Language and Law

A resource book for students

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Chapter B5

Linguistic Strategies Used by Lawyers

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of jury trial, for example, is part of a larger argument (which we consider in more detail in Unit D3): that such discourse shows a tension between two different ways of talking about (and in fact conceptualising) what is going on, use of narrative and legal exposition. For Heffer, what is important is that these two kinds of discourse together produce the 'complex genre' he describes, addressed simultaneously to two different audiences. But Heffer's general account may turn out to be more suggestive if considered alongside participant-focused observations about witness behaviour of the kind made by Conley and O'Barr (2005). They argue that how different litigants structure information can be categorised as being either **rule-oriented** or **relational**, based on informant interviews or analysis of conversational moves and sequences. What is significant from their point of view is that legal proceedings are receptive disproportionately to the former. If the contrast they put forward is justified, then there may be implications that go beyond the scope of any one of the studies described above on its own concerning the effectiveness of the justice system as a whole.

Such implications can be seen more clearly if findings from the different kinds of study are brought together. In their deliberations, for example, judges restructure relational accounts into legally relevant categories in order to pursue their own form of reasoning. In an empirical study conducted by Conley and O'Barr, however, members of the judiciary 'described relational litigants as hard to follow, irrational, and even crazy, while praising the straightforward efficiency of rule-oriented accounts' (Conley and O'Barr 2005: 73). Opposing that preferential treatment, Conley and O'Barr maintain (on the strength of sociolinguistic findings and research on reasoning in other fields) that relational accounts are not illogical, but simply follow a different kind of logic from the sort of reasoning a court can easily accommodate. For Conley and O'Barr, issues regarding courtroom discourse are in this way not only questions for scholarly analysis, but matters calling for practical reform, if litigants with legal claims of equal merit fare differently because they show different kinds of communicative competence. Their research (e.g. O'Barr and Conley 1990) shows a strong connection between witness background, greater satisfaction and less frustration with the (US) justice system when witnesses are able to use more narrative forms in small, informal courts or in tribunals or **alternative dispute resolution** (ADR; usually mediation) settings.

B5 LINGUISTIC STRATEGIES USED BY LAWYERS

In this unit, we introduce and discuss the main features of courtroom persuasion. We examine a series of examples of rhetorical techniques deployed at different stages of a trial in Unit C5.

Awareness of audience

Persuasion involves 'a deliberate effort to change a person's attitude' (Bradshaw 2011: 1). To persuade judges and jurors successfully, lawyers must combine attention to their

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message with attention to how they present that message, including by means of **non-verbal communication** such as facial expressions, gaze, body language, silences and physical distance (Burgoon and Bacue 2003). Advocacy manuals deal with all these considerations from a practical, experience-led point of view that reflects law's preference for tradition, cumulative wisdom, and experientially proven outcomes. In this unit, we bring together such understandings of advocacy with other approaches based on linguistic and related research.

Advocacy is often regarded as a matter of performance. But it cannot be reduced to performance entirely, since it is never unidirectional. Rather, advocacy involves implanting an idea or altering an existing idea in someone's belief system, in a courtroom context an idea or ideas that can form the basis of an important later judgment. To maximise the effectiveness of their advocacy, lawyers accordingly seek intuitively and through training to understand human **cognitive bias**, which influences judges' or jurors' perception of information presented to them. This practical approach combines with awareness of different audiences; so, in order to reflect necessary differences between legal and lay communication, lawyers adapt their persuasion strategies to different situations, adjusting in particular to whether a case involves a jury trial or a **bench trial** (i.e. proceedings overseen by one or more judges but no jury). Audience awareness (Bradshaw 2011) and the related principle of **recipient design** (structuring a message to reflect the priorities of its recipient rather than the needs or wishes of the speaker) are as a result central to advocacy.

Permissible strategies in advocacy vary between jurisdictions. For example, **objections** based on the manner or purpose of the language used (e.g. on grounds of vague or ambiguous questions) are raised more often in US courts than in other common-law jurisdictions, largely because in American courts any ground for appeal will be treated as having been waived if an immediate objection was not raised (Evans 1998). In an increasingly international media environment that potentially elides important jurisdictional differences in procedure, interactional differences can surface in unexpected ways (e.g. in one of our examples in Unit C4, an unrepresented litigant in Hong Kong may have been influenced by American courtroom dramas when seeking to raise an objection in an impermissible way).

Speech attributes and style

In many walks of life, a good public speaker is, at least partly, one who can manipulate **prosodic features of speech**, including pitch, tempo and loudness, intonation, and tone of voice, in order to reinforce other stylistic choices. Such characteristics also feature in courtroom advocacy. For example, **intonation** – including sometimes slightly exaggerated, 'stage' intonation – may be used to express irony or incredulity. The advocate may vary **tempo**, slowing down to let an important point sink in. Rapid questioning, on the other hand, may be used to put pressure on a witness. Such features are sometimes calculated for effect in a given courtroom situation, and at other times appear to be conventional effects that have been acquired from manuals and mentors.

Stylistic selection is not a matter purely of one-off choices. One highly regarded advocacy skill is an ability to switch between formal and informal register depending

on topic and target audience. Jurors may fail to attend to or understand – or may even appear bored by – evidence presented to them. One requirement of verbal communication to jurors is therefore simplicity, despite the complexity of the subject matter and legal framework governing what has to be communicated.

Most published work on advocacy consists of guidance by and for practitioners. Some studies, on the other hand, such as Findley and Sales (2012), claim to analyse 'the science of attorney advocacy', and relate practical advice to more general observations and evidence. Chapter 3 of Findley and Sales (2012), for example, presents a digest of recommended verbal techniques collected from a range of documents, suggesting the following as the main techniques to be adopted: use of familiar language, simple words with few syllables, short and linear sentences, attention to thesaurus alternatives, and care with figurative expressions. Among more general recommendations, they include: avoid 'legalese' and baby talk, humanise the client, and insert what they call 'memorable impact words' and details.

Perhaps surprisingly given the adversarial nature of the speech event overall, one effective persuasive strategy according to advocacy manuals is to be polite and likeable. This is recommended both for lawyers and their clients. Researchers such as Cialdini (2008) conclude that we are more persuaded by, and display more trust in, people we like. In a courtroom context, one way of appearing likeable is to **accommodate** linguistically to jurors, since psychological research suggests that people like people who resemble them. In analysing one US trial, Fuller (2009) showed how lawyers manipulate properties of language to communicate messages they would otherwise not be permitted to express. She documents how some Southern black attorneys switch from Standard US English to African American Vernacular English (AAVE) in order to convey solidarity and alignment with African American jurors and in order to show humility. Fuller concludes that such style switching is a frequent and clearly marked usage.

Apart from likeability, credibility is another, more obvious requirement in courtroom persuasion. The relationship between speech style and credibility has been studied by researchers such as Erickson *et al.* (1978), who found that testimonies containing frequent use of **powerless speech attributes** such as **intensifiers** (*so*, *very*, *surely*), **hedges** (*kinda*, *I think*, *I guess*), **hesitation forms** (*uh*, *well*, *you know*), **questioning intonations** (e.g. use of rising, question intonation in a declarative sentence), **polite forms** (*please*, *ma'am*, *thank you*) and **hyper-formality** (e.g. use of bookish grammatical forms) are perceived as less credible. Such 'powerless speech' features are commonly used by laypersons (such as witnesses) but avoided by legal professionals.

Control and coercion in questioning

In order to influence what jurors think, advocates seek to gain as much control as possible over what witnesses say (and, subject to professional and ethical restrictions, also what they do not say). Such control is achieved through strategic questioning, often by taking advantage of the **power asymmetry** in the lawyer's verbal interaction with witnesses. Lawyers are generally not allowed to ask leading questions during examination-in-chief, but are permitted to ask leading questions during cross-examination (for comparison with UK law, see Monaghan 2015; for US law, see the American Bar Association website at www.americanbar.org). Other restrictions also

apply: for example, in the UK, lawyers must not ask questions merely to insult, humiliate or annoy a witness.

Evidential rules in these and other ways limit the types of questions lawyers can ask. But lawyers still control topic, pace and duration (e.g. they can put fewer questions to a powerful witness and more questions to a weaker one). Lawyers can also use **coercive question forms**, loaded with information that the answerer may find difficult to accept but also difficult to refute. In Australia, improper questions (e.g. questions that are misleading, confusing or unduly annoying) are prohibited (s. 41, Evidence Act 1995). But Cooke (1995: 73) nevertheless reports attempts to 'upset, unsettle, confuse, confound or otherwise intimidate' witnesses 'through an aggressive barrage of questions' in Australian courtrooms. Permissibility aside, appearing over-aggressive can backfire. There may accordingly be a dynamic trade-off between (as well as rhetorical combinations of) the characteristic of being aggressive and being likeable.

Degree of coerciveness may be highly context-sensitive but it can be described in general terms. A typology of coerciveness in questioning is offered, for example, by Danet and Kermish (1978), based on how far lawyers control witnesses' answers during cross-examination. **Leading questions** consisting of a declarative sentence plus tag question (e.g. 'You walked into the room, didn't you?'; see Unit C4) are considered highly coercive: they strongly suggest and limit the answer that can be given, typically to 'yes/no'. A witness would be under increased pressure if he or she gives an unexpected, non-compliant and linguistically 'marked' answer. **Open-ended questions**, such as ones that start with *who*, *what*, *where*, *when* and *why*, are considered less coercive. The researchers found that the more coercive the questions, the shorter the answers they elicit.

Dunstan (1980) argues that analysis of coerciveness needs, however, go beyond surface linguistic forms (such as question type) and must investigate the contextual function and significance of an utterance. Analysing examples in context, he notes that cross-examination questions rarely request information. Instead, they counter arguments, display incredulity, repair initiations and pre-sequencers, and are to this extent primarily forms of accusation. For example, after receiving an unfavourable answer, a cross-examiner may pose a follow-up question challenging the previous answer (e.g. by pointing to inconsistency, as in 'But in the police interview, didn't you say that the car park was dimly lit?' or by requesting justification; Atkinson and Drew 1979). Alternatively, following a witness's answer, a lawyer may comment 'I hear what you say' before turning to the next question, implying disbelief (Evans 1998). Another strategy involves **reformulation** of a previous answer in different words, to make the answer fit the questioner's overall theory of the case. A hypothetical example of this is discussed in Danet and Kermish (1978): the witness testifies (in a case in which a car accident causes injury to a young person) that she 'saw a little girl crossing the street and a car struck her'. The cross-examiner then asks, 'Now this little girl darted right in front of the oncoming car, didn't she?' Substitution of 'darted' for 'crossing' deflects responsibility from the defendant and draws attention to a presumption of erratic behaviour by the child. Note, though, that in such examples, the underlying conflict between speaker and hearer remains concealed. Even more directly aggressive questions are typically masked in polite forms: 'Would you please, if you possibly can, answer

my next question "yes" or "no". You did not report the donation to your superior, correct?' Examples of further questioning techniques are explored in Unit C5.

Pragmatic and discourse strategies

Techniques for indicating reference can also subtly alter a witness's testimony and jurors' perception of events being reconstructed in the trial narrative. For example, lawyers can manipulate personal pronouns to designate **in-group and out-group boundaries**, by including the jurors in a 'we' construction while referring to the other side in the case as 'they'. **Modals** can also be employed to unsettle a witness's appearance of certainty. For example, a witness can be made to sound overconfident when presented with a forcefully phrased question: 'Is there the slightest possibility you might have misheard what he said?' The status of a witness may also be strengthened or diminished by adjusting the **form of address** used towards them (e.g. the contrast between 'John' and 'Doctor'; Gibbons 2003).

Other pragmatic techniques adopted in courtroom advocacy include strategic use of **interruption** (especially when a witness is saying something damaging to the case the advocate is seeking to establish); **repetition** (often with a raised intonation contour to cast doubt on an answer that has been provided); **overlapping speech**; and dramatic **silence**. Pausing after an answer can appear to demonstrate respect for the witness, while also giving judges and jurors more time to digest that particular section of an utterance.

Lawyers may also build credibility by emphasising information that fits into the audience's belief system before gradually introducing arguments that they may find difficult to accept if presented in isolation. In jury trials, since opportunities for verbal interaction with jurors are limited (except during **voir dire** in some jurisdictions), lawyers make educated guesses about their audience based on professional experience and intuition.

Storytelling

With an accumulation of evidence and competing accounts surrounding the crux event or events at issue in a trial, jurors construct a **mental model** of what happened, typically in the form of a story (Berg 2005). For courtroom purposes, a successful story shaped by the lawyer offers a theory of the case that is simple, consistent and compelling; such a story is also one that highlights the strengths of the case as perceived from one particular point of view, minimising weaknesses. The story leads to an obvious conclusion but allows jurors to feel they have solved the puzzle themselves (see Bradshaw 2011 for discussion of storytelling techniques in the courtroom). As well as in opening and closing speeches, such stories can be created through questions: how lawyers can tell a story through a series of questions, rather than by means of more conventional narrative techniques, is illustrated in Unit C5.

The audience for a courtroom story must be able to visualise and imagine it easily. Research suggests that a moment-by-moment narrative recounting a crime, in a criminal case, is more believable than an abstract statement about the relationship between the defendant and the physical event (e.g. probability of DNA matching). As in many novels, stories are commonly narrated in the **historic present tense** in courtrooms. Heller (2006: 266) argues that 'jurors do not decide whether to convict

by calculating probabilities or by scrutinizing inferential chains'; instead, he suggests, they decide whether a narrative 'possesses the "lifelikeness" that appears to mark it as true'. The potential criticism that other lives are reduced in such advocacy to jurors' own expectations, or even prejudices, is countered by the requirement of supporting evidence and the fundamental principle of judgment by peers.

The proposition that it is easier to impress jurors with stories than with statistical information is based on empirical evidence. Wells (1992) reports how, when a mock jury was told that 80 per cent of tyres of the Blue Bus Co., but only 20 per cent of the alternative Grey Bus Co., matched the tracks of a bus that had killed a dog, few (around 10 per cent) found the Blue Bus Co. liable for damages. With a different mock jury group, an eyewitness took the witness stand and testified that he saw that the bus was blue. Even though the jurors were told that eyewitness accounts have been shown to be only 80 per cent accurate in making such identifications, a significantly greater number of mock jurors (around 70 per cent) found the Blue Bus Co. liable in this condition of the experiment.

From one perspective, rhetorical strategies are extralegal factors that should not affect the outcome of a case in an ideal, rational legal system. On the other hand, legal advocacy provides ammunition for lawyers to use, at least in common-law adversarial systems, in the knowledge that the outcome of each case will be determined by the court after competing submissions and evidence have been presented as coherently and vigorously as possible by the respective parties. In this sense, an adversarial (rather than inquisitorial) structure for trials depends on competitive testing of arguments and evidence followed by detached judgment, even if a different balance of legal, factual and emotional components is likely to be found as between bench and jury trials, and in other adjudicative forums.

PRAGMATICS AND LEGAL INTERPRETATION

B6

Unless there is a reason not to, legal interpretation presumes that legislative texts are optimal in conveying a legislature's intention, even if in practice word meaning will vary because it is inevitably context sensitive. 'Construing' a legal text, as a result, involves pragmatic aspects in addition to the semantics of language and the specialised forms of reasoning associated with legal rules. In this unit, we outline the role of contextual interpretation in legal meaning. We also consider alternative judicial approaches to legal interpretation. In conclusion, we broach the question of how closely approaches to interpreting legal texts should be expected to resemble linguistic understanding of the ways meaning is created in everyday language use.

Semantic and pragmatic aspects of meaning

Legal indeterminacy that results from **linguistic indeterminacy** (such as ambiguity and vagueness) seems at first to be concerned with semantic dimensions of meaning: with

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