

Language in the American Courtroom

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Abstract

One of the most promising connections that linguistics can make to other fields is to the legal arena, primarily because much of the work in law is done *in* language and it is often largely *about* language, either spoken or written. For example, lawsuits, indictments, pleadings, briefs, legal opinions, and, of course, laws and statutes are all revealed and preserved in written language. Courtroom appearances and testimony, although presented orally, end up in written form and even oral evidence gets transformed into written transcripts. We begin with the observation that language and law are close bedfellows.

1. *The Beginnings*

The development of any new area of any discipline usually begins when practitioners of that field get involved with it in a noticeable way. In forensic linguistics, this development started when various linguists made appearances in the courtroom setting. But even ‘courtroom setting’ has different implications and meanings. For example, in Europe, it is often judges who call upon experts to analyze evidence. Expert reports are read by judges, who may, but usually do not, ask the experts to testify about their reports at trial. This contrasts with the common procedure in the United States, where experts are called by one side of the case and give testimony on behalf of that side.

Whether the European or American system obtains, linguists appear to have begun getting involved in court cases in earnest sometime around the early 1980s. Hannes Kniffka wrote expert linguistic reports in Germany during that period (Kniffka 1996), as did Malcolm Coulthard in England. Roger Shuy has testified at US trials since 1979. Public records are not available about the use of forensic linguists in other parts of the world but it is likely that they came later than the early 1980s.

History is unclear about exactly when linguists began to work with lawyers on specific law cases, but we have written evidence that one of the first Western linguists to get involved was Jan Svartvik, who published an analysis of the altered police statements in the case of Timothy John Evans, who was hanged 15 years earlier (and posthumously pardoned) for murdering his wife and baby (Svartvik 1968). By the 1970s and 1980s many linguists had gotten involved in law cases in both Europe and the United States, and

today this group is growing rapidly all over the world. There is now an International Association of Forensic Linguists (<http://www.iafl.org/>), which has a biannual journal, *The International Journal of Speech Language and the Law*. Regional associations are appearing as well, as in Europe and China.

Commonly, when a new field of study develops, it takes several decades for a comprehensive introductory text to be written. Sociolinguistics, for example, now has several good introductions in print but it took some 20 years for the field to sort itself out enough for this to happen. Today there are three introductions to forensic linguistics available (McMenamin 2002; Gibbons 2003; Olsson 2004). All contain useful introductions to parts of the field but by no means cover all of it. Because the field is still relatively new, it would appear that the breadth of forensic linguistics has not yet been fully represented.

2. Definitions

The term *forensic linguistics* has grown to be the common current name for such work. One could argue that the field is really applied linguistics or, for that matter, simply linguistics, because in order to be an expert witness, as the courts require, one should be an expert in the field upon which one testifies. The field is linguistics. An expert is someone with advanced training and skill, usually with a publication record as well. To some, it can seem a bit odd to call the field forensic linguistics since this identifies only the content area to which linguistics is applied. But the name has stuck just the same.

Forensic linguistics covers a wide range of topics, including the language used in trials by judges, lawyers and witnesses; the language of the law itself; the language used in civil cases; and the language used in criminal cases. Linguists have testified and consulted in virtually all types of civil cases, including trademark disputes; product liability (usually on warning labels or hazard statements); deceptive trade practices; discrimination by age, gender, race, and employment; defamation (slander and libel); business fraud; contract disputes (including the fertile area of insurance policies); and copyright infringement. Criminal cases in which linguists have testified or consulted include confessions, police interrogation, child sexual abuse interviews, perjury, adult sexual misconduct, price fixing, money laundering, illegal purchases and sales, and trade secrets. Some cases overlap the usual civil/criminal categories, such as authorship analysis and speaker identification.

Linguists call on their training in the tools of phonetics, phonology, morphology, syntax, semantics, pragmatics, speech acts, discourse analysis, sociolinguistics, dialectology, lexicography, language learning, and the processes of language change, depending on the nature of the law case.

In civil cases, these tools are used to unravel or identify ambiguities, to analyze words and expressions revealing discrimination, to determine potential meanings of words and expressions used, and to show linguistic similarity or differences in cases involving trademarks and alleged copyright infringements.

In criminal cases in which tape-recorded oral language is part of the evidence, the linguist's first job is to be certain that any written transcripts accurately represent the spoken language. Because many such tapes are of conversations, confessions, and police interrogations, discourse analysis is helpful to reveal language structures and features that the jury might easily miss; to assist the jury keep track of the themes, topics and agendas of the speakers; to point out ambiguities; to identify conversational strategies of the speakers; and to show how clues to the intentions of speakers are revealed through what they say (Shuy 1993, 2005). For example, the topic of 'investment' was crucial in the case of *US v. John Z. Delorean*. Analysis of the 63 tapes made by undercover agents in an effort to get Delorean to discuss his alleged 'investment' in drug trafficking showed that when Delorean used this term, his reference was to getting investors for his car company but when the agents used this term, they referred to Delorean's possible investment in their ostensible drug enterprise. At the end of the government's most crucial tape Delorean had agreed that investment 'was a good thing.' The prosecution, believing that they now had him, indicted him and brought him to trial. At court, discourse analysis of all 63 tapes showed that Delorean and the agents were on separate topics.

3. *General Uses*

Why do the courts need a linguist in the first place? Here is where the 'applied' part of applied linguistics makes sense. Lawyers, judges and juries speak and write the language but cannot see it the way specialists can. The analogy of a dentist's X-ray suggests itself. The patient sees the same X-ray that the dentist sees but the dentist is trained to see structures and features that go unnoticed by the patient. Those who use language expertly, such as lawyers and judges, simply do not know its complexity. They can easily miss important features that go by quickly in normal conversation or interrogation, and they often pay no attention to things that linguists know about intonation, syllables, grammatical scope, variability, or felicity conditions. The forensic linguist's first task is to make these and other things clear to the attorneys with whom they work. It is a lot like teaching introduction to linguistics to intelligent students. When it comes to teaching these things to jurors, the task can be even more difficult. One has to do this from the listener's perspective, starting from where they are and not talking down to them while explaining such things as vowel fronting, distinctive features, conversation strategies, or negative scope in ways that they can understand.

4. *Uses of Linguistics in the Courtroom*

As mentioned above, linguistic expertise is relevant and useful in three areas of the legal context: (1) the language used by lawyers, judges and witnesses,

(2) the language used as evidence in civil disputes, and (3) the language used in criminal case evidence. These categories are not always that discrete, however, because some types of law cases can be categorized as either civil or criminal. Defamation cases in Germany, for example, are often treated as a criminal matter, whereas in the United States, they are almost exclusively a civil tort. Likewise, authorship and speaker identification can occur in either civil or criminal cases. Following is a brief and incomplete summary of the types of work linguists do in these areas, limited only to books on the subject.

4.1 THE LANGUAGE OF LAW

An early book dealing exclusively with this topic is David Mellinkoff's *The Language of Law* (1963), who is among the first to point out that the legal lexicon is made up of a great deal of jargon (he calls it *argot*) that labors under the false assumption that legal language is precise. If it is truly the case that the language of laws and statutes is precise, one wonders, along with Mellinkoff, why there are so many lawsuits over meanings in such documents as contracts, agreements and jury instructions, all of which are written by lawyers.

Mellinkoff opened the door to later analysts and critics of legal language, including William O'Barr, whose 1982 book, *Linguistic Evidence: Language, Power, and Strategy in the Courtroom* (1982) describes his research on lawyers' use of language in legal tactics, their presentation style, and how they acquire and amass power. *Just Words: Language and Power*, by John Conley and William O'Barr (1998) extends the study of courtroom power further, pointing out lawyers' dominance strategies through the use of silence, question forms, topic management, evaluative commentary and challenges to witnesses. The authors also deal with the disadvantage of women in mediation hearings and the masculine control of law in general. Peter Tiersma (a law professor with a PhD in linguistics) wrote *Legal Language* (1999), a current classic in legal language history and analysis. Tiersma gives a descriptive history of how Anglo-American legal language developed and continues to this day, including the efforts to try to bring about clarity and precision of meaning, often unsuccessfully. It also contains valuable suggestions for reform in this area.

4.2 THE LANGUAGE OF JUDGES AND LAWYERS

In addition to these important overviews of legal language, several linguists have written books about the language of judges. Conley and O'Barr's book, *Rules Versus Relationships: The Ethnography of Legal Discourse* (1990), describes research on the efforts of litigants to make their case in small claims courts. Those who follow the rules that reflect the language of the courts are successful. Those who describe their problems using the language of broad social terms tend not to succeed. Lawrence Solan (also a law professor

with a PhD in linguistics) wrote his *The Language of Judges* (1990) to show how various linguistic features and terms are handled by judges, including 'plain language,' the 'and/or' rule, and how antecedents and pronouns are used and interpreted by the courts. For example, Solan outlines the confusion about the words 'and,' 'or,' and 'and/or' in the laws of various US states (45–55). Susan U. Phillips' book, *Ideology in the Language of Judges* (1998), is an ethnographic study of the power of judges who apparently believe that they simply follow and apply the law in a neutral and apolitical way but who still fall deeply into individual interpretation of it.

The language of lawyers during trials has also been researched by forensic linguists. Gail Stygall's *Trial Language: Differential Discourse Processing and Discursive Formation* (1994) analyzes an Indiana trial, including juror qualification, preliminary instructions, opening statements, questions and answers, final arguments, and jury instructions. In a similar manner, Janet Cotterill's *Language and Power in Court* (2003) describes how story telling, framing, cross examination, and reframing worked in the famous O. J. Simpson trial.

4.3 THE LANGUAGE OF JURY INSTRUCTIONS

If the language of law itself and the language used by lawyers and judges during trials is different from that to which the nonlegal world is accustomed, judges' instructions to the jury should provide a golden opportunity for them to communicate clearly these unfamiliar expressions and concepts to laypersons so that they can properly do their job as triers of the facts. Unfortunately, such instructions are still far from clear. For example, in American capital murder cases involving death penalty statutes, juries have to consider both the *aggravating* and *mitigating* circumstances. Tiersma (1999: 234–40) shows how this process is seriously flawed, since most 'courts assume that jurors understand these terms in the legal sense.' Tiersma notes that in at least ten capital murder cases in which jurors requested definitions of these terms the judges told them to use the commonly accepted and ordinary meanings of these words. The legal definition of *aggravating* includes acts such as torturing the victims and the defendant's past history of violent crime. The legal definition of *mitigating* includes evidence of remorse, an unhappy childhood, or mental problems. Even less helpfully, when juries request such definitions, the judges often simply repeat the formerly given instructions. Gibbons (2003: 174) points out that jury instructions are intended for two different audiences at the same time. That is, they have to communicate to jurors but still be worded in ways that will withstand legal criticism and appeals based on that wording. Stygall (1994: 92) points out that jurors have problems understanding instructions because of the form of the instructions themselves and because of the lack of exemplification of difficult legal concepts. Jurors even have trouble distinguishing one instruction from another and have trouble discovering any kind of relevant

ordering principles. A few linguists have carried out research on jury instructions (Charrow & Charrow 1979; Elwork et al. 1982) but there is much more work that linguists can do in this area.

Although the work is certainly a helpful beginning step, research on the language used by legal professionals, such as lawmakers, judges and lawyers, is far from complete, as the authors of these works admit. But at least some of the parameters for future studies have been well set.

4.4 THE LANGUAGE OF CIVIL CASES

One might think that hundreds of years of trying to accomplish clarity and precision in the writing of documents such as business contracts, warning labels on products, employment agreements, product names, and industrial work proposals would lead to fewer rather than more lawsuits. This has not been the case. It might be argued, perhaps with some justification, that society has become more litigious, or that we now have more lawyers than ever before to seek out new lawsuits, or that the art of clear writing has descended to depths hitherto unknown. But these hypotheses do not give us the whole picture. However, expert lawyers may be skilled in the law and in using language to persuade juries to accept their positions, they do not have the expertise in linguistics to help them to analyze and discover how to fully address topics that linguists know about, such as language ambiguity, references, and inferences. Most civil cases are duels over words, yet many lawyers come to these duels with blunted swords. And even when they recognize such language phenomena, they are ill equipped to explain how they work. For this, they can use the help of linguists, for a scientifically sound explanation trumps, amplifies, or at least assists persuasive rhetoric and understanding the language used in the legal context.

Eventually humans discovered that writing down their spoken language, stories, history, religious ideas, and legal affairs and actions could make them more consistent and permanent. In the legal arena, written language was first used to record what previously had been agreed upon orally. Later, shortly after about 1600, the focus was turned to the written document itself, leading to the *parol evidence rule*, which, as Tiersma (1999: 37) points out, prohibited any reference or evidence about discussions that led up to the written contracts. Some positive effects of this ensued, such as reducing the opportunity to commit perjury about how the contract was understood as well as the unstable reliance on memory (Solan 2001, 94). But can we always rely on the written word in such cases? Solan (2001: 94) argues that in many cases it may be necessary to discover the context in order to determine sensibly any language that at first glance seemed clear, since meaning is inevitably context dependent to some degree. The debate over parol evidence continues to this day. When a contract is judged to be ambiguous or incomplete, for example, lawyers can call on linguistic analysis to help unravel meaning. It is obvious that linguists cannot, and should not,

claim to get into the minds of those who wrote and read the contract in order to try to fathom what the writers intended or what the readers understood. But analysis of the text of a message enables linguists to determine the range of possibilities that the text could mean and the range of possible understandings that readers could have of that language, no matter what the signers thought or believed when they signed it.

Tiersma (1999) outlines some of the major areas in which improvements can be made in contracts. Words and sentences can be shortened, active verbs can replace passives, technical terms and jargon can be avoided, Latin and foreign language words and expressions can be scuttled, definitions can be added, sentences with more than one conditional clause can be eliminated, and expressions that cite exceptions to exceptions can be clarified and simplified. Legal language, like other forms of jargon, is perfectly acceptable when used internally, but it can become very troublesome when used outside the context of the inner group.

The major issue for linguists in a court case is not necessarily to improve the language of contracts, but to figure out what the meaning is. One thing a linguist easily can say about this is that the text is often written in a legal register that nonlawyers are not likely to comprehend, one that may have led to the dispute in the first place. For example, the Montana Department of Revenue recently asked me to help the staff revise that state's tax forms and instructions. The department had spent many hours answering taxpayers' questions about the meanings of various items on the forms. The state was also involved in litigation about what some of the tax forms intended, a sure signal that clearer texts were needed. A brief examination made it apparent that a major problem was that much of the text was taken directly from the statutes, resulting not only in legal problems but also the expenditure of departmental time and effort trying to clarify things for confused taxpayers. As a result, this was not a cost-effective situation for the state. At the federal level, many similar examples of writing in the wrong register and the lack of textual clarity that lead to litigation against the Social Security Administration, Medicare/Medicaid, the US Food and Drug Administration and the US Occupational Safety and Health Administration are discussed in Shuy, *Bureaucratic Language in Government and Business* (1998a). Forensic linguistics also has a role to play in preventing litigation from happening in the first place.

Civil cases involving contracts often call for the use of such linguistic tools as semantics, grammatical referencing and scope, and discourse structure. The language of insurance policies is one frequent area where problems in these areas occur. Writers of such policies may work very hard to make them clear and precise, but sometimes they are unsuccessful, often because the writers try to cram into few words what longer texts might make even clearer.

Contract disputes, of course, are not the only area of civil law in which linguistics can play an important role. In product liability cases the language of warning labels offers many opportunities for the use of linguistic expertise.

Such warnings often fail to be explicit about the dangers of the products, instead containing indirectness or inferences. They also sometimes place the major hazard deeply within the discourse, defusing its potential effectiveness as a warning to consumers. Some are written in the legal or medical registers, containing unfamiliar lexicon and deeply embedded syntax, rather than being consumer friendly. Others fail to make clear the association of the dangers with the product itself, choosing instead to describe the potential illness or disease in detail but leaving out its explicit association. The linguistic tools of semantics, discourse analysis, pragmatics and speech acts can help identify such lack of clarity in the courtroom.

Lawyers handling trademark cases have been turning more and more to linguists to help them with disputes about whether a trade name can be protected. The basic categories of trademarks are: generic, descriptive, suggestive, and fanciful or arbitrary. Generic refers to common dictionary words used to describe a class of objects, like cheese, oil, salt, or cereal. Descriptive words describe the qualities, ingredients or characteristics of a product (e.g., Holiday Inn, Tasty Bread, or Tender Vittles). Suggestive words are said to require some operation of the imagination to connect the name with the product (e.g., Greyhound bus or Tide laundry soap). Fanciful marks are words coined for the express purpose of functioning as a trademark (e.g., Kodak cameras, Clorox bleach, or Xerox printers). Arbitrary marks are words commonly used in the language but which are arbitrarily applied to a product in such a way that it is not descriptive or suggestive (e.g., Nova television program, Camel cigarettes, or Apple computers). Most trademark cases involve the sometimes-murky boundaries between generic and descriptive or between descriptive and suggestive. The basic questions involve whether the name of the product that held the mark first (senior user) and that of the more recent product (junior user), such as the senior Healthy Choice and the junior Health Selections, sound alike, look alike and convey the same meanings. As illustrated in Shuy, *Linguistic Battles in Trademark Disputes* (2002), linguists who are asked to work on these cases can make effective use of their expertise in phonetics, phonology, morphology, syntax, semantics, pragmatics, and lexicography.

4.5 THE LANGUAGE OF CRIMINAL CASES

Prior to the 1960s it was extremely difficult for the courts to prove certain types of criminal activities unless the law enforcement officer was present when the crimes took place or unless people who witnessed them reported and testified about them. Tape recording actual events as they happened changed all this. Federal wiretapping and electronic surveillance became law in 1968 (Blakey 1993) and federal and local law enforcement agencies began setting up sting operations in which undercover police or cooperating witnesses (usually people who had already been caught and then agreed to wear a body mike to tape others) engaged in both face-to-face and telephonic

conversations with targeted suspects. Shortly thereafter, surreptitious videotaping began to be used for the same goals and more recently other electronic language, such as Email messages, have provided written evidence in criminal cases.

The original targets of such undercover operations were potential white-collar criminals. Suspects were often public officials thought to be giving, taking or conspiring to give or take bribes, engaging in business fraud or deceptive trade practices, and involved in other crimes that are committed by using language rather than physical violence to perpetrate the offense. Shuy's book, *Language Crimes* (1993), was among the first to refer to such crimes with this expression.

It was not long, however, before law enforcement agencies, especially at the local level, began to tape record other types of language crimes, including the purchase and sale of illegal substances, solicitation of various types, especially sexual contacts, drug deals, prostitution and murder. Not surprisingly, they found that taped evidence was more persuasive than eyewitness accounts. In the early days, when audio recording equipment and techniques were somewhat primitive, many of these recordings were badly done. Even early videotapes were sometimes less than useful, because of lighting problems in hotel rooms where the meetings took place and due to camera angles, which often showed only part of the scene or only one of the speakers. When linguists are called on in such cases, the first task always is to use their skills in phonetics and language variability to make sure that an accurate, jury-ready transcripts of the conversations were made. After accuracy of the text is assured, linguists can determine such things as whether an offer was actually made or accepted, whether a legitimate threat was uttered, and whether a promise was involved. Linguists have made good use of speech act theory in such analyses (Shuy 1993). Videotapes offer more information than audiotapes, of course, since they can provide evidence of who was actually speaking and whether the target was within hearing distance – or even present – when incriminating statements were made.

Identification of the conversation strategies of undercover police and cooperating witnesses also calls for discourse analytic procedures (Shuy 2005). It is common in undercover cases for agents to try to elicit evidence from their targets of past or present criminal acts, or their predisposition to commit such acts in the future. To do so, law enforcement agencies suggest that their agents first let their targets talk uninterruptedly, thus incriminating themselves. If this does not work, the next step is to drop hints suggesting illegality, letting targets infer from these and incriminate themselves. If this still does not yield incriminating information, the next step is to try to get targets to retell some alleged past criminal action about which the agent has allegedly 'forgotten' the details and 'needs to be reminded.' Failing in this strategy, the last hope is for the agent to be clear and unambiguous about the nature of the illegal enterprise. However, effective these four strategies

may be in theory, agents seldom follow them in this order. Impatient to nab the suspect, undercover operators often skip the suggested first step and go straight to one of the others, despite the fact that the best evidence is self-reported. But some agents consider this step too time consuming. Even more troublesome is when there is no representation of illegality at all, leaving only the agents' hints for the jury to hear on the tape. From these, the jury also is then expected to infer illegality, even if the suspect showed no up-take on the hints.

Gradually, as law enforcement agencies continued to record conversations with targets, they also began to tape record events that occurred *after* suspects were apprehended. Police interrogations, along with alleged confessions, began to be used in court proceedings. This practice opened the door to linguistic analysis of these events as well (Shuy 1998b). Again, speech act analysis was prominent, helping linguists address such questions as whether the suspect actually confessed to the crime and whether the interrogation procedures influenced what the suspect said. Linguists have also analyzed how the police give suspects their Miranda rights as well as the nature of responses to them.

4.6 THE LANGUAGE OF AUTHORSHIP ANALYSIS AND SPEAKER IDENTIFICATION

A separate category is used here for writer and speaker identification of unknown texts and tapes because they do not fit neatly into the conventional categories of civil and criminal cases. Identifying authors based on anonymous texts and speakers based on unattributed speech samples can be an important part of either civil or criminal proceedings, depending on the nature of the case.

Authorship analysis has a long history, primarily relating to literary texts. In the forensic context, it is also very common, especially in Europe and America (Kniffka 1996, Chaski 2001, McMenamin 2002; Coultard 2004; Solan & Tiersma 2005). Here the source of texts is frequently threats, hate mail, and suicide notes. In most cases these texts are very short, making the certainty of identification difficult. In an investigative mode, sociolinguistic research can help identify expressions that may suggest a writer's region, gender, age, occupation, and education level, but without a larger corpus to work with, even these suggestions are necessarily tentative. The practice is known to have helped law enforcement agencies narrow down lists of suspected writers, but the handicap of limited amounts of evidence can make it difficult, if not impossible, to be certain enough about the results to testify about authorship at trial.

Standard procedure is to compare the unknown text with other comparable samples of written texts of known authorship. Unless such comparisons can be located, there is even less hope of certainty. Finding comparable texts is made difficult by the fact that the register of threat messages often differs considerably from the register of the comparison documents. In cases where there is no comparable text available, all the

linguist can do is point out whatever indications there are about regional or social variables in the writing.

The diagnosticity of linguistic features is also somewhat unsettled. Some forensic linguists focus on such features as punctuation, spelling, vocabulary choices, and grammatical aberrations in the writing. Others believe that these features are not diagnostic enough, assigning more weight to syntactic features, aspects of written text about which the writer is less likely to be consciously aware. Even when the comparison texts are large enough to yield reasonable statistical comparisons, it is not always clear exactly what frequency of occurrence of a given feature distinguishes it from the same feature in the unknown document. Suppose, for example, that the known text shows a frequency of 65% and the unknown document shows 50% for the same feature. Is that enough difference to show same or different authorship? Where is that line drawn? Also, there is the problem of unknown texts in which it appears to be likely that the writers were trying to disguise their language. Little is known about how this works.

Speaker identification has been common since the invention of recording equipment but the practice has met opposition in American courts for some of the same problems that plague authorship testimony (Baldwin & French 1990; Hollien 1990, 2001; Solan & Tiersma 2005). Phoneticians have found some acoustic characteristics that can help identify individual speakers in a small set of data but the results have not been as successful for a large set of speakers or when voices are disguised or recorded under different conditions. Nor has the question been resolved about the statistical distribution of known characteristics across the population at large. In comparison with DNA data, with its huge data base for such comparison, a huge voice data sample has not been compiled. The courts have generally agreed that 'voiceprints,' (the popular term for spectrograms) are not warranted at trial. This does not mean that no phonetic evidence can be used at trial, because there is a great deal that phoneticians can say about voices that untrained listeners cannot know. At this point, speaker identification is primarily useful in the same way that authorship analysis can be used – in the investigative stage, to help narrow suspect lists and to advise about certain features outside of the courtroom itself.

5. Testifying at Trial

To qualify as an expert, the linguist must first be one. This means having proper and extensive training in linguistics (usually with a PhD) and being able to demonstrate this expertise according to the standards of the field (usually with a relevant publication record). It does not mean that the expert should have legal training, although such is not harmful. The point here is that forensic linguistics is a field that requires practitioners to take their linguistic knowledge, expertise and experience into the legal arena and to apply the relevant tools of the field to the particular language evidence in a

civil or criminal case. For a practical guide to linguistic expert witness process, see Shuy (2006).

As noted above, working with lawyers is not the same as working with other people, because lawyers have considerable knowledge about how to use language effectively but usually do not know how to analyze it the way linguists can. And most linguists, of course, know little about law. So that means that linguists and lawyers need to be frank, clear, and honest with each other. Both need to be teachers. Both need to be students. Both need to nurture each other about their contributions to the case.

In American civil cases, experts are usually expected to write a report about their analyses. This report, which sometimes takes the form of an affidavit, is given to the opposing side's lawyer, who reads it and then calls the linguist in for a deposition. This is a questioning event in which the lawyer tries to understand what the report says and does not say. The expert is sometimes challenged, because one thing the opposing lawyer wants to do is to impeach the expert's method, findings or even integrity. The deposition is not common in many other countries.

After the deposition comes the trial. First is the expert's direct testimony, in which the lawyer with whom the expert works asks the questions. This is followed by cross examination by the other side's lawyer. Because a judge is present, trial testimony can be more controlled and civilized than many depositions turn out to be.

A serious issue that American forensic linguists face is in getting admitted as an expert witness. For 70 years, beginning in 1923, the common standard of acceptability was that the proposed testimony had to be relevant to the dispute, the theory or technique used had to be generally accepted by the scientific community, and the witness had to be an expert. This changed in 1993, when the US Supreme Court ruled in *Daubert v. Merrell Dow Pharmaceuticals*; <http://www.law.cornell.edu/supct/html/92-102.ZS.html> replacing the general acceptance test with a reliability assessment.

Four factors were now to be considered: whether the theory or technique has been tested and found to be sound; whether it was subjected to peer review; whether there is a high known or potential rate of error; and whether the technique is generally accepted by the relevant scientific community (Solan & Tiersma 2005; Shuy 2006). In 1999, in the case of *Kumho Tire v. Carmichael*; <http://www.law.cornell.edu/supct/html/97-1709.ZS.html> the US Supreme Court expanded these factors to apply to all forms of expert testimony, not just to the narrow category of scientific tests. It is clear that experts at one end of the spectrum of scientific 'objectivity,' such as those who do DNA testing, are judged acceptable. It is equally clear that experts at the opposite end, such as astrologers and palmists, are rejected. Debate continues about experts who fall between these extremes, including many experts with social and human science expertise. Because some courts are not clear about how to deal with experts in linguistics, linguists have to educate the lawyers they work with about the scientific nature of the field.

6. *The Reaction of Judges*

While an increasing number of lawyers have realized the need to get assistance from linguists in their cases, many judges have been less receptive to the idea. It is difficult to learn why, but a number of factors have been suggested.

For one thing, linguistics is still an unknown field to them. Lawyers have invited linguists to their conferences and workshops at a far greater rate than have judges. Many simply do not know what linguistics is and, even worse, what it is not. This does not stop them, however, from sometimes claiming that proposed linguistic testimony is likely to 'go beyond the scope of linguistics.' Judges seldom define what they mean by this but it is certainly not based on most judges' knowledge of linguistics. One possibility is that the judges feel that the linguists are getting close to legal argument rather than linguistic analysis. An equally common reaction of some judges is that linguistic testimony is not necessary because the attorneys are perfectly capable of introducing the findings of linguistics analyses by themselves. Linguists clearly offer useful assistance to trial lawyers but some judges feel that a linguist will cause them to have to deal with still one more expert that will slow down their trials.

Second, judges are deeply concerned, as they should be, that linguistic testimony might venture into the forbidden territory of usurping the role of the triers of the fact. This is a serious problem, of course, but one which competent forensic linguists know how to avoid. Nevertheless, the fear that this might happen is sometimes quite enough for a judge to rule out testimony by linguists, even without first hearing it.

Third, one of the greatest fears of judges, especially in bench trials, is the possibility that their decisions might be overturned on appeal. The fewer 'unusual or new' types of evidence or expertise that are brought to bear in a trial, the more likely their decision can stand. Part of this fear is probably based on the fact that lawyers are actually very good at using language but they confuse this competence with the ability to analyze it scientifically. Medical, engineering, and other expert witnesses have been around a lot longer and do not seem to be affected by the 'newness' phenomenon. There is the looming specter of violating precedent that permeates all of law. If in a previous case a judge has ruled out using a linguistic expert, other judges like to rely on this decision.

7. *Final Words*

When lawyers call on linguists to help them with their criminal or civil cases, they usually want an expert who will be ready and willing to testify at a forthcoming trial. However, it is estimated that some 90% of civil cases are settled before trial and that an equal percentage of criminal cases end with a plea bargain, guilty plea, or the indictment being dismissed. This means that the forensic linguist must prepare in the same way, whether or

not the case goes to trial. At any rate, being a consultant to lawyers can be every bit as useful as being an expert witness at trial. If the linguist teaches the lawyer what is linguistically important about the case, and if the lawyer represents this information effectively during cross examination and arguments, the linguists' tasks may be considered as important as when they actually testify.

For many years, applied linguistics has focused primarily on language learning, language teaching, and language testing. These are fine things to do but there are many more areas of life where linguistics is relevant and useful to society. Forensic linguistics is certainly one of these promising areas and it is not surprising that more and more linguists are beginning to do this work.

Short Biography

Roger W. Shuy is Distinguished Research Professor of Linguistics, Emeritus at Georgetown University. After receiving his PhD from Case Western Reserve University, he taught briefly first at Wheaton College, then at Michigan State University, and the final 30 years or his teaching career at Georgetown, where he created and headed the sociolinguistics program. His major research interests are in sociolinguistics and forensic linguistics.

His most recent books include *Language Crimes* (1993), *The Language of Confession, Interrogation and Deception* (1998), *Bureaucratic Language in Government and Business* (1998), *A Few Months to Live* (co-authored, 2001), *Linguistic Battles in Trademark Disputes* (2002), *Creating Language Crimes* (2005), *Linguistics in the Courtroom: A Practical Guide* (2006), and *Fighting Over Words* (in press, 2007).

Endnotes

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