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Defending through disaffiliation: The vicissitudes of alignment and footing in Belgian criminal hearings

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ABSTRACT

Drawing on Goffman's notion of footing, I demonstrate how the discursive creation of a legal reality is mediated by the complex interplay of alignments the attorney assumes toward (1) the client, (2) the judge and other trial participants, and (3) written documents produced during preceding trial stages. These footing patterns differ in the way they include or exclude the attorney and other trial participants in the phenomenal field of the discourse. However, they also draw attention to the network of intertextual relationships that connect the hearing and the time of the facts. This decomposition of the situated practice of "representing the client" into a complex of alternating footing patterns thus also contributes to understanding the intertextual structuring of courtroom discourse.

1. Introduction[1]

Criminal hearings are densely intertextually structured: A cursory glance through the literature suffices for noticing that the discursive transformation of situated conduct into punishable facts is extensively mediated by situated practices of quoting, summarizing, referring to or otherwise incorporating various written documents produced during earlier stages of the trial (see, e.g., Matoesian, 2001, the various contributions in Heffer et al. (2013), and also the introduction to this issue). This paper specifically zooms in on the role defense lawyers play in the intertextual constitution of criminal hearings. I therefore will investigate in detail the ways in which a defense lawyer in a Belgian first-instance criminal hearing "deconstructs" the case against his client. In presenting to the court a version of the facts that demonstrates the inapplicability of the legal category proposed by the prosecution, he adopts various strategies for incorporating discourses produced on earlier occasions, either during the course of the pretrial investigation or during preparatory meetings he had with the client.

A pivotal position among these intertextual practices is occupied by what Goffman (1981) identified as *footing*, which refers to the question on whose behalf the speaker (here, the defense attorney) is producing his/her discourse. Footing in this setting is particularly important because of the intrinsic tension defense attorneys face in speaking on behalf of their client. On the one hand, the defendant qualifies as the "principal" of the discourse (the one whose position is attested to according to Goffman's model of speakership, cf. infra), because, from a legal standpoint, he/she is the one who authorizes the attorney to act on his/her behalf. On the other hand, acting on the defendant's behalf often involves taking an argumentative line of which the defendant himself/herself cannot be the source, because as a rule defendants do not have the required legal and argumentative expertise for constructing and presenting a legal perspective on their case.

Importantly, this tension is not an outsider's construct but something that legal actors themselves are acutely aware of. Thus, statements to the extent that a lawyer's vocation is "to lend a voice to the voiceless" (as the prominent Flemish

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[1] Earlier versions of this paper were presented at Rhetoric in Society 3 (Antwerp, Belgium, January 26–28, 2011) and at the DiO Summer School "Discourses of Expertise" (Antwerp, Belgium, August 27–30, 2012), in addition to the panel at the 2011 International Pragmatics Conference in Manchester from which papers for this issue were drawn.

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criminal defense attorney Piet Van Eeckhaut is fond of reminding the public, see e.g. his statements in Vanderstraeten, 2011: 24) point strongly in the direction of the first understanding of the client–attorney relationship, which relegates the role of principal of the defense plea unequivocally to the defendant. In addition, that Article 190 of the Belgian Code of Criminal Procedure (which specifies the order in which the parties to a trial take the floor) cursorily mentions the defendant and the lawyer as alternative occupants of the same slot implicitly qualifies the client–attorney relationship as based on a logic of substitution (where the attorney indeed addresses the court "on behalf of" the defendant).[2] However, the deontological code for lawyers (e.g., Boydens, 2007) explicitly specifies the attorney's task as comprising the double duty of "representing" and "advising," for which the attorney is required to assume an impartial stance toward the client's case. This standpoint is also reflected in the often-quoted saying that the attorney is "the first judge" of the client's case. The ultimate consequence of this requirement of impartiality, still according to Boydens (2007), is that defense attorneys are deontologically prohibited from pleading cases in which they are personally involved (either as defendant or victim), as this would render such impartial advice logically impossible. Needless to say, according to these views the attorney's role clearly encompasses more than merely acting as a mouthpiece for the defendant.

The argument developed in this paper is that this tension implicit in the client–attorney relationship should not be seen as an impediment to successful pleading in court; instead, this tension constitutes an interactional resource that adept defense attorneys may skillfully exploit in presenting their client's case to the court. Looking at it from this angle, it quickly becomes clear that this tension forms part of a much broader interactional phenomenon. Examined under the magnifying glass of a minute analysis of real courtroom practice, the seemingly monolithic activity of "representing one's client" can be unpacked as a delicate interplay of alternating *footing patterns* and as an incrementally unfolding complex of continually shifting *interactional alignments*, each of which reflexively inscribes itself in a distinct way in the courtroom context. At the first level, these multiple alignments can be differentiated based on the extent to which other parties to the trial are allowed to emerge (or "become visible") as co-entities/co-participants in the "phenomenal field" of the discourse—I use *phenomenal field* here in a non-technical sense, to refer to the ensemble of objects and people (including the behaviors and other relevant characteristics associated with them) that together constitute the (presumably inter)subjective reality in which a discourse inscribes itself. Through footing and the phenomenal fields they project, the attorney first "acts out" a relationship with the client whose case the attorney is pleading (as will be shown below, this may occasionally even assume the shape of an apparent disaffiliation with the client, thus the title of this paper; see D'hondt, 2010 for a comparable case). Equally important, however, are the stances the attorney in doing so assumes toward (a) the court and the other legal actors present at the hearing (and occasionally even the public, cf. D'hondt, 2009a: 817ff) and (b) the ensemble of written documents, produced during the preceding trial stages, that makes up the "case file" around which the hearing is organized (cf. Komter, 2013). Projected intertextual relationships thus form a major ingredient of attorneys' interactional alignments, and the footing patterns described as follows inevitably also position the attorney vis-à-vis the written documents that form the connection between the hearing and the facts the defendant is being tried for.

These "phenomenal" analyses of the courtroom context are in turn predicated upon a set of shared understandings of the legal setting. Of particular significance here is the way the participants orient to the mixed "inquisitorial–accusatorial" character of Belgian criminal trial hearings (and the implications for the participation status of the different trial participants, about which more below). At this second level of interactional organization, shifting footing allows attorneys to navigate the *interactional dilemma* (Komter, 1998) between "not being found guilty" and "participating in the search for the truth." This, then, directly relates to the practical question with which we set off our discussion, viz. whether the defense should present itself as a mouthpiece for the client or as an impartial advisor.

A third issue that permanently looms in the background once the issue of interactional (dis)alignments is raised is the way in which these alignments are interwoven with assumptions of "normality." For an attorney, (dis)aligning oneself with the client often also entails positioning that client toward what common sense finds "acceptable." The function of footing, like that of many other intertextual resources, is thus "to anticipate shared common knowledge and shuffle particular ideas and subjectivities into the legal space" (Maryns, 2013: 109): It allows the defense attorney to tacitly take on board everyday concepts like "normality" and "culture" (D'hondt, 2010), or "insanity" (Maryns, 2014) that from a legal perspective are not clearly demarcated but may nevertheless be vital for alleviating guilt.

2. The legal setting: Belgian first-instance criminal hearings

The data examined in this paper were collected during ethnographic fieldwork carried out in 2002–2003 in two first-instance criminal courts in the Flemish-speaking part of Belgium, in the context of a government-sponsored field research project on intercultural communication in Belgian courtrooms (for the full field report, see D'hondt et al., 2004; D'hondt, 2009a). First-instance courts represent the middle tier of the Belgian criminal justice system. Responsible for adjudicating crimes punishable with a maximum prison sentence of five years, these courts are situated in between police courts (which deal with misdemeanors, mainly traffic violations) and the Assize Court (where serious crimes and felonies are tried before a citizen jury). The verdicts of first-instance courts can be subjected to a more in-depth review by the Court of Appeal.

[2] Article 440 additionally stipulates that lawyers must be registered at the Bar and hold the monopoly of pleading in court, but Article 758 makes an exception for defendants who appear personally before the judge to plead their own case.