# Language and Law

A resource book for students

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# Chapter C4

## Restricted Verbal Interaction in Court



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# C4 RESTRICTED VERBAL INTERACTION IN COURT

In this unit we look at some examples of constraints on interaction in courtroom discourse, especially examples involving question-and-answer routines between lawyers and witnesses and the funnelling of witness narratives towards legally relevant points.

## Identifying presuppositions in legal questions

Given the structure of an adversarial trial (see Unit A4), the most frequent direct speech act lawyers routinely perform is asking questions. Central to advocacy training, accordingly, is how to use question forms, both individually and in strategic combinations, in order to achieve persuasive effects as well as elicit answers.

To understand questioning in courtroom evidence, it is necessary first to see the difference between different types of questions, especially loaded and leading questions.

- ❑ **Loaded questions** are questions that contain **presuppositions** that have not been established (e.g. 'Do you *still* beat your wife?' presupposes previous beatings).
- ❑ **Leading questions** are questions that predispose the addressee towards giving a certain answer. Such questions may directly suggest the answer the examiner wants, making the addressee feel that words are being put into their mouth (e.g. 'You rushed towards him, didn't you?').

The same question may be both loaded and leading. While loaded questions can be objected to by either side in an adversarial trial, this is not the case with leading questions. In evidence-in-chief, such questions are not permitted except in a small number of circumstances: on preliminary matters that precede questions about the facts in issue (e.g. the witness's name and address); on matters not in dispute; when dealing with a fact already in evidence; and where leave has been granted to treat the witness as hostile. In cross-examination, on the other hand, leading questions are permitted as a standard type of question, because of the different purpose of the examination (see further discussion on this in Unit B5).

Even though it is the witness who is seemingly in the spotlight during examination and cross-examination, it can be the questions posed to that witness which influence jurors' impression most. This is why questioning, which appears to be a form of elicitation entirely dependent on the answers it extracts, can also function as a form of persuasion. As described by Matoesian (1993: 151), 'loaded or leading questions may register strong impressions about evidence, regardless of the answer, because they frame expectations about both the forthcoming answer and the question's truth content'.

Consider each of the following questions:

1 What has your husband done to you to make you want to kill him?
2 You immediately left the scene after the collision, correct?
3 Are you sorry you caused such a terrible tragedy?

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4 Was he drunk when you stabbed him?
5 As a matter of fact, you shared the information with him, didn't you?
6 You left work at eleven?
7 Was it a hot day?
8 Is it not true that you read and deleted that email?
9 Did you realise that your gun was loaded?
10 You didn't actually see anything, did you?

**Activity**

- ❏ Using the brief definitions given above, identify loaded and leading questions in this list, and describe why you consider each to be loaded or leading. Keep a note of difficulties you encounter in deciding; you can use the difficulties you observe in refining the informal tests you develop for distinguishing between the two.
- ❏ To what extent is context important in deciding whether a question is loaded, leading, or neither? Illustrate by looking more closely at one or two of the examples.
- ❏ What sort of presupposition or blame attribution might jurors register in their minds simply after listening to each of these questions, even without hearing any kind of answer?
- ❏ What kinds of expectation, prejudice or imagined scenario are such impressions based on?

## Understanding narrative restrictions in courts

In Unit B4, we explore how although witnesses are expected to give their testimony in their own words, often they do not get to narrate their story freely. There are two reasons for this. First, their turns are limited to responding to questions. Second, further restrictions are imposed on what they can say in the answers they give. Some of those restrictions are outlined in a widely cited legal and anthropological field study by William O'Barr and John Conley, which has been revisited in a number of influential later publications and commentaries:

> Our analysis of our earlier data repeatedly confirmed the intuition that lay witnesses come to formal courts with a repertoire of narrative customs and strategies that are often frustrated, directly or indirectly, by the operation of the law of evidence.
>
> (O'Barr and Conley 1990: 101)

The O'Barr and Conley list describes a number of legal restrictions imposed on witnesses in most American courts. These include:

1 A witness may not ordinarily repeat what other persons have said about the events being reported.

2 A witness may not speculate about how the situations or events being reported may have appeared to other people or from other perspectives.
3 A witness may not ordinarily comment on his or her reactions to, or feelings and beliefs about, events being reported.
4 In responding to a question, a witness is ordinarily restricted in digressing from the subject of the question to introduce information about something he or she believes critical as a preface or qualification.
5 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.
6 Value judgements and opinions by lay witnesses are generally disfavored.
7 Emphasis through repetition of information is restricted.
8 Substantive information may not be conveyed through gestures alone.
9 A witness is generally forbidden to make observations about the questions asked or to comment on the process of testifying itself.

These restrictions, O'Barr and Conley argue, are required by the statutory or common law of evidence or by unwritten custom followed in formal courts. But they query (O'Barr and Conley 1990: 102) how appropriate such restrictions are, because our ordinary ways of speaking suggest that each forbidden practice is common, if not essential, in everyday narration:

> It appears that frustration and dissatisfaction are inevitable results of such constraints. One federal judge has commented at some length on the fact that litigants frequently feel dissatisfied because the trial process does not afford them a fair chance to tell their stories (Weinstein 1977). He reports that greater satisfaction for litigants in small claims procedures seems to be related to the absence of formal rules of evidence. On the basis of his experience, Weinstein believes that
>
> > allowing litigants to introduce evidence relatively freely and to rely on hearsay, provided the opponent can call the declarant and otherwise attack him with a minimum of barriers, tends to tranquilize him. This truism is demonstrated repeatedly in magistrates' courts where a complaining witness pours out his heart to an attentive judge and then, having had his day in court, withdraws the complaint (1977: 521).

**Activity**

- ❏ Do you agree that the listed prohibitive acts seem common in everyday speech? Illustrate each in one or two likely contexts. What functions do they serve in such contexts?
- ❏ Now consider each restriction in the specific context of giving evidence. What do you think the rationale is behind each restriction?
- ❏ Might it be better if adversarial legal systems allowed more 'storytelling' by witnesses, then filtered what was said in terms of **probative value**, rather than preventing material being introduced in the first place?

❑ Is the answer to the previous question purely a matter for the law of evidence? Or does it also depend on how important litigant satisfaction is for a legal system (i.e. an aspect of the wider legitimacy of proceedings rather than specifically of law)?

## Cooperation in cross-examination?

Implied meanings researched under the heading of **implicature** in pragmatics help to explain how we mean more than we actually say (see Levinson 1983: Chapter 3). For example, A asks B: 'Did you see my email?' and B responds: 'I've just finished work'. Even though A and B appear to be talking about completely different topics, A may have no difficulty understanding B's reply as suggesting she has not had time to read her emails yet, having been at work.

The philosopher Paul Grice, whose work has given rise to a great deal of research in pragmatics (Grice 1989), suggested that conversation is guided by an implicit principle, the cooperative principle (CP), which operates on the basis of four maxims: quality, quantity, manner and relation (the last of these sometimes referred to, and later developed into a specific theory, as relevance; Sperber and Wilson 1995). Put simply, for efficient communication to take place, Grice argues that speakers will be presumed to 'speak sincerely, relevantly, and clearly, while providing sufficient information' (Levinson 1983: 102; see the rest of that chapter for further explanation and examples). Grice did not assume that people follow these maxims all the time, though he suggests that much that passes unnoticed in everyday conversation can only be explained on the basis that the CP is widely followed. It is when maxims are apparently not followed that implied meanings are retrieved, as the hearer infers an intended meaning by assuming that the CP *is* still being adhered to at a deeper level. B's apparently irrelevant response in the example above prompts A to draw the inference that B's work prevented her from checking her email (an inference that may depend on other surrounding assumptions such as that B either does not have email on her phone or is not able to look at her phone during work, etc.). The overall coherence of A and B's conversation is maintained by suitable inferences.

The question arises, however, how far a presumption such as that of the CP can apply in an adversarial setting such as a courtroom, whose structure and purpose might appear to discourage cooperative effort among speakers. This question has been addressed at two different levels: in legal theory (jurisprudence), for example by legal philosophers such as Andrei Marmor (see Unit D7 for discussion); and through observation and analysis of courtroom examination of witnesses and cross-examination in trials (Penman 1987).

Penman reports that all the interactions he observed could be construed as being congruent with Grice's CP. However, the author argues that the data nevertheless do not provide support for the assumptions underpinning Grice's model, since whatever cooperation was observed did not occur naturally but was coerced by the court through rules of allocated turn-taking. Equally important, Grice's account of conversational

inference does not explore the purposes of verbal interaction other than information exchange, or relationships between conversation participants other than those involved in a slightly idealised model of conversation.

An example of courtroom interaction can illustrate this point. The extract below is taken from a negligence case in Hong Kong, reported in Ng (2009: 112–13). A former ballerina (W) sought damages from her previous employer for a career-ending injury resulting from a slippery floor. C is the defence counsel.

C: Do you agree that people who remain as corps de ballet dancers for up to five years or more may remain at that level of corps de ballet dancers for five years or more?
W: Yes.
C: And they come to a point where there is no progress to a higher level at coryphée and they just leave the company. Do you agree?
W: Yes.
C: And do you also agree that people offered solo spots, as you say you were in *Pakita*, might sometimes not be promoted?
W: Yes.
C: Now, Ms Charles (ballet instructor) has also said that, although you have a good physique, you have little stage personality. Again, is it your evidence that she is being dishonest when she expresses that view, or are you prepared to accept that that is a view she expresses in good faith?
W: Yes.
C: You agreed that view is expressed in good faith.
W: Yes, on this point.
C: And do you not agree that this aspect of little stage personality is in other words talking about a dancer's charisma, which is that intangible thing beyond technique?
W: That would depend on the number of times of performance a dancer has got. A dancer would be able to acquire such stage personality through the performances.
C: That's not correct. As a matter of common sense, that's not correct, isn't it? In reality, some people have charisma and some don't. Some don't and some acquire it; some don't and some never acquire it. That's the reality, isn't it?

[W tries to say something]

C: Madam Chan, please wait for the question before you answer.
C: Do you agree that's the reality of the situation?
W: Yes.
C: I'd like to move to another area if I may.

**Activity**

- ❏ Why do you think many of C's questions are hypothetical, or about ballet dancers in general, rather than about W herself? What is established by the technique of starting with general statements in question form?
- ❏ Express as a single proposition the overall argument that C's chain of questions builds up to.

- ❏ Does W show signs of awareness of what C is trying to suggest? If so, identify where and how her words show this. Does she have any opportunity to defend herself against such implications?
- ❏ Why do you think C interrupts W?
- ❏ Towards the end of the excerpt, why does C intervene to move on to another area so quickly?
- ❏ Now consider the excerpt in terms of Grice's CP. Do this by looking at each turn. How far can a Gricean framework account for the interaction between C and W?

## Making your own case: the experience of unrepresented litigants

For reasons of legal consistency (but with further consequences), an unrepresented litigant is held to the same evidentiary standards as a lawyer in a trial. The verbal behaviour of such a litigant, however, will deviate from the lawyer's professional norm. To take a minor example, such a litigant may mistakenly address the judge directly, using 'you', a style of address common in most social settings but highly unusual in a courtroom. Such an error is a breach of etiquette but may not have serious consequences.

But there are other kinds of error that may have serious consequences. At trial, **objections** are properly initiated only for evidential or procedural reasons. However, Leung (2015) provides examples, also from Hong Kong, where unrepresented litigants have attempted to use 'objection' as a means to express disagreement:

### *Example 1*

D: Mr. X (plaintiff) never gave me the document –
P: (stands up; interruption) I object!
J: Don't fight for a turn! You sit down. He was talking!

The problem here concerns the plaintiff P's transgression of the court's turn-taking system. In another example, the plaintiff also transgresses, but by an almost opposite strategy: seeking a turn by politely asking for one.

### *Example 2*

P: Your Honour, can I talk now?
J: Ask all your questions in one go later. Take notes so that you won't forget!

Faced with this remonstration, P could only explain that he was old, forgetful and illiterate and so could not take notes.

**Activity**

- ❑ Discuss P's verbal behaviour in example 1. Where do you think he got the idea of saying 'I object!' from, as a way of intervening?
- ❑ The principle of orality, or primacy of speech, has traditionally been cherished in common-law systems. But to what extent does this example suggest a modern adversarial courtroom is suited to the needs of an illiterate advocate?

The following exchange shows how unrepresented litigants often see procedural requirements mainly as obstacles to their narration.

### *Example 3*

J: You are going to testify in a moment. Will you use the witness statement you submitted to the court?
R: What?
J: The witness statement you handed to court – will you be making use of it?
R: What?
J: You handed the court a witness statement – will you use it?
R: Statement?
J: Use the witness statement or not?
R: He does not want it. (Switches to start narrating his story)
J: Wait, Mr. X, don't start yet . . .

Lay advocates are also responsible for cross-examining witnesses. Cross-examination is a highly specialised genre, however, and unrepresented litigants often fail to see the point of allowing their opponent to speak.

### *Example 4*

J: You can now cross-examine, Mr. X.
R: (respondent): What?
J: Ask him questions!
R: (to applicant): Eh then, you say you don't rent it (a property) to me, you say it!

Our final example is also taken from cross-examination. The plaintiff seemed to have difficulty keeping his questions legally relevant.

### *Example 5*

P (to D): Do you sometimes look for part-time jobs?
J: How is that related to our case?
P: He said he is poor!
J: Whether he is poor or not has nothing do with this case.

Activity

- ❏ 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.

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