When a Juror Watches a Lawyer

William M. O'Barr and John M. Conley

William M. O'Barr has a joint professorship in the departments of cultural anthropology and sociology at Duke University and is adjunct professor of law at the University of North Carolina. He received his Ph.D. from Northwestern University in 1969. His research has involved peoples of Africa as well as the United States, and his interests include legal anthropology, sociolinguistics, and discourse analysis. He also researches the anthropology of advertising.

John M. Conley is a professor of law at the University of North Carolina, where he currently holds the Ivey Research Chair. He is also an adjunct professor in anthropology at Duke and practiced trial law for a number of years. His recent book, *Fortune and Folly*, is an anthropological look at institutional investors on Wall Street. Conley received his J.D. from Duke in 1977 and his Ph.D. in anthropology from Duke in 1980.

How things are said in court, as any successful trial lawyer knows, may be much more important than what is actually said.

Not only in the court, but in our everyday language, all of us have an intuitive notion that subtle differences in the language we use can communicate more than the obvious surface meaning. These additional communication cues, in turn, greatly influence the way our spoken thoughts are understood and interpreted. Some differences in courtroom language may be so subtle as to defy precise description by all but those trained in linguistic analysis. No linguistic training is necessary, however, to sense the difference between an effective and an ineffective presentation by a lawyer, a strong and a weak witness or a hostile versus a friendly exchange. New research on language used in trial courtrooms reveals that the subliminal messages communicated by seemingly minor differences in phraseology, tempo, length of answers and the like may be far more important than even the most perceptive lawyers have realized.

Two witnesses who are asked identical questions by the same lawyer are not likely to respond in the same way. Differences in manner of speaking, however, are usually overlooked by the court in its fact-finding quest. Once an initial determination of admissibility has been made, witnesses may follow their own stylistic inclinations within the broad bounds of the law of evidence.

"When a Juror Watches a Lawyer" by William M. O'Barr and John M. Conley, from *Barrister*. Reprinted with permission.

Scrutinize carefully the following pairs of excerpts from trial transcripts, and consider whether, as the law of evidence would hold, they are equivalent presentations of facts.

EXAMPLE 1

Q. What was the nature of your acquaintance with her?

A_1. We were, uh, very close friends. Uh, she was even sort of like a mother to me.

A_2. We were very close friends. She was like a mother to me.

EXAMPLE 2

Q. Now, calling your attention to the 21st day of November, a Saturday, what were your working hours?

A. Well, I was working from, uh, 7 a.m. to 3 p.m. I arrived at the store at 6:30 and opened the store at 7.

Compare this answer to the following exchange ensuing from the same question.

A. Well, I was working from 7 to 3.

Q. Was that 7 a.m.?

A. Yes.

Q. And what time that day did you arrive at the store?

A. 6:30.

Q. 6:30. And did, uh, you open the store at 7 o'clock?

A. Yes, it has to be opened.

EXAMPLE 3

Q. Now, what did she tell you that would indicate to you that she . . .

A. (interrupting) She told me a long time ago that if she called, and I knew there was trouble, to definitely call the police right away.

Compare the above with the slightly different version, where the lawyer completes his question before the witness begins answering.

Q. Now, what did she tell you that would indicate to you that she needed help?

A. She told me a long time ago that if she called, and I knew there was trouble, to definitely call the police right away.

Two years of study of language variation in a North Carolina trial courtroom, sponsored by the National Science Foundation, have led us to conclude that differences as subtle as these carry an impact which is probably as substantial as the factual variation with which lawyers have traditionally concerned themselves.

POWER LANGUAGE AND GETTING POINTS ACROSS

The three examples of differences in testimony shown here are drawn from separate experiments which the team has conducted. The study from which Example 1 is taken was inspired by the work of Robin Lakoff, a linguist from the University of California at Berkeley.

Lakoff maintains that certain distinctive attributes mark female speech as different and distinct from male styles. Among the characteristics she notes in "women's language" are:

- A high frequency of *hedges* ("I think . . . , It seems like . . . ." "Perhaps. . . ." "If I'm not mistaken . . .")
- *Rising intonation* in declarative statements (e.g., in answer to a question about the speed at which a car was going, "Thirty, thirty-five?" said with rising intonation as though seeking approval of the questioner)
- *Repetition* indicating insecurity
- *Intensifiers* ("very close friends" instead of "close friends" or just "friends")
- High frequency of *direct quotations* indicating deference to authority, and so on

We studied our trial tapes from the perspective of Lakoff's theory and found that the speech of many of the female witnesses was indeed characterized by a high frequency of the features she attributes to women's language. When we discovered that some male witnesses also made significant use of this style of speaking, we developed what we called a "power language" continuum. From powerless speech (having the characteristics listed above), this continuum ranged to relatively more powerful speech (lacking the characteristics described by Lakoff).

Our experiment is based on an actual ten-minute segment of a trial in which a prosecution witness under direct examination gave her testimony in a relatively "powerless" mode. We rewrote the script, removing most of the hedges, correcting intonation to a more standard declarative manner, minimizing repetition and intensifiers, and otherwise transforming the testimony to a more "powerful" mode.

From the point of view of the "facts" contained in the two versions, a court would probably consider the two modes equivalent. Despite this factual similarity, the experimental subjects found the two witnesses markedly different. The subjects rated the witness speaking in the powerless style significantly less favorably in terms of such evaluative characteristics as believability, intelligence, competence, likability and assertiveness.

To determine whether the same effects would carry over for a male witness speaking in "power" and "powerless" modes, we took the same script, made minor adjustments for sex of witness, and produced two more experimental tapes. As with females, subjects were less favorably disposed toward a male speaking in the powerless mode.

These results confirm the general proposition that how a witness gives testimony may indeed alter the reception it gets. Since most juries are assigned the task of deciding upon relative credibility of witnesses whose various pieces of testimony are not entirely consistent, speech factors which may affect a witness's credibility may be critical factors in the overall chemistry of the trial courtrooms.

These findings are not limited to a single study. Similar patterns have been discovered with other kinds of variation in presentational style.

Example 2 comes from a study of differences in the length of answers which a witness gives in the courtroom. Treatises on trial practice often advise allowing the witness to assume as much control over his testimony as possible during direct examination. Implicit in such advice is an hypothesis that relative control of the questioning and answering by lawyer versus witness may affect perception of the testimony itself.

To test this hypothesis we again selected a segment of testimony from an actual trial. The original testimony was rewritten so that, in one version, the witness gave short attenuated answers to the lawyer's probing questions. In the other version, the same facts were given by the witness in the form of longer, more complex answers to fewer questions by the lawyer.

BUT THEN, HOW LONG SHOULD A WITNESS SPEAK?

Contrary to our expectations, the form of answer did not affect the subjects' perception of the *witness*, but it did have a significant influence on the judgments about the *lawyer*. When the lawyer asked more questions

to get the same information, subjects viewed him as more manipulative and allowing the witness less opportunity to present evidence.

The subjects' perceptions of the lawyer's opinion of his witness were also colored by the structure of the witness's answers; however, the differences were significant only when the witnesses were male. When more questions were asked by the lawyer, subjects believed the lawyer thought his witness was significantly less intelligent, less competent and less assertive.

On this point, then, standard trial practice theory is confirmed indirectly. The lawyer who finds it necessary to exert tight control over his witness will hurt his presentation by creating a less favorable impression of himself and suggesting that he has little confidence in the witness.

A LOT DEPENDS ON WHO INTERRUPTS WHOM

Example 3 is part of a study of interruptions and simultaneous talk in the courtroom. We wanted to know what effect a lawyer's interrupting a witness or a witness's interrupting a lawyer would have. Preparing a witness for a courtroom examination often includes an admonishment against arguing with the opposition lawyer during cross-examination, and a lawyer often advises his own witness to stop talking when he interrupts what the witness is saying.

To study some aspects of this complex phenomenon, we focused on the relative tendency of the lawyer and the witness to persist in speaking when the other party interrupts or begins to speak at the same time. This is one of the most subtle factors of language variation in the courtroom which we have studied, but, like the other differences, this too alters perception of testimony.

Working from the same original testimony, four experimental tapes were prepared: one in which there were no instances of simultaneous talk by lawyer and witness, one in which the witness primarily yielded to the lawyer during simultaneous talk by breaking off before completion of his statement, one in which the lawyer deferred to the witness by allowing the witness to talk whenever both began to talk at once, and finally one in which the frequency of deference by lawyer and witness to one another were about equal.

All four tapes are clearly "hostile" and "unfriendly" in tone. The three containing simultaneous speech, or overlaps between lawyer and witness, would be difficult to distinguish by a person untrained in linguistic analysis of sequencing of questions and answers. Yet these subtle differences in patterns of deference in overlapping speech can be and are perceived differently by experimental subjects.

Findings from this study, like those from the second experiment, show significant effects on the perception of the lawyer. Subject-jurors rate the lawyer as maintaining most control when no overlapping speech occurs. The lawyer's control over the examination of the witness is perceived to diminish in all those situations where both lawyer and witness talk at once.

Comparing the situation in which the lawyer persists to the one in which the witness persists, interesting results also emerge. When the lawyer persists, he is viewed not only as less fair to the witness but also as less intelligent than in the situation when the witness continues. The lawyer who stops in order to allow the witness to speak is perceived as allowing the witness significantly more opportunity to present his testimony in full.

The second and third experiments thus show speech style affecting perceptions of lawyers in critical ways. Modes of speaking which create negative impressions of lawyers may have severe consequences in the trial courtroom. In all adversarial proceedings, lawyers assume the role of spokesmen for their clients. Impressions formed about lawyers are, to some degree, also impressions formed about those whom they represent.

The implications of these findings may be most severe in those criminal trials where the defendants elect not to testify, but they apply as well to all situations where lawyers act as representatives of their clients.

THE FACT IS: A FACT MAY BE MORE THAN A FACT

While the results of these particular experiments are undoubtedly important for the practicing lawyer, we feel that the true significance of the project lies in its broader implications. In a variety of settings, we have shown that lay audiences pay meticulous attention, whether consciously or unconsciously, to subtle details of the language used in the trial courtroom.

Our results suggest that a fact is not just a fact, regardless of presentations; rather, the facts are only one of many important considerations which are capable of influencing the jury.

As noted earlier, the law of evidence has traditionally concerned itself primarily with threshold questions of admissibility. The guiding principles have always been held to be ensuring the reliability of evidence admitted and preventing undue prejudice to the litigants. If it is true that questions of style have impact comparable to that of questions of fact, then lawyers will have to begin to read such considerations into the law of evidence if they are to be faithful to its principles.

As judges and lawyers become increasingly sensitized to the potentially prejudicial effects of speech style, one remedy might be to employ cautionary instructions in an effort to control jury reactions. For example, might it not be appropriate for a court confronted with

a witness speaking in an extreme variant of the powerless mode to instruct the jury not to be swayed by style in considering the facts?

Additionally, lawyers themselves might begin to give greater recognition to stylistic factors while addressing the jury during voire dire, opening statement and closing argument.

Lawyers are already accustomed to calling jurors' attention to such presentational features as extreme emotion in urging on them particular interpretations of the evidence. What we suggest is merely an extension of a familiar technique into newly explored areas. . . .

REFERENCES

Lakoff, Robin T. 1976. *Language and Woman's Place.* New York: Octagon Books.

Lakoff, Robin T. 1990. *Talking Power: The Politics of Language in Our Lives.* New York: Basic Books.

Forms of Address: How Their Social Functions May Vary

Salikoko S. Mufwene

Salikoko S. Mufwene, a native of Zaire, came to the United States in 1974 as a graduate student at the University of Chicago. He received his Ph.D. in linguistics in 1979 and is now professor of linguistics at his old alma mater. Previously he taught at the University of the West Indies in Jamaica and at the University of Georgia. Among his research interests are the relationship between language and culture, as well as pidgin and Creole speech.

The point of view presented in this essay is primarily Bantu, one of the several groups of sub-Saharan Africans typically characterized as black. Moreover, the outlook is that of a person who grew up in the transition from colonial Zaire (then the Belgian Congo, in central Africa) to postindependence Zaire, in an education system that fosters an interesting coexistence of colonial European and local African cultures. From a sociolinguistic point of view, French, inherited from the colonial days as the official language and the medium of education from the fourth grade up to higher education, has been adapted to convey this marriage of African and colonial European cultures heavily anchored in the African tradition.

In this essay, I show how this background affected my reaction over fifteen years ago to English forms of address, as used at a major midwestern American university. With time, I have also learned that the customs described in this essay do not apply universally to the overall American society. However, I think that these first impressions reflect best my then unaccultured perception of a facet of American culture.

The term "form of address" is used in this essay as much for names, like *Peter, Mary,* and *Bob,* as for titles, like *Mr., Mrs., Dr.,* and *Professor,* which are normally used before last or full names, for example, *Mr. (Paul) Simon* or *Dr. (Alice) Rosenfeld.* The term is also used for other titles such as *sir* and *ma'am,* normally used without a name; for kinship terms such as *Dad, Mom,* and *son* used to address relatives; for pet names such as *buttercup* and *cupcake;* or for any word used to address a person. Ethnographically, these forms of address specify the relation between the speaker and the addressee (for example, pals, professionals, parent-child, lovers) and the terms of their interaction (for example, distant, close, intimate), depending sometimes on the specific circumstances of the communication. To take an American example, a person named *Alice Rosenfeld* may be addressed in various ways, depending on context. She may be addressed as *Dr. Rosenfeld* in formal professional interaction, as *Mrs.* or *Ms. Rosenfeld* in situations where she is not well known, as *Mom* by her children, as *Alice* by her husband and colleagues in places where professional relations are not formal, and as *dear, darling,* or *honey* by her husband in intimate interaction.

I will restrict my observations on the American system to the usage of forms of address after the first time people have been introduced to each other. I will ignore those situations where preestablished relationships might allow usage of pet names and kinship titles, for instance, the title *uncle* extended to friends of the speaker's parents or blood uncles. However, it will help to provide more general background information about myself at this point, so that the reader may understand my original shock at how Americans address each other, at least at the university I attended.

In my Bantu background, addressees' names are often avoided in quite a variety of situations in order to express deference and/or intimacy. For instance, in the Bantu vernacular languages, people of the same age as one's parents are addressed by the same titles as the parents of the same sex, with the terms *papa* or *tata* (father) or *mama* (mother) prefixed to their names to express deference, for example, *Papa Kaniki* or *Mama Moseka.* These honorifics (that is, special forms of address for respect) are also used alone, without a name,

"Forms of Address: How Their Social Functions May Vary" by Salikoko S. Mufwene, from *Distant Mirrors: America as a Foreign Culture,* ed. by Philip R. DeVita & James D. Armstrong. Belmont, CA: Wadsworth. Reprinted by permission of the author.