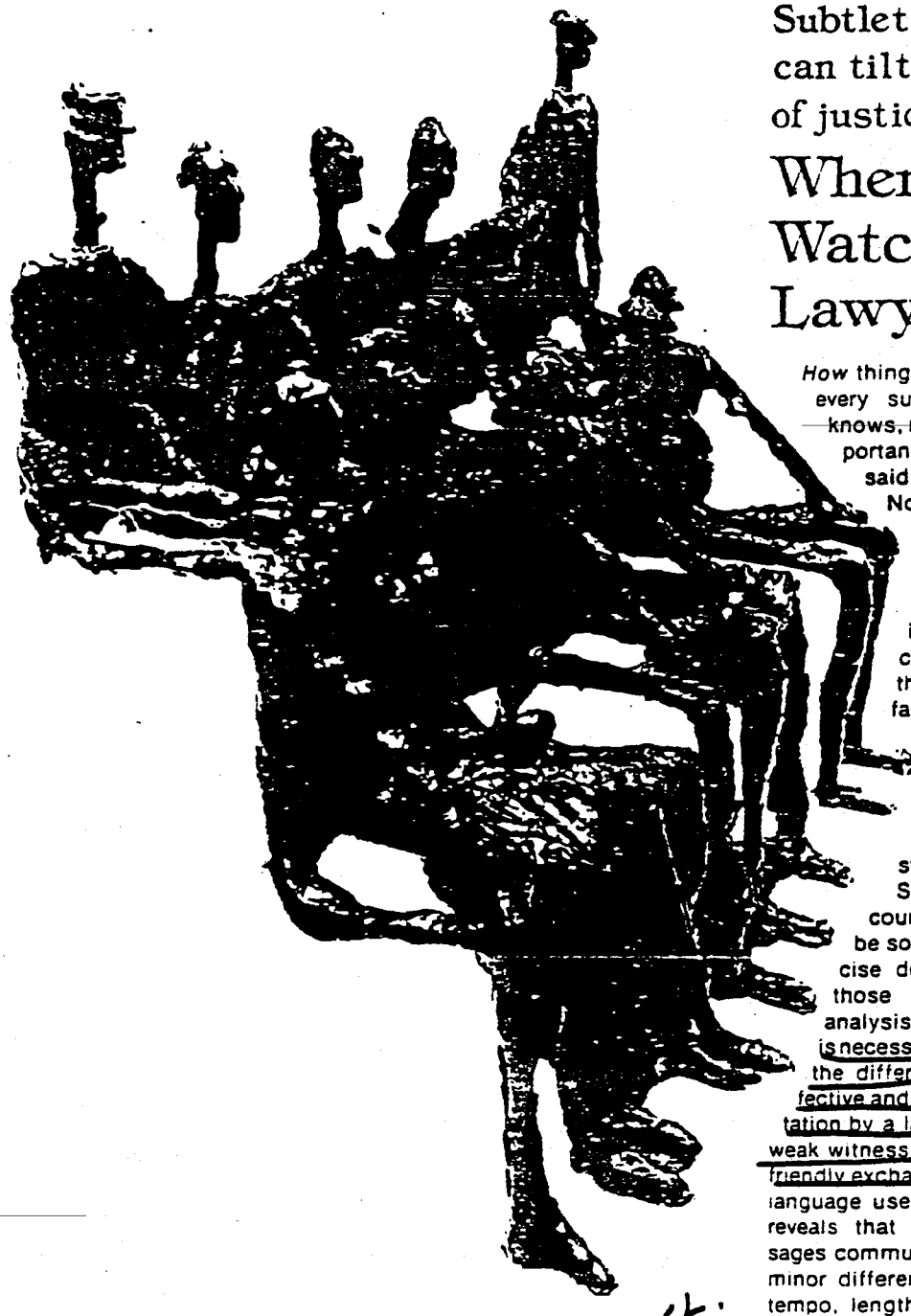

Subtleties of speech can tilt the scales of justice...

When a Juror Watches a Lawyer

How things are said in court, as every successful trial lawyer knows, may be much more important than *what* is actually said.

Not only in the court, but in our everyday language, all of us have an intuitive notion that subtle differences in the language we use can communicate more than the obvious surface meaning. These additional communication cues, in turn, greatly influence the way our spoken thoughts are understood and interpreted. Some differences in courtroom language may be so subtle as to defy precise description by all but those trained in linguistic analysis. No linguistic training is necessary, however, to sense the difference between an effective and an ineffective presentation by a lawyer, a strong and a weak witness or a hostile versus a friendly exchange. New research on language used in trial courtrooms reveals that the subliminal messages communicated by seemingly minor differences in phraseology, tempo, length of answers and the like may be far more important than even the most perceptive lawyers have realized.

By William M. O'Barr and John M. Conley

Two witnesses who are asked identical questions by the same lawyer are not likely to respond in the same way. Differences in manner of speaking, however, are usually overlooked by the court in its fact-finding quest. Once an initial determination of admissibility has been made, witnesses may follow their own stylistic inclinations within the broad bounds of the law of evidence.

Scrutinize carefully the following pairs of excerpts from trial transcripts, and consider whether, as the law of evidence would hold, they are equivalent presentations of facts.

EXAMPLE 1

Q. What was the nature of your acquaintance with her?

A. We were, uh, very close friends. Uh, she was even sort of like a mother to me.

A. We were very close friends. She was like a mother to me.

EXAMPLE 2

Q. Now, calling your attention to the 21st day of November, a Saturday, what were your working hours?

A. Well, I was working from, uh, 7 a.m. to 3 p.m. I arrived at the store at 6:30 and opened the store at 7.

Compare this answer to the following exchange ensuing from the same question.

A. Well, I was working from 7 to 3.

Q. Was that 7 a.m.?

A. Yes.

Q. And what time that day did you arrive at the store?

A. 6:30.

Q. 6:30. And did, uh, you open the store at 7 o'clock?

A. Yes, it has to be opened.

EXAMPLE 3

Q. Now, what did she tell you that would indicate to you that she . . .

A. (*Interrupting*) She told me a long time ago that if she called, and I knew there was trouble, to definitely call the police right away.

Compare the above with the slightly different version, where the lawyer completes his question before the witness begins answering.

Q. Now, what did she tell you that would indicate to you that she needed help?

A. She told me a long time ago that if she called, and I knew there was trouble, to definitely call the police right away.

Two years of study of language variation in a North Carolina trial courtroom, sponsored by the National Science Foundation, have led us to conclude that differences as subtle as these carry an impact which is probably as substantial as the factual variation with which lawyers have traditionally concerned themselves.

POWER LANGUAGE AND GETTING POINTS ACROSS

The three examples of differences in testimony shown here are drawn from separate experiments which the team has conducted. The study from which Example 1 is taken was inspired by the work of Robin Lakoff, a linguist from the University of California at Berkeley.

Lakoff maintains that certain distinctive attributes mark female speech as different and distinct from male styles. Among the characteristics she notes in "women's language" are:

- a high frequency of *hedges* ("I think . . .," "It seems like . . .," "Perhaps . . .," "If I'm not mistaken . . ."):
- *rising intonation* in declarative statements (*e.g.*, in answer to a question about the speed at which a car was going, "Thirty. thirty-five?" said with rising intonation as though seeking approval of the questioner);
- *repetition* indicating insecurity:
- *intensifiers* ("very close friends" instead of "close friends" or just "friends");
- high frequency of *direct quotations* indicating deference to authority, and so on.

We studied our trial tapes from the perspective of Lakoff's theory and found that the speech of many of the female witnesses was indeed characterized by a high frequency of the features she attributes to women's language. When we discovered that some male witnesses also made significant use of this style of speaking, we developed what we called a "power language" continuum. From powerless speech (having the characteristics listed above), this continuum ranged to relatively more powerful speech (lacking the characteristics described by Lakoff).

Our experiment is based on an actual ten-minute segment of a trial in which a prosecution witness under direct examination gave her testimony in a relatively "powerless" mode. We rewrote the script, removing most of the hedges, correcting intonation to a more standard declarative manner, minimizing repetition and intensifiers, and otherwise transforming the testimony to a more "powerful" mode.

From the point of view of the "facts" contained in the two versions, a court would probably consider the two modes equivalent. Despite this factual similarity, the experimental subjects found the two witnesses markedly different. The subjects rated the witness speaking in the powerless style significantly less favorably in terms of such evaluative characteristics as believability, intelligence, competence, likability and assertiveness.

To determine whether the same effects would carry over for a male witness speaking in "power" and "powerless" modes, we took the same script, made minor adjustments for sex of witness, and produced two more experimental tapes. As with females, subjects were less favorably disposed toward a male speaking in the powerless mode.

These results confirm the general proposition that how a witness gives testimony may indeed alter the reception it gets. Since most juries are assigned the task of deciding upon relative credibility of witnesses whose various pieces of testimony are not entirely consistent, speech factors which may affect a witness' credibility may be critical factors in

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The Art and Science of Getting Into the Minds of the Jurors

It may be useful for BARRISTER readers to know the research techniques which we employed in gathering our data.

With the court's permission, members of a research team based at Duke University recorded on audio tape all trials in a selected courtroom for a period of three months. Simultaneously, observers trained in anthropological field techniques made notes to be used in conjunction with the tapes.

Our recording equipment was the same as that used regularly by the court reporter and seemed to have no disruptive effect on court proceedings. Criminal trials on a variety of misdemeanor, felony and capital charges were taped, and the participants came from varied social, economic, ethnic and linguistic backgrounds.

A second, or analytic, phase of the project began as soon as the data collection was completed. Repeated listening and analysis of the language used on the tapes enabled the research team to select and describe with some precision many previously-unstudied features and patterns of courtroom language use.

The third phase—of greatest interest to practicing lawyers—involved developing and testing hypotheses about the impact of variations in language and presentational style on the critical courtroom audience, the jury.

LAWYERS OBSERVED: INTERPRETATIONS DIFFER

To sharpen the hypothesis we had developed through actual study of courtroom language, we asked many of the lawyers whose trials we had observed to discuss their presentational techniques with us. As expected, their comments were often guarded. Interestingly, however, the statements the interviewed lawyers made about courtroom language often bore little relation to what we had observed. Their comments and insights, like ours, provided only part of the total picture of courtroom language use.

Since participants and observers did not have entirely similar views of the situation, we decided to test the impact and importance of variations in courtroom language experimentally. Some of the notions we tested were derived from comments the lawyers had made; others were based on our observations.

The general method was the same in each experiment. First, an actual recorded trial was selected in which the phenomenon to be studied was clearly apparent. A segment of the original trial was then recreated on tape almost verbatim, using actors. All names, dates and places mentioned in the tape were changed in order to avoid identification of any experiment with the actual case on which it was based. Then the trial script was carefully altered so as to vary only the specific features of language and presentational style being studied.

A second version was then produced, using the same actors. The production of the experimental tapes is a tedious process, but we have confidence in the resulting tapes themselves. Linguists scrutinizing the tape pairs in minute detail are unable to find substantial differences beyond those which we intended.

In running the experiments, the two tapes are played to two different groups of subjects randomly selected from the same population. The subjects, told that they are listening to excerpts from a real trial, are asked to respond in writing first to a set of questions like those asked of real jurors—*e.g.*, who is liable?—and then to psychologically designed inquiries which attempt to isolate the reasoning behind the subject-jurors' legal judgments and their personal feelings about the characters in the trial.

A ROLE FOR SOCIAL SCIENCE IN THE COURTROOM

We believe the research reported here in brief demonstrates the importance of social science methods in understanding trial processes. But we hope that trial lawyers themselves will begin to play a greater role in posing questions for future empirical research. If a merger of law and social science is to reach its full potential, those who know the phenomena being studied most intimately must work to insure that the scientific investigators identify the important issues and design future research so as to provide the meaningful information to legal professionals as well as to social scientists.

An important goal of our research is the investigation of certain important theoretical propositions in sociolinguistics, anthropology and psychology, but there is no reason why it cannot—indeed should not—be informed as well by areas of concern and priority to those interested in a better understanding of legal processes for practical reasons.

More detailed expositions of our research methodology and results will be published in coming months in a law review and in a social science journal. Exact details of forthcoming publications were not available at press time, but interested readers should watch the "Letters to the Editor" column of BARRISTER for complete information.

The authors would welcome suggestions from BARRISTER readers about topics which should be investigated in future phases of their research program.

—W.M.O. and J.M.C.

the overall chemistry of the trial courtrooms.

These findings are not limited to a single study. Similar patterns have been discovered with other kinds of variation in presentational style.

Example 2 comes from a study of differences in the length of answers which a witness gives in the courtroom. Treatises on trial practice often advise allowing the witness to assume as much control over his testimony as possible during direct examination. Implicit in such advice is an hypothesis that relative control of the questioning and answering by lawyer versus witness may affect perception of the testimony itself.

To test this hypothesis we again selected a segment of testimony from an actual trial. The original testimony was rewritten so that, in one version, the witness gave short, attenuated answers to the lawyer's probing questions. In the other version, the same facts were given by the witness in the form of longer, more complex answers to fewer questions by the lawyer.

BUT THEN, HOW LONG SHOULD A WITNESS SPEAK?

Contrary to our expectations, the form of answer did not affect the subjects' perception of the *witness*, but it did have a significant influence on the judgments about the *lawyer*. When the lawyer asked more questions to get the same information, subjects viewed him as more manipulative and allowing the witness less opportunity to present evidence.

The subjects' perceptions of the lawyer's opinion of his witness were also colored by the structure of the witness' answers; however, the differences were significant only when the witnesses were male. When more questions were asked by the lawyer, subjects believed the lawyer thought his witness was significantly less intelligent, less competent and less assertive.

On this point, then, standard trial practice theory is confirmed indirectly. The lawyer who finds it necessary to exert tight control over his witness will hurt his presentation by creating a less favorable impression of himself and suggesting that he has little confidence in the witness.

A LOT DEPENDS ON WHO INTERRUPTS WHOM

Example 3 is part of a study of interruptions and simultaneous talk in the courtroom. We wanted to know what effect a lawyer's interrupting a witness or a witness' interrupting a lawyer would have. Preparing a witness for a courtroom examination often includes an admonishment against arguing with the opposition lawyer during cross-examination, and a lawyer often advises his own witness to stop talking when he interrupts what the witness is saying.

To study some aspects of this complex phenomenon, we focused on the relative tendency of the lawyer and the witness to persist in speaking when the other party interrupts or begins to speak at the same time. This is one of the most subtle factors of language variation in the courtroom which we have studied, but, like the other differences, this too alters perception of testimony.

Working from the same original testimony, four experimental tapes were prepared: one in which there were no instances of simultaneous talk by lawyer and witness, one in which the witness primarily yielded to the lawyer during simultaneous talk by breaking off before completion of his statement, one in which the lawyer deferred to the witness by allowing the witness to talk whenever both began to talk at once, and finally one in which the frequency of deference by lawyer and witness to one another were about equal.

All four tapes are clearly "hostile" and "unfriendly" in tone. The three containing simultaneous speech, or overlaps between lawyer and witness, would be difficult to distinguish by a person untrained in linguistic analysis of sequencing of questions and answers. Yet these subtle differences in patterns of deference in overlapping speech can be and are perceived differently by experimental subjects.

Findings from this study, like those from the second experiment, show significant effects on the perception of the lawyer. Subject-jurors rate the lawyer as maintaining most control when no overlapping speech occurs. The lawyer's control over the examination of the witness is perceived to diminish in all those situations where both lawyer and witness talk at once.

Comparing the situation in which the lawyer persists to the one in which the witness persists, interesting results also emerge. When the lawyer persists, he is viewed not only as less fair to the witness but also as less intelligent than in the situation when the witness continues. The lawyer who stops in order to allow the witness to speak is perceived as allowing the witness significantly more opportunity to present his testimony in full.

The second and third experiments thus show speech style affecting perceptions of lawyers in critical ways. Modes of speaking which create negative impressions of lawyers may have severe consequences in the trial courtroom. In all adversarial proceedings, lawyers assume the role of spokesmen for their clients. Impressions formed about lawyers are, to some degree, also impressions formed about those whom they represent.

The implications of these findings may be most severe in those criminal trials where the defendants elect not to testify, but they apply as well to all situations where lawyers act as representatives of their clients.

THE FACT IS: A FACT MAY BE MORE THAN A FACT

While the results of these particular experiments are undoubtedly important for the practicing lawyer, we feel that the true significance of the project lies in its broader implications. In a variety of settings, we have shown that lay audiences pay meticulous attention, whether consciously or unconsciously, to subtle details of the language used in the trial courtroom.

Our results suggest that a fact is not just a fact, regardless of presentations; rather, the facts are only one of many important considerations which are capable to influencing the jury.

As noted earlier, the law of evidence has traditionally concerned itself primarily with threshold questions of admissibility. The guiding principles have always been held to be ensuring the reliability of evidence admitted and preventing undue

(*Please turn to page 33*)

The emphasis on the box directs people to the technical questions of polling, when they should be questioning the subtleties of interpretation. What is needed is a change in orientation away from straight numbers and toward more analysis. Yankelovich believes that too many of his colleagues approach every polling issue as if it were an election in which people can only vote for or against. This two-dimensional approach removes the texture and depth from public opinion. He suggests that newspaper polls would be greatly improved if they got away from using just one indicator as a test of public opinion on a complex issue. "You can find out what people think, if you talk with them long enough, so you can still report on public attitudes, but instead of presenting just one item, you show the picture in its entirety."

Peter Hart believes that, together with improvement in interpretation, there must be more imaginative questions asked. To him, the agree/disagree question is the bane of polling, for it forces complex opinions into artificially narrow and misleading categories.

It is this kind of probing—the use of many questions to define the outlines of opinion and to explore ignorance and the depth of feelings—which can lead to more meaningful polling. But just as the statistics must be backed up by the little box which explains how they were derived, so must any interpretation be accompanied by enough information so that the reader himself can judge whether the analysis is sound.

Louis Harris prides himself as being a public opinion analyst; he emphasizes that all his columns are based on ten or more questions, the answers to which he analyzes in order to come up with the mood of the country. But Harris' columns are based entirely on conclusions. He does not present the evidence, the actual questions asked—he says that would take up too much space—so there is no way that the reader can form an independent judgment. It is as if one were trying to learn literature simply by reading reviews: to attempt it, one must have an unquestioning faith in the wisdom of the reviewer.

Harris complains that he has limited space and that editors have total discretion to cut whatever they please out of his releases. Perhaps this is so, but both Hart and Yankelovich have had far better luck with their newspapers, which reflects well on both them and their clients.

BLIND FAITH AND THE PUBLIC'S RIGHT TO KNOW

No doubt there will continue to be strong pressure to produce polls which make flashy headlines, but if the pollsters are strong enough to dictate the terms by which their work is used, and the well-known ones are, these pressures can be overcome.

Perhaps the orientation of the night editors and the headline writers will never change, but responsibility should not rest solely with them. Political writers and columnists, particularly the most respected ones, such as David Broder, Joseph Kraft and James Reston, must see to it not only that they avoid glib and misleading use of polls themselves, but that the newspapers which carry their work become more sophisticated and responsible.

In 1960 Henry Cabot Lodge, then the Republic vice-presidential candidate, observed that public opinion polls were a passing fancy, soon to disappear from the American political scene. "In the future, people are going to look back on polls as one of the halucinations which the American people have been subject to. I don't think the polls are here to stay."

Americans have been prone to mass hallucinations before, but usually we quickly snapped out of them. Within several years of the hangings of the "witches" of Salem, our Puritan forebears confessed that it was their own hysteria which had led them astray.

Apparently we are more vulnerable today, for despite Lodge's forecast we have remained completely bewitched by the polls, and there is no sign that the spell will break soon.

This influence will not be eradicated until the press and politicians recognize both that polling has built-in limitations and that public opinion is so complex and elusive that it can never be completely knowable. Polls have become entrenched in part because we have been dazzled by any appearance of science, but more because, living in such rapidly changing, disorienting times, we are desperate for any clue which might tell us what we really think and feel.

The pollsters have offered us what they claim is a mirror, a remarkable construction into which we can gaze to see who we are. The image which is reflected, however, is at best blurred, and the slightest tilt can distort it completely.

Public opinion is so fundamental to a democratic society that we must understand its full dimensions, its shape and texture. The polls offer only the trappings of scientific accuracy and the illusion of popular choice. That is not enough. ■

Juror Watches *(Continued from page 11)*

prejudice to the litigants. If it is true that questions of style have impact comparable to that of questions of fact, then lawyers will have to begin to read such considerations into the law of evidence if they are to be faithful to its principles.

As judges and lawyers become increasingly sensitized to the potentially prejudicial effects of speech style, one remedy might be to employ cautionary instructions in an effort to control jury reactions. For example, might it not be appropriate for a court confronted with a witness speaking in an extreme variant of the powerless mode to instruct the jury not to be swayed by style in considering the facts?

Additionally, lawyers themselves might begin to give greater recognition to stylistic factors while addressing the jury during voire dire, opening statement and closing argument.

Lawyers are already accustomed to calling jurors' attention to such presentational features as extreme emotion in urging on them particular interpretations of the evidence. What we suggest is merely an extension of a familiar technique into newly explored areas. ■