Linguistic experts as semantic tour guides*

Lawrence M. Solan

Brooklyn Law School

ABSTRACT This article examines the phenomenon of linguists testifying as experts on meaning in legal disputes over the interpretation of statutes, contracts, transcripts of tape-recorded conversations, and other important legal texts before courts in the USA. It concludes that there is an important role for linguists in such cases – the role of the tour guide. It suggests that judges need not be concerned about linguists usurping the traditional roles of the judge and the jury as ultimate interpreters provided that the linguist's testimony is appropriately circumscribed.

KEYWORDS semantics, expert witness, meaning, evidence

LINGUISTS AND LAWYERS – A TALE OF TWO CULTURES

With increasing frequency, American lawyers have been consulting linguists and other language experts in a diverse array of legal cases. Linguists have responded not only by offering their services, but also by taking a phenomenological interest in the legal system as an arena in which their specialized knowledge can be put to practical use. Thus, linguists present analyses of cases in which they have been involved at conferences, such as the annual meeting of the Law and Society Association, and the biennial conference of the International Association of Forensic Linguists. *Forensic Linguistics*, now in its fifth year of publication, devotes itself almost entirely to this area. *American Speech*, a dialectology journal, also publishes some of these accounts from time to time. And an electronic journal, *Language in the Judicial Process*, covers issues and events concerning linguists in the courts.

A few anthologies of articles have appeared (Gibbons 1994; Levi and Walker 1990; Rieber and Stewart 1990). And in two books (Shuy 1993; 1998), Roger Shuy has documented many of his experiences as a sociolinguist in the judicial system. Much of the literature is noted in Levi (1994a) and discussed in Levi (1994b).

Linguistics is a small field, law an enormous one. The Linguistic Society of America has 4088 active individual members.[1] In contrast, an article by Chief Justice William Rehnquist estimates that there are approximately 800 000 licensed lawyers in the United States (Rehnquist 1996: 651). Despite the increased role of language experts in the American legal system, I doubt that many of these 800 000 lawyers are aware

1350–1771

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of it. My own experience tells me that lawyers do not generally know what linguistics is. When I tell lawyers that I have been engaged on a number of occasions as an expert consultant, more often than not they have never heard of such a thing. They generally assume that linguists are experts in how to speak and write properly, 'language mavens', to quote Pinker (1994). Of course, when I explain to them what linguists actually do, most lawyers are intrigued and interested. But my point here is that the testimony of language experts, as important as it is in the linguistic community and to legal scholars who study the matter, is still a marginal phenomenon in the dominant legal culture.

Articles in the legal press periodically discuss the presence of linguists in the legal system; they paint a mixed picture. For example, in a recent article in the *ABA Journal*, Samborn (1996), spoke positively about the role that a linguistically oriented law review article by Clark Cunningham, a law professor, and Charles Fillmore, a linguist (Cunningham and Fillmore 1995), seems to have had on a recent Supreme Court decision, Bailey v. United States 116 S Ct 501 (1995). But another article, Hart (1996), which appeared in *The Communications Lawyer*, also an American Bar Association publication, devoted itself entirely to praising those courts that have rejected linguistic expert testimony in libel cases.

In the academic literature, we see the same ambivalence. For example, William Eskridge and Philip Frickey, in their leading text on legislation and statutory construction (Eskridge and Frickey 1995), find linguistic analysis useful in coming to grips with various interpretive problems. Eskridge has gone so far as to co-author an article with Judith Levi (Eskridge and Levi 1995), a linguist who is very involved in law and language issues. On the other hand, Dennis Patterson, who is also a prominent legal theorist, has concluded that linguistics is useless to the courts, because they must ultimately decide issues on the basis of legal – not linguistic – considerations (Patterson 1995). Marc Poirier, another law professor, accuses linguists of attempting to establish a place for themselves in the legal system for their own enrichment, both in terms of money and professional prestige (Poirier 1995). For reasons that will become clear below, I believe that both Patterson and Poirier have missed important areas in which linguistics can make significant contributions to the resolution of legal disputes.

Just like the writers in the legal press and the legal scholarly community, judges who have had to decide whether to allow the testimony of a language expert have had mixed responses.The issue of admissibility of expert testimony often arises on appeal after a trial judge has rejected the expert, and the party who offered him or her lost the case. Because the standard of review is very deferential to the trial judge, anyone reading these cases might get the impression, as did Hart (1996), that courts have very little interest in permitting lawyers to use linguists as trial experts.[2] That impression is inaccurate. There are many legal areas in

which linguists testify as experts routinely. Numerous judicial opinions make reference to testimony by linguists and other language experts. Many of these are discussed in the literature cited above.

For example, courts accept opinion testimony by language experts without controversy in cases when a non-native speaker had agreed to let the police conduct a search, and the defence argues that the defendant was not in a position to waive his constitutional rights knowingly and intentionally because he did not speak English well enough.[3] Comprehensibility studies have also been taken quite seriously by the courts with respect to the interpretation of jury instructions and other legal documents.[4] In Dotson v. Duffy 732 F. Supp 857 (N.D.Ill. 1988), Illinois welfare recipients challenged the adequacy of a notice sent to them concerning their right to receive future benefits, claiming that the notice was incomprehensible to them. The welfare recipients enlisted the help of a linguist, who testified about how the structure of the notice made it virtually impenetrable. See Levi (1994: 7–9, 16–18). The recipients prevailed.

Linguistic issues of all kinds arise in trademark cases, whether phonological questions concerning the likelihood of confusion,[5] or disputes over whether a particular use of a word occurs often enough to make that use descriptive or generic.[6] For example, in Trump v. Caesar's World, Inc., 645 F. Supp. 1015 (D.N.J. 1986), a linguist's testimony convinced the court that the word 'palace' in Caesar's Palace is not a generic term, which made Trump's casino, named 'Trump's Palace', an enjoinable infringement. The linguist presented both survey evidence and example sentences demonstrating that 'palace' is only used in the sense urged by Trump when it is accompanied by some modifying phrase, such as 'dairy palace'. Not all linguistic testimony in trademark cases is as compelling, but there does not seem to be much question of its admissibility.

Linguists have also testified in cases concerning the educational opportunities of minorities. The best known of these cases is William Labov's testimony in Martin Luther King, Jr. Elementary School Children v. Ann Arbor School District Board, 473 F. Supp. 1371 (E.D.Mi. 1979). And in Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975) the testimony of a linguist was permitted in an action alleging that bar examiners were able to identify black English dialect, and used this information to discriminate in grading bar exams. The American courts are not alone in accepting expert testimony on communication issues involving minority groups. For an interesting discussion by a linguist about an Australian case, see Eades (1996).

At times, the testimony of a linguist might actually be required. Courts sometimes refuse to permit non-linguists to testify about accents or about the similarities between two voices, especially when the identification involves voices on tape recordings or when untrained government agents are offered to make the identification.[7] When lay identification is permit-

ted, for example, by the police or by a victim in a voice line-up, linguists are often allowed to testify about the reliability of the process, (Dumas 1990; Labov 1988). Their testimony, however, may be limited to features of the particular voices or recordings in issue, and is not permitted to extend to global problems concerning voice recognition in general.[8]

This is not to say that expert testimony from linguists is always welcome in the courts, or appreciated when it is allowed. Sometimes linguists are asked to say things that are legally irrelevant. An especially egregious example is Mead Data Central, Inc. v. Toyota Motor Corp., 702 F.Supp. 1031, 1037 (S.D.N.Y. 1987). Mead had sued Toyota for trademark violation, claiming that Toyota's new car, LEXUS, infringed on Mead's legal data base service, LEXIS. Toyota presented the testimony of a language expert, who noted that the two words *can* be pronounced differently. While true, the opinion is completely beside the point, since the legal issue is whether the two were likely to be confused with one another. Judges have little patience with parties who attempt to create the illusion of science by offering expert testimony that is likely to lead a jury astray. When linguists, even unwarily, participate in such efforts, the judicial reaction damages the legal community's perception of linguistics as a field that can be of help to the courts, making it harder for relevant linguistic evidence to be accepted in subsequent cases. As for the lawyer who offered the linguistic testimony in the first place, he no doubt has moved on to other cases, without much regard for the broader implications of his failed effort.

It seems clear that the legal system is not negatively predisposed to hearing from language experts as a general matter. Yet, a somewhat different kind of picture emerges when linguists are called to testify about the meanings of legally relevant texts. Traditionally, some texts are interpreted by judges, others by juries. Courts have been protective of the roles of judges and jurors in interpretation, and have often reacted negatively to offers of linguistic testimony for fear that the expert is being offered to usurp these traditional functions. In the remainder of this paper, I will suggest a model for how linguistic expertise on meaning fits into the legal system. This might serve both to suggest ways in which the legal system can make use of linguistic expertise not usually exploited and at the same time to limit the extent to which irrelevant expert testimony is offered.

WHY SOME COURTS ARE SUSPICIOUS OF OPINION TESTIMONY ON MEANING

While the record is mixed, courts often reject the expert testimony of linguists offered to prove the meanings of statutes,[9] insurance policies,[10] recorded conversations,[11] and allegedly libellous statements.[12] This record has never been closely examined. However, Levi (1994b: 9–10) has noted the infrequency of court appearances by linguistic experts when the issue is semantics:

> One would thus imagine that there could be thousands of contract cases every year in which semantic analysis by a trained linguist could be useful to the court. Nevertheless, the most recent bibliographic record of forensic linguistics (Levi 1994[a]) shows very little in the way of published reports on *semantic* analysis as the focus of a linguist's expert testimony. (It would be reasonable to speculate, however, that many more cases in which a linguist consults on a semantic issue occur each year than those which are written up by that linguist subsequently.)

Courts articulate two reasons for their becoming suspicious when linguists are asked to testify about the meanings of legal texts. First, they sometimes hold that linguists are not needed because the members of the jury are just as able as the linguist to interpret ordinary English. Second, in cases in which it is up to the judge to decide meaning as a matter of law, courts sometimes make an institutional argument to the effect that linguists have no place in the process since linguists are not experts in the law.

It is not unusual for courts to reject proffered testimony about meaning out of hand because it appears to present expert opinion about something that the jury can do without the help of experts. In Tilton v. Capital Cities/ABC Inc., 938 F.Supp. 751, 752 (N.D. Okla. 1995), aff'd, 95 F.3d 32 (10th Cir. 1996), for example, a federal court rejected expert linguistic opinion testimony about the meaning of an allegedly libellous statement in a television programme:

> In the instant case, the Court concludes that [the linguist's] proposed testimony relates to matters within the common knowledge of an average juror. Similar to the courts in [other cases], the Court finds that [the linguist's] testimony would not assist the jurors in reaching a determination as to whether Plaintiff was defamed or placed in a false light by the PrimeTime Live broadcasts. In the Court's view, the jury is clearly capable of determining what the average viewer from a one time viewing understood as expressed or implied by the PrimeTime Live broadcasts in regard to Plaintiff.

The court summarized the letter from counsel offering the expert testimony as follows:

> [The linguist will] testify how the use of words, patterns of words, the position of words, the taking of words out of context and the placing of words with visual presentation, were used by Defendants to convey meanings to the viewing public. [The linguist] will testify

> as to the meanings expressed and implied in the PrimeTime Live broadcasts, how the average viewer was likely to understand the broadcasts, the implying of defamatory facts by Defendants and Defendants' knowledge of falsity of the facts and implied facts presented to the viewing audience.

I find nothing wrong with this ruling, at least if the facts are as the court states them. Jurors are themselves average viewers. The plaintiff's lawyer in this case was attempting to have an expert tell them whether they should be insulted by a television programme, just in case they were unable to decide on their own that they did not find the statements defamatory.

At the heart of the matter is the fact that linguists generally are not semantic experts in the sense that they know better than lay people what ordinary English words or expressions mean. They are experts in the nature of meaning. Thus, as a trained linguist, I can opine about what in the structure of English causes the ambiguity in the classic sentence, 'Flying planes can be dangerous'. Perhaps more significantly, I believe that I can explain my analysis to those not trained in linguistics. But my understanding of the sentence as ambiguous does not come from my training as a linguist. Rather, it comes from my being a native speaker of English. Significantly, my linguistic training has made me more sensitive to possible interpretations that others might not notice, and I can bring these to the attention of a judge or jury. But once I point these out, and illustrate them clearly, we should be on equal footing.

None of this is any secret within the linguistics community itself. Chomsky, for example, starts from the perspective that 'A person who speaks a language has developed a certain system of knowledge, represented somehow in the mind and, ultimately in the brain in some physical configuration.' (Chomksy 1988: 3). The intuitions that native speakers of a language have about the set of possible meanings of an utterance, and about the grammaticalness or ungrammaticalness of various utterances, form part of the underlying data that linguistic theory attempts to explain. Anyone reading the literature in semantics can see that it is about explanation – not about prescription. When a linguist takes the witness stand to tell jurors what their intuitions ought to be, that linguist is ordinarily not giving expert testimony at all. Rather, he is reciting the data on which linguists build theories: the intuitions of native speakers of a language about possible meanings and about grammaticality.

The admissibility of expert testimony in the federal courts is governed by Rule 702 of the Federal Rules of Evidence. The Rule states:

> If scientific, technical, or other specified knowledge will assist a trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The issue is whether the testimony will 'assist a trier of fact'.[13] Generally, we do not need a linguist to make prescriptive statements about the meaning of ordinary language any more than we need an expert in colour vision testifying that a traffic light is red and not green. While the vision expert could, no doubt, present an informative explanation of the electrochemical events that resulted in the perception of red, none of that is very important in a case involving a traffic citation for running a light that anyone not colour blind could see is red. Similarly, only when a linguist can provide information or analysis in addition to whatever it is that jurors bring with them to the jury room will his testimony be relevant.

Below I will argue that linguists do indeed have contributions to make in some cases when a dispute is over meaning. But they do not have something to offer in *all* such cases, which explains Levi's observation that the linguistic literature on forensic semantics is sparse.

Courts give a second, structural reason for rejecting testimony by linguists about meaning. Typically, courts do not accept experts on what the law is. Lawyers and judges are supposed to be able to figure that out for themselves. Interpretation of some documents, such as statutes, contracts and patents, is up to the judge, and is considered a matter of law. If a statute, for example, makes it illegal to use a firearm in a drug trafficking crime, judges decide whether the expression 'use a firearm' includes trading a gun for cocaine. The system does not let each jury in each case decide separately what behaviour the statute should cover.

In rejecting linguistic testimony, courts sometimes argue, as an institutional matter, that legal decisions are for judges – not for linguists. A California case interpreting an insurance policy exemplifies this position: 'The interpretation of the terms of the written policy, in the absence of a relevant factual dispute, is typically a question of law. The opinion of a linguist or other expert as to the meaning of the policy is irrelevant to the court's task of interpreting the policy as read and understood by a reasonable lay person.'[14] Similar statements can be found in the context of statutory interpretation,[15] although courts are more receptive to permitting linguists to assist them in that realm.[16]

This attitude reflects a long history of interpretation by judges of legally relevant documents. In fact, centuries-old statements about the interpretation of statutes by venerable scholars and judges, such as William Blackstone and Chief Justice John Marshall, are still routinely cited in the legal literature. See Solan (1998) for discussion.

Yet, the blanket rejection of expert testimony on the interpretation of legal documents is without legal basis. Nothing in either the rules of

evidence or the distribution of responsibility in the legal system should preclude such expert testimony in principle when it is helpful. In fact, the Supreme Court has itself quoted an article written by Clark Cunningham and a group of three linguists in several cases involving statutory interpretation (Cunningham, *et. al.* 1994).[17] The article presented linguistic analysis of statutory cases then pending before the Court. Similarly, courts routinely rely on experts in patent cases, where the judge could not have a clue about the scientific claims without assistance. (See Markman v. Westview Instruments, Inc., 116 S.Ct. 1394 (1996) for discussion of the use of experts in the interpretation of patents.)

THE LINGUIST AS TOUR GUIDE

A model for expert testimony on the meanings of texts that are difficult to understand

Does the judicial reaction to expert testimony on meaning suggest that the linguist should stay off the witness stand when the issue is interpretation? For simple statements and short, straightforward discourses, a jury's intuitions really are what the system calls for. If a linguist can tell the members of a jury that they should be offended by everyday speech that they understand perfectly well and do not find offensive, then it is hard to see why we need to have juries at all.

The balance changes, however, when we turn to tricky passages – passages about which the parties argue sensibly in favour of conflicting positions. Jurors have intuitions there, too, but a juror is not obliged to act only on intuitions. If a juror has access both to intuitions, and to an explanation for how her intuitions are as they are, she will have more confidence in the rightness of her position. And if a party can give a juror more confidence in the rightness of her position by converting, at least in part, an intuitive sympathy into a structured understanding, then the Rules of Evidence say that the party should be allowed to do so.

The same holds for long transcripts or documents in which the relevant interpretive problems are spread out. Of course the jury can read the document. Of course the jury can listen to the tape. But not all jurors, without help, can focus on a phrase in paragraph 24 of a contract that may have impact on how another word should be interpreted in paragraph 55, some forty pages later, and keep it all together. In fact, not all jurors can read the documents carefully enough even to notice the problem at all. And not all jurors, hearing two people talking about a murder, can reflect on exactly which of the two raised the issue each time the subject arose, and what each person said.

Similarly, the linguist can conduct studies of word use when that is in issue. I pointed out earlier that trademark cases sometimes require a court

to determine whether a particular meaning of a word has become generic. Linguists can conduct experiments, search databases, and gather information in other ways on whether a claimed trademark is really trying to capitalize on a word's everyday meaning. The same holds true for contract cases in which the custom and usage of a term is in issue.

I do not mean to say that a linguist is the only person who can offer help on these matters. But I do believe that a linguist is one person who can offer that help, and can do so in a manner that will serve the goal of expert testimony, which is to 'assist the trier of fact to understand the evidence'. Linguists are by training skilled at talking about language. When a case requires that the judge or jury be able to talk about language to evaluate the issues fully, then an expert in linguistics can be of help. In other words, the linguist can serve as a semantic tour guide.

Note that the linguistic tour guide's principal function is not to offer his 'expert' opinion about a document's meaning. He has no expert opinion about what the passage means, only the opinion of a native speaker who, through training, has made himself sensitive to the range of possible interpretations that are available to everyone. Rather, the linguist is being called to assist the trier of fact by explaining how their shared intuitions about possible meanings has a basis in the structure of our language faculty, and just what that basis seems to be. The linguist may also point out possible interpretations that may have gone unnoticed, but which a juror will recognize as legitimate upon reflection. I personally have testified as an expert linguist, explaining all of this to the trier of fact, and I have never had the experience of causing confusion about the difference between my role and that of the trier of fact in coming to an understanding of the text on which I was asked to comment. Rather, at least in my experience, people are capable of understanding how it is that jurors might be the ultimate interpreters, but still benefit from a technical tour of the text.

Moreover, Rule 702 imposes a 'gatekeeper' role on the judge, who must determine in advance of the proffered testimony whether to allow it. (See Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).) This function should be sufficient to keep from the jury bogus statements offered to explain how it is that we understand things in ways that we really do not understand them at all. It should also be sufficient to keep from the jury explanations of simple texts fully within the jury's grasp when a party attempts to call a linguist solely to gain authority for propositions that are clearly intuitive in any event. But the gatekeeper role should not be used to keep out guided tours of legally relevant text that is difficult to understand, and whose interpretation is disputed by two parties with defensible positions.

As with any tour guide, it will be up to those who take the tour to decide how good the guide really is. If a guide to a bird-watching expedition tells a sophisticated ornithologist that a common robin is actual-

ly a rare finch, then he should be exposed as a charlatan. Similarly, if a linguist explains to the jury how it is that a passage means x, but after careful consideration, the members of the jury find x to be a strained reading, or not even a possible reading at all, then the linguistic guide should go the way of our finch expert. Again, the judge can keep out obviously unhelpful analyses through her gatekeeper role.

But guides sometimes teach us a lot. The ornithological guide might really teach us a great deal about how it is that we are able to find our rare bird in one tree instead of another. And the linguist might walk us through a document, pointing out linguistically salient moments that can help us to notice new things, and to hone and to better understand our intuitions as we go along. This is what experts do. If a jury is forthrightly told about the scope of a linguist's expertise, there is no reason why the system should not benefit from this knowledge. Judges should recognize this, and permit the testimony of linguistic experts, when the testimony is appropriately circumscribed.

Overlap between the jury's everyday, practical knowledge, on the one hand, and the linguist's specialized knowledge on the other (the overlap is the set of intuitions that they all have as speakers of the language), should not disqualify the linguist. To the contrary, the tour guide model is the system's answer to this problem when it occurs in other contexts. Weinstein and Berger (1998: ¶702.03[2]) illustrate the point with experts who interpret surveillance photos. For example, in United States v. Everett, 825 F.2d 658, 661 (2d Cir. 1987), the United States Court of Appeals for the Second Circuit held that it was not error for the trial court to admit expert testimony on photogrammetry – 'calculating the heights of objects from their photographic images'. The court rejected the defendant's argument that 'the agent's testimony confused the jury, was within the jury's common understanding, and was repetitious and cumulative', precisely the same arguments made against testimony by linguists. 'Even were the jurors well-equipped to make judgments on height based upon photographs (a doubtful proposition given the distortions produced by the lighting and positioning of the camera), testimony from experts may still be admissible if they have specialized knowledge to bring to bear on the same issue which might be helpful.' Courts virtually always allow such testimony, provided that it is 'sufficiently detailed to assist the trier of fact within the meaning of Rule 702', much the same as courts' response to expert linguistic testimony on voice identification.[18]

Consistent with the tour guide model, courts do not always allow opinion testimony on the identity of the individual in the photograph (United States v. Snow, 552 F.2d 165, 168 (6th Cir. 1977)). What makes the expert an expert is her ability to examine the details of the photograph carefully, so that she can reach a more thoughtful, analytical conclusion than could someone less practised in photographic comparisons.

After the expert has shared this knowledge with the jury, the expert and the jury are on equal footing, and opinion testimony is beside the point. This is not to say that it is crucial that ultimate opinions be excluded as prejudicial in every case. Once a photographic expert has testified about the similarities or differences between the person in the photograph and the defendant, her opinion will often be obvious, whether or not it is stated outright. None the less, the core of the photographic expert's testimony is the tour of the photograph – not the expert's conclusion.

Similarly, a linguist who is asked to examine a tape-recorded conversation between the defendant and another about a murder for hire should be permitted to bring to the jury's attention the fact that the defendant never raised the issue himself and reacted only a few words at a time when the other participant in the tape spoke. The linguist should be permitted to organize the conversation around each instance in which the topic arose, and to show the jury exactly who said what each time. The linguist should also be permitted to tell the jury, based on the literature relating to the structure of discourse, that people confronted with uncomfortable suggestions in conversation, frequently make small statements of acknowledgment, to let the speaker know that they are listening, without committing themselves any more than they have to under the circumstances. See Shuy (1993; 1998) for many examples of this sort of testimony.

But the linguist should not opine as to the intent of a particular party. That is up to the trier of fact. Since, as a human, the linguist draws inferences about intent on the same basis as do other speakers, there is generally no purpose served by such opinions. I thus agree with the court's decision in United States v. Kupau, 781 F.2d 740, 745 (9th Cir. 1984), which disallowed expert linguistic testimony on a defendant's intent based on discourse analysis. It is not clear from the opinion whether some more limited, tour guide testimony would have been appropriate in that case.

The failure of lawyers who proffer linguistic experts to recognize this fact is, I believe, the principal reason for courts' rejection of linguistic testimony on meaning, especially in the area of discourse analysis. The linguist is indeed an expert in the kinds of information that we use in drawing such inferences. If a linguist can show where this information appears in a particular corpus that is too large or too complicated for jurors to grasp as a whole without assistance, then the linguist has helped the trier of fact to understand the evidence. Similarly, if the linguist can bring to the jury's attention a range of possible interpretations that is available to everyone, but which might have gone unnoticed, the linguist has served an important function at a trial, and her testimony should be allowed.

Sometimes, it will be impossible for the expert to avoid stating his opinion on meaning, since the explanation offered will naturally entail

the range of meanings being explained. A linguist, for example, who explains to the trier of fact the ambiguities in a lengthy contract that could lead the parties to disagree about their obligations, implies that those ambiguities are really present. Here, the jury should be told of the distinction between the linguist's expert analysis on the one hand, and his native speaker intuitions on the other. I do not believe that this distinction is the least bit confusing to a jury. Rather it should serve to put the guiding nature of the testimony in proper perspective.

Some examples of good and bad guides

Most judicial opinions that deal with the question of expert linguistic testimony on meaning do not contain a very detailed description of exactly what it was that the linguist was being offered to say. But a few opinions do, as do a number of accounts by linguists in the literature.

Linguists acting as guides are sometimes helpful to courts faced with tricky contractual or statutory provisions in which both sides seem to take reasonable positions. One trial court accepted a linguist's analysis of an employee stock option agreement, which had to be exercised no later than 'the expiration of 30 days from the date of termination of the optionee's employment *by the company*' (Dodds v. The Surety Indemnity Co., 1 Phila 611 (Common Pleas Ct. of Phila. Co. 1978)). The employee left voluntarily and tried to exercise the option about one year later. The company rejected the attempt, arguing that 'the optionee's employment by the company' had ended more than 30 days earlier.

To me, this expression is ambiguous. It can refer either to the company's termination of the optionee's employment, or to the termination of the company's employment of the optionee, regardless of the agent of the termination. The first of these readings means that the employee was fired. The second permits, but does not require that interpretation. It is only under the second reading that the employee can be said to have violated the contract by exceeding the 30-day deadline for exercising his options.

With the help of a linguist, the employee demonstrated that agentive *by*-phrases, like 'by the company,' are not fixed in position syntactically. Thus, we can say 'the destruction of the city by the enemy', or 'the destruction by the enemy of the city' (see Chomsky 1970). In this case, the position of the *by*-phrase creates an ambiguity. Compare the following:

1 the termination by the company of the optionee's employment.
2 the termination of the optionee's employment by the company.

Here again, in American English 1 means that the employee was fired; 2 means only that he was no longer employed. The *by*-phrase can be associated either with 'termination' or with 'employment', creating different readings.

Of course, the trier of fact would have to decide whether he senses this ambiguity, just as the reader of this article must also do. But the process of relating the ambiguity in the contract to the transportability of agentive *by*-phrases should clarify in the minds of the readers (as it did for the jury in the case) just why one of the parties might claim such an interpretation. The analysis helps the trier of fact understand the evidence, and thus was properly admitted. To the extent that the linguist offered an expert opinion about meaning, a limiting 'tour guide' instruction should be given, as I suggested above. And if, despite this analysis, a reader (or juror) simply cannot get both readings, then the analysis should be ignored as irrelevant. Without question, though, the analysis survives scrutiny under the court's gatekeeping function.

Roger Shuy's writings on discourse analysis also provide some good examples. Shuy (1998) writes of an Oklahoma case in which a husband was accused of killing his wife. There was very little evidence, including very little circumstantial evidence. The government's strongest point was what it considered to be inconsistent statements made by the defendant to the police and in testimony.

Shuy's contribution to the case was to perform a 'topic analysis'. Shuy sorted the record into instances in which the defendant spoke about particular topics, instances in which the police characterized what the defendant had said about those topics, and instances in which the police admitted not remembering what was said because of the stress of the moment. It turned out that some 'inconsistent statements' emanated from the police telephone operator's misreporting to the police the substance of the defendant's call. It also turned out that the police officers investigating the case really did not remember much of what had happened.

Shuy was appropriately permitted to testify in order to organize the various statements that the government argued were so incriminating in such a way that the jury could see them in a light that favoured the defendant. That is what it means to defend oneself. He did not opine, and should not have been permitted to opine, as to the honesty of the defendant. But he was properly allowed to restructure the evidence according to independently motivated, linguistically based categories, and to go through the chronology of each topic that the defence considered relevant in such a way as to bring out his point.

One might argue that a lawyer can do what Shuy was asked to do. Some lawyers can. But those linguists who specialize in the structure of discourse can do this too, and can most often explain their analyses more cogently than can lawyers. Significantly, the linguist is in a good position to decide what categories to use in presenting the evidence:

topics, speech acts, statements of knowledge, and so on. These analyses meet the Rule 702 requirement of assisting the trier of fact to understand the evidence. By limiting them to guided tours, the risk of juror confusion is diminished as well. By subjecting them to cross-examination, the jurors will be in an even stronger position to draw informed inferences from the evidence.

There are many good examples of linguistic contributions to issues of meaning in the literature. Kaplan (see pp. 107–26 in this volume) describes his having used Gricean pragmatics to demonstrate that one party's interpretation of a will was more consistent with generally used discourse principles than another party's interpretation. Green (1990) demonstrates how, using discourse analysis, linguistically motivated categories might provide a useful means for sorting conversations to make them more easily analysable by a jury. And Prince (1990) discusses how categorization by the police can lead jurors to misunderstand an individual. All of these articles illustrate how it is possible to bring to the jury's attention aspects of the structure of the discourse without actually opining on what an individual meant to say at a particular moment.

The Federal Rules of Evidence actually anticipate the need for tour guides in Rule 1006, which permits the use of summary charts when the underlying testimony is too voluminous to be conveniently examined in court. How voluminous must the evidence be to trigger Rule 1006? The Fifth Circuit has held that when: 'the average jury cannot be rationally expected to compile on its own such charts and summaries which would piece together evidence previously admitted and revealing a pattern suggestive of criminal conduct, summary/testimony charts [offered by the prosecution in a criminal case] may be admitted' (United States v. Winn, 948 F.2d 145, 158 (5th Cir. 1991)). The same standard should apply to criminal defendants and other parties where the charts would reveal a pattern suggestive of events other than criminal conduct.

Rule 1006 is consistent with the notion of the expert linguist guiding the trier of fact through complicated passages. In fact, there are two cases that discuss using charts when the evidence is linguistic in nature. In one case, the court excluded the use of charts because their headings 'impermissibly reflected the expert's opinion as to the content of the recorded testimony that had previously been presented to the jury' (United States v. Evans, 910 F.2d 790, 803 (11th Cir. 1990)). By implication, the charts would have been admitted had the headings served more as maps through lengthy passages than as opinion about the meaning of ordinary language. In the other case, the chart was admitted, but truncated by the court (United States v. Shields, 1992 WL 43239 at 33–34 (N.D.Ill. 1992)).

In contrast, the tour guide model suggests that the Fifth Circuit properly affirmed the exclusion of linguistic expert testimony where the expert was being offered to opine that a contract killer 'was not authorized by any client to contract for [the victim's] murder' (United States v. Edelman, 873 F.2d 791,795 (5th Cir. 1989)). This linguist was not walking a jury through complicated passages. Rather, he was being offered to draw the very inferences from those passages that the jury itself should be permitted to do. It might have been possible for defence counsel to offer linguistic testimony in keeping with the tour guide model in that case, but it did not happen, and the court acted appropriately.

By the same token, expert linguistic testimony was properly excluded in a libel action brought by the World Boxing Council against the late sports journalist Howard Cosell (World Boxing Council v. Cosell, 715 F. Supp. 1259 (S.D.N.Y. 1989)). In a co-authored book, Cosell had accused the Council of awarding the most lucrative fights in an improper manner. The Council sued. Cosell's defence was that he believed his statements to be true, based on adequate research, and that he therefore did not act with the malice required under the law of defamation. On motion for summary judgment, Cosell said that he was told of these improprieties by sources he had interviewed, and that he had read of them in various articles, some of which were far harsher on the Council than he was. To rebut this, the Council attempted to use an expert linguist, who was to opine on Cosell's state of mind when he wrote the book based in part on a comparison of the book and the source articles. The court rejected this offer: 'A layman is perfectly capable of reading Cosell's book and comparing it with the articles he claims to have relied on, without the "help" of a linguistics expert' (715 F.Supp. at 1264). For one thing, the expert was acting as a prescriptive interpreter rather than as a tour guide. For another, the court was almost certainly right in concluding that the materials were sufficiently straightforward so that no guide was needed at all.

CONCLUSION

Linguists are indeed welcome in the courtroom as experts – but not always as experts on meaning. Some legally relevant texts require no special expertise to interpret. Others are difficult – not so difficult that a trier of fact should not interpret them at all – but difficult enough for the trier of fact to benefit from some guidance. It is around this notion that I believe that the admissibility of expert testimony on meaning should be organized. To do this, I have suggested the model of the tour guide. It pays proper respect to the system's key players, and at the same time allows the system to benefit, as needed, from a group of experts that may have something to contribute to the fair resolution of legal disputes.

When linguists are asked to consult in legal cases, it is tempting for them to agree to do so as long as they are not being asked to say things that are not true. Unfortunately, this level of scrutiny is not enough to

render linguistic expert testimony useful and admissible. Lawyers who ask linguists to testify must recognize just what it is that linguists do, and structure their requests accordingly. Linguists can help in this process by enquiring into the legal issues, and pointing out just when their opinions add little to what jurors already know as native speakers. This more intense level of enquiry can ultimately serve to enhance the status of linguistics as a useful tool in legal analysis.

NOTES

* A version of a paper was presented at the meeting of the International Association of Forensic Linguists, Duke University, 6 September 1997. I am indebted to many people who gave helpful comments there, and especially to Judith Levi and Peter Tiersma. My thanks also goes to Margaret Berger for bringing relevant issues and examples to my attention. I am also grateful to Paul Leroy, Lori Mason and Nicholas Moyne for their valuable assistance in conducting the research. This project was supported by a summer research stipend from Brooklyn Law School.

1 Letter from Linguistic Society of America to the author dated 28 August 1997. The LSA publishes a list of all its members each December in the *LSA Bulletin*. Not all of these members are from the United States.

2 'The appellate court will sustain the trial judge's decision unless the decision is manifestly erroneous, or, as it is sometimes expressed, is an abuse of the trial court's wide discretion. There is no substantive difference between the "manifest error" and "abuse of discretion" standards of review. ... In short, the trial judge's ruling, whether excluding or admitting expert evidence, will not be disturbed except in rare instances.' (Weinstein and Berger 1998)

3 See United States v. Quintero-Barraza, 78 F.3d 1344 (9th Cir. 1995). For discussion of a linguist's testimony concerning the inadequacy of Miranda warnings to a defendant not fluent in English, see Roy (1990).

4 Free v. Peters, 12 F.3d 700 (7th Cir. 1993)(considering, but only perfunctorily, comprehensibility study of death penalty jury instructions that had been influential in district court on habeus corpus motion); Doston v. Duffy, 732 F.Supp. 857 (N.D.Ill. 1988)(comprehensibility of forms given to welfare recipients concerning certain rights). For discussion of the comprehensibility of jury instructions, see Tiersma (1993; 1995). For discussion of the *Free* case, see Levi (1993).

5 See, e.g., Infinity Broadcasting Corp. v. Greater Boston Radio, II, Inc., 1993 WL 740936 (D. Mass. 1994).

6 See, e.g., Conagra, Inc. v. Geo. A. Homel & Co., 784 F.Supp. 700 (D.Neb. 1992); Quality Inns Int. v. McDonald's Corp, 695 F.Supp. 198 (D.Md. 1988); Trump v. Caesar's World, Inc., 645 F.Supp. 1015 (D.N.J. 1986). For discussion of linguistic issues in the dispute between Quality Inns and McDonald's over the former's effort to create a chain of McSleep budget motels, see Lentine and Shuy (1990). Lentine and Shuy consulted for Quality Inns, which lost.

7 See Ricci v. Urso, 974 F.2d 5 (1st Cir. 1992) (holding that detective did not have expert training in voice identification); People v. King, 183 A.D.2d 918, 584 N.Y.S.2d 153 (2d Dep't 1992) (not permitting lay witness to testify about whether defendant speaks with a Jamaican accent). But see United States v. Locascio, 6 F.3d 924 (2d Cir. 1993) (permitting federal agent to identify voices on tape even though he had no linguistic training); People v. Sanchez, 129 Misc.2d 91, 492 N.Y.S. 2d 683 (Sup.Ct. Bronx Cy. 1985) (permitting lay witness to testify about perpetrator's accent, but acknowledging that expert linguistic testimony might sometimes be necessary).

8 See Government of the Virgin Islands v. Sanes, 57 F.3d 338 (3d Cir. 1995) (permitting limited testimony to the effect that voice exemplar was improperly suggestive); United States v. Turner, 528 F.2d 143 (9th Cir. 1975, cert. denied, 96 S.Ct. 426 (1975) (permitting limited testimony, but not permitting testimony that spectrography is more reliable than aural identification generally). But see United States v. Kapau, 781 F.2d 740 (9th Cir. 1975), cert. denied, 475 U.S. 1120 (1986) (refusing to admit expert testimony on the reliability of voice identification).

9 See Motor Vehicle Admin. v. Mohler, 318 Md. 219, 567 A.2d 929 (1990); Body-Rite Repair Co., Inc. v. Director, Div. of Taxation, 89 N.J. 540, 446 A.2d 515 (1982). *But see* Louisiana v. Azar, 535 So.2d 441 (3d Cir. 1988); Smith v. City of Akron, Ct. of Appeals, 9th Dist., slip op. (30 September 1987); Indiana Dep't of Revenue v. Apex Steel and Supply Co., Inc., 176 Ind.App. 187, 375 N.E.2d 598 (1978); Pre-Fab Transit Co. v. ICC, 262 F.Supp. 1009 (S.D.Ill. 1967).

10 National Automobile and Cas. Ins. Co. v. Stewart, 223 Cal.App.3d 452, 272 Cal.Rptr. 625 (1st Dist. 1990); Suarez v. Life Ins. Co. of North Amer., 206 Cal.App.3d 1396, 254 Cal.Rptr. 377 (2d Dist. 1988); Rusk Aviation, Inc. v. Northcott, 51 Ill.App.3d 126, 502 N.E.2d 1309 (1st Dist. 1986).

11 See United States v. Carr, 965 F.2d 408 (7th Cir. 1992); United States v. Edelman, 873 F.2d 791 (5th Cir. 1989); United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988); United States v. Valverde, 846 F.2d 513 (8th Cir. 1988); United States v. Kupau, 781 F.2d 740 (9th Cir. 1986); United States v. DeLuna, 763 F.2d 897 (8th Cir. 1985); State v. Hill, 601 So.2d 684 (La.App., 2d Cir. 1992); State of Wisconsin v. Horton, 160 Wis.2d 930, 468 N.W.2d 211 (1991); State v. Conway, 193 N.J.Super. 133, 472 A.2d 588 (App.Div. 1984). See Wallace (1986) for discussion of some of these cases and argument that discourse analysis should be accepted by courts.

12 See Tilton v. Capital Cities/ABC Inc., 938 F.Supp. 751 (N.D.Okla. 1995), aff'd, 95 F.3d 32 (10th Cir. 1996) (holding that proffered testimony about the common meaning of ordinary words is within the common knowledge of the average juror); Seropian v. Forman, 652 So.2d 490 (Fla.App. 1995) (holding it error for trial court to have allowed political science professor to testify about meanings of words); James v. San Jose Mercury News,

Inc., 17 Cal.App.4th 1, 20 Cal.Rptr.2d 890 (6th Dist. 1993) (stating that linguistic testimony need not be excluded in principle, but that it was not helpful in that case); World Boxing Council v. Cosell, 715 F.Supp. 1259, 1264 (1989) ('A layman is perfectly capable of reading Cosell's book and comparing it with the articles he claims to have relied on, without the "help" of a linguistics expert.'); Brueggemeyer v. American Broadcasting Companies, Inc., 684 F.Supp. 452 (N.D.Tex. 1988) (considering expert testimony by linguist, but not finding it helpful or convincing in that case). But see Weller v. American Broadcasting Companies, Inc., 232 Cal.App.3d 991, 1008, 283 Cal. Rptr. 644, 655 (1st Dist., 1991) (permitting linguist to explain disparities in meaning: 'Although the average juror no doubt could also listen to the broadcasts and understand their meaning, he or she is not as well equipped as is a linguist to explain the disparity between the words expressly stated and the implicit meaning conveyed.'); Fong v. Merena, 66 Haw. 72, 655 P.2d 875 (1982) (reversible error to exclude linguist's testimony to explain potentially non-libellous meaning of allegedly defamatory sign).

13 There is extensive case law about just what this means. The leading case that deals with scientific evidence is Daubert v. Dow Pharmaceuticals, 509 U.S. 579 (1993). I believe that the model for testimony by linguists presented here is compatible with any reasonable interpretation of the rules. I therefore will not discuss technical issues of evidence here.

14 National Automobile and Cas. Ins. Co. v. Stewart, 223 Cal.App.3d 452, 458–59, 272 Cal.Rptr.625,629 (1st Dist. 1990). See also Pietrzak v. Rush-Presbyterian-St. Luke's Medical Center, 284 Ill.App.3d 244, 670 N.E.2d 1254 (1st Dist. 1996). But see Fong v. Marena, 66 Haw. 2, 655 P.2d 875 (1982) (requiring the testimony of a linguist).

15 Motor Vehicle Admin. v. Mohler, 318 Md. 219, 567 A.2d 929 (1990); Body-Rite Repair Co., Inc. v. Director, Div. of Taxation, 89 N.J. 540, 446 A.2d 515 (1982).

16 Louisiana v. Azar, 535 So.2d 441 (3d Cir. 1988); Smith v. City of Akron, Ct. of Appeals, 9th Dist., slip op. (September 30, 1987); Indiana Dep't of Revenue v. Apex Steel and Supply Co., Inc., 176 Ind.App. 187, 375 N.E.2d 598 (1978); Pre-Fab Transit Co. v. ICC, 262 F.Supp. 1009 (S.D.Ill. 1967).

17 The article reviews my book (Solan 1993). It argues that the kinds of linguistic analyses that I presented of statutory cases for the purpose of making certain jurisprudential points could be useful to courts *before* they actually made their decisions. Cunningham *et. al.* presented similar analyses of cases then pending before the Court. The Supreme Court obviously agreed with their position, citing the article in several cases. See United States v. Granderson 114 S.Ct. 1259, 1267 (1994); United States v. Staples, 114 S.Ct. 1793, 1806 (1994) (Ginsburg, J. concurring); Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 114 S.Ct. 2251, 2255 (1994). See also Cunningham and Fillmore (1995), whose statutory analysis appears to have been followed closely by Justice O'Connor in the Supreme Court's unanimous opinion in Bailey v. United States, 116 S.Ct. 501 (1995). Although the Court does not cite the article, it was brought to the Court's attention in the briefs. For relevant history, see Solan (1997: 276, n.160).

18 United States v. Barrett, 703 F.2d 1076, 1084 (9th Cir. 1982). See United States v. Alexander, 816 F.2d 164 (5th Cir. 1987), holding it to be reversible error to deny a defendant the opportunity to use a photographic expert as part of his defence that he was not the individual in the photograph despite superficial similarities that could enhance the likelihood of mistaken identity.

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Pragmatic contributions to the interpretation of a will

Jeffrey P. Kaplan

Linguistics Department, San Diego State University

ABSTRACT The ultimate meaning of a holographic will lacking all conventional indicia of sentence boundaries (capitalization, punctuation) was the subject of litigation. At the sentence level, the will was ambiguous, but syntactic and (especially) pragmatic analysis led to a clear construal of the text. The main evidence derived from an application of Grice's maxim of quantity, with support from the maxim of relevance. The linguistic analysis was echoed by the court's decision.

KEYWORDS pragmatics, wills, Grice, maxim of quantity, discourse analysis, functional syntax

INTRODUCTION

In autumn 1996 a holographic will left by a wealthy San Francisco area real estate developer was presented to a California court for interpretation. The will lacked all punctuation, did not mark sentence boundaries, had random capitalization, and was grammatically deviant. (The trial court described the will as 'somewhat bizarre', and an appellate court labelled this characterization an understatement.)

Under California law, 'a will must be construed according to the intention of the testator as expressed in that will'.[1] While the court heard extrinsic evidence – e.g., about the testator's relationships with the parties – this evidence was offered for the purpose of supporting or attacking one or another interpretation of the will.

Because the will lacks the conventional indicia of structure providing a basis for interpretation, it was a fair candidate for linguistic analysis to uncover aspects of structure which might not be apparent to the court and which might constitute evidence about the intention of the testator as expressed in the will. I was asked to analyse the will to seek such aspects of structure. I was deposed and gave testimony in court, and judging from the court's written opinion when it decided the case, it appears that the testimony was helpful. The court construed the will in accordance with the linguistic analysis and referenced my testimony as among the factors upon which its decision was based. The case may be interesting to forensic linguists and legal scholars alike, in light of the twin rules that a court is the decider of issues of law and that the mean-

1350–1771