My Thwarted Start as a Forensic Linguist

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My early academic years were spent mostly teaching and in administration. After teaching for a couple of years at the merging (and then merged) Case Western Reserve University, I accepted an assistant professorship in the English Department at the University of Southern California in 1968. A year or so later, I became acting chair and then chair of the university's interdepartmental Ph.D. program in linguistics and went on to establish an independent department. As chair of a department with ties to several others, I served on or chaired an increasing number of college and university committees, a pattern I wasn't keen to continue! Then, in April of 1975, an opportunity arose to change the pattern, and I agreed to direct an English-language teaching program in Tehran under a contract the university had with National Iranian Radio and Television. In Tehran, I considered my future and even weighed the pros and cons of becoming a lawyer. I realized, though, that the likely path forward after law school would be to clerk for a judge and then take a post as an untenured assistant professor of law – a reboot at the bottom of the academic ladder. Besides, at the top of the list of courses I'd want to teach in law school would be "the language of the law," a topic in which I'd developed a serious interest, especially in the relationships between form and function.

Returning to Los Angeles and campus in December of 1976, I realized I could teach the language of the law in the Linguistics Department, and I filed paperwork to institute a course I dubbed "Language and Law." The university's curriculum committee objected to the Linguistics Department teaching law, as the proposed title suggested, but approved the course after a title change to "Linguistic Interpretation of the Law."

In January of 1977, a month after I'd returned from Tehran, the department secretary received a phone call asking whether any faculty member might be able to consult with a team of lawyers. Attorneys at the law firm of Irell and Manella were seeking a linguist to serve as an expert in a pending case. Why, that would be Professor Finegan, the secretary responded, given her familiarity with the paperwork for the new course.

Rose v. Home Savings & Loan Ass'n was a class-action suit filed in California Superior Court, and Irell and Manella represented the plaintiffs. The linguistic issue I was asked to address was whether an English speaker of ordinary intelligence could understand that a

"due on sale" clause – then common in promissory notes accompanying mortgage loans – would require a borrower to pay a pre-payment penalty upon sale of a property secured by the note. As I'd become acquainted with the linguistics of reading and readability while supervising an EFL curriculum and thirty teachers and staff in Tehran, the task seemed reasonably within my lane. When I analyzed a selection of the documents at issue, they fell at the bottom of the charts of standard readability measures and in some cases clear off the charts. It was apparent to me as a linguist that, in addition to the legal jargon in the note and the related documents, the complex syntax of the extremely lengthy sentences was extraordinarily difficult to parse and therefore to understand. It was apparent as well that the discourse structure of the documents seemed designed to disguise the steep penalty borrowers would be obliged to pay upon sale of their home, as an analysis of the discordance between topic sentences and a paragraph's contents could help demonstrate.

Prepped by attorneys – and having tutored them with a reasonably full understanding of my analysis and conclusions – I was ready for a court appearance. On the appointed morning – it was Valentine's Day – I combed my hair, buffed my shoes, and waited outside a Los Angeles courtroom eager to testify. I was keen to explain to a jury not only how difficult it would be for anyone reading the promissory notes to understand the financial consequences of selling a property secured by a note embedding a pre-payment penalty clause, but just what – beyond the jargon – made key points of the promissory note virtually impossible to grasp and just how the kinds of language ordinary people usually read differed in structure from that of the note. The point wasn't to tell jurors how difficult it was to understand the documents – they could judge that themselves. My task was to explain just what made the documents difficult to understand and how much and in what ways they differed from other kinds of texts. The objective was to help jurors understand how a reader-friendly document could have been structured if drafters had intended borrowers to recognize the pre-payment penalty's steep cost: when borrowers sold a home whose promissory note included pre-payment penalty language, they would have to pay six months' interest on the initial amount of the loan, irrespective of how much of the loan had been repaid. Thus, while smaller amounts related to the loan were spelled out in dollars and cents – $16.67, for example – the amount of the pre-payment penalty (often thousands of dollars whose exact amount was known at the outset, given that the penalty was based on the initial loan amount) was disguised in the relatively abstract language of percentage rates.

In 1977, corpus linguistics wasn't far along, but I was familiar with the Brown Corpus and drew on Kučera and Francis's *Computational Analysis of Present-day American English* (1969) for many of my proposed illustrations of word length and frequency, as well as average sentence lengths for various genres, and I could relate them to textual comprehension – to readability. Beyond that, my testimony would address the complexity of sentences, some running to scores of words in length, with clauses embedded in clauses within clauses, and a muddled use of pronouns – first person, for example, sometimes referring to Home and at other times to the borrower and Home together, thereby undercutting accurate understanding. Many of the complexities I recognized as a linguist would not have been apparent to jurors and weren't initially apparent to Irell's lawyers.

Pacing outside the courtroom on that Valentine's Day, I waited, with a tyro's eagerness, to be called. After far longer than I'd anticipated, Dennis Arnold, recently graduated from Yale Law School and the attorney I'd worked most closely with, came out of the courtroom to fetch me – or so I thought. To my utter bafflement, he reported that Home Savings & Loan had objected to allowing a linguistics expert to testify. Counsel for Home argued that, as ordinary speakers of English, jury members could determine for themselves how readable the loan documents were and that testimony by a linguist would unduly bias them. Crestfallen, I left the courthouse.

Little did I know then what transpired at trial about my intended testimony, but afterwards I read the transcripts. While I'd waited outside the courtroom, the judge heard arguments from attorneys on both sides as to the admissibility of a linguist and, in the end, asked the parties to submit briefs on the legality of a linguist's offering expert testimony in this case. During the following two weeks, the court received memoranda of points and authorities in opposition to my offering testimony and in support of it, and also heard oral arguments pro and con in chambers and in open court (though with jurors absent). At the end, in open court but again with jurors absent, Irell's attorneys made an "offer of proof." That is, an Irell senior attorney reported in detail what I would say if allowed to testify.

The offer of proof served two principal aims: it gave the court an opportunity to reconsider permitting my testimony, and, failing that, it created a record of the precluded testimony in the event of an appeal. "[T]he basis of Home's objection," Irell's attorney argued, "[was] that the proffered testimony is irrelevant to any contested issue of fact and [...] is unnecessary, improper, and patently prejudicial" because "the reading of documents is well within the experience of ordinary jurors." But, he went on, "the sophisticated and complex analyses, tests and theories that have been developed with the fields of linguistics and reading to measure the comprehensibility and readability of a particular document are sufficiently beyond the common experience of jurors to justify resort to expert testimony." Despite Irell's offer of proof (comprising nearly forty pages in the court's transcription), the court sustained Home's objection, citing two reasons for the decision. First, in the court's view, what I was to testify to was "not a proper area for expert testimony" because the jurors would "have an opportunity to examine the documents, and they [would] be assisted by the arguments of counsel." As a second reason, the judge said expert testimony giving quantitative measures could lead jurors to decide that "the documents just can't possibly be conspicuous, plain or clear." So, two weeks after I showed up at court to testify, the judge decided against allowing my testimony to the jurors.

That evening Dennis Arnold (today a partner at Gibson Dunn) phoned to let me know the final outcome. Naturally, I felt let down by the court's decision, but it was a valuable and important case for a novice forensic linguist. I learned a great deal, some of it linguistic and much of it legal. On the positive side as well, and this may be a third, though informal, reason for offers of proof, the litigants settled the case soon after my testimony was read into the record. It is tempting to think that the offer of proof containing my analysis helped persuade Home to settle the case.

As the promissory notes widely used at the time by S&Ls and other lending institutions included due-on-sale clauses and pre-payment penalties – the law journals in the years surrounding the case are filled with discussions of the subject – the Irell attorneys

and others brought class-action suits against one lender after another, and reached settlement after settlement. Eventually, with no linguist involved (to my knowledge), the underlying legal issue reached the California Supreme Court, where *Wellenkamp v. Bank of America* banned such due-on-sale clauses under most circumstances. Following that, the issue was litigated across the United States with similar results.

In 1977, I didn't know that I was part of the nascent field of forensic linguistics, as Jan Svartvik had named the field nine years earlier. My involvement came about because, as a linguist, I was particularly interested in the language of the law and had proposed teaching a course on the subject. Following the Home S&L matter, I went on to serve as a linguistics expert in a couple hundred cases, most of them civil matters, not criminal ones. Since that first case in 1977, I've served as an expert linguist chiefly in three arenas of the law. In trademark disputes, I've given expert advice or testimony for such firms as Bayer, Delta Airlines, DuPont, Victoria's Secret, and the United States Postal Service. In matters of contract dispute, I've interpreted insurance policies and assessed their linguistic comprehensibility for thousands of policy holders in dozens of cases brought against insurers. In defamation cases, I've been retained on behalf of Martha Stewart, Aretha Franklin, and Tom Cruise, among others, analyzing how discourse structure can convey propositions not expressly stated anywhere in a newspaper or other source.

Earlier in this decade I was honored to serve as president of the International Association of Forensic Linguists, and that was quite a surprise, but the most surprising development in my career came in 1996 when – without a law degree – I was appointed Professor of Linguistics and Law at the University of Southern California and taught in the law school for more than two decades.

References

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