

Language and Law

A resource book for students

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Chapter C5

Techniques in Legal Advocacy

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- ❑ Describe the unrepresented litigant's verbal behaviour in examples 3, 4 and 5. Characterise as precisely as you can the misunderstandings involved.
- ❑ Consider differences between courtroom procedures and everyday communication. Are such difficulties on the part of litigants to be expected?

TECHNIQUES IN LEGAL ADVOCACY

C5

This unit explores a number of questions about the rhetorical strategies employed by lawyers in developing their case. We describe discourse strategies used at different stages in court proceedings: making an **opening statement**; presenting an account of the facts in issue by taking witnesses through **examination-in-chief**; **cross-examining** witnesses whose evidence appears to conflict with the account presented; and delivering a **closing argument**.

Gaining attention in an opening statement

In Unit A5, we present a short extract from a famous nineteenth-century opening speech by Edmund Burke in impeachment proceedings against Warren Hastings. In doing so, we contrast Burke's high oratory with the simpler style encouraged in modern advocacy manuals as the best way to open, by summarising the facts and introducing the main issue(s) in dispute. We now juxtapose the opening speeches made by the two sides in a single trial, taken from the transcript of a widely reported American case. The speeches show how the prosecution and defence opened their respective arguments in the 1997 trial of Timothy McVeigh, following the Oklahoma City terrorist bombing in 1995 that killed 168 people.

Prosecution

HARTZLER: Ladies and gentlemen of the jury, April 19th, 1995, was a beautiful day in Oklahoma City – at least it started out as a beautiful day. The sun was shining. Flowers were blooming. It was springtime in Oklahoma City. Sometime after six o'clock that morning, Tevin Garrett's mother woke him up to get him ready for the day. He was only 16 months old. He was a toddler; and as some of you know that have experience with toddlers, he had a keen eye for mischief. He would often pull on the cord of her curling iron in the morning, pull it off the counter top until it fell down, often till it fell down on him.

That morning, she picked him up and wrestled with him on her bed before she got him dressed. She remembers this morning because that was the last morning of his life.

That morning, Mrs. Garrett got Tevin and her daughter ready for school and they left the house at about 7:15 to go downtown to Oklahoma City. She had to be at work at eight o'clock. Tevin's sister went to kindergarten, and they dropped the little girl off at kindergarten first; and Helena Garrett and Tevin proceeded to downtown Oklahoma City.

Usually she parked a little bit distant from her building; but this day, she was running a little bit late, so she decided that she would park in the Murrah Federal Building. [. . .]

Defence

JONES: Special attorney to the United States Attorney General, Mr. Hartzler, and to Mr. Ryan, the United States Attorney for the Western Judicial District of Oklahoma and to Mr. Timothy McVeigh, my client, I have waited two years for this moment to outline the evidence to you that the Government will produce, that I will produce, both by direct and cross-examination, by exhibits, photographs, transcripts of telephone conversations, transcripts of conversations inside houses, videotapes, that will establish not a reasonable doubt but that my client is innocent of the crime that Mr. Hartzler has outlined to you.

And like Mr. Hartzler, I begin where he began. As he said, it was a spring day in Oklahoma City. And inside the office of the Social Security Administration located in the Alfred P. Murrah Building, named after a distinguished chief judge of the United States Court of Appeals for the Tenth Circuit, a young black woman named Dana Bradley was feeling the atmosphere a little stuffy and warm; so she left her mother, her two children, and her sister in line and she wandered out into the lobby of the Alfred P. Murrah Building. And as she was looking out the plate glass window, a Ryder truck slowly pulled into a parking place and stopped. She didn't give it any particular attention until the door opened on the passenger side, and she saw a man get out.

Approximately three weeks later, she described the man to the Federal Bureau of Investigation agents, as indeed she did to us and to others, as short, stocky, olive-complected, wearing a puffy jacket, with black hair, a description that does not match my client. She did not see anyone else. [. . .]

★ Activity

- Describe the main strategies each advocate adopts in order to gain the jurors' attention.
- Why do you think the prosecution focuses so precisely on minute details of the last morning of one person among the 168 victims?
- How does the prosecution's opening resemble storytelling? How, for example, does it encourage you to form a mental image of the scene?
- What effect is created by the defence lawyer going through steps in the trial and types of evidence in the form of a list?
- How (and how far) is the effect of the opening by the defence affected by the fact that it comes after the prosecution's opening?

Constructing a story during examination-in-chief

Advocates aim to lead witnesses through a process of telling a story during examination-in-chief, by carefully constructing suitable questions. Evans (1998) encourages initially asking a question that lays a foundation to show *how* a witness learnt about something (e.g. establishing the location of the witness, or in what capacity he or she was there)

before asking what the witness actually saw. He also suggests asking a closed question (e.g. ‘Did you hear something?’) followed by an open question (‘What did you hear?’) to add to ‘the story-telling energy’ of the examination (Evans 1998: 87). Such techniques arguably apply psychological insights gained as much through professional experience as from study or research.

Requests put to the witness fall into three activity types: narrate, specify and confirm. Here are some examples adapted from Heffer (2005: 112).

Narrate	What happened around noon? Did anything happen when he came? Tell us what he did next. Did he say anything to you?
Specify	Where were you when you noticed the car? Who was in front? Do you mean this side or the far side? Did you agree to go with him?
Confirm	Is that a Horeston? You had the horse on the beach. You admitted that you had sexual intercourse. The knife just found itself in your hand, did it?

The further down the table you progress, the more control the examining lawyer exerts over permissible answers. Notice, incidentally, that some of the questions are not constructed directly as interrogatives.

During examination-in-chief (direct examination), simple **polar questions** can elicit answers that involve considerably more than a yes/no answer:

Q: Is demolition work at height dangerous?

A: Yes. It is a very hazardous activity. Over half of all fatal accidents in the construction industry every year are due to falls from a height. Up to about 10 per cent . . . (*plus a further 50 words*)

Q: Is this known within the industry?

A: In my experience, it is widely known within the industry. There are a number of guidance documents . . . (*plus a further 30 words*)

(Heffer 2005: 115)

- Polar questions asked during cross-examination, rather than during examination-in-chief, usually only generate a yes/no response, with no follow-up comment. Why should apparently identical question types be answered so differently in different sections of a trial?
- How far do you think Grice’s theory of cooperative exchanges in communication could be used to explain this difference?

Controlling a witness during cross-examination

Consider the following, often discussed example of a cross-examination question put to William Cadbury, a senior member of the Cadbury's chocolate company when the company sued the *Evening Standard* for defamation in 1909 in respect of statements concerning Cadbury's exploitation of slaves. Edward Carson KC posed a question constructed so that a reply, whether in the positive or negative, would be seriously damaging:

Have you formed any estimate of the number of slaves who lost their lives in preparing your cocoa from 1901 to 1908?

★ Activity

- What would the effect be of either of the direct answers to this question?
- If you were William Cadbury, how might you have answered the question to avoid problems associated with either of the two alternative direct answers?

In fact, Cadbury reportedly answered, 'No, no, no'. The force of the question, it appears, was not in the speech act of asking, or the response of estimating, but in an embedded presupposition: that slaves lost their lives preparing cocoa during the years referred to. Such presuppositions cannot be negated or overridden by a yes or no answer. While the way in which such a question is constructed may be dependent on the facts of a case, such examples illustrate how a cross-examination question can be used to control a witness by eliminating options otherwise available in answering.

Silence as control

Now consider an example taken from research into courtroom interaction by Gregory Matoesian (1993). The extract shows how a cross-examining lawyer (DA) strategically delays the start of their next turn in order to convey a silent comment on an answer given by an alleged rape victim (V). In Matoesian's transcription (a linguistic transcription, rather than the very different format of an official court transcript; for discussion, see Gibbons 2003; Eades 2010), underlining indicates stress or emphasis in a word; a colon marks a prolonged sound; and capital letters indicate sounds uttered with increased volume. The number in brackets indicates the duration of a silence, measured in seconds.

DA: Is it your testimony::: (1.0) under swor:::n(.)
 >SWORN< oath (0.8) that in four hours at the Grainary
 (.) you only had two drinks?
 (1.2)
 V: Yes
 (45.0)
 DA: Linda . . .

(Matoesian 1993: 145)

Activity 

- ❑ What effect do you think is created by such an extremely extended period of silence (45 seconds)?
- ❑ Matoesian (1993: 147) argues that ‘access to linguistic resources by the cross-examiner and witness is asymmetrical’. Silence is not usually considered a ‘linguistic resource’, although conversation analysis has shown that in some circumstances it is. How far is silence here an example of a linguistic resource being strategically used?

Reformulation

As described in Unit B5, lawyers may rephrase a witness’s words in favour of their own position during questioning. Consider the following two examples.

EXAMPLE 1

C: Good, but I am also . . .

W: (interrupts) I did not tell them everything.

C: Yes we shall get to that. You did not tell them everything, did you, so you *concealed* certain things did you not?

W: I know I only told them, I don’t know, I did not. . . . I don’t know.

(Lerm 1997: 172)

EXAMPLE 2

C: Were they in fact *a Protestant mob* that was attempting to burst out into Divis Street?

W: Prior to sending this message I must have known there was *a crowd of people* there.

(Atkinson and Drew 1979: 111)

Activity 

- ❑ Comment on the **reformulation** by the lawyer in example 1 and by the witness in example 2. What appears to have been the intended effect in each case?
- ❑ Do lawyers and witnesses have equal opportunities in using reformulation as a persuasive device?

Pre-ruling withdrawal

In our next example, the cross-examining lawyer asks a series of questions, including one susceptible to objection that he readily withdraws himself even before the judge rules on the objection. Double brackets ‘[[’ in the transcript indicate utterances that begin simultaneously; single brackets ‘[]’ denote a period of overlapping talk. Parentheses ‘()’, when blank, indicate speech that is inaudible; when the brackets enclose words, there is doubt in the transcription.

DA: Did you have any marijuana?
 (.)
 V: No.
 (.)
 DA: You have used marijuana have you not?
 (.)
 V: Yes I have.
 (1.8)
 DA: You enjoy its use do you not?
 PA: Objection yer honor (that isn't relevant)
 [[
 V: (
 DA: I'll withdraw that () yer honor
 []
 J: Sustained

(Matoesian 1993: 114)

★ Activity

- ❑ Why do you think DA withdrew his question so readily? What strategy might underpin a decision to do so?
- ❑ We have discussed how cross-examination questions typically do not seek new information, but are used for other purposes. Even though the question above does not solicit an answer, do you think the question objected to here still served a purpose in DA's construction of his case?

Leading jurors to a conclusion

The closing argument is the final opportunity for lawyers to engage in persuasion. It is also important because of its **recency effect**: it will remain more vivid than previous material. Below is an excerpt taken from a closing argument delivered by defence counsel Clarence Darrow in a famous 1924 American case, *State of Illinois v. Nathan Leopold & Richard Loeb*. Leopold and Loeb were prosecuted for murdering a 14-year-old boy, Robert Franks, in Chicago. They both confessed to the crime. The trial was therefore not a jury trial; and the closing argument was accordingly a plea to convince Judge Caverly to impose life imprisonment rather than capital punishment. The original speech was 12 hours long; we only look at a very small fragment from it here (a full transcript is available online; see the further reading and resources section for details).

Many may say now that they want to hang these boys. But I know that giving the people blood is something like giving them their dinner: when they get it they go to sleep. They may for the time being have an emotion, but they will bitterly regret it. And I undertake to say that if these two boys are sentenced to death, and are hanged on that day, there

will be a pall settle over the people of this land that will be dark and deep, and at least cover every humane and intelligent person with its gloom. I wonder if it will do good. I marveled when I heard Mr. Savage talk. Mr. Savage tells this court that if these boys are hanged, there will be no more murder. Mr. Savage is an optimist. He says that if the defendants are hanged there will be no more boys like these. I could give him a sketch of punishment, punishment beginning with the brute which killed something because something hurt it; the punishment of the savage; if a person is injured in the tribe, they must injure somebody in the other tribe; it makes no difference who it is, but somebody. If one is killed his friends or family must kill in return.

You can trace it all down through the history of man. You can trace the burnings, the boilings, the drawings and quarterings, the hangings of people in England at the crossroads, carving them up and hanging them, as examples for all to see.

We can come down to the last century when nearly two hundred crimes were punishable by death, and by death in every form; not only hanging that was too humane, but burning, boiling, cutting into pieces, torturing in all conceivable forms.

I know that every step in the progress of humanity has been met and opposed by prosecutors, and many times by courts. I know that when poaching and petty larceny was punishable by death in England, juries refused to convict. They were too humane to obey the law; and judges refused to sentence. I know that when the delusion of witchcraft was spreading over Europe, claiming its victims by the millions, many a judge so shaped his cases that no crime of witchcraft could be punished in his court. I know that these trials were stopped in America because juries would no longer convict.

Gradually the laws have been changed and modified, and men look back with horror at the hangings and the killings of the past. What did they find in England? That as they got rid of these barbarous statutes, crimes decreased instead of increased; as the criminal law was modified and humanized, there was less crime instead of more. I will undertake to say, Your Honor, that you can scarcely find a single book written by a student, and I will include all the works on criminology of the past, that has not made the statement over and over again that as the penal code was made less terrible, crimes grew less frequent.

- ❑ Describe the main linguistic register of this excerpt. Give examples of words, phrases and grammatical constructions to support your description. (You may find it useful to refer to concepts and terminology introduced in Thread 2, or to consult Halliday and Hasan (1976) or Biber and Conrad (2009).)
- ❑ Why does Darrow refer to the 'history of man', a very broad topic indeed given the circumstances? What overall point is he making by means of this reference?
- ❑ Darrow criticises capital punishment as a way of exacting retribution. What are the main features of the rhetorical strategies he uses in making this criticism?

Activity 