Constructing a Narrative in Courtroom Testimony

By Anita K. Barry

For some time now, linguists have joined other social scientists in examining legal language. Linguists, by trade, study human language: its structure, its acquisition, and its uses in society. Since language is the primary instrument of law, it is surprising that only in the last two decades or so have linguists become highly visible in the legal arena.

Linguists have been summoned as expert witnesses to testify in a variety of cases that hinge on language: to analyze conversations in covertly recorded tapes; to make judgments about the abilities of non-native speakers of English to understand contracts, warnings and confessions; to make judgments about voice evidence; and to help settle trademark disputes. Linguists have also taken the initiative in attempts to clarify and make accessible legal and bureaucratic language, such as in jury instructions, contracts, and product warnings. They have called into question long-held assumptions about the supposedly objective nature of court-reporting. They have explored bilingual interpretation in the courtroom. And they have devoted considerable effort to understanding the linguistic problems of citizens who attempt to have their voices heard and their disputes settled in the legal system.

Testifying in court, for instance, can be one of the most frustrating of all communication events, and it is that frustration which I would like to examine here, from the point of view of the linguist. My observations are based on written transcripts of trials in Genesee County Circuit Court, in Flint, Michigan.

The courtroom trial is an intimidating event for most people. The judge wears formal robes, sits higher than everyone else, wields a gavel. The proceedings are peppered with archaic and ritualistic language ("hear ye, hear ye," "the truth, the whole truth and nothing but the truth," "all rise") or other legal jargon that is incomprehensible to the layperson.

But the frustration that witnesses feel is also a result of being silenced even as they are invited, in fact *required under oath*, to tell the truth, the whole truth, and nothing but the truth. Witnesses are given the impression that they are supposed to narrate events to help the jury arrive at the truth. So they will typically proceed as if they were carrying on an ordinary conversation with the attorney. But their attempts to tell their stories are often thwarted at every turn, and they discover that telling a story in court is very different from telling a story under other circumstances. In fact, they may discover that they are not telling their story at all. Rather, they are instruments through which attorneys tell the story.

Legal process manipulates and controls the narratives of witnesses in two ways: it places constraints on what witnesses are allowed to say, and it empowers attorneys to structure the narrative so that they can tell the story as they want it to be told.

The restrictions on what witnesses may say operate through the commonly accepted law of evidence, or evidentiary constraints. Among the better-known constraints are that witnesses may not themselves ask questions, nor may they remain silent under most circumstances without risking being held in contempt of court. Conley and O'Barr list other constraints:

- *A witness may not ordinarily repeat what other persons have said about the events being reported.*
- *A witness may not speculate about how the situations or events being reported may have appeared to other people or from other perspectives.*
- *A witness may not ordinarily comment on his or her reactions to, or feelings and beliefs about, events being reported.*
- *In responding to a question, a witness ordinarily may not digress from the subject of the question to introduce information that he or she believes critical as a preface or qualification.*
- *A witness may not normally incorporate into his or her account any suppositions about the state of mind of the persons involved in the events being reported.*
- *Value judgments and opinions by lay witnesses are generally disfavored.*
- *Emphasis through repetition of information is restricted.*
- *Substantive information should not be conveyed through gestures alone.*
- *A witness is generally forbidden to make observations about the questions asked or to comment on the process of testifying itself.*[1]

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Under the law of evidence, witnesses are stripped of a wide array of devices for creating a story that has coherence, interest, and a point of view. Imagine trying to tell a simple fairy tale—say Little Red Riding Hood—under these constraints. "A little girl went to visit her grandmother. She found a wolf in her bed instead. She was very frightened (objection!). The wolf ate the little girl, and it probably ate the grandmother too (objection!)." No wonder that witnesses register frustration.

But as frustrating as this situation might be, the witness is at least made aware that some (unfamiliar) conventions are at work. Objections are overtly raised by attorneys, and judges make decisions about them. Sometimes explanations are even offered for the objection, giving the witness some clues about the rules of the game. Lawyers might even discuss these rules with witnesses before putting them on the stand.

The second form of control of testimony that I referred to earlier is much more subtle and less explicit, and therefore, I think, potentially more devastating to witnesses. Attorneys direct the construction of the narrative. In ordinary storytelling, the teller makes a series of judgments designed to make the story coherent and interesting and to convey events so that the listener is left with a certain point of view. To do this, the tellers must assess the prior knowledge of the listeners and sort out new information. They decide how to signal the relationships among the events, whether chronological, causal, or otherwise. They decide how much background information to provide. They choose when to introduce new topics. They choose how much information to provide about the characters. They choose how much emotive commentary to provide alongside the facts. They decide how much description to provide of the settings against which the events take place. While people succeed in varying degrees at making effective choices, it is the storyteller who gets to make them.

But not in courtroom testimony. All those choices are the prerogative of the questioning lawyer.

- The lawyer introduces new topics, usually through a yes/no question. ("Were you at work the night of April 16?") In this way, the lawyer chooses the scene, the time, the people, and the events to discuss, and may shift out of chronological order in introducing them.
- The lawyer builds on established information by requesting bits of new information, usually through a wh-question. ("Where were you the night of April 16?")
- The lawyer invites the witness to narrate events, usually through an open-ended question. ("And then what happened?")
- The lawyer highlights certain witness statements by repetition or a direct question about something contained within the witness's narrative. ("So you were out drinking with your friends?")
- The lawyer regulates the pace of the narrative by deciding how much background information and description should be included. This usually takes the form of an instruction to back up, hold on, or slow down, followed by a request for the witness to return to a certain point in the narrative to fill in more information.
- The lawyer takes responsibility for assuring that references to people are clear and unambiguous. ("When you say 'he,' who do you mean?")

If a witness recognizes that the lawyer is actually the one telling the story and cedes all control to the lawyer, we find a harmonious presentation of the facts. Below we see some examples in which the witness allows the attorney to regulate the pace of the narrative:

Q: Okay, and does something unusual occur to you?

A: Yeah. Well, we passed another vehicle and G. was drunk in the back seat and gave them hand gestures, and then we sped off and they caught up with us and fired a shot into our car.

Q: Slow down here just a little bit. You indicated that you had passed another vehicle.

A: Um hmm.

Q: Could you describe the other vehicle for us, please?

A: It was a two-door small car. It was a Buick Skylark or Skyhawk, tan brown, or some color.

Q: And you said G. made a gesture.

A: Yeah, she raised her middle finger towards them as we passed them. We were behind them, rode up on them and started passing them.

Twice here the lawyer intercedes to regulate the flow, asking the speaker to back up and to fill in details, and in both cases the witness complies.

But if a witness makes ordinary assumptions about his or her role as narrator and does not follow the lawyer's narrative agenda, a struggle will ensue. For example, consider this exchange between the same lawyer and another of his witnesses:

A: We went to Columbiaville because K, the other girl that was in the car, was gettin' in a fight and a guy knocked her down and—she was gettin' in a fight with a girl and a guy came over and knocked her down, and so we went to get my sister because my sister knew the guy, and we just wanted her to stay there in case somebody jumped in, and we went to D's house—

Q: Okay, you gotta slow down.

A: We went to D's house—(picks up where she left off)

Q: Okay, hold on. One step at a time.

And these are not isolated examples. They are typical of the exchanges each of these witnesses has with the lawyer. The increasing tensions between the witness just quoted and the lawyer end with her introducing unsolicited—and inadmissible—information. The jury is excused. The prosecuting attorney is reprimanded by the court and instructed not to ask the witness any more questions. The testimony is out of control. Unfortunately, this discord has nothing to do with the substantive issues, and it is likely to occur not as part of the adversarial process, but rather between two persons who may be aiming for the same outcome.

The most noticeable feature of this clash of narrative strategies is the degree of specificity with which witnesses refer to the people in their narratives. Whenever we talk about someone, we make judgments about how much information the listener needs to identify that person. If the person is totally unfamiliar to the listener, we might offer an elaborate description with definite articles, adjectives, and relative clauses to locate that person in time and space for the listener: "The extremely angry man who was trying to get a refund at the service desk gave me this advice." If the person is fixed in the mind or mind's eye of the listener, the simple pronoun "he" would suffice. There are degrees of specificity between these two examples, and in ordinary conversation the choice is left up to the narrator. But in the courtroom we find repeated instances in which witnesses choose a low level of specificity, while lawyers (and sometimes judges) will interrupt them, demanding a more explicit identification. Here are some examples, all from the same trial:

A: They just started beating them and at that time E. and...

Q: Okay, when you say "they" can you tell us who was doing the beating and who—first of all, came back in the house?

A: I don't think he used it. Not that I saw, no.

Q: When you say "he" who do you mean?

Q: And when did that occur during the fight?

A: That was about—not too long after he hit them in the head.

Q: After who hit who in the head?

This conflict over narrative strategy is presumably independent of any conflict about the facts. And it is understandable to anyone who pays attention to the task of constructing a narrative. The witness may be viewing the event as a conversation between witness and lawyer. The lawyer asks the questions; the witness answers them. The witness has probably told this story to the lawyer before, and so it is not unreasonable for the witness to assume a great deal of knowledge on the listener's part. Yet witnesses find themselves interrupted repeatedly when they use pronouns, because the legal system designates the jurors, not the lawyer, as the listener. Lawyers are the narrators, telling the story through the witnesses, since the lawyer's own words cannot constitute evidence. For lawyers the real conversation is between them and the jurors. The jurors, of course, have not heard this story before, and so they need more explicit descriptions. Furthermore, good lawyers know, and this has been corroborated by experimental research, that people are more likely to believe stories that are unambiguous and explicit than those that are unclear and ambiguous.[2] And so a struggle will ensue between witness and lawyer about how to present the narrative. Neither witness nor lawyer is making an erroneous judgment about how a conversation should work; but they carry different assumptions about their own and others' roles in the narration.

Unfortunately, the tension that can result may affect how jurors decide. Studies have indicated that witnesses who deliver fluid, uninterrupted narratives are more believable because,

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presumably, their lawyers trust them enough to allow them this freedom.[3] In fact, trial manuals advise lawyers to allow their own witnesses to speak without interruption, while confining opposition witnesses to short answers to pointed questions. But a lawyer runs the risk, as we have seen, that a witness will be so inexplicit that the lawyer feels compelled to interrupt—even though studies also show that interruptions call into question the competence of the lawyer.[4] So what we see is a hidden level of conflict, or at least potential conflict, that frustrates lawyers and witnesses alike and may affect the perceptions of jurors and ultimately the outcome of trials.

Besides helping to uncover hidden frustrations in the courtroom, linguistic analysis opens doors to potential solutions. If lawyers fully understood the three-way roles of the witness, lawyer, and jury and conveyed this to witnesses, witnesses would feel less frustrated, lawyers would seem less bullying to them, and at least friendly witnesses would be inclined to be linguistically as well as factually cooperative. The following exchange suggests that witnesses would be willing to cooperate if given the chance. A witness is instructed to be more explicit, and she complies.

> ***Instruction:*** *What I would like you to do is—so we don't confuse the jury here—when you say "he" was saying this, if you could use names we will be more clear as to who was saying what, okay?*
>
> ***Result:*** *I was trying to get up there as fast as I could, you know, short of a long fast dash, and I heard them come out of—"them" meaning C and I . . .*

In another instance a lawyer suggests to a witness that she use last names to help avoid ambiguity of reference. Although a rather bizarre requirement in ordinary conversation, again the witness indicates her willingness to comply:

> *. . . and him and K got in K's car and we rode in—I don't know what her last name is—the other K's car, and I don't know what her last name is though, and I rode in her car to Columbiaville.*

I suggest that witnesses will experience less frustration and testimony will proceed more smoothly if the ground-rules are made explicit to both lawyers and witnesses. Linguists, those with expertise in analyzing conversation, can contribute by detailing the dynamics of courtroom narrative.

The following are some specific suggestions for preparing a witness for testimony. A lawyer might say to the witness:

- It may seem as if you and I are having a conversation, but really I am talking to the jury through you.
- The jury has never heard any of this before, so we must spell everything out in detail.
- This is especially important when you are talking about people. If you just say "he" or "she," the jury might get confused. You can help by using names instead, or by adding a phrase to help identify them, such as "the man who came into the store." Also, if you know someone by a different name, make sure the jury understands that you mean the same person: So you might say "John Smith—I call him J.J.—came with me."
- I have an idea in mind of how I want the jury to hear the facts, and I will try to question you so that you describe them in that way.
- You may have a different idea of how this story should be told, but you must let me do it my way so the jury will not think that we don't trust each other.
- So please follow the instructions I give you. For example:

(1) I might ask you to slow down and say more about something you've already mentioned.

(2) I might ask you to provide me with very specific information about what you saw or did. Please try to answer just the questions I ask.

(3) I will be responsible for changing the subject.

(4) At times I will invite you to talk freely, but I will signal you when I think you should stop.

(5) It is better if we don't interrupt each other or try to talk at the same time.

Lawyers could undoubtedly think of other instructions along the same lines. What I am suggesting here is that such preparation would remove some of the mystery of testifying for the layperson and greatly reduce tension between lawyers and witnesses. ■

Footnotes

1. Conley and O'Barr, *Rules Versus Relationships: The Ethnography of Legal Discourse* (University of Chicago Press, 1990), pp 13-14.
2. Bennet and Feldman, *Reconstructing Reality in the Courtroom* (Rutgers University Press, 1981), chapter 4.
3. O'Barr, *Linguistic Evidence: Language, Power, and Strategy in the Courtroom* (Academic Press, 1982), pp 76-82.
4. *Id.*, pp 87-91.