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Evidence as Discourse:
Contrasting Modes of Presenting Information in Witness Testimony

by

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Abstract

This thesis expands a limited, but growing, area of interest that considers witness testimony from a linguistically-based, discourse analysis perspective. As a starting point, the thesis examines the Conley and O'Barr (1990) rules/relationships continuum - a framework developed in small claims court as a means of evaluating witness testimony. Testing the suitability of the model in a different environment, that of Provincial Court in Calgary, Alberta, it is demonstrated that the model is not without imperfections and remains in need of refinements. This thesis, then, identifies a number of current deficiencies of the model and develops an alternate evaluative framework for assessing witness testimony. The proposal appears promising for its ability to assess courtroom discourse and act as an influence upon witnesses before they enter the legal process.

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The interest shown in the project through the attempted theft of certain portions of the thesis, for reasons still unknown, by our German Shepherd, Ceileigh, was recognized and the finished hard cover copy will be continually monitored in the future.

Dedication

This thesis is dedicated to my father, Robert (Bob) Edwards - my Bud.

Table of Contents

Approval Page ii

Abstract iii

Acknowledgements iv

Dedication v

Table of Contents vi

Chapter One: Introduction 1

Chapter Two: Model Introduction and Internal Criticism 16

2.1. Model Introduction 16

2.2. Internal Criticism of Model 25

Chapter Three: Research Design and Model Application 34

3.1. Research Design 34

3.2 Application of the Model 36

Chapter Four: Document Based Testimony 74

Chapter Five: Implications and Conclusion 110

Endnotes 118

Bibliography 123

Chapter One

Introduction

One of the few institutions in modern society to have retained a substantially unaltered form and identity over an extended period is the Court of Law. If we examine certain features of the court such as architecture and language use, it is evident that the current, modern form is not far removed from that in use during the last century. Consider, first, the physical design for the court; the judge's bench - raised higher than any other area of the courtroom; the jury box - separated, but also raised; the prisoners dock - enclosed and isolated, the witness stand - always facing the prisoner dock and next to the judge. These features all have pragmatic explanations but are also firmly grounded in tradition. Such an architectural layout is hundreds of years old, yet new courts are still built in much the same fashion. Although the architecture provides the aesthetic cue toward an environment steeped in tradition, a more significant reminder of the historical background becomes obvious once the court begins session.

When the court convenes, the formal, traditional nature of courtroom discourse becomes apparent. As David Mellinkoff states: "the language of the law retains numerous Old and Middle English words and meanings which have long since passed out of general usage," (1972:13) as, for example, the words *heretofore, thereof* and *whosoever* while commonly found in legal English are seldom used in everyday conversation. Robin Lakoff also considers legal language as outdated, describing courtroom discourse as "cryptic, archaic language" (1990:84). In addition, Lakoff adds that not only is the vocabulary out-of-date, but the usage of utterances such as: "May

it please the court," (1990:93) and "I would ask that this be marked as People's exhibit C," (1990:93) are antiquated expressions that simply confirm the formality of the court. In certain ways then, as typified in the architecture and the use of language, the court is an institution that has preserved much of its form over decades and centuries.

Complementing the architectural layout and formal use of language in the court is the ceremonial nature of the trial. Again, we can consider the specific discourse that is used during a trial as an integral component of courtroom protocol as it includes "much repetitive language, utterances reeled off in a monotone until they become no more than a chant" (Lakoff 1990:94). Lakoff's comparison of certain ceremonial activities of the court to chants may be somewhat exaggerated, yet when we consider the methodical routine of swearing witnesses, empanelling juries, or conducting civil marriage ceremonies, it would seem that "after several repetitions anything ceases to be informative." (Lakoff 1990:94) Yet, we must not be too hasty to arrive at such conclusions as it appears, with respect to language, that much of the discourse is "a frozen style," (Danet 1980:472) meaning that it is not necessarily the literal language that is important per se, but the form of the language. As Danet claims, "form *is* content. The words are performative - a will written in the wrong formula is not a will." (1980:472) Considering the use of archaic language, specific architecture and ceremonial activities, these factors all set the stage for a performance; including the individuals who make up the cast to this 'play', let us now examine the actual working court more closely.

If we consider a trial as some sort of performance, it provides for unique and interesting observations as there are many similarities between a trial and a theatrical production. For instance, there is considerable preparation for any trial either criminal

or civil: court briefs, discoveries and disclosure of evidence all take place well before the issue enters court. When it does reach court, the judge, who some argue is the main performer, enters the court in a ceremonial fashion with all other participants and observers having been ordered to stand. Of course, as in a theatrical production, the spectators' gallery is akin to the audience as it is physically separated from the stage where those involved will begin their performance. After the judge has entered, the lawyers then begin to direct the proceedings by making motions, calling witnesses and developing their legal positions. Now, while the lawyer directs most of the proceedings, there is considerable debate concerning their overall level of influence in the trial. Lakoff, for example, claims that lawyers "have the least power, being the ones who need things from others" (1990:98). Although, perhaps an overly simplistic view of a lawyer's position relative to the functioning of the court, it does suggest that certain 'things' are needed from the other participants, witnesses, in particular. While the roles and positions of the judge, lawyer and court clerks are relatively clear during a trial, the role of witnesses should be examined more carefully as they are different from the other performers in that they come to court with widely varied backgrounds and often with no prior court experience.

Of all the performers in a trial, witnesses are clearly the most varied in terms of background, age, ethnic make-up and experience. Aside from professional witnesses (those who testify as experts in a certain discipline), few witnesses have specific legal training. Most of those attending court are lay people who have received a subpoena which orders them to attend the court on a particular date, at a certain time, and tell the court what they know of the issue at hand. In a civil trial, especially small claims court, their roles might be somewhat different as a witness might also be considered as a plaintiff or defendant. Regardless, though, a lay witness

in either a criminal or civil court faces the task of testifying with respect to the issue under consideration.

In reviewing Lakoff's comment concerning the relative powerlessness of attorneys, when compared to other participants of a court proceeding; by comparison, the witness could arguably be identified as the most important in a trial. For, while the judges and lawyers have specific issues of concern and required tasks to perform, the evidence to be weighed must be provided by the witnesses. These are the people who have first hand knowledge of particular events and are the only ones who can perform their specific function, they are, quite literally, irreplaceable. Usually without legal training, often lacking prior courtroom experience, the witness is thrust into centre stage and expected to *perform*, providing evidence that is concise and accurate. Despite the relative importance and associated expectations of witnesses, a number of scholars have seriously questioned the ease with which the average person makes the transition to court.

Within the topic of legal English there exists a specific literature that considers the ability of the lay person to comprehend legal language, both spoken and written. Understandably, given the archaic, formalized nature of legal English, many researchers have concluded that most encounters between lay persons and legal language are extremely negative. In fact, the research in this area suggests that significant problems exist regarding the alleged unintelligibility of legal English to the lay person. For instance, Gail Stygall suggests that "many people, faced with the incomprehensibility of legal discourse, come to believe that they are hearing a different English from the one they speak." (1994:1) Strongly worded perhaps, it remains an opinion echoed by other writers such as William O'Barr who states that

even "well-educated speakers of American English often find it difficult to understand the language used in the court." (1981:110) These comments are unequivocal in nature and suggest that legal language may be incomprehensible to anyone but a legal professional.

In an expansion on the above point, it appears that when laypersons testify in court they face significant restrictions on the ways in which they may express themselves. Anita Barry comments "that conversation in a courtroom follows a set of principles and expectations different from ordinary conversation," (1991:281) as witnesses are "confronted with a wholly different set of ground rules, often discovered only as they violate them." (1991:281) Evidently, for a person uneducated in legal English, the courtroom where a witness has been ordered to appear can be a frustrating and restrictive environment. Stygall points out that "narrative or account-giving is severely constrained" (1994:39) for witnesses, yet curiously, and in a somewhat unfair manner, these same restrictions are permissable "in the speech of members of the legal community." (1994:39) In many ways, then, the court can be an unforgiving place for a witness as many of the narrative techniques on which they normally rely are restricted or forbidden. Stygall summarizes the issue in the following comment which directly captures the seriousness of the problem: "witnesses have their speaking rights dissolved in court." (1994:39)

As we have seen there is considerable accomplished research that centres on lay witness interaction with the language of the court. To continue our focus upon witness testimony, let us now examine a model that was developed to describe lay person performance in court. The authors of the model, John Conley and William O'Barr focused on how ordinary people approach, consider and evaluate legal issues.

Because, as the above discussion demonstrates, legal language is largely incomprehensible for many lay people, this raised the question for Conley and O'Barr as to how these people would structure a legal position when in a court of law. As a result, the authors studied the performance of lay litigants in small claims court in an examination of lay witness beliefs in, and expectations of, the legal system. By studying transcripts of witness testimony and interviewing litigants before and after their appearances in court, the authors concluded that these individuals arrived in court with deeply rooted, preconceived notions and expectations of the legal system. The authors claim that the manner in which litigants structured their discussions, presented their positions, and argued their cases were clear indications of their philosophical orientations toward the law. With regard to their attitudes toward the law, witnesses are described as being oriented toward one of two divergent positions that exist in a continuum: the relational as opposed to the rule-oriented. The relational litigant sees their legal situation in terms of social relationships and equitable social entitlement. In comparison, the rule-oriented litigant is more concerned with the actual rules and principles supporting a legal argument and believes, that justice should be decided with respect to these same rules and principles.

As the specific details of the above model are discussed in chapter two, I will not expand upon these issues now, but wish to conclude this section by examining the link between the work of Conley and O'Barr and previous research that has been conducted in the same area. It should be noted that the specific design details of their research were unique in nature, but when considered more generally, their work still falls into a well-established line of sociolinguistic research. For instance, having presented the rules/relationships continuum, the authors then turn their attention to the distribution of the model, claiming that "the distribution can be explained in terms of

social roles." (1990b:80) These comments expand the relevancy of the model and increase the significant literature which can be profitably referenced. With this being said, let us now continue by considering a number of works in the related area of sociolinguistic research which will demonstrate the comprehensive foundation of the model in established academic study.

One work that bears a significant resemblance to the Conley and O'Barr model is Bernstein's (1971) paper where he suggests that one's social position within society is reflected and manifested in one's speech; this speech is then said to further reinforce and maintain these same social positions.[1] Bernstein identified two alternate 'codes': elaborated and restricted. As the author himself claims: "the social structure transforms language possibility into a specific code which elicits, generalizes and reinforces those relationships necessary for its continuance." (1971:76) The restricted code is one which, drawing from a more limited selection of alternatives, is more predictable and less explicit, one which might be used between married couples of long standing. Correspondingly, meanings are condensed and the intent of the speaker may be taken for granted since the main function of this code is "to reinforce the *form* of the social relationship" (1971:77). With respect to acquisition, it is suggested that the "abbreviated structures of a restricted code may be learned informally and readily," (79) which means that "all people have access to the code" (79). As one would expect, individuals who are confined to the restricted code are limited in their ability to convey their thoughts to a variety of interactants. When removed from an environment where intent can be inferred and meanings may be condensed, restricted code speakers are hampered in their ability to communicate.

By comparison, the elaborated code functions much differently. Individuals

who communicate through an elaborated code are described as having the capacity to choose from an extensive selection of alternatives to express meaning. Thus, this code allows for the elaboration and conveyance of their experiences and thoughts much better than the restricted code. As expected, the major function of the elaborated code is concerned with the preparation and delivery of explicit meaning. As a result this code is far more flexible and sensitive to communicative obstacles than the restricted code as the speaker is able to effectively modify their manner of speaking if understanding is not achieved. This brings us to the question of who might have access to the elaborated code. Differing markedly from the restricted code, "access to an elaborated code will depend not on psychological factors but on access to specialized social positions within the social structure" (1971:79). As one would expect, then, the elaborated code is not learned as easily as the restricted code, but "requires a much longer period of formal and informal learning." (79) With these points in place let us now examine Bernstein's suggestions with respect to the Conley and O'Barr model.

The relational speaker is less sensitive to the agenda of the court and often structures his or her dialogue according to his or her own perceived notions of legal relevance. These speakers are unable to modify their speech patterns to those that would be more appropriate in a court setting and remain grounded in their own descriptive techniques. For instance, relational speakers commonly assume shared knowledge on the part of their listeners which is often disastrous in court. In a similar manner, restricted code speakers are unable to modify their narrative techniques in certain environments. As these speakers choose from a narrower range of alternates than an elaborated code user, the ability to alter their speaking patterns is limited. In addition, again like relational speakers, restricted code users typically assume that their

listeners are able to infer their communicative intent and therefore condense meanings and make their dialogues less explicit.

In comparing the rule-oriented speaker to the elaborated code user, again certain similarities are obvious. Bernstein claims that the elaborated code speaker is one who can choose from a wide range of articulatory alternatives and therefore express meaning in various situations. In a comparable manner, Conley and O'Barr describe a rule-oriented litigant's testimony as organized "in an efficient manner and with a minimum of extraneous matter." (1990b:63) As we can see, clear parallels exist between the research of Bernstein and the authors Conley and O'Barr. As such, the more recent rules/relationships continuum is related to and expands a significant area of related research.

In a work that originates from Bernstein's code theories, Ruqaiya Hasan attempted to distinguish the notions of code, as developed by Bernstein, from her own definitions of social dialect. In identifying a social dialect, Hasan states that a "social dialect may be defined as a variety differing at any or all levels from other varieties of the same language according to 'who you are,' where 'who you are,' would mean 'what social class you belong to.'" (1973:256) As a comparison between the notions of 'code' and 'social dialect,' Hasan goes on to explain that all extra-linguistic factors that correlate with social dialect are to be regarded as incidental whereas, by comparison, in the case of 'code,' these extra-linguistic factors are identified as causal. In addition, the defining linguistic characteristics for social dialects are "located at the encoding levels of syntax, lexis and phonology," (Hasan 1973:265) which contrasts with the distinctive characteristics of code which occur at the level of meaning.

Because Hasan argues that "code as a concept lies on a different level from that of social dialect and that the two cannot be considered as different labels for the same thing," (1973:27) we have the opportunity to consider the Conley and O'Barr continuum with respect to social dialects as we did with codes. In this case, though, I believe the parallels are weaker and there is less resemblance between the two arguments. Hasan has failed to clearly identify her use of social dialect which makes any comparison between her notions of dialect with either the rule-oriented or relational manner of speaking difficult. Nevertheless, as in the case of Bernstein's work, it is once again clear that considerable research exists that examines the different manners in which people express themselves while speaking the same language.

Having considered both Bernstein and Hasan, it is now appropriate to introduce the research of Marga Kreckel, an author who argues against many of Bernstein's conclusions. Kreckel begins her discussion by referring to David Levy's study which was conducted at Stanford University. In this study Levy approached students registering for courses and asked the following question: "Please tell me your course schedule and explain how you ended up with it, what made you decide to organize it in the way you did." (1979:185) According to a strict reading of Bernstein's code theories, most students attending the formalized learning environment of the University should have access to an elaborated code. Therefore, since "the preparation and delivery of relatively *explicit* meaning is the major purpose" (1971:78) of an elaborated code, one would expect that most of the descriptions of course programmes that Levy received were relatively easy to follow. However, in providing one description which is "typical of the responses I got to my request,"[2] (1979:185) it is clear that the reply is restricted rather than elaborated and was difficult, even for Levy,

a staff member at Stanford, to follow. As Kreckel maintains, Levy's study is "one of many counter-examples which question Bernstein's assumption that users of elaborated codes will refrain from evoking contextual information and will modify their speech in relation to the specific requirements of the listener." (1981:35)

These findings contrast with Bernstein's work in critical ways. In discussing situations such as that experienced by Levy, Kreckel writes that these are:

> common to the non-initiated newcomer to any University (and to any other institution or long-standing social group for that matter.) For talk at University is charged with implicit background assumptions. By no means are principles and operations made linguistically explicit neither inside or outside the lecture theatre. Rather, talk at University consists of a multitude of in-group codes, discipline-specific and social-group-specific ones.
>
> (1981:35)

Kreckel subsequently argues that instead of considering the speech at University as a restricted code in the sense of Bernstein's work, it is explained more simply by suggesting that "the new-comer is confronted with the complicated task of differentiating between 'relevant' and 'irrelevant' knowledge." (37) Therefore, "whether a new-comer to University 'fits in' or has difficulty in 'adjusting' will depend on the ease with which he acquires the context-tied University specific sub-codes." (37) This, of course, is different from a strictly Bernsteinian viewpoint as the issue of acquisition is more formalized and exclusive under his theories.

The Kreckel project raises some interesting points when viewed against the Conley and O'Barr model. For instance, the Court is similar to the University in terms of its comprehensive institutional identity. Could a newcomer to court, then, have difficulty in "differentiating between 'relevant' and 'irrelevant' knowledge?" (Kreckel

1981:36) Kreckel's paper also suggests that depending upon an individual's "familiarity or unfamiliarity with comparable types of subcodes prior to University entry," (1981:37) the ability of a new-comer to 'adjust' will vary. Extending such reasoning to the court, Kreckel's observations would suggest that some individuals will 'adjust' more quickly to the language of the court depending upon their previous experiences with comparable sub-codes. This would, of course, assume that courtroom discourse be interpreted as a sub-code. Without pursuing these questions further, it is clear that previous research in sociolinguistics, even if not specifically focusing on the linguistic environment of the court, can have definite relevance to the Conley and O'Barr project. Although referred to earlier, let us consider one final author in more detail: Anita Barry, a writer who considers Bernstein's work with specific regard to the courtroom.

In a project that examined "the relationship between a witness' narrative style and judgments of jurors based upon that style," (1991:281) Barry's article has specific applicability to our discussion. The Conley and O'Barr project, for example, is extremely similar in many ways in that it, too, considers witness presentational styles but, with the difference being the judgment of small claims court judges based upon those styles. In Barry's article, the author first establishes that witnesses face very different rules for speaking in court than in everyday conversation. Unfortunately for witnesses, these rules are not explained beforehand and, are "often discovered only as they violate them." (281) Barry then reviews additional literature regarding presentational styles which supports her position:

> that narratives can take many forms, that there are many different ways that people have of telling stories, and that if the listener and the speaker do not share common assumptions about which of these forms is appropriate for the setting, the resultant conversation

> can lead to frustration and lack of communication, often with serious consequences. (283)

From this point Barry refocuses on the courtroom and maintains "that the elaborated code is expected for witnesses," (289) which is not surprising in light of Lakoff's claim that "[l]egal language is elaborated code at its zenith." (1989:111) This does, of course, when analyzed under a strict reading of Bernstein's code theory, suggest disturbing problems for witnesses as we will now consider.

If the elaborated code is expected for witnesses this would immediately create extreme problems for the administration of justice because of the exclusive nature of the code. As described by Bernstein, this code requires a more pronounced period of learning, both formally and informally, than the restricted code. Thus, it would seem alarming, then, if speakers unable to master the elaborated code were not able to effectively provide their evidence to the court. However, under Barry's argument, access to the elaborated code is not as exclusive as Bernstein suggests, and, in fact, it:

> is not a mysteriously difficult task that requires a great deal of training or membership in a privileged group, but rather how threatened a witness may feel in a given setting. It further suggests that the courts can better achieve the goal of more explicit testimony by informing lay witnesses of the expectations of the setting.
>
> (Barry 1991:292)

The important point to acknowledge from Barry's position is that the ability to use the elaborated code in court is not as difficult or exclusive as Bernstein would suggest and that the court itself could assist witnesses by informing them of the court's expectations.

When the comparison between Conley and O'Barr's project and Barry's research

is made, the findings are very thought-provoking. As it is witness testimony, and the interpretations made thereof by juries and judges, that both projects consider, my immediate reaction after comparing the two works, is to suggest that the authors are actually examining the same general phenomena but attaching different labels and suggesting alternate conclusions. One difference that remains, though, is the depth of the analysis as Conley and O'Barr infer philosophical positions toward the law from the speech of litigants. Barry does not make this extension and instead remains at the discourse level. Nevertheless, in the end, the differences that exist between the projects provide for meaningful comparisons and enhance our ability to critically analyze the Conley and O'Barr model.

As we have seen throughout the above discussion, legal discourse is extremely complex in nature and significant literature exists which suggests that it may even be incomprehensible to the average person. For the lay witness, then, the issue of communicative ability remains an important factor in court as the rules for speaking when testifying are much different than for everyday conversation. With these points in mind, Conley and O'Barr created a model which describes the ways in which litigants testify when in small claims court. For them, the speaking styles of litigants are reflections of how these same litigants philosophically approach the law. If we consider other related research, we see that Bernstein's discussion too, bears similarities to the Conley and O'Barr work in that the codes in which people speak are integrally related to their socio-economic status and education. Beginning with Bernstein, several additional researchers have considered how people speak in different environments and what prompts their chosen manner of expression. While some authors, Kreckel and Barry for instance, might reject certain elements of earlier research conducted by Bernstein, their work demonstrates that previous research is

constantly being renewed and refined.

With respect to the area of study Conley and O'Barr have pursued, it is clear that their work is linked to a significant body of research conducted in the areas of sociology, cultural anthropology and linguistics. With these points established, allow me to formally introduce the Conley and O'Barr model and detail my thesis discussion.

Chapter Two

Model Introduction and Internal Criticism

2.1 - Model Introduction

Having briefly examined the Conley and O'Barr construct and related literature in chapter one, the necessary foundation has been provided to formally introduce the litigant witness testimony model. The model was based on the results of a research project that considered how litigants in small claims court testify. The authors of the study, John Conley and William O'Barr, concluded that witness testimony could be characterized with respect to two opposing styles, both of which are characterized by the construct.

The model itself is best described as a continuum, with the end points the most extreme examples of litigant styles. At one end of the continuum is found the relational style where litigants consider their legal situation with respect to social relationships and social need. At the opposite end of the continuum is the rule-oriented litigant who testifies in a manner that focuses primarily on the rules and principles that are relevant to the legal issues under consideration. Not surprisingly, Conley and O'Barr claim that the rule-oriented litigant typically meets with greater success when testifying as their narrative patterns are closely related to the actual agenda of the court.

One point of particular importance that must not be overlooked in any analysis of the rules/relational continuum, concerns the fundamental argument of the construct. Simply put, while the model focuses upon certain discourse and narrative

characteristics, these features are only of concern insofar as being indicators of how litigants fundamentally regard the law. In effect, Conley and O'Barr gauge individual orientations and beliefs about the legal system from the manner in which small claims court litigants present their testimony in court. As the authors state, "we begin the process of listening to the voices of lay litigants by examining the accounts of their problems that they give in and out of court." (1990b:58) So, although the model has been developed through an analysis of the specific discourse characteristics of court testimony, because it is based upon an individual's approach and regard for the law, the construct is not strictly confined to this domain as these beliefs are independent and separate from the court itself.

To fully demonstrate how Conley and O'Barr have proceeded when interpreting speech manifestations, a number of comments taken directly from *Rules versus Relationships* are of relevance. In explanation of the viewpoints that rule-oriented account-givers appear to share, the authors suggest that such a "view of the law seems to be rooted in the belief, undoubtedly shaped by social experience, that society is a network not of relationships, but of contractual opportunities that each individual has the power to accept or reject on a case-by-case basis." (1990b:59) For relational speakers, Conley and O'Barr suggest that their beliefs appear "to be associated with a general social experience in which the individual lacks autonomy and is instead a passive victim or beneficiary of decisions that he or she is powerless to influence." (1990b:58) When examining testimony the authors remain consistent with the above comments through their interpretations of litigants' beliefs and motivations. For instance, in a landlord tenant dispute, the rule-oriented landlord, Broom, is described as interpreting his "problem in purely commercial and contractual terms." (1990b:77) Contrastingly, the authors suggest that Broom's adversary, Grumman, a relational

account-giver "sees the dispute as a problem in social relations" (1990b:77) and is thus "disadvantaged by his implicit assumption that the court has the willingness and ability to impose solutions on broader social problems." (1990b:78) Thus, discourse narratives evaluated under the guidelines of the Conley and O'Barr model are simply speech manifestations of an individual's regard for, and beliefs in, the law.

As the model has been developed in this manner these fundamental 'philosophies' of the law should not be confined to informal courts but should be specific to an individual and apparent in other environments. As my thesis research project I have tested the applicability of the Conley and O'Barr model to the more formal legal setting of the Provincial Court of Alberta in an effort to determine if the construct can be maintained in such an environment. Because the model is based upon individual approaches to the law rather than specific results of testifying in small claims court, the general premise of the construct might be expected to hold. If, then, the model does apply this would have important implications as it would provide, in the setting of criminal court, for the identification of relational account-givers that are likely to have problems when testifying. This being the case, attorneys would be better able to prepare witnesses so that certain discourse styles would be less likely to impede the evidence they might otherwise give. In the same manner, it could also be used to prepare judges to receive witnesses whose narrative techniques are not the most suitable for giving evidence. So, the application of this model to criminal law would, undoubtedly, be substantial.

In offering a number of comments as a postscript to *Rules versus Relationships*, the authors "conclude by noting some issues that we have identified as subjects for further research, whether by ourselves or others." (1990b:178) Although a

total of four different areas were identified, of specific interest to this thesis is whether the rules/relationships continuum is "significant at other points in the legal process." (1990b:178) Addressing this issue directly, Conley and O'Barr have commented that the model "may also prove useful in studying the discourses of lawyers, social workers, law enforcement officials and others involved in the legal process." (1990b:178) Since their findings are not intended "to foreclose further inquiry, but rather to invite it" (1990b:xiv) we see that the authors themselves, have encouraged and endorsed the idea of extending the application of the model beyond small claims court.

As added support for applying the model to a different environment we can note that throughout the Conley and O'Barr work there is no limitation in the applicability of the construct, but rather deliberate comments reinforcing the generic nature of the model. This is especially evident when the model is introduced as the authors state that "the objective of this book is to present a model of the interaction between the lay public and the legal system." (1990b:ix) Conley and O'Barr are consistent throughout *Rules versus Relationships* in maintaining the especially broad nature of their research. In explaining their approach, the authors state that "we have chosen as our primary unit of analysis not the case but the encounter of the litigant with the legal system." (1990b:8) As we can see, the justification for application of the rules/relationships model to the Provincial Court environment is supported in two ways. Firstly, as the model is founded on an individual's alleged beliefs and views concerning the law, actually referred to as the "philosophy of social governance" (1990:63) for relational speakers, these philosophical positions cannot be considered as unique to the small claims court environment. Secondly, the authors have not attempted to restrict their findings to informal courts and, in fact, suggest that

additional environments be considered in further research. With this justification of the construct considered, a more detailed analysis of the litigant witness model is now in order.

Beginning with the rule-oriented litigant[1], these individuals are described by Conley and O'Barr as presenting testimony that is in agreement with the agenda of the court. As the authors claim:

> rule-oriented litigants interpret disputes in terms of rules and principles that apply irrespective of social status. They see the law as a system of precise rules for assessing responsibility, and reject as irrelevant everything not circumscribed within these rules. (1990b:58)

Once in court these litigants perform well as they "structure their accounts as a deductive search for blame." (1990b:58) Of course, the court reacts favourably to this approach as such reasoning mirrors logic and sets a solid foundation for any resulting conclusions. By avoiding extraneous material and refusing comment on subjective social situations, these litigants are considered as making clear arguments which allow the judge to adjudicate with a minimum of effort.

Another identifiable characteristic of rule-oriented narratives is the degree of accuracy with which such witnesses testify. Rule-oriented narratives are typically "highly factual: names, dates, and the contents of conversations and documents are reported precisely." (1990b:63) Correspondingly, this is associated with a further described tendency of rule-oriented litigants: responsiveness to questions. Conley and O'Barr describe rule-oriented account-givers as highly responsive to questions or requests for clarity, seldom straying off topic or introducing irrelevant issues. These witnesses do not deviate from what has been asked and limit their answers to only the

information requested. Accompanying such deliberate dialogue are logical, sequentially organized narratives. Rule-oriented account-givers organize their dialogues chronologically, avoiding irrelevant off-topic digressions, allowing the listener to follow their narratives without difficulty. As the authors claim, these discourse attributes are in agreement with the agenda of the court, allowing rule-oriented speakers greater success and satisfaction when presenting testimony in court.

Considering now relational litigants[2], these witnesses are described as having a tendency to "focus heavily on status and social relationships. They believe the law is empowered to assign rewards and punishments according to broad notions of social need and entitlement." (1990b:58) When testifying, these litigants often overlook such issues as contracts, agreements and other valid arrangements, and instead "strive to introduce into the trial the details of their social lives." (1990b:58) These individuals apparently view the legal decision-making process as comprehensive, warranting the inclusion of all details that even remotely relate to the issue at hand. With narrative styles allegedly so far removed from what the legal system demands, Conley and O'Barr suggest that relational witnesses often experience difficulties in structuring their testimony in a manner that their audience fully appreciates and understands.

Accordingly, because relationally oriented litigants include details of their social lives supposedly irrelevant to the issues before the court, Conley and O'Barr claim that one of the major tendencies of such witnesses is to digress off topic. In describing the relationally-labelled litigant Rawls, the authors claim that her responses to the judge's questions evoked "lengthy digressions about the history of her relationship with Bennett [defendant]," (1990b:61) these digressions meandering "through time and place, drawing her audience ever deeper into her social world, but

providing little information about the specific issues that are of interest to the court." (1990b:61) Another individual the authors have chosen to illustrate the relational orientation appeared as the defendant in a landlord-tenant suit. As stated by Conley and O'Barr, when the judge asked the defendant "to summarize the contents of the note from Mr. Elrod, [previous landlord] he begins to do so, but quickly digresses into a lengthy description of the work he performed." (1990b:77) We see, then, that relational litigants are partially identifiable through their predisposition to wander from the main issues of concern to the court when testifying, addressing issues, presumably, they feel are of greater concern.

Another tendency that relational speakers share when testifying is the assumption of shared knowledge on the part of the listener. Again, in describing the litigant Rawls's testimony, Conley and O'Barr write that her "account assumes that the listener shares her knowledge of background events and places" (1990b:61) which, however appropriate in familiar conversations "creates difficulties for a stranger who is trying to extract a set of facts and apply strict legal rules to them." (1990b:61) The presumption of shared knowledge is considered by Conley and O'Barr to weaken a litigant's argument as it forces the listener to infer and speculate about details that might be missing from a speaker's narrative. Thus, in comparison to Rawls's testimony, the rule-oriented witness Hogan is described by the authors as providing an account that "presumes no prior knowledge of people, places, or events on the part of the listener." (1990b:63) As we see once again, the model provides us with observable indicators to gauge testimony.

In contrast to rule-oriented witnesses, relational speakers are described by Conley and O'Barr as less accurate, less precise, and generally inclined to provide

fewer specifics when testifying. Evaluating the small claims litigant Grumman, Conley and O'Barr claim that he "seldom provides direct or precise responses to the judge's questions." (1990b:76) In contrast, his legal adversary, Broom, testifies in a manner that has "an aura of precision and authority: it contains many quantitative references." (1990b:76) Rawls, identified earlier, is also noted by Conley and O'Barr as the judge "asked her a series of specific questions about the location of the property line," (1990b:61) but she was "unable to provide specific information about that issue." (1990b:61) So, according to the model, relational and rule-oriented witnesses display differing degrees of precision and accuracy when testifying.

Because of the overwhelming emphasis on social relations and corresponding entitlements, Conley and O'Barr maintain that it is only to be expected that the courts interpret relational accounts "as filled with irrelevancies and inappropriate information." (1990b:58) While certain material might be relevant to one's social situation, the court has a "more limited and rule-centred agenda" (1990b:61) that, even in the informal setting of small claims court, must be acknowledged. The more extraneous material a witness includes, the more difficult becomes the situation for the legal professional who is trying to determine the relevant facts for a legal judgment.

Beyond the obscured nature of a relational narrative is the resulting impression that such witnesses are "imprecise, rambling" (1990b:58) and commonly found wandering from the central issues of concern. Although this may be interpreted as a reflection on the intellectual ability or capacity of the individual, Conley and O'Barr still argue that the reasoning of relational litigants "is indeed systematic, but their logic is so different from the law's as to be largely imperceptible to those in whom the legal tradition of formal legal analysis is deeply ingrained." (1990b:60) Thus, the legal

reasoning of relational litigants is obscured to the court and requires decoding or translation to determine the legitimacy of the legal arguments.

So, when relational and rule-oriented speakers are directly compared, Conley and O'Barr maintain that the rule-oriented account-giver experiences more success in court. This success is not only measurable in terms of legal judgments, but also in terms of overall satisfaction with the legal system. As rule-oriented account-givers have presented their testimony in a manner the court accepts, understands and appreciates, it is unlikely they have been censored while speaking or have failed to convey their position.

Now, since the above positions are merely end points of the model, the notion of a continuum must be discussed. Consider the following statement:

> We have observed many litigants who are strictly rule-oriented or relational in their approach, but we have also found many others who cannot be categorized easily. Many litigants exhibit tendencies toward both approaches in a single account, or their approach may vary with the context in which the account is given. As a result of this variability, we characterize the rules-relationships distinction as a continuum rather than a dichotomy. (1990b:78)

Conley and O'Barr further add that "few litigants are exclusively rule or relationally oriented. Most have a predominate tendency, but they usually also have some capacity to understand and articulate the other perspective." (1990b:181) We see that although many of the speakers cited: Broom, Rawls, Hogan, and Grumman, were decidedly oriented at one extreme, the authors do not take such examples as typical or common among speakers. However, we should take serious note of the wording "predominate tendency" (1990b:181). The suggestion, at this point, is that according to the model

one would be able to discern an identifiable orientation, however weak, on the part of most speakers.

2.2 - Internal Criticism of Model

Before applying the model to the environment of the Provincial Court, a number of criticisms should first be addressed. I offer criticism because it should not be assumed when reviewing the application of the construct to Provincial Court that the model is flawless. On the contrary, a number of important issues do arise when the continuum is critically analyzed. In this section, then, I will consider a number of the more apparent complications with the rules/relationships model.

One of the more pronounced weaknesses in the Conley and O'Barr discussion is related to the interpretations of litigant beliefs, views or convictions, gained from the model. As the construct is derived from a survey of small-claims court behaviour where the authors deliberately attempted to infer philosophical orientations regarding the law on the part of speakers, consider the following difficulties. The first noticeable inconsistency concerns the design of their research, most particularly, the number of litigants the study is based upon. As Conley and O'Barr state, "we observed 466 cases and transcribed 156 of them," (1990b:30) indicating a sample size of 156 informal court sessions. Now, in considering their survey technique, the authors describe that they:

> studied litigants' accounts at three stages in the litigation process: at the time the plaintiff filed the complaint, at trial, and several weeks after trial. We adopted this three stage process because we were interested in both the nature of accounts at different phases of the legal process and the perceptions, attitudes, and assumptions they reflected. We were also interested in determining how interaction with the court and the opposing party might influence or change the

accounts given by litigants.

(1990b:30)

Acknowledging their preference for the three-stage interview as a basis for their interpretations, we see that, when examined more closely, the Conley and O'Barr data base is far smaller that it originally appears. Of the 156 cases studied, interviews were recorded "with a total of 101 plaintiffs at the time they filed their cases." (1990b:30) Numbers were not provided regarding defendants, but the authors comment that "when we tried to speak to defendants on the telephone or in person, we met with uniform resistance," (1990b:31) so, "this did not prove feasible." (1990b:31) As there were more than 300 litigants, including both plaintiffs and defendants, it appears that Conley and O'Barr were only able to conduct pretrial interviews with approximately one-third of those involved in the original 156 cases. At the second stage of the research involving the actual trials, there is little room for comment as all the litigants were observed. The more important aspect to consider, however, is the third stage: the post-trial interview. It is at this stage where the Conley and O'Barr research design suffered the most serious setbacks. The authors were only able to "interview twenty-nine litigants, both plaintiffs and defendants" (1990b:32) which, when corrected for those who were not interviewed at the first stage, meant that "three-stage data for only 19 cases" (1990b:33) was obtained. The numbers that reflect the actual research interviews demonstrate that less than half of the 312 litigants were interviewed and only a small portion of the witnesses were considered according to the "three stage process." (1990b:30) These numbers do not provide convincing support for the interpretive assumptions regarding litigant testimony that Conley and O'Barr have made.

Through their analysis of litigants, Conley and O'Barr make numerous claims

concerning witness orientation most often worded in a manner similar to the following passage which describes a relational litigant:

> she *appears* to base her claim against the garage owner on her dependent social status. Irrespective of the details of the business transaction, her account *implies*, people in helpless positions are entitled to assistance from those in positions of social and economic dominance. The fact that she brings the suit and then presents the case in this way further *suggests* that she believes that the court shares her vision of social justice.
>
> (1990b:47)

For purposes of clarity, I have italicized three separate words in the above passage that have been used by the authors. The use of the words: *suggest*, *appears*, and *implies*, shows the cautious, interpretive nature of the model as the authors avoid categorically asserting the conclusions gained from the model with respect to individual litigants. What is interesting, however, is that out-of-trial interviews which might have provided further substantiation for their interpretations, are only referred to on three occasions. For instance, an interview with the above litigant could have added significant credibility to their comments. However, the above wording is understandable when the absence of litigant interviews is taken into account. Yet, as we will see, Conley and O'Barr have not always been so cautious in their examination of litigant testimony.

In analyzing the entire text of *Rules versus Relationships* we find that on a number of occasions Conley and O'Barr have abandoned a suggestive approach to describing litigant interpretations and instead word their comments in a much more assertive manner. Consider the following passage noting the definitive nature of their conclusions in describing a rule-oriented litigant:

> he *assessed* his own conduct not in terms of a broad social duty to take responsibility for the sufferings of the powerless, but in terms of contractual principles which, *in his view*, transcend such personal

> concerns. He *expected*, correctly, that the court would share this theory of justice.
>
> (1990b:47)

I have again italicized two words and one phrase that demonstrate the assertiveness of the Conley and O'Barr interpretations. Once again, though, there is no mention of an interview with this subject nor are interview transcripts made available in the appendix to the book. Without supportive evidence for the definitive nature of the above comments these statements are reduced to assumptions. Interpretive evaluations such as the following were common throughout the text as demonstrated in the following passage which concerns the mandatory appearance of a teenager's parents in court: "they are less concerned with the specific legal rules that interest the judge than with the problems arising out of the relationship with their son." (1990b:55) Once again, without reference to an interview, these comments only reflect half of "what litigants say in and out of court." (1990b:35) which seriously compromises many of the authors' conclusions.

For reasons such as the above, "realist ethnography has been under considerable attack in recent years, particularly within anthropology." (Stygall 1994:41) As Stygall explains, such criticism "calls into question the possibility of the univocal researcher representing the multivocal culture being observed." (41) These comments are easily understood with respect to the rules/relationships continuum as Conley and O'Barr have made generalized inferences regarding litigants' philosophical positions based upon their speech performances in court and limited out-of-court interviews. With respect to interviews, Schiffrin argues that when speakers themselves are asked to "say what they meant," (1994:88) it is common "for different people to give very different answers to such questions." (88) When these points are considered in light of the Conley and O'Barr model, two problems are apparent. Firstly, and most

obviously, the authors were not consistent in conducting interviews with every subject at all three stages of the trial process. Secondly, since, as Schiffrin suggests, there may be such variation in speaker intent, to have included litigants within the study who were not interviewed and make inferences upon their intended meaning when testifying, markedly discredits Conley and O'Barr's discussion.

Another issue that leaves the model open for harsh evaluation concerns the notion of stylistic and discourse levels with respect to the operation of certain linguistic features involved in the model. To properly discuss the issue, however, it is first necessary to review an earlier study conducted by Conley et al. which was used as a foundation for certain aspects of the rules/relationships continuum. In their study the authors focused on courtroom discourse and identified a style that:

> is characterized by the frequent use of words and expressions that convey a lack of forcefulness in speaking. Among the specific features of this style is the abundant use of *hedges* (prefatory remarks such as "I think" and "It seems like"; appended remarks like "you know"; and modifiers such as "kinda" and "sort of"); *hesitation forms* (words and sounds that carry no substantive meaning but only fill possible speech pauses, such as "uh," "um" and "well"); *polite forms* (for example, the use of "sir" and "please"); and *question intonation* (making a declarative statement with rising intonation so as to convey uncertainty). An additional feature of style is the frequent use of *intensifiers* (for example, "very," "definitely" and "surely") - words that, though they normally increase the force of an assertion, may be so overused that they suggest that the speaker is not to be taken seriously in their absence. These features tended to occur together in the taped testimony, comprising a definite style in the delivery of testimony.
>
> (Conley, Lind, O'Barr 1978:1380)

Not surprisingly, the authors labelled the above style of speech as *powerless* language, a style, the authors claim, that is often used in courtrooms. With this brief

introduction of powerless language in mind, let us now consider the issue of feature levels.

Commenting on the litigant model, Conley and O'Barr claim that their observations "suggest that the rules/relationships continuum may be a discourse level manifestation of the power-powerless continuum that we identified at the stylistic level. The discovery of this apparent connection raises the obvious and highly significant question of how the two phenomena are distributed." (1990b:67) After introducing the possibility of connection, the authors later expand on their original comment adding that:

> The distribution of the rule and relational orientations appears to parallel the distribution of powerful and powerless speech styles that we described in a previous program of research (O'Barr 1982, Conley et al. 1978). Our experimental research on speech style and its effects on legal decisionmakers demonstrated that powerless speakers are believed significantly less often than their powerful counterparts. We find a convergence of the tendencies toward the powerless speech style and the relational orientation, and a complementary convergence of rule-orientation and the absence of powerless stylistic features.
>
> (1990b:81)

With the notion of discourse and stylistic levels formally introduced, an evaluation of the distinction between these levels warrants careful consideration.

Upon examination of Conley and O'Barr's usage of the terms *discourse level* and *stylistic level* in reference to certain discourse phenomena, it is clear that the authors' employment of these terms can lead to confusion. Apart from the above cited passages, Conley and O'Barr have provided no other descriptions to distinguish these 'levels' from one another. Instead, what has been provided, are examples of speech at

each level rather than actual definitions. Thus, the terminology becomes difficult to understand; at the discourse level are orientations, those of rule and relational-type litigants; at the stylistic level are linguistic features previously referenced such as hedges, tag questions and polite forms. To deduce that linguistic features are at the level of speech style whereas discourse level features are at the level of interpretation or outlook seems partially defensible, but still deficient. For instance, in the earlier construct of powerless language one of the characteristic components of such speech included: "Lack of a SENSE OF HUMOR: [sic] Women are said to be poor joke tellers and frequently to "miss the point" in jokes told by men." (O'Barr 1982:64) To evaluate and label this characteristic as operating at either the discourse level or stylistic level would seem unclear, while designated a stylistic feature by O'Barr, the property appears to involve deliberate interpretation on the part of the receiver. As we can see, the authors have introduced the notions of stylistic and discourse levels to their discussion of the rules/relationships continuum without accompanying these notions with adequate definitions.

Acknowledging there are problems concerning the above designations of linguistic phenomena, we must still deal with this component of the continuum as it relates to the application of the model. However, since this does not constitute an essential element of the Conley and O'Barr construct, I will simplify matters by confining my discussion, with respect to placement on either the stylistic or discourse levels, to consideration of the three observable linguistic features: hesitations, repeats and corrections as appearing on the stylistic level. Correspondingly, for the purposes of this paper, I will regard the indicators of the rules-relational model such as: digressions, precise recall of information, chronological ordering, as occurring on the discourse level. The correspondence between discourse-level phenomena and stylistic

features will include, and be limited to, the above components.

Another component of the model that is open to criticism concerns the "critical role of the judge" (1990b:56) as an influence upon litigant testimony. In the fourth chapter of *Rules versus Relationships* where Conley and O'Barr have developed the continuum model, the interpretive evaluations of litigant orientations are provided without any recognition of the impact a judge might have upon a witness's testimony. However, in the following chapter Conley and O'Barr identify "five contrasting approaches to the judicial role" (1990b:82) on the part of court judges, adding that the distinction "found among litigants may be at the heart of differences in judges as well." (1990b:111) Since, then, judges too are considered with respect to the continuum, we find a number of implications for the described interpretations of litigant testimony, implications that make the model extremely difficult to apply.

If we consider that "depending on the judge a litigant draws, informal justice may mean mediation, enforced compromise, apologetic application of legal norms, authoritative decision making spiced with social commentary, or obsessive attention to points of procedure," (1990b:106) it is clear that this variance in judicial adjudication affects litigants in the structuring of their testimonial accounts. As the authors definitively comment:

> the behavior of judges strongly influences the nature of accounts given in informal court trials. Thus, it is wrong to consider an account as simply that of a litigant. Rather, the audience is in some respects as important to the form of an account as the "facts" being recounted.
>
> (1990b:171)

This position is echoed by Paul Gewirtz who comments that "a sophisticated account of storytelling in law or legal scholarship must take account of the complex

relationship between storyteller and listener." (1996:6) We can see, then, since judges have the ability to directly affect a witness's testimony, interpretive conclusions that are made from the model, without an established framework to account for the interaction between judge and witness, may be open to criticism.

The introduction of variant judicial orientations to the discussion creates yet another complication the model cannot address which becomes apparent in the authors' use of the term *agenda* with respect to both litigants and the court. For instance, in one court case the authors claim that "the agendas of the witness and the court conflict." (1990b:15) If judges are as 'diverse' as Conley and O'Barr claim, is it accurate for the authors to maintain that "a rule-oriented account articulates better with the agenda of the law?" (1990b:66) In other words, with judges so apparently 'diverse,' it does not appear warranted to consider only one agenda of the court. This, of course, presumes that being responsible for the adjudication of trials the judge is the person who represents the agenda of the court. As, then, the "critical role of the judge" (1990b:55) in the trial seems beyond argument, their being "more diverse than the litigants" (1990b:82) suggests it is not reasonable to consider the court as having only one agenda.

With these criticisms in mind, it is clear that the Conley and O'Barr model does not exist without certain shortcomings. Nevertheless, it must still be remembered that the model provided worthy results in the environment of small claims court and, as demonstrated, should have application to other points in the legal setting. Let us proceed, then, to the third chapter and examine the results of applying the model to the criminal division of Provincial Court.

Chapter Three

Research Design and Model Application

3.1 - Research Design

The study site was Provincial Court in Calgary which consists of ten court rooms. However, preliminary hearings were held in only four different courtrooms which made research somewhat easier.

The research was focused on preliminary hearings for extremely pragmatic reasons. Because of an agreement with the chief court recorder, I was able to obtain transcripts of these hearings if the accused was ordered to stand trial. This was a tremendous assistance as I would not have been able to conduct my research without these documents.

From a legal standpoint, the preliminary hearing format is very similar to the subsequent trial situation. It is at the preliminary hearing that the Prosecutor presents the Crown's case in an effort to convince the presiding judge that compelling evidence against the accused exists. Basically, witnesses for the Crown are questioned and cross-examined in a manner quite similar to the trial situation. One exception from the actual trial would be that witnesses for the defence are not normally present at the preliminary hearing. Otherwise, aside from some minor differences, the testimony at preliminary hearings is very similar to that heard at the criminal trial.

Normally, although open to the public, the courtrooms were quite vacant with only a few people other than those involved in the present case in attendance. There

were times when the court was better attended, but these were rather infrequent. Additionally, as the courtrooms I was involved with were typically assigned only preliminary hearings, usually one or perhaps two cases would proceed in any single morning or afternoon session. There were, in fact, a number of entire sessions, seven in total, in which not one scheduled preliminary hearing proceeded.

Although there were few people in the courtroom on a typical day, I was seldom, if ever, acknowledged. I was only approached by attorneys on two occasions where they casually enquired if I was conducting a research project.

As there was a great variety of charges before the court, I attempted to attend as many different criminal cases as possible to have the opportunity to analyze different types of discourse that might be used. This was rather successful as it also facilitated exposure to a diverse cross-section of witnesses that included age, gender and ethnic differences.

The transcripts were produced by an official court recorder who was in attendance and using a shorthand machine during the proceedings. As well, a taped version of the hearing is produced and available to the transcriber at a later date. This taped copy can be reviewed to gauge the accuracy of the transcript or simply recheck a particular word or sentence. Overall, the quality of the documents is extremely professional and the transcripts should be considered faithful representations of the original discourse.

In total, 1063 pages of testimony were received and analyzed. This represented 14 criminal cases before the court with a total of 67 witnesses. It is estimated that this

represents approximately 32.5 hours of courtroom discourse which was accumulated over a one month period. In addition to the transcribed cases, another 17 hearings were observed, but transcripts were not received.

To preserve the anonymity of the subjects who were recorded in the transcripts, I have simply referred to witnesses by a particular number. Additionally, when a name has been mentioned in the course of quoted testimony, I have, in a manner similar to Conley and O'Barr, assigned a fictitious name. Finally, as a further measure to preserve anonymity I have modified all addresses, dates and times. These measures will ensure that individual witnesses are not identifiable in this project.

3.2 - Application of the model

As we have seen in the previous chapter, the Conley and O'Barr model is not without imperfections and can be criticised for a number of internal contradictions. However, as demonstrated in chapter 1, in other respects the Conley and O'Barr project bears many similarities to previous sociolinguistic research and essentially continues a well-established history of studying how people speak in certain situations. As the model has been designed as "a study of the ways in which ordinary people relate to the American legal system," (1990b:ix) it is neither narrowly focused nor confined to the environment of small claims court. In contrast, as discussed, the authors themselves suggest as a subject "for future research" (1990b:178) that the continuum be evaluated for suitability "at other points in the legal process." (1990b:178) My discussion in this chapter will focus, then, on applying the model to the environment of the Provincial Court of Alberta. As such, I will examine how witnesses have testified and analyze their speech with respect to the model to determine their possible placement along the continuum.

The first witness I wish to consider is the most extreme example of a relationally oriented speaker, witness-39. Identified as Sharon Rea for convenience, this witness was clearly the closest approximation to a fully relational witness in the entire study. Ms. Rea was testifying as a witness to an alleged assault upon both herself and a personal friend; her testimony is highly charged and, at times, quite emotional.

Rea's testimony demonstrates a number of occurrences labelled by Conley and O'Barr as representing relational speakers. For instance, the authors claim that relational account-givers seldom provide precise and detailed answers to questions. In the following passages it is clear that Rea either has no recollection of specific events or can only provide vague answers. The specific occurrences of inexplicit testimony are italicized for convenience.

3.1

Defence: When this man was pushing you, which direction was he pushing you; towards this other girl that you'd had the fight with?

Rea: *I don't recall.*

(ll. 11-14, p.33, H.8)

3.2

Defence: What time did you get to the Raven bar that evening?

Rea: I'd say just shortly after it opened. *I don't know when it opened.*

Defence: Well, I don't know what time it opens.

Rea: I'm sorry, I was on holidays. It's not like I was sitting there checking times and stuff like that. You know, we were just out -- went out for the evening, and you know, that was it. It wasn't like, you know, okay,

we have to be here at a certain time. I was vacationing.

Defence: I can appreciate that. My problem is I don't know what time bars open.

Rea: *I don't know either. I'd say what, eight, nine o'clock. I don't know. Somewhere in that range.*

Defence: So earlier in the evening.

Rea: Yeah, earlier in the evening.

(ll. 3-19, p. 37, H.8)

3.3

Defence: Do you recall what she was drinking that evening?

Rea: *No, I don't.*

Defence: All right, what did you do after you left?

Rea: After we left, we went home and phoned the police.

Defence: What time was that?

Rea: After it happened. *I really can't give you a time frame. I guess maybe about quarter after two, two-thirty, somewhere in that time.*

(ll. 12-19, p.38, H.8)

The italicized occurrences demonstrate the inability of this witness to answer with specific details concerning the night in question. Once again, this is considered by the authors Conley and O'Barr as consistent with a relational orientation as such individuals are supposedly more concerned with other aspects of such occurrences, aspects that primarily run counter to specific details that the court so often considers important.

As a transitory aside before considering the next section I wish to clearly qualify the parameters of my discussion. As this thesis originates from a linguistic perspective, it must remain, if the argument is to be competent, within the realm of discourse analysis and avoid legal comment or interpretation. There are, however,

certain issues that are germane to the thesis and must be addressed. Most specifically, in the following section, the relevance of witness testimony is discussed. To develop this argument it is necessary that the relevancy of one's testimony be gauged which requires the interpretation of testimony from a legal standpoint. Again, as this thesis is linguistically based, the need for legal commentary creates a problematic situation.

As a proposed solution, the relevance and applicability of a witness's testimony will be gauged on observable factors. Conveniently, Provincial Court offers a resolution to the above complication as in all hearings at least two attorneys and one judge are present. As will be demonstrated, presiding judges will frequently interrupt witnesses when their testimony wanders from the issue in question; as well, attorneys submit objections when the witness responds or answers in a manner irrelevant to the legal issue currently being addressed. Therefore digressions on the part of witnesses can be identified by the responses of the judge and counsel. In this way the conclusions arrived at may, in fact, be more sound than those of Conley and O'Barr as they rest upon the evaluative skills of three courtroom professionals.

Given the above, I regard the large degree of subjectiveness involved in the Conley and O'Barr model as a complication. To determine if information presented in a court of law is irrelevant or inappropriate to the issue at hand requires astute legal reasoning. Still, though, as individual variation is so great, testimony that one judge might allow as acceptable, another may reject as irrelevant. Evidence for such differences in judges can be found within the text itself as the authors comment "that informal court judges are highly variable in their conceptions of law, their views of their role, and their approaches to problem solving." (1990b:111) According to the model, however, interpretive reasoning on the part of judges is an integral component

of the construct since the introduction into a testimonial narrative of social relations or socially-based digressions is viewed as a movement "from the central issues" (1990b:58) important to the court. For example, in describing relationally oriented litigants, the authors write that their narratives typically "wander unpredictably through time and space." (1990a:350) This is problematic in that any sort of evaluative judgements about appropriateness of testimony involve a degree of subjectiveness about what might be regarded as important. As a result, the conclusions gained from the model may vary significantly from one person to another.

During the course of an individual's testimony, there sometimes arise instances where the speaker strays off topic or is led off issue by the questioning attorney. Such instances usually evoke an immediate reaction on the part of the judge or opposing attorney. Consider the following which demonstrates the active role of the presiding judge in the determination of the relevance of testimony: [relevant utterances by the judge noted in small capitals]

3.4

Prosecutor:	Now I understand that after a while you were contacted by the police and your vehicle was seized?
Sanderson:	That's correct.
Prosecutor:	Are you out of pocket any money as a result of having your vehicle seized by the police?
Sanderson:	Yes. The cost of the car, $5500. I also did some improvements to the car. He had -- Mr. Hendry had suggested the tires were bad and should have been changed and I did that. I also -
The Court:	ARE WE INTERESTED IN THIS?
Prosecutor:	No.
Sanderson:	Okay.
The Court:	OUR INTERESTS ARE NOT ALWAYS YOURS MR. SANDERSON. WE ARE INTERESTED IN

THE ELEMENTS OF THE DISHONESTY CHARGES HERE. ANY DETAIL AS TO IMPROVEMENTS ISN'T GOING TO HELP US VERY MUCH.

Sanderson: Okay.

(ll.17-27, p.35, H.7)
(ll. 1-6, p.36. H.7)

In the next example the defence lawyer is censored by the judge when he questions Mr. Howell at length concerning his previous expenses while working:

3.5

Defence: Well, would you just cash one cheque on a trip, or did you have many each time you had a meal?

Howell: Whatever it required. Whatever the trip required.

Defence: Well --

Howell: It wouldn't be -- no, I mean it would be -- normally you'd get an --

The Court: MR. FISHER, I THINK WE'RE GETTING A LITTLE FAR AFIELD HERE ON RUNNING THESE TRIPS DOWN TO FLORIDA.

Defence: Well there's an issue of cash advances being made on these bank accounts, that has been brought up in chief, so I'm just trying to get into the aspect of this man's cash needs.

The Court: WELL YOU CAN ASK HIM. I THINK -- I THINK YOU ALREADY DID WHETHER HE TOOK ANY ADVANCES OUT OF THE BANK ACCOUNT. HE SAID HE DIDN'T.

Defence: Right. So I -- with all respect, I don't know if I'm restricted to going at that to find out his cash needs.

The Court: WELL, I'M NOT GOING TO SIT HERE AND GO THROUGH THREE YEARS OF CASH NEEDS ON -- OF A TRUCKER ON A HIGHWAY BETWEEN HERE AND FLORIDA. I THINK YOU CAN ASK HIM IN GENERAL TERMS, AND I THINK YOU'VE GOT YOUR ANSWER.

Defence: You're saying you didn't take cash on your trip?

Howell: Very rarely. (ll.26-27, p.68, H.12)
(ll. 1-23, p.69, H.12)

These examples demonstrate the ability and authority of the judge to restrict questioning, and by extension, ensuing answers, to issues he or she considers relevant. In example 3.4 the judge actually interrupts the witness's answer and specifically asks the prosecutor "Are we interested in this?" The judge then addresses the witness and explains that "Any detail as to improvements isn't going to help us very much." This passage demonstrates the irrelevancy of the witness's testimony, as gauged by the judge, and is again further highlighted when the justice explains that the court's focus is upon "the elements of the dishonesty charges here." In example 3.5 the judge in this case also interrupts a response after a witness begins to explain how he covered his expenses while driving a truck. The judge, addressing the defence lawyer, comments that "we're getting a little far afield here on running these trips down to Florida." He then adds that he is "not going to sit here and go through three years of cash needs on -- of a trucker on a highway between here and Florida." This is another demonstration of a judge's active role in ensuring the relevancy of testimony.

One work that might be introduced as a means of expanding the consideration of witness testimony is H.P. Grice's "Logic and Conversation," specifically, his theory of implicature. This is a work, as Levinson states, that specifies what conversational "participants have to do in order to converse in a maximally efficient, rational, cooperative way." (1983:102) Although Grice has focused upon discourse exchanges between people in the course of daily activities, he has provided a framework for understanding that can be applied to witness testimony. Consider the cooperative principle, a premise that directs speakers during discourse:

> Our talk exchanges ... are characteristically, to some degree at least, cooperative efforts; and each participant recognizes in them, to some extent, a common purpose or set of purposes, or at least a mutually accepted direction ... at each stage, SOME possible

> conversational moves would be excluded as conversationally unsuitable. We might then formulate a rough general principle which participants will be expected (ceteris paribus) to observe, namely: Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.
>
> (Grice 1975:45)

As a means of further explaining this, Grice has developed four maxims: quality, quantity, relation and manner, which, when followed, will "yield results in accordance with the cooperative principle." (1975:45) These maxims are important to this discussion as they can be used as another resource for gauging the communicative efficiency of witness testimony.

The category of relation is, perhaps, the least detailed of the four categories that comprise the cooperative principle: "under the category of RELATION, I place a single maxim, namely, 'Be relevant.'" (Grice 1975:46) While this clearly asserts the importance of relevance to communication, it is still difficult to determine as Grice has not provided an adequate means for gauging "what different kinds and focuses of relevance there may be" (1975:46). A useful source to consider, then, is Sperber and Wilson's *Principle of Relevance*, which holds that every act of communication "communicates the presumption of its own optimal relevance." (1988:158) As a preface to this principle, the authors have also defined the *Presumption of Optimal Relevance* as a set of assumptions "which the communicator intends to make manifest to the addressee [that] is relevant enough to make it worth the addressee's while to process" (1988:158). If we consider 3.4 in light of this definition, it is very clear that the court's concern is centered on "the elements of the dishonesty charge" rather than details regarding improvements made to the car. Therefore, as this information has absolutely no bearing on the criminal misconduct being tried, it would not be worth

the judge's "while to process the ostensive stimulus" (Sperber and Wilson 1988:158) about the repairs. In this case it is clear that Sanderson has violated the maxim of relevance by offering information that is not appropriate to the "immediate needs" (Grice 1975:47) of the hearing.

In yet another example, consider the following exchange where the defence attorney has initiated a line of questioning that actually deals with the arrest of another individual during a separate investigation. In response, note the objection of the prosecutor that requires the presiding justice to evaluate the relevance of the testimony to the issue at hand:

3.6

Defence: Can you remember what you said to her?

Cst. Fleet: I said to her that you are under arrest for assault. You have the right to retain and instruct counsel without delay. That means you can call you own lawyer or seek immediate advice from duty counsel. If you are charged with the offence, you can seek assistance from legal aid.

She understood that.

Defence: All right. What else did you tell her?

Prosecutor: With respect, Your Honour, I don't see how this is relevant to this case. This is another accused, another investigation. As I understand, even if we were in a trial situation, any violation of a third party's rights are not relevant to the proceeding before this court. It would just be if there is a violation of this accused's right. Perhaps I may be

missing something which my friend can advise us of.

(ll. 23-27, p.8, H.8)

(ll. 1-12, p.9, H.8)

[procedural discourse, debating relevance of above questioning]

The Court: I agree with Ms. Wilson [prosecutor]. Please confine your questioning to this incident and this accused.

(ll. 8-10, p.10, H.8)

In the above example 3.6, the prosecutor interjects after the defence question: "All right. What else did you tell her?" and comments to the judge that such a line of questioning is "not relevant to the proceeding before the court." This is followed by a discussion concerning the relevance of testimony where the judge agrees with the prosecutor and directs the defence lawyer to "confine your questioning to this incident and this accused." This makes it clear that in the above examples: 3.4, 3.5 and 3.6 that a witness's testimony must bear relevance to the issue at hand. Once again, this suggests that the testimony within the transcripts has been deemed relevant by the judges that adjudicated each hearing.

In addition to restricting testimony, judges were observed on other occasions maintaining the accuracy of an attorney's reporting of previously presented testimony, refusing to allow unwarranted paraphrasing or inaccurate quotations by questioning counsel. This further demonstrates the importance attached to witness testimony by the court and the pivotal role that each judge performs during preliminary hearings. The following exchange between the presiding judge and defence attorney further underscores the importance of original narratives:

3.7

Defence: Okay. Now, did the boys wake up at all during the night?
Ms. Boyd: Mmm Hmm
Defence: Then you said that you and he ended up in the water bed and he climbed on top of you. Did you --
The Court: NO, I DON'T THINK SHE SAID THAT.
Ms. Boyd: No.
Defence: Sorry. That's right.

The Court: SHE SAID THAT HE PULLED HER ON TOP OF HIM.

Defence: I was trying to paraphrase here. When he --

The Court: WELL, NO, YOU ARE NOT TRYING TO PARAPHRASE. YOU ARE PUTTING SOMETHING TOTALLY DIFFERENT TO HER THAN WHAT SHE SAID. IF YOU WANT TO SUGGEST THAT TO HER, YOU CAN SUGGEST IT, BUT YOU CAN'T SUGGEST THAT SHE SAID THAT WHEN SHE DIDN'T SAY IT.

(ll. 1-16, p.53, H.14)

This example demonstrates the judge's involvement in maintaining the integrity of a witness's narrative once presented. For instance, when the defence rewords the witness's earlier testimony as: "Then you said that you and he ended up in the water bed and he climbed on top of you. Did you --," it clearly changes what was actually said by the witness and leads to a violation of one of the four maxims, in this case, quality: "try to make your contribution one that is true" (Grice 1975:46). As a result, before she can finish, the attorney is interrupted by the judge who states: "No, I don't think she said that." The defence then claims that she was attempting to "paraphrase here," but is again cut off by the judge who responds that "you are not trying to paraphrase." This brief exchange demonstrates that judges will not tolerate previous testimony being misrepresented or inaccurately referenced. When combined with the earlier examples illustrating the adjudication involved in evaluating testimony, it is very clear that irrelevant testimony will be disallowed by the presiding judge either upon his or her volition, or in response to requests by the attending counsel. As these examples support my proposed solution to gauge the appropriateness of witness testimony, I feel my alternative explanation to the problem of superfluous and immaterial testimony is firmly and sufficiently established. That is, by analyzing the transcripts for the reactions of the three legal professionals involved in all hearings, a clear comment on the admissibility and corresponding relevance of testimony can be

offered. With this aside now completed, let us, once again, consider the testimony of Sharon Rea, keeping in mind that her testimony features the most outstanding characteristics of the relational orientation among any observed witness.

The most obvious discourse phenomenon on the part of Rea that suggests a relational outlook toward the law, is her apparent tendency to markedly digress when answering questions. Conley and O'Barr claim that relational account-givers often provide lengthy summaries of previous relationships involving themselves and others, often introducing irrelevant details of their social lives. Consequently, such individuals are said to ramble, providing the court with unsolicited personal comments and interpretations of events. Consider the following narratives taken from Ms. Rea's testimony, chosen for their consistency with the model's characterizations:

3.8

Defence: Did you see her try and walk in any direction?

Rea: She couldn't. The guy had a knife to her. She would have. I know she would have. She's not going to let me get beaten up while she stands there, you know, with this --

(ll. 9-13, p.34, H.8)

3.9

Defence: So, why was there any concern about Linda driving then?

Rea: Because we had just gotten out of the nightclub, and you know, we just wanted to take a break for a second and sit down, and just, you know, regroup before we left, you know. I don't think there's too much wrong with that.

We didn't go out to cause problems, and problems

were the last things on our mind, believe me. This kind of stuff should not happen.

(ll. 20-27, p.36, H.8)
(ll. 1-2, p. 37, H.8)

3.10

Defence: Now, do you remember who you spoke to when you phoned the police?

Rea: No, I don't. I don't even remember if it was me actually who phoned the police, but we phoned the police when we got home.
At this time I was hysterical. I mean I've never been beaten up like this before in my life. I mean this was just totally uncalled for. I've never had to be in this situation whatsoever, and I don't think anybody should have to go through this. This is just, you know, it's animal behaviour, and I'm appalled by it. And I'm sorry, I had a lot to drink, but I'm not a violent person by nature, and I just do not understand any of this. So...

Defence: So your answer is you don't remember?

Rea: No, no, I really don't remember if I -- I was in hysterics. I'm sorry, I was in hysterics. I had just been beaten up. My face was cut up, my eye was cut up. Clothing was torn. I was lying on the ground getting kicked, you know, repeatedly in the face.

(ll. 26-27, p.38, H.8)
(ll. 1-19, p.39, H.8)

3.11

Defence: Weren't there any other people around at this time of night?

Rea: Oh yeah, there was actually quite a few people after that, you know. When I got up and stuff, they were

> saying, "Are you okay, you know? We saw the girl doing that, and whatever." And I mean somebody pulled the girl off of me, you know. So, somebody helped me. I don't know who it was that helped me. I mean by this time I had blood all over my face. I mean Officer Fleet didn't even recognize me the next time he saw me because of how different I looked after, you know, the beating compared to what I look like now.
>
> (ll. 7-17, p.40, H.8)

Given the above examples, it seems very clear that Ms. Rea presents testimony that is relational in orientation. Let us now examine each of the previous examples to determine what relational discourse characteristics are present.

Beginning with example 3.8, Rea is asked by the defence lawyer: (in reference to her friend) "Did you see her try and walk in any direction?" The question is never answered directly, the nearest we come to an answer is her response: "She couldn't. The guy had a knife to her." Rea then adds that "I know she would have. She's not going to let me get beaten up while she stands there." This comment is a remark on what her friend *would have done* if able, not about *what was done*. As such it is an introduction that is based on her previous relationship with the witness and her knowledge of her friend's character.

In example 3.9, the defence has asked Rea "Why was there any concern about Linda driving then?" This question is never answered by Rea, neither directly or indirectly. Instead she begins to comment on the event as a whole, responding that "This kind of stuff should not happen," which is more related to broad "social problems," (1990b:60) than to why there would be a concern about her friend driving.

Example 3.10 demonstrates Rea's tendency to use the defence's questions as a starting point to provide comments on the situation as a whole. When asked "do you remember who you spoke to when you phoned the police?" Rea quickly answers: "No, I don't," but then continues on to say that "I mean I've never been beaten up like this before in my life. I mean this was just totally uncalled for. I've never had to be in this situation whatsoever, and I don't think anybody should have to go through this." These comments go beyond the question and appear to draw "her audience ever deeper into her social world." (1990b:61)

In the final example, 3.11, we again see where a significant portion of Rea's response to a question digresses from the issue under consideration. When asked if other people were around at the time of the incident, Rea responds "there was actually quite a few people," but then becomes less specific as she adds: "I mean somebody pulled the girl off of me," which suggests, by way of an answer, that someone else must have been there. However, after these responses, Rea then digresses by contrasting her personal appearance on that night with what "I look like now."

While the above examples may seemingly serve as evidence of a relational orientation on the part of Rea, a more detailed analysis of her testimony is in order given the preceding discussion concerning the subjectivity involved in evaluating speakers under the Conley and O'Barr model.

Although the above testimony can be evaluated as relational, when measured against the alternative method presented, the relevance of testimony gauged according to its ability to withstand censoring by the judge or attending counsel, all of the above narratives are apparently relevant. The above passages are undeniably expressive and

emotional at times; however, except for 3.8 and 3.10, her testimony was not interrupted by either the judge or prosecutor. The only examples of interruptions were on the part of the questioning defence attorney which appeared to be an effort on his part to regain some sort of control over the direction of the witness's testimony. Regardless, these interruptions were not accompanied by any type of admonishment or reminder to remain focused. This testimony, then, when evaluated for its admissibility, despite the witness's intense presentation, appears to have some relevance to the hearing as it was not abbreviated or commented upon by either the defence, prosecution, or judge.[1] This creates an inconsistency with the Conley and O'Barr model since the above narratives are clearly relational when evaluated under the parameters of the model.

It is upon these points that the Conley and O'Barr model may be criticised. The manner in which court operates is, in many ways, subjective, numerous decisions are the responsibility of the presiding judge. While preliminary hearings must be conducted within the confines of the law, the judge still has considerable capacity for interpretation and discretion. Thus, it is very difficult to consistently predict how an individual will respond to a specific narrative style. As the authors themselves claim, between judges and litigants the "interactions are complex" (1990b:112). Therefore, each judge will interpret each witness differently and, even though the differences may be only slight, they will still exist. So, while Ms. Rea was the most extreme example of a relational account-giver under the Conley and O'Barr guidelines, her narratives were accepted in their entirety. Additional confirmation of the relevancy of her testimony may be derived from the fact that the defendant was ordered to stand trial indicating that there was enough evidence, according to the judge, for a properly instructed jury to find the accused guilty. As the majority of evidence regarding the

alleged assault upon Rea was based on her own testimony, the relevancy of her narratives appears certain.

The next individual I will consider appeared as a key witness in a homicide case. Identified as John Baker for convenience, the witness was described by a police officer who knew him as a "grizzled old tenant of the St. Regis Hotel." (ll. 9-10, p.55, H.1, Cst. Ward) When directly asked about his career employment experiences, Mr. Baker characterized himself as an "[e]x-soldier, ex-airman and ex-worker." (ll.24, p.117, H.1) I introduce this component of vocation and background since Conley and O'Barr claim that the "distribution of the rule and relational orientations appears to parallel the distribution of powerful and powerless speech styles," (1990b:81) meaning relational speakers are more likely to be found among "women, minorities, the poor, and the uneducated." (1990b:81) With respect to Baker, it is clear from descriptions of his former career and present lifestyle, that he fits into the above distribution and categorization for relational speakers. However, as I will demonstrate, Mr. Baker is not labelled so easily and creates problems for the rules/relationships continuum when compared for stylistic and discourse consistency.

There is little doubt upon review of Baker's evidential narratives that the witness exhibits strong stylistic tendencies of the relational orientation judged upon the three linguistic features: hesitation, repeating and correction. Over the course of his testimony, 33 pages of transcripts in all, he corrected or modified his speech on 26 occasions, hesitated twice, and repeated words or entire phrases at 31 different points. By way of comparison, Constable Dobson, throughout the course of his testimony in trial one (19 pages), exhibited only three corrections or modifications, no instances of hesitation, and only one repeated word. Although the police officer was not on the

stand for the same duration of time as Baker, there is still a notable difference in the occurrences of the above stylistic features. The following examples are typical narratives on the part of Baker, confirming the orientation of his stylistic tendencies:

3.12

Prosecution: Are you able to tell which one of the two said it?
Baker: No, I can't. They both -- they both -- well, they both -- they both gave more words after, but that was the part that I -- that I heard. They both -- both -- they both threatened him like.

(ll. 5-9, p.104, H.1)

3.13

Prosecution: Okay. And then they move down towards the van?
Baker: No, they -- he couldn't -- they -- they dragged him from there after they pounded the hell out of him and kicked him, --

(ll. 8-14, p. 110, H.1)

Examples 3.12 and 3.13 are representative of Baker's testimony as a whole. In 3.12 we see that Baker repeats the wording *they both* on six occasions. In example 3.13, there are three noticeable hesitations on the part of the speaker. In addition, after he begins to describe the condition of the victim with "he couldn't," Baker hesitates and then modifies his answer to explain what the suspects were doing as the question requested. Clearly, Baker's speech patterns exhibit strong stylistic characteristics of the relational orientation. If we can consider Baker's performance at the discourse level (digressions, precise recall of information, chronological ordering), there is further evidence that this witness would be labelled as relational according to the construct.

The primary indicators of the relational orientation on the part of Mr. Baker,

are in the form of topical digressions. Although previously discussed at length concerning the inherent subjectivity of such evaluative judgements with respect to Sharon Rea, Baker also appears to introduce socially based information according to the model. Consider the following passages, the topical digressions italicized, noting that the witness exhibits discourse level phenomena characteristic of a relational account-giver:

3.14

Prosecutor: Okay. And when did you first observe the three individuals, and where were you approximately?

Baker: I was coming from my -- my -- *I was leaving Calgary*, I was coming from my house. *I went back to see if the dog was alright because I was giving him away to the landlord.*

(ll. 1-6, p.98, H.1)

3.15

Defence 1: Okay. So where were you before that, before you went home to check on your dog?

Baker: I was at -- was at the hotel.

Defence 1: At the St. Regis?

Baker: Yeah, I was in my room in the hotel.

Defence 1: So you have a house and a room at the hotel?

Baker: Well, I was living -- I moved out of the house *but I left some things and the dog for the landlord, because I didn't want to bring him with me because I -- you can't get an apartment, so I give it to the landlord.*

Defence 1: So you went back to check on the dog.

Baker: Yeah, *I went to check that he had water and something to eat and take him for a walk, 'cause I was getting on the bus to go to Saskatoon.*

(ll. 5-18, p.111, H.1)

If we analyze passages 3.14 and 3.15 according to the model, Baker would clearly be

labelled as a relational speaker. For instance, in the first example, Baker is asked when he observed the three individuals and where he was at the time. He then responds that he was coming from his house but then adds, in a seemingly clear digression, the extraneous information that he was leaving Calgary and that he had been checking on his dog. With this fact in evidence, it is then used further by the defence who requests information concerning Baker's whereabouts before he went home to check on the dog. When he responds that he was at his room at the hotel, it prompts the defence lawyer to ask: "So you have a house and a room at the hotel?" In response, as italicized, he again appears to introduce irrelevant details into the testimony as he makes mention that he left his dog for the landlord as ownership of the animal would hinder his ability to rent an apartment at a later date. According to the framework the authors have established, these examples appear to be clear instances of digressive testimony on the part of Baker.

If, however, we examine Baker's responses with regard to the sequencing of speech acts, we find that the consideration of his comments as lacking relevance is subject to dispute. Referring to Schiffrin's (1994) discussion of hearer response to questions, one category of response that is particularly interesting in light of Baker's narratives is the *account*. Schiffrin explains that accounts "provide reasons and/or motivations for some prior action that has been considered marked (e.g. inappropriate, impolite, insulting) in some way," (1994:80) and, "because they provide explanations, accounts are causally linked to prior actions, as if the person is saying 'I did X because of Y.'" (1994:80) If now, we re-examine the passages identified as supporting a relational orientation, a more complete understanding of Baker's responses may be gained.

Beginning with 3.14, as mentioned, Baker has been asked to indicate when he first observed the three individuals and where he was at the time. In responding, Baker mentions that he was coming from his house which is most likely an attempt to place the event in a temporal setting. Of more interest, though, is Baker's comment that "I went back to see if the dog was alright because I was giving him away to the landlord." Although this comment seems somewhat irrelevant, we should consider that Baker's observation of the incident took place in the very early hours of the morning when pedestrian traffic is extremely unusual. Baker's inclusion of this explanation into his response, then, appears to be a deliberate attempt to justify the legitimacy of his late night errand.

Another notable feature of 3.14 is that Baker seems uncomfortable with his explanation of his whereabouts that night since he hesitates twice and interjects "I was leaving Calgary" before actually completing the phrase "I was coming from my house." If, though, we examine 3.15 closely, a likely account for his earlier response becomes clear. While being questioned in 3.15, Baker is reviewed on the apparentness of his having two separate residences. He explains that he has moved out of the house although he "left some things and the dog" because he was leaving for Saskatoon. In light of this information, it appears that in 3.14 Baker is attempting to make explanation for having been out at such a late hour and for having two residences. Baker's responses fit well into Schiffrin's definition of accounts as explanations for marked or unusual behaviour. Certainly having two residences and walking the streets of Calgary in sub-zero weather at 3:00 a.m. (without questionable intent) are relatively uncommon occurrences. By all means, then, Baker was highly sensitive to the needs of his listener by explaining such unusual factors without prompt. For these reasons, any interpretation that might designate the narratives in 3.14 or 3.15 as containing

irrelevant details of Baker's social situation could be seriously challenged.

Another interesting point that arises if we compare the 'digressions' of Baker to those of the lay litigant Rawls, is that Baker's narratives deal with events that are temporally proximal, having happened in the relatively recent past. Therefore, his comments do not appear as abruptly out of place as other witnesses who introduce details that are temporally far removed from the time of the court hearing or the event in question. This is true in the case of Rawls as her digressions are temporally distal as noted in the following example: "Well I can, well, well I have to jump back because, uh, for three years when Mr. Bennett moved back - because he was there once before and then he moved and then he come back into that house." (1990b:61) Clearly, when witnesses introduce events that are temporally distal and of questionable relevance to the issue at hand, they are more likely to be deemed as irrelevant than events that have occurred in the more recent past.

As we have seen, certain stylistic characteristics such as hesitations, repeats and word corrections are apparent in Baker's speech that would support a relational labelling under the continuum. With regard to discourse level digressions, within a strict application of the model, this would also support a relational categorization for Baker's speech. However, let us now consider some further examples of his testimony which appear to run counter to a relational interpretation. Referring to the model directly, the authors claim that one tendency of relational account-givers is the common assumption that the listener shares their "knowledge of background events and places." (1990b:61) Conley and O'Barr further add that "although the assumption of shared knowledge is common and appropriate in familiar conversation, it creates difficulties for a stranger who is trying to extract a set of facts and to apply strict legal

rules to them." (1990b:61) Reviewing the testimony of Baker with respect to these claims, it is clear that his responses and explanations to the questions of counsel seldom leave the court uninformed. Throughout his testimony, Baker consistently qualifies his comments, leaving his narratives more precise. Note the following examples with the qualifying remarks italicized:

3.16

Baker: But I ran -- I seen a friend of -- *not exactly a friend but he's the desk clerk*, you could see him standing at the door, ...

(ll. 17-19, p.96, H.1)

3.17

Baker: And then they grab him by the collar of his coat and they dragged him around -- *I'm standing in the middle of the road where the white line is watching this.* And they dragged him behind the van *or the -- whatever you want to call it, the vehicle.*

(ll. 1-5, p.100, H.1)

3.18

Baker: That's why they came back again, come -- came to my room and came to the desk clerk. And then I went down to the car -- *the second -- I don't know if it's the first car or the second car,* but then they went back over and they located the body.

(ll. 10-14, p.100, H.1)

3.19

Baker: Then I said I was going to go and stop them. I said, no, I said, if I miss one, the other one will get me. So I seen the desk clerk. *Through the park you can see*

> *the doorway of the St. Regis Hotel.* I seen him, it was a -- *he was standing outside.* So I ran through the park and told him to call the police.
>
> (ll. 5-10, p.102, H.1)

3.20

Baker: Well, they -- they more or less *the two of them* shouldered him into the parking lot. And then in the middle of the parking lot, he went down and they started jumping on him and kicking him.

(ll. 23-26, p.99, H.1)

In order to examine the above narrative fully, it is useful to refer to the work of Prince (1981) and Halliday (1994). Beginning with the former, Prince has developed a discussion that considers the concept of shared knowledge, or, what she has labelled *assumed familiarity*. Consider the following:

> from the point of view of a speaker/writer, what kinds of assumptions about the hearer/reader have a bearing on the form of the text being produced, where the form is not uniquely determined by the 'objective' information that the speaker/writer is attempting to convey?
>
> (1981:233)

If we consider this statement in light of Prince's own "not very original analogy" (1981:234) it becomes very clear. Prince uses the example of cooking recipes from two sources: a standard American household cookbook and a professional cookbook used by French chefs. In comparing the directions for the same dinner, the recipe from the professional source is far less detailed. For instance, while in the first recipe the information is over 35 lines of text and includes directions on oven temperature, cooking time, exact measurements and order of ingredients, by comparison, the second recipe, intended for professional chefs is conveyed in only two sentences. Of course, the reason for this difference "is that the writer of a recipe has a certain set of

assumptions about what the reader knows" (1981:235) and, conceivably, does not know. Assumptions concerning the knowledge level of the targeted audience then, directly affect the form of the message.

If, now, we extend the above reasoning to speaker-hearer terms, we find that shared knowledge may be described as follows: "the speaker assumes that the hearer 'knows', assumes, or can infer a particular thing (but is not necessarily thinking about it)." (Prince 1981:230) Clearly, then, with a speaker who assumes shared knowledge on the part of the listener, as relationally oriented witnesses are described as doing, we would expect that there is very little elaboration or qualification of statements, which makes their testimony difficult to follow. Before examining the above narrative, though, let us consider a second writer who provides another foundation from which to consider Baker's narratives.

As mentioned, the work of Halliday (1994) becomes extremely useful in analyzing testimonial narratives. Most applicable in examining testimony is Halliday's notion of *expansions*, which provides us with another framework to analyze witness digressions. Halliday maintains that "given a clause, in its multiple function as process, exchange and message, then this may enter into construction with another clause which is an expansion of it." (1994:225) Halliday subdivides the concept of expansions into three categories: elaborations, extensions and enhancements. Of most interest to our discussion, however, is the final category of enhancement, a process where: "one clause enhances the meaning of another by qualifying it in one of a number of possible ways: by reference to time, place, manner, cause or condition." (1994:232) Proceeding through the noted qualifications in examples 3.16 - 3.20, we see that Baker has expanded his answers to include spatial and manner enhancements

at many points.

Beginning with example 3.16, we see that Baker comments "But I ran -- I seen a friend of," at which time he self-corrects and clarifies his relationship to the person identified as a 'friend' stating "not exactly a friend but he's the desk clerk." This correction is an unsolicited clarification of having incorrectly referred to the individual as a friend.

Example 3.17 is another instance where Baker has provided explicit information which allows the listener to follow his dialogue accurately. In describing what happened, Baker states that "then they grab him by the collar of his coat and they dragged him around," but then stops and describes his observation position as "standing in the middle of the road where the white line is watching this." This qualification is a spatial enhancement, demonstrating that Baker may feel that the listener does not share his knowledge about how he would have been able to see the altercation.

Example 3.19 is yet another narrative passage where Baker incorporates a spatial enhancement, further demonstrating his regard for the fact that his audience might not be aware of the logistical components of his dialogue. In describing his leaving of the scene after witnessing a confrontation between three individuals, Baker comments: "I seen the desk clerk." Immediately thereafter, he adds to the comment: "Through the park you can see the doorway of the St. Regis Hotel," which explains how Baker would have been able to see the desk clerk from his position.

The final example in 3.20 demonstrates Baker's clarification of the use of

"they" in referring to the beating. In first using the terminology "they" and then becoming more explicit by adding "the two of them," Baker has explained the means by which the victim was moved in an enhancement of manner.

These narratives clearly indicate that Baker does not assume shared knowledge, but consistently qualifies his statements. His testimony, in fact, appears to assume "no prior knowledge of people, places or events on the part of the listener," (1990b:63) a statement, taken ironically, from Conley and O'Barr's description of a rule-oriented litigant. Clearly, on the discourse level, Baker's narratives are not consistent with a relational labelling.

A further discourse level phenomenon that Conley and O'Barr have identified concerns precision and expertise. In describing the rule-oriented litigant Broom, the authors contend that "his entire testimony has an aura of precision and authority: it contains many quantitative references." (76) By comparison, relational account-givers are said to seldom present detailed information, appearing ineffectual when specific details are requested. The above descriptions, however, can lead to incorrect assumptions, consider the following exchange involving Baker:

3.21

Prosecutor:	All right. And what side of that -- is that Edmonton Trail or 3rd Street or what is that, --
Baker:	I couldn't --
Prosecutor:	-- do you know?
Baker:	I don't know the streets too much.

(ll. 26-27, p.98, H.1)
(ll. 1-3, p.99, H.1)

Obviously, Baker is unable to answer the question put to him with specific details, commenting that "I don't know the streets too much." However, a simple explanation

for the above lack of precision was apparent later in Baker's testimony:

3.22

Defence 2:	I understand that you didn't live in Calgary for the course of this last winter; is that right? That you lived somewhere other than Calgary?
Baker:	Yes
Defence 2:	Okay. Since you -- when did you -- what day was it you came back to Calgary this last week? Okay, when did you return to Calgary to testify here today?
Baker:	Today.
Defence 2:	You came back just today?
Baker:	Yeah, just flew in today.
Defence 2:	All right. Have you had the opportunity to walk in that area again today?
Baker:	No.

(ll. 3-15, p.117, H.1)

As the witness is not a resident of Calgary, it would not be accurate to conclude, based upon certain portions of his testimony, that the lack of specificity in 3.21 was associated solely with a relational orientation. So, before any conclusions are drawn from a witness's testimony, we must first consider the many possible explanations that might account for a particular manner of discourse.

According to Conley and O'Barr, one of the more notable differences between the two manners of orientation, concerns the degree of chronological sequencing in litigant narratives. In comparing two witnesses: the relationally oriented Rawls and the rule-oriented Hogan, the authors claim that the evidential narrative provided by the latter witness "is given in chronological sequence," (1990b:63) in contrast to Rawls's testimony which meanders "through time and place" (1990b:61). With respect to Baker, in the longer narratives throughout his testimony the accounts are clearly

chronological in patterning. Consider the following extended passages demonstrating logical, sequentially organized narratives:

3.23

Prosecutor: Would you be good enough to describe, sir, where you were, at approximately what time of the day and what you observed and did?

Baker: It was about half past 12, 1 o'clock at -- in the evening.

Prosecutor: So that would be --

Baker: Towards --

Prosecutor: -- half past 12 midnight to 1 a.m.?

Baker: Yes.

Prosecutor: Yes. Go ahead.

Baker: And was walking back to my hotel, the St. Regis. I came under the viaduct and I turn right across kitty-corner to the little park that's in front of the St. Regis Hotel and I notice two guys beating up another guy. And they were -- they weren't just giving him a couple of punches, they were, oh, making spaghetti out of him. They were kicking and booting and batting and banging him up against the wall.

Prosecutor: Go ahead.

Baker: Then they dragged him in the -- they pushed him in the parking lot and then they really stomped on him. And then they grab him by the collar and they pulled him behind a white panel truck or a -- or a van of some kind.

But I ran -- I seen a friend of -- not exactly a friend but he's the desk clerk, you could see him standing at the door, said "You better call the police because that guy that they pulled behind the van is not going to live 'til the morning." It was very, very much below, I don't know how much, but it was very much below zero.

(ll. 20-27, p.95, H.1)
(ll. 1-23, p.96, H.1)

Despite the rather colloquial use of language, we can clearly observe the chronological

regularity of this narrative. The prosecutor has asked Baker a four-part question: where he was, what time of day it was, what he observed, and what he did. Baker's response is well ordered, sequential and allows the listener to follow with ease. Baker structures his response in the following manner:

1. Time: half past 12, 1 o'clock in the evening
2. What he was doing: walking back to his hotel
3. Location: under viaduct - kitty corner to park in front of hotel
4. What he observed:
    a. two males beating another male
    b. not a normal assault: a severe assault
    c. males pushed victim into parking lot and continued assault
    d. males finally pulled the victim behind a parked vehicle
5. What he did: ran to the hotel and told the clerk to call police

By structuring the narrative in this manner it is clearly sequential in ordering, easy to follow and answers all components of a difficult four-part question.

At this point, a brief overview of Labov's (1972) notion of narrative might be helpful as a means for more thoroughly examining Baker's testimony. Labov considers a narrative as "one method of recapitulating past experience by matching a verbal sequence of clauses to the sequence of events which ... actually occurred." (1972:35) Acknowledging that there are many ways of relating past experience, Labov then considers both minimal and fully-formed narratives. While at the one extreme a minimal narrative is defined "as a sequence of two clauses which are temporally ordered," (1972:360) a more complete narrative includes the following components: abstract, orientation, complicating action, evaluation, resolution and coda. While all of these components might not occur in less developed narratives, each element is distinct

and performs a specific function.

If we consider the components of a fully-formed narrative, we begin with an abstract which "encapsulate[s] the point of the story." (Labov 1972:363) Usually quite brief, perhaps only a few clauses, this is typically followed by the orientation where the speaker identifies "in some way the time, place, persons, and their activity or the situation." (1972:364) This being set, the narrator is then free to begin with the complicating action: the main body of narrative clauses, sometimes referred to as the obligatory nucleus of the story. In some narratives, an evaluation component would then follow where the storyteller provides an explicit statement of "why it was told, and what the narrator [was] getting at." (Labov 1972:366) Next is the resolution where the result of the story is presented to the listener. The final element is the coda, the purpose being to "close off the sequence of complicating actions" (365) and to indicate that none of the events that follow are "important to the narrative." (366) With this overview of Labov's framework in place, a more detailed analysis of Baker's testimony follows.

Analyzing Baker's response in 3.23 according to Labov's notion of narrative, we see that the witness has included all the components of a fully formed narrative excepting the first and the last: abstract and coda. Baker has clearly developed the orientation component of his narrative as he has related the time, place and situation of the event. This is followed by the complicating action, where he has temporally ordered the sequence of events regarding the beating. This, then, is followed by the resolution where Baker explains the result of his having witnessed the beating: "But I ran" and told the desk clerk to call the police. Finally, Baker has also included an evaluation component as he told the desk clerk that the victim "is not going to live 'til

the morning." Because the witness is being questioned by the prosecutor, the absence of an initial abstract is to be expected as the court is not inclined to hear a summary of such an incident. Similarly, the lack of a coda is not particularly outstanding since the questioning attorney is responsible for either asking another question or discontinuing the line of questioning. Thus, the witness is less obligated for returning the court's verbal perspective to the present moment. So, as the core components that constitute a narrative are present in Baker's testimony, it is understandable that his response is one that is easy to follow.

At the beginning of this section, I briefly introduced a number of the factors involved in Baker's stylistic performance. Recalling that discussion, it was demonstrated that the witness displayed a number of stylistic indicators, (hesitations, corrections and repeats) all suggesting a relational orientation. At this point, though, it is now clear that those stylistic features stand in contrast to Baker's discourse level performance. At this level, Baker clearly qualifies his statements and presents extended narratives in chronological sequence. Evaluating his overall speech performance with the Conley and O'Barr model would be difficult as so many of the features of his presentational style stand in contradiction to one another. Superficially, Baker's testimony might appear relationally oriented, but, as we have seen, these interpretations can be argued.

For many witnesses in Provincial Court it was found that the model could not provide clear indications of either a rule or relational orientation. While certain characteristics were present, they were either too few or too infrequent to infer any type of placement on the continuum for the speaker. Thus, the next few examples demonstrate that in some cases analysis of witness testimony using the model did not

provide any clear indications of orientation.

Note in the following narratives, purposefully chosen for their length, that the testimony is basically chronologically ordered and the speakers remain primarily focused on the issues in question. The first example involves witness Gordon Crawford who testifies with respect to his vehicle having been stolen:

3.24

Prosecutor: And when you came to Calgary to inspect the vehicle that had been recovered what did you observe about the condition?

Crawford: There wasn't any body damage that I could tell. The only difference was, like I say, it was the rims. When I came to Calgary to Buster's it was on blocks. And I had to provide rims and tires to get it home because there was just rims. And the gentleman who bought it had taken the tires off because they were brand new and the police allowed him to take them off.

Prosecutor: When you inspected the vehicle did you make any observations of the vehicle that satisfied you that this was your vehicle?

Crawford: Oh, I knew right away because, actually, when I first approached the vehicle on the Z28 IROC the position of the stickers that say IROC Z are usually right above the door jam. And on mine -- like what I noticed there is a moulding there so if you had a door ding and it was about that much, about an inch and a half below. And there aren't any other ones like that because the stickers weren't put on correctly after it was painted. Like, before I bought it. And the stickers -- I could just tell -- I knew it was my car because also where the seats were worn and the back seat is faded due to the sun. I knew right away that it was mine.

(ll. 24-27, p.28, H.7)
(ll. 1-24, p.29, H.7)

In these narratives, Crawford responds to two open-ended questions posed by the prosecutor. When asked what he observed about his vehicle when he came to Calgary, Crawford responds that "There wasn't any body damage I could tell." He then provides a brief explanation concerning the removal of the tires and his effort in providing replacement wheels. This response provides an answer to the question but does not seem remarkable in any other way. This is also true of Crawford's answer to the second question: he explains, quite specifically, how he knew it was his vehicle but again, this does not seem so uncommon as a car owner would be expected to be able to identify his or her own vehicle. Crawford's responses to the above questions do not demonstrate any overt manifestations of either orientation and it seems difficult, based on the above testimony, to place Crawford at any point along the continuum

In the same manner, consider the following narrative articulated by Bill Sanderson in response to a clearly open-ended question:

3.25

Prosecutor: Do you remember any conversation that you had with Mr. Hendry at the time that you purchased the Camero vehicle?

Sanderson: Yes, I do.

Prosecutor: Would you relate that to His Honour, please.

Sanderson: Well, I was a little concerned about the handwritten receipt that was presented after we had negotiated the deal. And he assured me that the car was very legitimate and that I really didn't need any other receipt in Alberta for registration of the car. And I still was a little nervous about it because he had suggested to me that he really wasn't the owner. That it belonged to a Randy Gates who he had known very well who he had at one moment said that it was his son then he said, well, it wasn't quite his son. It was just someone he lived with for quite a while and Randy asked him to sell the car, and he brought it to

> Alberta to sell. And Randy was going overseas. I think he had said with the -- he was with the Armed Forces and wanted to sell it right away, and he thought he could sell it for him very quickly in Calgary. He had told me that Randy had owned the car for some considerable time and that he had done some work on the transmission and that as far as he knew it was in fairly good shape. He had driven it from Ottawa. We had talked about the windshield of the car because it seemed to be taped up and he had said he had the windshield replaced at a spot in Ottawa before he brought it back and that they had installed it incorrectly and he tried to have it repaired and so it had to be taped and left for 24 hours in order for the glue to hold tight on the windshield. He offered to me his wallet and included for me any documentation I wished to look at. I wrote down his social insurance number from his card. I wrote down his driver's licence and, of course, his address and everything. And he offered me a card from AMA or an automobile association so I could check -- as a lien check. I said that was rather inappropriate to use his card but I had already gone to my bank and asked for a lien check before I brought any money to him. They suggested that it would take a day and they said that I'd have to find out the next day. And I said, okay. Well, I'd still take the chance on the car.
>
> (ll. 12-27, p.33, H.7)
> (ll. 1-27, p. 34, H.7)

It is clear that the prosecutor has given Sanderson considerable leeway in answering this question by asking the witness to relate any conversation he had with Mr. Hendry when he bought the vehicle. Sanderson then relates a number of facts and issues that occurred during his dealings with Hendry. However, some of the points are out of sequential order as Sanderson begins by commenting "about the handwritten receipt that was presented after we had negotiated the deal." After introducing this point

Sanderson then discusses issues that appear to have taken place before the deal was made such as the previous owner of the car, the mechanical condition of the car, and Hendry's offer to use his AMA card for the purposes of a lien check. Although Sanderson did not structure his narrative in a strictly chronological manner, the ordering is still relatively easy to follow. With respect to other discourse characteristics, there are no overt digressions or introductions of Sanderson's social situation into the narrative. At the same time the narrative has some detail but is not overly specific. Any analysis of this testimony using the Conley and O'Barr model would be fairly inconclusive. There are simply too few indicators of either orientation to attempt any evaluative effort. This narrative, as 3.24, falls into an unclassifiable area where the model fails to provide an indication of where on the continuum a witness might be placed.

As we have seen in the previous two witnesses, Crawford and Sanderson, it is sometimes difficult to interpret a tendency toward either the rules or relational orientation on the continuum. While in each case there were slight characteristics that typified either of the orientations, these were infrequent and too inconsistent to use as true indicators of either orientation. With these results in mind, let us now examine the conclusions that have been drawn to this point and conclude the chapter by examining the provisions the authors have made for individuals who cannot be categorized so easily.

When the model is applied to Provincial Court and witness testimony is analyzed using the construct, witness characterization and labelling is difficult to realize. For instance, Sharon Rea's testimony was seemingly relational when considered with respect to her many digressions, digressions that were highly

emotional and included her own personal opinions and comments about the incident. However, were these so-called digressions actually irrelevant? Such interpretations are extremely subjective so I gauged digressions upon the reactions to testimony of the prosecutor, defence and judge. I demonstrated conclusively by analyzing court transcripts that these legal professionals, most notably the judge, identify and disallow testimony that is irrelevant. Yet, in the case of Rea, her narratives were never interrupted for reasons of irrelevancy. Another factor that suggests the pertinence of Rea's testimony is that the accused was ordered to stand trial based primarily upon her evidence. Because of these complications it was not practical to label Rea as having a relational orientation.

In the case of John Baker his speech, too, was difficult to interprete using the model. For instance, Baker's speech suggests a relational orientation on the stylistic level as he frequently hesitated and corrected. On the discourse level, as well, Baker's performance suggested a relational orientation because of his tendency, although infrequent, to digress and his inability to remember specific details. Yet again, though, when examined more closely, Baker's testimony was still well-ordered and easy to follow. And, as with Rea, the two accused actually pleaded guilty after the preliminary hearing which is an endorsement of Baker's testimony as he was the only eye-witness to the murder. So, while both Rea and Baker possessed certain discourse characteristics that suggest relational outlooks, such interpretations are easily argued.

In considering the witnesses Crawford and Sanderson, their testimony could not be categorized as either relational or rule-oriented. There were simply no discourse characteristics that were consistent or frequent enough to suggest any sort of continuum tendency using the model.

It should be noted, though, that in the appendix to chapter four of *Rules versus Relationships*, the authors acknowledge that "few litigants are exclusively rule or relationally oriented." (1990b:181) The authors later add that "[d]ifficulties such as these have led us to abandon the effort at quantitative analysis," (1990b:185) instead maintaining that the "project was designed as a descriptive ethnographic study," (1990b:185) and "is best presented as such." (1990b:185) In light of these statements how do we evaluate the above results concerning witness testimony in small claims court?

The above comments remove the authors from having to provide a clear categorization for each witness that might be considered with the model. However, as the model is constructed as a continuum, it is certainly not my expectation, nor should, based on the model, anyone else anticipate, that all witnesses can be clearly and precisely categorized. Nonetheless, while individuals will "display elements of both orientations" (1990b:xiii) in the end, "a predominate tendency" (1990b:181) toward either end of the continuum should be identifiable. Unfortunately, though, this application of the model to Provincial Court does not work smoothly.

While there were clear problems in applying the model to criminal court, it must be noted that the construct does identify specific discourse phenomena that consistently appear when witnesses testify. Recognizing these characteristics and examining their presence in witness testimony under another framework takes us to the next chapter.

Chapter Four

Document Based Testimony

Having tested the suitability of the Conley and O'Barr model to Provincial Court, it was clear that certain problems emerged at many points. For instance, as evident with the lay-witness John Baker, while seemingly relational in terms of hesitations, corrections and digressions, in other respects, his testimony being sequential and thoroughly qualified, was more rule-oriented. While interpretations such as these made application of the model difficult, many of the discourse characteristics that the authors identified were exhibited in the speech of witnesses. As these characteristics did seem to occur simultaneously, another explanation was required to account for the fact that certain features might appear together at one point in a witness's testimony, while being absent at another.

One interesting observation that came to light when exploring witness testimony was the documentary evidence frequently used by those testifying. Often witnesses used aids such as notes, pictures and diagrams to help clarify and organize their testimony. On the other hand, there were many witnesses who had not prepared any documentary support prior to appearing in court. Because of these findings, and the need for a more satisfactory account for the occurrence of the discourse characteristics Conley and O'Barr have identified, a more detailed consideration of the use of documentary support and the effect if any, on testimony, seemed in order. This being the case, let us begin by first considering professional witnesses and the documentary support they might bring to court.

After examining the performance of expert witnesses, it was obvious that those who testify as a requirement of their profession: police officers, social welfare workers and forensic medical doctors, typically make notes of important details during the course of their work. It is suggested that the expertise in writing these notes increases with experience as prior court appearances guide the note-taker as to which details are most likely to be requested in subsequent testimony. In addition, such individuals, especially police officers, receive training that assists in the taking of notes. As Anita Barry claims: "police officers investigating the scene of a crime are trained to observe spatial and temporal detail and are trained as well to report those observations." (1991:286) It is fair to say, then, that professional notes, because of both training and experience, are often thoroughly prepared and include important information, information that may sometimes be regarded as trivial or redundant for less experienced witnesses.

The thorough nature of professionally prepared notes is evident in preliminary hearing-12, an inquiry where the defendant was accused of fraudulently receiving welfare benefits. As witnesses for the Crown, three social workers were called and a total of eleven exhibits were entered. As a measure of the detail and clarity of these documents, note the following dialogues between the prosecutor and John Devolin, an experienced social welfare worker, keeping in mind that the events occurred over five years earlier:

4.1

Prosecutor:	Okay. And on this sheet. What do you indicate that Susan Osbourne filled out?
Devolin:	This is the result of discussion with her. And the reason for assistance I'd indicated was a single parent, that she was separated, her family was in good health. We indicated her education, most recent work experience, income, and I've

> written down nil. For assets the '68 Chev., that she's living in a rent four-plex. I marked down what I used for identification, and then a very short indication of the circumstances as relating to her eligibility, according to the regulations. In which it would appear that there had been some discussion about whether or not she wished to reconcile with her husband, because I have made a suggestion here that I had referred her for counselling to ensure that she had made the decision she wanted, whether to reconcile or to maintain the separation.
>
> (ll. 21-27, p.10, H.12)
> (ll. 1-9, p.11, H.12)

This example clearly demonstrates the comprehensive nature of what has been referred to by Devolin as an 'Intake Information Sheet'. Despite the events having occurred a number of years earlier, the witness is able to testify precisely, quoting specific information such as the accused's marital status, income and assets.

In a comment on the extent to which this same witness relies upon these forms for his testimony, consider the following exchange between the defence counsel and again, John Devolin:

4.2

Defence:	The next thing is, do you have any personal recollection of these events, or do you just review these documents and give us your evidence from that?
Devolin:	I can't specifically say that I remember that particular interview.
Defence:	Right.
Devolin:	With quick arithmetic I've done somewhere between 4,500 and 5,000 since then so --
Defence:	No, I -- I appreciate that and I'm not criticising you. I'm just asking you --
Devolin:	No, No, that's --
Defence:	-- if you have any personal recollection at all, or do you just

review the documents before you?

Devolin: I can identify those documents as mine from the handwriting, but --

Defence: Right.

Devolin: -- a particular recollection of that particular interview, no, it doesn't stand out in any way.

Defence: And anything that exists outside these documents, you can't tell us other than what's on the documents?

Devolin: No, I don't think I'd be able to.

(ll. 22-27, p.17, H.12)
(ll. 1-15, p.18, H.12)

In this example Devolin testifies that the particular interview he had with the defendant "doesn't stand out in any way." Therefore, had the witness not completed the forms in such a comprehensive manner, he would have lacked, by his own admission, any recollection of the events. His ability, then, to testify five years after the occurrence, depending completely on his notes, is a comment on the importance of documentary evidence.

Another individual that warrants consideration is Constable Bill Clarke, a fingerprint technician with the Calgary Police Service. Testifying with respect to an incident that occurred over 18 months previous, the following exchange between the prosecutor and witness illustrates the technician's ability to respond precisely to questions:

4.3

Prosecutor: And under what terms did you take or have any dealing with that document?

Cst. Clarke: I fingerprinted Mr. Jordan at the time.

Prosecutor: And do you recall on what date it was that that was done?

Cst. Clarke: November 6th, 1992.

Prosecutor: And he was in police custody at the time was he?

Cst. Clarke: Yes, sir.

Prosecutor: And you took all 10 of his fingerprints and put it on that, did you?
Cst. Clarke: I did, yes.
Prosecutor: And did you also take personal information such as his name and address?
Cst. Clarke: I did.

(ll. 27, p.15, H.3)
(ll. 1-12, p.16, H.3)

Although some of the responses require only an affirmative or negative response, the witness does not hesitate and his testimony is very convincing. Once again, though, similar to Devolin, the technician is testifying without a specific recollection of events: 4.4

Defence: You're not going to tell us you have a specific recollection of booking in Mr. Jordan, do you?
Cst. Clarke: Not specifically as to his appearance, no.
Defence: No. You --
Cst. Clarke: I do thousands of them.
Defence: Correct. And the only recollection you have is what's on the --
Cst. Clarke: Through the photograph and fingerprints.

(ll.25-27, p.18, H.3)
(ll.1-7, p.19, H.3)

This witness, too, is still able to testify in court without any independent recollection of the events in question. Again, this is further support demonstrating the comprehensive nature of professionally prepared documentary evidence.

In isolating contributing factors and techniques that assist professional witnesses in preparing their notes, one consistent component concerned the time at which the notes were written comparative to the time of the actual event. It became apparent, through testimony, that professional witnesses often prepare their notes directly after, or sometimes during, the events in question. This, of course, assists the

note-taker as the events, particularly sequential ordering, are most clear in the writer's mind. The following examples demonstrate the note-taking techniques of professional witnesses:

4.5

Defence: And who provided you with that description?
Det. Evans: The uniformed personnel at the crime scene had interviewed people at the 7-Eleven store. One of them I knew to be the clerk. I don't know the status of the other person. I subsequently learned it was a friend of hers.
Defence: I take it you made a note of the vehicle description at that time?
Det. Evans: Yes, I did, sir.

(ll. 2-10, p. 75, H.13)

The important point in the above example is that the detective made an immediate note of the vehicle description once the witness gave him the information. The next example is taken from the primary police investigator involved in a car theft trial. Within the following narrative it is quite evident that the officer makes notes of all details while conducting the investigation:

4.6

Prosecutor: As I understand is [sic] a tape lift is something analogous to a brass rubbing or rubbing over a coin to lift the number.
Det. Clayton: That's correct, yes. The area is cleaned away, carbon paper is wiped over that surface and then sticky tape is merely placed down upon it, lifted off, and it reveals the number that you see with your eyes. You can take that and then place that on a piece of paper or cardboard and it comes out quite clearly. *And I have that right here.*
Prosecutor: You're gesturing to the exhibit binder.
Det. Clayton: That's correct. Now, that tape lift was actually taken by Mr. John Fowler. *I have that noted in my*

> *book.* He actually physically did this although I did see the number that he had exposed. I placed it on a card, however, and initialled it, dated it with the time and Mr. Fowler put his initials there as well. That's what we have here. We then -- after doing that we -- in this case we did not remove the windshield. It was easier to remove the dash of the truck. We removed that. It took some minutes. That exposed the actual public VIN plate that was sitting under the windshield. It was photographed then by Mr. Brigger and those photographs actually *appear here in this binder.*
>
> (ll. 4-27, p.14, H.7)
> (l. 1, p.15, H.7)

In this narrative, the precision with which the officer testifies is clearly linked to his having prepared exhaustive notes and other reference material about the investigation. In the above dialogue Detective Clayton makes mention of three documentary exhibits: a tape lift, officer notes, and photographs. Consider the following passages taken from 4.6 which demonstrate Clayton's use of documentary evidence:

> a. You can take that and then place that on a piece of paper or cardboard and it comes out quite clearly. *And I have that right here.*
>
> b. Now, that tape lift was actually taken by Mr. John Fowler. *I have that noted in my book.*
>
> c. It was photographed then by Mr. Brigger and those photographs actually *appear here in this binder.*

Detective Clayton has prepared extensive documentary evidence to which he specifically refers as in the above examples. Although he refers to these documents in an effective manner, let us now consider how expert witnesses are able to employ their notes while testifying.

While witnesses may arrive in court with documents they wish to use for testimonial purposes, rules of evidence demand that certain procedures be followed. Quite simply, the judge that is responsible for any hearing must first give permission for a witness to reference his or her notes. In response to a question, it would be inappropriate for a witness to immediately consult reference material without requesting permission from the judge. As expected, courtroom experience appears to significantly affect how a witness would introduce notes or request authorization to consult documentary evidence. For experienced witnesses, the procedural techniques did not provide any problems as most requests were made without any interruption or stoppage in the hearings. It is also evident that experienced witnesses will not hesitate to seek the court's permission to consult their notes, ultimately providing greater precision and accuracy in answering questions.

4.7

Defence:	Now, when did you first take the complaint from Ms. Collins?
Cst. Rubner:	The morning of July 15th -- or the afternoon. *I'd have to refer to the report for the exact time.* It was on July 15th though.
Defence:	Do you have that report with you?
Cst. Rubner:	I have a copy of it.
Defence:	Is that a report you prepared?
Cst. Rubner:	Yes, sir.
Defence:	Your Honour, might he refer to it?
Prosecutor:	I have no objection.
The Court:	All right, very well.
Cst. Rubner:	*It was at 2:20 p.m. on the 15th of July, '93.*

(ll. 21-27, p. 11, H.8)
(ll. 1-8, p.12, H.8)

4.8

Prosecutor:	All right. And when -- when was that taken? When did

you attend for the autopsy and take these pictures?

Witness-1: *If I may check my notes*, the date escapes me right now.

Prosecutor: Do you have notes in your hand?

Witness-1: I do.

Prosecutor: You require them now to refresh your memory and assist you for the date of the autopsy?

Witness-1: I do.

Prosecutor: I'd ask he have permission, Your Honour?

Defence 1: No objection.

Defence 2: No objection.

The Court: Yes

Witness-1: *It's on the first of November.*

(ll. 2-16, p.18, H.1)

4.9

Prosecutor: Sir, did you have occasion to arrest Mr. Barnes in March of 1993?

Det. Evans: It was, I believe, in April. *I'd have to refer to my notes.*

Prosecutor: Do you have those notes with you, sir?

Det. Evans: Yes, I do.

Prosecutor: Do you require them now to refresh your memory?

Det. Evans: Yes, I do.

Prosecutor: May he refer to those notes, sir.

The Court: Mr. Morton? [defence counsel]

Defence: No objection.

The Court: Please do so, Detective.

Det. Evans: *It was on the 12th of April 1993.*

(ll. 8-20, p. 33, H.13)

Considering example 4.7 firstly, we see that Constable Rubner is asked when he first took a complaint from Ms. Collins. Rubner is able to identify the date, but is uncertain about the time and states: "I'd have to refer to the report for the exact time." After the defence lawyer requests permission from the judge, Rubner consults his notes

and is able to answer: "It was at 2:20 p.m. on the 15th of July '93."

Example 4.8 is similar with the exception being that the constable asks the judge directly: "If I may check my notes." This, then, allows him to provide the prosecutor with a specific date.

Detective Evans's dialogue with the prosecutor in example 4.9 again demonstrates the manner in which notes are often used by professional witnesses. When asked if he arrested Mr. Barnes in March of 1993, the Detective is unsure and asks to "refer to my notes." Permission is granted and the exact date of April 12, 1993 is provided.

Consideration of the above examples makes clear a number of important points concerning the use of notes while testifying. Firstly, and most obviously, when experienced professional witnesses use notes it appears to enhance the specificity and precision of their testimony. In fact, as demonstrated in examples 4.2 and 4.4 involving Devolin and Clarke, neither witness had an independent recollection of the events in question so their entire testimony was based upon the documentary support they prepared at the time. This, though, is understandable when the transcripts are studied further as the note-taking practices of the witnesses are revealed. As evident with Detectives Clayton and Evans, a common practice for police officers and other professionals is the immediate documentation of details important to the investigation or incident under consideration. Thus, it seems, perhaps because of training, but quite likely also because of prior courtroom experience, that professional witnesses have prepared their notes mindful of the specific information that is of most interest to the court. The factor of previous experience, then, is one that should be acknowledged for

its influence upon a witness's testimony.

In view of the above examples and the associated discussion, it seems plausible to suggest that, at the stylistic level, the note-referencing witness will avoid numerous instances of hesitation, repeating and self-correction when allowed to refer to those notes. Furthermore, it appears at the discourse level, that note-based testimony would be less likely to include digressions as witnesses are able to aid their recollection of events with reference to notes. The relative courtroom experience of the note-referencing witness must not be overlooked though, as despite the difficulty in accurately assessing the actual effect of prior experience on the witness, it undoubtedly guides the note-taker in preparation and the note-referencing witness in testifying. With these thoughts in mind, a further reference to the Conley and O'Barr model is appropriate.

In a comparison to the above professional witnesses, consider the lay witness Rawls that Conley and O'Barr have profiled in their presentation of the continuum. In examining her testimony, the authors state that the judge "has asked her a series of specific questions about the location of the property line," (1990b:61) that she shares with her neighbour, but "she has been unable to provide specific information about that issue." (1990b:61) As Rawls was not able to answer the judge's requests concerning the precise measurements of her property line, the authors make specific reference to this inability in explaining their designation of Rawls as relational. One question that arises, however, concerns the following issue: can it be supposed that her narratives would have wandered if she had possessed the relevant survey information of her property? When discussing documentary supported testimony, this becomes extremely relevant as it might have changed her narrative.

Another court participant that Conley and O'Barr have identified as relational is Grumman, a defendent in a landlord-tenant dispute. According to the authors, the following example illustrates his relational tendency since he is unable to specifically answer the questions posed by the judge:

4.10

Judge:	Did that previous tenant assign it over to you or how did --
Grumman:	Yes he did.
Judge:	Do you have a copy of that with you?
Grumman:	I don't, I can't find a copy, but I had one.
Judge:	How long did that lease run?
Grumman:	For about --
Judge:	American Wood Products lease?
Grumman:	I don't know when his lease run out.
Judge:	Do you remember the day you took over?
Grumman:	But ah, according to Mr. Elrod, the man, that was there with American Wood Products, he was supposed to have had authority from Mr. Broom to lease the building at what, at the same rate as what he had it for such and he rented it for 200, uh $200 a month, more than what he had been paying.

(ll.29-44, 1990b:71-2)

Although Grumman does exhibit topical digressions in subsequent testimony, with respect to the above passage, questions still remain. It appears that the defendant, not having a copy of his lease, is at a disadvantage. Without the document Grumman cannot answer the simple questions of how long the lease ran or when he assumed the contract. Grumman's response to the judge's question concerning the possession date is described as a relational narrative yet, it seems unlikely, given a copy of the contract, that the defendant would have responded in the same manner to such a simplistic question.

Having discussed the litigants Grumman and Rawls, it is clear that without specific documentary support, both were at a disadvantage. In comparison, there is evidence from Provincial Court transcripts that suggests when witnesses are permitted to consult referential material the accuracy of their testimony is strengthened. The support concerning the effect of documentary evidence is not limited to Provincial Court though, as, ironically enough, within *Rules versus Relationships*, all of the litigants identified as rule-oriented make use of some sort of referential material. The influence of such aids is not explored by Conley and O'Barr and seems to have been largely overlooked. Nevertheless, let us examine the testimony the authors have provided, focusing especially on the reference material that rule-oriented witnesses have consulted.

If we consider the testimony of two rule-oriented litigants identified in *Rules versus Relationships*: Broom and Hogan, we see that these witnesses made extensive use of notes and reference material while testifying. Hogan, described by the authors as illustrative of the "rule-oriented method of presenting a case," (1990b:63) introduces documents throughout her narrative:

4.11

Hogan: ...Uh, in order to keep track of what we have sanctioned, we have a *calculation sheet* that specifically shows the sales representative what we are sanctioning. This is one for the first half. I have highlighted that that particular promotion for spectrometers was on the first half, from March until August of 1984, giving the particular payouts, and as you'll see there is a $200 payout there for 1001 Spectrometer.

(ll.29-36, 1990b:64)

4.12

Hogan: ...So I put out to them in September of 1986, a *list* of the sanctioned promotions. You will see on there that the Diller and Macy double pay-out is not on there.

(ll.40-43, 1990b:64)

4.13

Hogan: Um, Mr. Harper in a, in a *letter* that Mr., I asked for Mr. Harper to write, which I believe you already have a copy but here is another copy. In there it states the events. It does say that he um, prematurely put the promotions out to the sales force without talking to local management.

(ll.59-61, 1990b:65)

4.14

Hogan: ...this is the second half PIP *calculation sheet*, and you will see on there is not Diller and Macy pay-out for the second half.

(ll.91-93, 1990b:66)

In these examples we can see that by referring to documentary evidence, Hogan is able to testify with exactness and specificity. In addition, as Hogan introduces four documentary exhibits over her relatively brief testimony, it appears that her entire presentation and testimony revolves around such evidence. Let us examine each of the four examples in turn.

Beginning with example 4.11, we see that Hogan introduces a *calculation sheet* that "specifically shows the sales representative what we are sanctioning." (1990b:64) Hogan then goes on to point out that "as you'll see there is a $200 pay-out there for the 1001 Spectrometer." (1990b:64) By referencing the *calculation sheet* Hogan is able to provide the judge with highly detailed information such as the specific model

number of the spectrometer.

In example 4.12 Hogan introduces "a *list* of sanctioned promotions," (1990b:64) which allows her to verify "that the Diller and Macy pay-out is not on there." (1990b:64) This document reinforces Hogan's argument and allows her to develop her discussion in a chronological order as it includes the temporal reference of "September of 1986."

Example 4.13 demonstrates the next item that Hogan introduces to her argument: "a *letter.*" (1990b:65) Hogan not only introduces the letter but quickly sums the contents, telling the judge: "In there it states the events." (1990b:65) Since this is the third document, we see that Hogan provides documentary evidence for every portion of her narrative.

Finally, in example 4.14, Hogan offers a second *calculation sheet.* As this is the last portion of her testimony that Conley and O'Barr provide, it is unknown how the remainder of her evidence proceeds. However, in this example, we again see the support for the chronological development of her argument as she has now provided a "second half PIP calculation sheet," (1990b:65) which follows the earlier introduced sheet for "the first half." (1990b:64)

The use of these documents appears to assist Hogan in providing accurate, detailed, and specific information in a chronological manner. In the portion of her testimony that Conley and O'Barr have provided, Hogan's entire argument seems to revolve around the documentary evidence she has referenced. This same connection between documentary evidence and the characteristic features of a rule-oriented

as precision, accuracy, directness, and ordering seem to be related to the availability of reference material. From interpreting both the Provincial Court transcripts and narratives taken from *Rules versus Relationships*, when witnesses make use of reference material their testimony is notably more accurate, factual and ordered than witnesses who do not use reference material.

While to this point it has been demonstrated that the use of reference material and previous experience affects many of the same discourse characteristics that Conley and O'Barr have identified in developing the continuum, the second factor of experience should be approached cautiously. The following examples demonstrate that even expert witnesses, despite having extensive courtroom experience, can, at times, falter when giving testimony, exhibiting many of the characteristics Conley and O'Barr have identified as relational.

The first witness I will consider is a senior police officer, who, when questioned by the prosecutor, was able to refer to or recall from his notes many of the specific details requested. Under these circumstances the witness exhibited rule-oriented characteristics in his testimony. However, when questioned by the defence, he was forced to rely upon his memory as the requested details were not included in his notes of the event. When the questioning became removed from the information contained in his notes, the officer's testimony exhibited a number of relational characteristics.

Beginning with the questioning of the prosecutor, the required answers all seem to stay within the realm of his immediate knowledge as recorded in his notes. Recognize the specificity of the following answers:

4.16

Prosecutor: And that witness's name was what?
Cst. Ward: Bill Baker

(ll. 3-4, p.40, H.1)

4.17

Prosecutor: What road is shown there? As you look at photo 1 what are we looking at there?
Cst. Ward: Looking at 13th Avenue South East, east of Stewart Trail.

(ll. 18-21, p.43, H.1)

4.18

Prosecutor: Okay. Now in those pictures the deceased appears to be lying on his back. What position did you find him in?
Cst. Ward: When we first observed him, he was on his right side, with his arm flung in a northeasterly direction the glasses are just to the --
Prosecutor: So just --
Cst. Ward: -- would be to the northeast of his right arm.

(ll. 18-25, p. 45, H.1)

In these examples, there is no evidence, either stylistic or on the discourse level, of any indicators suggesting a relational orientation on the part of the witness. By comparison, consider the following exchanges between the defence counsel and the same officer:

4.19

Defence: And he gave you a description?
Cst. Ward: He gave us -- he told us what -- that there had been a beating of a fellow in this parking lot, and that was about the extent of his conversation that I recall.
Defence: You didn't --

Cst. Ward: We wanted, because of the situation may require immediate medical attention so we weren't going to dawdle. We knew that we could always come back to interview him.

Defence: All right, that's understandable. You didn't take down -- in your dealings with him you didn't take down the description of the men that he saw?

Cst. Ward: That's correct.

(ll. 24-27, p. 55, H.1)
(ll. 1- 10, p. 56, H.1)

Consideration of the above passage demonstrates that Ward's response to the initial question of the defence is clearly relational in style. Most notably, we see that Ward's response, despite an attempted interruption by the questioning attorney, fails to provide an answer to the question that has been asked. Considering the initial question of counsel: "And he gave you a description?" a Yes-No question as defined by Stubbs (1983:105), it follows that "hearers will try and interpret whatever follows as meaning either 'yes' or 'no'." (1983:105) As Ward does not respond with a yes/no or, in any other way that clearly indicates, as Stubbs terms ± certainty, the attorney eventually re-phrases the question in an altered form.

It should be noted, however, as discussed earlier with the homicide witness Baker, acceptable responses to questions may vary and often fall under the headings of extensions or accounts. In example 4.19 it seems clear that Ward's response could be defined according to Schiffrin's (1994:80) definition of *account.* Undoubtedly, Ward is providing reasons for not having either noted or elicited a description from the witness because the situation might "require immediate medical attention so we weren't going to dawdle." While Ward's account might be acceptable in addition to a definitive response, without his indication, at some point, or in some form, of yes/no or ± certainty, the question remains unanswered.

We can also consider the above exchange in terms of Grice's cooperative principle, namely the categories of quantity and manner. Ward's response to the defence attorney's question can be regarded as vague since we can only infer that a description was not obtained, meaning that he has failed to "avoid ambiguity" (1975:46) as the maxim of manner dictates. More importantly, though, by not answering the question, Ward has clearly failed to make his contribution "as informative as is required" (1975:45) which forces the lawyer to rephrase the question "You didn't take down -- in your dealings with him you didn't take down the description of the men that he saw?" By finally responding "That's correct" an acceptable answer has been provided, one that is informative and without ambiguity.

Analysis of Constable Ward's testimony using the Conley and O'Barr model is somewhat inconclusive and indeterminate. While the passage in example 4.19 is clearly relational, the measurable indicators of both orientations suggest that Ward, throughout the majority of his testimony, is rule-oriented. It would follow, then, that Ward, when gauged according to the notion of a continuum, might be placed nearer the rule-oriented extreme. Yet, as Ward is an experienced witness and veteran police officer, when using the model it seems difficult to account for his relational performance in 4.19. If, though, the authors had considered the influence of notes or other documentary evidence, a more suitable explanation to Ward's performance might be realized. In the above examples involving Ward it was evident that when removed from his notes his testimony exhibited more frequent occurences of relational characteristics. To further illustrate this pattern consider the following narratives which focus on the testimony of three individuals concerning one event.

The specific hearing in question which I will examine deals with an alleged

assault that took place during the early morning hours in a city nightclub. The events surrounding the incident, however, are somewhat confusing as a large brawl ensued with a number of individuals involved. Of relevance for this hearing is the fact that the individual officers dealing with the accused were also involved with additional persons and occurrences directly after arresting the defendant. Because of the chaotic nature of the brawl, the officers were unable to make notes until sometime after the incident.[1] Complicating the note-taking was the fact that the additional occurrences took place during the brawl, meaning the officers were involved with a number of criminal charges by the end. In the preliminary inquiry transcripts, neither police witness refers to or requests to consult referential material. A third witness involved in the incident who testified in the hearing will also be introduced as a means of further comparing testimony. To briefly summarize, the following transcripts represent inaccuracies, inconsistencies and digressions that were heard in the testimony of professional witnesses when these same individuals testified without reliance upon notes.

One type of digression commonly appearing in testimony, seems to result when witnesses are uncertain, or simply do not know, specific information. Note the following digression on the part of police witness Constable Nathan Smith:

4.20

Prosecutor: Okay and how long was it that you dealt with this accused? How long to handcuff him?

Cst. Smith: At that time it probably - since fights don't generally take very long - it probably was about 30 seconds to a minute from the time that we got there.

(ll. 14-18, p. 38, H.9)

This answer appears to be more of a conjecture than a precise response. The officer has used the term *probably* twice and added the extraneous comment: "fights don't

generally take very long." Clearly this response to the direct question of how long it took to handcuff the accused appears to be more of a guess than an accurate response. Another digression can be observed with police witness Constable Bob Carson, also assigned to this same occurrence. In this passage, note both the digression and the apparent chaotic nature of the situation.

4.21

Defence: And was there anyone else with Dorin or helping Dorin at that point in time?

Cst. Carson: As I said it was -- there's a great number of people around at that time. There was approximately a hundred persons but the two appeared to be fighting by themselves.

(ll. 14-18, p. 30, H. 9)

Although this is not a serious digression, it does appear that the officer is offering the additional information so as to emphasize the frenzied situation on the night in question, thereby excusing the lack of specific detail. Again, while we can make note of these tangents, the more important evidence I will now present, concerns the conflicting testimony offered by the three witnesses in question.

The following passages will include an initial response of one witness to a question, and then subsequent testimony of a second witness and sometimes a third, that stands in contradiction. The testimony involves two police officers and one civilian.[2]

4.22.1

Dorin: I proceeded to grab Mr. Logan and put him in a full nelson which -- grabbed him behind and held his hands up. And at that point one of the other -- the first officer [Cst. Carson] -- I'm not sure which one it was at the time -- approached him and Mr. Logan kicked him.

Prosecutor: Okay. You say, "One of the officers." Is that one of the officers here today?
Dorin: Yes it is, it's the one with the beard [Cst.Carson].
Prosecutor: With the beard?
Dorin: Yes
Prosecutor: Okay and where did Mr. Logan kick this officer?
Dorin: In the stomach

(ll. 2-13, p.4, H.9)

4.22.2

Defence: I take it from what you've told us then, Constable, but -- that you were never struck by Mr. Logan?
Cst. Carson: No I was not.
Defence: Okay. I -- I mean in any way?
Cst. Carson: No I was not.

(ll. 12-16, p.29, H.9)

In these first two examples, the witness, Dan Dorin, claims that Constable Carson was kicked in the stomach by the accused, Mr. Logan. However, when Carson is questioned by the defence he clearly states that he was not struck by Mr. Logan.

4.23.1

Prosecutor: What happened to that officer [Cst. Carson]?
Dorin: He proceeded to -- he threw him to the ground, threw Mr. Logan to the ground and told me to sit on him until someone else would arrive. I in turn did that and the officer went on to help break up the rest of the scuffle that had -- had started to happen --

(ll. 23-27, p.4, H.9)
(l. 1, p.5, H.9)

4.23.2

Defence: But the one thing is for sure is you never told someone to sit on him [Mr. Logan] until you got back or anything like that?

Cst. Carson: I don't recall doing that, no.
Defence: You'd certainly remember something like that wouldn't you?
Cst. Carson: I would think.

(ll. 16-21, p.33, H.9)

Examples 4.23.1 and 4.23.2, feature the same witnesses, Constable Carson and Dorin. Dorin states that the constable threw the defendant onto the ground and then "told me to sit on him." When asked about this Carson replies that "I don't recall doing that, no." Again, we see the police and civilian witness disagreeing on key issues.

4.24.1

Defence: Okay and the policeman did what then?
Dorin: He put his knee up to his [Mr. Logan's] hip and just -- and he just with my body weight just pulled him over his knee so he -- he'd fall. So he'd lose his -- he would lose his legs.
Defence: So the two of you crashed to the ground?
Dorin: Yes

(ll. 19-24, p.13, H.9)

4.24.2

Prosecutor: Did you ever have to put him [Mr. Logan] down on the ground or?
Cst. Carson: At one point, yes. To get him handcuffed I had to put him to the ground.
Prosecutor: Okay. How did you do that?
Cst. Carson: I don't recall specifically. I believe I just took his arm and pushed him forward to the ground where we could gain some control.
Prosecutor: And you say you -- you handcuffed him at that time?
Cst. Carson: Yes that's correct.

(l. 27, p.28, H.9)
(ll. 1-8, p.29, H.9)

4.24.3

Defence: Is Mr. Logan up on his feet or down on the ground?

Cst. Smith: He was on his feet.
Defence: Okay. So when you come Mr. Logan 's on his feet, Constable Carson's on his feet?
Cst. Smith: Yes.
Defence: You and your partner come?
Cst. Smith: Yes
Defence: And the three of you together take Mr. Logan to the ground?
Cst. Smith: Yes.
Defence: Did either -- I'm sorry, did any of the policemen go to the ground as well or did you just sort of have to bend over to put him down?
Cst. Smith: Actually we all went to the ground. We all wound up on our knees on the ground.
Defence: So you pulled him down somehow or another --
Cst. Smith: Yes
Defence: -- the three of you pulled Mr. Logan down and not gently either?
Cst. Smith: No.
Defence: No? You forcefully get him to the ground all three of you somebody's got to be falling on top of Mr. Logan I take it?
Cst. Smith: I don't recall anybody falling on top of him. I remember falling to the left side of him.
Defence: So you don't know if someone fell on him or not?
Cst. Smith: No I don't.
Defence: And anyways he's handcuffed by the three of you while he's on the ground?
Cst. Smith: Yes

(ll. 5-27, p.41, H.9)
(ll. 1-7, p. 42, H.9)

Examples 4.24.1-2-3, demonstrate disagreement between two police officers and one civilian. Dorin's viewpoint, as related in 4.24.1 is much different than both officers as he claims he fell to the ground with Constable Carson when Logan was forced down. In addition, he makes no mention of anyone else being involved.

From Carson's perspective, he was solely involved in taking Logan down as he states: "I had to put him to the ground." As well, he testifies that he "took his arm and pushed him forward" while Dorin's perception was that Carson just pulled him [Logan] over his knee so he -- he'd fall."

Considering 4.24.3, Constable Smith has yet another version of the same incident as he claims that three police officers took Logan to the ground and handcuffed him. Clearly these witnesses differ with respect to the following issues: who was present, how Logan was knocked down, and, finally, how Logan was handcuffed.

4.25.1

Cst. Carson: ...As he [Mr. Logan] was being moved to the rear of a police van several feet away, probably 20 or 30 feet away, the accused turned and looked at me, quite clearly looked at me for a second or two and spat at my face. He did not hit me in the face.

(ll. 11-15, p.25, H.9)

4.25.2

Cst. Smith: I believe myself and Constable Reiter, were the ones that picked him [Mr.Logan] up off the ground, one on either side. I was on his left side and as we stood him up we were about to lead him away to a police van and he turned. Constable Carson was standing a little bit behind him and to his right side, he turned around and spit over his right shoulder into the face of Constable Carson.

Prosecutor: Okay did you see him hit Constable Carson?

Cst. Smith: Yes I did.

Prosecutor: Did it hit?

Cst. Smith: Yes it did it hit him right in the face.

(ll. 9-19, p.39, H.9)

The final two cited narratives 4.25.1-2, present one of the clearest contradictions between the officers. Constable Carson testifies that Logan spit at him but "did not hit me in the face." Clearly in contradiction, Constable Smith testifies that Logan spit at Carson and "hit him right in the face." This represents an obvious inconsistency between the officers and comments adversely on the certainty of their testimony.

At this point in the discussion, another consideration of Anita Barry's work that was mentioned in chapter one is appropriate. In her study, Barry considered the narrative styles of witnesses, comparing "that of the law-enforcement officers" (1991:281) to "that of some nonexpert witnesses." (281) While Barry's article ultimately focused on the credibility that jurors associate to each type of delivery, her discussion is extremely relevant because she identifies the extreme explicitness of police officers when testifying.

In evaluating the performance of various witnesses in a judicial environment, Barry maintains that the "courts value a particular narrative style for witnesses," (284) where the style of law-enforcement officers is the one "best received by the courts." (284) In comparing the testimony of police officers to nonexpert witnesses, Barry makes reference to the work of Basil Bernstein. Barry suggests that the elaborated code which "assumes no shared information on the part of the speaker and listener and spells everything out in detail," (289) is commonly used by law-enforcement officers who actually "carry it to an extreme." (289) By comparison, some witnesses use a restricted code, assuming so much information "that the conversation is thwarted at nearly every turn." (289) Since, as established in chapter one, there are clear parallels between Bernstein's code theories and Conley and O'Barr's rules/relational continuum, I wish to examine Barry's work in light of my current discussion in chapter four.

Although professional witness testimony is often specific, detailed and chronologically ordered, this appears to be linked to the use of documentary evidence when testifying. Once expert witnesses such as police officers are forced to testify outside their notes, their testimony can change dramatically and is less specific, less precise, less sequential, and hence, more relational. As discussed, Barry's research also considered law-enforcement officers and identified their testimony as notable for "its temporal and spatial explicitness." (286) However, Barry compared this testimony to that from "a hearing in which law-enforcement officers are the defendants." (291) The results from this study were very similar to those gained to this point in the thesis as I will now explain.

In examining the performance of one officer acting as a defendant, Barry writes that his "style of testimony leads the judge to seek clarification at several points and finally to instruct the trooper to use full names to keep the story straight." (291) In comparison to the typical performance of a police officer when testifying, Barry states that in his "testimony we see none of the expert witness' explicitness and clarity of reference." (1991:292) These are strong observations but they are very similar to the results of my own study where police officers are shown to range from providing highly specific, detailed, and accurate testimony to unspecific, imprecise and contradictory evidence.

To further add to the above argument I will now analyze a number of passages involving lay witnesses and their interaction with documentary evidence. To introduce this discussion, however, some background on the effective use of referential material and beneficial influence that experience may provide to a speaker, is warranted.

When analyzing instances in which lay witnesses have used, or attempted to use, documentary evidence, we find that the occurrences are often interrupted by the judge. Rules of evidence in Canadian courts require that all documents, forms or notes a witness consults, be first approved by a judge. In the previous examples where police officers were referring to their notes, the occurrences took place without obstructing the court as typified in the following example:

4.26

Det. Clayton: Okay on the 7th of May I conducted an examination of this Ford pickup truck.
If I could refer to my notes, Your Honour, it might help me refresh the exact sequence.
The Court: Did you make them while you were doing it or shortly thereafter?
Det. Clayton: I did, sir.
The Court: You may refer to any such notes on this examination or any other work that you did in relation to your work in connection with this matter.
Det. Clayton: Thank you, Your Honour.
The Court: If you want to refer to other than your notes not -- material not made more or less contemporaneously please let us know.
Det. Clayton: I will sir.

(ll. 7-21, p.13, H.7)

As we can see in the above passage, representative of expert witnesses, the referral to notes is made with a minimum of disruption and within the established procedural guidelines of the court.

By comparison, lay witnesses were observed attempting to consult their notes without informing the court of their intentions. In all cases this was followed by some form of censoring or admonishment from the court. Consider the following dialogues:

4.27

Prosecutor: Now, sir, on September 27th of last year did you operate the Egg Roll Company?
Wong: Yes I do [sic].
Prosecutor: And is that at 314A - 6th Avenue South East, Calgary?
Wong: Yes
Prosecutor: And when you went into work on the 27th of September, 1993 did you find that something had happened to your store?
Wong: Oh, on September 27th so --
The Court: MR. WONG, YOU CAN'T READ, JUST TELL THE PROSECUTOR WHAT HAPPENED?
Wong: Yes
The Court: PLEASE PUT THAT AWAY, YOU CAN'T READ FROM NOTES. THANK YOU.

(ll.24-27, p.1, H.3)
(ll. 1-9, p.2, H.3)

4.28

Prosecutor: Mr. Sanderson, I understand that in April of 1993 you bought a Camero vehicle?
Sanderson: That's correct. Can I refer to my notes?
Prosecutor: What type of notes have you made?
The Court: JUST LEAVE YOUR NOTES ASIDE FOR THE MOMENT. JUST ANSWER THE QUESTIONS.

(ll.16-21, p.30, H.7)

4.29

Gibson: No, I don't think so. Or -- I'm not quite sure. With -- may I look at the statement?
Prosecutor: Do you require to look at your statement to refresh your memory to assist you in your testimony now?
Gibson: Yes.
Prosecutor: All right.
Prosecutor: Perhaps I'd ask he have permission, Your Honour, --

4.27

Prosecutor: Now, sir, on September 27th of last year did you operate the Egg Roll Company?
Wong: Yes I do [sic].
Prosecutor: And is that at 314A - 6th Avenue South East, Calgary?
Wong: Yes
Prosecutor: And when you went into work on the 27th of September, 1993 did you find that something had happened to your store?
Wong: Oh, on September 27th so --
The Court: MR. WONG, YOU CAN'T READ, JUST TELL THE PROSECUTOR WHAT HAPPENED?
Wong: Yes
The Court: PLEASE PUT THAT AWAY, YOU CAN'T READ FROM NOTES. THANK YOU.

(ll.24-27, p.1, H.3)
(ll. 1-9, p.2, H.3)

4.28

Prosecutor: Mr. Sanderson, I understand that in April of 1993 you bought a Camero vehicle?
Sanderson: That's correct. Can I refer to my notes?
Prosecutor: What type of notes have you made?
The Court: JUST LEAVE YOUR NOTES ASIDE FOR THE MOMENT. JUST ANSWER THE QUESTIONS.

(ll.16-21, p.30, H.7)

4.29

Gibson: No, I don't think so. Or -- I'm not quite sure. With -- may I look at the statement?
Prosecutor: Do you require to look at your statement to refresh your memory to assist you in your testimony now?
Gibson: Yes.
Prosecutor: All right.
Prosecutor: Perhaps I'd ask he have permission, Your Honour, --

without permission.

In example 4.28, we see that Mr. Sanderson asks to refer to his notes after being asked if he bought a vehicle in April of 1993. Sanderson responds "that's correct" but then requests to look at his notes. This request is denied by the judge as, most likely, he feels notes are not necessary to the witness's testimony at that time.

The most interesting example involves the witness Chris Gibson in 4.29. While being questioned at length he forgets certain events and requests permission to look at his statement. The judge allows him to do so but the witness encounters trouble almost immediately when the defence counsel objects: "For the record, sir, I'd just like to point out the witness is literally reading it." This is followed by the prosecutor's instruction to the witness that the statement may be used to "refresh your memory" but, in doing so, it must not be "read" to the court.

These examples demonstrate that the use of notes and other documentary evidence by lay witnesses is often awkward and prone to correction on the part of the court. This is not to say that lay witnesses cannot use documentary support without effect, but rather, it suggests that experience is an important factor in using notes correctly. Let us now consider more effective use of notes by lay witnesses and the resulting alterations in testimony.

Perhaps the first witness to consider should be Mr. Sanderson. In example 4.28, Sanderson was censored by the judge and denied access to his notes when he first requested. However, shortly thereafter, he again requests leave to consult his notes but is this time granted permission.

4.30

Prosecutor: And do you remember when in April of 1993 you saw the ad in the Herald?
Sanderson: The ad was in the morning of -- I don't remember the specific date, but it was in the morning of the day that I bought the car.
Prosecutor: And do you remember what day you bought the car?
Sanderson: I think it was April 12th, but it's in my notes if I could look at those.
Prosecutor: Now, when did you make notes about this?
Sanderson: I made notes about this when the police actually reported it.
Prosecutor: How much after the purchase of the vehicle was that?
Sanderson: Oh, perhaps ten days.
The Court: I didn't hear you.
Sanderson: Perhaps ten days.
Prosecutor: At the time that you were making the notes were the dates, and times, and details of the transaction fresh in your memory?
Sanderson: They certainly were.
The Court: You have permission to look at such notes.

(ll. 1-21, p.31, H.7)

Having consulted the notes, Mr. Sanderson can now reply accurately to the presented question:

4.31

Sanderson: Okay. I saw the ad on April 14th and I bought the car on April 14, 1993.

(ll. 25-26, p.31, H.7)

This passage demonstrates the ability of lay witnesses to adopt acceptable courtroom protocol for the use of referential material. In this particular instance, the witness was allowed access to his notes only minutes after first being denied. In examples, 4.30 and 4.31 it is quite clear that having access to documentary evidence allows the

witness to provide the factual information requested by the prosecutor.

The ability of witnesses to quickly adapt to courtroom protocol is not acknowledged by Conley and O'Barr. However, Barry claims that "the courts can better achieve the goal of more explicit testimony by informing lay witnesses of the expectations of the setting." (1991:293) In looking back to example 4.29, we see that this is exactly what the prosecutor has done as he explains to the witness: "Just tell us what you recall of the conversation. The statement is there to assist you if you need it to refresh your memory, but I'd like you to tell us what you recall." He then further adds: "you can use the statement to refresh your memory to assist you, but when you're giving your testimony don't read the statement, tell us about it." In reference to Barry's above comment, this is a clear effort by the prosecutor to explain the reason for the objection and how the written statement is to be used. These comments are similar to those of Kreckel, discussed in chapter one (cited p.11) who suggests that in the University setting the newcomer is confronted with having to determine the difference between 'relevant' and 'irrelevant' knowledge, and the ease for a person to 'fit in' or 'adjust', will depend on their ability to acquire the "context-tied University specific sub-codes." (1981:37) In extension to the court, it is clear that some witnesses, Sanderson for example, are able to acquire 'relevant' knowledge such as the rules for introducing documentary evidence, rather quickly.

Now consider the next example that illustrates a witness that is initially having difficulty recalling the sequential ordering of events, but once allowed access to his statement, is able to present the requested sequence of events in chronological order:

4.32

Prosecutor: Give us all the details of all of the conversation

that you can possibly remember. It's essential that you try to remember who said what at what time. You and your wife go home. You've now learned that there's Canada-wide warrants for murder for the two people that are at your home.

Burke: Yes

Prosecutor: Go ahead

Burke: Okay. This is all in my statement. I just can't remember.

The Court: Speak up sir, please.

Burke: Sorry. He -- okay. We went home, and we went in the house and asked them what they did and who did it and everything, and we didn't get a straight answer and -- I can't remember.

Prosecutor: You gave a statement to the police.

Burke: Yes, I did.

Prosecutor: Would you like to have a look at that to refresh your memory?

Burke: Yes.

(ll.1-21, p.174, H.1)

[procedural discourse, text continued at l. 24, p.176]

Prosecutor: All right. You said you wanted a moment to refresh your memory. Go ahead and take a moment and read that, then, and we'll continue on.

Does that help you, sir, reading --

Burke: Yes, sir.

Prosecutor: -- it over?

Burke: Yes, sir.

(ll. 24-27, p.176, H.1)
(ll.1-3, p.177, H.1)

[further procedural discourse, text continued at l. 14, p.178]

Prosecutor: -- time, sir. We have four people in the room: you and your wife, this accused, and Doug Welsh. We have to be very careful about who said what.

Burke: Okay. I asked Kevin what they did, and he said that

> they were at Phil's place partying, and this guy was bugging them and picking on them or something to that effect, and later on they went to a gas station, I think. They were headed for a gas station to get some junk food, and they were climbing over a fence and the guy started to beat on them. And then he said that he didn't remember what happened after that.
>
> (ll. 14-24, p.178, H.1)

As we see in the above example, after being asked the details of a conversation in which he was involved, Burke says that "This is all in my statement. I just can't remember." He then begins to describe the conversation, but again is unable and responds: "I can't remember." At this time the witness is allowed to review his statement which assists him in providing the details of the conversation.

It is quite clear, then, that when witnesses use notes or other documentary support while giving evidence, their testimony is markedly affected. Without reference material witnesses provided fewer accurate and precise details, had more difficulty with chronological ordering, and were more likely to digress. However, witnesses who made use of notes were more prone to exhibit characteristics of rule-oriented testimony.

Given the discourse evidence from Provincial Court transcripts, it has been shown that the factor of documentary evidence is an important component to consider in evaluating a witness's style of testimony. My suggestion remains, then, that certain witness discourse phenomena identified by the Conley and O'Barr model, may, in Provincial Court, be more substantially explained by acknowledging whether the observed testimony is primarily memory recall as opposed to note-based.

Chapter Five

Implications and Conclusions

At the end of the discussion we are left with a number of points that need to be summarized and drawn together. Firstly, and perhaps most importantly, it is clear through the application of the model to Provincial Court, that the construct remains deficient in critical areas. As specifically discussed in chapter two, although the model was premised on the setting of small claims court, the actual descriptive characteristics of the construct should have extended beyond that environment. However, it was clear that the model is not applicable in all aspects when tested for suitability in Provincial Court. The overwhelming complication with the model is that it does not include provisions for taking into account the effect of documentary evidence on witness testimony. Thus, although the authors contribute to our understanding of witness testimonial styles, their argument remains inadequate in a number of ways.

When the model was first considered for the examination of witness testimony from Provincial Court it did appear as if many of the components of the model had descriptive applicability. However, once the testimony was re-examined it became clear that many of the interpretations gained from the model were open to criticism. Take, for instance, the issue of digressions. While Conley and O'Barr identified instances in small claims court of litigants wandering from the main issues when testifying, in Provincial Court it was far more difficult to find instances of this. For the purposes of this thesis, I gauged digressions upon the reactions of the judge, prosecutor and defence, to the testimony as presented. In this way I found that

objections or requests for clarity from any one of the above three could be used to measure digressions on the part of witnesses. It was found, however, that the objections or further requests for clarity were seldom raised which prompted me to reconsider several passages of testimony that I had initially labelled as digressions. Upon re-examination it became apparent that seemingly insignificant testimony can provide indications of such things as truthfulness, involvement and sympathy, to name only a few. In the environment of Criminal Court these points take on significant importance to the judge and therefore remain relevant. Thus, it becomes extremely difficult to label certain passages of testimony as irrelevant or extraneous which complicates the model at the level of Provincial Court.

Another issue that arose during this project concerned the philosophical basis of the model. As it stands, the Conley and O'Barr model is premised on the claim that one's philosophical regard for the law will be manifested through, and inferred from, one's discourse patterns when testifying in court. This fundamental premise became extremely complicated when speakers were shown to be demonstrating both orientations within the course of one narrative. Although surprising, the authors did not find such shifts problematic, commenting that the rules-relationships continuum "lacks consistent and reliable indicators suitable for coding." (1990b:182) I found that I could never reconcile this issue with respect to the model. If witnesses arrive in court with fixed notions of the justice system, as the model predicts, it does not follow that speakers could switch between opposing orientations that entail contradictory beliefs within the course of a narrative. Unfortunately, although the authors allowed for such shifts, they did not explain or address how the model should accommodate witnesses of this sort. Therefore, in the application to Provincial Court I found myself at a loss on how to label speakers who demonstrated simultaneous characteristics of

both orientations.

Because of the above problems I began to look for other factors that might influence the characteristics of testimony the model identified such as ordering, precision and relevance. The one factor that was most apparent concerned the issue of reference material. As demonstrated in both the Provincial Court transcripts and the passages of narrative cited by Conley and O'Barr, when witnesses utilized reference material these same speakers hesitated less often, were more accurate, and generally provided more concise testimony. The use or absence of documentary support appeared, then, to be directly related to the characteristics of either the rule-oriented or relational perspectives.

As support for the above point I then began to examine more closely whether only particular individuals such as professional witnesses, might use notes effectively. I was also interested to find examples of professional witnesses not having the opportunity to use their notes, would they still testify in the rule-oriented manner? My concern at this point was that having found only limited support for the model at the Provincial Court level, if professional witnesses demonstrated the characteristics of the rule-oriented perspective when testifying, regardless of whether reference material was used, the model would still retain a degree of applicability. As predicted, it was found that when professional witnesses make use of documentary evidence their testimony is most often decidedly rule-oriented. What was most interesting, however, were the instances where professional witnesses found themselves being questioned concerning events for which they did not have documentary support. In these instances, even those rehearsed in giving evidence such as senior police officers became imprecise, inaccurate and unordered. Thus, the more professional witnesses were forced to testify

strictly from memory, the more their testimony reflected characteristics of the relational orientation. In the same way it was found that when lay witnesses had the opportunity to use reference material, their testimony correspondingly included indicators of the rule-oriented perspective.

Ultimately these findings demonstrate two important points. Firstly, such shifts in style call into question the credibility of the philosophical component of the model as the authors have not provided a satisfactory explanation of such variances in mindset. Secondly, the above discussion demonstrates that reference material strongly influences how witnesses testify. With these points in mind let us continue.

To establish my position at the end of this project I need to consider the model itself, the application of the model and finally, my alternate suggestions to explain the observed discourse phenomena. Therefore, I maintain that the discourse phenomena identified by the model are more reliably accounted for by considering the prior courtroom experience of an individual and whether the witness is using documentary evidence as support when testifying. I mention prior courtroom experience as a matter of course since an extensive background as a witness would undoubtedly assist one when testifying. This factor, though, when considered against the discourse phenomena that Conley and O'Barr have identified with the rules/relationships continuum needs to be approached carefully.

In response to the position I have taken concerning Conley and O'Barr's explanation of discourse phenomena, one might wonder if my conclusions extend to all witnesses that might use reference material. In other words, would I suggest that anyone using documentary support will display discourse features of the rule-oriented

perspective while anyone not using notes will demonstrate relational features in their speech? This would be far too simplistic and leave the thesis open to the same criticism that Conley and O'Barr have faced regarding classification and labelling.

I do not take the extreme position that anyone using notes or reference material in Criminal Court will display features of the rule-oriented perspective. Similarly, I also do not suggest that any witness not using notes will display features of the relational perspective. My approach after considering the project as a whole is firstly to maintain that when the model is used as a means of evaluating witnesses in Provincial Court it remains deficient. The reasons for this are numerous and have been outlined in detail. From this point, though, it was demonstrated that certain discourse features of the model were still apparent in witness testimony and could be correlated with the use or absence of reference material by witnesses, both lay and professional. Having established, then, that the model is inadequate when applied in Provincial Court, the above correlation is a preferable means of accounting for the discourse phenomena in question. This being said, I have no doubt that certain witnesses, namely lay witnesses, even with documentary supported testimony, would not display features of the rule-oriented perspective. Also, I would expect that certain professional witnesses, even without reference material would demonstrate rule-oriented characteristics. This, however, does not invalidate my conclusions. Generally, when witnesses, either professional or lay, use reference material, they display more features of the rule-oriented perspective. Again, generally, when witnesses do not have access to documentary support, their testimony tends to display more features of the relational orientation. My conclusions are not as rigidly predictive of witness behaviour as the Conley and O'Barr position and allow for individual variation.

To understand the above as a final statement, I reintroduce the most damaging component of the Conley and O'Barr model: the link between philosophical mindset and the manifestation of speech. As developed, the model outlines that certain speech manifestations reflect how a witness views and thinks about the law as a whole. This premise of the model is what proves very damaging in the end as changes or inconsistencies in speaker behaviour are difficult to explain. By comparison, my conclusions do not establish a link between mindset and speaker behaviour. There are simply too many interrupting and distracting elements in court that affect how a witness will testify.

As a police officer the implications of this project have become clear from first hand experience when testifying. As the majority of cases for which I have been called occurred many months previous, it is difficult to accurately remember the events. As a rule, in answering the questions of counsel I refuse to speculate on issues that are unclear or for which I cannot refresh my memory from notes made at the time. Consistently, I find that defence lawyers will ask questions regarding details that are not included in my officer notes, seemingly trying to cover issues with which I may not be familiar. Thus as a defence strategy, counsel will often pose leading questions which are meant to evoke responses beyond what is contained within one's notes. This, of course, is a move toward establishing that the officer may be unclear about certain aspects of the matter at hand which would be beneficial to the position of the defence. In testifying, then, I strive to remain as close to my notes as possible if I cannot remember the precise details surrounding the charge being considered.

In routinely testifying, the benefits of experience have become clear. Having experience about which issues are of primary importance to the court, guides me as a

note-taker concerning which facts are likely to be questioned. In this manner, I have found that the quality of my notes is continually improving, which again, allows me to testify with greater accuracy and detail. My increase in experience has also assisted me in dealing with victims and complainants.

Depending on the nature of any incident, if criminal charges are going to be filed, then a statement from a witness or multiple witnesses is essential. As with officer notes, rules of disclosure demand that any witness statements be provided to the defence counsel before the trial date. Therefore, as few of these individuals have testified in court before, I explain to witnesses that what they will write will be their account of what happened and that they can use the statement when testifying to refresh their memory of the incident. Thus, they can include anything in the statement that might help refresh their memory, but that details such as descriptions and times should be included. Additionally, I then explain that the prosecutor and defence counsel will be reading their statements before the trial and that these individuals may be asking questions. With most witnesses, I have found that they are very interested in this brief explanation as it helps them understand the process they will be going through in court. Interestingly, the majority of witnesses with whom I deal tend to write more on their statements after the above process is explained than witnesses who were not informed of the court process. Subsequently, in court, it has been apparent that many of these witnesses are more accurate and detailed when testifying. It should be remembered that the average witness will often only write a few lines for events that are extremely comprehensive in nature. If, then, as a police officer I can prompt these witnesses to document more of their involvement in any incident it appears to have an impact on their eventual testimony.

In the end it is clear that the Conley and O'Barr model is deficient when applied in Provincial Court in that it does not have a means for taking into account the influence that documentary evidence may have on a witness's testimony. Having identified a number of characteristics that occur when witnesses testify, the authors have added to our understanding of such research despite the obvious shortcomings of the construct. It should be remembered that Conley and O'Barr's research differed "from much prior social science research on legal topics in that the focus is not on cases, but on individual interactions between litigants and the system." (1990b:ix) Because of this uniqueness in addressing a subject with such a limited history of previous research, the model has generally been accepted uncritically (Stygall 1994, Davis 1993) to this point. Therefore, the extension of the construct to another legal setting, as recommended by the authors themselves, is an extremely worthwhile exercise. As a result, the project was successful as the conclusions I have gained have already had consequence through my own preparation of notes and ongoing interaction with witnesses. As a professional witness, it is clearly evident that the use of reference material allows individuals to testify with more detail, greater precision and better ordering. Correspondingly, the absence of documentary support makes it more difficult for a witness to respond with detailed accuracy and appears to increase the likelihood of digressing testimony.

Chapter One

1. It should be noted that Bernstein's original proposals involving the elaborated and restricted codes were integrally linked to the social-class background of the speaker. Bernstein was widely criticised for specifying the causality of such a link and later modified the explanation to one that involved the dynamics of family communication.

In writing this thesis I acknowledge that this component of Bernstein's argument exists, but, have chosen not to include the notion of social class background because of its highly controversial nature. Therefore I have limited my discussion, as Anita Barry has done, to the actual descriptive characteristics of Bernstein's code proposals.

2. The following is the actual response that Levy provides in "Communicative Goals and Strategies: Between Discourse and Syntax":

> OK, well I'm taking French, it's either two or three....I signed up for both and I'm going to one or the other, and then Poly Sci one and American Economic History, because I want to major in Econ and I use my French for Humanities, 'cause otherwise I had to take some drama thing, and didn't want that. And like it's nine, ten, eleven I hope, and that's perfect, because then I, it's not too early but then I've got the whole afternoon. And, I don't know, there were a lot of ones that I wanted to take at ten, but there were too many at ten so that ruled out a bunch of choices, just from the time conflict. And then, like my adviser told me to take American Economic History this quarter because Elementary Econ is next quarter, and it's a better teacher. So that's sort of what I did, I think.

Chapter Two

1. The following is a partial text of the rule-oriented litigant Hogan that Conley and O'Barr provide in chapter four. Hogan is described as a "sales executive who is appearing in court on behalf of her company." (1990b:63)

> HOGAN: Okay, thank you. Um, as uh Dan [the plaintiff] stated, uh, Instrument Supply is a scientific distributor. Uh, we represent over 1500 manufacturers and we sell over 60,000 products. Um, we are continuously being exposed to gimmicks from our manufacturers to boost the sale of their products. Uh, the only control that manage-

ment has, um, over these prod-, over these promotions, is to pick and choose the ones that uh, best support our local selling programs, where we want the local emphasis to be. Um, then it is my responsibility, as well as the district manager, to assist the sales reps in focusing on these sanctioned programs. Uh, in order to keep track of what we have sanctioned, we have a calculation sheet that specifically shows the sales representative what we are sanctioning. This is one for the first half. I have highlighted that that particular promotion for spectrometers was on the first half, from March until August of 1984, giving the particular payouts, and as you'll see there is a $200 payout there for the 1001 Spectrometer. In the, we, uh, usually will change some of the programs on the second half uh, PIP program. Um, we also as sales managers, provide to the representatives, um, some sort of indication that we are bombarded, our plate is full. So I put out to them in September of 1986, a list of the sanctioned promotions. You will see on there that the Diller and Macy double payout is not on there. Uh, I was unaware that this, um, letter had gone out from D and M. Approximately October of 1986 they did send this out to the sales representative. Uh, I received notification that it was out amongst the reps late October, early November, upon returning from vacation. My management told me of his conversation with Mr. Harper and the agreement was made between John Taylor, uh the dis-, the then district manager and Mr. Harper, that there had been a, uh, an advance notification put out on an unsanctioned program through Diller and Macy, not sanctioned by Instrument Supply. And uh, that Mr. Harper was more than uh, uh, uh, he was more than open to go ahead and pay his $200, but that we would not pay the matching $200.

(1990b:64)

2. The following is a sample of an exchange between a presiding judge and the lay-litigant Grumman. This particular case is a landlord-tenant dispute, where the defendant Grumman is being sued for "back rent, late charges, cleaning costs, and the expenses associated with replacing a heating system that Grumman installed during his tenancy" (1990b:68).

JUDGE: Now then what else is there that I should know as to why you don't believe you're obligated?

GRUMMAN: Okay here's a, here's another deal from Mr. Broom, stating that, I took the hanging heater down and

set it in the back and had it setting back there so that when I got ready to, to move I could rehang it 'cause the only thing I moved was a piece of gas line. He was gonna sue me if I took that furnace out of there and he took pictures of it and everything. If I took it out of there he was gonna sue me. So then he finally decided to give me credit for it.

BROOM: Could I see that?

JUDGE: You certainly can. Uh, go right ahead uh, Mr., uh, Grumman, we're still with you.

GRUMMAN: Ok I, that, I have another slip signed here from Mr. Elrod.

JUDGE: And what does this one, what does it do, say?

GRUMMAN: Well, what it conc-, that the windows were broken when I went into the building and the window was cracked, the stool was leaking and I also fixed the stool on the other side and ran a copper line to the other side, which I never charged nobody for. I fixed the roof on the building, I fixed the roof on the shed back behind and I hauled all the trash off that was back behind the building.

JUDGE: Anything further sir?

GRUMMAN: Also my, at the time, he, when he served the three day notice, I went to my attorney because I couldn't be out of there in three days and my attorney contacted his attorney and asked his attorney for me to stay the additional four days right there.

JUDGE: What was that deal?

GRUMMAN: That everything would be fine and use the deposit because he was doing nothing, he wasn't standing by and had men standing by. Brown's right next door was empty and he wasn't doing anything with that building either.

JUDGE: Was this deal reduced to writing?

GRUMMAN: Beg your pardon?

JUDGE: Was this reduced to writing, the deal to stay until the fourth of June? Did the lawyers put anything down on paper?

GRUMMAN: No, they, I don't think they did. They had an agreement between them. It cost me actually where I paid my attorney $200 for taking care of the matter, before this popped up.

JUDGE: Anything else you want me to know? Do you understand the nature of the claim, the plaintiff is seeking rent for uh, the month of May, and uh, for the removal, installation, removal of your furnace, the installation of the, a replacement and then the uh, clean up cost of 185 and the

late charge.

GRUMMAN: I understand it. But I mean when he, when he offered to give me credit for that furnace and he took the other furnace that I took down, that I planned on reinstalling, at the time that I left.

JUDGE: What happened after this memo, which states, "I will give you credit for the heater that you've installed as a fixture?" What happened after that? Did anything get put down in writing, other than that lease?

GRUMMAN: I've got another, sir, I've got another letter that I cannot find where he was gonna sue me if I took the heater out of the building.

JUDGE: Well this says, "As soon as possible. Let me hear from you since time is getting short." This sounds as though this memo was awaiting getting signed up on a lease. Is that correct?

GRUMMAN: I don't recall at this point.

Chapter Three

1. I do not suggest that the issues of testimonial relevance or even conversational relevance is one that may be taken lightly or might be determined easily. For instance, Grice himself comments that:

> questions about what different kinds and focuses of relevance there may be, how these shift in the course of a talk exchange, how to allow for the fact that subjects of conversation are legitimately changed, and so on, I find the treatment of such questions exceedingly difficult...
>
> (1975:46)

Bearing these thoughts in mind in formulating my position, I have gauged the relevance of testimony by its ability to withstand censoring or objection from the court or counsel. Still, though, the question of relevance is one that is extremely difficult to accurately gauge and any single interpretation is unlikely to exist without imperfections.

2. Use of the term *narrative* is extremely varied among sociolinguists and encompasses widely divergent ideas and thoughts. This being the case, for the purposes of this thesis I have adopted Labov's (1972) definition which considers a narrative "as one method of recapitulating past experience by matching a verbal sequence of clauses to the sequence of events which actually occurred." (1972:359) Of particular interest is the variation between a less developed and a fully formed narrative. As Labov states, "we can define a *minimal narrative* as a sequence of two clauses which are *temporally ordered*: that is, a change in their order will result in a change in the temporal

sequence of the original semantic interpretations." (1972:360) One the other hand, a fully formed narrative includes six distinctive elements: Abstract, Orientation, Complicating Action, Evaluation, Result or Resolution, Coda. In the courtroom, narratives of this sort seldom occur as many factors affect their full development. For instance, an abstract of a story is seldom heard as a witness, being prompted by questions, is usually asked to relate a distinct event or incident with specificity. Thus, an encapsulation of the story would not suit the purposes of the court. The coda stage too, is often entirely absent since the direction of testimony is the responsibility of the questioning attorney. Finally, although it does occur, the evaluation segment of the narrative is unusual since personal reflections, attitudes or opinions are generally disfavoured during witness testimony.

Chapter Four

1. Personal communication with both officers revealed that their note-taking of this incident was frustrated by a number of factors. Most notably, both constables mentioned the frenzied environment of the night and the issue of multiple arrests. Therefore, in comparison to making one arrest at an incident and maintaining continuity with that subject, the officers suggested that having to deal with other individuals hampered their normal note-taking habits.

2. The following individuals were involved in the cited passages at the nightclub:
   a. Dan Dorin - promotions director at the nightclub
   b. Constable Bob Carson - first officer on scene in response to a disturbance
   c. Constable Nathan Smith - dispatched after Carson requested assistance because of the seriousness of the situation
   d. Mr. Logan - the accused

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