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LEGAL COMMUNICATION: VERBAL AND NONVERBAL COMMUNICATION IN THE PRACTICE OF LAW

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The paper describes the types of communication in the practice of law which encompasses complex relations across a diversity of languages, cultures and different orientations arising from their confrontations within space and time. The paper also analyses the specific features of Legal English which is used in each type of legal communication. The two types of legal discourse are interdependent and are often used simultaneously. One follows logically after the other, but both highlight the purpose of preventing ambiguity and vagueness in the practice of law.

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INTRODUCTION

Legal practitioners and judges continually emphasize the importance of communication in the practice of law. Law is fundamentally a profession about research and communication. The practice of law involves researching case law, constructing arguments and persuading others. It demands the ability to clearly construct, present and critically analyze arguments. Legal language is made up of several genres, each with its own specific characteristics. It ranges from the spoken exchanges in a court between, say, lawyers and witnesses in a cross-examination, to the relatively standardized instructions given to jury members who are required to express a verdict in a court case, to the jargon employed by members of the legal profession in interpersonal communication, to the written language in case law, law

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reports and prescriptive legal texts. It may include anything from international treaties to municipal regulations, insurance policies, contracts of sale or wills. Some of the genres constituting legal language are more formal than others. For example, even if there are various formal restrictions in how spoken exchanges in the courtroom may be allowed to develop, some of the actual language used, for example by witnesses, may not differ radically from other genres of spoken discourse. On the other hand, certain types of written legal language may contain features that mark it as being so highly idiosyncratic as to be at times incomprehensible to anyone except legal experts.

D. Mellinkoff, describing legal language in America, writes

In a vast literature the portion devoted to the language of the law is a single grain of sand at the bottom of a great sea. The profession is properly more concerned with rights, obligations, and wrongs, and the incidental procedures....At this writing, the subject of "language" is absent from most law indexes and only in capsule form in the rest. It is certainly not too early, nor is it too late, to commence examination of the language lawyers use.¹

Communication, in general, and legal communication, in particular, is an act with consequences, and comprises performative utterances with effects. Communication involves the imparting or interchanging thoughts, opinions, or information among people by speech, writing, or signs.²

There exist various ways in which actors in our society have provoked public discourse in order to unveil the unsaid or hidden mechanisms of power and control, and then to call for transparency to all citizens—that is, readability, visibility and accessibility. Legal communication encompasses complex relations across a diversity of languages, cultures and different orientations arising from their confrontations within space and time. The treatment of data and its reliability presupposes intercultural analyses with factorial typologies: Linguistic, pragmatic and situational accounts. Cultural "embeddedness" is a key notion in effective, transparent and clear legal communication, which involves analysing the power of social institutions included in the language itself but not limited to it. Verbal communication entails the use of words in delivering the intended message. The two major forms of verbal communication include written and oral communication. In practice of law legal communication includes legal writing and oral communication. Nonverbal communication, which also is used in the practice of law, entails communicating by sending and receiving wordless

¹ D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 4 (Boston: Little, Brown & Co., vi. 1963).

² A. J. Ayer, *What Is Communication?* in *STUDIES IN COMMUNICATION* (A.W. Ayer et al.) 12—13 (1955).

messages. These messages usually reinforce verbal communication, but they can also convey thoughts and feelings on their own.³

I. LEGAL WRITING

Legal writing is a type of technical writing that professionals in the legal field use. The basis for any kind of legal writing is legal authority, and lawyers, judges, and paralegal construct court opinions, statutes, and administrative regulations to back up or support his or her ideas. A legal writer always includes appropriately formatted citations to the legal authority on which he or she is relying, but the format can vary according to the jurisdiction and the writer's audience. As technology has evolved, lawyers have increasingly relied on legal authority in electronic formats, which has changed the prevalent citation formats substantially in many jurisdictions.

Legal writing is technical in the sense that it often utilizes technical terms that a person who is not a legal professional is unlikely to understand. Some of the terms are unique to the legal profession, such as tort, or come from another language, such as *voir dire*, which is a French term. It may be necessary for lawyers to somewhat adjust their writing so that it contains fewer technical terms when addressing clients or other non-lawyers.

The main goal of any legal document is to express the writer's legal opinion on a particular issue. Writers also use some forms of legal writing to persuade the reader of a certain position or opinion. For instance, a lawyer might submit a legal memorandum in support of a motion that he or she has filed in a court case, which gives the legal authority underlying the motion and sets forth his or her argument in detail. In other cases, the writer simply intends to inform the reader or just give a legal opinion and the legal analysis underlying that opinion. For example, a lawyer might write a letter to a client giving a legal opinion about an issue or problem that he or she is facing.

Legal writing also applies to the drafting of legal documents, such as motions, petitions, and orders for filing with the court system. Lawyers typically draft and file these documents or pleadings with the court to request a court order about a particular issue. Many times, judges will write their own orders after making a decision or ruling on a case that lawyers have argued in court. Both lawyers and judges may use templates or forms

³ S. J. Drucker, *Legal Communication: A Review in Search of a Field*, 5(1) REVIEW OF COMMUNICATION 12—14 (2005).

for frequently used motions and orders, such as real estate contracts, which helps simplify the legal drafting process.

The vocabulary of legal writing has some specific features in using technical terminology that can be divided into four groups:

1. Special words and phrases unique to law, e.g. *fee simple*, and *novation*.

2. Quotidian words having different meanings in law, e.g., *action* (lawsuit), *consideration* (support for a promise), *execute* (to sign to effect), and *party* (a principal in a lawsuit).

3. Archaic vocabulary: Legal writing employs many old words and phrases that were formerly quotidian language, but today exist mostly or only in law, dating from the 16th century; English examples are *herein*, *hereto*, *hereby*, *heretofore*, *herewith*, *whereby*, and *wherefore* (pronominal adverbs); *said* and *such* (as adjectives).

4. Loan words and phrases from other languages: In English, this includes terms derived from French (*estoppel*, *laches*, and *voir dire*) and Latin (*certiorari*, *habeas corpus*, *prima facie*, *inter alia*, *mens rea*, *sub judice*) and are not italicised as English legal language, as would be foreign words in mainstream English writing.

Legal writing is of two, broad categories: Legal analysis and legal drafting. Legal analysis is two-fold: (1) Predictive analysis, and (2) persuasive analysis. In the United States, in most law schools students must learn legal writing; the courses focus on: (1) Predictive analysis, i.e., an outcome-predicting memorandum (positive or negative) of a given action for the attorney's client; and (2) persuasive analysis, e.g., motions and briefs. Although not as widely taught in law schools, legal drafting courses exist; other types of legal writing concentrate upon writing appeals or on interdisciplinary aspects of persuasion.⁴

The legal memorandum is the most common type of predictive legal analysis; it may include the client letter or legal opinion. The legal memorandum predicts the outcome of a legal question by analyzing the authorities governing the question and the relevant facts that gave rise to the legal question. It explains and applies the authorities in predicting an outcome, and ends with advice and recommendations. The legal memorandum also serves as record of the research done for a given legal question. A legal motion is a procedural device in law to bring a limited but contested matter before a court for decision. A motion may be thought of as a request to the judge (or judges) to make a decision about the case. Motions

⁴ <http://web-local.rudn.ru/web-local/prep/rj/index.php?id=1415&p=12400>.

may be made at any point in the proceedings, although that right is regulated by court rules which vary from place to place.

Legal Brief is a one-page summary of the case. Briefs must contain the following elements in the order listed: 1. Title page. 2. Procedural history. 3. Legal issue. 4. Facts of case. 5. Statement of rule. 6. Policy. 7. Dicta. 8. Reasoning. 9. Holding. 10. Concurrence. 11. Dissents.

Legal drafting creates binding, legal text. It includes enacted law like statutes, rules, and regulations; contracts (private and public); personal legal documents like wills and trusts; and public legal documents like notices and instructions. Legal drafting requires no legal authority citation, and generally is written without a stylized voice.

Legal letter drafting is an essential part of any legal dispute or arrangement. Most jurisdictions place an elevated value on memorialized thoughts, wishes, and demands. It is important, then, that letters be carefully drafted: Each word has meaning, and in many cases, what is written in a legal letter is binding. Drafting tasks typically fall to an attorney, though most anyone can craft an effective legal letter with a bit of research. The best tips for legal letter drafting are to know the issues, know the party, and know the legal rules of the governing jurisdiction.

Legal letters can also be used in less contentious circumstances. A letter designed to draft a contract, for instance, can start the ball rolling for a legally binding agreement, and a letter to draft a will can set out initial wishes and distribution requests. Neither contracts nor wills can be completely formalized in a single letter, but letters are a good way to set up early terms and come up with a baseline for negotiations.

Again, knowing the law is essential. Before drafting a contract letter, for instance, it is important for a drafter to understand what the governing jurisdiction's rules are on contract formation and language. In some places, certain contracting words must be used, and formalities must be followed in setting up the contract's form and structure. The same is often true for wills. Although a probate court will certainly consider a legal letter outlining a will, that letter is not usually itself an enforceable instrument unless it follows the precise form dictated by statute.

Language and word choice is also an important consideration in any sort of legal letter drafting. It can be tempting for a non-lawyer to pepper a letter with legal-sounding language, but this is not usually necessary or helpful. Legal terminology may make a letter sound important on the surface, but it will not fool a court. If a letter is not legally sound, no amount of "legalese" language will save it.

One of the best ways to draft an effective legal letter is to look at

examples of similar letters that have been written by attorneys. Reading a breadth of legal letters can give a drafter a feel for the appropriate format, as well as a sense of what kind of legal references are needed. Because the laws are different in different places, and are prone to change over time even in the same place, it is not usually advisable for drafters to rely on prior letters for legal interpretation.

Citing statutory law without actually understanding it is never advisable. Using existing letters for ideas on format, content, and organization, however, can be very helpful.

II. ORAL COMMUNICATION IN THE PRACTICE OF LAW

The language(s) used in the courtroom in any society forms a distinct register. Spoken language in the courtroom is different from spoken language in any other situation. It is partly because of the nature of the legal language, and partly because of the courtesies and politeness strategies used in multilingual situation which may dictate that the lawyer act as an interpreter between the accused and the court. Discussing the nature of spoken legal language, Erickson et al. (1978) suggests four varieties of spoken legal language. They are:

- Formal legal language;
- Standard English;
- Colloquial English;
- Sub-cultural varieties.⁵

The styles used by the judge, the advocate, the accused, the plaintiff, make language use in the courtroom a special universe of discourse and merits study as such. Oral arguments are spoken presentations to a judge or appellate court by a lawyer (or parties when representing themselves) of the legal reasons why they should prevail. Oral argument at the appellate level accompanies written briefs, which also advance the argument of each party in the legal dispute. Oral arguments can also occur during motion practice when one of the parties presents a motion to the court for consideration before trial, such as when the case is to be dismissed on a point of law, or when summary judgment may lie because there are no factual issues in dispute. Oral argument operates by each party in a case taking turns to speak directly to the judge or judges with an equal amount of time allotted to each. A party may often reserve part of their time to be used for rebuttal after their

⁵ B. Erickson, A. A. Lind, B. C. Johnson, and W. M. O'Barr, *Speech Style and Impression Formation in a Court Setting: The Effects of "Powerful" and "Powerless" Speech*, 14 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 266—279 (1978).

adversary has presented. Presenting lawyers usually cannot get away with simply making speeches or reading their briefs when presenting oral argument to an appeal court. Unlike trial court procedure, where judges intervene only when asked by the parties to resolve objections, it is typical for judges at the appellate level to be active participants in oral argument, interrupting the presenting lawyers and asking questions. This is true even of courts that are formed of panels of multiple judges, such as the United States Supreme Court, where a presenting lawyer must be prepared to handle questions from any of the nine justices. It is also true that when a motion is made before or during trial that the lawyers conduct themselves before the judge in a manner similar to the presentation of the case on appeal, the lawyers present their arguments to the judge in a more conversational mode; in some pretrial proceedings the appearances may not be recorded by court stenographers as they are invariably recorded in appellate proceedings.

Oral argument is not always considered an essential part of due process, as the briefs also give the parties an opportunity to be heard by the court. Whether a court will permit, require, or guarantee the opportunity to present oral argument is usually left up to each court to decide as part of its rules of procedure, with differences from court to court even within a single jurisdiction. Some courts may guarantee the right to present oral argument, either requiring the parties to request to present or their waiver if they do not wish to, while other courts may require oral argument without the ability to waive it. Courts may also have the discretion to decide a case without presentation of oral argument, rendering their judgment entirely based on the arguments set forth in the parties' briefs. An attorney prosecuting or defending an accused criminal at a trial must devote a lot of time and resources to preparing for court. Understanding the facts of the case, legal precedent and the strengths and weaknesses of both sides is essential. Also important is the speaking skills of the attorney. He or she will need to address the court, most importantly the judge and jury. The first impression that jurors will get during the trial is the attorney's opening statement. The opening statement is the best opportunity the attorney has to lay out the case without objection or argument from the other side. A closing argument is the final address to the jury by the attorney for each side of a case in which the attorney summarizes the evidence and his or her client's position—also called closing statement, final argument, summation, summing up. A closing argument is delivered by attorneys at the end of a trial, after all of the evidence has been presented, witnesses and experts questioned, and the theory behind a prosecution or a defense is put forth. A closing argument is

the last chance an attorney has to address the judge and jury. Unlike an opening argument, which can be written well in advance of the trial, a closing argument will be based on the events of the trial. Attorneys usually do not prepare them until both sides of the case have rested. Examination of witnesses is the questioning of a witness by a lawyer during a trial or other judicial hearing. This inquiry requires both objective judgment and the examination of witnesses.

Ultimately the presentation of testimony is regulated by the trial judge's discretion rather than the rules of law. In most jurisdictions, witnesses are entitled to an interpreter. The order of examination is the following: 1) Direct examination/examination in chief; 2) cross-examination; 3) re-examination. As linguists argue in practice it is a difficult task to take statements from the witnesses as in most cases people are not skilled at pacing their delivery. They do not deliver their statements in a coherent, ordered fashion: They speak too fast, they omit important details speculate aloud, backtrack, and so on.⁶

A legal motion is simply a request directed to the court. A motion can be made in writing before a hearing or trial, or orally during the proceedings. A legal motion is a procedural device in law to bring a limited but contested matter before a court for decision. A motion may be thought of as a request to the judge (or judges) to make a decision about the case. Motions may be made at any point in the proceedings, although that right is regulated by court rules which vary from place to place.

Effective client communication is a topic that's not often discussed but which is of the utmost importance. After all, the failure to adequately communicate is one of the top bar complaints lodged against lawyers by their clients. So it makes sense to give some thought to incorporating more effective communications tools and techniques into your client interactions. It's a simple step that will make you a better lawyer in the long run.

III. NON-VERBAL COMMUNICATION IN THE COURT

Nonverbal communication entails communicating by sending and receiving wordless messages. These messages usually reinforce verbal communication, but they can also convey thoughts and feelings on their own.

Types of Nonverbal Communication

Physical nonverbal communication, or body language, includes facial expressions, eye contact, body posture, gestures such as a wave, pointed

⁶ OLLSON FORENSIC LINGUISTICS (2nd ed. Continuum, London, New York 2008).

finger and the like, overall body movements, tone of voice, touch, and others.

Facial expressions are the most common among all nonverbal communication. For instance, a smile or a frown conveys distinct emotions hard to express through verbal communication. Research estimates that body language, including facial expressions, account for 55% of all communication.

Paralanguage

The way something is said, rather than what is actually said, is an important component of nonverbal communication. This includes voice quality, intonation, pitch, stress, emotion, tone, and style of speaking, and communicates approval, interest or the lack of it. Research estimates that tone of the voice accounts for 38% of all communications.

Other forms of nonverbal communication usually communicate one's personality. These include:

- *Aesthetic communication* or creative expressions such as dancing, painting, and the like;
- *Appearance or the style of dressing and grooming*, which communicates one's personality;
- *Space language* such as paintings and landscapes communicate social status and taste;
- *Symbols* such as religious, status, or ego-building symbols.

Speaking about the non-verbal communication in the court it should be noted that almost in all countries conduct of all people in the court—from a judge and jury to a defendant and witnesses—is regulated and restricted by various sets of rules. For example, in the USA according to The Code of Judicial Ethics “A judge should be temperate, attentive, patient, industrious, and, above all, impartial... He should so conduct himself during trials and hearings that his attitude, manner, or tone toward counsel or witnesses will not prevent the proper presentation of the cause or the ascertainment of the truth”.⁷ In Russia a judge should be impartial and polite and keep “the culture of conduct” in the courtroom.⁸ Thus, a judge cannot express his own attitude whether it is sympathy or hatred to any party to a case during the trial by his facial expressions or gestures. On the other hand nonverbal cues convey a world of nuance-filled information and myriad of attributes about, say, an expert, for example self-confidence, composure, credibility, poise, preparedness, control, and leadership, which can greatly impact the expert's

⁷ The Code of Judicial Ethics (1967), <http://www.state.wi.us/>.

⁸ The Judicial Code of Ethics of the RF (2012), <http://www.garant.ru/products/ipo/prime/doc/70201432/>.

delivery and a jury's perception. Although an expert witness should always maintain ethical standards that demonstrate objectivity, impartiality, and professionalism, expert witnesses have become critical courtroom players whose ability to communicate effectively can make or break your case.⁹

CONCLUSION

In law, communication is essential because it bridges the barriers between client and lawyer, lawyer and lawyer, and judge and lawyer. Thus, in legal discourse, certain terminologies are often used. These terms and phrases are branded as pertinent and exclusive to the meaning given to them by the legal world. Although it takes the form of linguistics, legal discourse does not confine itself to linguistic methods. Its principal basis is the theory of law, because it is meant to aid legal players in their day-to-day communication relating to law. Legal discourse refers to the acts of communication used in the practice of law. There are two basic types of legal discourse: The written and the oral.

In its general sense, written communication refers to communication that is more permanent and more useful for reference, as these are words put down on paper and will not disappear upon delivery. On the other hand, the oral type of legal discourse is temporary in nature. Once uttered, it may be lost if steps are not taken to write or type it down.

Legal discourse, particularly the written kind, gives rise to legislations couched in legal language. The meaning of terms used in drafting laws may either be in its ordinary sense or its technical one. The phrasing, the organization, and the overall form of the drafted laws have legislative intent that brings forth legal analysis. Written communication in law involves significant variations of grammar and word usage, which are a manifestation of the intent of the framers to have a word or phrase understood in one way for a specific field of law, yet comprehended in another way for a different legal area. Understanding these nuances is typically very important in obtaining an accurate interpretation of the texts.

The oral type of legal discourse refers principally to the language used in the speech or utterances of a lawyer as he or she participates in courtroom advocacy. Courtroom advocacy refers to the arguments, motions, and objections that a lawyer may raise in the course of his or her defense or prosecution. There is a specific legal "instrumental" language¹⁰ outlined and mandated to enable a swift and uniform comprehension of what a lawyer

⁹ H. Aviezer et al., *SCIENCE* 338: 1225 (30 Nov 2012).

¹⁰ Crystal and Davy *Investigating English Style* (1969).

intends to communicate. The two types of legal discourse are interdependent and are often used simultaneously. One follows logically after the other, but both highlight the purpose of preventing ambiguity and vagueness in the practice of law.