"If It May Please the Court": Analyzing the Use of Rhetorical Elements in Courtroom Opening Statements

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Despite all of the research done on the influence of intertextuality, word choice, formatting, and the presentation of the speaker on opening statements in a courtroom, we still do not know which components of these statements are the most important, from a rhetorical perspective, for lower and appellate courts, respectively. My research studied opening statements from both lower and appellate court cases and simultaneously compared the aforementioned components in each. My analysis of these opening statements finds that categories which have been deemed important in existing discussions of opening statements are truly impactful, and yields some insight into what exactly makes each type of opening statement effective.

When presenting a case in a courtroom, lawyers prepare oral arguments to help convey their stances to the audience. An important factor in helping frame the case a certain way from the start is a well-formulated opening statement. Within an opening statement, a lawyer gives a brief overview of the facts of the case, provides the jury or judges with a basic understanding of what is to come, and creates interest in the matter at hand. Most importantly, the opening statement is a chance to appeal to the audience in an attempt to guide them toward the desired conclusion. As such, opening statements can be seen as one of the most important genres of the legal field because they are a lawyer's opportunity to make a good first impression and begin influencing the audience's mindset. All genres, not just opening statements, are critical in discourse communities because they serve as a means of communication and a way to provide direction for thought processes or actions. Genres are "patterned, typical, and therefore intelligible textual forms" that use language to convey the social facts that an author intends to share with their audience (Bazerman 311). However, as Charles Bazerman asserts, "the role of individuals in using and making meaning" is also an important component of genre (317). This is especially important to keep in mind when considering the legal field because interpreting the evidence and facts at hand to make oral arguments, which include opening statements, is a significant part of lawyers' work.

Furthermore, as is the case for any communicator, it is important that lawyers consider their rhetorical situation when creating opening statements. For example, lawyers usually address either a panel of jurors in a district court or a panel of judges in an appellate court. A district court is a general trial court where both criminal and civil cases are handled, but any challenges to district court decisions are heard in

appellate courts. In a district court, lawyers might not want to make many quick references to laws and precedents without further explanation because the jurors probably would not know previous case law and the lawyers would not want to alienate audience members. However, when lawyers present opening statements in an appellate court, the judges would definitely be familiar with existing laws and precedents due to their research and experience, so lawyers could quickly and briefly reference them.

By analyzing the rhetorical elements of opening statements, such as references to previous case law, and their rhetorical situations, we can better understand what makes an opening statement successful. A successful opening statement is one whose rhetorical elements establish a good foundation for a lawyer's argument while also creating a lasting first impression that shapes how the jurors and judges will view everything else the lawyer says. The purpose of my research, therefore, is to find out which rhetorical elements lawyers use most often to accomplish that goal within district and appellate courts. With these findings, methods of better utilizing the most frequently used rhetorical elements can be considered. In this article, I analyze rhetorical elements in opening statements from both district and appellate court statements and compared their frequency of use. My findings illustrate and highlight the ways in which lawyers alter their use of commonly used rhetorical elements in opening statements to respond to courtroom situations in district and appellate courts.

Review of Literature

Many researchers have already conducted studies to analyze different rhetorical elements of opening statements. Some of these researchers have concluded that diction is important in opening statements because it can help set the tone of an argument and prevent audience misinterpretations (Chaemsaithong; Devitt, Bawarshi, and Reiff; Hobbs). Research also has shown that the organization of an opening statement is impactful because whether the audience is a panel of judges or a jury, there are ways to organize statements to help set a good foundation in terms of establishing tone to be used to effectively frame and relay sufficient information for optimal audience reception (Goodwin; Spiecker and Worthington; Brook). Intertextuality is also important because of the differing levels of legal knowledge between a jury and judges (Porter; Stolk). Other studies have examined the spoken aspect of opening statements and determined that the speaker's presentation and performance are just as important as the written words (Chaemsaithong; Hobbs). In this section, I review this literature to demonstrate how different rhetorical elements in opening statements can influence audience members' perspectives.

When delivering an opening statement, lawyers' language styling—from how they explain details of the case to their use of pronouns—can make all the difference in framing the jurors' mindset for the rest of the proceedings (Chaemsaithong, "Interactive" and "Positioning"; Devitt, Bawarshi, and Reiff; Hobbs). In his research that included both prosecutors' opening statements from trials between 1759 and 1789 and district court cases presented in front of juries in the early 2000s, Krisda Chaemsaithong argues that interactive devices, pronouns, attitude markers, questions, and reported discourse are important in framing the situation. Specifically, Chaemsaithong asserts that the manipulation

of pronouns simultaneously creates a "shared identity" with jurors while establishing authority. Devitt, Bawarshi, and Reiff, who studied juror instructions given in district courts in order to help outsiders make educated rulings, suggest that since legal discourse is complex, lawyers' ability to carefully explain specialist language to non-legal specialists in arguments (and especially juror instructions) is important because the language lawyers use needs to be understandable to make a trial fair for those being prosecuted. In her comparison of an opening statement from a district court murder trial to "similar presentations delivered by celebrated attorneys," Pamela Hobbs agrees with these findings by concluding that demonstrating a command of "the legal voice," which includes using legal and authoritative language effectively, is important for showing an audience credibility and knowledge in the subject (232, 246).

Even if someone believes that a lawyer's use of language seems credible, legal discourse, just like any specialized discourse, can be difficult for outsiders of the legal community to utilize or even understand (Hobbs; Devitt, Bawarshi, and Reiff). As Hobbs writes, a criminal defendant's ability to reproduce the form of the opening statement but failure to reproduce the accompanying legal voice when representing himself "illustrate[s] the complex relationship between speech, interaction, and context that characterizes human communication and that the field of critical discourse analysis seeks to explore" (246). Additionally, Hobbs stresses the importance of district court lawyers' persuasive phrasing in their performance because lawyers must "command the attention of [one's] hearers" and, thus, make their statements understandable for those outside of the legal community (231). Devitt, Bawarshi, and Reiff agree with this idea, noting that many words in the legal community have different meanings and weights in common language that can influence how juries act.

Along with language styling, the organization of an opening statement also can have an effect on audiences' mindset (Brook; Spiecker and Worthington; Goodwin). Sanford M. Brook outlines the dos and don'ts of creating an opening statement and discusses the statement's importance, goals, and limitations, which are all essential to consider when organizing. Furthermore, Shelby C. Spiecker and Debra L. Worthington conducted a study to show how the organization and structure of opening and closing statements contribute to their effectiveness in district court trials. Spiecker and Worthington specifically examine two different organizational structures: narrative and legal-expository. They find that both the plaintiff's and defense's presentations can benefit from using the legal-expository structure to "[delineate] the legal elements and judicial instructions governing the case" and interpret how evidence either meets or fails to meet those criteria (453). Jill T. Goodwin only examines the narrative model of opening statements for a district court case, but she suggests that the textual structures' functions can help sway the audience because they are "features of the power (social semiotic) and persuasive relationship (rhetoric) between lawyer and jury," so employing different structures to frame information differently can help shape audience members' mindsets (n. pag.).

Both narrative and legal-expository opening statements are likely to contain instances of intertextuality, whether they surface in the forms of easily recognizable commonplaces or

legal precedents. Legal documents in general are particularly rich with examples of intertextuality because of their dependence on past ideas like laws that have been passed and precedents that have been set (Porter; Stolk). James E. Porter writes that "every discourse is composed of 'traces', pieces of other texts that help constitute its meaning" (34). He further asserts that even the Declaration of Independence, a landmark legal document, was not written solely by Thomas Jefferson, as he was "an effective borrower of traces" (36). By using "traces," lawyers can refer to texts that are familiar to the audience to support their position. By building this foundation, the audience has additional context to base their conclusions on. Sofia Stolk agrees that this idea is true at an international level, stating that when comparing opening statements from the International Military Tribunal, the Special Court for Sierra Leone, and the International Criminal Court, there was a theme of intertextuality in the form of the use of "auto-histories" or the tribunals' own histories within opening statements to justify trials from the beginning.

Although opening statements start on paper, the verbal delivery and performance of the speech also can influence the audience (Bazerman; Chaemsaithong, "Dramatic"; Hobbs). Charles Bazerman asserts that spoken interactions are important to observe because in such situations, when analyzing speech acts on three levels—what was actually said, what the intended speech act was, and the resulting effect—the amount of misunderstanding and lack of coordination in actions is more evident. Bazerman goes on to suggest that "the lack of coordination [of actions] is potentially much worse when we are communicating by writing, for we cannot see each other's gestures and mood, nor can we immediately see the other's uptake in a perlocutionary effect that does not match our illocutionary intent" (315–16), meaning we are usually unable to fix any damage done by written statements, while we are better and more quickly able to when statements are made in person. Since opening statements are delivered orally in front of an audience, it is easier for lawyers to play off of the audience's reactions. For example, if a sentence or tactic wasn't well received by audience members, the lawyer could recognize that based on facial expressions, body language, or even verbal rebuttal from a judge, and try to win back the audience to their side.

After conducting his own research on the spoken aspect of district court opening statements from the early 2000s, Chaemsaithong concludes that lawyers take on three discursive roles while presenting opening statements—the storyteller, the interlocutor, and the animator—and they manipulate each differently to lead jurors to think a certain way and act accordingly. Chaemsaithong asserts that lawyers shift between each of those roles in order to strategically "bypass the legal requirement that the lawyer refrain from using overt evaluation and persuasion" (779). By manipulating each role in different parts of their opening statements, lawyers can get all their information across by framing parts as an animator who is painting the picture with others' statements, a storyteller who interjects her or his own stance and uses evaluative devices to continue the story, and an interlocutor who "[invites] the jurors to share their stance and direct their attention to specific aspects of the narratives" (779). Hobbs agrees with this statement, as she sought to "demonstrate that language has its limits, and that the speaker's personality and identity are key factors in determining

how a verbal presentation will be received" (231). In her analysis of an opening statement delivered by a suspected murderer who was acting as his own lawyer, Hobbs finds that while the defendant was able to put together an opening statement well, he could not use the "legal voice" effectively in his speech and in the given context, so the verbal presentation did not work as he had hoped (246).

Each of these researchers studied different rhetorical elements of opening statements in an effort to determine the elements' influence on audiences. While this research has focused on the influence of language styling, organization, intertextuality, and the presentation of the speaker on opening statements independently, there has not been much research conducted comparing the importance of the elements' influence in relation to one another. Given that there is a lack of research on comparison of the rhetorical elements of opening statements, this paper compares the prevalence of these elements to better understand which components are used most frequently to convey lawyers' positions within their opening statements for district and appellate courts.

Methods

To determine which of the four rhetorical elements identified above—language styling, organization, intertextuality, and the presentation of the speaker—are used most often in opening statements for district and appellate courts, I examined eight opening statements: one from each side represented in four court cases, each concerning murders. Specifically, I conducted textual analysis on opening statements from two district court cases (*State of Texas v. Cameron Todd Willingham* and *State of Texas v. Darlie Lynn Routier*) and two from appellate courts *(Emilia Carr v. State of Florida* and *Ana Maria Cardona v. State of Florida*). I color-coded the court transcripts to identify instances of intertextuality, language styling, organization, and speaker presentation. Language styling was broken into five subcategories: imperative sentences (yellow), interrogative sentences (pink), pathos (lime green), logos (red), and switches between singular and plural pronouns (light blue). While I identify pathos and logos as language styling, I did not create a category for ethos here since I aligned ethos with the "presentation of the speaker" category, given that they both relate to establishing credibility. Organization was narrowed into two categories: narrative (blue) and legal expository (green). Instances of intertextuality were highlighted in orange, and those of speaker presentation, which included instances of lawyers attempting to sway the audience with personal interjections, were highlighted in purple. A spreadsheet was compiled using the coded data. From this, the data from each case were compiled into the pie charts included in this article.

One significant limitation of my study is the sample size. I was able to easily locate only four opening statements because court transcripts are not usually free to the public, nor are they very easily accessible, especially for district courts. Many of the usable databases only allow users to search for transcripts by case number or even more vague terms like last name or general type of case (like "criminal felony" or "traffic citation"), making it difficult to find similar cases. Given this limitation, future researchers would want to consider these issues with locating opening statements to collect and analyze a larger sample size. Additionally, the amount of text available to code was

limited due to the varying lengths of the opening statements within my sample, so there were sometimes very few instances to be coded. The matter of statement length affecting the research is particularly evident in the analysis of appellate court opening statements because the judges can interrupt the lawyers at any point, redirecting or cutting the opening statements short. Still, I believe that two opening statements from each type of court provide enough data for some preliminary observations.

Results

After reading each opening statement and coding the categories I outlined above, I found that language styling was the most used of the rhetorical elements in district court opening statements, as seen in Figures 1 and 2. In the case of *State of Texas v. Cameron Todd Willingham*, I found that 70 percent of the coded text fell under one of the five language styling subcategories. Similarly, in *State of Texas v. Darlie Lynn Routier*, the majority of the text (20 of 36 items coded or about 56 percent) was language styling. For these cases, the lawyers specifically frequently employed pathos, with sentences like "We believe the evidence will show that he stood by and he did nothing as the heat and the flames and the smoke killed those three children" (*Texas v. Willingham* 9) and "Darlie Lynn Routier, and no other person, is the individual who stabbed and murdered her own children as they lay sleeping in their own home on June 6th, 1996" (*Texas v. Routier* 31). The use of pathos was especially prevalent in *Texas v. Routier*; a perfect example is "You will see a lot of things, unfortunately, that are going to be very graphic. And I'm just going to apologize in advance for that" (40).

Figure 1
State of Texas v. Cameron Todd Willingham

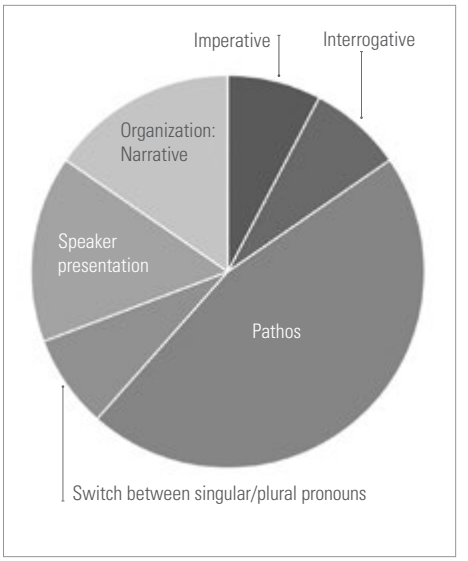
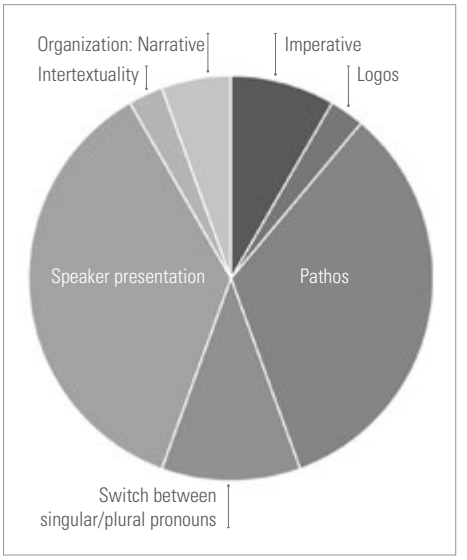


Figure 2
State of Texas v. Darlie Lynn Routier



Speaker presentation was the second most used element coded in the district court opening statements. In *Texas v. Routier*, this category accounted for 36 percent of the text analyzed. Despite the smaller amount of content to code in *Texas v. Willingham*, 15 percent of the text available was instances of speaker presentation. The two uses of speaker presentation in *Texas v. Willingham* demonstrated the types I coded for. One type was instances where the lawyer interjected their own views, like in saying, "Every time I hear described to me the State's theory of what happened—and it is a theory; no one knows for certain; it is a theory that they propose to you—it makes me shudder. It truly does" (*Texas v. Willingham 10*). The other type I included was instances where the lawyer tried to personalize those involved in the case with statements such as, "this 24-year-old father of three poured a flammable liquid throughout his house and set it on fire to murder his three infant children" (*Texas v. Willingham 11*). In *Texas v. Routier*, the lawyers only used speaker presentation to interject their views two times out of the total of 13 accounted for.

Within the set of district court opening statements, I only found one instance of intertextuality. In *Texas v. Routier*, attorney for the defense Mr. Mosty said, "The State's case that Mr. Davis has described, and will present, is not what the evidence will show they were focusing on back in June, because the June investigation has fallen apart" (48). By referring to an investigation without any context, the statement contains a reference to information about a prior investigation. However, I did find that the opening statements for both the defense and prosecution in both cases followed the narrative organization. By using this organizational model, the lawyers laid out the facts of the case as a story so that the audience of jurors would be familiar with the situation and follow along easily.

As seen in Figures 3 and 4, the results yielded from coding opening statements from the appellate court cases of *Emilia Carr v. State of Florida* and *Ana Maria Cardona v. State of Florida* did not mirror one another as closely as the district court results. While language styling methods were employed the most in *Carr v. Florida* (45 percent), they only accounted for 36 percent of the text coded in *Cardona v. Florida*. The lawyers in both of these cases depended mostly on the language styling element of logos when speaking before a panel of judges. In *Carr v. Florida*, references were made to the "bare majority" (1) by which Ms. Carr was sentenced to death and the notion of wanting to order sentences as soon as possible so a judge "has everything fresh" (21). However, in *Cardona v. Florida*, logos was used to address missing information, with statements such as "Ms. Cardona's defense was that Olivia Gonzalez was more responsible for the injuries of the child and inflicted the blow with the baseball bat which resulted in the death of the child. The suppression of that was highly material to Ms. Cardona's defense at a number of various areas." (1).

In the case of *Cardona v. Florida*, instances of intertextuality dominated instead, accounting for 46 percent of the text coded, while yielding only a 22 percent rate in *Carr v. Florida*. The lawyers involved in *Cardona v. Florida* made references to "a 3.850 appeal on habeas corpus" (1) and "the Brady issue" (5). The lawyers of *Carr v. Florida* did provide less text to code but made a few references without context by saying things like, "And so it's prudent for that judge to file that sentencing order as

Figure 3
Emilia Carr v. State of Florida

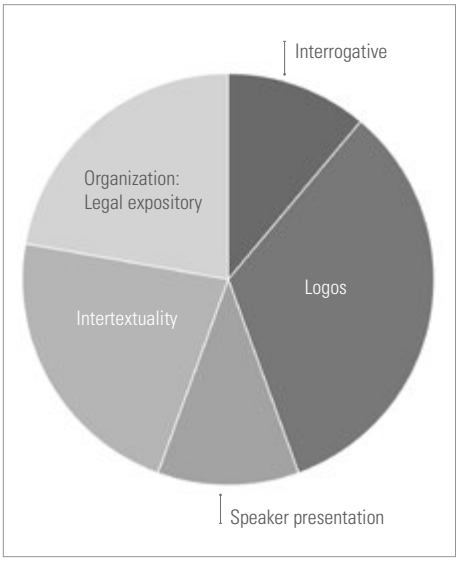
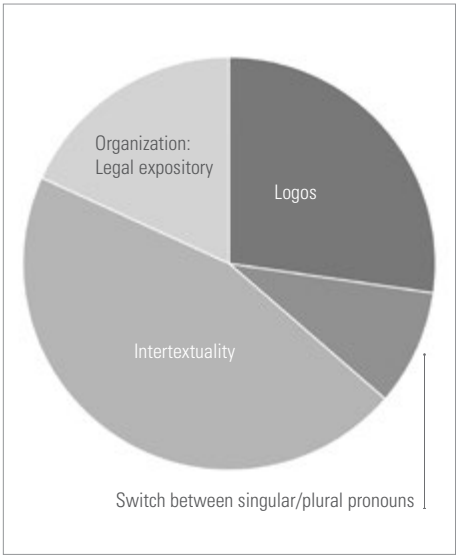


Figure 4
Ana Maria Cardona v. State of Florida



soon as possible after both the penalty phase and the Spencer hearing" (21).

Among the appellate court opening statements coded, only one instance of speaker presentation was found. In *Carr v. Florida*, Carr's lawyer claimed to the judges that, "In Ms. Carr's trial, Mr. King—the state attorney—made Ms. Carr the mastermind of the murder, and she was the manipulator of Mr. Fulgham" (1). This attempt to personalize Ms. Carr and paint a picture of how she was portrayed previously was not repeated by the opposing side or replicated in the case of *Cardona v. Florida*. However, the appellate court cases' opening statements did all follow the legal-expository organization. Through their use of the legal-expository model, the lawyers focused on the precedents and laws rather than providing background and explanation of the case.

Discussion

As detailed above, my analysis revealed differences in the elements of organization, speaker presentation, and intertextuality in opening statements for district and appellate courts. My analysis also uncovered one significant similarity: the element of language styling within the opening statements was used most often in both the district and appellate court cases. In this section, I discuss each of the rhetorical elements so that the workings of opening statements for both district and appellate courts can be better understood.

Starting with organization, the fact that the appellate court opening statements were all written in legal expository structure is reasonable. This organization, according to Spiecker and Worthington, is "identified by the delineation of the judicial instructions and legal elements governing the dispute, accompanied by a preview in the opening

statement or summary in the closing argument of why the evidence in the case either supports or refutes the applicable law" (440). In appellate court hearings, the judges must read the district court documents beforehand and are, therefore, made familiar with the facts and related laws, so the lawyers can structure their opening statements—and their entire arguments—solely on the judicial elements. In district courts, by contrast, jury members need to be informed of the facts of the case and the crime at hand, so lawyers use their opening statements to tell the story from a particular perspective. This is supported by my finding that the opening statements of the district courts followed a narrative organization. By using the narrative organization when speaking to jurors and the legal expository organization when speaking to judges, lawyers "[follow] communicative patterns that other people are familiar with, [so the audience] may recognize more easily what [they] are trying to accomplish" (Bazerman 316). In doing this, lawyers use organizations that each audience will recognize while still including the information about the case that each audience needs, which may elicit audience reactions in their favor.

In addition to different organizational methods, district and appellate court opening statements varied in their use of speaker presentation. Speaker presentation was more prevalent in district courts than appellate courts most likely because it allows lawyers to explain who they are or who the participants of the cases are. Doing this can make either the lawyers themselves or those involved in the case likable or dislikable in the jurors' eyes because they have more background information to formulate judgments or, in the case of a lawyer, to ascertain whether or not they seem like a person who they trust and whose views they would like to support. In an appellate court setting, speaker presentation was not as common because it is not necessary for a lawyer to interject anything about their personal beliefs or the people involved in the case. The judges are more concerned about the relevant legal facts in relation to a ruling rather than any personal information. Furthermore, lawyers need to be succinct, since judges chime in with their own questions throughout opening statements.

The district and appellate court lawyers' opening statements differed in usage of intertextuality as well. While coding the opening statements from the district court, intertextuality was only used to refer to a previous investigation. However, in the appellate court opening statements, examples of legal terms were quickly incorporated without explanation. The difference in types of references made can also be attributed to the types of audiences that were present in each situation. Within the appellate court, the audience was a panel of judges. Since these judges are seasoned and educated members of the legal field, they understand the terms used by lawyers without additional explanation. Had those lawyers used the same legal terms in a district court, they would have had to explain what the legal precedents are because the jurors are likely not members of the legal community.

My findings indicated that language styling was dominant in both of the district court cases coded, and—surprisingly—also one of the appellate court cases (*Carr v. Florida*). In district courts, lawyers are speaking to an audience of jurors. The lawyers' need to appeal to the jurors, who are most likely not familiar with the legal field, yields a more careful choice of wording and explanations of the facts. Appeals to pathos

appeared to be the most common of the language styling techniques used in *Texas v. Willingham* and *Texas v. Routier*, while logos was most common in *Carr v. Florida* and *Cardona v. Florida*. By relating to jurors on an emotional level and judges on a logical level and combining those tactics with other language styling methods, lawyers attempted to explain their positions and make them seem more reasonable.

Finding that only one of the appellate court cases yielded results showing the prominence of intertextuality within its opening statements was unexpected. These results came as a surprise given that since an appellate court's panel of judges are already familiar with laws and precedents, lawyers presenting their opening statements in this setting would be more inclined to employ more intertextuality by making more references to past cases and laws to explain why a ruling should be overturned than to employ a lot of language styling elements, as they would to paint a picture for the audience of jurors. In *Cardona v. Florida*, intertextuality accounted for a majority of the instances coded. In *Carr v. State*, there were twice as many instances of language styling as intertextuality, but in *Cardona v. State*, there was only one more instance of intertextuality than language styling. This difference can be attributed to the lack of text in appellate court cases, but if the results from both cases are combined, most of the instances fall under the language styling category.

Based on this information, the data seem to indicate that language styling is the most important component to manipulate in appellate courts as well. This finding is important because it shows that there can be differences in formulating opening statements; lawyers do their best to employ different rhetorical elements to effectively combat what they think their opponent will say or has already said, and that could involve different combinations and frequencies at different times. However, it is worth noting that language styling subcategories accounted for over half of the codes used and there was less text to code in these samples, which helps contribute to its dominance of the coding results overall.

Conclusion

My findings demonstrate that language styling was the most frequently used rhetorical element in opening statements for district and appellate courts, but there can be some discrepancies, as seen in the analysis of appellate court opening statements. My findings also demonstrate that speaker presentation is more prevalent in district courts than appellate courts due to the nature of the audience being more inclined to be swayed when the lawyers and people involved connect to them on a more personal level than a panel of judges would be. The courts also differed in their uses of intertextuality, with the lawyers presenting in the appellate court cases employing this rhetorical element more frequently because the judges' existing knowledge allowed them to make more references without having to explain them. For this same reason, the legal-expository organizational model is more commonly used in appellate courts, while the narrative model is more common in appellate courts because it allows lawyers to present their opening statement with explanations and background, which is a familiar and easier to follow structure for the jury of non-legal specialists.

While my research provides some preliminary observations on how often different rhetorical elements are used in opening

statements in district and appellate court cases, there are limitations that affected these results, such as the number of statements analyzed and statement length, as discussed above. Given these limitations, further studies need to be conducted on a larger scale to see if the trends I found are observed in other sets of opening statements. Also, since all of the opening statements in my corpus were similar in nature in that they were all part of murder trial proceedings, additional analyses across different types of court cases could provide an even deeper understanding and perhaps new findings concerning which rhetorical elements are used most frequently in defending different types of cases. In future studies, researchers can address the issue of varying opening statement lengths by simply including more appellate court opening statements in the sample to account for the difference in content available in the district court portion of the sample. By doing this, the amount of text to be coded would be proportionally equal and the trends that I discovered can be further proven or disproven.

While limited, my findings are especially valuable for lawyers and legal students who are trying to gain a better understanding of the rhetorical elements of opening statements. Opening statements are integral to the oral argument process because they serve as a means for lawyers to communicate their goals of reaching a certain verdict and appealing to their audience. Since the community—in this case, the judges or jurors—values the presence of factual evidence to support claims but may also be naturally swayed by whether or not they sympathize with what is being said, it is important that each side tailors their opening statement accordingly and puts forth their best efforts so that their desired outcome may even be considered, let alone reached. My findings are helpful in doing so because they can be used to consider how to better employ the most frequently used rhetorical elements within opening statements. If my findings are taken into account with the outcomes of each case, a lawyer can come to their own conclusions about the effectiveness of certain combinations of rhetorical elements or how much each rhetorical element should be used based on how each side fared in the final rulings.

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