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Communicating with silent addressees: Engagement features in legal opening statements

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A B S T R A C T

This study presents an empirical study of explicit features of audience orientation, investigating how lawyers transform overhearing observers into active participants. Drawing upon a corpus of five high-profile American trials, the quantitative and qualitative analysis reveals the ways in which the lawyers establish solidarity and foster in-groupness through inclusive pronominal choices, and dialogically position the jurors through questions, directives, references to shared knowledge, and asides so as to negotiate agreement and secure consent. The findings reveal how perceptions of the audience influence discursive choices, thereby attesting to the centrality of relational work in legal communication.

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1. Introduction

A key feature emerging from recent studies of legal discourse is the view that courtroom discourse is a persuasive interactive practice. By looking beyond the ideational dimension (Halliday, 1994), scholars have come to see that lawyers do not simply present external realities, but use language to acknowledge, construct and negotiate social relations, hence the interpersonal dimension (Fuller, 1993; Bogoch, 1999; Schrager, 1999; Caldwell et al., 2002; Hobbs, 2008; Chaemsaithong, 2012, 2014). That is, a lawyer's establishment and maintenance of an appropriate relationship with her interlocutors is as important as strategic management of lexico-grammatical resources, a coherent presentation of evidence and witnesses, and logical theory of the case. Mauet (1980) argued, three decades ago, that jurors believe the lawyer who they feel a cultural or personal connection with. To portray herself as being someone the jurors can connect with, the lawyer can put on a "lawyer persona" (Trenholm, 1989). This social view of courtroom discourse is recently echoed in Hobbs (2008, p. 232): "the speaker's personality and identity are key factors in determining how a verbal presentation will be received". The central point here is that arguments or evidence need to be presented in ways that the jurors find both credible and persuasive. Essentially, this means that lawyers must draw on conducive ways of expressing their arguments, representing themselves, and engaging their audience. Recognizing the pivotal position of social relations in the process of communication, such a social constructionist perspective locates interpersonal negotiation and participant relationships at the heart of a trial, assuming that every successful case presentation must display the lawyer's awareness of both its audience and its consequences.

Different methods of interactional negotiation have been examined: through the display of "similarity cues", including demeanor, accent and language style (Trenholm, 1989), the use of different dialects to invoke cultural and ethnic aspects that come with such dialects (Hobbs, 2003), violation of Grice's cooperative principle (Cotterill, 2010), effective footing and identity management (Matoesian, 2001; Chaemsaithong, 2012), face work (Kryk-Kastovsky, 2006; Chaemsaithong, 2011),

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address terms and referring expressions (Dettenwanger, 2011), and metadiscourse (Cavalieri, 2011; Chaemsaithong, 2014). However, these studies have all concentrated on an interactional environment where the addresser (i.e. the lawyer) manages her relationship with the *apparent* addressee (i.e. the witness/defendant), rather than the *real* addressee (i.e. the jury) who needs to be convinced. In other words, attention has virtually entirely been devoted to interaction in witness examination (see Hobbs (2008) for an exception). This in turn partly limits the strength of the claim about the extent to which legal discourse is interpersonal, as it overlooks the importance of relational work with this powerful group of addressees.

In this study, I address such a research gap and seek to explicate the process of real audience engagement, which refers to the ways in which lawyers explicitly bring jurors into the discourse, give them a voice and a role, and transform them from passive observers into active participants. Drawing upon a corpus of five high-profile American trials, I examine the discourse of the opening statement, not only because it is an interesting site to examine the degree of the audience's presence, representing a prime opportunity for the lawyer to directly lead the jurors to the verdict she desires, but also because this genre remains an under-studied area of legal discourse. I am guided by the following research questions: 1) How do lawyers communicate with the silent addressee? That is, what linguistic resources do lawyers employ to manage relationships with the jurors? and 2) How do these engagement resources contribute to the lawyers' construction and maintenance of their relationships with the jurors, and to their roles in storytelling?

As my qualitative and quantitative analysis will show shortly, the genre of the opening statement, albeit not a audience–participation genre, significantly presupposes the active role of addressees, as evidenced through six key features (inclusive pronouns, personal asides, appeals to shared knowledge, questions and directives). Such resources, I argue, reflect two overarching concerns of the lawyers in meeting the audience's expectation to be accommodated in the presentation as part of the discourse community, and in responding to the potential rejectability of their knowledge claims by the audience. Namely, the lawyers intervene into the discourse to create a dialogic space by engaging the jury actively, thereby construing a relationship of rapport and solidarity, and to position the jury to galvanize support and guide them to the desired interpretation to ultimately accept the knowledge claims. These two concerns in turn reflect the heteroglossic nature of the opening statement, which emphasizes "the role of language in positioning the speakers and their texts within the heterogeneity of social positions and world views" (Bakhtin, 1986, p. 13). The study not only contributes to attesting to the centrality of relational work in legal discourse in enabling the lawyers to bypass the communicative constraints that prohibit any display of personal opinions and comments on the evidence, but also to revealing how perceptions of the audience influence discursive choices in legal communication.

This article begins by outlining the linguistic characteristics of the opening statement, and proceeds to discuss theoretical insights informing this study, the data and methodology. It then presents the findings in detail, and concludes with some observations on the use of engagement features in this discursive genre.

2. Opening statement

Setting aside voir dire, the opening statement is the first opportunity for the trier of fact to hear a comprehensive statement of each party's factual claims, hence counsel's first persuasive interaction with the jury without interruption. This phase of the trial starts with the party with the burden of proof (i.e. the plaintiff's attorney in a civil trial or the prosecution in a criminal trial), and is then followed by the defense's presentation. In the adversarial system, when the defense take up the ball, they will try to construct facts to suggest either a counter-narrative, or the weakness of the prosecution narrative. The narrative construction in this initial phase of the trial will later influence the type of facts that counsel will try to construct from the witness examination and that the defense will try to deconstruct in their cross-examinations.

The critical role of the opening statement has been widely acknowledged. Cognitive studies have suggested that many jurors draw at least tentative conclusions at this initial stage (Lind and Ke, 1985; Pennington and Hastie, 1991; Spiecker and Worthington, 2003). The opening statement, while not mandatory, is seldom waived because it offers a valuable opportunity to provide an overview of the case to the jury and to explain the anticipated proof that will be presented in later parts of the trial.

Generally speaking, the opening statement allows attorneys from both sides to introduce themselves and the parties involved in the lawsuit, outline the important facts of the case in the form of narratives, explain the applicable law and make a request for a verdict. However, what makes the discourse of the opening statement particularly peculiar is its dual nature. The official website of the US federal courts states that "although opening statements should be as persuasive as possible, they should not include arguments" (Administrative Office of the US Courts, 2014), as this part of the trial is limited to outlining facts and intended to be informative, rather than argumentative. Similarly, the Supreme Court characterized the opening statement as "ordinarily intended to do *no more than* to inform the jury in *a general way* of the nature of the action and defense so that they may better prepared to understand the evidence" (*Best v. District of Columbia* 291 U.S. 411, 54 S. Ct. 487, 78 L. Ed. 882 [1934]; my own emphasis). What this means in practice is that, to create a successful opening statement, lawyers need to arouse the interest of jurors, build rapport with them and, at the same time, come close to being argumentative (Tanford, 2009, p. 147). They can, for instance, offer a discussion of the anticipated evidence and "facts" they intend to prove, but they cannot assert personal opinions, comment about the evidence, discuss how to apply the law to the facts, or arouse the emotions of the jurors by making negative judgments about the other party in scurrilous terms (such as "a big cow"). In reality, however, such limits are hard to enforce straightforwardly, and are usually left to the discretion of the trial judge. Lilley (1999) shows how lawyers merged trial facts with media appeals in their attempts to affect the court public opinion in O.J.

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