case turned on a definition of what constituted the linguistic act of notification.

Conclusion

This chapter has examined how the courts have dealt with the issue of language competence and the rights of NNSs. It has examined how NNSs with varying language abilities have been treated by the courts and outlined the rights that they are given in that setting. The chapter has also reviewed the limited number of studies that have examined courtroom language involving NNSs. Most of these studies have come from outside the United States and have used a sociolinguistic or intercultural perspective as a frame of analysis. These studies have not used naturalistic recorded data nor given detailed examination to talk-in-interaction as it works to create institutional social order with varying types of interactants. Such examination is the aim of this study. The next chapter discusses the data used for this study, and the data collection and analysis procedures.

CHAPTER 3 DATA, METHODS AND DESIGN

Introduction

This chapter discusses the data used for the study, and the methods and design for its acquisition and analysis. It also offers some insights and considerations for other researchers who have an interest in detailed study of interactional data from legal settings. I originally conceived of this study as an examination of question and answer sequences between judges and NNSs in small claims (magistrate) court. Specifically, I had planned to look at examples of such interaction when the NNS chose not to have an interpreter for the judicial proceeding. I had acquired enthusiastic permission from a judge in a county in the greater metropolitan Atlanta area to videotape court proceedings. Recognizing the increasingly diverse population appearing before his court and the possibilities for miscommunication and misunderstanding, he described the study as “admirable and needed.” My selection of this court was based on the county’s large immigrant population, the court’s high volume of cases, and personal observations of the court.

Ultimately, I was unable to proceed with the study as first envisaged because the Institutional Review Board (IRB) of the University of Georgia determined that it would be necessary to obtain prior written consent from all the litigants in the courtroom. Given the flow of proceedings in this high volume court, this was a requirement that would have been virtually impossible to meet, and in addition, it would have altered the quality and character of the naturalistic data. The board also seemed to conflate the terms “non-English speaking” and “non-native speaker,” and considered NNSs to be vulnerable subjects. While this was a disappointing decision and one that resulted in significant

delay of my work, in hindsight, it served at least three purposes: a) to illustrate tensions between IRB definitions and legal definitions of public access and public forums; b) to highlight tensions between the evolution of IRB definitions and interpretations of regulations and those of various disciplines within the social sciences, particularly those that value naturalistic data; and c) to reshape and refocus the scope and emphasis of the study -- giving it greater focus on social context and issues concerning how NNSs are portrayed in institutional settings.

The discussion that follows first provides a brief history and overview concerning the role of institutional review boards and considers some of the inherent difficulties and potential stumbling blocks that may confront social science researchers who wish to work with legal discourse and other types of naturalistic data. Next, it turns to an overview of data sources for work that focuses on legal contexts, particularly courtrooms. The chapter then explains the data collection process for this study, provides details about the data collected, and finally describes the data analysis process.

Protecting the Innocent: IRBs and Social Science Research

In 1985, Drew wrote that one reason for a surprising lack of empirical research concerning courtroom discourse was due to the “very restricted availability of natural data, owing to the judiciary’s reluctance to permit court proceedings to be recorded for research purposes” (p. 133). While there are certainly still restrictions on recordings in particular types of courts and in some instances skepticism on the part of jurists to permit such recordings, in the intervening twenty years, attitudes of openness have become more common and there has been a considerable widening of electronic accessibility to courts and to many other types of public domains. For example, for the court junkie, Court TV[®]

which started in 1991 provides constant access to various high profile cases through its internet site and on the television airways. Its website says, “Court TV[®] provides a window on the American system of justice through distinctive programming that both informs and entertains” (Court TV, 2006). Court TV NewsSM provides live trial coverage during daytime programming. For the researcher interested in legal discourse, these widening avenues of data access are welcomed; however, these encouraging developments can be offset by an institution in the researcher’s own backyard: the institutional review board (IRB).

As of 2000, there were roughly 4,000 institutional review boards operating in the United States (Nelson, 2004). One of the main tasks of these boards is an important one: to ensure that research involving human subjects is carried out in an ethical and professional manner, and to thereby mitigate, to the extent possible, any physical or mental injury to the subjects of the research. As many university researchers, both students and faculty members, have come to learn, this is tricky business. More and more researchers in the social sciences and humanities have found themselves pitted against IRBs in exhausting academic equivalents of arm wrestling matches.

History and Background

The federal regulations that govern the work of IRBs are found in Title 45 Part 46 of the Code of Federal Regulations. There have been several major versions of these regulations including those from 1966, 1974, 1981 and 1991. The current version, most commonly referred to collectively as the Common Rule, is subscribed to by seventeen federal agencies and departments. For an institution and its researchers to be eligible for

funding from these agencies they must conform to the Common Rule (American Association of University Professors [AAUP], 2000, p. 2).

The primary impetus for development and implementation of these regulations and their subsequent evolution over the last forty years was concern over abuses in clinical and biomedical settings. Standards for judging physicians and scientists came to the world stage in the aftermath of World War II with the development of the Nuremberg Code. The stunning revelations of depraved concentration camp experiments led to codification of ethical standards for research involving humans. The Nuremberg Code set forth ten conditions that had to be met to justify research on human subjects. “The two most important conditions were the need for voluntary informed consent of subjects and a scientifically valid research design that could produce fruitful results for the good of society” (National Institutes of Health [NIH], 2004, p. 15). All of the members of the United Nations accepted the code in principle, but in the United States, as in other countries at that time, there was no mechanism for its implementation. As with the passage of many major federal regulations, that required galvanization around a crisis.

The crisis took the form of highly publicized clinical research abuses in the late 1960s and early 1970s. Among these were research in New York in which elderly patients were injected with live cancer cells without their consent and the Tuskegee Syphilis Study in which African American men were involved without their knowledge in a lengthy study on the natural history of syphilis. The latter study included the withholding of penicillin even after it was a standard treatment. These disclosures prompted U.S. Senate hearings, enactment of the National Research Act of 1974, and the

formation of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (NIH, 2004).

In 1979, this commission authored a report called “The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research.” The report put forth three basic ethical principles that should govern research with human subjects: respect for persons, beneficence and justice. The three principles embraced these ideas:

- *Respect for Persons*: Acknowledges individuals’ dignity and autonomy; requires informed consent and special protections for those with diminished autonomy.
- *Beneficence*: Requires a weighing of benefits versus harms; anticipated benefits must be maximized and possible harms minimized.
- *Justice*: Requires that subjects are chosen fairly; insuring that certain individuals or classes of individuals are not systematically selected or excluded without valid reasons. (NIH, 2004, p. 19)

The Belmont principles are interpreted and defined in the current regulations. They were written primarily with biomedical research in mind, yet they also apply to social and behavioral research. Even as the regulations were under development, there was discussion as to the advisability of having a single set of rules that applied to both medical and clinical research and social and behavioral research. The regulations that emerged attempted to address this concern by giving IRBs “the prerogative of formally exempting some research from the regulations, of conducting expedited review, and of waiving the requirement of signed consent under certain reasonable circumstances” (Sieber, Platner & Rubin, 2002, p. 1).

This is not to say that social scientists should be exempt from the regulations nor that there have not been questionable research practices in social science disciplines. For

example, the Chicago Jury Project of the mid-1950s involved surreptitious taping of the deliberations of a federal jury. The taping was done with the permission of the judge and the attorneys, but without the knowledge of the jury members. Fear of jury tampering led to the passage of a law banning taping of jury deliberations at the federal level (Simon, 1984). A primary concern was that some deception had been involved in a setting where privacy and confidentiality were viewed as extremely vital. Another more troubling example was the research of Stanley Milgram at Yale University in which he investigated people's susceptibility to perform immoral acts at the direction of authority figures. Participants willingly gave others what were later revealed to be fake electric shocks that escalated in severity (Brainard, 2001; Oakes, 2002).

A Body of Concerns

On their face, the regulations, their discretionary provisions and the definitions they contain seem palatable enough for those outside the clinical and biomedical world, but their "on the ground" interpretation has become increasingly problematic for those other disciplines. In 2000, the American Association of University Professors (AAUP) in conjunction with several social science organizations conducted a survey of social science faculty members concerning their experiences with IRBs. While some respondents praised their IRBs for drawing attention to ethical issues, others reported experiences that included undue delays, failures to follow the regulations applicable to survey and oral history research, and little familiarity with issues related to social science research.

Some qualitative researchers as well as humanities faculty members have documented interactions with their institutional review boards that they view as instances

of overextensions of authority and impositions of idiosyncratic or ethically questionable requirements. These have included actions by IRBs such as the following: investigating a literary piece by a faculty member with no notice to him, including threatening to attempt to block his publication; requiring that students doing practice interview assignments with family members obtain signed consent forms; requiring that students observing body language in the university gym obtain signed consent forms from everyone they watched (Nelson, 2004); delaying for one year allowing a principal to conduct action research in her elementary school; issuing approval for students to engage in fieldwork for a class assignment and then notifying the instructor halfway through the semester that approval had been withdrawn and the course would have to cease (Lincoln & Tierney, 2004). In addition, varying definitions of what constitutes “research,” varying interpretations of those definitions and of when IRB approval is necessary complicates and politicizes what is valued and what is accepted in academia (Roulston, Legette, DeLoach, & Pitman, 2005).

Additional concerns in the AAUP report centered on the composition of IRB membership and the lack of adequate appeal procedures. Many IRBs, particularly at small to mid-size institutions, are still composed mainly of “hard” science members with minimal representation of the social sciences. This issue is sometimes addressed at larger research universities by having multiple IRBs reviewing research from various disciplines. The AAUP recommends a minimum of three social scientists on a board. Such a minimum number may help to insure that one or more of the members “will be familiar with most of the major research techniques in the social sciences involving human subjects. There is also a better chance for a vigorous exchange of ideas about

social science research to take place among all the members of the IRB to their mutual benefit” (p. 11).

The AAUP also recommended that institutions establish an appeal process from IRB decisions. In discussing a particularly troubling case at his own institution, the University of Illinois at Urbana-Champaign, Nelson (2004) said the following: “The IRB’s independence meant that it was procedurally answerable to no one; it had come to a series of conclusions without even giving Wright [a junior faculty member] a hearing and he had no formal mechanism for appeal, though there is nothing in the federal regulations to prevent IRBs from establishing appeal procedures and separate appeal boards” (p. 214).

Overall, these writers argue that more and more frequently IRBs are failing to distinguish the obvious differences in risks between interviewing someone for an oral history or watching how someone dribbles a basketball versus giving someone experimental drugs. In addition, they say the IRBs are not primarily interested in fostering research and protecting subjects who may genuinely be at risk, but rather with protecting the institutions and themselves from any possible litigation. They say that this litigation avoidance perspective is reflected in the ever increasing jurisdiction that IRBs claim, a concomitant narrow reading of exemptions and a failure to exercise discretion when balancing risks and benefits and the need for informed consent. In other words, these critics assert that for the most part IRBs have an attitude of ‘why use a band aid when a body cast will do?’

The Proposed Study

I will now look at some of these issues in relation to the study that I initially proposed and more generally in relation to research that involves the collection of naturalistic data in courtroom settings. As mentioned at the opening of this chapter, I had obtained permission to film proceedings in a local small claims (magistrate) court. I was particularly interested in examining the interaction in this court that involved non-native English speakers who chose to participate in the proceedings without any type of interpreting assistance. The camera was to be set up in a location in the courtroom where it would capture the judge and those who appeared directly in front of the judge's bench—the area where litigants stand. Its presence would have been obvious to everyone in the courtroom. There were also built-in, although currently nonfunctioning, microphones at key locations in the courtroom (bench, witness stand, litigant's tables).

My original application for IRB approval stated the following: Since it is unknown prior to the calling of the court calendar how many non-native speakers of English will appear and to which courtroom they will be assigned, obtaining individual consent from each participant prior to the hearings would be virtually impossible and highly disruptive of the normal courtroom proceedings. In addition, attempting to obtain such consent at that time could easily have a "chilling" or "observer's paradox" effect on the normal interaction which the study seeks to observe. Those recorded and selected for possible inclusion in the study will be approached at the conclusion of the hearing. This procedure is the only practical and effective method to obtain the data necessary for the study, insure that it is credible, untainted data and minimize risks for the participants.

In other words, I was proposing to film the court proceedings and then obtain written consents after the filming. While mentioning obtaining consent, I also asserted in a cover letter to the board that the proposal fell into one of six categories of exempt research. A number of important issues, including definitions of research, exemptions, consent waivers, board membership and appeal procedures were involved in review of this proposal. Each of these is examined in turn below.

Who Are “Human Subjects”?

My proposed study obviously involved humans, but were they “human subjects?” This is not a flippant, irrelevant or irreverent question. IRBs are required to approve research that involves “human subjects,” and the applicable regulations define “human subjects” in a very particular way.

45 CFR 46.102(f) defines a “human subject” as follows: “Human subject means a living individual about whom an investigator (whether professional or student) conducting research obtains (1) Data through interaction or intervention with the individual, or (2) Identifiable private information.” The section goes on to define private information as:

information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information which has been provided for specific purposes by an individual and which the individual can reasonably expect will not be made public (for example, a medical record). Private information must be individually identifiable (i.e., the identity of the subject is or may readily be ascertained by the investigator or

associated with the information) in order for obtaining the information to constitute research involving human subjects.

It is somewhat difficult to see how those in a courtroom can “reasonably expect that no observation or recording is taking place” or that any information divulged during the courtroom proceedings will “not be made public” since they are already in a public forum. Other than juvenile courts, courts in all states are traditionally public forums. In Georgia, the Georgia Supreme Court has held that there is a presumption that the public will have access to all court records and this presumption can only be overridden in cases of clear necessity (*Atlanta Journal and Atlanta Constitution v. Long*, 1988). One of the reasons for open proceedings is to maintain the integrity of the judicial process, and persons in a courtroom cannot reasonably believe that they are providing information for a purpose that will remain private.

Ethnomethodological and conversation analytic research often involves observation of and/or capture of data in public settings. Given the growing ubiquity of cameras and webcams in public settings, for example, at banks, automatic teller machines, convenience stores, subway terminals, and on college campuses, is it realistic to think that persons in these settings “reasonably expect that no observation or recording is taking place”? The CFR section also requires that data be obtained through “interaction or intervention with the individual.” Does the capture of images and activities of all persons within a given public setting constitute “interaction or intervention with the individual”?

If research does not involve “human subjects,” then it is not subject to IRB review; however, at no point during the review of my application or during my

appearance before the board did the IRB broach this possibility for consideration or discussion. A well-positioned or prominent researcher might be able to make such a decision on his or her own and ignore submitting an application to the IRB. As one retired sociologist from the University of Washington said, “As long as it’s not public, you can get away with a lot. They are certainly not about to fuss with senior people.” (Shea, 2000, p. 7). Obviously, this would be an extremely risky stance for a non-tenured professor and certainly for a student. The awarding of a degree can be denied without the proper approval number from the IRB.

It is a natural tendency of virtually all administrative bodies to expand rather than contract jurisdiction; however, the usefulness of this “creeping jurisdiction” to the academic community and to the public at large is a legitimate concern. In one case that centered on review of conversations that had taken place between a demographer at the University of California Berkeley and a centenarian, there was a special appointee to investigate the case and a special review committee. The demographer spent countless hours documenting “his state of mind at every turn” (Shea, 2000, p. 1), and the department chair had to set aside his own work to deal with the matter. After six months of investigation, he was cleared of any wrongdoing and one committee member said, “We looked at this and said, ‘What have we done?’ (Shea, 2000, p. 1).

Exempt Research

As mentioned above, I asserted to the board that my research fell under one of six categories of exempt research as defined by the CFR. According to 45 CFR 46.101 there are six categories of research that are specifically exempt from IRB regulation even if human subjects are involved. One of these is:

(2) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures or observation of public behavior, unless:

(i) Information obtained is recorded in such a manner that human subjects can be identified directly or through identifiers linked to the subjects; and (ii) any disclosure of the human subjects' responses outside the research could reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, or reputation.

In my opinion, the proposed research could have been exempted under this provision. The courtroom is a public setting and so the research would be observation of public behavior by adult subjects. Although the recordings of the subjects could be linked to them, any possible disclosure could not reasonably be said to expose them to a risk of criminal or civil liability or be damaging to their financial standing, employability, or reputation. In fact, they were already in a setting where civil liability was being contested. In addition, transcripts created and used from the tapes could not be linked to the subjects. The board, however, obviously disagreed with this position since they asked for my appearance for a full board review, effectively discounting the possibility of exempt status.

One possible source of this difference in viewpoint concerning exempt status, revolves around the issue of what is "public behavior," what is a public forum, and who has the right to control it. This issue is also tied to the questions raised earlier about what constitutes "intervention" on the part of a researcher and how this relates to the growing presence of cameras in public locations. Courts clearly believe that the vast majority of

proceedings are public and that they control who and how those proceedings are observed. In Georgia, the Supreme Court has ruled that there is a right to camera coverage of trials unless the judge makes specific findings that such recordings are not within the requirements of due process and cannot be done without detracting from the dignity and decorum of the court (Uniform Rules of Superior and Magistrate Courts, Rules 11 and 22; Multimedia WMAZ, Inc. v. State, 1987; Georgia Television Company v. Napper, 1988). In fact, Georgia is what is often called a “tier one” state in that it allows the greatest amount of camera coverage in the courtroom. All courts have the authority to order that proceedings be recorded and such recordings can be requested by any interested parties. Once that determination is made by the judge, no matter the source of its instigation, the recording process becomes part of the judicial process and within the purview and control of the judge. Those who appear before a court can easily anticipate that the proceedings may be recorded.

One prominent researcher of legal discourse recently offered these observations: Mercifully, we did our original taping before IRBs had been invented. In our 1980s small claims research, I had some trouble at UNC. I argued that the proceedings were public, and the courts had final say over protecting the rights of the litigants. The presiding judges had already approved the research, and had decided to seek oral permission at the beginning of each session that we were taping. The UNC IRB wanted written consent, which would've killed the thing. I finally persuaded them by pointing out that the IRB had no authority to supersede what the presiding judges wanted to order. (J.M. Conley, personal communication, January 24, 2006).

In my particular case, the IRB did indeed believe that they could supersede the orders of the presiding judge in the courtroom. There was a clear disjuncture between what the IRB and judge (and I) considered to be a “public forum,” “observation,” “intervention,” and who has the right to control that forum. The IRB did ultimately approve the use of pre-existing tapes of the same nature as those that would have resulted from my request. Such a result seems to indicate that this board interprets “interaction or intervention with the individual” under 45 CFR 46.102(f) as presence within the same forum as the individual and/or interaction with institutional authorities who control the forum.

Waivers of Consent Requirements

Under 45 CFR 46.116(d) institutional review boards also have the power to modify or to completely waive informed consent requirements:

(d) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth in this section, or waive the requirements to obtain informed consent provided the IRB finds and documents that:

- (1) The research involves no more than minimal risk to the subjects;
- (2) The waiver or alteration will not adversely affect the rights and welfare of the subjects;
- (3) The research could not practicably be carried out without the waiver or alteration; and
- (4) Whenever appropriate, the subjects will be provided with additional pertinent information after participation.

Observations (including recordings) of public behavior and collection of naturalistic data within public settings would frequently fall within these four requirements. If “the research” mentioned in (1) above refers to the data collection process, then recordings do not expose subjects to risk. Subjects’ “rights and welfare” within a public setting are often established by the setting or institution itself, and would seldom be adversely affected by observation. For example, entry into a public building is often considered consent to be filmed by security cameras. The conditions of (3) require review on an individual basis, but by its very character naturalistic data cannot be collected if there is overt intervention in the setting or if consent is required before the data collection. Under (4), individuals could be provided with information on the purpose of the research and the data collection process.

An on-going tension in interpretation of this section (and others) seems to be rooted in these two questions: What is the subject consenting to? And exactly what is meant by the term “the research”? Both questions concern whether one is considering current action or future use. Are subjects being asked to consent to the data collection process? Or are they being asked to consent to *any* future potential use of the data collected? Are IRBs reviewing respect for human subjects in terms of “the research” equating to the data collection process? Or are they reviewing respect for human subjects in terms of “the research” equating to *any* potential future use or write-up and publication of the data collected? These are two vastly different issues and seem to be inadequately teased apart in current regulations and interpretations. “One consequence of an unreflective commitment to “respect for persons” is that IRBs have great difficulty accepting research destined to be critical of its “human subjects” and to cause them

[emotional] pain, even though interviewers may treat them with cordiality during the research phase” (Nelson, 2004, p. 210). For example, an investigation of reformed gang members or of corrupt politicians might be both critical and psychologically or emotionally unpleasant for the interviewees. This tension and nebulous overlap of definition between current research actions versus future research uses may derive from the regulations’ origins in response to biomedical abuses. The concept of “physical risk is conceptually leveraged to restrain a much wider range of scholarly inquiry” (Nelson, 2004, p. 210).

Researchers should certainly be held to particular ethical standards in terms of both how they collect data and how it is used in the future, but leveraging restrictions on the former to inhibit the latter can easily amount to prior restraint of freedom of speech or at least of academic freedom. Ethical constraints on how research findings are published and used might best be left to the forces of disciplinary specific self-regulation and peer supervision. Some professional organizations have established ethical codes of conduct concerning both data collection and use. For example, the American Sociological Association adopted a Code of Ethics in 1997 that “sets forth the principles and ethical standards that underlie sociologists’ professional responsibilities and conduct” (American Sociological Association, 1999, p. 3). Other organizations have also been active in educating IRBs on standards of practice in their particular disciplines. In 1998, the American Historical Association, the Oral History Association, and the Organization of American Historians contacted approximately 700 IRBs to ask them to take into account the standards of practice relevant to historical research when evaluating oral history

projects. They also persuaded the government to include oral history research among activities subject to expedited review (AAUP, 2000, p. 3).

The tension discussed above is also reflected in the fact that IRBs at different institutions may take markedly different perspectives on very similar situations and issues. Another prominent researcher in the area of legal discourse agreed with my viewpoint that a waiver of consent was a reasonable alternative to consider for my proposed research. He provided the following anecdote:

I have students who have gotten ... an exemption because the courts are public access. I even had a recent Ph.D., [name omitted], who had audio video tapes of police-citizen traffic stops, where the police audio-video tapes on the dash recorded the stops, and IRB granted him an exemption. I would expect that small claims courts are the same thing, so I don't see why you need citizen consent (they're in a public institution) (G. Matoesian, personal communication, June 26, 2003).

The UGA IRB took a different stance as stated in their decision concerning my proposed study:

The board thought that videotaping courtroom proceedings posed too high a risk to the subjects. The board recommends that you consider doing an observational study and/or working with archival tapes. This too would be subject to IRB review and approval (C. Joseph, personal communication, June 27, 2003).

These variations in interpretation can leave researchers, particularly students, with confusing and vastly dissimilar roadmaps to traverse the research approval process. One

possible reason for these differently drawn maps may be that the IRB members themselves are using diverse disciplinary compasses.

Social Science Representation

As discussed earlier, one of the recommendations of the AAUP 2000 report was that IRBs have a minimum number of social scientists as members. If IRBs are dominated by “hard” science members, they may be severely out of their area of expertise when confronted with proposals involving observational or naturalistic social science research. Even within the social sciences many different methods of data collection are used and valued; therefore, it would not be uncommon for a researcher to be confronted with a board that has no or little knowledge of naturalistic observational methods or that is very skeptical of their value. This is a particularly vexing problem for researchers who take an ethnomethodological or conversation analytic approach, as these are relatively “small academic communities in the United States. The International Institute for Ethnomethodology and Conversation Analysis is comprised of members in North America, Europe and the United Kingdom, but is dominated by members outside of the U.S.

During the review of my proposed research, I was not informed of the disciplinary membership of the board. I also note that as of this writing, while one can request a list of members of the IRB from the Human Subjects Office, membership information is not available from the University of Georgia website. Such information would be helpful, even during the application process, as it would alert the applicant about how much background information on unique methods or research approaches might be useful for the board.

One indication that, in my particular case, the board may have misunderstood the methodological approach and methods I was using is reflected in their decision: “The board recommends that you consider doing an observational study and/or working with archival tapes” (C. Joseph, personal communication, June 27, 2003). A traditional “observational study” that does not involve the capture of verbatim conversation and interaction is not a viable alternative in a conversation analytic study.

Appeal Process

In addition to its recommendations concerning social scientist membership, the AAUP report also recommended that institutions establish an appeal process from IRB decisions. The appeal process that was recommended to me was the following:

According to our guidelines, the principal investigator has the right to appeal this decision in writing or in person at an IRB meeting. If the investigator is not satisfied with the decision subsequently reached by the IRB, the investigator may request a re-review by the IRB whenever significant changes are made to the application or significant new information becomes available. (C. Joseph, personal communication, June 27, 2003)

The guidelines referred to for an appeal are taken verbatim from the University of Georgia website (<http://www.ovpr.uga.edu/hso/guidelist.html#7>). In other words, the IRB disapproves a proposal; the researcher then appeals to the exact same body that just disapproved the proposal. If the researcher does not like that result, there is nowhere else to go. There is a right to re-review only after making significant changes to the proposal, and again to the same body. This appeal process seems discouraging at best.

Lessons for the Future

Regardless of whether the decision regarding my initial proposal is viewed as right or wrong, there are a number of lessons to be learned from this experience that I believe may be beneficial to other researchers. They are:

- Working with regulations born primarily from abuses in clinical and biomedical settings and highly litigation conscious, IRBs are tugged to the most conservative approach. “No one is likely to get into trouble for insisting that a research proposal is not exempt” (AAUP, 2000, p. 5).
- It is incumbent on the researcher to take a clear stance as to which standard and category of review applies to the research. Based on my experience and those of others in the literature, IRBs seem reluctant to consider alternatives that would diminish their own jurisdiction. Vacillation or uncertainty by the researcher further opens the door to the most conservative approach.
- Qualitative researchers who are proposing to use unique or little known methods or strands of research are well advised to review the disciplinary mix represented on the IRB and to provide background information on the applicable social science methodology. Michael Oakes offered similar advice in a 2002 article in *Evaluation Review*, along with fifteen tips to improve interaction with IRBs.
- Professional organizations may be an important resource and mechanism for influencing the work of IRBs. They can develop relevant codes of ethics, standards of practice and guidelines for researchers.

I also propose that the following suggestions be considered for IRBs at campuses across the country:

- Provide a membership list, including disciplinary affiliations, on the Human Subjects Office/IRB website.
- When asking researchers to appear before a full board review, provide specific issues or concerns that are likely to need to be addressed.
- If a proposal is rejected, provide a written, point by point rationale.
- Provide an appeal process to a body other than the board itself.
- Consider creating separate IRB panels for social science research.

In their 2002 discussion of IRBs, Sieber, Plattner and Rubin offered the following analogy:

Suppose you were attempting to drive to a place that you had not been to before, and had to rely on road signs to get there. Suppose further that the road signs, if properly interpreted, were accurate, but were written in such a way that most people misinterpreted them. The delays, extra expenses, spoiled trips, and missed opportunities would be enormous, especially if this were a national highway on which many people traveled (p. 1).

There is a wealth of interesting and vital research to be done in all disciplines within the university community. We need to make sure that our national research highway is marked with interpretable signs that offer guidance to new destinations, not ones that double us back for fear of what lies ahead. Researchers and IRBs need to work together to insure that research work can be fostered in a balanced and well-reasoned fashion while simultaneously maintaining high ethical standards and the public trust. This is a worthy goal that I am pleased to be engaged in.

Data Sources

Following the negative decision of the IRB, I began a quest for archival courtroom tapes, ultimately locating those that are now the subject of examination in this study. The United States has an arguably well deserved reputation as a litigious and

attorney saturated society. With its complicated mixture of various governmental and administrative entities on both the federal and the state level, there is an equally complicated mixture of courts and agencies to deal with both civil and criminal matters. For example, in the State of Georgia there are over 1000 local courts of the following types: City/Municipal or Special Courts; Juvenile Courts; Magistrate Courts, Probate Courts; Recorder's Court; State Courts and Superior Courts. Each type of court has jurisdiction over specific kinds of cases. In addition, at the state level, the Court of Appeals and the Supreme Court hear cases that are appealed from the lower courts. Each of the fifty states determines the specific structure of its court system.

Layered on top of the varying state court systems are the federal courts. Federal courts include district courts, appeals courts, bankruptcy courts, and of course, the U.S. Supreme Court. There are also certain specialized federal courts, such as the U.S. Court of International Trade and the U.S. Tax Court.

In addition, to these state and federal court systems there are numerous state and federal agencies which adjudicate questions and disputes on wide-ranging topics. Examples on the federal level would be the Social Security Administration, the Occupational Safety and Health Administration, and the Bureau of Citizenship and Immigration Services. As with court cases, these administrative hearings have an immediate impact on the parties involved and in some instances, can lead to rules, regulations, interpretations or precedents that impact larger segments of the community.

Obviously, this encapsulated summary is not intended to fully explicate the state and federal court and administrative systems but rather to underscore the incredible number of formal institutional adjudicative and adversarial encounters that take place

across the country on a daily basis. This plethora of encounters would seem to provide an ample supply of data sources; yet, the collection of data for this study proved to be more complicated than initially imagined as is more fully discussed in the next section.

The work that transpires in a courtroom has traditionally been a public matter. The Sixth Amendment to the U.S. Constitution guarantees a defendant a fair and public trial. Open access in both criminal and civil matters helps to provide a check on possible abuse of power by the judiciary and to ensure a fair outcome for the parties. The system of trial by a “jury of peers” imposes a responsibility on members of the community and makes them a crucial cog in the functioning of this democratic institution. Public access also helps to provide some evidence to the public that the legal system is functioning equitably (United States Department of State, 2003). Of course, in some instances, a need for privacy may counterbalance the rationale for open access, such as in juvenile cases, cases involving sexual abuse or in instances where publicity may “taint” the selection of an impartial jury.

Technological developments have expanded the possible definitions of “access” and “coverage,” and courts, traditionally reluctant to change, have struggled with how these technologies should interface with their work. This is true both in U.S. courts and in Great Britain, the birthplace of trial by jury. Only in 2004, did British courts tentatively open the door to media exposure when the lord chancellor, Lord Falconer, announced a pilot scheme to allow appeal court cases to be filmed. This is the first time that cameras have been allowed in English and Welsh courtrooms since 1925. According to Lord Falconer, part of the reasoning for the pilot project is that if justice does not proceed in public it risks losing the public’s support. Nonetheless, he emphasized that

British trials would not be “turned into US-style media circuses” (Born, 2004, p. 1) such as the coverage of the murder trials of OJ Simpson and the English nanny Louise Woodward.

In addition to high-profile cases such as those mentioned above and those broadcast on channels such as Court TV, some local courts in the U.S. have experimented with live web cam or internet broadcasts. An Orange County, Florida trial court was the first to web cast proceedings in 1999 (Ninth Judicial Circuit Court of Florida, 2006). A Delaware, Ohio municipal court also currently makes a live web cam available stating on its website, “Whether it is a traffic arraignment, misdemeanor trial, felony preliminary hearing, or small claims case, it is real courtroom action” (Delaware Municipal Court, 2006). A Wise County Virginia Circuit Court also experimented with web casts, but discontinued the service in favor of broadcasting on a local cable television channel (Wise County Circuit Court, 2006). The court’s website asserted that the main reason for initiating the web cast was “to bring the administration of justice into the open and to make it accessible to the public. Court decorum is expected to be more frequently adhered [to] by the litigants. Professional standards of conduct by the attorneys appearing before the Court may be enhanced with knowledge that greater public access to the proceedings is occurring. And, more rapid case resolution should occur with more accountability and professionalism by all concerned.”

Public access also involves the issue of access to court records and how those records are produced and maintained. There are basically three ways to record a court proceeding: court reporter (stenographically), audio, video (or some combination of the three). In all three types of recording if a written verbatim record is required, a transcript

must be produced from the stenographic tape, audio or video recording. Only a small percentage of the many proceedings that take place across the country every day are recorded by any of these three methods.

For those proceedings that are recorded, courts around the country are increasingly considering the use of audio and/or video recordings as an alternative or replacement for the traditional court reporter. Adoption of these technologies has pluses and minuses for litigants, attorneys and the public. Typically, the long term use of automated audio or video recordings reduces costs for the court and the public; however, for cases which are appealed there are increased costs to the attorneys and litigants who must devote additional time to reviewing the tape and must pay for the production of a transcript (Grittner, 1993). As noted by one Kentucky attorney, “Most attorneys like a transcript before trial. I can read a transcript in 30 minutes while it would take two hours with video” (Miller, 1996, p. 3). Recording equipment has generally been quite dependable, but there is always the possibility of user error or of tape malfunctions such as happened in a hearing related to the 1995 bombing of the federal building in Oklahoma City, Oklahoma. A secret hearing with James Nichols, brother of Terry Nichols, who was later convicted for his part in the bombing, was held before a U.S. magistrate judge, and it was discovered that the tape of the hearing was blank. James Nichols was later released for reasons unrelated to the non-recorded hearing, but the court administrator described the discovery as “very embarrassing” (Miller, 1996, p. 4).

Since 1987, several states have conducted video courtroom projects, including Alabama, Arkansas, California, Florida, Hawaii, Maryland, Minnesota, New Jersey, North Carolina, Oregon, Utah, Vermont, Virginia and Washington. However, many of

these projects have met resistance from court reporters and attorneys and have been conducted on a very limited basis. Kentucky was the first state to embrace the use of video courtrooms (Grittner, 1993), and it is currently the only state that utilizes video recordings on a statewide basis (J. Gildersleeve, personal communication, October 2, 2003). These tapes are the official and permanent records of the court proceedings and are maintained by the clerks of the courts. They may be purchased by any member of the public for a fee established by the Kentucky Supreme Court (Kentucky Revised Statutes; Rules of Civil Procedure 3.02).

Data Collection

Following my unsuccessful application to the IRB to conduct videotaping in a local court, I determined that I would need to work with archival tapes. As discussed above, a number of states have experimented with videotaping court proceedings; however, many of these projects have been limited in scope, both in terms of the number of courts involved and in their duration. Since I was looking for court proceedings with a very particular type of participant (NNSs), I needed to locate a broad source of data. In July of 2003, I contacted the National Center for State Courts (NCSC) to see if they might have comprehensive information concerning the use of videotaping in various courts around the country. The NCSC is an independent non-profit organization located in Williamsburg, Virginia. It collects data on court operations and case loads throughout the country and provides consulting services, publications, and national educational programs to improve court operations. Through conversations with personnel in the technology services division of NCSC, I learned that Kentucky had been an early adopter

of videotaping technology and is the only state that uses courtroom video recordings on a statewide basis.

This was a promising lead; therefore, I did some initial on-line research to learn more about how videotaping is used in Kentucky courts. I discovered that pursuant to Kentucky Supreme Court Rules of Procedure all circuit court proceedings throughout the state are automatically videotaped. The videotape system first began to be implemented in the mid-1980s and is now operational throughout the state. Given below is the description of the videotaping equipment and procedures provided on the Kentucky Administrative Office of the Courts website (www.kycourts.net):

Cameras, microphones, VCRs and a program sound mixer are the devices used in a video courtroom. Cameras are mounted in various locations so as to record the entire court proceeding -- testimony of witnesses, bench conferences, objections, etc. The typical system, for example, has five (5) wall mounted cameras in the courtroom and one (1) camera in the judge's chambers.

The chamber camera permits the judge to question witnesses or parties within the confines of his or her own chambers. ...In addition, the judge may review taped portions of hearings or trials in the privacy of his or her own office.

Voice activated microphones are strategically placed throughout the courtroom. The VCRs, which operate the system, generally are located near the bench. The judge usually is responsible for turning the equipment on and off, before and after trials. When the equipment is on, two green lights will appear on the front of the judge's bench.

Both the camera and microphones are programmed to lock-in on an individual speaker and do not switch until that person has finished speaking. A computer programmed sound mixer switches the cameras from person to person (video follows audio) to provide close-ups of the judge, witnesses, and attorneys as individual microphones transmit.

Pursuant to Rule 98(2)(a) “[t]he official record of court proceedings shall be constituted of two (2) videotape recordings, recorded simultaneously, of the court proceedings.”

Videotapes constitute the official court record, and in fact, court reporters are not used in the circuit courts. The Kentucky Supreme Court provides all procedures for identification and labeling of the tapes. Upon appeal, “no transcript of court proceedings shall be made a part of the record...The official videotape recordings, together with the clerk’s written record, shall constitute the entire original record on appeal.” Rule 98(3). Copies of all videotapes are maintained in each judicial circuit and are public record. Copies of the tapes may be obtained by any interested person upon payment of a reproduction fee of \$15.00 (Kentucky Revised Statutes; Rules of Civil Procedure 3.02).

Next, I contacted the Kentucky Administrative Office of the Courts (AOC) to learn more about the Kentucky system and how I might best go about identifying the types of cases of interest for this study. The technology manager at the AOC put me in contact with the court administrator of Warren County (Bowling Green). I traveled to the Warren County courthouse in the fall of 2003 to determine if the quality of the recordings would be adequate for the purposes of my research. I met with the Warren County Court Administrator who generously provided me with extensive information concerning the Kentucky videotape recording system and who gave me a full tour of the court facilities.

He explained the VCR system and stated that the emerging technology in Kentucky is to transition from the use of VCRs to the use of DVD recorders, a superior technology in terms of quality, long-term maintenance and space requirements. The current video recording system installed in Kentucky Circuit Courts works as follows:

- a) A system of courtroom cameras (the number may vary from courtroom to courtroom) allows for coverage of the bench, attorney's tables, attorney's podiums, witness stand, jury box and litigation area.
- b) Each camera is synchronized with at least one sound activated microphone connected to a centralized automated electronic control panel.
- c) An additional camera is located in the judge's chambers and is used for *in camera* conferences, and for in chambers trial and pre-trial conferences.
- d) Standard VHS tapes are used for recording and Hi-Fi videocassette recorders. The standard system has 5 VCRs. Two record simultaneously to create an original and a back-up copy; a third VCR is used for playback of tapes; the remaining two VCRs allow the system operator (normally a deputy court clerk) to immediately provide a real-time copy for counsel if they so desire.
- e) The system also uses several 9 inch monitors. These are located on the bench, in the judge's chambers, judge's secretary's office, Chief Clerk's office, Court Administrator's office and law clerks' offices.
- f) A color monitor is used for playback of tapes in the courtroom.
- g) Using the date and time generator displayed on the screen, the system operator keeps a log of when key events take place (i.e. introduction of exhibits, testimony of various witnesses, etc.).
- h) Any of the cameras can be "locked on" at the judge's or operator's discretion. For example, a judge might want to lock the camera on a criminal defendant during a guilty plea. The camera lock does not affect the audio portions of the recording. (J. Gildersleeve, personal communication, October 2, 2003)

Assuming that the quality of the recordings would be roughly comparable throughout the state, I viewed several tapes from the Warren County Circuit Court and determined that

the audio and video quality of the tapes was more than sufficient for the purposes of the study.

The next stage in the data collection process was to identify cases that involved NNSs. The process of identifying these cases was a very time consuming and somewhat random one. I contacted a former Kentucky Circuit Court judge to discuss his experiences with the Kentucky taping system and to ask if he had any insights on the most efficient way to locate the type of cases that interested me. He suggested that medical malpractice cases particularly from rural counties with a large number of foreign born and trained physicians might yield the type of data I needed. Foreign born physicians often fill positions in rural and small city areas of the United States where it is difficult to attract U.S. born physicians.

I then searched the Westlaw[®] database for malpractice cases. Westlaw is a comprehensive legal database of state and federal cases, legislation, treatises and other types of legal documents. State cases in Westlaw are decisions from a state's court of appeals and supreme court. Having identified all malpractice cases that had been appealed to the Kentucky Court of Appeals or Supreme Court, I then identified cases where the defendant's name indicated a likelihood that he or she was a foreign born non-native speaker of English. I also searched the database for other terms that might yield cases with non-native English speaker parties---for example, "immigrant," "passport," and "interpreter & English & language." I also periodically examined the Kentucky on-line docket system that lists cases scheduled for trial throughout the state.

With these higher appeals court cases in hand, I had the names of attorneys who had represented parties that seemed likely to be non-native English speakers. I then

wrote to each of the attorneys I had identified explaining the type of cases I was searching for. One attorney responded by phoning me and identifying all three of the malpractice cases listed below (Cases A, B, and C). She also allowed me to borrow all 19 tapes from Case A listed below rather than having to purchase them from the court as was necessary in the other cases. I located Case D and Case E by reviewing the docket in the county courthouse and using the Kentucky on-line docket system.

In October of 2004, I traveled to Kentucky and obtained copies of hearings and trials from the Circuit Courts in two of the counties I had identified. In addition, I requested by mail copies of tapes from a third county. Each of these hearings or trials involves a non-native speaker of English appearing in court without an interpreter. Below is a summary of the cases I obtained. For purposes of confidentiality and to avoid any potential for embarrassment to the parties involved, I have omitted the case names, and I have also omitted the names of the specific counties.

Table 3.1

Cases Collected by Location, Date and Type

Case Location and Date Oldest to most recent; year listed is initial year of filing.	Type of Case	Number of Tapes and Length of Recordings
Case A: County A; 1991	Medical malpractice	19 tapes; over 85 hrs.
Case B: County A; 1995	Medical malpractice	3 tapes; 16.5 hrs.
Case C: County A; 2000	Medical malpractice	6 tapes; 34 hrs.
Case D: County B; 2001	Divorce/child custody	1 tape; 1.25 hrs.
Case E: County C; 2003	Divorce	1 tape; 3.5 hrs.

The tapes for these five cases vary in length but generally are between 4 and 6 hours. For example, the first tape in Case B commences at 9:15 AM and ends at 4:37 PM with

breaks of various lengths interspersed throughout the day. The total time of the recordings for these five cases is over 140 hours.

After viewing the tapes from each case, I selected Case B and Case C for analysis. These cases are from the same county, are both medical malpractice cases and were tried within one year of each other. Case B, though first filed in 1995, was tried in June 2001. Case C was tried in May of 2002. Case A, although also a medical malpractice case from the same county, was tried almost a decade earlier in 1992. In addition, while the quality of the tapes from that case was acceptable, it was not as good as those of the more recent cases. According to Heritage (2005), findings in institutional CA tend to be less permanent and more influenced by social change than those in basic CA. “They are historically contingent and subject to processes of social change under the impact of culture, social ideology, power, economic forces, intellectual innovation, and other factors impacting change in society” (p. 105). Since I was most interested in current examples of cases involving NNSs, I selected the two cases that were the most recent, that were the same type of case and that provided the longest segments of discourse involving the NNSs. The physician in Case B was on the stand for an hour and twenty minutes. The physician in Case C was on the stand for two days for just over eight hours.

Below, I provide a summary of the facts in each case. Pseudonyms are used for all the parties involved in each case, as well as the county and city name. Both cases were tried in the same county in the county seat, Eastville. East County is one of the easternmost counties in Kentucky and borders Virginia and West Virginia. It is located in the heart of the Appalachian coal fields and has been a major coal producer since 1910. In 2000, the county population was 68,736 with the overwhelming majority (98.3%) self-

reporting race/ethnicity as white. In 2000, the median household income was \$23,930. The majority (61.8%) of adults over 25 have a high school diploma; 9.9% of adults over 25 have a bachelor's degree or higher (STATS Indiana, 2005).

Nasa Case (Case B in Table 3.1)

In this case the plaintiff, Jeremy Wright, was suing Dr. Kousar Nasa. Wright was represented by an attorney from Lexington, Kentucky, Sam Cutler. Nasa was represented by an attorney from Huntington, West Virginia, Robert Pooler. Wright had injured his left ankle during a game of pick-up basketball at his high school gymnasium. At the time of the injury he was 17 years old. The morning after the injury, he went to the emergency room at the local hospital (Eastville Medical). He was examined and his ankle was x-rayed. The hospital arranged for him to see Dr. Nasa at Nasa's office two days later. Wright kept his appointment with Dr. Nasa. This was the only occasion on which he saw Dr. Nasa.

Wright's ankle continued to swell after he saw Nasa and after speaking with his high school coach he went to see another local doctor. He subsequently developed fracture blisters. These are blisters that occur due to markedly swollen skin over the site of a fracture. He also developed necrotizing fasciitis (commonly called "flesh-eating disease"). Necrotizing fasciitis is an extremely rare and serious infectious condition in which bacteria destroy tissues under the skin. It results in death in approximately 30% of patients and requires aggressive treatment, including high doses of antibiotics and surgery. Wright was in a hospital in Louisville for two months, underwent multiple surgeries and suffered permanent damage to his left ankle. The plaintiff contended that his condition was the result of Nasa's recommended treatment of applying heat to the

injury rather than ice and that this recommendation was negligent and was below the proper standard of care. The defendant contended that his recommended treatment was appropriate and that even if it was not appropriate, it did not cause the fracture blisters and necrotizing fasciitis that Wright subsequently developed. The defense asserted that the infection was the result of a nail puncture to the bottom of Wright's left foot that occurred a few weeks earlier.

Masand Case (Case C in Table 3.1)

In this case the plaintiff, Elizabeth Jones, was suing Dr. Abhishek D. Masand. Jones was represented by Patty Honor and her co-counsel (and cousin), Mike Honor. Masand was represented by Sue Wells. All of the attorneys in this case were from Eastville. Jones was suing in her capacity as the executrix of the estate of Mary Gillam. Jones and Gillam were close friends and had lived together prior to Gillam's death. Her death was from causes completely unrelated to Masand's care and was not part of this case.

Beginning in 1993, Gillam had been treated by Masand for over five years for ulcer disease. Masand had performed surgery on Gillam as well as numerous EGD procedures (esophagogastroduodenoscopy). An EGD involves the insertion of a flexible tube (endoscope) down the throat to exam the lining of the esophagus, stomach, and upper duodenum (opening to the small intestine). A small camera is at the end of the endoscope. The procedure can also be used to dilate the duodenum. In 1999, Masand performed another EGD on Gillam that was the subject of this lawsuit. After she returned home following that procedure, Gillam experienced significant pain. She returned to the hospital and was admitted. After several days of observation and

treatment, she was not improving and appeared to be developing sepsis. Masand then performed exploratory surgery. Following this surgery, Masand left town on a scheduled vacation. While he was away, Gillam experienced a “blow-out” of a repaired section of her intestine. She was transferred to a Lexington hospital, had to undergo numerous additional reparative surgeries and was hospitalized for several weeks.

The table below summarizes the parties for both cases. Appendix A provides a sequential list of the major activities for each case. Hereafter the cases under examination will be referred to as Case 1-Nasa and Case 2-Masand.

Table 3.2

Parties and Attorneys by Case

Case	Plaintiff	Plaintiff’s Attorney(s)	Defendant	Defendant’s Attorney
Case 1-Nasa	Jeremy Wright	Sam Cutler	Kousar Nasa	Robert Pooler
Case 2-Masand	Elizabeth Jones on behalf of Mary Gillam (deceased)	Patty Honor Mike Honor	A.D. Masand	Sue Wells

Data Analysis

Ethnomethodological and conversation analytic analysis of data do not allow for a formulaic, sync-step process. Both require an intimate knowledge of the discourse and conversational exchanges being examined. This knowledge is gained through repeatedly listening to and working with recordings and transcripts; therefore, to begin the analysis, I repeatedly listened to the tapes from both cases. I initially took notes while listening to the tapes much as one might do in field or ethnographic work. These repeated listenings and the process of note taking gave me the opportunity to review the organization and progression of the cases as unified linguistic events. This process also allowed me to identify the sequencing of interaction within pre-prescribed institutional activity units or

stages of the trials (see chapter 5). Consistent with an ethnomethodological perspective, I was interested in how context was being constructed as “both a project and a product of the participants’ actions” (Heritage, 2005, p. 109), and specifically how that context was manifested in the organization of the talk and in the use of various member categories. I wanted to determine what activities the participants were performing through talk-in-interaction and how this both reflected and produced context.

I approached the data using the “ ‘conversation analytic mentality’: the distinctive way of seeing the world of talk-in-interaction that the conversation analyst develops in the course of working through specific pieces of data” (Hutchy & Wooffitt, 1998, p. 120). This mentality incorporates an interest in both individual cases and a broader range of cases. What Have (1990) labels as the distinction between “interpretation” and “analysis.” He says that interpretation refers to “the effort to formulate the relatively unique meaning an utterance, an action or an episode seems to have for participants and/or researchers, while ‘analysis’ is used to indicate efforts to isolate aspects, mechanisms and procedures that are relevant to a range of cases” (p. 17). This might include looking at overall interactional organization patterns, such as turn-taking, sequencing, repair and turn-construction or design (Have, 1999, p. 111).

I was particularly interested in portions of the proceedings that directly dealt with the non-native speaker status of the defendants. When dealing with data from institutional settings it is especially easy to lapse into what might be called the ‘supposition of circumstance’—relying on pre-assigned participant roles or social categories to draw conclusions about interaction. By focusing on portions of the proceedings in which the defendants’ NNS status was made germane by overt reference, I

aimed to address what Schlegoff (1992a) has called the ‘problem of relevance’ when examining talk in institutional settings. Analysts should ground their characterizations of participants in “aspects of what is going on that are demonstrably relevant *to* the participants, and at that moment – at the moment that whatever we are trying to provide an account of occurs” (p. 109). By focusing on sections of the proceedings with overt references to NNS status as well as those surrounding them and direct testimony given by the defendants, I looked to the talk or conduct and “what immediately surrounds it ... as displaying which out of that potential infinity of contexts and identities should be treated as relevant and consequential (both by co-participants and by professional analysts)” (Schlegoff, 1992b, p. 197).

Next, I transcribed these portions of the tapes that were particularly relevant to the defendants’ NNS status. I also transcribed portions of the tapes during which the attorneys first spoke directly to the jury panels and the selected juries (voir dire and opening statements). I was interested in these initial interactions between the attorneys and the juries because often perceptions of parties in a case are closely tied to perceptions of their attorneys. Psychological literature on opening statements suggests that they can have a huge persuasive effect particularly when “assessment of a defendant’s character or behaviour” (Cotterill, 2003, p. 65) plays a large part in the case. Using Sacks’ terms, attorney and client are a standardized relational pair (SRP) and members of collection K (professional and lay person). Membership in these categories ties them together in important ways in the courtroom. The portions of the trials that I transcribed included voir dire, opening statements and direct examination of the defendants. Membership categorization, as developed by Sacks, is more fully explained in chapter 8.

Creating a transcript is considered an integral part of the analysis since "in repeatedly listening to the tape one begins to hear and to focus on phenomena that may subsequently form part of an analytic account" (Hutchby & Wooffitt, 1998, p. 76). While transcripts can never reflect all the details and nuances of the interaction, the aim of such transcription is to capture and reproduce the talk as it occurred, "in all its apparent messiness" (Hutchby & Wooffitt, 1998, p. 75). I used the transcription method developed by Gail Jefferson (see Appendix B). Jefferson's system does not provide exact phonetic and orthographic rendering of speech, rather it focuses on the type of interaction that is relevant to the conversation analytic researcher: the dynamics of turn-taking, sequencing, and characteristics of speech delivery, including such phenomena as overlap, pauses, laughter, intonation and volume. I also included in the transcripts some non-verbal features of the interaction such as gestures, movements and relative positioning of interactants.

Silverman (2000, p. 152) suggests analyzing transcripts by doing the following: a) identify sequences of related talk; b) examine how speakers take on certain roles or identities through their talk (questioner/answerer; client/professional); c) look for outcomes of the talk (clarification requests, repair, laughter) and work backwards to find how the outcome was produced. Hutchby and Wooffitt (1998) propose a three-stage model for constructing an analytic account of data: "First, identify a potential object of analytic interest -- a conversational device or a sequence type. Second, produce a formal description of an empirical example, concentrating in particular on the sequential environment, in order to try and define what the device or sequence type is *doing*. Third, return to the data collection to refine the description until it becomes a generalized

account" (p. 110). Both of these approaches illustrate the proposition that every detail is worthy of examination, and that analysis begins with these details not with theory. I was guided by these approaches and in examining particular sequences I also used Heritage's (2004) six categories for probing the institutionality of the talk: 1) turn-taking organization; 2) overall structural organization; 3) sequence organization; 4) turn design; 5) lexical choice; and 6) epistemological and other forms of asymmetry. These are more fully discussed in chapters 6 and 7.

All of these approaches to CA are dependent on one's ability to understand what the participants are doing with language; "a member uses his or her 'membership competencies' to understand what the interaction may be all about and how the various details may function in that respect" (Have, 1999, p. 35). In CA's view a general practical competence is assumed to be available to members and the same competence is used by CA researchers (Have, 2001). Turner (1971) says that the researcher trades on his or her "members' knowledge in recognizing the activities that participants to interaction are engaged in" (p. 171). He goes on to say that the researcher must use "socialized competence, while continuing to make explicit what these resources are and how he [sic] employs them. I see no alternative to these procedures, except to pay no explicit attention to one's socialized knowledge while continuing to use it as an indispensable aid" (ibid.).

A number of CA and EM researchers acknowledge that while one must bracket any preconceived beliefs about categories or implied meanings before examining data, analysis of institutional settings is particularly dependent on understanding the setting and the work that is taking place within the institution (Lynch, 1985; Maynard, 1984;

Moerman, 1988). For example, Burns, at the urging of Garfinkel, attended law school after undergraduate studies in sociology at UCLA and then investigated pedagogic interchange in the law school classroom: “The examination of the law school classroom as a research site was tied to my member’s knowledge of what went on there” (Burns, 1997, p. 268). Having worked in the law, in courtrooms, and with nonnative speakers, I have unique membership knowledge and experience that informed my analysis.

Conclusion

This chapter has examined some possible impediments for researchers who wish to collect and analyze naturalistic data. It has also discussed possible data sources for those who are interested in detailed analysis of courtroom interaction. The data collection process for this study was explained along with a description of the data collected and the data analysis process. The next chapter explains the theory and methodology that informs the study.

CHAPTER 4

THEORY AND METHODOLOGY: EXTRAORDINARY ORDINARINESS

Introduction: Legal Roots

The prior chapter's explanation of the data collection and data analysis process for this study alluded to its theoretical and methodological underpinnings. This chapter provides an overview of that theory and methodology before subsequent chapters turn to the study's specific findings. The work presented in this study is informed by the theory and methodology of ethnomethodology (EM) and its branches, conversation analysis (CA) and membership categorization analysis (MCA). The history of the birth of EM and the background of the primary developer of CA and MCA, Harvey Sacks, make it particularly fitting that these perspectives be used for investigations of legal settings.

Harold Garfinkel coined the term ethnomethodology in 1954 when he was working with covert recordings from jury room deliberations in five civil cases from Kansas. These recordings were part of a research study, the Chicago Jury Project, arranged by the University of Chicago law school faculty. Garfinkel's attention was drawn to how the jurors discussed the methodology of argument and how they came to make decisions about what were adequate accounts and adequate descriptions of events (Dingwall, 2000, p. 887; Garfinkel, 2002, p. 5). He thus came to be interested in the process by which ordinary members of society (the ethno) use different practices (the method) to construct an orderly social structure.

A connection to the law also influenced Harvey Sacks' work. Sacks graduated from Columbia College in 1955 and was awarded a scholarship to Yale Law School. He earned his LLB in 1959. In his introduction to Sacks' lectures, Schegloff provides some

insight into how this law school experience might have affected Sacks. Sacks was struck by the fact “that ‘legal reasoning’ which was the much heralded instrument in whose use they (students of the law) were being trained rested on, and was constrained by, an infrastructure of so-called ‘common sense’ which was entirely tacit and beyond the reach of argument, while controlling it” (p. xiii). This seeming contradiction led Sacks to become “more interested in understanding how the law as an institution worked, how it *could* work, than in making it work as an attorney himself” (Sacks, 1992, Vol. 1, pp. xii-xiii). In 1961-62, before conversation analysis had yet emerged in his work, Sacks wrote a paper on *The Lawyer’s Work*, inspired by Garfinkel’s work on common sense knowledge (Sacks, 1997, p. 48). Schegloff acknowledges Sacks’ debt to Garfinkel for teaching him (Sacks) “common sense.” Garfinkel, however, seems to imply that Sacks’ debt might be considerably larger and the topics more wide-ranging: “In my meetings with Sacks, one-on-one, in 1961 and 1962 in his visits to me at the UCLA Neuropsychiatric Clinic, ... with his feet propped on the edge of my desk, I read him my notes” (Garfinkel, 2002, p. 84).

Ethnomethodology

It was during this period in the early 1960s, that both Harold Garfinkel and another groundbreaking sociologist, Erving Goffman, were offering “massive dissent” (Heritage, 1998, p. 175) to the then current traditions and perspectives of sociology which focused almost entirely on abstract reasoning concerning social organization and the constraints such organization places on individuals. Ironically, the individual was left out of the picture. “Sociologists were content to sketch abstract constraints that ‘box in’

human action without ever addressing what actually happened in the conduct of action itself” (ibid.).

Garfinkel had numerous doubts and fundamental disagreements with the dominant sociological perspectives of his day. Rather than theorizing about abstract institutions, he wished to “develop a sociology of the common sense world of everyday life” (Heritage, 1998, p. 177). Building on his work with the jury project, he wanted to study the common sense means (methods) that members of a specific culture or subculture (ethno) share and use to understand, reason and behave in the world of everyday life. Dismissing prevailing ideas that saw societal members as "cultural dopes" controlled by institutionalized and powerful societal norms and rules (Holstein & Gubrium, 1998, p. 141; Hutchby & Wooffitt, 1998, pp. 30-37), Garfinkel sought the practical everyday procedures, the "ethnomethods," that people use for maintaining order. In *Studies in Ethnomethodology* (1967), Garfinkel defined EM as “the investigation of the rational properties of indexical expressions and other practical actions as contingent ongoing accomplishments of organized artful practices of everyday life” (p. 11). Put somewhat more simply, it is “the study of the methods people use for producing recognizable social orders” (Rawls, 2002, p. 6).

To find and study these methods, Garfinkel devised ways to “throw chinks” in the workings of the methods and upset the normal flow of understanding. These clever chinks or “breaching experiments” were carried out by his students and involved actions such as continuously asking co-interlocutors to explain their ordinary remarks or violating the rules of a game such as tick-tack-toe. Such intrusions and prods into the submerged common sense methods of activities were meant to buoy them to the top of

consciousness and illustrate that the social world is a manufactured world, one that is “constantly produced and reproduced by sense-makers, who make decisions and act on the basis of the sense they make” (Heritage, 1998, p. 186). Sometimes these breaching experiments are not manufactured ones, but are encountered in everyday experience as the example in the opening of chapter 1 reveals. Such impromptu moments are like a lightening strike of illumination on the usually dimly lit world of accounting practices that order our lives.

Today, ethnomethodologists conduct their research in a wide range of ways and the discipline is “characterized by a diversity of forms and directions of inquiry” (Hester & Eglin, 1997, p. 2). CA is only one of several ethnomethodological approaches; however, the object of all EM research is “to discover the things that persons in particular situations *do*, the methods *they* use, to create the patterned orderliness of social life” (Rawls, 2002, p. 6). In other words, it is the discovery of members’ “common sense” methods of maintaining social order.

Conversation Analysis

Perhaps it was during his “common sense” conversations with Garfinkel that Sacks came to ponder how one would go about studying “common sense.” For Sacks, the answer was eventually found in conversation itself. Sacks turned to language or conversation as the object of examination to discover social orderliness and sense-making in interaction. As a Fellow at the Center for Scientific Study of Suicide in Los Angeles, he had access to a collection of tape recorded phone calls to the Suicide Prevention Center. Working with these recordings he began to shape the approach that was to later become known as CA (Have, 1999, p. 6). He “did not turn to the analysis of recorded

conversational materials out of an interest in language per se, but rather to develop a rigorous approach to sociological inquiry” (Zimmerman, 1988, p. 406). This approach is presented in Sacks’s lectures which “demonstrated his methodology as well as his theoretical orientation. For Sacks, these were inextricably linked” (Psathas, 1995, p. 7). Sacks delivered these lectures or “iconoclastic thought experiments” (Arminen, 1999, p. 253) at the University of California at Los Angeles (UCLA) and at the University of California-Irvine from the mid-1960s to mid-1970s. He was the first person in the social sciences to examine conversation systematically and analytically and to somewhat boldly assert that it deserves such attention. The purpose of this attention is, however, sometimes misunderstood.

As Pomerantz and Fehr (1997) point out, the very name “conversation analysis” is “something of a misnomer and can lead to some confusion as to the phenomena under investigation” (p. 64). They mention two ways in which the name may be misleading. First, the term “conversation” tends to imply that consideration is only given to exchanges that take place in everyday informal settings (such as talking to a neighbor in your yard) to the exclusion of interaction in more formal contexts (such as applying for a driver’s license). In fact, conversation analysts are interested in exchanges in all types of contexts, and part of the work of CA can be seen as elucidating exactly what is “informal” versus “formal.” Secondly, the name “conversation analysis” implies that the primary focus is on verbal aspects of talk; however, “conversation analysts from the outset have been interested in both the verbal and the paralinguistic features of talk (that is, sound quality, pauses, gaps, restarts, etc.)” (ibid., p. 65). More recent work by conversation analysts has further broadened the scope of analysis to include non-verbal

types of conduct such as posture, pointing, and hand gestures and to underscore the value of video documentation of interaction (Heath, 1997). Psathas (1995) agrees that "...it is clear the term *conversation analysis* is a misnomer. It is not conversation but *talk-in-interaction* that is the broader and more inclusive characterization of the phenomena of study" (p. 2). Hutchby and Wooffitt (1998) define CA as "the systematic analysis of the talk produced in everyday situations of human interaction: talk-in-interaction" (p. 13).

A third, and perhaps more important, area of possible misunderstanding relates to what is the ultimate purpose of analysis. Despite its focus on talk as the object of data collection and of study, CA's ultimate object of analysis is social order. It is concerned with studying the "interactional organization of social activities" (Hutchby & Wooffitt, 1998, p. 14). It wishes to explicate the procedures and resources by which actors can engage in mutually intelligible social interaction whose organization works through an architecture of intersubjectivity and moral accountability (Heritage, 1984). In this respect it shares more with the underpinnings of sociology than with linguistics; nevertheless, language is *the* critical component in CA.

A central idea of CA is that what keeps key aspects of social order in focus, what keeps it "glued together" is the talk through which it takes place. Making meaning is always an "ongoing accomplishment" (Crotty, 1998, p. 47). This "ongoing accomplishment" is precisely what CA seeks to examine. CA is based on the idea that "utterances may be viewed as objects which speakers use to *accomplish* particular things in their interactions with others" (Hutchby & Wooffitt, 1998, p. 19) and that this talk can be viewed as "an object of analysis in its own right, rather than simply a window through which we can view other social processes or broader sociological variables" (ibid., p. 21).

No matter how minute the details of conversation may be, they are the crucial foundation for intersubjective understanding “upon which the accomplishment of social actions, simple and complex, rest” (Arminen, 1999, p. 251). “For conversation analysts, talk-in-interaction is the site where social actors display their knowledge of the ‘social order’” (Ehrlich, 2002, p. 732). Both EM and CA are clearly concerned with social life as it is manifested in the details of everyday practices. According to Garfinkel, “by paying to the most commonplace activities of daily life the attention usually accorded extraordinary events” we can “learn about them as phenomena in their own right” (1967, p. 1).

During one of the trials in this study the defendant’s attorney (Pooler) begins his interaction with his client (Nasa) as follows:

Excerpt 4.1

- 1 Pooler: ((picks up a small stack of stapled papers and walks to a position behind
2 the plaintiff’s table and behind the railing that separates the public seating
3 area of the courtroom)) Dr. Nasa I think everyone knows ya (.) but for the
4 record, would you introduce yourself ((points toward jury box)) to the
5 ladies an’ gen- gentlemen of the jury please?
6
7 Nasa: Eh my name is Kousar Nasa. ((clears throat))

This is the sort of “ordinary event” that EM and CA wish to examine. It is replete with both actions and talk-in-interaction which tell us how the social order of the courtroom is commonly constructed and specifically occasioned. The action begins with the attorney standing and positioning himself in an area typically reserved for the public. During this part of the trial he is afforded this freedom of movement while others are not, and indeed, the jury always remains stationary. This contributes to the social order and assignment of roles and activities that constitute “doing a trial” in the United States. The verbal talk also constitutes this construction of social order. Pooler’s reference to “for the record”

(line 3-4); to “everyone” (line 3) and to “the ladies an’ gen- gentlemen of the jury” (lines 4-5) all tell us something about the specific event under examination, but also about the carrying out and replication of social order. Few events are as “ordinary” as they might appear. The core assumptions of CA are essential to a delineation of this view.

CA’s Core Assumptions

CA as originally conceived by Sacks, rests on a number of important assumptions all of which have their underpinnings in interpretivism and constructionism. Like ethnomethodology, CA believes that the best way to examine social order is through the close inspection of encounters between individual members of society. Garfinkel argued that "people make *joint* sense of their social world *together*, and that they do so *methodically*, using *social procedures or methods* that they share" (Heritage, 1998, p. 176).

Psathas says that the methodological perspective of CA is “characterized as an analytic approach that seeks to describe and analyze social actions, the organizational features of various, naturally occurring, interactional phenomena” (1995, p. 45). Hutchby and Wooffitt (1998, p. 23) provide the following propositions that form the methodological basis and framework of CA:

- 1) All interaction is worthy of examination and analysis of such interaction should not be constrained by prior theoretical assumptions.
- 2) Analysis of talk-in-interaction should be based on naturally occurring data.
- 3) Talk-in-interaction is systematically organized and deeply ordered.

As is made more evident in the discussion below, there is considerable overlap and interrelatedness in these propositions and the principles that they reveal about CA.

1) All interaction is worthy of examination and analysis of such interaction should not be constrained by prior theoretical assumptions. As discussed above, CA was partially a reaction to the tendency of sociology and other disciplines to *theorize* about the actions of members of society rather than *examine* these social actions. CA “rejects the use of investigator-stipulated theoretical and conceptual definitions of research questions” (Pomerantz & Fehr, 1997, p. 66) assuming that the researcher should not begin with theory but rather with the details of social interaction. The focus should be on what people *do* not on speculating about what they do or assuming that what they do is controlled by exterior cultural or social imperatives. CA assumes an innate level of competence in speakers that requires respect and a constant attempt to see every interaction as worthy of independent evaluation not initially "constrained by prior theoretical assumptions" (Hutchby & Wooffitt, 1998, p. 23).

The notion of beginning with preconceived theories is wholly rejected. “The effort to pose social structure as an independent force constraining, affecting, influencing, or determining social action ... is not compatible with either the ontological or epistemological position of ethnomethodology and conversation analysis” (Psathas, 1995, pp. 65-66). Analysis of the interaction must be measured against itself, “against the reality of recorded interactions and their transcriptions” (Arminen, 1999, p. 252) not against theoretical accounts of interaction.

This perspective means that CA has sometimes been criticized for what is called its “method of instances” which constitutes a methodological and epistemological position of CA (Psathas, 1995, p. 50). The assumption of CA is that a single instance is sufficient to warrant attention and analysis. Additional instances of an occurrence are not

necessary to justify nor to prove the validity of analysis. The mere fact of an interaction's occurrence proves that the underlying social structure for its production exists. "That this particular social action occurred is evidence that the machinery for its production is culturally available, involves members' competencies, and is therefore possibly (and probably) reproducible. Its recurrence, however, is not proof of the adequacy of an analysis, because the analytic task is to provide a wholly adequate analysis of just how this instance is organized" (Psathas, 1995, p. 50).

However, this does not mean that CA is uninterested in collections of cases that are illustrative of particular types of social interaction. The CA mentality incorporates an interest in both individual cases and in a broader range of cases—what Have (1990) labels as "interpretation" versus "analysis." He says that interpretation refers to "the effort to formulate the relatively unique meaning an utterance, an action or an episode seems to have for participants and/or researchers, while 'analysis' is used to indicate efforts to isolate aspects, mechanisms and procedures that are relevant to a range of cases" (p. 17). This might include looking at overall interactional organization patterns, such as turn-taking, sequencing, repair and turn-construction or design (Have, 1999, p. 111). For example, Frankel (1984) and Silverman (1987, 1990) have explored encounters between patients and medical providers that may have implications for the delivery of health care services. This study interprets two specific cases of courtroom interaction with NNSs and asserts the importance of knowledge concerning a broader range of such cases.

2) The analysis of talk-in-interaction should be based on naturally occurring data.

Use of the term "talk-in-interaction" underscores one of the primary tenants of CA which

is that data must be taken from naturally occurring real-life interactions---not from contrived or experimental situations such as Garfinkel's breaching experiments or the invented exchanges of linguists (Silverman, 2000). Zimmerman refers to this as the "domain of data" principle: "The data of conversation analysis should be drawn from the domain of naturally occurring talk and action" (1988, p. 420). Many types of data which are used in other social science disciplines such as interview data, observational studies that rely on fieldnotes or coding procedures, invented examples and experimental methodologies are rejected by CA as being too much a product of either the researcher's and/or the informant's constructions of what is happening rather than looking at what is actually happening (Have, 1990). CA's interest in the full spectrum of types of interaction, in every detail of such interaction and in naturally occurring data means that wide varieties of data may be encountered.

The use of naturally occurring data overcomes (or at least ameliorates) what Sacks saw as three key problems with ethnographic work. These problems being: a) over emphasis on information gained from interviews with group members; b) use of common sense knowledge of participants as a resource rather than as a topic of study; and c) unavailability to the reader of details of ethnographic events. The focus should be on "natural" data rather than on asking members what they believe. The problem with native informants or interview data is that such data is "studying the categories that Members use...not investigating their categories by attempting to find them in the activities in which they're employed" (Sacks, 1992, Vol. 1, p. 27).

Since the primary object of investigation in CA is naturally occurring talk, data is best gathered through audio or video recordings. In fact, were it not for the advent of

modern recording devices, CA could scarcely exist. This method of gathering data allows for the study of the minutiae of interaction. "[C]onversation is something that we can get the actual happenings of on tape ... If you can't deal with the actual details of actual events then you can't have a science of social life." (Sacks, 1992, Vol. 2, p. 26; Silverman, 2000, p. 54). This method of gathering and preserving data has a number of advantages. Among these advantages are: minute details and nuances of conversation are available through taping, and tapes are an exact and replayable record that is available to other researchers. This permanent availability means that transcriptions can be improved and new threads of interest can be developed by other researchers. As discussed in the previous chapter this study relies on such naturally occurring and recorded courtroom data.

3) Talk-in-interaction is systematically organized and deeply ordered. "A basic tenet of CA is the recognition that social order, evident within the detailed and contingent activities of societal members, exists *independently* of social scientific inquiry" (Beach, 1994, p. 135). Indeed, Sacks asserted that there was "order at all points" in talk-in-interaction. "The hypothesis with which this programme [CA] was begun was that ordinary conversation may be deeply ordered, structurally organized phenomenon" (Hutchby & Wooffitt, 1998, p. 17).

This notion of "order at all points" supports the previously mentioned proposition that all data is worthy of examination and no piece of data should be dismissed as trivial prior to examination. "Order at all points" also implies that talk is methodic. Conversational moves are seen as methodic answers to particular unfolding problems or situations. "The methodic character of talk is always addressed to the details of the

interactional and sequential context in which it is produced” (Hutchby & Wooffitt, 1998, p. 20). Meaning is being created and renegotiated on a moment-to-moment basis.

The successful employment of conversational methods shows that they are both context-sensitive and context-free and must be examined from this perspective. This means that on one hand there is a certain basic and repeatable orderliness to the way in which talk is conducted and is responsive to societal problems and encounters, yet on the other hand it is capable of "fine-tuned adaptation to local circumstances" (Have, 1990, p. 2). CA is designed to “explicate the structural organization of talk-in-interaction at this interface between context-free resources and their context-sensitive applications” (Hutchby & Wooffitt, 1998, p. 36).

CA researchers must look to the details of the recorded interaction to see how these context-free and context-sensitive attributes are embodied in any particular situation. “CA researchers cannot take ‘context’ for granted nor may they treat it as determined in advance and independent of the participants’ own activities. Instead, ‘context’ and identity have to be treated as inherently locally produced, incrementally developed and, by extension, as transformable at any moment” (Drew & Heritage, 1992, p. 21).

Heritage has expressed this as the double contextuality of talk. “[T]he production of talk is doubly contextual in that a subsequent utterance not only relies upon existing context for its production and interpretation, but that utterance is in its own right an event that shapes a new context for the action that will follow it” (Duranti & Goodwin, 1992, p. 29). Thus, the roles of speakers are highly malleable, and new contexts can be created

or invoked by the talk itself. Talk does a great deal more than merely reflect or replicate the external context; it in effect reconstructs and reconstitutes it.

These methodic or “order at all points” and context sensitive qualities are seen in the opening series of questions in Case 2-Masand.

Excerpt 4.2

- 11 Wells: All right. And can you tell the jury uh (.) where you live and how you
12 came to be in Eastville. >Just tell 'em a little bit about yourself.<
13
14 (2.0)
15
16 Masand: Um
17
18 (2.0)
19
20 Masand: You want me to start from (.) when I first –
21
22 Wells: Well, I would tell 'em where you were born, how you came to be an
23 American then more particularly how you came to be in Eastville.

After Wells' question, Masand hesitates (line 14), uses a filler sound “um” (line 16) and then hesitates again (line 18). His insertion sequence (line 20) seeks clarification of Wells' question, but this move provides a methodic answer to the unfolding problem of uncertainty evidenced by his hesitations. This move is context-free in its turn-taking sequence and its use of a dispreferred marker (hesitation and “um”), but context-sensitive in its response to the specific interactional problem. Hesitations and fillers such as “um” are typical markers of breakdowns in communication or are used as preface objects before dispreferred responses. Here they signal Masand's lack of understanding and his reluctance to seek clarification.

Psathas provides a characterization of CA that nicely summarizes its focus on the key concept of orderliness, and the following is an extensive quote from his 1995 work:

Conversation analysis studies the order/organization/orderliness of social action, particularly those social actions that are located in everyday interactions, in discursive practices, in the sayings/tellings/doings of members of society.

Its basic assumptions are:

1. Order is a produced orderliness
2. Order is produced by the parties in situ; that is, it is situated and occasioned.
3. The parties orient to that order themselves; that is this order is not an analyst's conception, not the result of the use of some preformed or preformulated theoretical conceptions concerning what action should/must/ought to be, or based on generalizing or summarizing statements about what action generally/frequently/often is.
4. Order is repeatable and recurrent.
5. The discovery, description, and analysis of that produced orderliness is the task of the analyst.
6. Issues of how frequently, how widely, or how often particular phenomena occur are to be set aside in the interest of discovering, describing, and analyzing the *structures*, the *machinery*, the *organized practices*, the *formal procedures*, the ways in which order is produced.
7. Structures of social action, once so discerned, can be described and analyzed in formal, that is structural, organizational, logical, atopically contentless, consistent, and abstract, terms. (pp. 2-3).

Note that point #3 above stresses the first methodological proposition or core assumption with which this section began---namely that interaction is to be examined without prior theoretical assumptions. In addition, #2 complements the proposition of examining naturally occurring data. Social order cannot be recognized and described unless its real life (in situ) execution is the object of analysis. CA's theoretical perspectives, key methodological propositions, and its methods of data collection and analysis all support the belief that human social practices and interaction construct our knowledge and reality.

Membership Categorization Analysis

In addition to the intellectual explorations that led to the development of CA, another major theme or track of inquiry that emerged in Sacks' lectures was membership categorization analysis (MCA) and the use of membership categorization devices (MCDs). The early lectures included considerable discussion of how we generate member categories to make sense of particular events and conversational exchanges. The consideration of category generation and assignment again derived at least partially from a dissatisfaction with sociology's seemingly unscrutinized practices of labeling and identification of societal members and their activities. "All the sociology we read is unanalytic, in the sense that they simply put some category in. They may make sense to us in doing that, but they're doing it simply as *another Member*" (Sacks, 1992, Vol. 1, pp. 41-42). Sacks proposed instead that we examine how members "do descriptions." Frequently using mechanistic or production-type language that was to become so characteristic of CA, Sacks discussed finding a "membership categorization apparatus because it generates the categories that members of society use in their descriptions" (Silverman, 1998, p. 77).

Hester and Eglin (1997) say that:

Whilst 'conversation analysis' (CA) and membership categorization analysis have their origins in the work of Sacks, these two forms of inquiry have developed to a large degree independently of each other, with differing attention on the part of each to the salience of the other, and with

conversation analysis having been the most widely practiced (p. 2).

Watson agrees and says that CA has “increasingly focused on aspects of sequential organization of utterances, to the virtual exclusion of any focal concern with membership categorization” (1997, p. 49). It is interesting to note that two relatively recent texts on CA by Have (1999) and Hutchby and Wooffitt (1998) fail to provide any serious discussion of MCA.

In fact, MCA has generated considerable debate regarding its proper status within the ethnomethodological tradition as well as within various CA communities of practice. Silverman (1998) says that MCA’s status and relationship to CA is a matter of “fierce debate” (p. 128). Schegloff tends to downgrade Sacks’ work on MCDs and argues that by the late 1960s Sacks was moving away from their use: “In my view, Sacks abandoned the use of ‘category bound activities’ because of an incipient ‘promiscuous’ use of them...” (Schegloff, 1992c, Vol. 1, p. xlii) -- such promiscuity being the tendency of an investigator to assert the use of an MCD as a “common sense” matter rather than as a result of close examination of the data at hand.

Nonetheless, both Silverman (1998) and Watson (1997) assert that “Sacks’s work on membership categorization is wholly consonant with his analysis of the sequential organization of conversation” (Silverman, 1998, p. 97). They argue that Sacks envisioned MCDs as completely “local members’ devices, actively employed by speakers and hearers to formulate and reformulate the meanings of activities and identities” (ibid.). This perspective stresses that membership categorization is an activity that is carried out

in particular local circumstances and is always indexical to those circumstances. This emphasis is compatible with ethnomethodology.

Although arguably seen as “two sides of the same coin” (Silverman, 1998, p. 152), the separation of MCA and CA was no doubt influenced by the appearance of the seminal article “A simplest systematics for the organization of turn-taking in conversation” in 1974. This now classic article by Sacks, Schegloff and Jefferson was published in the journal *Language*, and includes many of the core concepts of “pure” or “orthodox” CA. “By 1974 Sacks and his colleagues began to write and act less like natural philosophers and more like scientists who inspected data, developed analytical models and announced their findings in technical reports” (Lynch & Bogen, 1994, p. 92). These early reports and articles focused on the sequential procedures of talk-in-interaction abstracted from any specific context (“pure” or “orthodox” CA). Subsequent lines of research interest have examined “practices typical of setting- and institution-specific (inter-)actions” and “framed wider concerns than *just* studying talk-in-interaction” (sometimes referred to as “applied” CA) (Have, 1999, p. 10). These two lines of research have also been described as a focus on the institution *of* interaction as an entity in its own right (pure CA) versus an examination of the management of social institutions *in* interaction (applied CA) (Heritage, 1989).

Sacks’ MCA work developed a number of concepts to explain the social apparatus of membership categorization. Among others, these included MCDs (membership categorization devices or collections of membership categories), the economy rule (a single category from an MCD can be referentially adequate), the consistency rule (related categories are generally used to categorize members of a

population) and the duplicative organization rule (sets of categories are used to define and count units). MCA concepts and definitions are explained further in chapter 8.

Work in MCA has been expanded by, among others, Jayyusi (1984), Lynch & Bogen (1997), Eglin and Hester (1999), Baker (1997, 2000), Watson (1997), Lepper (2000), and Housley & Fitzgerald (2002). To a large extent, social action and social order rests on our mutually understood categories and descriptions for our fellow members and on specific occasions our “population cohorts” (Rawls, 2002, p. 46). A population cohort is a collection of persons into a group engaged in a particular activity. These cohorts “work together to produce recognizable orders of social affairs” (Rawls, 2002, p. 46). MCA provides a means of interpreting the fiber of the social and moral order and the moral responsibilities that are done to, for and about our fellow interactants. Any individual can be described in a tremendous number of ways. The selection of a descriptive term and how it is deployed or made relevant at any given time can also be said to be “context sensitive” and “context free.” Ascriptions of categories both create and recreate context. A well known example of this is Danet’s (1980b) examination of the use of the terms “baby” versus “fetus” during a manslaughter trial. A doctor was on trial for manslaughter after performing an abortion. The prosecution always used the category or descriptive term “baby” while the defense always used the category or descriptive term “fetus.”

Reliability, Validity and Acceptability

In 1995, Psathas said CA “has fulfilled many of the promises of ethnomethodology to be the study of the ways in which members ongoingly produce social order...while at the same time refusing to present its findings and formulations in

overly theoretical or abstract terms” (p. 67). Perhaps it is this seeming rejection of the “overly theoretical” that has contributed to CA’s increasing appeal to varying disciplines. Ironically, although CA continues to be used in more and more academic fields, both it and ethnomethodology also continue to struggle to explain their basic tenets and underlying principles, and like most types of qualitative research they are confronted with issues of reliability and validity. Reliability refers to the “repeatability” of the findings. In other words, would the research process yield the same results if repeated? Validity refers to how well the research process has accurately addressed the phenomenon under consideration.

One of the main tasks of CA is to delineate “all the procedures employed by interactants in the achievement” (Lepper, 2000, p. 178) of their activities; therefore, reliability in CA can be addressed in three ways. First, to what extent is there agreement on what the interactant procedures are among other researchers and/or among “ordinary language speakers who can offer a shared understanding of the ‘common sense’ hearing” (ibid.)? Second, quality recordings that provide the details of interaction are required and transcripts should be produced with agreed upon transcription conventions. Finally, the selection of data should be inclusive enough to address the analytic task. “Reliability of the findings of an analysis depends on [the] search for a wider base, from which the variations of the phenomenon can be thoroughly examined” (Lepper, 2000, p. 179).

According to Sacks, et al., a participant’s display of understanding of prior turn talk “in subsequent turns affords a resource for the analysis of prior turns, and a proof procedure for professional analysis of prior turns, resources intrinsic to the data themselves” (Sacks, Schegloff & Jefferson, 1974, p. 729). This means that each turn is

validated (or proved) by the next turn. “It is not the analyst’s interpretation of the utterance but the understanding displayed by the hearer which provides for valid analytic inference about the procedures employed” (Lepper, 2000, p. 175). In addition to this next turn validation procedure, claims must be “transparent.” This refers to both the transparency and availability of the data and to the fact that claims should be clearly recognizable in the results. Finally, deviant cases have to be accounted for. “If a deviant case cannot be explained within the emerging pattern being studied, then the working hypothesis about the pattern must be revised” (ibid.).

Conversation analysts are said to “downplay theoretical matters and to search instead for novel empirical results” (Lynch & Bogen, 1994, p. 66). Some critics of CA and ethnomethodology have labeled them as “atheoretical,” even as “abandoning epistemology in favor of methodology,” and as being “obsessed with details” and the trivialities of talk and interaction (Wei, 2002, p. 161). Heritage (1989) conceded that CA’s “orientation may be criticized as resulting in an atheoretical taxonomy” (p. 36). Sacks’ own statements contribute to this perspective: “Basically what I have to sell is the sort of work I can do. And I don’t have to sell its theoretical underpinnings, its hopes for the future, its methodological elegance, its theoretical scope or anything else. I have to sell what I can do, and the interestingness of my findings” (Sacks, 1992, Vol. 2, p. 3). Both Garfinkel and Sacks are said to

obstinately turn to the social world in order to address the questions they are asked. This seems to be a typical ethnomethodological trick. When asked any questions about matters pertaining to epistemology, method, theory, meaning,

rationality, thought, structure, action and so much more, [they] constantly appear to turn to specifics, to turn to some materials they have collected, or study they have conducted, in order to explain what they mean (Button, 1991, p. 5).

Yet such “obstinacy” can scarcely be said to be “atheoretical.” If anything, it typifies and underscores many of the basic beliefs of CA. These beliefs are further typified in the methods that CA employs, the type of knowledge that it seeks through these methods, and the goals that it seeks to achieve with that knowledge. Have asserts that the “major difference between CA and other efforts to understand human life is one of *theoretical style*” (1999, p. 32). While “the field remains strongly orientated towards the systematic description of the details of interactional phenomena ... no apology is made for it here” (Heritage, 1989, p. 36).

Conclusion

Sacks left a remarkable framework for our examination of social activity that deserves the attention of researchers interested in understanding the minutiae, the potentially momentous and the myriad possibilities of daily interaction. The findings chapters that follow are underpinned with the theoretical and methodological perspectives of EM, CA and MCA. They examine how NNS defendants and their attorneys execute and manage their talk-in-interaction in a courtroom. This examination provides one snapshot of what Matoesian calls the “performance of culture in the situated details of legal action” (2001, p. v), and it seeks to show how every ordinary act is infused with the extraordinary.

CHAPTER 5 THE INSTITUTIONAL SPACE: CONTEXTUALIZING CONTEXT

Overview

“Context” is a house with many rooms. It is a key concept in virtually any type of study involving language from pragmatics to sociolinguistics to historical linguistics.

The word can have quite different meanings across different disciplines and even within different disciplines depending on the type of analysis being conducted. Duranti and Goodwin (1992) have said:

It does not seem possible at the present time to give a single, precise, technical definition of **context** [original emphasis], and eventually we might have to accept that such a definition may not be possible. At the moment the term means quite different things within alternative research paradigms, and indeed even within particular traditions seems to be defined more by situated practice, by **use** [original emphasis] of the concept to work within particular analytic problems than by formal definition (p. 2).

Essentially, this seems to mean that defining context depends on the context! CA has its own postulates about what constitutes context. As discussed in the previous chapter, one of the assumptions of CA is that talk is both context-sensitive and context-free—demonstrating certain patterns of orderliness across settings, but also responding to local circumstances. Context as constructed through language is constantly both self-replicating and capable of redefinition. “[S]ocial context itself is a dynamically created thing that is expressed in and through the sequential organization of interaction” (Heritage, 2005 , p. 105).

Analyses of the data collected from these two malpractice trials reveal that despite the seeming similarity of the external or “distal” (Schegloff, 1992b, p. 195) contexts of the trials and of the backgrounds of the defendants the *in situ, in the moment* context that is created by each attorney and defendant is strikingly different. More importantly, this is true well before “the facts” of the specific cases are presented to “the fact finders,” the respective juries. The situated identities that are created for and by the defendants and the categorizations that are applied to the defendants provide contrasting moral fields of play on an ostensibly “even playing field.” Detailed examination of the language presented in these courtrooms illuminates the institutional and social order work that is constructed in the moment-to-moment milieu of discourse. Specifically, it also shows how institutional work is done when one of the key players is a NNS.

As explained in the previous chapter, the analyses of the data are informed by ethnomethodology, membership categorization analysis and conversation analysis. Despite their joint origins, research in the latter two areas has tended to develop separately; however, there is a growing realization that they are not antithetical perspectives and in fact can be used in complementary ways. MCA and CA are not conflicting means of examining social structure-in-action (Silverman, 1998; Watson, 1997). While each may provide a different lens of analysis, from zoom to wide-angle, they both fit on the ethnomethodological camera to give us better snapshots of how social order is constituted. Each captures important insights into the construction of social structures, activities and relationships through language. This chapter provides a framework for understanding the institutional space, the context, of a jury trial. The next three chapters show how that space is furnished, populated and nuanced by the power of

language. They present specific findings from examination of the courtroom language in these cases and thereby provide insights into how people “do” this institution. Before proceeding to those findings, it is useful to look at the evolution of CA from “mundane” to “institutional” settings, and at how this particular institution is structured.

Institutional Forays

The contexts to which CA has been applied have expanded since its inception. The “naturally occurring” talk in which CA is interested includes both “mundane” occurrences of conversation as well as those that occur in institutional or more formal settings. The turn-taking system first described in the Sacks, Schlegoff, and Jefferson paper of 1974 was for that of “mundane conversation” – the baseline or “primordial form” (Zimmerman, 1988, p. 424) against which other types of interaction are compared. In “mundane” conversation the parameters of turn *form*, turn *content* and turn *length* are said to be free to vary. In “institutional” talk one or more of these three parameters is said to be constrained (Hutchby & Wooffitt, 1998, p. 47). Although CA began by examining interaction in "mundane settings of everyday life" (Hutchby & Wooffitt, p.145), it has increasingly been used to investigate talk in such institutional settings. (Although one might reasonably argue that the data from which CA had its start, suicide hotline conversations and counseling sessions, are scarcely mundane.)

Drew and Heritage (1992, pp. 21-25) provide three characteristics of institutional talk: 1) it is goal oriented in institutionally relevant ways; 2) it frequently involves special and unique constraints on what may be contributed; and 3) it may be associated with inferential frameworks and procedures that are unique to particular institutional contexts. Examples would include courtrooms, workplaces, doctor-patient exchanges in

consulting rooms, and classrooms. Given the influence of such institutions on our lives, an interest in these institutions is wholly congruent with CA's original interests in discovering the workings of situated social order.

In fact, increasingly, CA has been used to examine new areas of institutional talk, including human and computer interaction and survey or interview interaction. Its applications continue to expand, including its use to look at communication problems of 'deficient' speakers (Have, 1999, pp. 189-192; Hutchby & Wooffitt, 1998, pp. 252-257); and use in new disciplines, such as 'discursive social psychology' (Hutchby & Wooffitt, 1998, pp. 202-228) and a linguistically oriented slant that looks at the intersection of grammar and interaction (Arminen, 1999, p. 255).

The distinction between "ordinary" or "mundane" conversation and "institutional" interaction has generated increasing concerns and debates among CA practitioners. Most recently, Hester and Francis (2001) have questioned whether this strand of CA research (what they call the institutional talk program--ITP) betrays its ethnomethodological roots by the very label of "institutional." "The terms 'institution' and 'institutional' are, rather sociological terms. As such, they come trailing clouds of (conventional) theory" (p. 209). It was just such prepackaged sociological labels that ethnomethodology and CA were originally designed to avoid. These are certainly legitimate points for debate; however, similarly, labeling something as "non-institutional" or as "mundane" also sends up wisps, if not clouds, of conventional theory. The process of labeling and the accompanying implications are not easy to avoid no matter which research camp one chooses.

The Judicial Space

Examination of courtroom talk within an EM, MCA and CA framework should recognize that a jury trial is a very unique, pre-populated and pre-sequenced event. It is a particular institutional discourse *space*. I intentionally opt for the word *space* here rather than *context* for two reasons. The word *space* implies a defined but fluid and changeable area that is waiting to be filled, one that can both expand and contract, and is subject to active design. The word *context* has more of an implication as an area with already determined contours and constituent elements. If “context” is a house with many rooms, then “space” is a loft with moveable walls. We can and do create a variety of discourse *spaces* in the same physical space. For example, a backyard conversation between two neighbors can quickly move from “neighborly discourse” to “medical discourse,” and in the same moment that space is repopulated with doctor-patient instead of neighbor-neighbor. When Warren Zevon (1978) implores, “I was gambling in Havana; I took a little risk; Send lawyers, guns and money; Dad, get me out of this,” we smile because with 4 lines and 21 words he moves from fun-loving, spoiled and privileged wanderer to unfairly persecuted son and simultaneously calls on at least three major types of institutional discourse: the law, the military, and capitalism. The discourse adeptness and fluidity demonstrated during trials is considerably lengthier, but no less impressive.

This study proceeds on the assertion put forth by Heritage (2005) that “although the boundaries between institutional talk and ordinary conversation are not clearly fixed and demarcated, the distinction is useful and empirically sound” (p. 108). The three primary characteristics of institutional talk as articulated by Drew and Heritage (1992) are given in the table below and applied to the example of a jury trial.

Table 5.1

Institutional Talk Characteristics: Jury Trial

Institutional Talk Characteristics	Example: Jury Trial
Involves the participants in specific goal orientations which are tied to their institutionally relevant identities: doctor/patient; teacher/pupil	Goal: Determine “the facts” and render a “fair” verdict Identities: Lawyer-client; lawyer-lawyer; lawyer-witness; judge-lawyers, etc.
Involves special and unique constraints on what may be contributed to the business at hand	Substantive: prohibition against hearsay Procedural: lawyers are permitted to ask questions; witnesses are not
Associated with inferential frameworks and procedures that are unique to particular institutional contexts	Swearing in of jurors and witnesses Stages of the trial proceed in a particular order (see below)

In the United States, trials are indeed very staged events, and the characteristics of institutional talk can very easily be applied to the courtroom situation. Participants have assigned roles or identities (judge, juror, defense attorney, plaintiff, etc.), and these roles implicate the actions they can take and the types of discourse they are permitted to produce. The framework for the discourse and the procedures through which it proceeds are also quite specific and sequenced. These actors are constrained by rules of location, sequencing and interpretation.

Location Rules

Participants have specific roles, and they also have specific and assigned locations within the courtroom “stage.” These are shown in the diagram in Appendix C. “Activity in prototypical public settings for various public institutions relies on positioning of participants for evidence of expected and actual speaker-hearer roles” (Philips, 1986, p. 225). These positions and the roles they dictate influence the sequential organization of interaction.

Permission to significantly transgress the boundaries of assigned locations must be requested of the judge. The judge's elevated bench and costume (robe) symbolically mark his or her status as director and overseer of the business at hand. Attorneys have certain leeway to move within the courtroom, but the jury remains stationary and the public is restricted to specific viewing areas. As is typical in other institutional settings such as the church or the classroom, the judge, "as the official representative of the institution who controls the interaction is ... in the maximal position of visual and auditory access to all present in the situation, as well as all entries and exits" (Philips, 1986, p. 229). The witness stand is normally positioned next to the judge facing the plaintiff and defendant tables, but not directly facing the jury--underscoring that direct interaction is clearly sanctioned between the attorneys and the witnesses, but not between a witness and the jury nor between a witness and the judge.

Sequencing Rules

For dramas both big and small, the judicial adversarial play of a jury trial proceeds in a specific sequence of well defined stages or acts. Participants are selected and have particular roles and responsibilities during each of these stages. Particular rules of interaction also govern each stage. The sequence of these stages and their corresponding primary institutional purpose are provided in the next table.

Table 5.2

Stages of a Jury Trial and Corresponding Institutional Purpose

Stages of a Jury Trial	Institutional Purpose
1) Jury selection (voir dire) by plaintiff's and defendant's attorneys	To select a "fair and impartial" jury.
2) Opening statements by plaintiff's and defendant's attorneys	Outline key elements of each party's case and the evidence each proposes to present.
3) Presentation of plaintiff's case a) direct examination of witnesses by plaintiff's attorney b) cross-examination of witnesses by defendant's attorney	Present the best possible evidence that supports the plaintiff's assertions. Defense allowed to question/challenge plaintiff's witnesses.
4) Presentation of defendant's case c) direct examination of witnesses by defendant's attorney d) cross-examination of witnesses by plaintiff's attorney	
5) Closing statements by defendant's and plaintiff's attorneys	Summarize key elements of each side's case.
6) Instructions to the jury by the judge	Instruct the jury as to relevant laws and appropriate burden of proof to be used in making a decision.
7) Verdict by the jury	Conclude case/render decision.

There are also restrictions on how and when interaction can take place within these stages. For example, direct interaction between attorneys and jurors takes place on three occasions, two at the beginning and one at the end of the trial. Only during these three stages can attorneys officially and directly address the jury. These opportunities are during voir dire and opening statement and then during a closing statement. The first of these is, at least in theory, dialogic while the other two are monologic. During voir dire,

attorneys are picking their primary audience. Ostensibly, the purpose of voir dire is to determine the qualifications of potential jury members.

Following jury selection, each party's opening statement presents his or her version of the facts and outlines the case to come. These initial comments can make a strong impression on the jury and are essentially the first move in the highly stylized judicial conversation. Of course, this particular conversational turn (as with most courtroom "turns") is a very formalized and particularly sequenced one. It is a turn taking system very different from that of everyday conversation. There is strict turn-type pre-allocation in the courtroom, meaning that "participants, on entering the setting, are normatively constrained in the types of turns they may take according to their particular institutional roles" (Hutchby & Wooffitt, 1998, p. 149). These roles are fluid ones depending on the particular stage of the trial.

The courtroom context contains elements of a variety of discourse situations, including ordinary conversation, lecture and dramatic production. Jurors are clearly ratified participants, but their specific roles within the complex interaction change significantly during various stages of the trial. During voir dire they are addressed recipients (Goffman, 1981, p. 132) with the right to respond directly to the attorneys and judge. During questioning of witnesses their participation status or role changes to what Goffman has called "encircling hearers" (1981, p. 133) or ratified overhearers. Goffman refers to a trial as a "binding podium event" (1981, p. 140) in which "a single speaking slot is organizationally central, and yet neither a stage event with its audience, nor a conversation with its participants is taking place" (ibid.).

Ironically, the arguably most important participants in the courtroom conversation (the jury), the participants who ultimately decide the binding quality of the interaction, have no verbal turns other than those that can occur during *voir dire*. As Drew (1985) points out “this element of non-speaking reciprocity of courtroom discourse certainly complicates an investigation of properties of talk whose effect cannot easily be observed in naturally occurring data” (p. 134). However, Heritage (1984) says that one way this non-speaking reciprocity is oriented to by the attorneys is in the sequence of their questions and the frequent lack of any third turn receipt tokens. Since the attorney is not asking a “real” question (truly seeking information) or an “exam” question (determining if the other party has information), the attorney avoids “any form of third turn receipt item in favour of a move to the next question” (p. 289). Attorneys are asking what I would call “dramaturgic questions” to produce information for the jury.

While asking these dramaturgic questions, they must also stand in the stead of the jury members who are ratified overhearers in the action. Even though attorneys usually know the answers or at least have anticipated answers in mind to their questions, they must assume the role of a jury member who is hearing the information for the first time. I call this role that of a sympathetic ratified overhearer. In this role they must constantly track or monitor possible miscommunications or “troubles” with the communication between the witness and the jury members—recognizing needs for expansion, repetition or clarification of the witnesses’ turns. Successful execution of this role means that they are acting on jurors’ behalf as addressed recipients rather than as simply encircling hearers.

During examination of witnesses, both attorneys and witnesses are constrained in the form their turns can take. Attorneys must ask questions and witnesses must provide answers. During closing argument, attorneys again have the chance to directly address the jury and sum up their case, highlighting important points and often reconnecting to topics and points raised in the opening statement.

Interpretation Rules

In addition to the location and sequencing rules that are imposed in this institutional space, there are also specific interpretation rules that are dictated to the jury. For example, the jury is specifically told that information discussed during voir dire, as well as statements made during opening and closing argument are not to be considered as evidence in the case. In addition, these institutional interpretation rules sometimes contradict the “normal” interpretation rules of the ‘institution of conversation’ itself. In criminal cases in the United States, an accused’s silence cannot be used against him/her. This, however, conflicts with the preferred format response to accusation in conversation which is denial and accounting. Interestingly, the reverse is true in Britain where a suspect’s silence in the face of a question or accusation may be used in evidence by the prosecution (Heritage, 1984, p. 269). Talk is functioning within and co-producing two institutional spaces—one of the courtroom and one of conversation.

Bi-Insitutional Spaces

This discussion has shown that the talk-in-interaction in the courtroom is what I am calling “bi-institutionalized.” In other words, not only are there unstated institutional rules of discourse and conversation (for example, preference responses) that can be discerned through examination of courtroom language, but there are also stated and

written institutional rules of the court (statutory and administrative) pertaining to discourse that constrain and influence language production (for example, rules against hearsay, and concerning who can ask questions and when). Sometimes these two levels of institutionality act in concert; however, sometimes they are in opposition. Different actors within the institutional space proceed with varying levels of knowledge and competence concerning these bi-institutional rules. “Ordinary” citizens rely on their understanding of the institution of conversation while institutional representatives may draw on their knowledge of the rules of the institution of conversation and of the institution that they represent. The tension between these two types of institutionality and the varying levels of knowledge of the participants may result in marked power differentials and frustrating or confusing exchanges.

The researcher has access to the first type of institutionality (what might be termed level one institutional constraints) through examination of the language produced in the courtroom. The researcher has access to the latter (level two institutional constraints) through both written materials and through examination of the language produced in the courtroom. How these bi-institutional spaces are produced and enacted is presented in the following chapters.

Conclusion

This chapter has considered how to frame the meaning of “context” within the courtroom setting. It has also introduced the concepts of bi-institutional talk and spaces, and the role of a sympathetic ratified overhearer within that space. Each of the stages of a trial and the procedures within them contribute to the creation of the courtroom discourse space. Participants enact their assigned roles and clearly orient to the

institutional work at hand in a variety of ways. “The myriad ways in which specific contexts (e.g. particular social identities, purposes and circumstances) are talked into being and oriented to in interaction vastly exceed our comparatively limited, and overwhelmingly typified, powers of imaginative intuition” (Heritage, 1984, p. 237). The courtroom participants must adapt to their roles and those of other participants during every stage of the interaction. In particular, attorneys need to understand the nature of the bi-institutional interaction, and recognize opportunities to assume the role of a sympathetic ratified overhearer on jury members’ behalf.

The next three chapters examine the structure of the opening portions of voir dire by all four attorneys in the two cases and consider the direct examination of the defendant doctors. The discussion analyzes how the talk works to create both the institution of talk and the institution of the law within the discourse space of the courtroom.

CHAPTER 6 ACHIEVING INSTITUTIONALITY AND INSTITUTIONAL IDENTITY

Introduction

The voir dire stage of a trial provides an excellent entry point to examine how “institutionality” is achieved through language. As explained in chapter 5, voir dire is the stage of the trial during which jury members are selected and is the first of three occasions when attorneys are able to directly address jury members. The “primary aim of jury selection is to construct, as far as possible, a panel of jurors who are attentive, receptive to argumentation and, for both sides, sympathetic to the issues in the case” (Cotterill, 2003, p. 12). During voir dire, attorneys are in effect picking their primary audience and simultaneously presenting themselves to that audience. As Drew and Heritage (1992) point out, one way to examine the institutional character of interaction is to determine how (or if) “participants’ institutional or professional identities are somehow made relevant to the work activities in which they are engaged” (p. 4).

This chapter examines the opening portions of voir dire for each of the four attorneys involved in these two cases to determine how they initially present themselves to the potential jury members and how “institutionality” is achieved via talk. The data reveal that despite the fact that they are all ostensibly working on the same task (selecting a jury) they go about the work in quite different ways and thereby achieve quite different institutional identities. The fine distinctions between these identities can be vital for their clients. Since this study is particularly interested in the workings of the courtroom when a NNS is one of the participants, the contours of the achievement of identity by their attorneys is of vital importance. The next chapter examines how the attorneys initially portray their NNS clients and how their mutual identities are intertwined.

Institutional Purpose

The overt purpose of voir dire is to determine the qualifications of those who have been called as potential jury members and thereby to choose the jury. Like most work in the courtroom, this is done through the question-answer process. Attorneys question the members of the jury panel to uncover possible biases, prejudices, attitudes towards issues crucial to the case and personal involvement with or knowledge about litigants, potential witnesses or other key players in the trial. Of course, attorneys are also attempting to discover who among the potential jurors will be most sympathetic to their side of the case, and they are trying to create a positive first impression of both themselves and of their clients.

In chapter 5, institutional talk characteristics as described by Drew and Heritage (1992) were applied to a jury trial. In addition to the overarching purpose of the entire trial, each stage of a jury trial has a specific purpose and can also be framed within these talk characteristics. Using this framework, the voir dire stage is presented below:

Table 6.1

Institutional Talk Characteristics: Voir Dire Stage of Jury Trial

Institutional Talk Characteristics	Voir Dire Stage of Jury Trial
Involves the participants in specific goal orientations which are tied to their institutionally relevant identities: such as doctor/patient; teacher/pupil	Goal: To select a fair and impartial jury. Identities: Attorneys-potential jurors.
Involves special and unique constraints on what may be contributed to the business at hand	Attorneys ask questions; potential jurors respond.
Associated with inferential frameworks and procedures that are unique to particular institutional contexts	Potential jurors are sworn in; refusal to take the oath will disrupt the process.

In this chapter, I examine the introductory portions of the voir dire by each attorney in each of the two cases. The four transcript segments provide the interaction immediately up to the point where each attorney asks the first question that relates to the overt purpose of the voir dire—selecting a jury. Inspection of this talk shows that a great deal of interactional and institutional work is being done prior to the commencement of the institution’s stated overt function for this phase of the trial. This is particularly evident in Case 2-Masand for the defendant’s attorney.

Heritage (2004) says that the “institutionality” of interaction can be probed through a variety of means, including examination of the following: 1) turn-taking organization; 2) overall structural organization; 3) sequence organization; 4) turn design; 5) lexical choice; and 6) epistemological and other forms of asymmetry. For the first of these (turn-taking organization), Heritage asks whether or not there are special turn-taking rules that can alter the parties’ opportunities for action and potentially change the interpretation of the activities. “The decisive feature of a special turn-taking organization is that departures from it...can be explicitly sanctioned” (p. 226). All segments of a jury trial, including voir dire, are examples of such a special turn-taking organization.

Examination of the four introductory portions of voir dire reveals that they share an overall structural organization. In each instance, there are at least the following phases: turn initiation by the judge and acceptance by the attorney; self-introduction by the attorney; and transition to on-task work. In the table below, I list some of the techniques used during these phases to create institutionality and identity. The discussion of each transcript excerpt that follows is also divided into these three phases.

Table 6.2

Phases of Voir Dire and Attorneys' Institutional and Identity Techniques

Phase of Voir Dire Segment	Attorneys' Institutional and Identity Techniques
Initiation and Acceptance	Formality Honorifics Ritualistic exchanges/phrases
Self-Introduction	Affiliative Statements Directives* Explanation* Joking* Narrative* References to place/locale References to roles/responsibilities Use of jury member names* "We" references
Transition to on-task work	Empathy* Explanation* Less formal language Personalization of the defendant "We" references

* Indicates use in Case 2-Masand by defendant's attorney only.

Case 1-Nasa: Plaintiff Attorney's Voir Dire

In Case 1-Nasa, the plaintiff attorney's (Cutler's) voir dire begins as follows.

Pooler is the defendant's (Nasa's) attorney:

Excerpt 6.1

1 Judge : O::K Questions for the plaintiff.
2 ((Nods head toward plaintiff's attorney.))
3 Cutler: >Thank you your honor.<
4 ((Stands at plaintiff's table.))
5 May it please the court.
6 Judge: Mr. Cutler
7 Cutler: ((Moving from plaintiff's table to podium in front of jury.))
8 (Mr. Pooler)
9 Pooler: Mr. Cutler
10 Cutler: Ladies and gentlemen of the jury panel
11 (1.5)
12 the judge has already introduced me Sam Cutler. I practice in Lexington
13 (). I've tried several cases in this area
14 (.)

15 as well as other areas
16 (.)
17 > pleasure to be back. <
18 (.)
19 Um, I think there were a couple of hands with respect to knowing either
20 Jeremy or his Dad or uh his brother Chris. His mother Diane will also
21 be a witness at the trial of the case and ↓she is not here this morning.
22 She had to have dialysis but ↑she will be here and she will be a witness
23 and perhaps we ought to (.) to be complete
24 ((coughing by defendant))
25 (that)
26 if any of you know Jeremy's mom Diane Wright well we need to know
27 that
28 (3.0)
29 ((jury member raises hand))
For the same reason?

Turn Initiation and Acceptance (Lines 1 to 9)

The judge's "O::K" marks the end of one segment of activity (the swearing in of the last jury panel member) and the shift to the beginning of the voir dire segment. With the noun phrase "Questions for the plaintiff" the judge initiates the start of voir dire and directs the plaintiff's attorney to begin. The attorney responds by standing and saying "Thank you your honor." His use of the honorific "your honor" and his next statement "May it please the court" both orient to and create a formal atmosphere. "May it please the court" could be seen as a ritualistic phrase that requires no response; however, here the judge responds with the attorney's name and only at this point does the attorney move to the podium in front of the jury to begin his voir dire. As he does so, he also acknowledges the defense attorney (Mr. Pooler, line 8) and the defense attorney returns the acknowledgement (Mr. Cutler, line 9). These greetings and responses have a scripted character that provides a formal tone to the proceedings and contributes to its resemblance to a staged drama. The organization of this sequence also reflects and helps to constitute the institutional context: first a direct response is given to the judge's

initiation of the turn, next, what might be termed a more ‘global’ reference is made as permission is sought to begin, finally, the other key professional player is acknowledged (the opposing attorney). An alteration of this sequence would similarly alter the institutional character that it invokes.

Self-introduction by the attorney (Lines 10 to 17)

The plaintiff’s attorney continues the formality with his greeting to the potential jury members: ‘Ladies and gentlemen of the jury panel.’ (line 10). The design of this turn serves as a greeting, but also emphasizes the participants’ role within the institutional setting by referring to them as ‘of the jury panel.’ He then reminds the jury that he has previously been introduced by the judge and states his name for them. His reference to the judge emphasizes the hierarchal structure of each party’s role and identity within the courtroom. Next, he provides a bit of background information about himself and appears to be attempting to establish some sort of relationship or connection with the jury by his reference to trying cases ‘in this area.’ The additional statement ‘as well as other areas’ (which, of course, could be anywhere) is designed to emphasize his experience and skill. He concludes this introduction phase with the statement ‘pleasure to be back,’ stressing the immediate locale and his connection to it.

Transition to on-task work (Lines 18 through 30)

With a slight pause and the filler ‘um,’ he transitions to the on-task work of picking a jury. He reminds the panel that two members have indicated they know either Jason (the defendant), his father, or his brother. Although, he uses informal and personal language to refer to his client and to his family members (Jeremy, Dad, Chris) he uses more formal and distancing language to refer to their knowledge of these individuals.

Rather than specifically saying ‘a couple of you’ or ‘two of you,’ he chooses to use the phrase ‘a couple of hands.’ He also does not simply say ‘know,’ but chooses to use the phrase ‘with respect to knowing.’ This combination of formal and informal language tends to personalize the defendant and his family while depersonalizing the work that the jury members are required to do. The attorney is also working to produce a sympathetic identity for the plaintiff and his family, by the inclusion of the additional, but largely irrelevant, information about why Diane Wright is not currently in the courtroom (‘She had to have dialysis,’ line 22).

During this phase, lines 23 and 26, he uses an institutional ‘we.’ By saying ‘we ought to (.) to be complete’ and ‘we need to know that’, he again emphasizes that the work at hand is required by a larger social entity. They are working together on a specific institutional undertaking. The members of the jury panel orient to this statement as a question as is evidenced by the affirmative response of one individual.

Case 1-Nasa: Defendant Attorney’s Voir Dire

In Case 1-Nasa, the structure of the defendant attorney’s (Pooler’s) voir dire is strikingly similar to that of the plaintiff’s attorney, and begins as follows:

Excerpt 6.2

1 Judge: For the defendant.
2 Pooler: May it please the court.
3 Judge: Mr. Pooler.
4
5 Pooler: Mr. Cutler
6 Ladies and Gentlemen
7 As Judge [xxx] told you my name is Robert Pooler
8 ((moves podium away from jury box))
9 and I my office is located in Huntington West Virginia
10 (.)
11 and like a lot of doctors and lawyers and accountants and business
12 people here I practice regularly in Eastern Kentucky as well as Eastern

13 and Southern West Virginia. I practice regularly in this court and have
14 appeared before Judge [xxx] several times and had several trials here.
15 (.)
16 Would any of you simply because I don't live in Kentucky uh will any
17 of you hold that against my client (.) Dr. Nasa?

Turn Initiation and Acceptance (Lines 1 through 5)

The judge directs the defendant's attorney to begin his voir dire with the words "For the defendant." The attorney stands, uses the exact same ritualistic phrase used by the plaintiff's attorney, "May it please the court," and begins moving to the podium. As with the plaintiff's attorney, the judge responds with the attorney's name. The defendant's attorney acknowledges the plaintiff's attorney (Mr. Cutler, line 5), but in this instance the acknowledgement is not returned. He also acknowledges and greets the jury panel with the words 'Ladies and gentlemen.' Again, these ritualistic exchanges create the formality of the situation and show the roles, relationships and responsibilities that inure to these individuals in this setting.

Self-introduction by the attorney (Lines 6 through 14)

The defense attorney, Pooler, begins his self-introduction in a manner similar to that of the plaintiff's attorney, but with different wording. On a surface level he seems to be imparting the same information, but the effect is quite different. Rather than 'the judge has already introduced me' he says, 'As Judge [xxx] told you.' This is a slightly harsher and more hierarchal reference than that of Cutler, and emphasizes the judge's authority. Rather than simply state where he is from and mention his prior work in this court, he aligns himself with a list of professionals ('doctors and lawyers and accountants and business people') and he repeatedly mentions his association with the general area and with this specific court: practice regularly in Eastern Kentucky (line 12); practice

regularly in this court (line 13); appeared before Judge [xxx] several times and had several trials here (line 14). These references to ‘place’ and ‘home’ are recast in a negative rather than a positive manner in Pooler’s subsequent question in lines 16 and 17.

Transition to on-task work (Lines 15 through 17)

The first question that Pooler asks in regard to the on-task work of voir dire ties his status of residency to that of his client, Dr. Nasa: ‘Would any of you simply because I don’t live in Kentucky uh will any of you hold that against my client (.) Dr. Nasa?’ His question does little to truly determine possible biases and in fact, implies to the jury members that he believes they may harbor such unfounded viewpoints, as the phrase ‘simply because’ makes clear. The question is slightly confrontational with a hint of accusation. This question fails to focus fact finding and questioning on the individual defendant, rather it ties the lawyer and the defendant together concerning a matter that is unrelated to the facts of the case. In other words, it raises covert status to overt relevance in a setting that overtly says it should be irrelevant. This is an approach that continues in the next part of the voir dire as Pooler begins a description of his client. This description is discussed in the next chapter.

Case 2-Masand: Plaintiff Attorney’s Voir Dire

In Case 2-Masand, the plaintiff attorney’s (Honor’s) voir dire begins as follows:

Excerpt 6.3

1 Judge: Ms. Honor
2 (11.0)
3 ((Attorney walks from the plaintiff’s table to a podium in front of the
4 jury box.))
5 Honor: >I was introduced to you at the beginning< of the ca:se. My name is
6 Patty Honor. I don’t recognize a one of your faces. Do any of you all
7 know me: (.) or have seen me before (1.5) or had any contact with me ↓
8 >I didn’t think so.< an’ no one here knows Mike (.) Honor, right↑

Turn Initiation and Acceptance (Lines 1 through 4)

The judge by simply pronouncing the name of the plaintiff's attorney indicates that she may begin the voir dire stage of the trial. He is in effect nominating and selecting her as the next speaker. She accepts this offer to take the floor not with any verbal response but by moving to the podium positioned in front of the jury box. The brevity of the judge's turn, its lack of reference to an institutional role as was used by the judge in Case 1-Nasa, and the absence of a verbal acceptance of the nomination create a lower level of formality than was seen in Case 1-Nasa.

Self-introduction by the attorney (Lines 5 through 6)

Honor begins by reminding the jury panel that she was introduced to them previously and then reintroduces herself with the rather typical "my name is Patty Honor" format. These statements are almost identical to the turns used by the plaintiff's attorney in Case 1-Nasa; however, she does no additional identity work as was done by the plaintiff's attorney, Cutler, in that case. She makes no mention of her specific role in this case, of whom she represents, where she is from, or what other work she has done in this court or in the region.

Transition to on-task work (Lines 6 through 8)

From there she moves directly to the interesting statement in line 6 "I don't recognize a one of your faces." This statement is somewhat difficult to interpret without knowing the institutional goal orientation of this stage of the trial, which is to select a fair and impartial jury. Her statement seems intended to emphasize that she has no personal relationships with anyone on the jury panel. The extreme case formulation phrasing (Pomerantz, 1986) conveys a slight level of surprise and underscores that there is not a

single (not “a one”) individual that she can identify, and the use of “your faces” gives it a personal tone. The phrasing is also somewhat informal and familiar, bordering on colloquial.

She then checks her assertion with the question put to the jury panelists in lines 6 and 7: Do any of you all know me: (.) or have seen me before (1.5) or had any contact with me ↓ The silence of the jury members is their response; equaling an answer of ‘no.’ She then strengthens her earlier assertion and agrees with their response with the statement “I didn’t think so.”

Next, in line 8, she asks about any contacts or relationships with her co-counsel: No one here knows Mike (.) Honor, right? The pause between Mike and Honor indicates some uncertainty as to the best way to refer to him. She settles on using his complete name, but again uses only a given name with no reference to his role in this trial (co-counsel). This optimized tag question is designed for a no problem response. It presupposes a preferred answer of agreement, however, five jury members respond that they do indeed know Mike. Each of the five jury members is then asked to provide an explanation of how they know Mike Honor.

Case 2-Masand: Defendant Attorney’s Voir Dire

In the same case, the beginning of voir dire by the defense attorney (Wells) is strikingly different, and is also quite different from both of the initial segments of voir dire in Case 1-Nasa. The same phases of activity occur, but they are considerably more complicated and elaborated. This attorney takes considerably more time to move to the “real” work of the voir dire—which is to ask questions of the panelists that potentially

relate to their qualifications as jurors. Her voir dire begins immediately after lunch and she takes advantage of this time frame to begin with a story to commence the interaction.

Excerpt 6.4

1 Judge: Ms. Wells
2 Wells: Thank you your honor.
3 (9.0)
4 ((Attorney walks from the defendant's table to a podium in front of the
5 jury box.))
6 I don't know how Mr. Jones feels but the toughest class of the day for
7 me when I used to teach was the class ↑immediately following lunch
8 cause everybody comes back (.) they're a little bit sleepy >the
9 courtroom's not too bright< so I have asked the bailiff that if anybody
10 starts to DO:ZE or looks like you're not paying attention to me just to
11 turn the air conditioning up a little bit and see if we can't get it cool
12 enough for you all to stay awa(h)ke OK.

Turn Initiation and Acceptance (Lines 1 through 2)

The judge initiates this segment in the same manner that he used for the plaintiff's voir dire. He simply states the defense attorney's name. She responds to his nomination of her turn with 'Thank you your honor' acknowledging his role, position and power to control the sequence of turns in the courtroom.

Self-introduction by the attorney (Lines 6 through 24)

Unlike the plaintiff attorney's rather simple and formal introduction of herself ('My name is Patty Honor'), the defense attorney never provides her name to the jury panel; however, her lengthy introductory phase establishes her role, her relationship to the jury panel and to the task at hand with a clear level of authority and purpose. This is done in some exceptionally clever ways. First, although she never mentions her own name she refers to two of the jury panelists by name. These seemingly simple references accomplish some very complex social and institutional work.

In lines 6 through 9 she says: ‘I don’t know how Mr. Jones feels but the toughest class of the day for me when I used to teach was the class immediately following lunch cause everybody comes back they’re a little bit sleepy the courtroom’s not too bright...’ It was revealed during the plaintiff’s voir dire that Mr. Jones is a high school teacher, so the defense attorney takes this opportunity to single him out as she begins a mini-narrative about teaching. This statement works on a multitude of levels. It shows that she has been paying attention to the jury panelists and to their identities outside of the courtroom. It also acknowledges and sympathizes with the difficult job that Mr. Jones has as a teacher and draws a comparison between his outside the courtroom role and an identical role that she formerly had (when I used to teach, line 7). In addition, this statement works to establish commonality between herself and the jury members. She is “someone like them.”

In mid-sentence she switches the locale of this narrative from the abstract and imagined, but very familiar and recognizable, classroom setting to the current courtroom setting (the courtroom’s not too bright, line 9). This switch to the current setting further draws the comparison between the role of a teacher and the role that she has in the courtroom. She then mentions another player in the courtroom by referring to his role (the bailiff, line 9) and by stating that she has asked him ‘to turn the air conditioning up a little bit’ (line 11) she works to establish her authority in the courtroom. She does not directly tell the jury panelists that they have an obligation to concentrate on her statements, but this point is made clear by the condition that she lays out to invoke the bailiff’s action: ‘if anybody starts to DO:ZE or it looks like you’re not paying attention to me..’ (lines 9-10). Yet the blame for such potential inattention has been placed on the

time of day (following lunch, line 7), the dimness of the courtroom, or the need for more air conditioning. Drawing an analogy between courtroom work and classroom work draws on knowledge that all the jury members would have.

The second reference to a jury panelist by name takes place in lines 13 to 14 below: ‘And I would also note that some of you all on the back row unless Susan got a haircut during lunch you all have changed seats on me OK?’ This statement also has a “teacher quality” to it; it is something that might typically be heard in a classroom setting. After returning from lunch, two of the jury panelists who were seated next to each other, one a man and one a woman, have switched seats.

Excerpt 6.5

13 Wells: And I would also note some of you on the back row unless Susan got a
14 haircut during lunch you all have changed seats on me OK. And we
15 attorneys have all our little boxes
16 ((Susan looks at the attorney with raised eyebrows while pointing to
17 first herself and then the man seated to her left.))
18 so I would ask if if those of you that aren’t in the right box
19 ((Attorney shakes head ‘yes’))
20 if you could switch ba(hh)ck. Are you two the only two that aren’t
21 sitting where you sat before↑ OK.
22 ((Susan and the man next to her switch seats.))
23 I could probably figure you two out as we got down the row I wasn’t
24 sure OK but it’s real important to us.

Much like the very long introductory sentence, these statements work on multiple levels to establish the defense attorney’s identity and her authority. She is carving out a much more confident and commanding interactive space with these potential jury members than that achieved by the plaintiff’s attorney. The preface to the statement, ‘And I would also note,’ is not just an anticipatory statement of what is to come, but it also says, “I have the right to note this; it is within my role and my authority to do so.” Her jesting statement, ‘unless Susan got a haircut during lunch,’ evokes a few smiles

from the jury panelists. This use of humor works to both downplay her authority and simultaneously establish it. Only certain people have the right to make such jesting or joking statements. Her first name reference to Susan is a more familiar one than that to Mr. Jones, as is her reference to Susan's personal appearance and the activity of getting a haircut. By adding 'on me' to the end of her statement ('you all have changed seats on me') she further emphasizes her role in relation to the jury panelists. In other words, she is not just observing a change of seating arrangements but is emphasizing that it specifically impacts her and the task at hand.

Lines 13 through 23 specifically discuss the work of attorneys both in general and specifically in this case: 'And we attorneys have all our little boxes so I would ask if those of you that aren't in the right box if you could switch back. Are you two the only two that aren't sitting where you sat before? OK. I could probably figure you two out as we got down the row I wasn't sure OK but it's real important to us.' There is an interesting mix here of plural and singular references that invokes the general work of attorneys during trials and that of this specific attorney, and in fact, references to the more general institutional work of attorneys is used to authorize the specific actions here. This is clear in the statement 'And we attorneys have all our little boxes so I would ask..' (line 14-17). She concludes this exchange with another plural reference that underscores the consequence of the work being done and gives a broader framework to the interaction: 'but it's real important to us.' (line 24). This statement also creates a certain level of asymmetry between the attorney and the jury members. She understands how procedures in the courtroom work, but they need to receive an explanation of them.

At the same time, her use of the diminutive term “little boxes” (line 15) is a way of lessening the official and the directive tone of the exchange.

Transition to on-task work (Lines 25 through 34)

In the very next sentence, she continues with this broader framework by providing an explanation of what this segment of the trial is all about. In lines 25 and 26 she says ‘This is the opportunity as most of you know cause you’ve been on juries when we get a chance to talk to you and ask you questions.’

Excerpt 6.6

25 Wells: >This is the opportunity as most of you know cause you’ve been on
26 juries when we get a chance to talk to you and ask you questions. If I
27 were in your seat I’d be thinking what in the world is this woman going
28 to ask me that we haven’t already been asked< OK. But I do have a
29 few questions and I will ask you to bear with me and be patient and
30 give me a chance to ask a few questions <on behalf of Dr. Masand
31 because this case is about Dr. Masand> One Ms. Honor asked you if
32 any of you all em (.) know Dr. Masand but I don’t think we got to the
33 question have any of you ever had family members or close friends
34 treated by Dr. Masand.

This statement both provides an explanation and simultaneously gives most of the jury panelists credit for understanding the procedures (‘as most of you know’). She is specifying her role as the questioner and the jury panelists’ roles as respondents. She then works to create a sense of camaraderie with the jury panelists with the statement that follows: ‘If I were in your seat I’d be thinking what in the world is this woman going to ask me that we haven’t already been asked< OK.’ This is the second time that she has worked to create a sense of empathy with the jury members, placing herself in their role or position. Both of these sentences are said extremely rapidly. As she moves to a request for patience from the jury panelists her pace slows, and the phrase ‘on behalf of Dr. Masand because this case is about Dr. Masand.’ is noticeably slower than her other

talk. Only now does she move to her first “real” voir dire question when she asks if anyone has had a family member or close friend treated by her client.

Conclusion

Examination of even these brief introductory sections of voir dire shows that the features and business of institutional work are instantiated and developed in its moment-to-moment execution. Lexical choice, story-telling, turn design, references to roles, responsibilities and knowledge all work “to do” the institution and to create the identities of its participants. In these opening sections of voir dire, the attorneys do much more than simply begin the process of selecting a jury. They also establish their institutional identities and roles within the interaction.

Wells takes considerable time to transition to the on-task work of the voir dire segment. It is during this pre-on-task interaction that she does significant work in achieving her institutional identity. She uses several techniques (directives, joking, narrative, empathy, explanation) that are not employed by the other three attorneys. By using multiple and more elaborative techniques during the initiation and acceptance and self-introduction phases of voir dire, Wells establishes herself as an authoritative yet also understanding and sympathetic figure before the jury.

This chapter has looked at how they attorneys initially achieved their own identities at the opening of voir dire. The next chapter examines how the non-native speaker defendants in these cases are initially portrayed by their attorneys in this institutional setting and how their identities are created and shaped during direct examination.

CHAPTER 7
INSTITUTIONAL CO-AUTHORSHIP:
THE BIOGRAPHY PHASE OF DIRECT EXAMINATION

Introduction

Following voir dire and the selection and seating of the jury, each side makes an opening statement to the jury. This is followed by the presentation of the plaintiff's case and next, the presentation of the defendant's case. In many, if not most, civil trials the defendant will be called as a witness on his or her own behalf. This occurred in both of these cases.

The prior chapter looked at the organization of the opening of voir dire by all four attorneys and discussed how particular features of the talk contributed to the achievement of institutionality. This chapter also examines institutional achievement but within the trial segment of direct examination between the two NNS defendants and their respective attorneys. In each case, the attorneys took some care to "introduce" their clients before moving to questions that dealt with the specific events that precipitated these malpractice cases.

These introductions, which I am calling the "biography" phase of direct examination, had to be achieved within the framework of question-answer sequential pairs as required by the institution of the law. Furthermore, they had to be achieved within the institution of conversation itself as enacted between each attorney and defendant. The subtleties of interaction both within and between these two types of institutional achievement (the bi-institutionality of the interaction as discussed in chapter 5) created very different pictures of these two defendants. In most instances in Case 2-Masand the institution of conversation worked collaboratively with the institution of the

law to build a positive biography of the defendant; conversely the picture of the defendant in Case 1-Nasa was a less positive one. As is required within the courtroom, the biography phase presents certain “facts” about the defendant, but the manner in which these facts are presented is equally important, because the “fact-finders,” the jury, must process these facts within their understanding of the rules of conversation and their understanding of the rules of the courtroom. In most instances, their understanding of the former is stronger than their understanding of the latter. “[J]urors bring their social evaluations with them” and they also bring “their assumptions about conversation: ideas about turn-taking, floor holding, and simultaneous speech” (Stygall, 1994, p. 14).

Below, I first briefly review some of the literature that has examined questions and answers in the courtroom. Next, I give an overview of the institutional purpose of direct examination and look at the organization and types of questions used with these defendants during the biography phase. This is followed by a summary of Heritage’s “six basic places to probe the “institutionality” of interaction” (2004, p. 225). These six basic places are then used to consider the contours of the biography phase representation created for each defendant, first for Case 1-Nasa and then for Case 2-Masand. Transcripts of these biography phases are included in Appendices D and E.

Questions and Answers

As might be guessed, a number of researchers have examined questions and answers in the courtroom as well as in other contexts associated with the law, for example, police interrogations (Gibbons, 1996; Johnson, 2002), legal aid offices (Bogoch & Danet, 1984), and covert tape-recordings used as evidence (Shuy, 1993). Most prior research examining the use of questions in courtrooms has involved exchanges between

native speakers of the same language (Conley, O’Barr, & Lind, 1978; Drew, 1985; Matoesian, 1993; Tiersma, 1999; Cotterill, 2003). Some of the research on questions and answers that is specific to NNSs was discussed in chapter 2.

One common approach has been to quantify the total numbers of questions asked and the particular types of questions used during direct and cross-examination and toward friendly (those used to support one’s side of a case) versus unfriendly (those who are testifying on behalf of the opposing side) witnesses. Often this is discussed in combination with claims about the level of coerciveness or constraint that various question types impose and the strategic use of various question types in the courtroom. Of course, a question can be formed in a variety of ways (by intonation, by various lexical choices), and a single “question” can be classified in a variety of ways. For example, “Can you tell us what happened last Tuesday?” could be labeled as either a yes/no question (based strictly on the lexical choice) or as an indirect/request question (based on the probable desired effect) or even as a *wh*- question (based on the embedded question). From a CA perspective, the identification of question type is best decided based on the next turns of the participants and the interaction involved.

Danet and Kermish (1978) assert that questions range from most to least coercive in the following order: declarative; yes/no or choice; open-ended *wh*-; and request or indirect. Examples of these as described in their article would be:

- Declarative: You went to the restaurant that night?
- Yes/no or choice: Did you leave at nine or at ten o’clock?
- Open-ended *wh*-: What did you do that night?
- Request or indirect: Can you tell us what happened?

Woodbury (1984, p. 225) says that the use of questions in court and their effects depend “partly on their pragmatic properties, partly on the rules of discourse governing

different episodes of the trial, partly on the purpose of the activity that is going on, and partly on whether the participants are in an adversary or nonadversary relationship.” She summed up her findings on the strategic use of questions in the courtroom with the following list of various uses and the question types that are best suited to the use (p. 225). Below each type, I have provided an example from her article:

- (1) Eliciting a story-version: broad *wh*- questions
What else did you do? (p. 211)
- (2) Providing narrative orientation: narrow *wh*- questions
How long did you stay? (p. 212)
- (3) Participating in the story-telling: prosodic questions
And when you read him, ‘Do you understand each of these rights I have explained to you?’ he said ‘yes’? (p. 218)
- (4) Wording the evidence: all yes/no questions
Did B.C. say anything to you that evening of November 25th while you were sitting out in the patio of your house? (p. 214)
- (5) Checking for consistency: narrow *wh*- questions
What is much later? (p. 212)
- (6) Controlling the number of possible responses: all yes/no questions
Did you enter the house at that time? (p. 201)
- (7) Covert comments to the jury: prosodic, tag, narrow *wh*-, and negative grammatical yes/no questions
Weren’t you supposed to take her home from the hospital on November 21st? (p. 217)
- (8) Masking new information as given: prosodic and tag-questions
On December 1st, in the afternoon, you told them that you wanted to get a lawyer? (p. 219)
- (9) Coercing a witness: checking tag-questions.
And you bought gifts for other girl friends, too, didn’t you? (p. 223)

Woodbury analyzed data from a criminal trial that consisted of a total of 4153 questions, 1840 asked during direct examination and 2313 asked during cross-

examination. She found that both the prosecution and the defense used *wh*- questions more than any other type during direct examination. The percentage of *wh*- questions dropped dramatically during cross-examinations. Luchjenbroers (1997) had similar findings. In her data, *wh*- questions were used more than twice as often during direct examination as during cross-examination, and there was a much higher incidence of declarative and tag questions during cross-examination.

Broad *wh*- questions on direct testimony have benefits related to the issue of information control and to impression-management. A side's own witnesses should be the best prepared and thus the issue of control management is reduced. *Wh*- questions allow for the introduction of new information and avoid the problem of violating the prohibition against leading questions. In addition, since witnesses can present pieces of narratives in response to *wh*- questions they give the jury the impression that the lawyer trusts his or her witness. Longer narrative responses from witnesses are associated with greater believability (Conley, O'Barr, & Lind, 1978; Conley & O'Barr, 1990). More narrow *wh*- questions are frequently interspersed in direct testimony to help create a coherent or chronological narrative. As Luchjenbroers (1997) rightly points out, even *wh*- questions can potentially be just as restrictive as other question types in that only one legitimate answer is acceptable. For example, "What is your occupation?" (p. 487). Therefore, it is somewhat problematic to automatically label certain question types as producing particular results or having particular uses. Indeed, CA's insistence on close examination of what language does and accomplishes in interaction seeks to avoid this type of pitfall.

In Woodbury's data, grammatical yes/no questions were the next most common type used in direct questioning. Although the law mandates that the production and presentation of evidence come from witnesses, these question types allow the attorney to present an evidentiary proposition and restrict the witnesses' role to affirmation or denial. During direct examination, such questions are used to detail evidence in the attorney's words (Woodbury, 1984, p. 215). As would be suggested by Heritage's (2002) findings on the effects of negative yes/no questions types, Woodbury found that this type of question was used most frequently during cross-examination and was almost completely absent during direct examination (p. 217). In contrast to *wh*- questions, restrictive yes/no questions can be used to make the witness appear recalcitrant or inarticulate (Luchjenbroers, 1997, p. 483); for example, "What did you do then?" versus "You then went to the store, did you not?"

Prosodic (declarative) questions also appeared most frequently in cross-examination in Woodbury's data. She accounts for this in two ways. First, cross-examination focuses on given information and so do the discourse properties of prosodic questions; second, such questions convey the questioner's belief and thus rank high in their attempted control of the addressee (p. 222). Luchjenbroers (1997) found a similarly higher percentage of prosodic/declarative questions during cross-examination. She attributes the use of this question type to the fundamental nature of cross-examination which is to challenge and create doubt in the other side's version of facts (p. 499).

Gnisci and Pontecorvo (2004) analyzed data from a criminal trial in Italy and had similar findings to those of Woodbury (1984) and Luchjenbroers (1997). They only looked at hostile (cross) examination of witnesses and found declaratives to be the most

frequent type of question used. They considered “hostile” examination to be those instances where the questioning attorney (either the prosecutor or the defense) was trying to get the witness to admit guilt. Declaratives were followed by minimal (yes/no and tag questions), *wh*- questions and finally the least used type was indirect requests or open-ended (for example, Can you tell us what happened?) (p. 973). Reformulation (summarizing another’s statement) was also an effective strategy used by attorneys during questioning (p. 977) either to re-emphasize what had been stated or to add a new element or piece of information.

In some instances, reformulation might be used to ask a leading question. Normally leading questions are only permitted during cross-examination. It is difficult to succinctly define what a leading question is, but generally it is said to be a question that suggests (or “leads”) to a specific answer (Woodbury, 1984, p. 221; Tiersma, 1999, p. 164). While leading questions may take a variety of forms, according to Tiersma (1999, p. 164) there are three common types: negative yes/no questions, tag questions and statements with question intonation. Luchjenbroers (1997) also says that leading questions are generally presented in three ways, but her types vary slightly. She identifies them as yes/no, declarative and forced choice. Berk-Seligman (2002) says that the English declarative question is a “particularly significant convention used by attorneys to convey blame, challenge, and irony when examining a witness” (p. 223).

Philips (1984) examined questions and responses between attorneys, judges and defendants in change of plea proceedings in Arizona courts. She examined the frequency of yes/no questions and *wh*- questions between these three types of interactants. Her findings indicated that the greater the status and authority of the respondent in relation to

the questioner, the less the response was constrained by the question type. Those in lesser status roles display more question copy and less elaboration. Thus, “persons of relatively lower status exert less influence over the negotiation of social reality through the ways in which one speaker builds on another’s turn at talk, and social order is manifest in utterance interdependence” (p. 223). Lawyers’ “questions” to judges are often indirect speech acts of assertion or requests with expressions of uncertainty to demonstrate politeness (pp. 244-245). One of the examples provided is: “Your Honor, that wouldn’t exceed a thousand dollars, though, would it?”

In her study of fifteen Austrian court proceedings that involved severe car accidents Wodak (1985) concluded that if the defendant "demonstrated flexible verbal behavior--was able to adapt quickly to all of the questions and expectations of the judge--he or she was likely to fare much better than a defendant who memorized a version of what had happened" (pp. 185-186). She further concluded that middle class defendants were able to build a positive image through their successful manipulation of expected language behaviors whereas working class defendants failed in court because they did not know what to expect and their language behavior reinforced various expectations and stereotypes held by the judge (p. 190). She goes on to say that judges should be trained to consider language behaviors differently.

Institutional Purpose

All of the studies mentioned above examine questions in light of the institutional purpose for their use during particular segments of a trial. The purpose of direct examination is to present one’s case in the best light possible. The questioning of witnesses is “the basic activity that dominates the trial and is the mechanism by which the

elicitation of the conflicting ... narratives is achieved” (Cotterill, 2003, p. 126). It is also the means by which the characters that inhabit that narrative are composed for the jury. Through adjacency pairs of questions and answers, attorneys must work with witnesses to co-construct a coherent version of events for the jury. Drew and Heritage’s (1992) institutional talk characteristics are applied to the direct examination stage of a jury trial below.

Table 7.1

Institutional Talk Characteristics: Direct Examination Stage of Jury Trial

Institutional Talk Characteristics	Direct Examination Stage of Jury Trial
Involves the participants in specific goal orientations which are tied to their institutionally relevant identities: such as doctor/patient; teacher/pupil	Goal: To present the best possible version of one’s case. Identities: Attorneys-various witnesses.
Involves special and unique constraints on what may be contributed to the business at hand	Attorneys ask questions; witnesses respond.
Associated with inferential frameworks and procedures that are unique to particular institutional contexts	Witnesses are sworn in; refusal to take the oath will disrupt the process.

In the data from these two cases, it is clear that both attorneys considered one of the purposes of direct examination to be to provide the jury with a sense of who the defendant was as both a person and as a competent and reliable member of the medical profession. They accomplished this task by spending considerable time at the beginning of each defendant’s direct testimony eliciting background information before transitioning into questions that related specifically to the facts of each case. It is during this biography phase that the attorneys and the defendants co-construct, co-author if you will, the story or biography of the defendant.

Overview of Biography Phases

The attorneys' questions at the beginning of direct examination related to the defendants' personal backgrounds (e.g. families, place of birth) and to their professional training and careers (e.g. education, residency training). Each attorney began the direct examination with a question to elicit the defendant's name. I first examined these biography phases to determine the number and type of questions used by each attorney. This was only a preliminary examination before moving to the details of interaction. I classified the questions into three broad categories (open-ended, *wh-*, yes/no). This categorization was based primarily on lexical choice; however, in some instances a lexical yes/no question was categorized as a *wh-* questions due to its pragmatic effect. For example, the following question opens the Masand direct examination: "Even though we've informally introduced you to the jury, would you please tell the jury what your name is?" This was categorized as a *wh-* question. In addition, prosodic/declarative questions were classified as yes/no questions. A list of questions and how they were categorized appears in Appendices F and G.

Nasa's attorney, Pooler, spent nine minutes on the biography phase and asked 44 questions. Pooler spent most of his time asking questions related to his client's professional training and career (34 out of 44 questions). The majority of his questions were yes/no questions (23), followed by *wh-* questions (20). He used 1 open-ended question during this phase of the direct examination. Even though the analysis here is restricted to the biography phase of direct examination, his use of more yes/no questions is inconsistent with the findings of Woodbury (1984) and Luchjenbroers (1997). In addition, out of the 23 yes/no questions that were used, 18 of them were answered with

only the minimal response required (a positive or negative answer) while 4 of the responses contained some type of elaborative information. Even for the 20 *wh*- questions only slightly less than half (9) elicited anything more than the minimal information required by the question. The table below summarizes the number and type of questions used by topic.

Table 7.2

Nasa Case: Number and Type of Questions by Topic

Topic	Open-Ended Questions	Wh- Questions	Yes/no Questions
Name	0	1	0
Profession	0	14	20
Personal Background	1	5	3

Masand’s attorney spent just over eight minutes on the biography phase and asked 37 questions. In contrast to Nasa’s attorney, Masand’s attorney spent most of her time asking about her client’s personal background and family (21 out of 37 questions). The majority of her questions were *wh*- questions (20), followed by yes/no questions (15). She used 1 open-ended question at the beginning of this phase of the direct examination and 1 at the end. In the Masand case, out of the 15 yes/no questions that were used, 11 of them were answered with only the minimal response required (a positive or negative answer) while 4 of the responses contained some type of elaborative information. Of the 20 *wh*- questions from Masand’s attorney 13 produced an elaboration of the requested information and for 7 only a minimal response was given. The table below summarizes the number and type of questions used by topic.

Table 7.3

Masand Case: Number and Type of Questions by Topic

Topic	Open-Ended Questions	Wh- Questions	Yes/no Questions
Name	0	2	0
Profession	1	3	10
Personal Background	1	15	5

This preliminary look at the biography phases based on question types and topics indicates that Pooler was more interested in establishing Nasa's professional credentials while Wells (Masand's attorney) worked to create a picture of Masand based both on his professional status and his personal or family background. With her use of roughly an even number of *wh-* and yes/no questions, Wells also gave Masand more opportunities to engage in extended sequences of interaction than did Pooler who asked slightly more yes/no questions.

Probing Institutionalality: Heritage's Six Analytical Categories

These numbers give us a basic picture of the overall structure and organization of the biography phase of direct examination in each case; however, as Schegloff (1993) has remarked "quantification is no substitute for analysis" (p. 114). Heritage's analytical categories for probing the institutional character of interaction give us an even more interesting depiction of what is being accomplished and how institutionalality is enacted during these biography phases. They also provide us with a means of seeing how each defendant's biography was being sketched for the jury as they first took the witness stand. Heritage's categories are: 1) turn-taking organization; 2) overall structural

organization; 3) sequence organization; 4) turn design; 5) lexical choice; and 6) epistemological and other forms of asymmetry.

The categories are discussed separately below, but there is a great deal of overlap and interplay as to their function and effect during interaction. For example, the special turn-taking system at work during direct and cross examination in the courtroom (i.e. attorneys are allowed to ask questions/witnesses are required to answer) imposes a particular type of asymmetry at the outset. Functioning within the bi-institutional framework discussed in chapter 5, witnesses work to emerge from this imbalanced turn-taking system with a credible and likeable identity. This requires comprehension (whether innate or acquired) of the rules of both the institution of conversation and the institution of the legal system. Ideally, attorneys and their clients should be co-producing a coordinated and positive biography within the strictures of both institutions.

Turn-Taking Organization

Special turn-taking rules are one of the hallmarks of institutional interaction. These rules can relate to areas such as permissible topics, content, and order of contribution. Examples can be found in the rules of debate, classrooms and many kinds of meetings. These rules can alter the parties' opportunities for action and potentially change the interpretation of their contributions. "The decisive feature of a special turn-taking organization is that departures from it...can be explicitly sanctioned" (Heritage, 2004, p. 226). The overall structure of a jury trial (discussed in chapter 5), as well as each stage within it, is an example of such a special turn-taking organization.

Overall Structural Organization

A careful reading of data may yield “an overall “map” of the interaction in terms of its typical “phases” or “sections” (Heritage, 2004, p. 227). This is true of the data collected in these cases. Just as the opening interaction of voir dire could be divided into “phases” or “sections,” as explained in the previous chapter, the direct examinations of each of these defendants also have definite phases. The most obvious of these are the biography phase (the focus here) during which the defendant is “introduced” to the jury followed by a shift to the “fact finding” phase when the specific events of the case begin to be discussed. Even within the biography phase of these cases there are three distinct sections: opening or formal identification; detailing of specific biographical information and finally a transition to the facts and events of the case.

In each case, the detailing section that follows the formal identification section includes a variety of questions about the defendants’ place of birth, families, education, medical training and experience and what brought them to Eastville. There is no discernible pattern as to the organization or grouping of these questions. The final question of the biography phase then transitions into looking at the parties involved in and the events that led to the present lawsuit.

The question numbers used for these sections in each case are presented in the table below.

Table 7.4

Sections of Biography Phases

Sections of Biography Phase	Nasa Case	Masand Case
Opening	Question 1	Questions 1 & 2
Detailing of biography	Questions 2 through 44	Questions 3 through 37
Transition	Question 45	Question 38

Sequence Organization

Analysis of sequence organization is a “central aspect of CA work” (Heritage, 2004, p. 230). Many of Sacks’ lectures examine issues of sequencing. Sequential analysis of conversation means “that the parts which are occurring one after the other, or are in some before and after relationship, have some organization as between them” (1987, p. 54). The organization of these sequences “while explicitly analyzed by us, are also implicitly grasped – to a greater or lesser extent – by the participants who may use what transpires as a basis for inferences about the character and situation of their co-interactants” (Heritage, 2004, p. 230). In the case of a jury trial, the attorney and defendant have to be attentive to the implicit inferences that the jury may be drawing from their exchanges.

Turn Design

Turn design refers to both the action that a turn is meant to perform and the means selected to perform that action (Drew & Heritage, 1992; Heritage, 2004). A first turn may be interpreted in a variety of ways, and the design of the second turn forms the action in response to the first turn. The example used by Heritage (2004, p. 232) is one from a health care visitor interacting with a new mother and father. In line 1 the health care visitor comments on the baby sucking or chewing on something.

- 1 HV: He’s enjoying that [isn’t he.
2 F: [Yes, he certainly is=
3 M: =He’s not hungry ‘cuz (h)he’s ju(h)st (h)ad
4 ‘iz bo:ttle .hhh

The father’s turn (line 2) is designed as an agreement action whereas the mother’s turn (lines 3-4) is designed as a defensive action showing that she interpreted the health visitor’s remark as implying that the baby was hungry. Even when turns are performing

the same action they may be designed in significantly different ways. For example, a turn of disagreement to a question such as “Were you happy with the result?” can be designed in a variety of ways, from a brief “no” to “certainly not” to a lengthy explanation.

Lexical Choice

Word choice within turns can convey a great deal about an interactant’s attitude or orientation toward the work at hand, the topic under discussion, or the situation in which the conversation is taking place. Lexical choice can often index both attitudes and what are typically perceived as levels of formality. A response of “yes, sir” rather than “yep” is an example. In addition, lexical choice may influence perceptions, as seen in Drew’s (1992) discussion of the use of “bar” versus “club” during a rape trial. “Lexical choice implies that alternative lexical formulations are available to reference the same state of affairs. For example, speakers can reference themselves using “I” or “we,” the latter choice often being used to index that they are speaking on behalf of an institution” (Sacks, 1992, as cited in Heritage, 2005, p. 132).

Hale (1999) examined the use of discourse markers such as *well*, *now* and *see*. She determined that in both direct and cross-examination these markers are an important means of “portraying a speaker’s intentions and adding tone and force to their utterances” (p. 57). During direct examination these devices may be used to maintain control of the flow of information and to show the development of the storyline. During cross-examination they are more frequently used to show argumentation, disagreement or challenge. Bogoch and Danet (1984) found a similar use of “well,” and the markers of

“good” and “first of all” as topic control devices during attorney-client interviews (p. 256).

Asymmetries

Heritage (2004) identifies four areas of asymmetry that may be at work in institutional interaction. These are participation, overall “know how” about the institution and its functioning, knowledge, and rights to knowledge (p. 236). Institutional representatives are frequently afforded greater leeway in terms of topic control and turn design than their lay person counterparts. There is a “direct relationship between institutional roles and tasks on the one hand and discursive rights and obligations on the other hand” (p. 237). Due to experience and training, the institutional representative may also have considerable more “know how” about the current action or process than the persons with whom they are interacting. As discussed in chapter 5, the bi-institutional nature of courtroom discourse places the lay citizen at a disadvantage. The institutional representative may understand the institutional discourse rules at operation in the courtroom, but it is likely that the lay person does not.

Lay persons are also frequently at an emotional disadvantage in institutional interaction. For a defendant a case may be a one time and a life altering experience; for an attorney or judge it is likely “just another case.” “[E]ach case is treated as an ‘instance’ whose resolution has been provided for, rather than as a new development” (Sacks, 1997, p. 45).

By way of experience and training, institutional representatives may also have considerable more knowledge about the topics under discussion than do the non-professionals in the interaction. Nonetheless, a feature of “many kinds of institutional

interaction is a kind of epistemological “cautiousness” in which professionals avoid committing themselves to taking firm positions” (Heritage, 2004, p. 238). For example, attorneys may offer only guarded predictions as to the possible outcome of a client’s case or doctors may provide limited or cautious diagnoses. This may result in considerable frustration for those without similar knowledge.

Finally, institutions often impose constraints on who has the right to knowledge and how it can be expressed. Rules regarding hearsay are a good example of this asymmetry in the courtroom. Hearsay (information that is based on reports from others rather than personal knowledge) is not admissible as evidence. Witnesses may possess certain knowledge but that knowledge is specifically excluded as evidence if it is not from personal experience.

I now explore how each of these six categories was manifested in the interaction during the biography phases of Case 1-Nasa and Case 2-Masand.

Case 1-Nasa: Biography Phase Interaction

In the Nasa case, Dr. Nasa was the last witness called by his attorney, Pooler. Nasa was under direct or re-direct examination by his attorney for one hour. The biography phase of direct examination lasted for nine minutes and 56 seconds.

Turn-Taking Organization

The following excerpt shows Nasa’s orientation to the turn-taking rules of the courtroom. Attorneys are required to elicit information through questions and witnesses are required to answer these questions. As mentioned above, the majority (18 of 23/78.26%) of the yes/no questions posed to Nasa elicited only a minimal response. One example of this appears below.

Excerpt 7.1

- 41 Pooler: Do you still have family in India
42
43 Nasa eh I do.
44
45 Pooler Who's who's still there?
46
47 Nasa eh I have some of my (.) uncles and my parents live there

This response (line 43) answers the question as posed and adheres to the requirements of the courtroom rule that attorneys ask questions/witnesses answer them, but in “ordinary” conversation this response might well be perceived as uncooperative or even as having something of a smart aleck character—much as one might interpret an answer of ‘yes’ to ‘Do you have the time?’ Responding only to the locutionary meaning and not the illocutionary intent of the sentence is insufficient. This is particularly true given that Pooler and Nasa should be perceived as a team co-producing the facts that are presented to the jury. Pooler’s turn in line 45 shows that his initial question should have been interpreted in a more typical and broader manner as a request for specific information. Pooler now resorts to a *wh-* question to elicit the information rather than the apparently more opaque yes/no format of his previous turn. Nasa provides a rather minimal answer with a filler sound at the beginning and an internal pause giving the overall impression that he is somewhat reluctant to provide this information.

Another example involving the use of a yes/no question is the following:

Excerpt 7.2

- 121 Pooler: OK and by the time you're a third year resident, then you
122 actually handle cases on your own?
123
124 Nasa: eh >that's correct<
125
126 Pooler: OK under the general supervision again of the attendings?

127

128 Nasa: eh yes sir.

Again we see that Nasa adequately responds to the institutional requirements of turn-taking organization in line 124 with his affirmative answer; however, Pooler's next question again indicates that additional information is needed. His use of a second yes/no (lexically prosodic) question again receives an adequate, but a minimal response. Pooler's turn in line 126 provides new information but it also implies that Nasa's response was inadequate or missing important details.

These sequences of yes/no questions followed by minimal responses create a rather staccato or disconnected flow of information concerning the defendant. By adhering to the courtroom's institutional requirements the NNS appears as a reluctant participant in sharing his biography.

Overall Structural Organization

As discussed above, the biography phase of both cases has an overall structural organization of three sections: opening, detailing of biography and transition to fact-finding. The opening initiates the interaction of direct examination and formally establishes the identity of the defendant. In the Nasa case, the opening or formal identification is completed in the following adjacency pairs:

Excerpt 7.3

- 1 Pooler ((picks up a small stack of stapled papers and walks to a position behind
2 the plaintiff's table and behind the railing that separates the public seating
3 area of the courtroom)) Dr. Nasa I think everyone knows ya (.) but for the
4 record, would you introduce yourself ((points toward jury box with his
5 right hand)) to the ladies an' gen- gentlemen of the jury please
6
7 Nasa: Eh my name is Kousar Nasa. ((clears throat))
8
9 Pooler: And your occupation or profession?

10

11 Nasa: Eh I'm a physician practicing orthopedic surgery here in Eastville.

This question (line 4 "would you introduce yourself") functions as a direction to the defendant. He provides the required answer with a relatively formal and complete sentence in line 7, Eh my name is Kousar Nasa. Pooler then immediately moves to detailing Nasa's biography with his next turn. The question in line 9, is, in fact, a somewhat odd way to begin this section of the direct examination since by this stage of the trial Nasa's occupation or profession has been well documented and is indeed at the very heart of the trial. If this phase of the direct examination is viewed as the co-authoring of a biography for the benefit of the jury, then this seems like redundant, almost flippant, presentation of information.

The manner in which Pooler transitions out of the biography phase to the fact finding phase of direct examination is presented below.

Excerpt 7.4

244 Pooler: Now, I want to take you (.) uh to your treatment of of Jason Rowe and go
245 through some things with ya and
246 (1.0) ((begins walking toward defendant's table))
247 we have talked some about your
248 (1.5) ((opens and goes through swinging railing gate))
249 medical record
250 (3.0) ((picking up poster board))
251 and I have it blown up here I think the jury also has copies of it themselves
252 but I have a blow up that we've marked as defendant's exhibit seven.
253 (3.0) ((moving stand closer to the jury box))
254 It's put up here for reference and you have it in front of ya and I want
255 (7.0) ((positioning poster board on stand))
256 for you first just to explain to ah to the jury what is your practice ((goes back
257 through swinging railing gate)) in terms of keeping your office medical
258 charts. (1.0) How ho- what's your routine for doing them when you see
259 patients during the day.
260
261 (3.0)
262

263 Nasa: >I don't understand< Wh- h- how do I

Pooler's first question regarding the specific facts in this case begins on line 244 with "now" a topic transition marker, and then he launches into a very complicated turn both in terms of its content and in terms of his movement around the courtroom. Pooler has been standing in the public or audience area of the courtroom behind the plaintiff's table. He now walks back into the area reserved for the parties and picks up a poster board blow-up of Nasa's office record of the plaintiff's visit. He places the poster on an easel and moves the easel closer to the jury so they will have a better view of it. He then moves back to his original position within the public area of the courtroom.

His turn contains at least two questions in lines 256-257 (what is your practice in terms of keeping your office medical charts) and in lines 258-259 (How ho- what's your routine for doing them when you see patients during the day). This multi-part and multi-topic turn is a somewhat less than "clean transition" (Heritage, 2004, p. 229). This is evidenced by his client's response in line 263: >I don't understand< Wh- h- how do I-. Because of the complicated transition question, the defendant is left in the awkward position of having to say he does not understand and appears confused before the jury as the first response to issues that are key to the case. This exchange again shows Pooler and Nasa as being "out of sync" and gives the impression of miscommunication. They show discord within the collaborative enterprise of the institution of conversation.

Sequence Organization

The following question answer sequence in the Nasa case provides a good example of the complicated work of sequence organization.

Excerpt 7.5

79 Pooler: All right, did you actually practice in India↑

80

81 Nasa: Uh no I did not. After I finished my residency eh I did eh I was trying to decide
82 (.) what post-graduation I want to do. So I did some time in orthopedics eh I think
83 I did about 6 months, and then 6 months eh eh I did cardiothoracic surgery trying
84 to decide which specialty I want to go into. And after that uh I had uh opportunity
85 to uh come to the States uh to do uh additional uh training eh which I was
86 interested.

87

88 Pooler: OK and where was that

The phrasing of Pooler's question is discussed below in the section on turn design. Here Nasa organizes his response as not simply an answer to the question but as a justification of his not having worked as a doctor in India. He answers the question in the first four words but then continues with a mini-narrative about his post-residency experiences and the decision making process that led him to come to the United States. He treats the question as something of an accusation. Since his answer is one of disagreement the preferred organization of the response is one of accountability (Heritage, 1984, p. 267) which he proceeds to provide.

His work to keep the floor is evidenced by only one pause in line 82; otherwise, his response is replete with fillers (i.e. eh, uh) which are somewhat distracting, but that serve to string together what would be logical phrase or sentence boundaries. For example, in lines 82-84: "So I did some time in orthopedics eh I think I did about 6 months, and then 6 months eh eh I did cardiothoracic surgery trying to decide which specialty I want to go into." He also provides a number of sequential chronological markers: "after" in line 81; "then" in line 83; "after" in line 84. These markers help to bind the response together and orient the listener to the chronology of events. However,

the sequential markers are offset by a somewhat odd combination of past tense and present tense phrases. Two sentences that begin with past tense (“After I finished” in line 81 and “So I did some time” in line 82) conclude with the present tense phrases “I want to do” and “I want to go into.” These types of “odd” or non-native like mixtures of tense are potential sources of negative inferences by the jury. Credibility and “coherence judgments are matters of conversational inference, which like grammatical rules involve automatic processes not readily subject to conscious control” (Gumperz, 1982, p. 178). Nasa then concludes with the awkward phrase “which I was interested.”

Pooler provides only a minimal response to this justification and mini-narrative. His “OK” indicates that he is satisfied with the response, but rather than acknowledge or reinforce the reasonableness of the explanation, he simply proceeds to the next question of “where was that?”

This example shows the typical sequence organization of the institution of conversation in operation within the institution of the courtroom. The defendant has conformed to the institution of conversation by providing an accounting following a dispreferred response of disagreement; however, the organization of the accounting does little to place him in a positive light before the jury and his attorney’s next turn fails to bolster the legitimacy of the accounting.

Turn Design

The turn design of Pooler’s question in the excerpt just examined (and repeated below) is significant. In this example, the two elements of turn design, action performed and “selection of how the action is to be realized in words” (Drew & Heritage, 1992, p. 36), interact. As discussed above, Nasa’s response shows his construction of Pooler’s

question as an accusation. The inclusion of the medial “actually” in Pooler’s question acts as what Taglicht (2001) has called the “truth-insistent” use of actually that “serves to contrast what is really so with what is only pretended or imagined” (p. 2). This meaning of “actually” is also emphasized by the slight stress that is placed on the word.

Excerpt 7.6

79 Pooler: All right, did you actually practice in India↑
80
81 Nasa: Uh no I did not. After I finished my residency eh I did eh I was trying to decide
82 (.) what post-graduation I want to do. So I did some time in orthopedics eh I think
83 I did about 6 months, and then 6 months eh eh I did cardiothoracic surgery trying
84 to decide which specialty I want to go into. And after that uh I had uh opportunity
85 to uh come to the States uh to do uh additional uh training eh which I was
86 interested.

The use of “actually” also implies that Pooler already knows the answer to this question. It performs a much different action than would have the same question with the word “actually” omitted: “Did you practice in India?” This question does not have the same tinge of accusation as that produced by Pooler. The design of Pooler’s turn places Nasa in a defensive stance that undercuts his professional standing before the jury. “Actually” functions to provoke a response that highlights Nasa’s inexperience and indecisiveness. Immediately before this turn we see the following adjacency pair:

Excerpt 7.7

75 Pooler: And you received your license then in essence to practice medicine in India?
76
77 Nasa: >That’s correct.<

This is another example of how the design of one of Pooler’s turns works against creating a positive biographical portrait of Nasa. The medial “in essence” works in much the same way as “actually.” While this turn does not provoke a negative answer and a

defensive reply, it does give a sense of artificiality or less than “real” status to the referenced license rather than emphasizing Nasa’s achievement.

Lexical Choice

One example of lexical choice in institutional settings is “the way that, when speaking as a member of an organization, persons may refer to themselves as “we” rather than “I” (Drew & Heritage, 1992, p. 30). There are several examples of this phenomenon in the Nasa case. During the detailing section of the biography phase, Pooler says the following while asking about Nasa’s medical training and experience:

Excerpt 7.8

53 Pooler: Okay, and just give us an overview of what the six years is like. We
54 know in the United States, it’s a four-year program and generally what
55 students do. How is it different in India?

In line 53, Pooler uses both “us” and “we.” He begins with a direction (“just give us an overview”) and follows with a general knowledge claim (“We know in the United States, it’s a four-year program and generally what students do.”). These do not function as equivalent first person pronouns. The initial use of “us” is narrower than the use of “we.” The use of “us” is inclusive of those persons currently in the courtroom. In other words, give me, the jury and everyone else currently in this room an overview; however, the “we” that follows is much broader. It is not just a “we” that encompasses everyone present or even a “we” that embodies the institution, rather it is a societal “we.” It says “we Americans” as members of our society understand how medical school works, now tell us how India (and by implication how you) are different. Pooler underscores this contrastive stance with the use of “different.” This use of “we” frames the jury members as “insiders” and Nasa as an outsider.

Interactional Asymmetries

Discussions of power asymmetries in the courtroom have frequently examined the types of questions used by attorneys toward various witnesses—in other words, control of topic and response or participation rights in the courtroom. This is one of the four areas of asymmetry specified by Heritage. Two others are asymmetry in knowledge and right to knowledge. Pooler's turn above and the response that Nasa provides following it are an interesting example of how asymmetries of knowledge and right to knowledge combine with presentation style to influence the biographical sketch of Nasa. Pooler's turn produces an extended response by Nasa. Pooler's turn and the first five lines of Nasa's response are presented below.

Excerpt 7.9

- 53 Pooler: Okay, and just give us an overview of what the six years is like. We
54 know in the United States, it's a four-year program and generally what
55 students do. How is it different in India?
56
57 Nasa: eh it's uh uh pretty much the same but the duration is a little bit longer, you spend
58 uh uh longer time eh you have the first year where you have the eh eh basic
59 science and then as you start going to the next year, then you go into more detail,
60 going to anatomy, physiology, and biochemistry. Those are the basic (science)
61 which you learn.

Pooler's turn attributes certain knowledge and the right to that knowledge to Nasa. He requests this knowledge in something akin to a teacher-like style, and Nasa's response has an instructional and depersonalized tone. Rather than speak of his personal experience by using "I," he uses the second person "you," however, this "you" actually functions as an indefinite or generic pronoun "one." This gives the impression not that he is speaking of his own experience but that he is lecturing or instructing Pooler and the jury. Nasa's three longest responses to questions regarding his medical training adopt

this depersonalized or generic tone as evidenced by the use of a generic “you.” Although he is demonstrating important knowledge about his background, he is doing so in a manner that distances him from the events. This depersonalized tone is responsive and appropriate to the phrasing of the request/question from Pooler, but it does not serve to reveal individual background information about Nasa nor to show him as a well-educated member of his profession.

Case 2-Masand: Biography Phase Interaction

In Case 2, Masand was the first witness called by his attorney, Wells. Masand testified over the course of two days for over eight hours: six hours and 25 minutes in direct examination or re-direct examination and one hour and 45 minutes in cross examination or re-cross examination. The biography phase of direct examination lasted for 8 minutes and 22 seconds.

Turn-Taking Organization

An example of Masand’s orientation to the turn-taking rules and organization of the courtroom occurs in the third exchange between Masand and Wells.

Excerpt 7.10

11 Wells: All right. And can you tell the jury uh (.) where you live and how you
12 came to be in Eastville. >Just tell ’em a little bit about yourself.<
13
14 (2.0)
15
16 Masand: Um
17
18 (2.0)
19
20 Masand: You want me to start from (.) when I first –
21
22 Wells: Well, I would tell ’em where you were born, how you came to be an
23 American then more particularly how you came to be in Eastville.

Wells turn in lines 11 and 12 presents three different questions to Masand. Two *wh*-questions (where you live and how you came to be in Eastville) are imbedded within the yes/no format. This yes/no format functions as a request for information. Wells then presents a third question in the form of a direction, line 12: >Just tell 'em a little bit about yourself<. This direction both broadens and attempts to clarify the previous two questions. The directive form, which also acknowledges the presence of the jury (tell 'em), is an institutional one that would be unlikely in "ordinary" conversation.

This open-ended question/direction leaves Masand uncertain of what is required as is evidenced by the two extended pauses (lines 14 and 18) and the content of his insertion sequence which requests clarification. His turn orients to the turn-taking organization of the courtroom in a number of ways. It both acknowledges Wells' right to ask the question or give him a directive and his understanding that particular information is required. His considerable hesitation indicates his reluctance to violate the institutional rule that witnesses are required to fill the role of answerers. His insertion sequence, by seeking explanation concerning the appropriate parameters for his answer, acknowledges that institutional role. In lines 22-23, Wells then offers some specific suggestions for how Masand should respond. Although Masand has begun with some hesitation, this four turn exchange concludes with an overall impression of collaborative activity between Masand and Wells.

This sort of collaborative activity is also seen in the turn-taking organization of many of the yes/no question sequences. In the Masand case, the percentage of yes/no questions that were answered with a minimal response (11 of 15/73.33%) was similar to that in the Nasa case. Based only on those numbers one might conclude that these

minimal answers had a similar effect. Closer, in context, scrutiny, however, gives a different and more positive impression of Masand and of the biographical construction work that was being done between Masand and his attorney. The majority of yes/no questions posed by Masand's attorney, Wells, were not used to introduce or request new information as in the example from the Nasa case, but rather to reinforce or restate information from an adjacent turn. The example below, in which Wells is asking about Masand's son, illustrates this function.

Excerpt 7.11

- 199 Wells: OK and his name and what he's doing.
200
201 Masand: Suman. He's a pediatrician and uh he's going to start a fellowship in
202 pediatric cancer specialization in July.
203
204 Wells: OK so he's going on to become s- a children's cancer specialist.
205
206 Masand: Yes, m'am.

In her initial turn (line 199) Wells asks two questions about Masand's son (his name and what he's doing). Her follow-up turn restates and reinforces the information that he has provided in his answer in lines 201-202. Masand treats her turn in line 204 as the first pair part of a yes/no question or adjacency pair, and he responds with "yes, m'am" in line 206. This is typical of the type of yes/no (lexically prosodic) questions that she asked. Taken together, the four turns reinforce positive information about Masand's family, working to establish them as well-educated and dedicated to the medical profession, and give an impression of a unified "doing" of Masand's biographical details.

Overall Structural Organization

In the Masand case, the opening or formal identification section is completed in two question-answer adjacency pairs as presented below.

Excerpt 7.12

- 1 Wells: ((picks up notebook and walks to podium in front of jury and witness
2 stand)) Even though we hav' (.) informally introduced you to the jury,
3 would you please tell the jury what your name is
4
5 Masand: My name is Abhishek D. Masand
6
7 Wells: And (.) what is the name you commonly go by in Eastville
8
9 Masand: A.D. Masand

Unlike Pooler who starts the direct examination of Nasa by positioning himself in the public area of the courtroom at some distance from his client, Wells uses a podium that is directly in front of the jury and the witness stand. She begins with a statement (line 2) followed by a question that functions as a clear request or directive (line 3). Masand responds in a manner identical to Nasa with a “my name is...” format. Wells then continues this formal identification section in line 7. This turn, with the embedded presupposition that there is a different or common name that Masand goes by, elaborates on Masand’s identity and conveys to the jury a tenor of shared personal knowledge between Masand and Wells.

Wells’ transition question to the fact-finding section of direct examination is also quite different from that of Pooler in the Nasa case.

Excerpt 7.13

- 235 Wells: We’ve heard testimony that um ((motions toward plaintiff)) Elizabeth Jones
236 was a CNRA* at the hospital at that time (frame) did you know Elizabeth?
237
238 Masand: Yes m’am
*CNRA refers to a Certified Nurse Registered Anesthetist

Wells’ transition question begins with something akin to a pre-sequence. The phrase “We’ve heard testimony that..” acts as a topic shift and an announcement that a

question is about to be delivered. The question that follows is clear and direct and receives an equally clear answer. Again, in the Masand case we see a coordinated effort between the attorney and defendant in conveying information to the jury.

Sequence Organization

The sequence organization below also shows a harmonized “doing” of information concerning Masand’s biography. Wells’ initial question is similar to that of Pooler discussed above under the topic ‘turn design’; however it also has some significant differences which are discussed below under the same topic.

Excerpt 7.14

- 47 Wells: So you actually taught as a s- medical professor?
48
49 Masand: I was not a professor at that time. I was it’s called (civilian resident)
50 surgeon which is equal to probably an assistant professor here. It’s a
51 beginning first step of—
52
53 Wells: You taught other people that were becoming doctors↑
54
55 Masand: Yes, m’am. Then I left India in 1969 to improve my surgical skills um.

Masand is placed in the same position as Nasa. He produces a dispreferred (negative) response and offers an accounting or explanation, insisting on specific facts and truthfulness regarding what the term “professor” means. When his explanation trails off, Wells rephrases the response in a more positive light. Masand then treats this as the first pair part of an adjacency pair and responds with “yes, m’am” (line 55).

Turn Design

In the first turn above (line 47) we see another medial use of the word “actually;” however, its function is much different than that produced by Pooler’s use of the word. (See Excerpt 7.6 above, “All right, did you actually practice in India↑”). Here the word

acts as an intensifier and it signals topic movement or a “shift in the topical direction” (Clift, 2001, p. 283) triggered by the immediately preceding talk. A review of Masand’s prior turn confirms this use of “actually.”

Excerpt 7.15

43 Masand: [4 lines omitted] Then I worked in (the government) medical college which
44 is associated with the (government) general hospital there as a (civilian
45 resident) surgeon teaching surgery for three years.

In line 45, Masand mentions “teaching surgery for three years.” Wells next turn (line 47 above) stays with the same topic but shifts the topical emphasis to Masand’s expertise in being able to teach others. When Masand responds to this with disagreement and an accounting, Wells quickly focuses on the positive portion of the statement and rephrases it in such a way as to elicit agreement from Masand. This underscores Masand’s competence and experience and shows collaborative interaction between the two speakers.

In addition, Well’s turn using “actually” is designed as a prosodic rather than a yes/no question as was Pooler’s. This prosodic design means that although Masand does disagree with the statement he does not produce a bald “no,” so that the disagreement is more a correction of specifics than an outright denial.

Another typical example of turn design in the Masand case appears below.

Excerpt 7.16

113 Wells: What did you do in Flint Michigan to improve your surgical skills?
114
115 Masand: Um I joined the rotating internship again because they did not recognize
116
117 Wells: You joined what? I’m sorry.

Both Masand and Nasa had arrived in the United States as young adults and had spent many years in various locations in the U.S.—for Masand over 30 years and for Nasa over 20 years. Although, for the most part, readily comprehensible, their accents possessed definite “foreign” qualities particularly as compared to the pronunciation of residents born and reared in the county where these suits were tried. Wells alluded to this in comments she made during voir dire (Dr. Masand’s goin’ to be much easier to understand OK). In the example above his pronunciation of “rotating internship” is roughly: /rowdey’tɪŋ’/ /Intərn’ʃɪp/. The most striking features of the pronunciation are three glottal stops; the pronunciation of the first “t” sound in “rotating” is much closer to a “d”; and the intonation is constant throughout, with no rising or falling pattern.

Wells asks for repetition of the key phrase in this response (line 117) and concludes with the apologetic phrase “I’m sorry.” This is the sort of action that we might see in “ordinary” conversation, and it serves to assist the jury in understanding what is likely a problematic pronunciation for them. Since she is (or should be) familiar with Masand’s background, it is likely that Wells understood what Masand was saying but has made an on-the-spot determination that the jury may not have understood Masand’s statement. As discussed in chapter 5, Wells is functioning as a sympathetic ratified overhearer for the jury members and seeks a repetition on their behalf. There are other sequences in which she repeats complete phrases or significant words that have been used by Masand. In the Nasa data there are no instances of requests for repetition of words or phrases and few instances where Pooler repeats words that may have been difficult for the jury to understand.

Lexical Choice

As in the Nasa case, there are also examples of the use of “we” during the biography phase in the Masand case. An examination of two of these uses shows the “extraordinary transiency of reference” (Sacks, 1992, p. 333) of pronouns.

Excerpt 7.17

69 Wells: We’ve seen a lady sitting in one of the front rows here off and on. Is that
70 your wife
71
72 Masand: Yes, m’am

This “we” is confined to those persons who are actually in the courtroom. It connects all the individuals there in the joint activity of having “seen a lady.” There could be no “we” outside of the courtroom as individuals outside of the courtroom would not have been involved in this joint activity. A later use of “we” is a broader one.

Excerpt 7.18

208 Wells: You and Jyoti came here in 1974. Tell the jury a little bit about the practice
209 of medicine here in 74 and what the hospital was like because when we look
210 at the hospital today I think it’s fair to say it was dramatically different in 74.

This use of “we” includes those within the courtroom but also is broader. It is a local community “we” that expands beyond those persons within the courtroom participating in the current trial. Both of these uses of “we” include the defendant and thus serve to reinforce commonality with the jury.

Interactional Asymmetries

As mentioned earlier, one type of asymmetrical interaction in institutional settings involves know how “about the interaction and the institution in which it is embedded” (Heritage, 2004, p. 236). A reexamination of an excerpt used earlier demonstrates such asymmetry.

Excerpt 7.19

- 11 Wells: All right. And can you tell the jury uh (.) where you live and how you
12 came to be in Eastville. >Just tell 'em a little bit about yourself.<
13
14 (2.0)
15
16 Masand: Um
17
18 (2.0)
19
20 Masand: You want me to start from (.) when I first –
21
22 Wells: Well, I would tell 'em where you were born, how you came to be an
23 American then more particularly how you came to be in Eastville.

In lines 14-20, Masand struggles to understand Wells' question and seeks direction on exactly what is required. He calls on her know how in this setting to clarify what is needed and what would be considered an adequate response. She responds by giving him a "road map" of sorts as to what kind of information to include. "Well" has been identified as a preface to a dispreferred response (Heritage, 1984, p. 275); however, here it functions to downplay the directive nature of her response. In combination with "I would" it softens the instructive nature of what follows to a tone of advice and thereby also diminishes the asymmetry in know how between herself and her client.

Conclusion: "Actually" It Does Matter

This chapter has examined the bi-institutionality of the interaction, the blending of the institutional requirements of conversation with the institutional requirements of the courtroom during the opening of direct examination to show how different interactional work is being done between each client and his respective attorney. Both forms of institutional work serve to create a biographical sketch of the NNS defendant, but quite different ones.

Exploiting both the rules of the courtroom and the rules of conversation, Wells and Masand have collaboratively authored a biographical sketch of Masand that creates a favorable image of Masand. In particular, Wells has used turn design, sequence organization, repetition, and rephrasing within the institutional rules of the court and of conversation. Pooler and Nasa demonstrate an understanding of the rules of the courtroom, but frequently their use of the rules of conversation place Nasa in an unfavorable light. For example, when the phrasings and lexical choices of Pooler's questions produce a dispreferred response from Nasa (as dictated by the rules of conversation), Pooler fails to restate or rephrase these responses to produce a more positive image of Nasa.

These data reveal that the details and subtleties of this interactional work are "actually" quite important for the defendants and serve as the "doing" of their biographies for the jury. The casting of these biographical "facts" can be just as important as the presentation of the specific "facts" of the alleged acts of malpractice. The next chapter uses membership categorization analysis to further show how the defendants' biographies and identities are accomplished through the interaction.

CHAPTER 8

MEMBERSHIP CATEGORIZATION: EVIDENCE OF IDENTITY

Introduction

Ethnomethodology provides a research approach that sees "both communication and interaction as inherently social processes, deeply involved in the production and maintenance of social institutions of all kinds, from everyday intersubjectivity, to the family, to the nation-state" (Hutchby & Wooffitt, 1998, p. 37). A central premise when looking at snapshots of courtroom data with an ethnomethodological camera is that language is not a "mere passive vehicle for the imposition or transmission of law but actually constitutes and transforms evidence, facts, and rules" (Matoesian, 2001, p. 3). Part of the "evidence" and "facts" of a case includes issues of "who is?" this defendant; what are the details of the defendant's identity? From this perspective the judicial setting is not an objective, rational and impartial environment in which "right" and "wrong" are discovered but is a much more complex, manipulable and multihued palette of social interaction.

In both civil and criminal cases, it is important for the defendant and the defendant's attorney to be seen as "honest," "believable," "upright," and if possible, to create a suggestion of false accusation. After all, courtrooms are in effect moral arenas where moral theory must be put into practical application. How individuals are categorized and identified through descriptions within this moral arena influences our perceptions of them and contributes to the on-going social and institutional order. "[T]he categorization of persons (membership categorizations) is criterial and foundational in the understanding of members' practical activities" (Jayussi, 1984, p. 2). An examination of

the categories used for these NNS defendants helps to explain how their situated identities were created in the courtroom.

Each of these attorneys makes it obvious, sometimes painfully so, that they are aware that the status of their respective clients as NNSs and as “foreigners” is a potential issue for the jury. The approaches taken by each to address this status are quite different and set the stage for the creation of each defendant’s courtroom identity as a sympathetic or non-sympathetic character in the unfolding story and that of his attorney as a similarly sympathetic or non-sympathetic, if not conflated, character. These situated courtroom identities becomes part of the moral fiber of the case the jury is asked to decide.

“[I]dentity is something that is *used* in talk: something that is part and parcel of the routines of everyday life, brought off in the fine detail of everyday interaction” (Antaki & Widdicombe, 1998, p. 1).

The last two chapters examined aspects of the sequential organization of two stages of a jury trial, voir dire and direct examination, and how different portraits of the defendants were being painted during these stages. This chapter, using membership categorization analysis (MCA), extends the analysis of how the identity of each NNS defendant was rendered for the jury. Before turning to the details of the data from each case, some of the main concepts of MCA are explored below.

Membership Categorization Analysis

Sacks’ lectures “returned time and time again to the way people organized their world into categories, and used those categories – and the features that they implied – to conduct their daily business” (Antaki & Widdicombe, 1998, p. 2). Sacks was interested in how members describe, label and thereby “see” their fellow members. His interest was

not in how the discipline of sociology or other academic disciplines or researchers label or categorize people and actions within various social activities, but rather in how the members themselves go about that business in the process of creating a comprehensible picture out of a jumble of daily events.

Psathas (1999) defines membership categories as classifications or social types that may be used to describe persons. Examples are debutante, hip-hop artist, homeless person and teacher. When a member is placed in a category other members make inferences or assumptions about the typical behaviors, rights, responsibilities and activities of such a category incumbent. According to Sacks, these categories are to greater and lesser degrees “inference-rich” – “a great deal of the knowledge that members of a society have about the society is stored in terms of these categories” (Sacks, 1992, Vol. 1, p. 40).

In some ways, MCA might be thought of as the study of the implications of shared connotative meanings and how those shared meanings both constrain, expand and imbricate our activities and social sense-making. The work of MCA has to do with examining what those shared connotative meanings are, how they are exhibited in social interaction, how they are often inextricably bound to denotative meanings and what happens when the connotative suggestions exceed the denotative substance. According to Sacks, one result is that the “inference-richness” of some categories and their associated activities, obligations and responsibilities are so strong that they are “protected against induction” (Sacks, 1992, Vol.1, p. 336). In other words, the assumptions connected to them cannot be overcome no matter how many contrary cases one encounters. (The Irish love whiskey no matter how many teetotaler Irish one meets.)

These assumptions can be disproved, but they cannot be dismissed. In addition, this “inference-richness” is reversible. If one hears a certain sort of activity then a member can decide what category of other members would have performed such an activity.

MCA work seems particularly important for a courtroom setting where decision makers (the jury) are specifically told to leave their connotations at the door and concentrate on the denotative “facts” only. Sacks recognized the importance (and irony) of how various membership categorization rules might work in trials and legal contexts. In a 1966 lecture (Sacks, 1992, Vol. 1, pp. 333-340), he discussed the “reasoning” that jurors had apparently used in convicting an African-American in an assault and attempted rape case. He also used the example below (p. 340) from the 1954 Robert Oppenheimer hearings before the Atomic Energy Commission. Oppenheimer was one of America’s leading physicists and was director of the Manhattan Project, the World War II atomic bomb project, yet in 1953 he had been denied a security clearance amidst accusations that he might be an agent of the Soviet Union, “a communist.” The questioning below relates to one of Oppenheimer’s colleagues, another physicist involved in the project, Fuchs, who had confessed to passing secrets to the Soviets.

Questioner: Were you acquainted with Fuchs?

Witness: Yes, I knew Fuchs quite well.

Questioner: Did you have any reason to suspect his integrity or dependability or whatever was involved in the subsequent disclosure?

Witness: Not particularly. He was a rather queer person, but then under those conditions queer persons occur. I did not suspect him particularly. He was clearly not an ordinary person.

And then later:

Questioner: At the time you learned about it [Fuch’s confession] were you surprised?

Witness: Look. I was not surprised in this sense. That he clearly was a peculiar person. So if it turns out about an ordinary run of the mill person that he's a conspirator and spy, you are shocked and surprised. He was a very peculiar persons [sic], with respect to whom I didn't have much experience. Of course I was surprised by the fact that there had been such a thing, that a spy had been so well placed.

As Sacks then says, if you know someone is "peculiar," "if you're told something and you know somebody's queer, then anything much they do is understandable" (p. 340).

Sacks explained how this understanding takes place through various membership categorization devices (MCDs) and rules for their application.

Membership Categorization Devices and Rules of Application

MCDs are collections of various membership categories combined with rules for how we apply the categories. Examples of collections of categories are "orchestra members," "family," and "baseball team." Sacks' definition of an MCD is:

any collection of membership categories, containing at least a category, which may be applied to some population containing at least a member, so as to provide, by the use of some rules of application, for the pairing of at least a population member and a categorization device member. A device is then a collection plus rules of application (Sacks, 1972, p. 332).

Deciphering that definition becomes easier if it is broken into parts using a simple example:

Table 8.1

Membership Categorization Device and Example

An MCD is:	Example:
a) any collection of membership categories	Baseball team
b) containing at least a category	Contains at least one (actually, a minimum of nine) categories (pitcher, catcher, first baseman, etc.)
c) which may be applied to some population containing at least a member	A “population” of men walking down the street.
...so as to provide, by the use of some rules of application...	
d) for the pairing of at least a population member and a categorization device member	The men are wearing baseball uniforms. One man = a baseball player/team member
e) a device is then a collection plus rules of application	This is how we decide the man in question is a member of a “baseball team.”

According to the economy rule “a single category from any membership categorization device can be referentially adequate” (Sacks, 1992, Vol. 1, p. 246); therefore, it is perfectly adequate to refer to the man as a “baseball player.” It is not necessary to use further descriptive terms, such as height, age or hair color, or even which category within the collection “baseball team” applies to the man.

A second rule of application is the consistency rule (Sacks, 1992, Vol. 1, pp. 238-239). Using the consistency rule, once a first member of a population is categorized then other members of the population may be described with the same category or with other categories from the same collection. Extending the baseball team example a bit further, the consistency rule means that the other men may also be called “baseball team

members” or more specifically, the “pitcher” or “catcher.” The consistency rule corollary says that if two or more categories are used to describe two members of a population and those two categories can be heard as belonging to the same collection then that is how they are heard. If the first man is described as a “third baseman” and the second man is described as a “pitcher,” these will be heard as part of the collection “baseball team,” not as one member of a baseball team and one member of a cricket team.

Extension of the consistency rule corollary means that once we see members as being part of the same collection we also see them as “teams.” So just as the third baseman and the pitcher belong to the baseball team, so too a defendant and his attorney belong to the “defense team.” According to the duplicative organization rule once we create teams or units of categories we count not the members of the unit individually, but the units themselves (Sacks, 1992, Vol. 1, p. 225). Finally, a “hearer’s maxim” applies to the duplicative organization rule. If members are described (categorized) as part of a collection that has the duplicative organization property, and if these categories can be heard as co-incumbents of a “team” or unit, then hear them that way (Sacks, 1992, Vol. 1, p. 248).

All of these rules allow for interpretation of Sacks’ classic example: “The baby cried. The mommy picked it up.” (1992, Vol. 1, p. 236). “Baby” and “mommy” are adequate descriptions from the collection “family” (economy rule); they can be heard as members of the same collection “family” (consistency rule corollary); they can be grouped together as a unit and heard as a team within the collection “family” (hearer’s maxim for duplicative organization). We hear the “mommy” as the mommy of this

particular “baby;” we hear the baby’s cry as the reason the mommy picked it up and as the meeting of her responsibility as a mommy.

Paired Relational Categories

Sacks (1972) also described a number of category pairings within membership categorization devices that rely on mutual responsibilities and obligations (such as the mommy and baby in the above example). These include standard relational pairs (SRPs), Collection R and Collection K. In addition, Sacks noted that certain collections of categories are positioned to one another in a particular hierarchical or sequential order; for example, baby, adolescent, adult. The data from these cases contain abundant references to SRPs, Collection R, Collection K and to positioned categories. Sacks’ definitions are given below along with examples from the data in these cases.

Standardized Relational Pair: A pairing of Members such that the relation between them constitutes a locus for rights and obligations. Examples abound: Husband and Wife, Mother and Baby, Lecturer and Student, and Doctor and Patient (Sacks, 1972, p. 37).

Both of these cases are malpractice cases, so the SRP of doctor-patient is an overarching consideration during all stages of the proceedings. In addition, other SRPs are made relevant in the interaction. For example, in Case 2-Masand, the defendant’s attorney, Wells, invokes the SRP of husband-wife during the following turn:

Excerpt 8.1

69 Wells: We’ve seen a lady sitting in one of the front rows here off and on. Is that
70 your wife?
71
72 Masand: Yes, m’am

Collection R: “Any pair of categories is a member of collection R if that pair is a “standardized” relational pair that constitutes a locus for a set of rights and obligations concerning the activity of giving help” (Sacks, 1972, p. 37). These pairs tend to make observable the absence of one of the members (Silverman, 1998, p. 82).

In the following example from Case 1-Nasa, the defendant’s attorney, Pooler, invokes a Collection R pair in an exchange with Nasa:

Excerpt 8.2

- 121 Pooler: OK and by the time you’re a third year resident, then you
122 actually handle cases on your own?
123
124 Nasa: eh >that’s correct<
125
126 Pooler: OK under the general supervision again of the attendings?
127
128 Nasa: eh yes sir.

During a residency program, the “attendings” (attending physicians) are required to supervise and provide guidance to third year residents who are under their direction.

Collection K: “Collection K is composed of two classes (professionals, laymen). ... All those occupational categories for which it is correct to say that Members of the named occupations have special or exclusive rights for dealing with some trouble(s) are occasional occupants of K’s class (professionals)” (Sacks, 1972, p. 39).

These are categories of experts who provide help for particular sorts of needs. Again, the pair of doctor-patient would be part of this collection. In addition, the attorneys in both cases make numerous references to the pair of attorney-client which also belongs to Collection K. Near the beginning of his voir dire, the attorney in Case 1-Nasa says:

Excerpt 8.3

16 Pooler: Would any of you simply because I don't live in Kentucky uh will any
17 of you hold that against my client (.) Dr. Nasa?

Pooler makes specific reference to “my client” and thereby his relationship to Nasa as a professional provider of legal services.

Category-Bound Activities

Some types of activities imply the identities of members who would perform them. These are activities “taken by Members to be done by some particular or several particular categories of Members where the categories are categories from membership categorization devices” (Sacks, 1992, Vol. 1, p. 249). These category-bound activities affect how we see the activity and how we assign identities to the participants. If we see a man slip a necklace in his pocket at a department store jewelry counter we are likely to place him in the category “thief.” Certain categories are also “required” to act in certain ways, at certain times and under certain circumstances. Normally, a “mommy” should pick up her baby when it is crying.

These collections, categories and rules for their application are used in complex ways during the interaction in these two cases. This is more fully examined below first in Case 1-Nasa and then in Case 2-Masand.

Categorizing the Defendants

“[M]embership categorization devices are local members’ devices, actively employed by speakers and hearers to formulate and reformulate the meanings of activities and identities” (Silverman, 1998, p. 97). MCA work must be based on “empirical observations that show that the *participants themselves* are demonstrably oriented to the identities or attributes in question” (Drew & Heritage, 1992, p. 20). The data in these

cases are rich with categorization work. In particular, the participants orient to and make relevant the defendants' "foreign" and NNS status, to their professional competence as physicians and to how these might be linked. The remainder of this chapter uses MCA to examine the local situated identities of each defendant and how they are categorized in the talk-in-interaction. For each case, first, portions of the voir dire of each defendant's attorney are used, and then excerpts from the biography phase of direct examination of each defendant are examined.

Case 1-Nasa: Voir Dire Categorizations of NNS and "Foreignness"

As mentioned in chapter 5, voir dire is the first opportunity that each attorney has to directly address the potential jury members. The attorney in the Nasa case opens his voir dire with the following statement:

Excerpt 8.4

5 Pooler: Mr. Cutler
6 Ladies and Gentlemen
7 As Judge [xxx] told you my name is Robert Pooler
8 ((moves podium away from jury box))
9 and I my office is located in Huntington West Virginia
10 (.)
11 and like a lot of doctors and lawyers and accountants and business people here I
12 practice regularly in Eastern Kentucky as well as Eastern and Southern West
13 Virginia. (1.0) Uh I I practice regularly in this court and have appeared before
14 Judge [xxx] several times and had several trials here.

After his greetings or acknowledgments to opposing counsel (line 5, "Mr. Cutler") and to the jury (line 6, "Ladies and Gentlemen"), Pooler introduces himself in line 7. He then employs a number of location categories that also serve to invoke certain membership categories. This begins in line 9 ("my office is located in Huntington West Virginia"). This is a recipient designed reference in that it works on the assumption that the jury members know of, about and where Huntington West Virginia is. This location

specific reference places him in a broad membership category of “outsider” or “foreigner” to this community. Pooler, however, then works to counter this with two indexical “here” references – one that refers to the local community (line 11) and one that refers to this specific court (line 14). Pooler never uses the location category of Eastville, although he does refer to Eastern Kentucky.

In line 11, Pooler also describes himself as a member of Collection K. He places himself in the elite company of “doctors and lawyers and accountants and business people” rather than using a description that might work to align him with the full community of Eastville or with this specific collection of jury members. This is particularly striking since the plaintiff in this case, the plaintiff’s father (a disabled coal miner) and his mother are all unemployed.

The next section of Pooler’s voir dire shows that Pooler is aware that he and his client’s (Nasa’s) memberships in particular categories are linked. Both Pooler and Nasa are members of what might be thought of as a “courtroom collection” or a “trial collection.” They belong to the collection of persons and roles necessary for such an institutional activity to be carried out. Nasa is the “defendant” and Pooler is the “defendant’s attorney.” Through the consistency rule corollary they can be seen as a “defense team.” Pooler makes these categorizations and their function as a team explicit in the section below.

Excerpt 8.5

16 Pooler: Would any of you simply because I don’t live in Kentucky uh will any of you
17 hold that against my client (.) Dr. Nasa? Is that a problem for any of you?

The first question above re-emphasizes Pooler’s outsider/foreign status and ties that status to Nasa. The reference to the activity of not living in Kentucky works to

create the category of “foreigner.” To be “foreign” one must live or be from elsewhere, but the category is then made problematic by the statements that follow. The second part of the question (“will any of you hold that against my client (.) Dr. Nasa?”) ties that category to unacceptable features or activities—perhaps “not local” equals “not trustable;” or worthy of belief, otherwise why would the jury potentially hold it against either Pooler or his client? This implication is further emphasized by the next question in line 17: “Is that a problem for any of you?” These questions combine to create a specific assignment of the category “foreign” to Nasa and then a problematization of that category. In addition, the quadruple repetition of the phrase “any of you” also works to create something of an “us” versus “you” connotation.

After an extended pause of 3.5 seconds, Pooler then puts Nasa’s foreignness front and center.

Excerpt 8.6

19 Pooler: Let me ask you a (little) hard question. Dr. Nasa (.) is not from Kentucky he is
20 not from West Virginia. He was born in India. Do any of you have any
21 feelings or prejudices against Dr. Nasa because he was born in a foreign
22 country?

In line 19, Pooler uses a pre-sequence (“Let me ask you”). This pre-question sequence acts as something of a “heads-up” to the recipient. Schegloff (1980, p. 107) says that usually such a pre-question sequence is not followed by a question but rather by information delivery. This is true in this example as Pooler then proceeds with two statements that further construct Nasa’s foreigner membership status. In lines 19 and 20 he says “Dr. Nasa (.) is not from Kentucky he is not from West Virginia.” This equals saying not only is he not from “here” (Kentucky), he is not even from “anywhere close” (West Virginia). His next statement makes the divide clearer: “He was born in India.”

(line 20). Use of these specific location categories and the phrasing of the statements in the negative continue to underscore how different Nasa is from the people who are about to judge him. Rather than use any descriptive terms or categories that emphasize connections, Pooler constructs disconnects with these descriptive categories.

The phrasing of Pooler's pre-question sequence is also significant: "Let me ask you a (little) hard question." (line 19). This is an example of what Schegloff (1980, p. 131) has called the marking of an upcoming delicate question. It displays that "a question hearable as subject to delicate treatment once heard, has been so treated on this occasion, by this speaker, for this recipient" (p. 134). This "delicacy" is observable in the phrasing of the pre-question sequence. First, the mere use of the pre-question sequence shows that Pooler is aware he is about to deliver something sensitive. Since the format of the voir dire stage of a trial is constrained by the procedural requirement of questioning by attorneys and responses by potential jury members, pre-sequences are not institutionally required, but reflect their context-free use as a tool of the institution of conversation. Second, Pooler juxtaposes two terms that are not precisely antonyms but that certainly sound a bit odd together and that imply different meanings. If something is "little" it is usually seen as non-threatening, but if something is "hard" it is perceived as serious and difficult.

The question that eventually follows might also be seen as "difficult" in the sense that it categorizes the potential jury members as well. In lines 20-22, Pooler asks: "Do any of you have any feelings or prejudices against Dr. Nasa because he was born in a foreign country?" The implication of this question is that they may be classed as "bigots" or potential racists.

Schegloff (1980, p. 128) suggests that even when a pre-question sequence is followed by the projected question it is often treated as a preliminary to even further questions. The data here follow that pattern as shown in the next section of voir dire that continues to describe Nasa's foreign status and ties that status to his competence.

Case 1-Nasa: Voir Dire Categorizations of Professional Competence

The delicate question in lines 20-22 above is followed by several others. After another significant pause of 2 seconds in line 23, allowing for possible responses by the jury pool members, Pooler now links the category of foreignness with the category of physician in his next question in lines 24-25 below.

Excerpt 8.7

23 Pooler: (2.0)
24 Do do any of you have any particular feelings or biases against foreign born
25 physicians?
26 (2.0)
27 Do you think that their their education is inferior or their training is inferior or
28 because of language problems or whatever that they don't do a good job in in the
29 practice of medicine in general? Any of you have any particular (.) feelings in
30 that regard? Have have can you tell me how many of you have been to a foreign
31 born physician (.) for treatment?

This question again implicates the “problem” or “questionable” status of foreigners and now specifically foreign born doctors. Pooler then continues with a list of category-bound activities that are associated with the category of “questionable foreign doctor:” inferior education, inferior training, language problems or “whatever.” Jayyusi (1984, p. 75) described two types of lists, those that are category lists and those that “deliver categorization.” In this instance, by providing a list of category bound activities possibly associated with foreign born doctors, Pooler is delivering a categorization not only of some generic or abstract “foreign born doctor,” but also of his client. He specifically

refers to “language problems” (line 28) and invokes the NNS status of his client, thus making this category available and relevant for the remainder of the trial. He also repeatedly emphasizes that Nasa is part of a distinct and different group of physicians by his use of “their” and “they”: *their* education, *their* training, *they* don’t do a good job. Pooler never uses the category “we” or “our” to align himself or Nasa with the jury.

Since, as one might guess, these “questions” are eliciting no responses either verbal or non-verbal from the potential jury members he then asks a question regarding their activities that he might tie to the membership category of “impartial jury member.” In lines 30-31 he somewhat haltingly asks: “Have have can you tell me how many of you have been to a foreign born physician (.) for treatment?” Presumably if someone has gone to a foreign-born physician then they will not harbor biases toward Nasa; however, this is a rather tenuous tie between an activity and a category as there is no follow-up question that would determine what the experience might have been. Perhaps they went to a foreign born doctor but had an unsatisfactory encounter.

Case 1-Nasa: Biography Phase Categorizations of NNS and “Foreignness”

During the biography phase of direct examination several adjacency pairs implicate Nasa’s foreign and NNS status. Near the beginning of this phase, Pooler asked Nasa to describe his “childhood and growing up.” Nasa responded with an answer that concentrated on his education and medical training. The next two adjacency pairs after this response appear below.

Excerpt 8.8

33 Pooler: Is that the British system of training?
34
35 Nasa: eh >that’s correct<
36

37 Pooler: And um (.) were your classes in medical school in English?
38
39 Nasa eh, yes sir.

The use of the adjective “British” in line 33 is another example of the assignment of a category of “other” or “foreigner” to Nasa. It highlights difference between his background and that of the location category “here” or “American.” Somewhat oddly, there is no follow-up to this question that would explain to the jurors exactly what “the British system of training” entails. It seems unlikely that they would be familiar with how medical training is conducted under a British model, yet they are left to wonder what the differences are and how they might be important in this case. This lack of follow-up is a failure to anticipate a communication need or breakdown in communication on behalf of the jury members. Pooler fails to assume the role of a sympathetic ratified overhearer.

This question is followed by the one in line 37: “And um (.) were your classes in medical school in English?” This question does much more than determine the language of instruction for Nasa’s medical school classes. It implies that it was likely Nasa’s medical school classes were not in English, when in fact, many universities in India use English as their language of instruction. It further instamps the category of NNS and continues to heighten the contrast between the category “doctor” and that of “foreign born doctor.” If Nasa were only a “doctor,” then under the economy rule additional descriptive work would probably be unnecessary, but since he is a “foreign born doctor” further descriptive information is elicited by Pooler. The adequate, but bare, answer “eh, yes sir” does little to help allay potential concerns that the jury might have about Nasa’s language fluency.

Case 1-Nasa: Biography Phase Categorizations of Professional Competence

During the biography phase of the Nasa case there are numerous examples of interaction between Nasa and his attorney, Pooler, that work to create Nasa's identity as a physician. Since this is a malpractice case in which Nasa's professional competence is under examination these are particularly important sequences to consider; some of these were discussed in the previous chapter. The one below is rich with categorization work.

Excerpt 8.9

216 Pooler: And why did you come to Eastville?
217
218 Nasa: (2.0) Well, I was the only orthopedic surgeon in Williamson so I was basically
219 on call almost every day and uh I think I was getting tired of it, and um and
220 besides uh my f- friend, Dr. Rajawat was leaving the area and uh uh Dr.
221 Hawkins also asked me to come over so it was a mutual benefit for us to be able
222 to cover.

In response to Pooler's "why" question, Nasa provides an explanation for his decision to come to Eastville. The placement of this exchange is significant in that it occurs shortly before the transition to the fact-finding section of the direct examination and is one of the last statements that the jury hears from Nasa about his motivations for connections to their community and relationship to his profession. This is an extremely complex passage, and unfortunately, at least for Nasa, a somewhat damning one.

There are numerous categories and standard relationship pairs invoked in Nasa's response. These are doctor-patient (line 217, "I was the only orthopedic surgeon"); friend-friend (line 219, "my f- friend, Dr. Rajawat"); and colleague-colleague (line 220, "Dr. Hawkins also asked me"). Each of these categories implies particular responsibilities and appropriate actions. There are particular ways that doctors should treat patients; friends should treat friends and colleagues should treat colleagues. While

none of the specific category bound activities and responsibilities associated with these three SRPs are necessarily mutually exclusive, they work in different ways depending on the specific occasion of their use, and there is often a certain gradation of moral responsibility as to the category that one calls upon to justify or explain action.

Nasa has prioritized his status as “friend” and/or “colleague” over that of his status as “doctor.” He has decided to come to Eastville because his friend asked him to come and because he and a second colleague saw the mutual personal benefits of having two doctors in the community—thus reducing the workload. These are certainly plausible reasons, but they portray Nasa’s actions as self-serving ones rather than as the public or patient serving ones that would be invoked by the category “doctor.” In other words, he appears not as a dedicated doctor, but as someone who puts his self-interest first. Nasa appears to have misunderstood the intent of Pooler’s question which probably was to afford Nasa an opportunity to establish ties and connections with Eastville. His answer appears to be an honest and direct one, but it fails to infer the type of answer wanted. Gumperz (1992) and Jupp, Roberts, and Cook-Gumperz (1982) have found similar non-responsive and rather self-damning responses from Indian and other South Asian English speakers during job interviews.

Nasa’s prioritization of categories and associated actions is further emphasized by his statement in lines 218 to 219: “I was basically on call almost every day and uh I think I was getting tired of it.” Again, this is certainly not an implausible or illogical reason for his decision to come to Eastville, but it is in conflict with what Jayyusi (1984) has called “category-constitutive” (p. 43) skills or moral duties. In other words, some skills and duties are not simply *bound* to certain categories but are *required* for one to be a bona

fide member of the category. Such duties, obligations and commitments may be “so strongly required that [they] may come to be formulated as constitutive of the categorization ‘doctor’ as a moral categorization and situatedly criterial for one’s right to carry it, i.e., one’s eligibility *to practise*” (p. 43).

Jayyusi (1984, pp. 43-44), using the example of a doctor, offered further discussion of how some categories’ duties imply complex and morally accountable interaction between domains of action (work/pleasure); domains of duties/entitlements (what I would term the domain of prerogative); and domains of time (private time/public time). In each of these domains, Nasa’s explanation undercuts the activities and responsibilities for which we hold “doctors” or at least “good doctors” accountable. He did not want to be “on call almost every day” (line 219) and he was “getting tired of it” (line 219). His coming to Eastville offered some “mutual benefit” (line 221). All of these statements imply that he places activities associated with personal pleasure, entitlements and private time above those associated with professional work, duty and public time. Nasa’s explanation is seeable as a complaint about his status as a doctor because it is “embedded in and trade[s] off the nature of the categorization ‘doctor’ as a membership categorization that operates within a social, practical and moral geography” (Jayyusi, 1984, p. 44). As Silverman (2001) says “[B]ecause of the category-bound character of many activities, we can establish negative moral assessments of people by describing their behaviour in terms of performing or avoiding activities inappropriate to their social identity” (p. 145).

The discussion now turns to Case 2-Masand in which a very different picture of the defendant emerged through the use of various membership categories and descriptors.

Case 2-Masand: Voir Dire Categorizations of NNS and “Foreignness”

In her voir dire, Wells’ (Masand’s attorney) use of MCDs, descriptions and categories creates a very complex and multi-faceted portrayal of Masand. Several minutes into the voir dire she begins with the description below.

Excerpt 8.10

11 Wells: Dr. in Dr. Masand has lived in East County for twenty-eight years (.)
12 and he’s practiced here (.)
13 and for those of you that are accustomed to talking to Dr. Wen Dr.
14 Masand’s goin’ to be much easier to understand OK. Does anybody have
15 problems taking the time and effort to try to listen to Dr. Masand or if you
16 can’t understand raising your hand and say I need you to repeat that OK.

Her first sentence works to position Masand as a community member, as “one of us.” She uses two descriptions of category-bound activities to place Masand in two separate categories (doctor and community member) and simultaneously manages to tie these two categories together. Wells emphasizes that Masand has “lived in East County” (line 11) and “practiced here” (line 12). This use of a specific (East County) and indexical (here) location category shows local connections and involvement. It is not just that he is a member of the category “doctor” (emphasized by “practiced here”), but that he is also an “involved citizen” (emphasized by “lived in East County”). This community involvement is further enforced by the specific and lengthy time reference (“twenty-eight years”). The slight pause that occurs after each of these invocations of categories lends them further emphasis. She opens with a description that is not one of “foreignness” but of “sameness” and affinity with the jury members.

Lines 13 through 16 place Masand in the category NNS but in an extremely complex and arguably clever manner. The statement “for those of you that are accustomed to talking to Dr. Wen” has recipient design features. It works on the

assumption that there are at least some jury members who have spoken to Dr. Wen and who understand that he belongs to the category NNS. This is shown in the continuation of the sentence: “Dr. Masand’s goin’ to be much easier to understand OK” (lines 13-14). Her statement works on the assumption that the jury members are using the consistency rule: Dr. Wen is a member of NNS and he is difficult to understand, then if Dr. Masand is also a NNS he must be difficult to understand as well. She counters this consistency rule by adding additional descriptive features to Masand (line 14, “much easier to understand”) and then uses a checking device (“OK”) much like a teacher in a classroom might use to seek agreement or confirmation that she is being understood. By making this reference that works on an assumption of common knowledge about Dr. Wen, Wells also positions herself as an insider in the community.

The next few lines (14-16) by reference to responsibilities and category-bound activities of the category “jury member” shift the emphasis from Masand’s NNS status to the status of the recipients. Wells says: “Does anybody have problems taking the time and effort to try to listen to Dr. Masand or if you can’t understand raising your hand and say I need you to repeat that OK.” Jury members have a responsibility to listen to the presentation of evidence in the courtroom. She lists several activities that they can perform to meet their obligation not just as a “jury member,” but as a “responsible jury member:” “taking the time and effort,” “try to listen,” “raising your hand,” “say I need you to repeat.” These descriptions of appropriate activities for a jury member have an instructive character and also work to create a dynamic of “we’re all in this together” and to highlight that this is important work. Incumbency in the category “jury member” is a valuable service.

Wells next takes on another category of “foreignness” or “otherness,” but this time a much more ominous one—that of “terrorist.”

Excerpt 8.11

19 Wells: Now we don't like to talk about this but September eleven I think has
20 changed a lot of our mindsets (.) and the ways we loo- the way we look at a
21 lot of people and I'm not just saying just you all I have flown in airplanes
22 after September eleven and I can tell you that I look around at the people
23 sittin around me and getting on the plane with me a whole lot differently
24 than I did before September eleventh (.) OK.

Wells begins with the topic shifter “now” (line 19) and then the interesting phrase “we don’t like to talk about this.” This phrase introduces a story that is filled with categories and that adeptly and mercurially moves Masand (and Wells) among competing categories and devices for their application. “We don’t like to talk about this” is a recipient designed introduction to the story that announces a sensitive topic and organizes the story in such a way that the recipient is told there is probably something wrong with the way we “talk about this.”

The use of “we” (lines 19 and 20) and “our” (line 20) is also important in that it includes Wells and the jury members in a joint activity of altered mindsets and thus a joint category. This category might be conceived in a variety of ways—something along the lines of “worried American” or “innocent American,” but the important achievement is Wells’ inclusion of herself and the jury members in that category however it is defined. She then proceeds to describe some activities that are appropriate or connected with this category: new ways of looking at people; looking around at fellow airplane travelers. Wells concludes this section with a checking device (line 24, “OK”) and continues the story in the next section.

Excerpt 8.12

26 Wells: Dr. Masand is not from that region of the world however he is from India. I
27 have flown with Dr. Masand since September eleventh and watched the
28 airport security guards make him take his shoes off scan his shoes search
29 him physically pat him down wand him and go through his briefcase from
30 top to bottom (.) because (.) he looked (.) like somebody who might be (.)
31 suspicious after September eleventh. You all know and will hear that he's
32 lived in this community as has Dr. Jyoti forever. Is there anybody that
33 because of what happened September eleven that can't be fair or that has
34 any uneasiness
35 ((moves hands up and down as if on a see-saw and "squinches" eyes and
36 face))
37 about Dr. Masand?
38 (2.0)
39 Cause that just that would not be fair for him for you all to sit here if that
were the case.

The statement "Dr. Masand is not from that region of the world" simultaneously invokes the unstated category "terrorist" and excludes Dr. Masand from it. Wells then teams herself with Masand in the activity that she has just mentioned in the previous section (flying on an airplane). This links Wells and Masand in an activity that is bound to the previously referenced category of "worried American" or "innocent American." Next, in lines 27 to 30, she lists acts that Masand is subjected to in order to jointly participate with her in this activity: make him take his shoes off, scan his shoes, search him, physically pat him down, wand him, go through his briefcase from top to bottom. The cumulative effect of this list is to insinuate that Masand is subjected to unjustifiable suspicion and to cast Masand in the category of "victim." The four slight pauses in lines 30-31 ("top to bottom (.) because (.) he looked (.) like somebody who might be (.) suspicious after September eleventh") also alert the jury that this is a statement that deserves attention.

Wells then reinforces this victimization description and the unjustness of placing Masand in a “terrorist” category with a description very similar to the one with which she began this part of the voir dire: “You all know and will hear that he’s lived in this community as has Dr. Jyoti forever” (lines 31-32). Dr. Jyoti is Masand’s wife and is also a physician. Instead of a specific time frame (“twenty-eight years”, line 11) she uses the extreme case formulation “forever” (line 32) to bring home her point that both Masand and his wife are “one of us.” The phrase “You all know” also again shows recipient design and calls on the jurors’ joint knowledge as community members.

Finally, in lines 38-39, Wells produces another appeal to the duties and responsibilities of the category “jury member” in her statement: “Cause that just that would not be fair for him for you all to sit here if that were the case.” This calls upon the institutional demand of fairness bound to category incumbency as jury members. It also works to separate the issue of personal bias from category incumbent responsibility of fairness thereby giving the entire passage a less accusatory tone than that seen in Case 1-Nasa.

These two passages combined are a remarkable accomplishment on the part of Wells. In these passages, Wells makes relevant and speaks to a particular type of category incumbency for Masand, and she addresses why that category assignment is potentially “seeable” and “doable” for this population cohort. Jayyusi (1984, p. 57) describes four different modes of category incumbency. These are: ascribable (victim); perceivable (woman); discoverable and perceivable (policeman); and achievable and ascribable (friend). Perceivable categories are “commonsensically available on sight” (p. 68); yet, even for such perceivable categories “it is still an accomplishment on the part of

members that it is sustained and given as just such a perceptually available matter” (pp. 58-59). Wells’ statements effectively say to the jury members: I understand that you might be using perceivable categories of Masand (dark-skinned male foreignness) and that this perceivable category might lead you to one that is ascribable (terrorist). I feel the same way you do, but the category you should ascribe to Masand is that of “us” as “concerned citizens” and to do otherwise, particularly in this institutional activity, is both unfair and a violation of your duty.

According to Sacks, there are certain experiences or events to which one is “entitled” (1992, Vol. 2, pp. 242-248). A member’s entitlement to experience allows them to tell a story as a witness to the event. This witness category allows the teller to convey both knowledge and feelings about the storyable events and descriptions that are told. After so many levels of story-telling the ordinariness and warrantability of being able to achieve particular feelings (whether good or bad) about an event are exhausted. “That is to say, if A calls B to tell her a wonderful thing that happened to her, B could feel good for A, but B is not in a position to call C, where, e.g. C doesn’t know A, and have C feel as joyous as B felt hearing a story about A” (p. 244). Sacks further says that sometimes a situation or event is given an “abstract status” (p. 245) and that even those members who did not directly experience it become “entitled” to not only the knowledge associated with the event, but also with the “feelings” that are achievable by a witness. September 11th is such an event.

September 11th can be thought of as what I would call an “event category” or an “experience category” that implicates a number of membership categories. The uniqueness of events such as September 11th is that they become “witnessable” events for

every member of certain populations and they automatically invoke particular membership categories and justify certain feelings. Wells both understands and exploits the jurors' membership in this "witness" category, utilizes her own incumbency in the witness category and adeptly moves Masand into the category with all of them.

Wells uses powerful, multifaceted, and interrelated descriptors and categories to deal with delicate and stereotypical images of her client. She adroitly reminds the jury of how categories in which they function relate to Masand's categories. The cumulative effect of the descriptions and categories used by Wells to deal with Masand's NNS and foreign status is what I am calling "positive profiling." Wells deals with potentially negative and damaging generic one-dimensional categories but augments, softens and refashions them to ultimately create a positive and individualized profile of her client. This is a major accomplishment and stands in stark contrast to the manner in which Pooler dealt with the same categories as applied to his client.

Case 2-Masand: Voir Dire Categorizations of Professional Competence

Wells spends considerably less time on the topic of professional competence during voir dire. Her statements related to this topic appear below.

Excerpt 8.13

1 Wells: Is there anybody on the jury panel that would not feel comfortable getting
2 medical care (.) in Eastville or East County? Does anybody believe that just
3 because a doctor practices in Lexington or Chicago or Louisville (.) that
4 they're automatically a better doctor?
5 (2.0)
6 <Do you understand> there's sometimes s- greater specialists in cities but
7 that all doctors take the same test (.) to become a doctor and that when you
8 say board certified they all take the same um board eligibility exams.
9 ((Shakes head yes.))

In this example, Wells, rather than tie together the categories of “foreignness” and “doctor” as Pooler did in Case-1, uses the economy rule and the consistency rule to say all doctors are basically the same, “a doctor is a doctor is a doctor.” Her statements also elevate or at least equalize the status of the local community. She refers to a number of indexically “outside” location categories (Lexington, Chicago, Louisville) and says that “just because” (lines 2-3) a doctor practices there they are not any better than someone from “here” (Eastville and East County). She emphasizes the sameness of everyone in the “doctor” category by referring to “all doctors” (line 7) and “they all take” (line 8) when she talks about category-bound activities associated with becoming a doctor (taking tests and exams). Without specifically mentioning Masand, his training, or its location she places him on an equal status with any other physician no matter their place of origin or current location of practice. She concludes this section with a checking device as she nods her head ‘yes.’

Case 2-Masand: Biography Phase Categorizations of NNS and “Foreignness”

During the biography phase of direct examination there are several examples of sequences that deal with Masand’s “foreign” status. In these sequences there are additional instances of positive profiling of Masand. His foreign status is downplayed while his commonality with jury members is repeatedly emphasized. One such example is the second question that is addressed to Masand. In this case, Wells uses two question-answer adjacency pairs to formally identify Masand. The second of these seemingly only clarifies Masand’s name, but also does considerably more work in terms of managing his membership categorization.

Excerpt 8.14

- 1 Wells: ((picks up notebook and walks to podium in front of jury and witness
2 stand)) Even though we hav' (.) informally introduced you to the jury,
3 would you please tell the jury what your name is
4
5 Masand: My name is Abhishek D. Masand
6
7 Wells: And (.) what is the name you commonly go by in Eastville
8
9 Masand: A.D. Masand

In her first question Wells has asked for Masand to introduce himself and he provides his full name in line 5. She then asks for this description to be elaborated in line 7: “And (.) what is the name you commonly go by in Eastville.” This question de-emphasizes Masand’s “foreignness” both in its design and in its lexical choice and emphasis. It assumes that there is indeed a name that he “commonly” goes by in Eastville and that this is important information for the jury. The question also works to place him in the category of “long-time community member” since otherwise he could not have established such a commonly known name.

A later exchange also concerns Masand’s ties to Eastville.

Excerpt 8.15

- 157 Wells: And you told us just a few minutes ago you came to Eastville in 1974.
158 Um h- I don’t mean how did you find Eastville ((smiling)) from Detroit
159 but what caused you to look at Eastville
160
161 Masand: Um at that time when I graduated um I was looking for a job. There wa- I
162 had some offers in Detroit but that was too big for me, a lot of crime, you
163 know how 1960’s late 60s and 70s. We were looking for a small place
164 and I saw the advertisement here and Dr. Kennedy, a surgeon at that time,
165 and Dr. Rollins who was an obstetrician they were looking for doctors and
166 my wife finished obstetrician and we both came here to look at it and we
167 liked the small area which was at that time we didn’t have all these big
168 shopping centers and everything ((smiling)) We just thought uh (for) we
169 thought it was the right place to raise our children and we came here.

Wells' question in lines 157-159 is similar to a question from Pooler to his client, Nasa, in Case-1, see p. 181. Pooler's question provoked a description that related primarily to the category "doctor;" however, Masand's response utilizes descriptions that use more community oriented categories and that align Masand with the jury members. Masand repeatedly uses the word "we" to refer to himself and his wife (lines 163, 166, 167, 168). This employs the category "family" and the standard relational pair husband-wife. He talks about their responsibilities to each other and to their children in the decision making process that brought them to Eastville.

He also contrasts the location category of "here" (lines 164, 166), and the descriptors "small place" (line 163), "small area" (line 167) and "right place" (line 169) with the location category of "Detroit" (line 162) and its descriptors "too big" (line 162) and "lot of crime" (line 162). This positions Masand as a "family man/member" and a "local" -- two categories that the jury members probably also belong to. Masand talks about category bound activities and responsibilities associated with these two categories in explaining his reasons for coming to Eastville, rather than activities associated with the category "doctor" that Nasa used. Masand positions himself as an "average" and dedicated family man rather than as a doctor looking for more free time.

Case 2-Masand: Biography Phase Categorizations of Professional Competence

During the biography phase of direct examination, one of the main resources that Wells uses to draw attention to Masand's professional abilities and competence is reformulation and repetition. This begins in the following exchange.

Excerpt 8.16

- 47 Wells: So you actually taught as a s- medical professor?
48
49 Masand: I was not a professor at that time. I was it's called (civilian resident)
50 surgeon which is equal to probably an assistant professor here. It's a
51 beginning first step of—
52
53 Wells: You taught other people that were becoming doctors↑
54
55 Masand: Yes, m'am. Then I left India in 1969 to improve my surgical skills um.

In line 47, Wells is asking about Masand's experience and work following his graduation from medical school in India. By describing him as a "professor" or teacher she is underscoring his abilities and knowledge. Masand counters this description with one that is more "truth insistent" in its descriptive terms: "not a professor" (line 49); "it's called (civilian resident)" (line 49) and "equal to probably an assistant professor" (line 50). When this description trails off, Wells returns to her original descriptive term ("taught", line 53) and re-establishes Masand as not just a "regular doctor," but one who is knowledgeable enough to teach future fellow members of the category "doctor." Masand agrees with this description and then continues his description of his activities with the phrase "improve my surgical skills" (line 55). This also serves to place him in special category of doctors; he is not satisfied with the normal level of training, but he wants to better himself as a doctor.

Wells twice repeats this exact phrase later in the direct examination.

Excerpt 8.17

- 108 Wells: So you and Jyoti went to Flint Michigan so you could improve your surgical
109 s- [skills?
110
111 Masand: [Yes m'am yes m'am
112
113 Wells: What did you do in Flint Michigan to improve your surgical skills?
114
115 Masand: Um I joined the rotating internship again because they did not recognize

In lines 108 and 113, Wells repeats “improve your surgical skills” accentuating Masand’s dedication to his profession. The reference to Jyoti (Masand’s wife) uses the standard relational pair of husband and wife in the description of this activity and portrays them as a team or unit willing to make these sacrifices for the sake of Masand’s advancement.

Conclusion

Jayyusi (1984) tells us that “members do not routinely use category-concepts as mere labels, but as methods for organizing their knowledge, belief, perceptions, tasks, moral relationships, etc.” (p. 136). This chapter has examined how categories and labels were applied to and used by the defendant doctor non-native English speakers in these malpractice cases. While both attorneys make overt references to the foreign and non-native speaker statuses of their clients, Wells uses much more complex descriptions and multiple categories to position her client in a positive light and to portray him as a member of the community. She makes use of both professional and personal descriptive categories in portraying her client. Wells achieves interactional positive profiling on behalf of Masand; altering or tearing down typical “foreigner” and NNS profiles that might negatively impact her client. Pooler is dealing with similar issues that may work against a positive profile of his client, but he fails to utilize descriptive categories to sketch and organize information about Nasa that will work favorably for his client.

Membership categorization analysis helps us to “see” how the work of the institution is accomplished and how members call upon their common sense knowledge of categories and activities to understand the tasks and activities before them. Carrying out these activities has immediate and concrete consequences for the defendants who are subject to the decision rendered by the jury. The categories enacted and presented to the jury during the interaction strongly influence how the jurors perceive the defendants and their attorneys. These categories shape jurors’ perceptions of credibility, reliability, honesty and persuasiveness.

CHAPTER 9
“THE DEFENDANT CRIED. THE LAWYER PICKED HIM UP.”:
FINDINGS AND FINAL THOUGHTS

Institutional Bookings Reconsidered

This work began by asking what it means to be booked into an institutional role and how social roles and practices are enacted in talk-in-interaction in the institutional setting of a courtroom. The study asked 1) What members’ practices and activities take place in courtrooms?; 2) How does institutional talk-in-interaction contribute to and create the local social order? How are defendants portrayed within that social order?; and 3) Given these particular actors, these particular defendants, at this particular time, in this particular setting, how does justice talk? I asserted that an ethnomethodological perspective and an investigation informed by conversation analysis and membership categorization analysis provide a valuable means of seeking answers to those questions. Through examination of the details of interaction in two medical malpractice cases the study has shown how the business of an institution is carried out and more specifically how it is carried out when a particular type of defendant, a non-native English speaker, is involved.

This study extends and broadens current work in conversation analysis and membership categorization analysis by examining a significant institutional setting, the courtroom, and a largely ignored population of interlocutors within it, non-native English speakers. Courts are important and powerful sites of governmental and institutional work. This work is carried out through talk-in-interaction. The number of non-native English speakers who encounter the court system will continue to grow, and it is increasingly important to understand how they are treated and represented within it. This

is true for both non-native speakers who require an interpreter as well as for those who have a high level of English competency. As courts, as well as other institutions, deal with more and more individuals who are outside of “the mainstream” population, they need a more nuanced and thorough understanding of the power of language and how “meaning,” “facts,” and “character” are constructed with and through language. A careful and detailed examination of the institutional context of the courtroom helps to improve understanding of how it functions and ultimately, perhaps, to improve delivery of services within it. This study refines our understanding of how talk and context are inextricably bound partners in all social and institutional interaction.

The application of conversation analysis and membership categorization analysis to the data in these cases shows that social roles and activities are deployed on a moment-to-moment basis and are not rigidly fixed by the institution. Have suggests that practitioners of conversation analysis who have followed in Sacks’ footsteps “are less given to philosophical reflection than to hard work. The ability to produce analytical results, empirically based findings about basic procedures of ‘doing being human,’ is one of [conversation analysis’] main attractions” (1990, p. 17). The findings in this study show that ‘doing being human’ is a complicated and complex phenomenon that deserves some philosophical reflection.

The main findings concern: a) *Reconstituting institutional space*: In this dissertation, I have argued that the institutional space is a constantly reconstituting one based on the talk-in-interaction that occurs within it; this talk is bi-institutionalized in sometimes conflicting and sometimes cooperative ways; b) *Portraying the participants*: Attorneys use multiple and intricate interactional techniques to portray themselves and

their clients and to establish their mutual roles within the interaction; and c)

Problematizing the non-native speaker category: The category of “non-native English speaker” is one that can function in a variety of ways and that deserves more “problematizing” within institutional settings.

Reconstituting Institutional Space

Chapter 5 examined the institutional space of the courtroom. This institutional space is a constantly reconstituting one based on the talk-in-interaction that occurs within it. In my analysis, I argue that within the courtroom space there are at least two institutions at work--that of conversation and that of the law. This means that the talk that occurs there is bi-institutionalized in sometimes conflicting and sometimes cooperative ways. There are varying rules that control the talk of each institution; therefore, talk-in-interaction must be analyzed with this bi-institutional character in mind. For example, the institution of conversation may call for an elaborative explanation after a dispreferred response, but the institution of the law may restrict the respondent to only a yes or no response effectively shutting down norms at work in everyday conversation. Interactants within this space must negotiate and interweave both sets of rules.

The participant roles that are enacted within this space are also very complicated and constantly evolving ones. As Goffman has said, “The relation(s) among speaker, addressed recipient, and unaddressed recipient(s) are complicated, significant, and not much explored” (1981, p. 133). The courtroom space contains elements of a number of other discourse situations, such as “ordinary” conversation, drama and lecture. I have argued that this hybrid conflux creates the opportunity for attorneys to assume the role of a sympathetic ratified overhearer.

There are also specific institutional purposes associated with each stage of a jury trial; yet, these purposes may be both supplanted and eclipsed by other work that is being accomplished during the interaction of any particular stage. In this data, we see Wells accomplishing the work of establishing her authority during the voir dire stage, the institutional goal of which is to select a fair and impartial jury. In fact, adherence to only the uni-institutional and overt purpose of a stage based on the institution of the law, without utilizing the resources of the institution of conversation, may create a less than positive impression of the interactant. For example, when Honor begins her voir dire with “I don’t recognize a one of your faces” she is attending to the purpose of voir dire, but her statement has a rather odd ring when measured against the often affiliative purposes of the institution of conversation.

Examination of the details of interaction reveals how the institutional space is constantly reconstituted. This ever evolving space is shaped by turn-taking organization, overall structural organization, sequence organization, turn design, lexical choice, asymmetries, story-telling, and references to roles, responsibilities and knowledge. The ability to successfully act within and to simultaneously supplement the requirements of the institution of the law with the resources of the institution of conversation is also key to the portrayals of the interactants that emerge.

Portrayals Through Interaction

Despite the overt, and some might say naïve, assertion by the law that the purpose of a jury trial is to derive and evaluate “the facts” under examination, portrayals of the face-to-face interactants, the characters of them that emerge, are also an important matter for consideration. The data here reveal that those portrayals take place at every turn and

stage of the interaction. Even as the jury is being selected during voir dire, attorneys are creating portraits of themselves and their clients through a variety of resources. Chapter 6 discussed some of the resources used during voir dire, including directives, explanation, joking and narrative.

Chapter 7 examined how the portrayals of the defendants were enacted during the openings of direct examination. During this interaction between the defendants and their respective attorneys similar “facts” but quite different characters emerged before the jury. Prior studies have paid considerable attention to the institutionally mandated form of this interaction—that of question and answer exchanges. That form was attended to in this analysis, but detailed scrutiny of the interaction through conversation analysis reveals that “form,” “function,” and “effect” of linguistic resources need to be examined and their meaning sought within the particulars of the specific interaction. For example, the turn-design of a yes/no question may not inhibit the information sharing between an attorney and witness, but can act to reinforce and elaborate on a prior sequence of action. This is only revealed by examination of the surrounding talk.

The attorneys in these cases use multiple and intricate interactional techniques to portray themselves and their clients and to establish their mutual roles within the interaction. Wells’ questioning sequences are interlaced with the use of resources that make the portrayal of Masand both a fuller and a more sympathetic one than that created by Pooler for Nasa. She accomplishes this through a number of resources, most prominent among them are turn design (repetition or rewording of key words and ideas, requests for repetitions and clarifications); lexical choice; directives; pre-sequences that signal transitions; and turn-taking organization that works with Masand to create a

cooperative “doing” of information about him. She functions in the role of what I have called in chapters 5 and 7 a sympathetic ratified overhearer. Her enactment of this role assists the jury members and effectively makes them participants in, rather than observers of, the interaction.

Pooler’s portrayal of Nasa is a considerably less sympathetic one. He fails to repeat or elicit key information that would benefit his client. The majority of his questions relate to Nasa’s professional status and are often phrased as yes/no questions giving little opportunity to Nasa to provide elaborative responses. His turn design repeatedly strikes a negative image for Nasa or emphasizes difference between Nasa and the jury members.

The portrayals of these defendants also include information about their status as “non-native English speakers” and “foreigners” in the community. These categories are clearly made relevant in the interaction and take on many descriptive nuances. Despite their high level of English competency and their long-term residency in the United States, these categories are repeatedly invoked. The invocation of these categories implicates the social roles defined for the defendants and their treatment within this institution.

Problematizing the Non-Native Speaker Category

As discussed in chapter 2, the institution of the law has only relatively recently begun to grapple with how to properly define the category of “non-native English speaker.” Current practice focuses on the construal of institutional rules that require the appointment of an interpreter in particular types of cases. Little consideration has been given to how conversational institutional rules of categorization (those that are exposed by membership categorization analysis) may be working to implicate the rights of non-

native speakers in courtrooms. The category of “non-native English speaker” is one that can function in a variety of ways and that deserves more “problematizing” within institutional settings.

Chapter 8 discussed how the non-native speaker and foreign identities of the defendants in these cases became evident in the interaction. Wells successfully “unpacked” and “repacked” this category in a way that benefited her client. Pooler brought in that “baggage” of his client, but then left him carrying it alone. Wells’ elaborative descriptions of Masand and of various category-bound activities worked to make Masand a unique, individualized and likable “non-native English speaker” rather than a generic one with potentially unflattering associated characteristics. Wells also used various category bound activities of both members and of location to convert Masand from a “foreigner” to a “local.” She also exploited categories and descriptions to place Masand, herself and the jury members in the same “population cohort” of activity.

Pomerantz and Mandelbaum (2005) have said that when members reference various categories “they are responding to specific circumstances and are relying on shared assumptions about incumbents of the [categories] to accomplish a conversational action” (p. 150). Wells’ efforts amount to the accomplishment of, what I have called, interactional “positive profiling.” In the moment-to-moment interaction, she converts what she knows may be negative one-dimensional category profiles of her client into different multi-dimensional and positive categories. This is no small accomplishment, and it is an accomplishment that can have immediate and real world consequences for her client.

Pooler is obviously aware that his client may be perceived in a stereotypical and negative manner, but he is unsuccessful in countering this image. The membership categorizations that both he and Nasa invoke do not build a likable or even a competent image for Nasa. Pooler also fails to position himself or his client in any categories of similarity to the jury members.

Implications: Picking Up Defendants

Real world consequences have been examined in the work of Bresnahan (1981, 1991), Gumperz (1982) and more recently Eades (1996, 2000, 2002, 2003, 2004). Their work suggests that even highly competent non-native speakers of English may be at a disadvantage when trying to satisfy the expectations of both the institution of the law and the institution of conversation within the often high-pressure and high-stakes space of the courtroom. The findings of this study suggest similar conclusions, but also suggest that the interactional work of the non-native speaker's attorney may be key to counteracting this disadvantage and to "picking up the defendant." It is part of the attorney's responsibility to perform that role and current practitioners and teachers of practitioners know too little about the complicated functions of language and how it affects their work.

Bresnahan (1981) suggested that jurors should be instructed that "differences and difficulty in expression for the defendant, who does not speak English as a native language, should not be interpreted as evasiveness" (p. 571). This seems like a strategy that is unlikely to have the desired effect, for as Dingwall (2000, p. 903) notes, "the reluctance of ethno/CA scholars to become involved in the political agenda of law and society is not a kind of moral cowardice but the result of a deep and principled uncertainty about whether things are quite so simple." In fact, understanding how we

perceive our fellow interactants and how they account for themselves is never simple. It is difficult to counter “the obvious” with statements such as Bresnahan suggests, when “the obvious” is often made accountable in details and subtleties.

These details and subtleties are often ignored in the training provided to current and future attorneys. The curricula of few law schools in the United States include focused consideration of the intersection of language and the law; for example, on matters such as language rights, language policy, the plain English movement, jury instructions, or the nature and development of legal language. Even fewer have considered how detailed scrutiny of courtroom language might benefit lawyers and law students and heighten our understanding of legal institutions. Law students spend considerable amounts of time reading appellate court decisions, but very little time reading or considering court transcripts from lower courts—where one might argue the “real work” of the courts is taking place.

Scrutiny of courtroom language such as that presented in this study could benefit law students in courses such as trial advocacy, tactics and practice. Students participating in moot court and clinical programs would also gain useful insights into the complexities and impact of language use in the courtroom. Practicing attorneys seeking to improve their trial advocacy skills would also profit from detailed analysis of courtroom language.

Dingwall asserts that one reason conversation analysis is important for law and society scholars is that it contributes to an understanding of the practical skills necessary in a system that depends heavily on orality. “If you want to train counsel, witnesses, judges or interrogators to do their job more efficiently and effectively, then an understanding of the institutional talk of courtrooms, interrogation suites, and law offices

will make a vital contribution” (2000, p. 898). The same is true for all institutional representatives who work with non-native English speakers. Our society’s institutions need to give careful consideration to how we are constructing and imposing social roles in locally rendered social action.

Implications: Studying Institutions

The findings from this study underscore that the “real” work of institutions can be discovered in close examination of the details of linguistic interaction. The implications of these findings apply to researchers interested in legal discourse as well as practitioners in legal and other institutional settings. As Conley and O’Barr (1998) have said, “the details of legal discourse matter” (p. 129) and “society’s big picture—its macrodiscourse—is best understood by examining the little details of a society’s linguistic practice—its microdiscourse” (p.128). The use of the ethnomethodological approaches of conversation analysis and membership categorization analysis adds to our understanding of these details of legal discourse. Conversation analytic and membership categorization researchers must continue to insist on repeated and close examination of the details of institutional contexts and share their work with institutional practitioners.

These practitioners would include those who routinely work with non-native English speakers, and those who train future trial lawyers as well as current trial lawyers. This study has shown how the details of interaction, which are often overlooked and their impact underestimated, can affect how we “see” those who fill particular institutional roles. In these cases, the attorneys in the moment to moment interactional work constructed markedly different social identities for their non-native English speaker clients.

Final Thoughts on the Ordinary

Conversation analysis requires a belief in the extraordinariness of the ordinary. Garfinkel writes of the “unique coherence of the things of immortal ordinary society” (2002, p. 97). “*Immortal* is a metaphor for the great recurrences of ordinary society, staffed, provided for, produced, observed and observable, locally and naturally accountable” (2002, p. 92). Sacks told us “ventures out of being ordinary have unknown virtues and unknown costs” (1992, Vol. 2, p. 219) and that “being ordinary” was an on-going accomplishment of everyday life. As our cohorts within institutional settings change, we, and they, struggle with how to “make them ordinary.” The data here show that when such ordinariness is accomplished for and by the non-native English speakers it becomes an asset.

We must continue to use conversation analysis and membership categorization analysis to reveal that there is never anything “ordinary” about language, the way we use it, or the effects that it may have, nor is ‘doing being human’ an ordinary accomplishment. Language in use, talk-in-interaction, always has ordinary qualities and extraordinary potential; it is always a noun amenable to redefinition and a verb waiting to perform an action. Researchers, institutional practitioners and “ordinary” members of society must continually be aware of both the substance of *justice talks* and of how *justice talks*, because, indeed, it does talk.

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APPENDICES

Appendix A List of Major Activities in Case 1-Nasa and Case 2-Masand

Nasa Case	Total Time	Major Activities
Day 1	9:15am – 4:37pm	Voir Dire Plaintiff's Opening Statement Defendant's Opening Statement Presentation of Plaintiff's Case: Testimony by plaintiff's father Testimony by plaintiff's coach Testimony by plaintiff's brother Testimony by plaintiff's mother
Day 2	9:00am – 3:54pm	Continuation of Plaintiff's case: Testimony by expert witness Testimony by plaintiff Plaintiff rests cases (13:05) Presentation of Defendant's Case: Testimony of second treating physician (by videotape) Testimony of expert witness
Day 3	9:04am – 3:14pm	Continuation of Defendant's Case: Testimony of 2 nd expert witness Testimony by defendant Defendant rests case Instructions given to jury Defendant's closing statement Plaintiff's closing statement Case submitted to jury (15:14) Verdict (20:52)

Masand Case	Total Time	Major Activities
Day 1	9:00am – 5:00pm	Voir dire Plaintiff's opening statement Defendant's opening statement
Day 2	9:02am – 4:46pm	Presentation of Plaintiff's case: Testimony by expert witness Testimony by Jones Testimony by hospital nurse
Day 3	9:17am – 3:24pm	Continuation of Plaintiff's case: Testimony by Gillam's sister Testimony by another treating physician (by videotape) In chambers conference
Day 4	8:46am – 4:39pm	Continuation of Plaintiff's case: Testimony by another treating physician (by videotape) Plaintiff rests case (2:32) Presentation of defendant's case: Testimony by defendant
Day 5	9:03am – 5:32pm	Continuation of Defendant's case: Continuation of defendant's testimony Testimony by expert witness
Day 6	9:03am – 3:39pm	Continuation of Defendant's case: Testimony by another treating physician Testimony by another treating physician Testimony by another treating physician Defendant rests case Instructions to jury Defendant's closing statement Plaintiff's closing statement Case submitted to jury (15:39) Verdict (16:27)

Appendix B Transcription Conventions

Sequencing

- [Single left bracket indicates a point of overlap onset
-] Single right bracket indicates a point where an utterance terminates vis-à-vis another
- = Equal sign indicates latching (no gap between the two lines of utterances)

Times Intervals

- (2.0) Numbers in parentheses indicate elapsed time in silence by tenths of a second
- (.) Dot in parentheses indicates a tiny gap within or between utterances

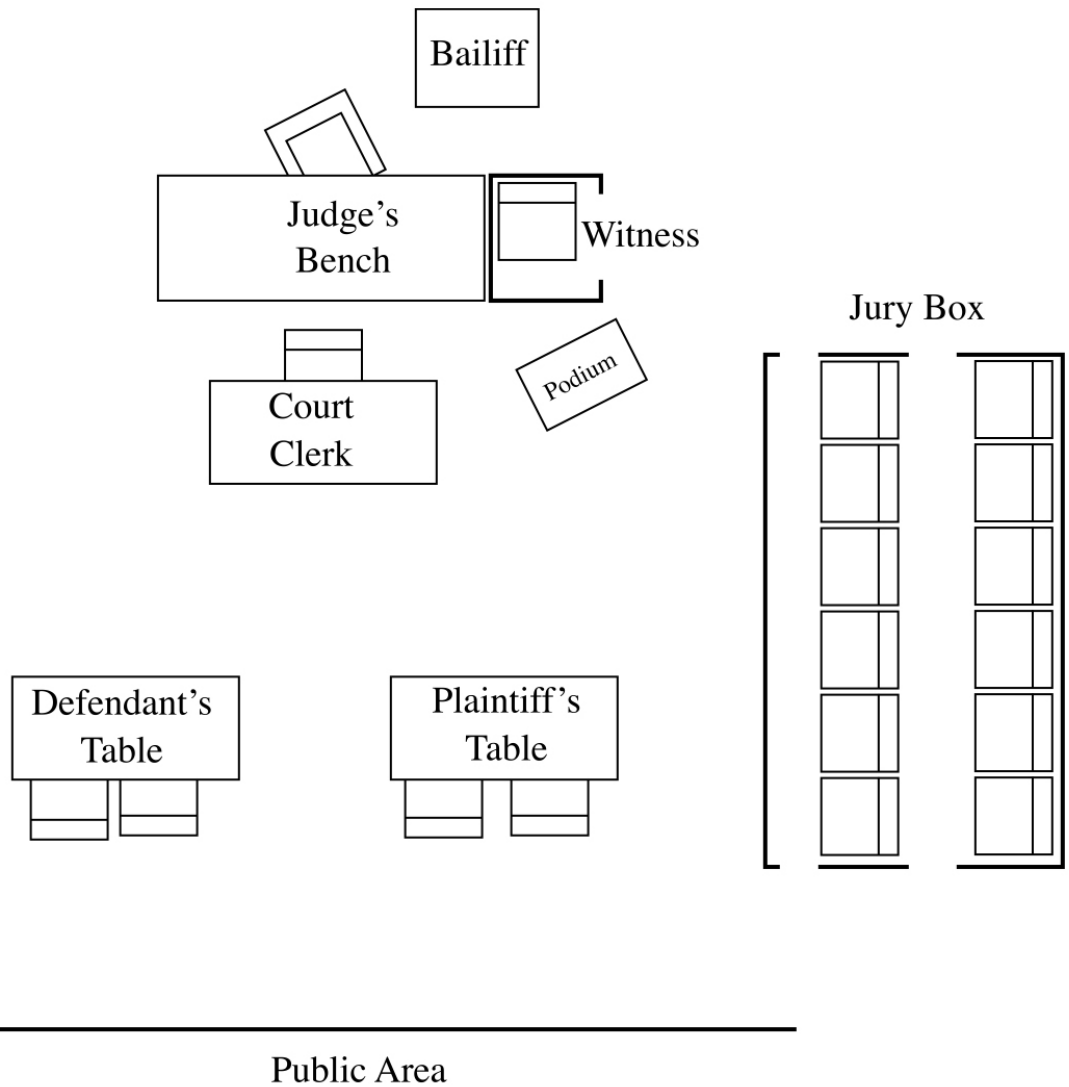
Characteristics of Speech Production

- underlined Underlining indicates some form of stress, via pitch or amplitude
- po::sibly Colons indicate prolongation of the immediately prior sound. Multiple colons indicate greater prolongation.
- A dash indicates a cut off
- ↑ ↓ Arrows indicate either upward or downward intonation in the utterance immediately following the arrow.
- maybe Degree signs indicate an utterance that is softer than surrounding the talk
- <like this> Left/right carets indicate an utterance that is faster than surrounding talk
- >like this< Right/left carets indicate an utterance that is slower than surrounding talk

Transcriber's Doubts and Comments

- (what) Parentheses indicate uncertainty as to the words spoken
- () Empty parentheses indicate inability to hear/understand an utterance.
- ((describe)) Double parentheses provide description by transcriber

**Appendix C
Diagram of Courtroom**



Appendix D
Case 1-Nasa
Direct Examination: Biography Phase

(Total Time: 9 minutes and 56 seconds)

- 1 **POOLER:** ((picks up a small stack of stapled papers and walks to a position behind the
2 plaintiff's table and behind the railing that separates the public seating area
3 of the courtroom)) Dr. Nasa I think everyone knows ya (.) but for the record,
4 would you introduce yourself ((points toward jury box)) to the ladies an' gen-
5 gentlemen of the jury please?
6
- 7 NASA: Eh my name is Kousar Nasa. ((clears throat))
8
- 9 **POOLER:** **And your occupation or profession?**
10
- 11 NASA: Eh I'm a physician practicing orthopedic surgery here in Eastville.
12
- 13 **POOLER:** **And how long have you practiced here in Eastville?**
14
- 15 NASA: eh (.) approximately 8 years.
16
- 17 **POOLER:** **Where are you from originally?**
18
- 19 NASA: eh I'm from India.
20
- 21 **POOLER:** **Where in India?**
22
- 23 NASA: I'm from Madras.
24
- 25 **POOLER:** **Tell us a little bit about your childhood and growing up.**
26
- 27 NASA: eh essentially eh I grew up eh in southern India and eh I had my high school
28 education in Kerala it's the southern part of India. After I did my high school, I
29 did my college eh at St. Xavier's College eh where I did my eh pre medicals, then
30 subsequently in Madras, I had my medical training where eh the training is eh for
31 a period of eh six years with one year (as) of residency.
32
- 33 **POOLER:** **Is that the British system of training?**
34
- 35 NASA: eh >that's correct<
36
- 37 **POOLER:** **And um (.) were your classes in medical school in English?**
38
- 39 NASA: eh, yes sir.
40

41 **POOLER:** Do you still have family in India?
42
43 NASA: eh I do.
44
45 **POOLER:** Who's who's still there?
46
47 NASA: eh I have some of my (.) uncles and my parents live there.
48
49 **POOLER:** Okay, now uh when did you start your medical training in India?
50
51 NASA: eh (2.0) in 1969.
52
53 **POOLER:** Okay, and just give us an overview of what the six years is like. We know in
54 the United States, it's a four-year program and generally what students do.
55 How is it different in India?
56
57 NASA: eh it's uh uh pretty much the same but the duration is a little bit longer, you spend
58 uh uh longer time eh you have the first year where you have the eh eh basic
59 science and then as you start going to the next year, then you go into more detail,
60 going to anatomy, physiology, and biochemistry. Those are the basic (science)
61 which you learn. Then the following year, you go into clinicals, that's when you
62 start learning about dealing with patients where you go to the hospitals. You
63 make uh different rotations and different spe-ce-al-ah-tees. The clinicals is
64 basically about three years, eh make four years, and during that four years eh you
65 study different subjects. One year, biochemistry and pharmacology, and the next
66 year is pathology, and the final year you do medicine, surgery, and obstetrics and
67 gynecology. And then you pass that exam following which there is a compulsory
68 year of internship or what we call is a house surgency. And only then you're
69 conferred the degree as MBBS eh which is basically is what a British system is.
70
71 **POOLER:** OK, and did you complete that one year internship uh su[ccessfully]?=
72
73 NASA: [eh eh yes sir.
74
75 **POOLER:** And you received your license then in essence to practice medicine in India?
76
77 NASA: >That's correct.<
78
79 **POOLER:** All right, did you actually practice in India↑
80
81 NASA: Uh no I did not. After I finished my residency eh I did eh I was trying to decide
82 (.) what post-graduation I want to do. So I did some time in orthopedics eh I
83 think I did about 6 months, and then 6 months eh eh I did cardiothoracic surgery
84 trying to decide which specialty I want to go into. And after that uh I had uh
85 opportunity to uh come to the States uh to do uh additional uh training eh which I
86 was interested.

87
88 **POOLER:** **OK and where was that?**
89
90 NASA: Eh initially I started my uh residency in New York eh where I did my basic
91 general surgical residency and I did a year of uh rehabilitation medicine which
92 basically deals with physical therapy and things like that. And then following
93 which I went into orthopedic residency at Downstate Medical Center and I did my
94 uh necessary training (.) then eh subsequently
95
96 **POOLER:** **Let's stop there for just a second. We talked about residency programs and**
97 **I'm not sure that all of us really understand what (that's) involved. Do you**
98 **just follow orthopedic surgeons around for three years or how is a residency**
99 **program structured in the United States in orthopedic surgery?**
100
101 NASA: Well eh basically I mean you start off as the junior eh resident or the first year
102 resident, you follow the next eh junior or senior resident, then you have a chief
103 resident who is in charge for all of you, and there's an attending who's in charge
104 for all of us. So basically, eh as a junior resident, you try to take exam, take eh
105 evaluations and take part in the treatment process. You really don't take part in
106 the physician (process) but you're involved in it. And each year you kind of
107 graduate to a point when you reach a chief residency, you are almost primarily
108 making the (decisions) keeping in touch with the attending physician and that's
109 how the training is done.
110
111 **POOLER:** **OK let's take just as an example a surgery. As a first year resident, what**
112 **would be your role in surgery?**
113
114 NASA: Well in first year I mean they ask you to go see patients in emergency room,
115 admit patients, that means doing histories and physicals. Then uh assist in uh
116 surgery when major surgeries are being done uh basically you try to see what is
117 done. I mean you get yourself involved in the process. You may be doing little
118 things trying to sss suture some things, hold onto a retractor, so each year you
119 graduate and learn more and more as you go up.
120
121 **POOLER:** **OK and by the time you're a third year resident, then you actually handle**
122 **cases on your own?**
123
124 NASA: eh >that's correct<
125
126 **POOLER:** **OK under the general supervision again of the attendings?**
127
128 NASA: eh yes sir.
129
130 **POOLER:** **All right. When did you complete your residency program (.) in**
131 **orthopedics?**
132

133 (4.0)
134
135 NASA: eh I think it was 1983.
136
137 **POOLER: So by that time you have starting back in medical school, you have what 14,**
138 **15 years of formal education?**
139
140 NASA: eh >that's correct<
141
142 **POOLER: What did you do after completing your residency program?**
143
144 NASA: eh for a year eh I was a staff physician (.) eh in the same eh eh hospital. Eh I was
145 involved in the fracture service. And eh eh I was actually involved in teaching the
146 resident, I was an attending there.
147
148 **POOLER: OK and after that was over, what did you do then?**
149
150 NASA: eh subsequently, I came initially to Williamson, WV, where I did my prac[↓]tice.
151
152 **POOLER: Did] you go back to India [for a**
153
154 NASA: Yea for for I] was uh uh uh eh eh out of the country for a period of time.
155
156 **POOLER: OK uh when you went back to India, did you practice medicine or teach**
157 **medicine?**
158
159 NASA: eh no sir eh at the time there were some personal things that needed to be attended
160 to, so I had ↓to
161
162 **POOLER: So you interrupted your your profession for a while, and for less than a year**
163 **I believe and then came back to the United States?**
164
165 NASA: That's correct.
166
167 **POOLER: And you first set up private practice where?**
168
169 NASA: In Williamson West Virginia.
170
171 **POOLER: And did you limit your practice in Williamson to uh orthopedics?**
172
173 NASA: eh yes sir.
174
175 **POOLER: And what hospitals did you practice at?**
176
177 NASA: Well, as you know, Williamson is border town in Kentucky and West Virginia, so
178 there are two hospitals. Uh one is on the West Virginia side and the other's on the

179 Kentucky side. So I had privileges in both the hospitals and I was covering both
180 those hospitals.
181
182 **POOLER:** **And did you have to be licensed in both West Virginia and Kentucky?**
183
184 NASA: eh yes sir.
185
186 **POOLER:** **Did you get board certified in orthopedic surgery?**
187
188 NASA: eh yes sir.
189
190 **POOLER:** **And when was that?**
191
192 NASA: eh ninety-three sir.
193
194 **POOLER:** **And what did that involve?**
195
196 NASA: Basically mean uh mean board certification you got to do the necessary
197 completion of the training, and you do the exam and the orals.
198
199 **POOLER:** **You have a written exam?**
200
201 NASA: And oral exam.
202
203 **POOLER:** **And you successfully passed [them both?**
204
205 NASA: Yes sir.]
206
207 **POOLER:** **And that would be, as Dr. Goldner told us yesterday, that he sat on those**
208 **three panel examining boards that's the process that you went through?**
209
210 NASA: eh yes sir.
211
212 **POOLER:** **um when did you um come to Eastville?**
213
214 NASA: I came (.) I think in December 1992 or <January of ninety-three>.
215
216 **POOLER:** **And why did you come to Eastville?**
217
218 NASA: (2.0) Well, I was the only orthopedic surgeon in Williamson so I was basically on
219 call almost every day and uh I think I was getting tired of it, and um and besides
220 uh my f- friend, Dr. Rajawat was leaving the area and uh uh Dr. Hawkins also
221 asked me to come over so it was a mutual benefit for us to be able to cover.
222
223 **POOLER:** **Dr. Rajawat was an orthopedic surgeon?**
224

225 NASA: eh yes sir.
226
227 **POOLER: And he retired?**
228
229 NASA: >eh he actually transferred to California<
230
231 **POOLER: Did you take over his patients and his practice?**
232
233 NASA: >eh that's correct<
234
235 **POOLER: And in 1993 at least when you treated Jason Rowe, were you and Dr.**
236 **Hawkins the only orthopedic surgeons here in Eastville?**
237
238 NASA: eh yes.
239
240 **POOLER: Is that still the case?**
241
242 NASA: eh yes.
243
244 **POOLER: Now, I want to take you (.) uh to your treatment of of Jason Rowe and go**
245 **through some things with ya and**
246 (1.0) ((begins walking toward defendant's table))
247 **we have talked some about your**
248 (1.5) ((opens and goes through swinging railing gate))
249 **medical record**
250 (3.0) ((picking up poster board))
251 **and I have it blown up here I think the jury also has copies of it themselves**
252 **but I have a blow up that we've marked as defendant's exhibit seven.**
253 (3.0) ((moving stand closer to the jury box))
254 **It's put up here for reference and you have it in front of ya and I want**
255 (7.0) ((positioning poster board on stand))
256 **for you first just to explain to ah to the jury what is your practice ((goes back**
257 **through swinging railing gate)) in terms of keeping your office medical**
258 **charts. (1.0) How ho- what's your routine for doing them when you see**
259 **patients during the day.**
260
261 (3.0)
262
263 NASA: >I don't understand< Wh- h- how do I

Appendix E
Case 2-Masand
Direct Examination: Biography Phase

(Total Time: 8 minutes 22 seconds)

1 **WELLS:** ((picks up notebook and walks to podium in front of jury and witness stand))
2 **Even though we hav' (.) informally introduced you to the jury, would you**
3 **please tell the jury what your name is?**
4
5 **MASAND:** My name is Shrihari R. Masand.
6
7 **WELLS:** **And (.) what is the name you commonly go by in Eastville?**
8
9 **MASAND:** A.D. Masand.
10
11 **WELLS:** **All right. And can you tell the jury uh (.) where you live and how you came**
12 **to be in Eastville. >Just tell 'em a little bit about yourself.<**
13
14 (2.0)
15
16 **MASAND:** Uh
17
18 (2.0)
19
20 **MASAND:** You want me to start from (.) when I first –
21
22 **WELLS:** **Well, I would tell 'em where you were born, how you came to be an**
23 **American then more particularly how you came to be in Eastville.**
24
25 **MASAND:** I was born in 1940. I'm 61 year old. I was born in India, (moved to) southern
26 India. And I went to school in India and I finished my high school in 1954 and
27 went to college. I went to a Jesuit College Andhra Layola College for two years
28 and then to Andhra Christian College for two years and got my bachelors degree
29 in chemistry in 1958. And I went to medical school in India. It's uh uh (Andri)
30 University which is the state university. I went for five years we have a five year
31 college, medical college. And uh [then I –
32
33 **WELLS:** **[Is that, uh, I'm sorry Dr. Masand that's actually a year longer than in**
34 **America [isn' it**
35
36 **MASAND:** [Yes m'am.
37
38 **WELLS:** **the medical training**
39

40 MASAND: And uh after the medical school I did one year of internship where we rotate and
41 we go through different um and from 64 to 66 I did what you call a residency in
42 surgery In India (.) we call it postgraduate course and I got a degree in
43 postgraduate. Then I worked in (the government) medical college which is
44 associated with the (government) general hospital there as a (civilian resident)
45 surgeon teaching surgery for three years.
46
47 **WELLS: So you actually taught as a s- medical professor?**
48
49 MASAND: I was not a professor at that time. I was it's called (civilian resident) surgeon
50 which is equal to probably an assistant professor here. It's a beginning first step
51 of—
52
53 WELLS: You taught other people that were becoming doctors↑
54
55 MASAND: Yes, m'am. Then I left India in 1969 to improve my surgical skills um.
56
57 **WELLS: When you left India in 1969, where did you go**
58
59 MASAND: Um I first went to Flint, Michigan.
60
61 **WELLS: Flint Michigan**
62
63 MASAND: Flint Michigan.
64
65 **WELLS: Who went to Flint Michigan with you?**
66
67 MASAND: My wife and my two children.
68
69 **WELLS: We've seen a lady sitting in one of the front rows here off and on. Is that your**
70 **wife**
71
72 MASAND: Yes, m'am.
73
74 **WELLS: You want to tell 'em who she is and what her name might be ((slightly "sing-**
75 **songy"))**
76
77 MASAND: My wife is Dr. Jyoti Masand. Um (.) she is a a she wor- she was an obstetrician
78 and gynecologist and um practiced here with me. Both of us practiced here for
79 since 1974.
80
81 **WELLS: Now when you went to Flint, Michigan, you said you had two children who**
82 **were they**
83
84 MASAND: My oldest daughter is Sailaja. She graduated from Eastville High School (.) in
85 1983.

86
87 **WELLS: How old was she when you went to Flint Michigan**
88
89 MASAND: She was four year old.
90
91 **WELLS: OK and then you had another child that you took with you to Flint**
92 **Michigan?**
93
94 MASAND: Yes, m'am.
95
96 **WELLS: And who was that**
97
98 MASAND: She was Suparna. She is uh um 2-1/2 years old.
99
100 **WELLS: K and what's Suparna doing now**
101
102 MASAND: Suparna is an attorney in Atlanta, Georgia.
103
104 **WELLS: And your and your other daughter is what**
105
106 MASAND: She's an obstetrician and gynecologist in uh Indiana practicing in Indiana.
107
108 **WELLS: So you and Jyoti went to Flint Michigan so you could improve your surgical**
109 **s- [skills?**
110
111 MASAND: [Yes m'am yes m'am
112
113 **WELLS: What did you do in Flint Michigan to improve your surgical skills?**
114
115 **MASAND: Um I joined the rotating internship again because they did not recognize**
116
117 **WELLS: You joined what? I'm sorry.**
118
119 MASAND: Um I joined an internship again it's called rotating internship where we rotate
120 through each department for 12 months, medicine, surgery, pediatrics, and
121 emergency medicine. Um but because they did not I tried to get because I had
122 already a degree in India and taught but they said that they don't recognize my
123 degree here would I go through training again from the beginning.
124
125 **WELLS: So you essentially went through training to be a doctor twice?**
126
127 MASAND: [Yes, m'am
128
129 **WELLS: [hhh OK**
130

131 MASAND: To be a surgeon twice, not not a doctor (.) doctor I been they they recognize my
132 degree because we have to take a test when we come here called Education
133 Council for Foreign medical graduates.
134
135 **WELLS: And you passed that test?**
136
137 MASAND: Yes m'am.
138
139 **WELLS: But you redid your surgical training?**
140
141 MASAND: Yes m'am.
142
143 **WELLS: How long did you stay in Flint?**
144
145 MASAND: We stayed for one year for internship and then we moved to (.) Detroit.
146
147 **WELLS: And what did you do in Detroit?**
148
149 MASAND: Detroit I join- joined a surgical residency general surg- general surgery residency
150 that is a four year program where you get trained from first year, second year,
151 third year, and fourth year, four years we graduate from there.
152
153 **WELLS: And by this point in time what year was it**
154
155 MASAND: It was 1974.
156
157 **WELLS: And you told us just a few minutes ago you came to Eastville in 1974. Um h-**
158 **I don't mean how did you find Eastville ((smiling)) from Detroit but what**
159 **caused you to look at Eastville**
160
161 MASAND: Um at that time when I graduated um I was looking for a job. There wa- I had
162 some offers in Detroit but that was too big for me, a lot of crime, you know how
163 1960's late 60s and 70s. We were looking for a small place and I saw the
164 advertisement here and Dr. Kennedy, a surgeon at that time, and Dr. Rollins who
165 was an obstetrician they were looking for doctors and my wife finished
166 obstetrician and we both came here to look at it and we liked the small area which
167 was at that time we didn't have all these big shopping centers and everything
168 ((smiling)) We just thought uh (for) we thought it was the right place to raise our
169 children and we came here.
170
171 **WELLS: OK and you went to work with Dr. Kennedy**
172
173 MASAND: Yes m'am.
174
175 **WELLS: OK did Jyoti go to work with Dr. Rollins**
176

177 MASAND: Yes m'am.
178
179 **WELLS: OK um and you all when you joined Dr. Kennedy's office, how many general**
180 **surgeons were there in Eastville**
181
182 MASAND: Um there were two general surgeons. >Of course Dr. K- Morgan was also there
183 at that time.< Dr. Kennedy, Dr. Reese and Dr. Morgan was not full time practice
184 he was mostly working in the emergency room and a full time mayor. For a he
185 was about So two and a half we can say so I was the third surgeon.
186
187 **WELLS: OK so Dr. Morgan was being mayor. He was older by that time though**
188 **wasn't he?**
189
190 MASAND: Yes, m'am.
191
192 **WELLS: And he was working in the emergency room so there were several of you**
193 **surgeons. When you came to Eastville, did you have any more children or**
194 **were you still at two?**
195
196 MASAND: No our son was born in Flint, Michigan. Dr. Jyoti was pregnant at that time when
197 we came here and he was born in Flint, Michigan.
198
199 **WELLS: OK and his name and what he's doing.**
200
201 MASAND: Suman. He's a pediatrician and uh he's going to start a fellowship in pediatric
202 cancer specialization in July.
203
204 **WELLS: OK so he's going on to become s- a children's cancer specialist.**
205
206 MASAND: Yes, m'am.
207
208 **WELLS: You and Jyoti came here in 1974. Tell the jury a little bit about the practice**
209 **of medicine here in 74 and what the hospital was like because when we look**
210 **at the hospital today I think it's fair to say it was dramatically different in 74.**
211
212 MASAND: It was a hospital the hospital was pretty the old hospital was there. I didn't I didn't
213 go onto the hill. The hill was after me I came after the hill was transferred into
214 the There was a strike going on in Eastville at that time but I came in '74 July and
215 joined the hospital staff at that time. The staff was only about 30 doctors at that
216 time and we have a smaller staff and uh only four operating rooms and we had a
217 lot of work to do and we didn't have any specialists especially orthopedics and
218 there was only one (EMT) surgeon. There were no plastic surgeon at that time.
219 Um we did a lot of surgery, trauma, took care of a lot of people at that time.
220
221 **WELLS: Would it be fair to say for many years you saw all kinds of surgery?**
222

223 MASAND: Yes m'am.
224
225 WELLS: And because you only had four operating rooms and only several surgeons, was
226 there kind of a closeness ((motions hand in a circle with index finger pointing
227 down)) between the surgeons and the operating room
228
229 MASAND: Yes m'am.
230
231 **WELLS: Crews?**
232
233 MASAND: Yes m'am.
234
235 **WELLS: We've heard testimony that um ((motions toward plaintiff)) Laddie Gilbert**
236 **was a CNRA at the hospital at that time (frame) did you know Laddie?**
237
238 MASAND: Yes m'am.

Appendix F
Case 1-Nasa
Question Types and Topics During Biography Phase

Question	Question Type	Topic
1. Dr. Nasa, I think everyone knows you, but for the record, would you introduce yourself to the ladies and gentlemen of the jury please?	Wh-	Name
2. And your occupation or profession?	Wh-	Profession
3. And how long have you practiced here at Eastville?	Wh-	Profession
4. Where are you from originally?	Wh-	Personal Background
5. Where in India?	Wh-	Personal Background
6. Tell us a little bit about your childhood and growing up.	Open-ended	Personal Background
7. Is that the British system of training?	Yes/no	Profession
8. And were your <u>classes</u> in medical school in English?	Yes/no	Profession
9. Do you still have family in India?	Yes/no	Personal Background
10. Who's who's still there?	Wh-	Personal Background
11. Okay, now when did you <u>start</u> your medical training in India?	Wh-	Profession
12. Okay, and just give us an overview of what the six years is like. We know in the United States, it's a four-year program and generally what students do. How is it different in India?	Wh-	Profession
13. OK, and did you complete that one year internship uh successfully?=-	Yes/no	Profession
14. And you received your license then in essence to practice medicine in India?	Yes/no	Profession
15. All right, did you actually practice in India?	Yes/no	Profession
16. OK And where was that?	Wh-	Profession
17. Let's stop there for just a second. We talked about residency programs and I'm not sure that all of us really understand what's involved. Do you just follow orthopedic surgeons around for three years or how is a residency program structured in the United States in orthopedic surgery?	Wh-	Profession

18.	OK let's take just as an example a surgery. As a first year resident, what would be your role in surgery?	Wh-	Profession
19.	OK and by the time you're a third year resident, then you actually handle cases on your own?	Yes/no	Profession
20.	OK Under the general supervision again of the attendings?	Yes/no	Profession
21.	All right. When did you complete your residency program (.) in orthopedics?	Wh-	Profession
22.	So by that time you have starting back in medical school, you have what 14, 15 years of formal education?	Yes/no	Profession
23.	What did you do after completing your residency program?	Wh-	Profession
24.	OK and after that was over, what did you do then?	Wh-	Profession
25.	Did] you go back to India [for a?	Yes/no	Personal Background
26.	OK uh when you went back to India, did you practice medicine or teach medicine?	Yes/no	Profession
27.	So you interrupted your your profession for a while, and for less than a year I believe and then came back to the United States?	Yes/no	Personal Background
28.	And and you first set up private practice where?	Wh-	Profession
29.	And did you limit your practice in Williamson to uh orthopedics?	Yes/no	Profession
30.	And what hospitals did you practice at?	Wh-	Profession
31.	And did you have to be licensed to both West Virginia and Kentucky?	Yes/no	Profession
32.	Did you get board certified in orthopedic surgery?	Yes/no	Profession
33.	And when was that?	Wh-	Profession
34.	And what did that involve?	Wh-	Profession
35.	You have a written exam?	Yes/no	Profession
36.	And you successfully passed [them both?	Yes/no	Profession
37.	And that would be, as Dr. Goldner told us yesterday, that he sat on those three panel examining boards that's the process that you went through?	Yes/no	Profession

38.	um when did you um come to Eastville?	Wh-	Personal Background
39.	And why did you come to Eastville?	Wh-	Personal Background
40.	Dr. Rajawat was an orthopedic surgeon?	Yes/no	Profession
41.	And he retired?	Yes/no	Profession
42.	Did you take over his patients and his practice?	Yes/no	Profession
43.	And in 1993 at least when you treated Jason Rowe, were you and Dr. Hawkins the only orthopedic surgeons here in Eastville?	Yes/no	Profession
44.	Is that still the case?	Yes/no	Profession

Appendix G
Case 2-Masand
Question Types and Topics During Biography Phase

Question	Question Type	Topic
1. Even though we've informally introduced you to the jury, would you please tell the jury what your name is?	Wh-	Name
2. And what is the name you commonly go by in Eastville?	Wh-	Name
3. Alright and can you tell the jury uh where you live and how you came to be in Eastville. Just tell 'em a little bit about yourself.	Open-ended	Personal Background
4. Well, I would tell 'em where you were born, how you came to be an American then more particularly how you came to be in Eastville.	Wh-	Personal Background
5. Is it, uh, I'm sorry Dr. Masand that's actually a year longer than in America, idn' it?	Yes/no	Profession
6. So you actually taught as a s- medical professor?	Yes/no	Profession
7. You taught other people that were becoming doctors?	Yes/no	Profession
8. When you left India in 1969, where did you go?	Wh-	Personal Background
9. Who went to Flint Michigan with you?	Wh-	Personal Background
10. We've seen a lady () sitting in one of the front rows here (off and on). Is that your wife?	Yes/no	Personal Background
11. You want to tell 'em who she is and what her name might be?	Wh-	Personal Background
12. Now when you went to Flint, Michigan, you said you had two children. Who were they?	Wh-	Personal Background
13. How old was she when you went to Flint Michigan?	Wh-	Personal Background
14. OK and then you had another child that you took with you to Flint Michigan?	Yes/no	Personal Background
15. And who was that?	Wh-	Personal Background
16. OK and what is Suparna doing now?	Wh-	Personal Background
17. And your and your other daughter is	Wh-	Personal Background

what?		
18. So you and Jyoti went to Flint Michigan so you could improve your surgical s- [skills?	Yes/no	Profession
19. What did you do in Flint Michigan to improve your surgical skills?	Wh-	Profession
20. You joined what? I'm sorry.	Wh-	Profession
21. So you essentially went through training to be a doctor twice?	Yes/no	Profession
22. And you passed that test?	Yes/no	Profession
23. But you redid your surgical training?	Yes/no	Profession
24. How long did you stay in Flint?	Wh-	Personal Background
25. And what did you do in Detroit?	Wh-	Personal Background
26. And by this point in time what year was it?	Wh-	Personal Background
27. And you told us just a few minutes ago you came to Eastville in 1974. Um how did you find I don't mean how did you find Eastville ((smiling)) from Detroit but what caused you to look at Eastville?	Wh-	Personal Background
28. OK and you went to work with Dr. Kennedy?	Yes/no	Profession
29. Did Jyoti go to work with Dr. Rollins?	Yes/no	Personal Background
30. Uh and you all when you joined Dr. Kennedy's office, how many general surgeons were there in Eastville?	Wh-	Profession
31. OK so Dr. Morgan was being mayor. He was older by that time though wasn't he?	Yes/no	Personal Background
32. And he was working in the emergency room so there were several of you surgeons. When you came to Eastville, did you have any more children or were you still at two?	Wh-	Personal Background
33. OK and his name and what he's doing.	Wh-	Personal Background
34. OK so he's going on to become s- a children's cancer specialist.	Wh-	Personal Background
35. You and Jyoti came here in 1974. Tell the jury a little bit about the practice of medicine here in 74 and and what the hospital was like because when we look at the hospital today I think it's fair to	Open-ended	Profession

say it was dramatically different in 74.		
36. Would it be fair to say for many years you saw all kinds of surgery?	Yes/no	Profession
37. And because you only had four operating rooms and only several surgeons, was there kind of a closeness between the surgeons and the operating room	Yes/no	Profession
