

**POLISH VS. AMERICAN COURTROOM DISCOURSE:  
INQUISITORIAL AND ADVERSARIAL PROCEDURES  
OF WITNESS EXAMINATION IN PENAL TRIALS.  
WHAT COURT INTERPRETERS NEED TO KNOW  
ABOUT WITNESS EXAMINATION IN CRIMINAL  
TRIALS UNDER DISPARATE LEGAL SYSTEMS TO  
PROVIDE HIGH LEVEL INTEPRETING SERVICES IN  
THE LIGHT OF THE DIRECTIVE 2010/64/EU OF THE  
EUROPEAN PARLIAMENT AND OF THE COUNCIL  
OF 20 OCTOBER 2010?**

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**Abstract:** The major objective of this paper is to redefine translational competence of court interpreters necessitated by the introduction of the Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010, which assures the right to translation and interpretation to the persons accused of committing a criminal offence and suspects, who do not understand the language of the investigative proceedings and court hearings so that they can exercise their right of defense, as well as the right to a fair trial. The implementation of the said Directive into the national law of each EU Member State seems to have outdated the definition of a competent court interpreter, who until the said Directive became effective on 13 October 2013, had mainly interpreted criminal trials within one legal system only and therefore was required to be fundamentally familiar with the procedures applied during the criminal trial within the legal system in which the criminal trial took place.

**Keywords:** court interpreting, translational competence, legal translation

**POLSKI KONTRA AMERYKAŃSKI DYSKURS SĄDOWY: ŚLEDTCZE I SKARGOWE  
PROCEDURY PRZESŁUCHIWANIA ŚWIADKÓW W PROCESACH KARNYCH.  
CO TŁUMACZE SĄDOWI MUSZĄ WIEDZIEĆ O PRZESŁUCHANIU  
ŚWIADKÓW W PROCESACH KARNYCH W RÓŻNYCH SYSTEMACH PRAWNYCH,  
BY ZAPEWNIĆ WYSOKĄ JAKOŚĆ USTNYCH TŁUMACZEŃ W ŚWIETLE  
DYREKTYWY 2010/64/UE PARLAMENTU EUROPEJSKIEGO ORAZ RADY Z DNIA  
20 PAŹDZIERNIKA 2010?**

**Abstrakt:** Głównym celem niniejszego artykułu jest ponowne zdefiniowanie kompetencji tłumaczeniowej tłumaczy sądowych wymuszone wprowadzeniem Dyrektywy 2010/64/UE Parlamentu i Rady z dnia 20 października 2010, która gwarantuje oskarżonym o popełnienie przestępstwa oraz podejrzanym, którzy nie rozumieją języka danego postępowania karnego lub języka używanego przed śledczymi organami prawnymi prawo do tłumaczenia ustnego i pisemnego dla zapewnienia ich zdolności do wykonywania swojego prawa do obrony oraz do zagwarantowania rzetelnego postępowania. Implementacja tej Dyrektywy do prawa krajowego Państw Członkowskich Unii Europejskiej zdezaktualizowała dotychczasową definicję kompetentnego tłumacza sądowego, który do dnia wejścia w życie wspomnianej Dyrektywy w dniu 13 października 2013 tłumacząc procesy karne głównie w obrębie jednego systemu prawnego winien był mieć wiedzę na temat procedur stosowanych podczas procesu karnego systemu prawnego, w jakim odbywała się określona rozprawa karna.

**Słowa kluczowe:** tłumaczenie sądowe, kompetencja tłumacza, tłumaczenie prawne

## **Introduction**

Within the area of translation studies, translational competence of court interpreters occupies a prominent status and has been studied before. However, new socio-economic, political and legal conditions require new expertise, new competences, and new aptitude. For this reason, both translators and interpreters need to constantly keep pace with the changing world, update their knowledge in order to keep it fresh, or otherwise they risk being victims of professional exclusion due to incapacity to perform their job professionally. Continuing professional development is and has always been a must. As regards court interpreting, the introduction of the Directive 2010/64/EU on the right to translation and interpretation given to all of those citizens, who have to go through a criminal trial requires redefinition of translational competence of court interpreters. The need to redefine translational competence of court interpreters is an immediate consequence of the fact that the said Directive endorses videoconference interpreting. As is widely known, videoconference interpreting is nothing new, because this method has been in use for quite a while by courts in cases when there is a need to examine a witness, who lives far away, or when the witness/or defendant is serving a custodial sentence in a prison situated in a different location and the cost of his/her transportation to the place of the trial would be too high. The novelty of videoconference interpreting in the light of the new Directive relies on the fact that it entails court interpreting not only across the borders, but across the legal systems, which has serious implications owing to the fact that legal systems vary significantly according to the following aspects of legal style explicated by Zweigert and Kötz (1998, 68-72): (1) different historical development; (2) distinctive mode of legal thinking; (3) different sources of law; (4) different legal institutions; and (5) ideology. In what follows, this paper seeks to delineate new translational competence of court interpreters brought about by the Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 with reference to two legal systems: Civil Law and Common Law. This paper addresses one of the major components of translational competence, namely textual, or discourse expertise. However, owing to the fact that this component comprises vast knowledge of many different aspects of courtroom discourse, this paper will address only three crucial aspects of the textual, or discourse competence of court interpreters, which are as follows: (1) structural

organization of the evidential phase in criminal trials within Common Law and Civil Law; (2) the social roles of the representatives of the legal professions under Common Law and Civil Law; and (3) the types of questions posed during the examination of witnesses in criminal trials under Common Law and Civil Law, which shall be preceded by a concise general information about translational competence.

**Translational competence: a succinct overview of the major constituents of textual/discourse competence**

The major point of departure for this paper is the definition of translational competence by Neubert (2000, 3-18), who has delineated translational competence as a sum of the following five components: (1) language competence; (2) subject competence; (3) cultural competence; (4) transfer competence; and (5) textual competence. As indicated earlier, this paper will concentrate on the last component of translational competence, that is to say – textual competence, otherwise known under the name of discourse competence, which entails translators’ and/or interpreters’ expertise in written and spoken discourse. Discourse in this paper is perceived as “language above the level of sentence or above the clause” as outlined by Hymes (1974b). The entire research dedicated to textual parameter of translational competence in this paper is based on the study dedicated to the analysis of courtroom discourse conducted by Bednarek (2014) in her monograph entitled *Polish vs. American Courtroom Discourse: Inquisitorial and Adversarial Procedures of Witness Examination in Criminal Trials*, whose major objective has been to provide a comparative analysis of Polish and American courtroom discourse with emphasis laid on the similarities and disparities between two distinct methods of witness examination – adversarial and inquisitorial - in criminal trials under two entirely distinct legal systems, i.e. Common Law and Civil Law.

In general, discourse competence of courtroom interpreters encompasses colossal knowledge about different aspects of courtroom discourse, including: fundamental competence in the historical development and characteristics of the legal systems of the SL and TL, the social roles of the participants of criminal trials, education, and mode of appointment to the position of the representatives of the legal professions, such as judges, attorneys for the prosecution and defense, jury, lay assessors, knowledge about the structural organization of the criminal trials with particular attention to the components of the evidential phase under the two legal systems, the purpose of the evidential phase, the atmosphere in which the examination of witnesses takes place, the channel of communication, norms of interactions and major rules on which the entire criminal trials are founded, which determine what is going on during criminal trials and in what manner they are performed, the type of genre, the organization of taking turns, that is who speaks to whom, who may pose questions during the examination of witnesses and who is required to answer them during the evidential phase, and who needs to remain silent throughout the entire trial, knowledge about courtroom interaction, the social roles of the major representatives of the legal professions partaking in the examination of witnesses, the types of questions asked during the examination of witnesses, that is to say any possible predilections to pose certain types of questions in order to control witnesses. The entire research dedicated to courtroom discourse by Bednarek (2014) has been carried out with the use

of the concepts and methods of research delineated by the following approaches to discourse analysis applied to study Polish and American procedures of witness examination during criminal trials: (1) the ethnography of communication; (2) conversation analysis (CA); and (3) pragmatics.

Of the aspects of courtroom discourse investigated by Bednarek (2014), the following three appear to have paramount importance for providing high quality interpreting services of criminal trials across the borders and different legal systems: (1) structural organization of the evidential phase during the criminal trials within Common Law and Civil Law; (2) the social roles of the representatives of the legal professions during the evidential phase under Common Law and Civil Law; and (3) types of questions posed during the examination of witnesses in the mentioned legal systems. Lack of expertise in these key, and relevant aspects of courtroom discourse on the part of the court interpreter may lead to a failure of communication during the entire criminal trial, which might have disastrous consequences not only for the interpreter, but predominantly for the suspect, or the person accused of committing a criminal offence. Therefore, during a criminal trial, whereby defendant's freedom is at stake, there is no room for unprofessional conduct by court interpreters, there is no room for disorientation, or lack of knowledge, because a fair trial may only be guaranteed with the participation of a court interpreter, who is competent and conscious of what is happening during the trial, that is to say with the participation of an expert in these areas.

### **Structural organization of American and Polish of American and Polish evidential phase**

One of the key components of discourse competence, which court interpreters need to be aware of when they prepare for interpreting of the criminal trial is the structural organization of the evidential phase. Its characterization in this paper will commence with the explanation of a very important aspect of the criminal trial, namely the essential and underlying legal principles, or legal norms, on which American and Polish criminal trials are based, which determine all the procedures that take place during the examination of witness, as well as the entire trial. The American criminal trial is governed by the principle of *formal truth*, whereas the Polish criminal trial is administrated by the *principle of substantive truth*. The former allows the two key parties of the criminal trial, that is to say, the prosecution and defense, present their own versions of the events of the committed crime. Under Common Law, the truth is whatever the legal counsels from the prosecution and defense are able to find as the fact finders (Summers 2000, 285-286). In other words, each of the two sides presents the story based on what they as the fact finders have discovered, which they will subsequently tell to the members of the jury, who issue the guilty or not guilty verdict, through those, who they are going to call to the witness stand to testify. On the other hand, the latter requires that the person responsible for examining the witnesses, i.e. the judge, who *nota bene*, is independent of the prosecution and defense, establish the objective truth related to the committal of the crime.

Under Common Law, the examination of witnesses encompasses two fundamental parts: (1) *direct examination*, and (2) *cross-examination* of witnesses, which may be followed by their *re-direct examination* and *re-cross examination* by attorneys of both sides. Direct examination involves prosecutors or attorneys for defense in questioning of their own witnesses, whereas cross-examination involves the interrogation of witnesses by the opposing party. The major objective of direct examination is to present by prosecution and defense counsels of their own versions of events associated with committing of the crime, while the key aim of the cross-examination is to discredit the credibility of witnesses of the opposing party revealing their prior criminal record, or demonstrating them as liars, drunkards, etc. that as witnesses totally incompetent of providing reliable evidence, as well undermine the credibility of the version of events provided by the opposing parties, pointing to the inconsistencies in the testimony given, as well as dumbfounding the witness. The prosecution, whose onus is to prove beyond reasonable doubt the guilt of defendant, enjoys the right to present their case prior to defense. In contrast to that, the defense role is to engage in a fierce fight to have their client, i.e. defendant, cleared of all the accusations and achieve the not guilty verdict.

Under Civil Law, the examination of witnesses comprises two major stages. In case of defendant they are as follows: (1) free and unrestricted *explanation* provided by defendant; and (2) supplementary questions asked by the judge, who is also the chairman of the trial, prosecutor, attorney for the defense and experts, who enjoy the right to ask defendant/s to elucidate any ambiguities in the statements made by defendant. In case of other witnesses the examination encompasses the following parts: (1) free and unrestricted *testimony* provided by witnesses; and (2) supplementary questions asked by the judge, who is also the chairman of the trial, prosecutor, attorney for the defense and experts, for exactly the same reasons as in the case of defendant/s.

Court interpreters need to acquire the basic knowledge in this respect, because they not only have the duty to provide a high level of interpreting services, but also moral responsibility to do their job professionally as representatives of one of the key professions, which enjoy public trust.

### **Social roles of the representatives of the legal professions during the evidential phase under Common Law**

Seen as the personification of justice, American judges hold great power under the criminal justice system of the United States. Their social role comprises a number of key responsibilities.

First of all, American judges, who are addressed *Your Honor*, guarantee that the rights of the accused person are upheld during the criminal trial. In doing that, the judge ensures that the prosecution and defense attorneys are kept on track according to the binding law in whatever they do during the trial. In connection with that, the judge enjoys the right to grant permission to counsels of the prosecution and defense to call in their witnesses to the witness stand in order to give testimony. In the O. J. Simpson

criminal trial, judge Ito regularly allowed lawyers of the prosecution and defense to call witnesses to testify. Here is an illustrative example of this responsibility:

- The Court: *All right. Thank you, ladies and gentlemen. Be seated. All right. The People may call their next witness.*
- Ms. Clark: Thank you Your Honor. The People call detective Mark Fuhrman.
- The Court: *All right. Detective Fuhrman.*

When the prosecution and defense call in professional witnesses or experts to present their opinions on the evidence gathered in the course of the investigation, because their expertise in various fields, appears to be particularly relevant, as it either incriminates the defendant or proves his/her innocence, counsels need to obtain permission from the judge for such evidence (e.g. blood samples, crime weapons, fingerprints, shoe prints, as well as many other types of physical or biological evidence, and/ or charts, graphs, video films) to be presented by their expert witnesses. There is no doubt, that one of the most spectacular examples of evidence presentation during the O. J. Simpson trial was when prosecutor Darden asked the defendant to put on the gloves found at the Bundy and Rockingham crime scenes, which were allegedly lost by the murderers of Nicole Brown Simpson and Ronald Goldman. Before, however, Mr. Darden could do that the prosecuting attorney was required to obtain judge Ito's permission:

- Mr. Darden: Okay. Your Honor, at this time, the People would ask that Mr. Simpson step forward and try on the glove recovered at Bundy as well as the glove recovered at Rockingham.
- The Court: *All right. Do you want to do that?*
- Mr. Cochran: No objection, Your Honor.
- The Court: *All right. He can do that seated there. All right. And I think so the jury can see, I'll ask Mr. Simpson to stand. All right. Mr. Darden, which glove do you have?*
- Mr. Darden: This is the Bundy glove, Your Honor.
- The Court: *All right.*
- Mr. Darden: And after Mr. Simpson tries on the gloves, I would ask that he be required to step back over to the jury and again show them his bare hands.
- The Court: *Well, we'll get to that in a second. All right. The record should reflect that, as is our practice with these gloves, Mr. Simpson will have a pair of latex gloves on while doing this.*

Subsequently, judge Ito gave his consent to prosecutor Darden for the Isotone Glove expert to examine the hands of the defendant:

- Mr. Darden: You Honor, if it pleases Court, could we have Mr. Rubin step down from the witness stand, walk through the well and have a look at Mr. Simpson's hands?
- The Court: *And this is for the purpose of the size, glove size?*

Mr. Darden: Yes.  
The Court: *Yes. Mr. Rubin, would you please do that.*  
Mr. Darden: Will the Court ask Mr. Simpson to extend his hands?  
The Court: *Yes.*

During the American criminal trial, the judge holds the power to rule on admissible evidence given by particular witnesses. What this entails is that when one of the parties does not agree with the line of questioning by the opposing party, or when a witness does not provide a response to the question, a counsel of the opposing party may object to that. In such situations, the responsibility of the judge is either to sustain or overrule such objection. This implies that the witness must act accordingly to the judge's decision. In the O. J. Simpson trial, when judge Ito decided to overrule an objection, it implied that the witness was allowed to provide a response to a question; whereas, if judge Ito decided that an objection be sustained, it implied that the witness should withhold from providing a response to a particular question. In the example presented below, judge Ito reacted to the objection raised by the leading defense lawyer, Johnnie Cochran, who claimed that the question posed by prosecutor Christopher Darden to the LAPD 911 dispatcher, Sharon Gilbert, was conclusionary in form. Judge Ito declined the objection, and as a result, the witness was granted permission to answer to the question:

Mr. Darden: And when you listened to the tape a week and a half ago, could you hear slaps or strikes?  
Mr. Cochran: Move to strike, Your Honor, as conclusionary in form.  
The Court: *Overruled. You can answer the question.*  
Ms. Gilbert: I could, in remembering the call. I could determine after the first scream, then I heard someone being hit.

While Christopher Darden questioned Denise Brown, the sister of Nicole Brown Simpson, the defense lawyer, Mr. Shapiro raised an objection claiming that the reply to Mr. Darden's question was non-responsive, called for speculation and constituted a narrative:

Mr. Darden: Did anything unusual happen that night in the Red Onion?  
Ms. Brown: Yes.  
Mr. Darden: What was that?  
Ms Brown: Well, we all started—Well, we were all drinking and goofing around and being loud and dancing and having great time. And then at one point, O.J. grabbed Nicole's crotch and said, "This is where babies come from and this belongs to me." And Nicole just sort of wrote it off as if it was nothing, like—you know, like she was used to that kind of treatment and he was like—I thought it was really humiliating if you ask me.  
Mr. Shapiro: *Move to strike the last part as being nonresponsive, calling for speculation, narrative.*  
The Court: *Overruled.*

On this occasion, judge Ito overruled the objection. As a result, the statement did not have to be stricken from the transcription of the trial.

Under the United States of America Common Law, in an adversary criminal justice process, witnesses are required to provide exact responses to the questions posed, i.e. they may not voluntarily provide more information than is expected of them. Providing narrative is *strictly forbidden* during direct examination and cross-examination of witnesses. In the following example, the defense lawyer objected to the answer provided by the same witness to the prosecution lawyer. This time, judge Ito sustained the objection and the witness was instructed not to volunteer additional information:

Mr. Darden: Okay. While you were talking, did you say something to the defendant?  
Ms. Brown: Yes, I did.  
Mr. Darden: What did you say to him?  
Ms. Brown: I told him he took Nicole for granted, and he blew up.  
Mr. Shapiro: *Your Honor, I'm going to object. The question has been asked and answered. Motion to strike the last response.*  
The Court: *Miss, Brown, if you would, don't volunteer anything beyond actual question, please.*  
Ms. Brown: Okay.  
The Court: *Thank you.*

A few minutes later, the prosecution lawyer asked Denise Brown to explain the reason of her doing so, but the defense lawyer did not think it was relevant to the case, therefore, he objected. Judge Ito sustained the objection and the witness was not allowed to answer the question:

Mr. Darden: You told the defendant that he took Nicole for granted?  
Ms. Brown: Yes.  
Mr. Darden: Why did you tell him that?  
Ms. Brown: Because she did have-  
Mr. Shapiro: *Objection. Irrelevant.*  
The court: *Sustained.*  
Mr. Darden: On 352 grounds, Your Honor?  
The Court: *It's irrelevant. Why this witness thinks that Miss Brown Simpson was taken for granted is not relevant. What's relevant is the fact that she made the comment and any reaction to that comment.*

In her testimony, Denise Brown provided incriminating statements about defendant's conduct on one of the occasions, when they all had gone out to a restaurant Red Onion. Her testimony was significant for the prosecution case, owing to the fact that it represented O. J. Simpson as a violent person, who was unable to control his fury once he got angry, someone whose conduct appeared to be unpredictable and uncontrollable, as well as, extremely frightening. It was the behavior of someone, who



continually abused his wife, someone who would not refrain from violent behavior towards his wife, even in front of other people. For this reason, counsel for defense in this trial carefully listened to every single word of her testimony and objected on every possible occasion when she provided more information than required in order to prevent the inculpatory testimony from Denise Brown being heard by the jury:

- Mr. Darden: And was he saying anything to-Did the defendant say anything as he threw those-
- Ms. Brown: He wanted her out of this house.
- Mr. Darden: That is what the defendant said?
- Ms. Brown: He wanted her out of his house and he continued going up the stairs and he grabbed the clothes out of her closet and started throwing them down and grabbed Nicole. He threw her up against the wall and then he grabbed her. And the only thing I remember is that it was—he looked so—his whole facial structure changed. Everything about him changed.
- Mr. Darden: Let me stop you there.
- Mr. Shapiro: *Your Honor, we would object. That is nonresponsive.*
- The Court: *All right. Ladies and gentlemen, the witness' comments regarding facial structuring and change of expression is stricken from record and it was not in response to the question. You are to disregard that answer.*

Another witness, who offered more information than was expected was Mr. Riske, the first police representative at the crime scene. Again, defense lawyers objected to his non-responsive reply, and judge Ito had to rule on the evidence:

- Ms. Clark: And did they tell you how they found the dog?
- Mr. Riske: They told me that –
- Mr. Cochran: Answer that yes or no.
- The Court: *Correct. Did they tell you? Yes or No?*
- Mr. Riske: Yes.
- The Court: *All right. Next question.*

On other occasions, especially in situations, when defense lawyers appear to be too hard on the hostile witness, judges are required to react to the objection raised by the opposing party. By way of illustration, every now and then, defense lawyers did not let the hostile witnesses finish their statements, and on such occasions judge Ito had to instruct them to let the witness complete their testimony:

- Mr. Bailey: Have you not testified that you were concerned that there were suspects there that night?
- Mr. Fuhrman: I said victims. I prefaced it with victims, possibly suspects-
- Mr. Bailey: Had you not testified that you were concerned that there were suspects?
- The Court: *Wait, wait Mr. Bailey, he was still answering the question.*

Mr. Bailey: I'm sorry.  
Mr. Fuhrman: *I prefaced that with my first concern was victims, hostage, possible suspect, yes.*

Judges are also frequently compelled to react whenever a mistake is made with reference to the names of the witnesses. In the O. J. Simpson trial, judge Ito reacted to such mistakes instantaneously, making sure that a correction is made, so that the appropriate information is registered in the transcription of the trial:

Mr. Bailey: Did it not seem likely that whoever placed that glove there, detective Philips, had walked back over the alley over the leaves?  
The Court: *Excuse, me. Detective Philips or detective Fuhrman?*  
Mr. Bailey: I'm sorry, detective Fuhrman, over the leaves?

Finally, judges are also responsible for making decisions when the trial should come to a stop, or when the court should adjourn the proceedings for a day or so, as well as, when the trial proceedings should resume. In the example below, judge Ito granted his permission to the defense counsel to resume cross-examination of a witness:

The Court: ...You may resume with your cross-examination.  
Mr. Bailey: Thank you, Your Honor.

Under Common Law in the United States of America, it is normal for the prosecution and defense lawyers to participate in the so called sidebar conferences, whenever the two parties cannot resolve contentious issues. The judge orders a sidebar conference so that the jury do not hear the heated discussion between them. In one of the sidebar conferences, the prosecution and defense attorneys had an argument related to the admissible evidence:

Mr. Darden: He can't object. This is not his witness. Back to his side of the table. This is not his witness. Ha cannot object.  
Ms. Clark: Mr. Douglas' Bailwick.  
Mr. Cochran: Tell him to get his hands off me, judge.  
The Court: Get your hands off him, Mr. Darden.  
Mr. Cochran: The reason I approached, Miss Clark told me that they were going to investigate something regarding potential witness and she wouldn't try to show this to the jury because it may never come to pass. So Your Honor gratuitously offered to do that, but she said that was their representation.  
The Court: But they – Wait.  
He already testified that this is where his podium is. The limo guy said, yeah, he went over and put this thing on top of the trash can.  
Ms. Clark: But now this witness corroborates the other witnesses and we have him standing by the trash can.

- Mr. Cochran: He says he never saw him doing that. What difference does that make?
- Ms. Clark: Different view.
- Mr. Darden: You don't have to –
- Mr. Cochran: Grabbing at straws. My objection is this: grabbing at straws. Do you have something in the trash can?
- The Court: Well, is there any doubt, counsel, that if we were to go to LAX right now and look at this particular podium at American Airlines that it is going to be exactly the same as it is?
- Mr. Cochran: I have no doubt.
- The Court: All right.
- Mr. Cochran: I was present – I helped build the airport, so I know about that airport.
- The Court: Then I have many bones to pick with you.
- Mr. Darden: You haven't done an honest day's work in your life.
- Mr. Cochran: For 13 years I was commissioner but the point is there are pictures of trash cans. Let them all in there or let them look at them. That is my point.
- Ms. Clark: You've looked at them.
- Mr. Cochran: The deal when we left, she wasn't going to do it, so that is why I'm up here. I don't care about these pictures.
- Ms. Clark: Thanks to Mr. Douglas we have two witnesses now putting the defendant next to the trash can, you know, one of whom had no clue here that question was coming from. And I really think, you know, I'm not asking you to draw any inferences at this point, but it is an accurate representation of where they stood. It does corroborate the witness and it corroborates Allan Park.
- The Court: The problem is if you told Mr. Cochran you weren't going to show them to the jury, then at this point we won't.
- Mr. Cochran: That is – She did tell me that.
- Ms. Clark: I did. I told him because I didn't think this witness would say he was near the trash can, but then he did.
- The Court: Hold on, hold on. So given that there is an agreement –
- Mr. Cochran: There was an agreement. Also, if you came up to this thing, you would be standing near the trash can based upon those pictures.
- Ms. Clark: Sure.
- The Court: Sure.
- Ms. Clark: Why are you arguing about it? What is the big deal? Why are you so scared?
- The Court: Since there was an agreement, we won't do it right now.
- Mr. Cochran: We can argue about it later.

In the light of the foregoing, the social role of the judge under the American Common Law is to exercise control over the entire criminal trial proceedings with particular attention to the appropriateness of conduct of the prosecution and defense

counsels, to resolve questions of evidence and procedure and to pilot questioning of witnesses.

Acting as advocates for the State, prosecution attorneys in criminal trials under the American Common Law are responsible for proving beyond reasonable doubt the guilt of defendants.<sup>24</sup> Acting in the name of the victims, prosecutors enjoy the right to present their case ahead of the defense. In doing so, the prosecutors are allowed to call in witnesses, both professional, as well as, lay witnesses, who make contributions to their case in their testimony during direct and re-direct examination. While exercising their responsibilities during direct examination of witnesses, prosecution attorneys examine, or question their witnesses and while exercising this responsibility, they seem to act according to a recurring pattern that allows them to make the most of the examination of their witnesses. It is particularly discernible when the prosecuting attorneys question professional witnesses. Prosecutors usually begin direct examination of their witnesses with eliciting the following information: profession, name of employer, position held, number of years of employment with the current employer, previous employment, range of responsibilities, experience in the job in terms of years or number of investigated criminal cases, education or training related to exercising the duties under the employment, and subsequently they proceed to the responsibilities in the O. J. Simpson case. The examination of detective Fuhrman conducted by prosecutor Marcia Clark in the O. J. Simpson trial is an illustrative example of this pattern of questioning witnesses:

- Ms. Clark: All right, sir. Can you tell us how you are employed right now?
- Mr. Fuhrman: I'm a detective for the city of Los Angeles currently assigned to West Los Angeles homicide.
- Ms. Clark: How long have you been so employed?
- Mr. Fuhrman: 19 years six months.
- Ms. Clark: And is that since you have joined Los Angeles Police Department?
- Mr. Fuhrman: Yes.
- Ms. Clark: Can you tell us what your assignments were on June 12<sup>th</sup> and the 13<sup>th</sup>?
- Mr. Fuhrman: I was a detective assigned to West Los Angeles homicide.
- Ms. Clark: Okay. That was in 1994?
- Mr. Fuhrman : Yes.
- Ms. Clark: In 1985 and 1988, where were you assigned, sir?
- Mr. Fuhrman: West Los Angeles patrol car.

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<sup>24</sup> The reasonable doubt standard is essential to the criminal procedure under the United States Common Law criminal justice system. Siegel and Senna (2007, 281) point out to the *Bringer v. United States* case, which took place in 1949, whereby the Supreme Court stated as follows: "Guilt in criminal cases must be proven beyond reasonable doubt and by evidence confined to that which long experience in the Common-Law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions with resulting forfeitures of life, liberty and property."

Ms. Clark: Now, in the West Los Angeles area you were assigned to, sir, did that include the Brentwood area?  
Mr. Fuhrman: Yes...

The same procedure was preserved when the prosecuting attorney, Mr. Goldberg, examined Dennis Fung, the LAPD criminologist, who gathered evidence at the two crimes scenes:

Mr. Goldberg: What is your occupation and assignment?  
Mr. Fung: I am a criminalist employed by the Los Angeles Police Department. I'm assigned to the firearms analysis unit of the scientific investigation division.

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Mr. Goldberg: On June the 13<sup>th</sup> of 1994, were you responsible for collecting certain evidence at 360 North Rockingham and 875 Bundy in the City of Los Angeles?

Mr. Fung: Yes.

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Mr. Goldberg: You said you were a criminalist?  
Mr. Fung: Yes. A criminalist is somebody who employs the principles of the natural and physical evidence to identify, document, preserve and analyze evidence that is related to a crime. He later testifies to his findings in a court of law.

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Mr. Goldberg: When did you become a criminalist at the Los Angeles Police Department?

Mr. Fung: In October of 1984.

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Mr. Goldberg: Approximately how many crime scenes would you say that you investigated over the course of your career?

Mr. Fung: Approximately 500 crime scene investigations.

Similarly to the above examples, Mr. Richard Rubin, the Isotone glove executive, was allowed to boast of his all-embracing and extended career at the company manufacturing gloves during direct examination by prosecutor Darden:

Mr. Darden: When did you first begin with them?  
Mr. Rubin: I started with them in 1976.  
Mr. Darden: Okay. And what were your duties in your capacity as vice president and general manager?  
Mr. Rubin: I was responsible for the design, manufacturing, production, raw material, sales and marketing of all men's gloves.

When the prosecution attorneys complete direct examination of witnesses, defense attorneys are permitted to cross-examine them. As soon as the defense end the questioning of hostile witness, the prosecution counsels are again allowed to continue questioning their witness in re-direct examination, which they usually do in order to ask supplementary questions to explain the issues that come out during the cross-examination of their witness by the defense attorneys.

In the O. J. Simpson case, for instance, as soon as the defense attorneys had finished cross-examining Sharon Gilbert, the LAPD 911 dispatcher, the prosecution then, once again, questioned Ms. Gilbert in re-direct examination. In response to the defense suggestions that Ms. Gilbert may have changed her opinion about what was going on when she had answered the emergency call from the Simpsons' residence back in 1989, prosecutor Goldberg sought to elicit from the witness that although the accident took place five years ago, she was positive that it was Ms. Nicole Brown Simpson that was being hit by the defendant:

- Mr. Darden: *Miss Gilbert, you concluded back on January 1, 1989, that a woman was being beaten as you listened in on the telephone?*
- Ms. Gilbert: *Yes.*
- Mr. Darden: *And since – you have heard that tape again, that is, since 1989; is that correct?*
- Ms. Gilbert: *Yes.*
- Mr. Darden: *Have your conclusions changed?*
- Ms. Gilbert: *No, they have not.*

The prosecutions attorneys wanted to show to the members of the jury that Ms. Gilbert's testimonial evidence has not changed. By confirming the previous testimony, she upheld what she had testified before, thus, refuting the defense allegations. The contest between prosecution and defense attorneys is stopped by the judge, who decides when the process of re-direct and re-cross-examination of witnesses should terminate.

In the O. J. Simpson trial, in order to manage the number of witnesses that the prosecution called in to testify against O. J. Simpson, as well as to counterbalance the dream team of defense lawyers employed by the defendant, the leading prosecutor, Marcia Clark was allowed to have other prosecutors to assist her in the examination of witnesses. The prosecutors, who helped her included: Christopher Darden and Hank Goldberg. Although in this trial, there were no witnesses to the crime, and no crime weapon had ever been found, the prosecution were able to present quite a strong case, in that they were able to prove that the defendant was a violent person, which a number of people had witnessed, they also presented strong evidence in the form of blood samples, two gloves, of which one had been found at the Bundy crime scene and the other at the back of O. J. Simpson's house, appeared to match the defendant's size of the gloves. The prosecutors also showed that the size of the shoe prints appeared to match the size of the defendant's shoes. Despite their painstaking efforts to prove defendant's guilt, the prosecution lawyers lost their case. The jury did not believe the prosecution proved O. J. Simpson's guilt beyond reasonable doubt, which is why they

voted in favor of his acquittal. All the actions that the prosecution undertook during examination-in-chief and re-direct examination of their witnesses were subjected to the primary goal that the prosecution fought to attain - to prove the defendant's guilt beyond reasonable doubt.

In contrast with the above, the major objective of defense attorneys during a criminal trial is to present a strong defense case in order to refute all the accusations and assertions made by the prosecution attorneys and win the acquittal of defendant. In doing so, defense attorneys are allowed to cross-examine the prosecution witnesses to rebut their testimonial evidence, undermine the allegations they make, demonstrate inconsistencies in the testimonial evidence, discredit the credibility of witnesses. Defense attorneys, too, enjoy the right to call in witnesses to present their own version of events. The O. J. Simpson's case is replete with instantiations of endeavors undertaken by the defense counsels to rebut the testimony provided by the hostile witnesses in every possible manner. The defense attorneys first rebut the testimony of the prosecution witnesses in the course of cross-examination of the hostile witnesses. As soon as the prosecution lawyers complete the presentation of their case, the defense counsels are allowed to present their case.

In the O. J. Simpson case, Johnnie Cochran, who cross-examined Ms. Sharon Gilbert, strongly disproved her testimony, suggesting to the jury that Ms. Gilbert may have mistaken her fast typing for someone being hit:

Mr. Cochran: And are you a pretty fast typist?  
Ms. Gilbert: I don't know. Maybe.  
Mr. Cochran: Mr. Cochran; Well, you heard your – the typing in there, didn't you?  
Ms. Gilbert: Yes, right.  
Mr. Cochran: *And so there is no mistaking about it, your typing was not anybody being struck, was it?*  
Ms. Gilbert: No.

On another occasion, another member of the defense team, Mr. Douglas sought to undermine the credibility of Ron Shipp, the ex-police representative and friend of the Simpsons:

Mr. Douglas: *But you've lied a few times concerning what you know about Mr. Simpson, true?*  
Mr. Shipp: Yeah, I would say.  
Mr. Douglas: You lied to Marcia, didn't you?  
Mr. Shipp: Well if withholding back information – they never asked me about – if holding back information is lying. I don't think it is lying. I just didn't tell them everything.  
Mr. Douglas: Well, you didn't tell the Police and the District Attorney about an important conversation that you claim occurred, true?  
Mr. Shipp: That's correct.

One of the most spectacular endeavors made by the defense attorneys to discredit the inculpatory evidence given by the prosecution witness, were those against detective Fuhrman, who had found the glove at 360 North Rockingham. F. Lee Bailey, who cross-examined Mr. Fuhrman, suggested that detective Fuhrman must have felt irritated when he was ousted from the investigation:

- Mr. Bailey: *Weren't you a bit angry that you were being shoved out of a murder in your own territory?*
- Mr. Fuhrman: No, no.
- Mr. Bailey: *Didn't bother you a bit?*
- Mr. Fuhrman: None.
- Mr. Bailey: *Weren't you a fellow that had spent a good part of his career waiting for an opportunity to make, quote, the big arrest?*
- Mr. Fuhrman: No...

F. Lee Bailey assumed that the elimination and humiliation of detective Fuhrman may have driven him to some desperate actions. F. Lee Bailey displayed to the members of the jury that despite being ousted from the investigation, Fuhrman continued to rummage around looking for evidence that might incriminate O. J. Simpson. Here is how F. Lee Bailey insinuates that detective Fuhrman was snooping at O. J. Simpson's residence:

- Mr. Bailey: *Okay. When you walked down to the Bronco, did you ask permission from lieutenant Vannatter before you did that?*
- Mr. Fuhrman: Detective Vannatter? No.
- Mr. Bailey: *I'm sorry. Detective Philips?*
- Mr. Fuhrman: No.
- Mr. Bailey: *Detective Lange?*
- Mr. Fuhrman: No.
- Mr. Bailey: *This was on your own initiative?*
- Mr. Fuhrman: Yes.
- Mr. Bailey: *And you were detecting at this point, I take it?*
- Mr. Fuhrman: I'm sorry?
- Mr. Bailey: *You were detecting?*
- Mr. Fuhrman: I was detecting.
- Mr. Bailey: *You had been frozen in your function by the notice of dismissal but now you are back again detecting, true?*
- Mr. Fuhrman: No. At the point I wasn't detecting; I was just walking.
- Mr. Bailey: *You weren't just being nosy, were you?*
- Mr. Fuhrman: I don't think nosy. I was walking and I noticed something on the Bronco and I continued walking towards it.
- Mr. Bailey: *Well, was this a walk that you took to get some exercise and just happened to take you by the Bronco? Is that what happened?*
- Mr. Fuhrman: It wasn't a walk for exercise. I just walked down to the corner and looked down Rockingham, saw the Bronco.



Mr. Bailey: *Was it a walk specifically to inspect the Bronco for some purpose, detective Fuhrman?*

Mr. Fuhrman: No.

While he was examining the rear part of the defendant's residence, detective Fuhrman found one of the most incriminating pieces of physical evidence, the glove that seemed to match the glove found at 875 South Bundy. In the course of cross-examination of detective Fuhrman, F. Lee Bailey contested the prosecution allegations that the glove was lost by O. J. Simpson, the murderer, while he was coming home from the crime scene. The defense attorney insinuated that the glove had been planted at their client's residence. With a history of racial prejudice against Afro-Americans, detective Fuhrman appeared to be a perfect suspect that the defense claimed had taken the glove from the Bundy crime scene and placed it at the rear of the defendant's residence in order to mislead the police. This version may have sounded quite plausible to the members of the jury, who, in the overwhelming majority, consisted of Afro-American citizens. Detective Fuhrman was alone when he found the glove, there was no one, who could confirm that the glove had been there before he got to the Rockingham estate:

Mr. Bailey: When you left for Rockingham did he go with you?

Mr. Fuhrman: No.

Mr. Bailey: *Was there anyone with you, other than the four detectives, initially?*

Mr. Fuhrman: No.

Mr. Bailey: *Did others come after you arrived and before you entered the property?*

Mr. Fuhrman: I believe there was a uniformed vehicle, police vehicle, that arrived just as we had already made entry, and they stayed at the front gate...

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Mr. Bailey: *Now, detective Fuhrman, you went out there in the alley where you had never been before, did you not?*

Mr. Fuhrman: What alley, sir?

Mr. Bailey: Along the chain link fence where Kato said he heard a noise?

Mr. Fuhrman: *(No audible response.)*

Mr. Bailey: *Did you not?*

Mr. Fuhrman: *Yes, I went on that pathway.*

Mr. Bailey: ***You walked there by yourself, correct?***

Mr. Fuhrman: *That's correct.*

F. Lee Bailey was so hard on detective Fuhrman, he frequently interrupted detective Fuhrman's testimony and brought it to a standstill. The leading prosecutor had to request judge Ito to instruct Mr. Bailey to let the witness complete his testimony:

Ms. Clark: Objection, Your Honor. Can the witness be allowed to finish his answer?

Mr. Bailey: I thought he had.

Motivated by the desire to obtain acquittal of their client, the defense attorneys engaged in a fierce battle with the prosecution counsels in order to refute all the evidence, which could confirm O. J. Simpson's guilt. That is to say, defense contended that what Ms. Gilbert had heard on the phone was probably a fight between two unknown people, not just someone being hit. There was no evidence, they contended, that it was Nicole Brown Simpson, who was beaten, nor that their client was the batterer. The defense lawyers went to the extremes, claiming that what Ms. Gilbert considered to be spanking was actually her fast typing on the key board. The testimony provided by Ron Shipp was nothing but a pack of lies made up by a habitual drunkard, the defense attorneys claimed. The fact that their client was stalking his ex-wife, as Carl Colby testified, was presented as a mistake. The defense argued that while standing in front of his ex-wife house at night, the defendant was probably waiting for her on that occasion; they had probably arranged to meet on that evening. The testimony given by Pablo Fenjevs was contested with the testimony of Danny Mandel and Denise Pilnak. His claims relating to the time of the barking of the dog were challenged with counter claims given by Ms. Pilnak, a suspicious lady, a stickler for time, who always wore two watches. The testimonial evidence of Alan Park, the limousine driver, who testified that on that night the defendant seemed agitated, distressed and sweated profusely were undermined with Michael Norris' claims that on the night of the crime O. J. Simpson was in a good mood, looked good and socialized with people. The fact that the DNA of the blood samples found on his socks, as well as on the carpet of the Bronco, and on the side of the vehicle appeared to match his blood was refuted with claims that the biological evidence was contaminated by the inept police representatives, who let a trainee collect the blood samples from the crime scenes, who trampled the crimes scene, who covered the victim with a blanket, which might contain their client's hair, who forgot to take the fingerprints from the telephone at Nicole's house. The fact that the glove found at the defendant's residence matched the South Bundy crime scene glove was disputed with insinuations that someone may have planted the glove on purpose to mislead the police.

In addition to all that, the defense attorneys knew very well how to appeal to the Afro-American members of the jury. In their desperate attempts to clear their client of the accusations, they decided to raise the racism issue. They made the jury listen to Laura McKinney's tapes, where the racially prejudiced police representative, detective Fuhrman, stated he knew what to do to when he saw a Caucasian lady in the company of Afro-American citizen; a someone, who made use of the "N" word whenever he spoke of Afro-American citizens. Although the prosecution expert witness claimed that the glove had shrunk as a result of saturation with blood, defense main lawyer shouted in the courtroom chamber "When it doesn't fit, you must acquit." The fact that the size of the shoes matched the size worn by their client was downplayed, too. The defense attorneys argued that two or more people may have on purpose worn the same size of shoes at the crime scene to mislead the police.

On top of that, the medical examination conducted by the defense expert witness, dr. Huizenga confirmed that O. J. Simpson may not and could not have committed the two crimes for reasons of his very poor health condition. The fact that he had only seen his doctor two days after the murders despite his alleged numerous

ailments did not matter. Members of the jury gave the not guilty verdict and O. J. Simpson was freed from jail. His acquittal was apparently the result of the ferocious contest that the defense dream team attorneys won with the prosecution. The best lawyers in the United States, who agreed to represent O. J. Simpson in this historic trial included: Johnnie Cochran, F. Lee Bailey, Robert Shapiro, Alan Dershowitz, and Robert Kardashian.

As illustrated above, in contrast to prosecution attorneys, who represent the state, the defense counsels' role is to secure the best possible defense to their client, no matter if s/he is guilty or not. The innocence or guilt of their clients does not have an effect on their defense.<sup>25</sup> When they decide to defend their clients, they remain loyal to their clients and promise to protect them even if they are guilty. Under the United States adversarial criminal justice model, the prosecution and defense attorneys engage in a fair combat before an impartial jury. Although it may not always be guaranteed, the truth is to come out of the battle, as legal professionals indicate. This is the way the adversarial criminal justice works.

During the entire evidential phase, the members of the jury remain silent and pay attention to the evidence provided by the prosecution and defense witnesses. As soon as both parties have presented their cases, the jury members are instructed by the judge and retire to their room in order to deliberate. When they reach a unanimous decision, they issue the verdict. Subsequently, the judge passes the sentence and the trial comes to an end. The defendant may appeal against the sentence at an appellate court.

### **Social roles of the representatives of the legal professions during the evidential phase under Civil Law**

The social roles that the key partakers exercise during the criminal trial under Civil Law in Poland are governed by the procedural law in force in Poland, which governs the demeanor of the judge, prosecutor, attorney(s) for defense and lay assessors.<sup>26</sup> To start with, art. 365 of the Code of Penal Procedure sets forth that all the penal trials in Poland assume a verbal form. Under the Civil Law legal system in Poland, the judge assumes the role of the Chairman of the adjudicating panel during the criminal trial, who is responsible for examining the witnesses. Art. 366 § 1 of the Code of Penal Procedure provides that the Chairman conducts the trial and assures that its course remains correct, and all the relevant circumstances of the case, including the circumstances under which the crime was committed are explained. Following art. 366 § 2 of said code, the Chairman strives for the resolution of the case during the first meeting. Under the law in Poland, the judge is responsible for opening the evidential phase, which takes the following form:

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<sup>25</sup> Cf. del Carmen (2010, 392); Cole and Smith (2011, 249).

<sup>26</sup> Waltoś (2009, 19) defines the procedural law as a collection of legal norms regulating the penal trial. In Poland, as indicated earlier in Chapter 4, lay assessors participate in criminal trials only in the Regional Courts, they do not participate in criminal trials in District Courts.

Judge: The Court opens the evidential phase.

According to art. 385 § 1 of the Code of Penal Procedure, the evidential phase under the Civil Law legal system in Poland commences with reading by the prosecutor of the act of indictment. Section 2 of said article provides that in cases when the act of indictment is elongated, it is possible to introduce the charges against the defendant instead of reading the entire act of indictment. Section 3 of said article stipulates that in cases when the response was given to the act of indictment, the judge is required to inform all the persons in the courtroom about this fact and its contents. The Chairman announces that the prosecutor will read the act of indictment and instructs the defendant to stand up when the act of indictment is read:

Judge: Ms. Prosecutor.

Judge: Defendant, you are requested to stand up.

As soon as the act of indictment is read, the judge thanks the prosecutor for introducing the act of indictment. Subsequently, the judge takes the floor and asks the obligatory questions to the defendant to find out whether the defendant has understood the act of indictment:

Judge: Have you understood the act of indictment?

Defendant: Yes, I have.

If the defendant has not understood the act of indictment it is necessary to explain it to her/him, which is the responsibility of the prosecutor. If, however, the defendant has understood the act of indictment, then there is no such need (Waltoś 2009, 525). Next, The judge makes sure that the personal data included in the act of indictment are correct. Subsequently, following art. 386 § 1 of the Code of Penal Procedure, the Chairman instructs the defendant about her/his rights to provide explanations, to withhold from providing explanations or responses to questions, and then asks the defendant whether s/he understands the charges, and whether s/he pleads guilty or not guilty of committing the prohibited act, and next asks whether s/he wishes to give explanations and answer to the questions of the Court and the parties:

Judge: Do you understand the charges made against you?

Defendant: Yes, I do.

Judge: Do you plead guilty or not guilty?

Defendant: Guilty.

Judge: Do you wish to give explanations?

Defendant: No, I do not.

Judge: Do you wish to give answers to the questions of the Court and the parties?

Defendant: Yes, I do.

Subsequently the judge examines the defendant and witnesses. Under art. 175 § 1 of the Code of Penal Procedure, the defendant has the right to provide explanations as to the commitment of the prohibited act; the defendant may, without providing any

reasons, refuse to provide explanations and responses to questions; the defendant has to be instructed on this right. Pursuant to art. 171 § 1 of the Code of Penal Procedure, the Chairman is required to provide the defendant with the opportunity to give a free and unrestricted testimony. This article stipulates that the defendant may be asked questions to supplement her/his explanations only when s/he has finished her/his unrestricted testimony; such questions may be asked by the Chairman and both parties, but following art. 370 § 1 of the Code of Penal Procedure, the prosecutor enjoys the right to ask the questions to the defendant prior to the attorney for defense and experts.

As indicated above, in the examined case, the defendant refused to provide explanations, however, he consented to providing answers to the questions asked by the Chairman, prosecutor and his attorney for defense. In situations when defendants do not wish to provide explanations, the Chairman usually reads the explanations of the defendant given in the course of the preliminary proceedings to the prosecutor and subsequently begins to ask questions to the defendant to explicate the circumstances of the committed crime:

- Judge: As regards the first count/charge, do you confirm that the circumstances in which you committed the prohibited act were as described in the act of indictment?
- Defendant: I do.
- Judge: Did you threaten the plaintiff that you would physically injure him?
- Defendant: No, I did not threaten to physically injure him. I wish to correct my response. I threatened that I would hit him.
- Judge: Did you order victim<sub>2</sub> to give you his mobile phone?
- Defendant: Yes, I did.
- Judge: Did you order victim<sub>1</sub> to give you his earphones?
- Defendant: Yes, I did.
- Judge: Did you hit victim<sub>1</sub> and victim<sub>2</sub> on his face?
- Defendant: Yes, I did.

Under Civil Law in Poland, in criminal trials, the judge is responsible for the examination of the defendant prior to the prosecutor and the attorney for defense. In situations when all the possible supplementary questions have been asked by the Chairman, the prosecutor and the attorney for defense may or may not have any questions to ask of the defendant, especially if, in the course of the questioning conducted by the Chairman, all the circumstances of the committed prohibited act have been explained.

During the criminal trial under Civil Law in Poland, the judge is also in charge of questioning of other witnesses, who testify following the defendant.<sup>27</sup> Before the

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<sup>27</sup> Under art. 187 of the Code of Penal Procedure, witness may testify with or without being sworn in. Pursuant to art. 188 of the Code of Penal Procedure, the witness swears as follows: "Being conscious of the validity of my words and responsibility before the law, I hereby solemnly swear that I will tell the truth without keeping in secret anything that I am aware of."

judge begins the questioning of a witness, s/he is required under art. 191 § 1 of the Code of Penal Procedure to instruct the witness on the penal responsibility for providing untrue testimony or withholding the truth from the Court.<sup>28</sup> The Polish Code of Penal Procedure provides that the judge begins the questioning of the witness with questions on her/his personal data, such as forename, surname, age, profession, place of residence, prior criminal record for perjury or issued acts of indictment against her/him, as well as the relationship *vis a vis* the defendant:

Judge:           What is your name?  
Witness:        My name is X.  
Judge:           How old are you?  
Witness:        I am 52 years of age.  
Judge:           What is your profession?  
Witness:        I am a sales assistant and cashier.  
Judge:           What is your place of residence?  
Witness:        I live in B.  
Judge:           Are you related to the defendant?  
Witness:        No.  
Witness:        No.

Before the witness commences her explanations, the judge instructs witness, under art. 233 § 1 on the responsibility for providing false testimony and consequences of concealing the truth.<sup>29</sup> The witness may then give the unrestricted testimony under art. 171 § 1 of the Code of penal Procedure, and subsequently, as soon as the witness completes providing the testimony, prosecutor and attorney for defense may commence asking the supplementary questions in order to explicate any ambiguities in connection with the circumstances of the committed crime. The order of persons, who may pose questions to a witness is exactly the same as in the case of the defendant (cf. art. 170 § 1 of the Code of Penal Procedure).

The Chairman, who conducts the trial and who manages all the talk during the trial, frequently asks both the prosecution and defense whether they wish to submit any motions, or whether they wish to pose questions. The Chairman also questions the experts, who are called in to express their professional opinion on various issues.

During the penal trial under the Civil Law legal system in Poland, the social role of prosecutor is that of the public accuser, who introduces the act of indictment, which s/he has prepared during the preliminary proceedings conducted at the earlier stage of the criminal procedure. The act of indictment in the case selected for the analysis in this paper was as follows:

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<sup>28</sup> Pursuant to art. 191 § 2 of the Code of Penal Procedure, witness are required to sign a statement that they have been instructed on the penal responsibility during the preliminary proceedings, prior the case is brought to the Court.

<sup>29</sup> Art. 233§ 1of the Penal Code provides that whoever, in providing testimony, which is to serve as evidence in courtroom or other proceedings conducted on the basis of law, gives false testimony or conceals the truth shall be subject to penalty of deprivation of liberty for up to 3 years.

Prosecutor: I hereby accuse the defendant, son to X and Y, family name Z, born on January 21, 1994 in B., without a permanent place of residence, residing in B., at 10 X Street, Polish citizen, without a profession, financially dependent on his mother, without any persons financially dependent on him, with no children, no estate, with criminal record, punished for commitment of an act under art. 280 § 1 of Penal Code committed by him when he was under age, of committing a prohibited act on June 2, 2011 in B., in X street, at the junction with Y street, committed on a minor victim<sub>3</sub>, in such a manner that he threatened the victim to inflict injury to his body thus demanding from him the contents of his pockets; the defendant took with intention to misappropriate a packet of cigarettes make Viceroy and money in the amount of PLN 10.00, thus causing damage in the aggregate amount of PLN 20.00, i.e. I accuse the defendant of committing a prohibited act under art. 280 § 1 of Penal Code, and of the act committed on June 2, 2011 in B., in X street, at the junction with Y street, committed on a minor victim<sub>3</sub>, in such a manner that he threatened the victim to inflict injury to his body if he refused to bring and hand over to him a mobile telephone, but he did not achieve the attempted goal, because he was detained by the Police on June 3, 2011, i.e. of a prohibited act under art. 13 § 1 of the Penal Code in connection with art. 282 of the Penal Code.<sup>30</sup>

As soon as the act of indictment is read or the counts against the defendant are presented, the prosecutor informs all the persons in the courtroom that under art. 24 § 1 of the Code of Penal Procedure and in connection with art. 31 § 1 of the Code of Penal Procedure that this case is subject to examination by the District Court in B. in the ordinary procedure. Subsequently, the prosecutor provides the justification for the act of indictment:

Prosecutor: The Public Prosecution Office in B. supervised the proceedings in connection with a series of robberies committed by the defendant on victim<sub>1</sub>, victim<sub>2</sub> and victim<sub>3</sub>.

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<sup>30</sup> Art. 280 § 1 provides that whoever commits theft with the use of violence against a person by means of threatening the immediate use of violence or by causing a person to become unconscious or helpless shall be subject to penalty of deprivation of liberty for a term between 2 and 12 years. Art. 282 of the Penal Code stipulates that whoever with the intention of obtaining material benefit by using violence or threatening the life or health of a person or threatening a violent attack against the property causes another person to dispose of her/his own property or the property of others or causes a person to cease running their business, shall be subject to penalty of deprivation of liberty for a term of between 1 and 10 years. Art. 13 § 1 provides that whoever with the intention to commit a prohibited act directly attempts its commission by his conduct, which subsequently does not take place is held liable for an attempt.

The following facts were established as a result of the conducted investigation: witness<sub>3</sub> informed the Public Prosecution Office about a prohibited act – a robbery committed on her son victim<sub>3</sub> by the defendant with a prior criminal record, as a result of which, the victim lost the cigarettes and PLN 10.00. Witness<sub>3</sub> described the event pointing to the defendant as the perpetrator, indicating that the defendant also attempted to extort from him a mobile phone, which he was supposed to bring and hand over to the defendant some days afterwards. Similar testimony was given by witness<sub>1</sub>, victim<sub>1</sub>, witness<sub>2</sub> and victim<sub>2</sub>, who claimed that the defendant had committed similar offences against them; the defendant has a prior criminal record – he committed similar offences when he was under age. The Police, who conducted the search in the flat of the defendant found a mobile telephone make Nokia N73 and earphones, which were obtained by the defendant as a result of the committed prohibited acts. In connection with the facts established in the course of the investigation the defendant was charged with commitment of acts prohibited under art. 280 § 1 of the Penal Code in connection with art. 13 § 1 of the Penal Code and art. 282 of the Penal Code. The defendant was questioned and gave explanations in connection with the committed acts and admitted his guilt. The defendant has a criminal record at the Family Court, where he had been tried for commitment of similar acts prohibited under art. 280 § 1 of the Penal Code when he was under age. The material in connection with these acts was enclosed with the records for separate proceedings. The analysis of the evidence collected in connection with this case revealed that there is sufficient cause for the charges pressed against the defendant to be brought into Court. In connection with that, I hereby declare institution of the courtroom proceedings justified.

During the Polish penal trial, having introduced the act of indictment, the prosecutor may pose questions to defendant and witnesses, although such questions may only be asked following the explanations of defendant and the examination conducted by the Chairman, or following the testimony given by witnesses. The power of the Chairman in the courtroom over the public prosecutor and defense is unquestionable. Sometimes, when defendant has given extensive explanations in the preliminary proceedings during the investigation conducted by the prosecutor, the prosecutor does not have any more questions to be asked to the defendant during the trial.

The social role of the attorney for defense during the Polish criminal trial is to guarantee that the rights of defendant are upheld. S/he listens carefully to what is being



said during the entire trial and when the Chairman asks her/him if s/he has any questions to be asked to defendant or witnesses, s/he may do so provided that defendant has completed giving the explanations and the Chairman has no more supplementary questions to ask to him/her, and following the testimony given by witnesses and the completion of examination of a witness by the Chairman. It is not surprising for the attorney for defense not to pose any questions, if such need does not arise.

In the light of the above, the major responsibility for establishing the facts during the criminal trial under Civil Law in Poland lies in the hands of the Chairman, i.e. the impartial judge, who is vested with the judicial authority and responsibility to act not only in the interest of the victim(s), but also in the wider public interest. As such, the impartiality of the Polish judge as the manager of the courtroom discourse implies that s/he does not represent the interest of the prosecution or of the defense, her/his social role involves the search for the evidence, which either exculpates or inculpates the defendant establishing the truth by means of an independent investigation. In cases when defendant pleads guilty, as the defendant did in the analyzed case in this paper the judge is still required to go through the entire courtroom trial, providing explanation and answers to the questions posed by the Chairman, prosecutor and attorney for defense.

To summarize, the inquisitorial method of witness examination in a criminal trial distributes power in the courtroom primarily to the judge, not the opposing parties. The unique role of the judge entails conducting the investigation during the criminal trial and deciding about the guilt or innocence of the accused person. As such, the penal trial under Civil Law in Poland is comprised of unique stages, in which the major protagonists play unique social roles making the Polish penal trial an experience *suis generis*. The social roles played by the representatives of the legal professions in the American criminal trial vary from the social roles of the judge, counsels for the prosecution and defense in the Polish criminal trial.

### **Types of questions asked during the adversarial procedure of witness examination in a criminal trial under Common Law in the United States of America**

Research into American courtroom discourse indicates that in the American criminal trial the examination of witnesses phase accounts for as much as 91.9% of the entire time of the courtroom proceedings (Cotterill 2003, 127). On the other hand, the remainder of the stages of the evidential phase of a typical American criminal trial occupy significantly less time, e.g. jury selection takes up barely 2.7%, the opening statements of the prosecution and defense as little as 1.3%, the closing arguments of the two parties use only 1.4%, and jury deliberations absorb 2.7% proportions of time measured in days spent on each of the respective phases of the trial (Cotterill 2003, 127). This part of the paper addresses the types of questions asked by the counsels of prosecution and defense during direct examination and cross-examination of witness during a criminal trial. The analysis in this section is quantitative in nature and as such provides the numbers of questions asked by prosecution and defense, percentages of various types of questions used in the trial calculated with regard to the total amount of

particular type of questions, as well as with regard to all the questions asked by the prosecution and globally to the twenty four witnesses.

This section provides the analysis of the questions employed while obtaining the testimony from witnesses taken from the excerpts from the O. J. Simpson double murder trial, which encompass testimony given by fifteen witnesses summoned by the prosecution and eight witnesses called in by the defense. The analysis of the questions posed by the prosecution and defense to elicit testimony adopts the division of all the questions in the English language put forward by Quirk et al. (1985, 801-855). The numbers of the questions asked by the prosecution and defense are illustrated in two tables, the first of which contains all the questions asked in the direct examination and cross-examination to the prosecution witnesses, whereas the subsequent comprises all the questions posed in the direct examination and cross-examination to the defense witnesses.

The entire number of all the questions asked to the prosecution witnesses equals 4025. Of this number, prosecution asked 2270 questions (56%) and defense posed 1755 (44%) questions. The analysis of the questions posed by prosecution has shown that the most frequently asked questions to prosecution witnesses during direct examination were the Yes/No-questions, which prosecutors used as many as 990 (43.6%). The second most favored type of questions asked by prosecution during the direct examination were the wh-questions, which prosecutors used 781 (34.4%). The number of declarative questions used in the direct examination was considerably lower and amounted to 360 (15.8%). There were only 18 (0.79%) tag-questions posed in the direct examination of the prosecution witnesses, 9 (0.39%) alternative questions, 5 (0.22%) echo questions, and 107 (4.8%) of other types of questions, including rhetorical, exclamatory questions, or other utterances.

On the other hand, the most favored types of questions asked by defense lawyers during cross-examination of prosecution witnesses were the declarative questions, whose number amounted to 670 (38.2%). The second most favored type of questions during the cross-examination of prosecution witnesses constituted the Yes/No-questions, which the defense asked 604 (34.4%). The number of the wh-questions during cross-examination of prosecution witnesses dropped significantly to as few as 213 (12.1%), whereas the number of the tag-questions rose to 149 (8.5%). The number of alternative questions during the cross-examination was equal to that during the examination-in-chief and amounted to 5 (0.3%). But, the number of echo-questions during the cross-examination augmented to 35 (2%). Finally, the number of other types of questions or other utterances equaled 79 (4.5%).

The investigation of the types of questions preferred during the direct examination and cross-examination of witnesses has been confirmed by the study of the questions asked to the defense witnesses. The total number of all the questions asked to defense witnesses declined in comparison with the total number of questions asked to the prosecution witnesses and amounted to 1081 questions. Of that number, the defense asked 609 (56%) of the questions to their witnesses during the examination-in-chief, while the prosecution asked 472 (44%) of the overall number of questions asked to the defense witnesses. Similarly to the direct examination of the

prosecution witnesses, the most preferred type of questions asked to the friendly witnesses by the defense lawyers were the Yes/No-questions, which they posed as many as 288 (47.3%). Again, the wh-questions were the second most favored type of questions, which the defense used 146 (23.0%) times. The defense lawyers asked 120 (19.7%) declarative questions. The number of tag-questions decreased to 20 (3.3%), so did the number of the alternative questions, which dropped to 1 (0.2%). The defense lawyers used no echo-questions in the direct examination of witnesses. Other types of questions and other utterances reached the number of 34 (5.6%). During the cross-examination of the defense witnesses the prosecution favored the declarative form of questions of which they applied as many as 234 (49.6%) times. The number of the Yes/No-questions during the cross-examination attained a significantly lower level of 132 (28%). The number of wh-questions plummeted to as few as 39 (8.3%). The number of the tag-questions was surprisingly low and equaled 37 (7.8%). The prosecution chose not to employ the alternative type of questions. There were only 3 (0.6%) echo-questions used in the cross-examination. Other types of questions and other utterances reached the number of 27 (5.7%).

When summarized, all the questions asked of the twenty three witnesses subpoenaed to testify in this particular criminal trial, the total number of questions asked to the prosecution and defense witnesses in direct and cross-examinations equals 5106. Of this number, the total amount of the Yes/No-questions accounts for 39.4% (2014). This figure appears to confirm the hitherto findings that the overwhelming majority of questions asked in the American criminal trials constitute the Yes/No-questions, otherwise known as closed questions, which restrict the contribution that witnesses may make towards the reconstruction of the reality of the crime. Following Quirk et al. (1985: 806), the Yes/No-questions are such questions that expect affirmation or negation to what the speaker says. Usually formed by placing the operator before the subject and giving the sentence the rising intonation (Quirk et al. 1985: 807-808). The Yes/No-questions may take positive or negative forms (Quirk et al. 1985: 807-807). When the Yes/No-questions include nonassertive forms, such as *any* or *ever*, they form neutral forms of questions devoid of any partiality or prejudice, as is the case in the following example: "Did *anyone* call last night?" However, the Yes/No-questions may also point to the preferred or expected form of response from a witness, as is the case in the example: "Did *someone* call last night?" Strategic selection of either of the above forms means that lawyers may deliberately employ either of the two forms to elicit a desired response, thus, restricting the contribution of the witnesses to the desired form of reply. In other words, lawyers appear to be in possession of tools that allow them to maneuver the feedback from the witnesses that they summon to testify and exercise control over the witnesses, making them say whatever they wish the jury to hear so that the jury form a favorable judgment to them.

The quantitative analysis of questions used in the criminal trial indicates that the use of the wh-questions, otherwise known as the open questions, is radically lower in comparison with the closed Yes/No-questions and accounts for 23% (1179) of the entire number of questions asked in the course of the courtroom proceedings. The analysis of the incidence of the wh-questions in the direct and cross-examination of witnesses appears to prove that lawyers for the prosecution and defense favor the wh-

questions during direct examination of the witnesses. The number of the wh-questions used in direct examination overwhelmingly exceeds the number of the wh-questions used in the cross-examination of witnesses and equals respectively 18.1% (927) and 4.9% (252). Such distribution of the wh-questions may be credited to the fact that during direct examination of witnesses lawyers want to obtain as much detailed information about what happened, who they saw, when and where it took place, why, how many times, while examining a friendly witness. Since direct examination involves the examination of non-hostile witnesses, lawyers do not fear to ask open questions to them, because they know that these witnesses will not provide any incriminating testimony, so they may give their witnesses a certain degree of freedom of expression. Thanks to asking such detailed questions, lawyers for prosecution and defense may create the story of the crime, as well as elucidate any uncertainty of particular deeds or facts of the case. By asking the wh-questions lawyers do not hold as much power as they do when they ask the Yes/No-questions, which restrict the contribution of the witnesses.

Further analysis of the data indicates that lawyers have a penchant for the use of declarative questions during cross-examination of witnesses, which is confirmed by the following figures: the number of the declarative questions in the entire trial accounts for 27 % (1384). Of this number only 34.6% (480) were asked in direct examination and as much as 65.3% (904) in cross-examination of witnesses. Quirk et al. (1985, 814) assert that the declarative questions resemble declarative sentences, except for the final rising question intonation. Declarative questions are conducive questions, i.e. they encourage the listener to verify whatever is said, and as such they bear a resemblance to tag questions (Quirk et al. 1985, 814). Lawyers appear to favor them during cross-examination for reasons that they invite the hearer to confirm what the speaker says (Quirk et al. 1985, 814). Lawyers are not allowed to contribute themselves to creating the narrative of the crime story, however, they deliberately ask their witnesses the declarative questions so that the witnesses confirm what the lawyers claim had happened and speak for them.

As concerns the tag questions, they account for 4.38% (224) of the entire number of questions asked to the witnesses, which indicates that these types of questions are not very popular in the criminal trials, and this appears to validate the hitherto findings. Their distribution in direct examination is significantly lower, i.e. 1.7% (38) of all the Tag-questions asked in comparison with the number of tag-questions employed in the cross-examination, whereby they account for 83% (186) of all the Tag-questions asked in the trial. They appear to occur more frequently when the hostile witnesses are examined, owing to the fact that they are highly conducive (Quirk et al. 1985, 810). This study seems to confirm the previous research, which observed that the Tag-questions were usually used to pounce upon the hostile witness; as such Tag-questions may be deemed as one of the ways employed for the purpose of damaging the credibility of the witnesses' testimony.

Lawyers do not seem to favor the Alternative-questions, which account for as little as 0.2% (15) of the entire number of questions asked. Quirk et al. (1985, 823) claim that there are two types of Alternative-questions, one type resembles the Yes/No

questions, as is the case in the following example: “Would you like chocolate, vanilla or strawberry (ice-cream)?, and another type resembles the wh-questions, as in the following example: “Which ice-cream would you like? Chocolate, Vanilla or Strawberry?” Quirk et al. (1985, 823) explain that the first sentence varies from the Yes/No-question only in intonation, i.e. instead of the final rising tone, it contains a rise on each item except for the last item, where there intonation falls. Quirk et al. (1985, 823) claim that the difference in intonation may lead to a misunderstanding, for this reason, it is very likely that these types of questions are used for the purposes of confusing the witnesses in addition to other methods, such as building complex sentences, which has been addressed in the preceding chapter.

Echo-questions, which account for 0.8% (43) of the total number of questions asked to the witnesses, appear to be favored during cross-examination of witnesses, where they account for 88.3% (38) of all the Echo-questions asked in contrast to direct examination, where they account for as little as 11.7 % (5) of the entire number of the Echo-questions. Quirk et al. (1985, 835-837) explain that the echo questions may take the form of (1) Recapitulatory Echo-questions, which repeat part of or all of a message as a way of having it confirmed, and (2) Explicatory Echo-questions, which ask for clarification rather than repetition of something said. The Recapitulatory Echo-questions may be used strategically to reiterate certain words, expressions or utterances for various purposes, such as summarizing of the testimony, emphasizing certain words, expressions or utterances, sneering certain words, expressions or utterances from the testimony.

The remaining types of questions applied were: rhetorical questions, exclamations and other irregular types of questions, which account for 4.83% (247) of the entire questions asked. Their distribution appears to be higher in the direct examination, whereby they constitute 57% (141) of their total number in the trial in contrast to 43% in the cross-examination.

### **Types of questions used during the inquisitorial procedure of witness examination in a criminal trial under Civil Law in Poland**

As indicated earlier in this paper, the evidential phase of the Polish criminal trial encompasses in its contents two fundamental stages: (1) the free and unrestricted explanation of defendant, or the free and unrestricted testimony of other witnesses in response to the Chairman’s question “What do you know in connection with this case?” and (2) the supplementary questions asked to witnesses in order to dispel any ambiguities asked by the Chairman, prosecutor, attorney for defense and experts. Such structural organization of the procedure of witness examination profoundly affects the number and types of questions asked to the witnesses.

The examination of the defendant and witnesses commences with the question “What do you know in connection with the committed crime?” Such a form of the question enables both defendant, as well as other witnesses during the criminal trial to provide a free and unrestricted answer to the question through which, they may inform the Chairman conducting the examination about all the necessary facts and details

pertaining to the committed crime. No objection is ever raised with regard to the length of the answer, while defendant or witnesses explain the circumstances of the committed crime. Answers to such a question appear to be generally elongated and consist of more than one sentence with all the professional participants listening carefully to what is being said. Detailed questions may be posed after defendant or other witnesses have completed their account of the events. Such a form of the examination of defendant and witnesses, where the defendant and witnesses do not have to wait for another question to be asked to say all that they know in connection with the committed crime affects profoundly the number of questions posed in the entire trial, which is not very high.

The total number of all the questions asked in the selected Polish criminal trial amounts to 283. The types of questions, which the Chairman, prosecutor, attorney for defense and experts ask are the Yes/No-questions and wh-questions. The Code of Penal Procedure prohibits asking leading questions in the examination of witnesses. Of this number, the Chairman, prosecutor, attorney for defense and experts asked 155 Yes/No-questions, which constituted 54.8% of the entire number of questions asked in the Polish penal trial. The remainder questions asked to the defendant and witnesses were the wh-questions, which the Chairman, prosecutor, attorney for defense and experts posed in the amount of 128, i.e. 45.2% of the entire number of questions asked during the Polish criminal trial.

There is no sharp difference between the number of Yes/No-questions and wh-questions, which indicates that both types of questions are used almost on equal terms during the interrogation of witnesses. The study seems to indicate that there are no special techniques in which certain types of questions are preferred over others during the examination of witnesses. The Chairman, prosecutor, attorney for defense and experts use either of the two types of questions without any special predilection, except for the fact that no other types of questions have been employed. As a matter of fact, the difference in the number between of the two types of questions is very small and amounts to 5%.

In the light of the above results, the Chairman, i.e. the judge is the most active professional participant during the Polish criminal trial, whereas the attorney for defense, experts and prosecutor, who asked fewer questions, accompany the judge in the procedure examining the defendant and witnesses. The findings of the study indicate that attorney for defense is the second most active partaker during the criminal trial. In this particular trial, the prosecutor had already interrogated defendant in the preliminary proceedings, which is why he did not have to examine defendant during the trial. Neither did the experts. On the other hand, the attorney for defense took active part in defending the accused person by means of posing questions to various witnesses and experts.

Quantitative analysis of the questions asked to defendant and witnesses proved that the major purpose of the examination of defendant and witnesses is to find out the substantive truth and facts associated with the committed crimes. Both defendant and other witnesses were allowed to explain and testify all that they knew, first in the free and unrestricted part of the examination and secondly during the phase when

supplementary questions were asked. None of the professional participants appear to favor any type of questions while examining the defendant or witnesses, and no leading questions are permitted during the interrogation of witnesses in Poland.

### **Concluding remarks**

Translational competence of court interpreters is extremely relevant in order to guarantee a fair trial to defendants and suspects, which they enjoy under international law. Due to obvious limitations, this paper has only addressed one constituent of translational competence, namely the textual, or discourse competence of court interpreters with particular attention to: (1) structural organization of the adversarial and inquisitorial procedures of witness examination; (2) social roles of the major representatives of the legal professions partaking in the criminal trials under Common Law and Civil Law in the United States of American and Poland respectively; and (3) types of questions used during the examination of witnesses in criminal trials under the mentioned legal systems. All these components of courtroom discourse, in addition to others, not addressed in this paper and provided by Bednarek (2014), constitute a fundamental integral part of the necessary knowledge, which court interpreters should update owing to the introduction of the Directive 2010/64/EU of the Parliament and of the Council of 20 October 2010. This knowledge, court interpreters will employ, when they are called in to participate in the court proceedings associated with committing a crime under new conditions, namely across the borders and across the legal systems for the benefit a fair and due legal trial.

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