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*Published in:*  
NSfK's 58 Research Seminar

2016

*Document Version:*  
Publisher's PDF, also known as Version of record

[Link to publication](#)

*Citation for published version (APA):*

Flower, L. (2016). Dramatic Subtlety: Exploring Anger and Strategic Niceness in the Courtroom. In *NSfK's 58 Research Seminar: New challenges in criminology; can old theories be used to explain or understand new crimes?* (Vol. 58, pp. 407-421). Nordiska Samarbetsrådet för Kriminologi.

*Total number of authors:*

1

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## **Dramatic Subtlety:**

### **Exploring Anger and Strategic Niceness in the Courtroom**

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Traditionally, the law has been considered as devoid of emotions, however recent research has begun to analyze the courtroom as an emotional scene. The emotion norms of the courtroom are thus interesting to explore and, as the courtroom work and emotions of defense lawyers have received little sociological attention, this will be the focus of this paper. The aim here is to show the emotions that are present in the courtroom and how they are managed using the case of anger and I will also discuss the use of niceness. The paper will also explore the ways in which anger and niceness should be displayed in order to both conform to the emotional regime of the courtroom *and* in order to show loyalty to the client, loyalty comprising the guiding principle of defense lawyers in Sweden. The paper will also discuss the background to the recent shift from viewing courtrooms as unemotional arenas to a move in sociological and legal research aimed at uncovering the emotions lying beneath. I aim therefore to explore what defense lawyers actually *do* in the courtroom, that is, the interactional and emotional strategies used to represent clients in order to give the impression of being loyal to the client. By studying this in a context where the scope for expressive gestures is limited, namely the Swedish courtroom, it is possible to gain a greater understanding into the prevailing emotional regime of the courtroom and the ways in which legal representation is performed. This paper draws on ethnographic fieldnotes from courtrooms in Sweden and interviews with defense lawyers. The emotional regime in the courtroom is also discussed, outlining the emotional parameters of the courtroom.

#### **Law and emotion**

The law is typically and traditionally associated with neutrality, objectivity and impartiality (Bladini, 2013; Deflem, 2008; Jacobsson, 2008), however the current turn towards the “emotionalization of law” (Karstedt, 2002, p. 299) has seen the re-introduction of emotions (chiefly shame, disgust and anger) in criminal procedures. The focus of this paper will be on the emotions of defence lawyers. The courtroom can be a scene of strong emotions, both sincere and insincere, involuntary and staged (Dahlberg, 2009; T. A. Maroney, 2011; Roach Anleu & Mack, 2005) although they are typically withheld, contained or only displayed subtly. In this paper I will highlight and discuss the emotional undercurrents hiding beneath the calm veneer of the courtroom (see Adelswärd, 1989) and I will attempt to answer the following questions: Which emotions are present in the courtroom? How are emotions displayed and managed? How does a defence lawyer represent a client using emotionally motivated or charged interaction?

This study considers emotional labour as “the effort, planning and control needed to express *organizationally desired emotion during interpersonal transactions.*” (Morris & Feldman, 1996, p. 1996, authors own emphasis). By this rationale, defence lawyers may be expected to perform emotional labour. This means not only managing their own emotions but also the emotions of others, for example, the client’s emotions or the plaintiffs, or witnesses’. Managing the emotions of the client can be useful for ensuring that the impression given by the client is in line with overall impression the defence lawyer is attempting to accomplish. (see Thoits, 1996)

Emotional displays can be analytically divided into three types (Wharton & Erickson, 1993) defined as positive (to build enthusiasm), negative (to emphasis anger or hostility) and neutral (aimed at demonstrating fairness and professionalism) (Morris & Feldman, 1996). For example, a positive emotional display would be “strategic friendliness” (Pierce, 1995, p. 72) which Pierce suggests that trial lawyers employ in order to influence the jury. Professionalism is linked to concepts such as disinterestedness (Parsons, 1954), detachment neutrality and credibility (Shulman, 2000) and the suppression or expression of emotional expression (Lively, 2000) which may lead to or result from the socialization into “affective neutrality” (Smith & Kleinman, 1989). Displays of strong emotions are thus often linked with being out of control (Gibson & Schroeder, 2002) and should therefore be avoided according to the emotional regime.

The role of social interactions and emotions in the courtroom require attention as the trial outcome may be dependent on the interactive work conducted by the communicating parties (Aronsson, Jönsson, & Linell, 1987, p. 114) Despite this, there is limited research looking at such interactions in Swedish courtrooms, and very little conducted on an international level. Until recently the focus in Sweden has instead been on how one presents oneself linguistically or discursively (Adelswärd, 1989; Aronsson et al., 1987; Jacobsson, 2008). However a recent turn towards emotions has focused on the emotions of the courtroom, judges and prosecutors (Bergman Blix & Wettergren, 2015; Törnqvist, 2013; Wettergren & Bergman Blix, 2016) and the general courtroom climate (BRÅ, 2013).

On an international level, there has been greater focus on emotions of legal actors (judges, prosecutors, defence lawyers, and juries) in the courtroom (Harris, 2002; Lange, 2002; Lively, 2000; T. A. Maroney, 2011; Pierce, 1995; Roach Anleu & Mack, 2005; Westaby, 2010) or on factors influencing decision-making (Cowan & Hitchings, 2007; Gathings & Parrotta, 2013; Kaufmann, Drevland, Wessel, Overskeid, & Magnussen, 2003). One study looking at the impact of “offstage observations” on decision-making by juries (Rose, Seidman Diamond, & Baker, 2010) found that jurors were aware when lawyers or defendants were performing by using strong emotions or attempting to generate support. Rafaeli and Sutton (1987) state that “the courtroom is an organizational context that is brimming with emotions.” (Rafaeli & Sutton, 1987) making it an excellent site for study.

### **But what is an emotion?**

As this is an area of research that is beginning to emerge, I will now briefly discuss how emotions have traditionally been viewed along with defining the term.

The exclusion of emotions in rationality is based on the view that emotions are “anarchic, unbounded and associated with a lack of control” (Lange, 2002). However, research on the role and importance of emotions in rational decision-making is growing (Bechara, Damasio, & Damasio, 2000; Damasio, 1999) with growing support for the argument that calm and supportive background emotions sustain the performance of rational action both consciously and subconsciously. (Barbalet, 2001) Rational action and thought is therefore possible because of emotions (Fineman, 2006; Williams, 2001). The law is considered to be rule-oriented and value-neutral (Conley & O’Barr, 1990, p. 60) with defence lawyers expected to be able to set aside personal interests or opinions so that the legal process is perceived as “sustaining a systemic process which does not depend on the frailty of human judgement.” (Rogers & Erez, 1999, p. 267).

All this begs the question, what is an emotion? One starting point is the difference between feelings and emotions which can be seen as the division between private experiences (feelings) and public performance of feelings (emotions) (as discussed by Fineman 1993 in Vince, 2006, p. 346)<sup>1</sup>. Emotions are thus the way in which we communicate feelings. Emotions and emotion rule systems or “emotional regimes” (Reddy, 2001) are socially situated and role-related (Barbalet, 2001; Coupland, Brown, Daniels, & Humphreys, 2008) and can therefore be seen as “socially sustainable practices” (Coupland et al., 2008, p. 328). Emotions are thus “both socially *responsive* and socially *efficacious*.” (Williams, 2001, p. 132 original italics), that is, they are produced in interaction and also produce an interaction. Such an interactionist approach (Ashforth & Humphrey, 1993; Harris, 2002) sees the construction of emotion as contextual; it enables a wide array of permitted emotional displays; furthermore it differentiates between the experience and display of emotions (Harris, 2002). In this paper then, I am mainly interested in both the display of emotions: how defence lawyers perform loyalty in the courtroom and also the emotional experience, for example, how emerging feelings of anger or irritation should be managed.

## Theoretical framework

I will combine the sociology of emotions, looking at “how emotions are regulated by culture and social structure and how emotional regulation affects individuals, groups and organizations” (Wharton, 2009, p. 148) with a symbolic interactionist approach focusing on the social processes of interaction through which identities are created, maintained, reproduced and communicated. The branch of sociology known as symbolic interaction is based on the work of Erving Goffman who was interested in “the ways in which the individual in ordinary work situations presents himself and his activity to others, the ways in which he guides and controls the impression they form of him, and the kinds of things he may and may not do whilst sustaining his performance before them.” (Goffman, 1956, p. Preface). This paper will thus look at the performance of defence lawyers which is intended to give the impression of loyalty to the client as defence lawyers in Sweden are supposed to follow the guiding principle of

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<sup>1</sup> See Vince (2006) for a discussion surrounding the link between feelings and emotions as well as the interplay between the social, political and psychoanalytic.

<sup>2</sup> Moods differ to emotions as moods are slower-changing, less intense, and not necessarily in response to a situation, unlike emotions (Briner, 1999)

loyalty (see below). Such impression management strategies are used to maintain “face” (Goffman, 1956) that is, to appear in a certain way in line with how we wish to be perceived by others. This can be done, in part by drawing attention towards certain confirmatory facts which reinforce the impression we are attempting to give (Goffman, 1956) but may even entail withdrawing attention in order to reduce the impact or importance given to certain facts (Flower, 2016). Impression management strategies therefore entail the performer acting in order to convince the audience and him/herself of the reality of the impression that is being displayed. In this paper, the performer is the defence lawyer who is attempting to present himself or herself as loyally representing the client’s interests. The defence lawyer must also present the client’s version events as being accurate and plausible account, no matter how unlikely it may appear in the eyes of others.

This performance includes emotion management strategies; techniques used to adjust one’s emotions to fit the current situation. Hochschild’s (Hochschild, 2003) work on emotion work shows that there are emotion rules present in society which guide our emotional performances: which emotions to show and how to show them. Emotion work entails adjusting our outer countenance in order to produce a certain feeling in someone else. For example, even if we are having a terrible day at work, we should still smile and nod and be polite to the customer in order to make the customer feel good. Similarly, emotion work can also entail producing fear in another, as Hochschild writes regarding the emotion work of debt collectors (Hochschild, 1983). When such emotion work is controlled by an employer or organisation, it is classed as emotional labour. The vast majority of research on emotional labour has looked at traditional service industries as emotional labour takes place in face-to-face (or voice-to-voice) interactions. However, more research is starting to looking at the emotion work conducted by professionals such as doctors, teachers and even lawyers.

### **The Swedish district courts**

I will now give a brief description of the Swedish courtroom and criminal trial in order to set the scene for the ethnographic work conducted. In a Swedish courtroom, the judges and clerk sit in a row at the front of the courtroom whilst the defence lawyers sits on the right hand side of the room at a table with the defendant to their left. The prosecution sits opposite, on the left hand side with plaintiffs sitting to their left. The witness sits in the middle of the courtroom when they give evidence and spectators sit at the back of the courtroom. In a criminal trial the main actors are the judge, lay judges, clerk, prosecutor and defence lawyer along with the plaintiff, defendant and witnesses. Proceedings are relatively informal and less adversarial than the Anglo-Saxon system and the judge may be fairly active during proceedings (Aronsson et al., 1987). Trials are open to the general public although spectators are rare. Defence lawyers in Sweden must follow the code for professional conduct as decided by the Board of the Swedish Bar Association<sup>3</sup>. The main purpose of the above Code of Conduct is to protect the

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<sup>3</sup> “The principal responsibility of an Advocate is to show fidelity and loyalty towards the client. As an independent adviser, the Advocate is obliged to represent and act in the client’s best interests within the established framework of the law and good professional

public from unqualified practitioners, the secondary purpose is to act as a professional guide for lawyers (Ebervall, 2002, p. 47).

## Method

This paper is based on my ethnographic fieldwork which was conducted at two district courts in southern Sweden on over 40 occasions, each lasting between two and six hours. Fieldnotes were written during proceedings and therefore allowed me to focus on the interaction between defence lawyer and client, including small, subtle gestures. I have also conducted interviews with 16 lawyers (14 criminal lawyers, one business lawyer and one focusing on civil law), ranging in length from 45 minutes to over two hours long. Other material has also been gathered, including informal observations and conversations, reports in the media, and autobiographies written by defence lawyers. Fieldnotes from courtrooms written by criminology students studying at university have also been considered in the analysis.

## Emotional regime of the courtroom

The court is like a living theatre and when you come to court you should have a professional attitude towards the court. We should not raise our voices, we should not display too much emotion... we should be confident, self-assured, put things in front of the court like a news anchor more or less. This I think, is the facade you should have.

Interview with Peter

The above extract from an interview with a criminal defence lawyer summarises how defence lawyers are to appear in the courtroom. Professionalism is expected and implicit in this is the assumption that emotional displays should be muted. The performance therefore of a defence lawyer must remain within the confines of the courtroom theatre: the emotional regime of the courtroom. I will now discuss how defence lawyers accomplish this by using exemplifying how they describe dealing and using one emotion: anger. I will first show how defence lawyers display loyalty before moving on to the role of anger; and finally exploring how anger may be legitimately used in the courtroom in order to give the impression of loyalty.

## Loyal lawyers

I begin by showing the importance of the duty of loyalty for defence lawyers by using Martin's viewpoint, an opinion repeated by all defence lawyers in the interviews:

I have only one criterion: loyalty towards the client...I have a very strong duty of loyalty towards my client and should basically do everything within my power, within the scope of the rules for what a lawyer may do. (...) My working hypothesis

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conduct. The Advocate must not be influenced by possible personal gain or inconvenience or by any other irrelevant circumstances." (Association, 2008, p. 4)

is the client's position or version of a certain course of events, I do my job based on that.

Interview with Martin

The question follows, how does this loyalty show itself in the courtroom? We begin with an excerpt taken from my fieldnotes on the final day of a murder trial where the prosecution is pushing for a charge of premeditated murder, claiming that the defendant intentionally killed the victim. The defendant denies the charges:

The defence lawyer begins her closing argument. She takes off her glasses and states that “the prosecutor is **WRONG** in making these claims!” She leans forwards, forearms on desk, hands clasped and asks the judges to experiment themselves in holding the weapon in the way the prosecution claims the defendant was holding the weapon before the incident. Her voice becomes louder and there are large hand gestures. She shakes her head, uses an even louder voice and speaks faster when explaining that it would have been impossible for the incident to have occurred in the way claimed by the prosecutor. She points a finger on the desk and then waves it up in the air, reiterating her point. She then speaks even more loudly, pointing at the prosecutor and stating that there is no evidence for the accusations. Her voice becomes slightly higher in pitch with lots of emphasis on certain words when claiming that the client was in **SHOCK** after the incident which explains his reactions afterwards. The defence lawyer goes on to state that “I don't claim that this **IS** what happened, rather than it **COULD** be what happened” whilst pointing a finger at the judges, speaking quickly and loudly. She continues that the claims of the prosecution “are pure speculation” which she says in a tone of voice implying incredulity. Her voice then becomes much softer stating, “my client is not the same person now as she was when she was taken into custody” which makes the defendant's mother start to cry. She states that the charges will never be accepted and looks to the mother when she says this, before stating in the softest tone of voice yet that her client should be released immediately.

Extract from fieldnotes

We see here how the defence lawyer aligns herself as being loyal to her client by supporting the client's version of events. The client claims that the accusations are untrue, therefore the defence lawyer must react as though the judges may agree with the evidence presented by the prosecution, indicating that the client is guilty. It is a team performance aimed at over-communicating or drawing attention to certain facts such as weaknesses in the prosecution's case, whilst under-communicating others (Flower, 2016; Goffman, 1956, p. 87), for example, any evidence incriminating the client or destructive information. As seen above, this may be achieved by using rhetorical tools such as tone of voice, pace of delivery and emotional tone, the result highlighting the flaws in the prosecution's case and underlining the emotional impact of events.

## Angry lawyers

The defence lawyer in the above extract gives the impression of anger. Of course it may be the case that the defence lawyer is actually emotionally experiencing anger which is then expressed. This may be the case if it is perceived by the defence lawyer that the prosecutor has broken the courtroom rules by not following their duty of objectivity or in cases where they feel strongly that a client should not be convicted as described by Martin an experienced criminal case lawyer who is talking about the feelings that can arise when representing a client one strongly believes should not be found guilty:

If you feel that, this is wrong! Sometimes you are so convinced that the client can't be judged on the evidence and the poorer the evidence, the more convinced I am and then I get emotional, you can see it on me.. it more than likely shows on me as I really believe in what I am saying. But you can't be so damn engaged all the time, it's impossible I think.

Interview with Martin

However, the display of anger may also be an impression management strategy, aimed at drawing attention to the inaccurate accusations of the prosecution because anger is an emotion that should, for the most part, be avoided in the courtroom. As Dan, a criminal defence lawyer notes in an interview, getting angry can lead to a misstep, saying something unintentionally or saying something incorrect. Instead a defence lawyer should preferably discursively display anger for example by saying "I was really surprised with what (the plaintiff or witness) was saying today", rather than emotionally expressing it by visibly displaying anger. This instrumentality is supported by Erik who states, "you're out to get a reaction, it's rational emotional expressions aimed at supporting the client." Visible anger is thus viewed by defence lawyers as an "unbecoming emotion" (Averill, 1994, p. 265) which should be re-formed into something more becoming, for example, into relevant questions or into a protestation regarding the prosecutor's lack of objectivity. One of the defence lawyers interviewed, Linda, says the following when we are discussing what happens when one feels oneself starting to get angry:

If you get angry, which happens more often than getting sad (...) you try and think of a suitable counter-question or you try and think about how I approach this in my summing up, point out that I think the prosecutor overstepped the mark.

Interview with Lydia

However, displays of anger should be handled with care. Misdirected or too intense anger may risk breaking the emotional regime of the courtroom and endanger, in turn, angering the court as Linda goes on to explain:

I know that if I start to shout and get angry, it can reflect badly on my client. If I stand up and shout, and it happens, there are lawyers who have done it, but it doesn't benefit my client if I act like that.

Interview with Lydia



Research has shown that “incidental emotion” (Litvak, S., Tiedens, & Shonk, 2010) that is, emotion that arises in one situation and which spills over into the next situation can lead to misdirected allocations of blame based on already-present feelings of anger (see Fiegeonson, 2016 and; Lerner & Tiedens, 2006 for an overview). It could therefore be argued that angering the judge could lead to him or her allocating too much blame to the client and even lead to harsher punitive attributions and punishment (Lerner, Goldberg, & Tetlock, 1998).

Another aspect to anger being viewed as an unbecoming or inappropriate is based on the roots of anger: it is an emotion that arises when one’s self (or someone near) has been offended or injured (Litvak et al., 2010) therefore the display of anger by a defence lawyer could also risk being viewed by the court as the defence lawyer having crossed the personal/professional divide which is supposed to be upheld between lawyer and client, that is, that the professional role of defence lawyer has fallen, as Per M. states discusses below:

It’s like showing that you don’t have a professional attitude (...) You are there to represent your client as a lawyer. You’re not his or her twin.

Interview with Peter

All of this shows that defence lawyers must rely on emotion management strategies in order to draw forth the appropriate emotional impression of loyalty. Discursive emotion management strategies are a way of giving the impression of anger whilst maintaining a professional role by using emotion management strategies to conform to the normative order of emotions in the courtroom.

### **Dramatic subtlety**

So we know that defence lawyer get angry. We also know that they are not always able to show this anger as they risk breaking the emotional regime of the courtroom which may in turn lead to harsher judgments regarding their client or indeed reprimands from the judge or being reported to the disciplinary board as Andreas discussed in an interview. So how should anger be shown? We have seen in the fieldnote extract above that anger may be displayed in the closing argument in order to direct attention to weaknesses or inaccuracies in the prosecution’s case. However, it is also possible to see anger throughout the trial, anger which is appropriately managed and displayed.

In the following extract we see an example of outrage in the Swedish courtroom. In the interaction the prosecutor is presenting the facts of the case at the start of a trial and is reading aloud a report written by an expert witness regarding the extreme temperatures that can be reached inside a car on a warm day. The findings of this report are of importance for the defence’s case and when the exact temperatures are read out:

The defense lawyer look up sharply and says, very quietly but also very forcibly “what?!?” He looks sharply at the prosecutor, then the judge and then his client and shakes his head. Later on when it is the defense lawyer’s turn to talk, he sits up straighter in his chair, speaks rapidly and in a loud tone of voice states that he

became quite outraged when hearing the report which he claims includes incorrect details.

Extract from fieldnotes

Here we see a performance of outrage and loyalty, in the Swedish courtroom. The performance is both verbal and non-verbal aimed at giving the impression of outrage, as stated by the defence lawyer himself. The defence lawyer can thus be seen to be following the corresponding affective line for the team performance, in this case, outrage that information that the defence perceives to be inaccurate is being given by the expert witness. As this information in turn could make the client look bad (i.e. guilty), this can be seen in terms of being a face-threat to the client. A face-threat occurs when the impression or face one is trying to portray is threatened, in this case, that the client is claiming that he is innocent therefore the face-threat is aimed at his claims of innocence. The defence lawyer must therefore act to save the client's face by appearing outraged. However, as the Swedish courtroom is a non-confrontational one where emotions should remain muted, the scope for responding to such face-threats is limited. As the defence lawyer and client are a team, the defence lawyer is acting on behalf of the client who has even greater limits on performance. Once again the performance is designed to draw attention (over-communicate) to the flaws in the prosecution's case.

The defence lawyers interviewed state that interrupting a prosecutor's presentation of facts is seldom done, as Dan states "I don't want to lose points." Such interruptions are thus considered as a technique for antagonising the prosecution therefore a verbal interchange at this stage may be frowned upon and may lead to the court being negatively positioned towards the defence lawyer, a position that is not wished for (Blomkvist, 1987; Mellqvist, 1994). The defence lawyer must thus use other non-linguistic methods combined with a muted verbal response ("what?!?"), this is a response seen in numerous observations. As mentioned above, whilst the given culture can open up opportunities for display, it also puts constraints in place for what is or is not permitted as may be seen here. In this way s/he is able to show the appropriate front of outrage whilst still conforming to the emotional regime of the courtroom, which dictates that muted emotions should be shown at the appropriate time. According to Blomkvist, the rule to be followed by defence lawyers in the Swedish courtroom is that of *Foriteter in re, suaviter in modo* – resolutely in fashion, gently in manner (Blomkvist, 1987). This emotional regime also includes civility as Erik points out that "you can achieve a great deal with objectiveness (saklighet) and courtesy" in the courtroom. Maria also states that defence lawyers "can be really difficult (besvärlig) but nevertheless polite." Maria goes on to state that:

It's often a better result if you can stay calm and nevertheless get the other person or whoever is being questioned to say something wrong or stupid. You can get exactly the same effect of getting something to sound completely crazy or unlikely by saying in a calm voice, "when you said this and this and this, but we know it was like this, then I can't quite understand it, do you have any comment on this?" Instead of sounding angry or aggressive when you say it.

Interview with Maria

Therefore, maintaining a calm demeanour or poise whilst using “selective stubbornness” according to Erik, is an approach that ensures that one remains under control. This emotion work (Hochschild, 1983) is thus aimed at adjusting ones emotions in order to achieve the desired result in someone else. In the above examples, the defence lawyers adopt a calm, friendly countenance in order to make the person being questioned feel at ease. However, there is an undercurrent to this amiable façade as although defence lawyers want to keep a pleasant tone in the courtroom to conform to the emotional regime, it is a case of strategic niceness (cf Pierce, 1995) aimed at extracting the relevant information which may even include making the person being questioned appear less credible.

### Subtle dramas in the courtroom

In conclusion, we see that emotions are ever-present in the courtroom and that defence lawyers must use various emotion management strategies in order to ensure that the emotion displayed remain subtle in order to conform to the emotional regime. This regime ensures that emotions remain controlled and displayed in appropriate ways and at appropriate moments in the proceedings. Anger and strategic niceness may serve to exemplify this as defence lawyers may use emotional expressions of anger and niceness instrumentally in order to achieve certain goals, however displays must remain within the confines of what is appropriate for the courtroom. Emotionality is often deemed by defence lawyers to be undesirable as it may lead one to lose ones train of thought or committing an error. Frequently it is the consequence of the emotion that is unwanted, rather than the emotion itself.

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