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This is not a course in trial practice: Multimodal participation in objections

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ABSTRACT

This first part of this paper argues against the assumption that trial examination consists of question-answer patterns. Rather, data from cross-examination in a criminal trial reveals the existence of an objection option space that screens questions for evidential relevance. When activated, the option space transforms the micro social organization and participation structure of the court in officially sanctioned ways. Unofficially, however, both witness and judge deploy forms of multimodal conduct as an affective stance to comment on the objected-to-questions and signal egregious evidentiary violations to the non-questioning attorney and jury, undermining the credibility of the questioning attorney. The second part of the paper analyzes an objection conference after the judge dismisses the jury to consider the questioning attorney's litany of evidentiary violations. The only effective cross-examination in the entire segment occurs when the judge questions the attorney on her blatant disregard for proper legal procedure. The judge employs speech-synchronized gestures in a poetic performance to insult the questioning attorney, a legal identity constructed in and through a multimodal mapping of denotational text to interactional function.

1. Introduction

Numerous researchers argue that institutional interaction is organized around questions and answers. According to Tracy and Robles (2009: 131), "Questioning is one of, if not *the*, central communicative practice of institutional encounters." In a similar vein, Freed and Ehrlich (2012: 3) state: "The study of questioning has always been central to investigation of institutional discourse." Speech events like interviewer-interviewee (Clayman and Heritage, 2002), doctor-patient (Heritage, 2010), teacher-student (McHoul, 1978), police-suspect (Komter, 1997), counselor-counselee (Erickson and Schultz, 1982), and lawyer-witness (Atkinson and Drew, 1979) consist of asymmetrical roles and discursive control that organize questioning practices in institutional settings.

Courtroom examination between lawyer and witness, in particular, consists of identity-driven question-answer patterns, as a number of scholars have indicated. According to Heritage and Clayman (2010: 176; see also Atkinson and Drew, 1979), the turn taking system in trial examination is "organized around questions and answers." Raymond (2006: 115) states: "lawyer's conduct in courtroom interactions . . . is organized primarily through questions and answers." Tracy and Robles (2009: 137) remark that, "The drama of the Anglo-American legal system is all about questioning, particularly in cross-examination." Finally, even the noted forensic linguist and attorney, Peter Tiersma (1999: 168) claims: "The conversation between the lawyer and witness . . . consists of virtually nothing but questions and answers."

Indeed, perhaps no area of institutional interaction possesses more significant consequences for questioning than courtroom examination. Because lawyers control the turn taking system in court they set the agenda or topic, limit answers from witnesses, and phrase evidence to steer a particular interpretation of testimony through questioning practice. As Holt and Johnson (2010: 21) put it: "The most distinctive and widespread linguistic feature of legal talk is the question . . . lay

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interactants are largely controlled by and at the mercy of questions from professionals in dyadic legal encounters." The classic quote from Sacks (1988: 54) captures the controlling power of questions, especially when based on the asymmetrical distribution of institutional options: "As long as one is doing questioning, then in part they have control of the conversation."

In this paper, I take a radically different position on questioning practices in court and the *question centric* focus characteristic of trial examination in the adversary system. I argue that direct and cross-examination are not organized around questions and answers as commonly assumed. Instead, I show how they are organized around what I refer to as *objection mediated forms of participation*. That is, each attorney question is followed not by an answer but by an *objection option space*, an evidential contingency that may or may not materialize during the course of testimony. Only if the attorney's question *clears* this option space will question-answer and institutional control materialize. More explicitly, the question has to clear the option space after screening for evidential relevance en route to completion. Thus, rather than question-answer pairs, direct and cross-examination are organized around (1) question, (2) objection option space, and (3) answer. If the non-questioning attorney activates the objection option space, the participation structure changes from attorney-witness to attorney-attorney-judge (or attorney-judge) and from question-answer to objection-(basis for question)-ruling, a contingent and improvisational evidential field consisting of multi-laminated, multiparty, and multimodal forms of participation.

The paper is organized as follows. After a brief literature review of objections I introduce an audio-video transcript from a cross-examination in a criminal trial. Section four analyzes a four-minute segment of data consisting of twelve questions by the prosecuting attorney, ten of which are objected to by the defense attorney, with all ten sustained by the judge. I show how the witness mobilizes body and head movements, gaze, and paralinguistic cues as an affective stance to comment on the prosecuting attorney's questions and signal egregious evidentiary violations to the defense attorney and jury. I also show how the judge uses gaze and facial expressions to move out of a neutral "umpire" role and signal objectionable questions to the non-questioning attorney. More generally, I demonstrate how the institutional reflexivity of questioning practices departs significantly from orthodox descriptions of question and answer patterns in adversarial courtrooms. The final section investigates how a series of sustained objections leads the judge to dismiss the jury and deliver a multimodal "cross-examination" within a cross-examination. Both sections track the ongoing flow of multiparty participation shifts and their multimodal laminations during the course of cross-examination.

2. Literature review

In her study of the O.J. Simpson trial, Cotterell (2003: 95) counted more than 16,000 objections, though she failed to provide an analysis (keeping in mind that she never set out to do so). Despite their prevalence in the adversary system very few researchers analyze the organization of objections in the courtroom (but see Heffer, 2005: 82–84 for a brief discussion). To be more precise, the only (detailed) discursive analysis of objections (at least to the best of my knowledge) was in my study of rape trials twenty-five years ago, and it will be instructive to review briefly several of the major findings before proceeding (Matoesian, 1993). First, I demonstrated that the majority of objections occur in turn environments prior to the witness's answer, thereby preempting it, and even when the witness begins an answer the attorney uses turn-interruptive objections to "strand" the answer in progress. Second, objections are not a type of remedial insertion or repair sequence, since the canonical insertion sequence maintains the integrity of the question-answer pair, even across multiple embeddings. By contrast, when the judge sustains the objection it deletes the relevance of an answer altogether. And, finally, even when the judge overrules an objection, the questioning attorney typically reformulates the question, creating a "fresh" question-answer pair in the process (for numerous reasons, see Matoesian, 1993). Consequently, it seemed necessary to build an objection option space into the very fabric of questioning practices – not questions but objection mediated questioning practices. In the case here, I build on this prior work but now with a renewed emphasis on the role of embodied conduct, interactive forms of participation, and affective stance, especially in the conduct of the witness and judge.

Although language and law research ignores objections, trial practice textbooks typically devote an entire chapter to their study, a consideration that may be instructive for linguists studying legal institutions. According to Haydock and Sonsteng (1991: 152), objections are a "procedure used to oppose the introduction of inadmissible evidence, to oppose the use of improper questions and to stop inappropriate conduct during the trial." Perrin et al. (2003: 343) state, "Any overall trial strategy that fails to include consideration of objections and even objection strategies is inadequate and incomplete." And it is easy to see why. In the adversary system, each attorney question invites careful screening for its evidential relevance. Each question must be precisely phrased to exclude improper evidence and procedure during the trial – legal strictures that may be relevant "down the line" should the case go to appellate review.[1] Just as important for the current study, sustained (or upheld) objections may undermine the credibility and authority of the attorney. As Haydock and Sonsteng (1991:153) note, objections "signal lack of ability on the attorney when sustained . . . that they are poorly prepared and possess little knowledge of evidence law." Mauet's classic text (2017: 515), links objections to legal identity, in particular, which attorney occupies the role of "evidence expert": "Jurors notice who wins objections and how the judge reacts to objections and rules on them . . . it shows who the better attorney is." This relates to a legal point I have mentioned in previous works. The trial is not about truth or falsity but winning and losing, and that depends on which attorney can best persuade the jury. Indeed, the credibility of the attorney is under scrutiny and evaluation just as much as the witness.

However, while trial texts devote an entire chapter (or more) to objections, they possess a *speaker*-centric folk ideology of communication that ignores the role of the witness (see Goodwin, 2007 for a relevant critique of this ideology and how it

[1] Just as important, a major critique of the adversary system is that it is too slow, and as we will see objections play a major role in the slow pace of trial proceedings (Landsman, 1984: 35). In the words of Perrin et al. (2003: 343), objection "is a powerful word in the courtroom. It stops the proceeding in its tracks."