

Breaking into language and law: The trials of the insider-linguist

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Robert Bork, when he was being interviewed for an appointment to the United States Supreme Court, was asked, “Why do you want this job?” His response, which for some reason caused him great distress, was: “Because being on the Supreme Court would be an intellectual feast.” Some years ago I wrote an article called, “Breaking into and out of Linguistics” (Shuy 1975), in which I tried to provide an outline of the intellectual feast that is out there in the real world, ripe and ready for linguists to consume. A quarter century later, I want to say some of the same things, only this time I will focus on only one course of this intellectual feast, that of linguistics and law. This paper is directed to scholars who are thinking about a career in forensic linguistics. Its secondary goal is to familiarize other linguists, even established ones, with the ways in which forensic linguistics is the same as or different from more conventional work in the field. A third goal is to show how applying linguistic knowledge in real world contexts, such as education, medical and therapeutic communication, diplomacy, business, journalism, or in this case, law, causes one to approach the work somewhat differently than might be expected.

In the past quarter century, linguists have become more and more involved in language issues that grow out of criminal and civil law cases, leading to the creation of the term forensic linguistics to describe such work. In this paper I will classify this work that forensic linguists do into two types: work that is done without becoming involved in specific litigation, which I call outsider work, and work that is carried out within individual law cases, which I refer to as insider work. Both types of work are important. Both advance knowledge. Both advance the field of linguistics into another significant area of life. But working from the outside can be the more comfortable, more academic way.

Academic research is self-paced, subject only to well-known and comfortable restrictions, and reasonably stable in terms of expected methods of evaluation. Outsider forensic linguistics falls neatly into this category. Insider forensic linguistics, however, has many differences. The purpose of this paper is to examine these differences and examine the ways that insider linguists have to deal with them.

Outside forensic linguist work, among other things, involves the study of the language of the law itself, (Mellinkoff 1963; Tiersma 1999), transcripts or other

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records of the language of judges (Solan 1993; Stygall 1994; Philips 1998), trial language (Matoesian 1993), the language of mediation (Conley and O'Barr 1998), courtroom language (Conley and O'Barr 1990), witness language (Berk-Seeligson 1990), and the language of trial attorneys.

By insider forensic linguistics, I refer to the occasions in which linguists enter into the courtroom as expert witnesses or when they consult with attorneys on ongoing law cases. Insider forensic linguistics is controlled by a different set of circumstances, a different way of doing the work, and a different audience. It is, in many ways, quite different from the way linguists normally conduct their business, do their research, and write their academic papers. Some linguists find this different approach so daunting that they stay away from it. Others respond to the challenge and leap right into the fire. Those who contemplate becoming insider forensic linguists would do well to consider these differences carefully. They will have to adjust their thinking to a new way of doing their analysis, a new way of being judged by their peers, and a new set of requirements for their work.

It should be pointed out, in addition, that insider forensic linguistics has parallels in other areas in which linguists have tried to make contributions to different academic fields. Similar things might be said about insider and outsider linguistics in education, therapy, medical communication, political discourse, and other areas as well. Expected outcomes of such contributions may often depend on whether or not the linguist attempting such work fully appreciates the differences between being an insider or an outsider.

There are numerous, undeniable advantages that come from being an insider forensic linguist. For one thing, our data are gathered for us by the legal system. When we work on a case, in which the data consist of tape recordings, letters, trademarks, speeches, or warning labels, we have no need to go out and gather our data. Nor do we need to worry about whether or not these data are complete, since the evidence in a case is what it is; no more, no less. That issue is determined before we even begin.

A second advantage is that of the significance of the problem. We don't need to worry about whether or not the issue is one that will grab our audience. This too has been determined by the fact that litigation is taking place. The case wouldn't be in court if it were not a serious problem. Finally, those of us who are deeply interested in justice are placed in the very arena where justice is supposed to be of paramount importance, whether such justice involves individual freedom in a criminal case or proper business practice in a civil case.

Balanced against these advantages are certain problems facing an insider forensic linguist. Eight such problems are:

1. short time limits imposed by a law case, as opposed to the more familiar time limits enjoyed in everyday academic pursuits;
2. an audience almost totally unfamiliar with our field;

3. restrictions on what we can say and when we can say it;
4. restrictions on what we can write;
5. restrictions on how to write;
6. the need to represent complex technical knowledge in ways that can be understood by people who know nothing of our field while maintaining our role as experts who have deep knowledge of these complex technical ideas;
7. constant changes or jurisdictional differences in the field of law itself; and
8. maintaining an objective, nonadvocacy stance in a field in which advocacy is the major form of presentation.

1. Getting used to short time limits. Attorneys sometimes involve the forensic linguist early, especially in civil cases that tend to have a long life span anyway. But other times, especially in criminal cases, the linguist may be called only a week or so before trial. My advice is to be very cautious about agreeing to work on such late-arriving cases. Attorneys who get inspired to use a linguist at such a stage may be in such trouble with their evidence that they are desperate for a miracle of some sort. In one case, an attorney accompanied his request for my services with these words: "I want you to work your magic here." After pointing out that there is nothing magical about linguistic analysis, I politely declined to be involved.

The late request for a linguist may also be a sign that the attorney is not well organized or prepared. Preparation is essential in any civil or criminal case and a prepared linguist working with a relatively unprepared attorney can spell only doom. Years ago I agreed to work on a criminal case in Oklahoma in which a district judge was being tried for bribery. The time for analysis was short but, since there were only four taped conversations involved, I agreed to take the case. I thought it odd that my many efforts to communicate by telephone with the attorney were unsuccessful. I wanted to share with him my findings, which cast at least some doubt on the judge's involvement in any crime, but he didn't return my calls.

Finally, as the trial date approached, I decided to write out the questions the attorney could ask me in court, along with my answers and charts illustrating the points I would make. I arrived in Oklahoma City the day before the trial, hoping to go over this question-and-answer script with him. He had other things to do and this was not possible. An hour before my testimony I finally got to talk with him and show him the questions and answers. He looked at it quickly and said: "Fine." He followed my script exactly and the testimony was as good as it could be under those circumstances. I will never know how much better it might have been if he had managed to discuss it with me, make corrections, or delete things that were not germane to the case. As it turned out, he was also unprepared for many other things that happened during the trial and the client was convicted.

One of the most difficult things to get used to in the work of insider forensic linguistics, however, is the fact that short time limits to accomplish the analysis are unlike the normal academic process of creating an article or a book. In the academic world, deadlines for submitting abstracts can be missed and the only damage is that we don't get on the program. Deadlines for paper submissions can be missed and the only thing that happens is that the paper is published at a later date. With court trials, such delay is not possible. Linguists have to learn that they do not control the time line; the Court does.

Nor is there the normal time for ideas to develop and mature, resources to be explored, or changes to be made. The insider linguist has to make do within the time allotted, no matter how short. This can lead to some interesting problems, particularly if the other side in the case uses a linguist to offer counter testimony. That linguist may have thought of new approaches, leaving with no time to explore them. The judgment of one's linguistic knowledge and skills, therefore, can be the result of compressed preparation time that would not have occurred in an academic setting. This takes some getting used to.

2. *Making adjustments to the audience.* Linguists, like most academics, commonly talk to other linguists at conventions, in classrooms, or in private discussions. We share common assumptions about language and argue about its edges. Some of the things we take for granted, however, are not shared by most other nonlinguists. Audiences of linguists who deal with education issues at least have the common ground of teaching and learning upon which to base their statements. When applying linguistics to the trial arena, however, we face two different kinds of audiences.

One audience is the lawyers themselves, who work with language daily and are very aware of its power. Although they may seem like kindred spirits with whom linguists can share assumptions, this is not always the case. Lawyers, like other professionals such as doctors and politicians, are used to controlling the language around them, making it sometimes difficult to convince them of some of even the simplest percepts of our field. More than one lawyer and judge have told me that they use language as their basic tool and are quite familiar with it, thank you.

The second audience is the jury, about whom the courtroom linguist can never be totally certain. On the whole, juries are made up of people with widely different educational and social backgrounds, making for a much more diverse audience than, say, the teachers to whom educational linguists normally speak.

Addressing the lawyer audience is the first step, of course. The linguist must accept the lawyers' language skills, treat them as equals, then present the linguist's way of seeing the issues as a complement to the lawyers' approach and not as a threat to their linguistic competence. Once this hurdle is met, the more serious problem of addressing the jury audience can be tackled.

Most jury members know no linguistics whatsoever. This means that the common ground has to begin somewhere else. I have found that it can be deadly to give the appearance of being smarter or more knowledgeable than they are. So I try to begin with them on more familiar ground, often with their seventh-grade English class. Instead of describing anaphora or other referencing that is often crucial in litigation, for example, I sometimes remind them of how in seventh grade they learned that pronouns like “he” relate to what was then called “the noun that ‘he’ stands for.” This usually rings at least a few bells among jurors, assuring them that they will understand what I’m talking about.

3. *Restrictions on how we can talk.* As any experienced expert witness knows, the courtroom is a place where topics can be introduced only by questions asked by attorneys. This ritualized behavior is unlike most other forms of language behavior faced by human beings. The purpose for such a procedure is that in this way information can be unfolded in a manner that the question asker believes to be most efficient, allegedly a time-saving device. It also controls the language of the witnesses, preventing them from presenting facts that might not be in the best interest of the case being made.

During the direct examination, the linguist as expert witness has some room to control what is introduced. But this must be prearranged with the attorney who does the questioning. As noted earlier, after discussing my potential contribution with the attorney, I often write out a set of questions that can be asked of me, along with a sketch of my answers. In this manner, it can be said that I have some control of topic introduction even in this restricted context. If I happen to think of a new topic during the direct examination, however, it is difficult to figure out a way to bring it up without first privately discussing it with the attorney.

On cross-examination, it is extremely difficult to bring up new topics. Any effort to do so often meets with stoney glances and words such as, “I’ll ask the questions here; you just answer.” But there are ways, however dangerous, of circumventing this problem. For example, in a Texas criminal trial in which I served as an expert witness, the defense attorney, named Racehorse Haynes, had me avoid testifying about one of the tape recordings that the prosecution believed was the most damaging evidence against the defendant. After my direct examination ended, the prosecutor took the bait and straightaway asked me about that tape. My response was: “I’m glad you asked about that because I’ve prepared a chart of it for the jury. Would you like me to show it to you?” Dumbfounded, the prosecutor couldn’t say, “No.” Thus I proceeded to introduce a topic in response to his question, a topic that is said to have greatly helped obtain a verdict of not guilty for the defendant. Such courtroom drama is neither common nor is it often a wise way to go. I would never have done this without careful coordination with this attorney, who was known to have a flare for the unusual and dramatic.

