

# The Power of Words

By Allen P. Wilkinson

*“Words are, of course, the most powerful drug used by mankind.”*

— Rudyard Kipling

Abraham Lincoln famously said, “A lawyer’s time and advice are his stock in trade.” He could just have easily added that words are a lawyer’s stock in trade. Law is all about words: the interpretation of a statute, the persuasion of a jury or an appellate court, and the questioning of a witness are just a few examples of how words are used in the legal profession. As one appellate judge wrote, “In courts at all levels our business is handling words.”<sup>1</sup> And, as will be discussed in the latter part of this article, words can have a profound effect on the memory and recall of victims and witnesses. But far too many lawyers do not spend enough time and consideration in determining which words they will use.

Consider this example of the use of words: Who will ever forget Franklin D. Roosevelt’s stirring speech the day after Pearl Harbor was bombed: “Yesterday, December 7, 1941 – a date that will live in infamy – the United States of America was suddenly and deliberately attacked by the naval and air forces of the Empire of Japan.” Would we remember his words if he had simply said, “Yesterday, the Japanese



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attacked Pearl Harbor”? And would Martin Luther King, Jr.’s “I have a dream” speech be as memorable and forceful if he had not used those four little words?

The importance of words in the legal profession was emphasized to an incoming class at an Indiana law school:

The words of a lawyer, spoken or written, must be clear, precise, organized and, above all, literate. Lawyers are judged, daily, on the quality of words they string and lean together. As a lawyer, you must tell, persuade, and fix, and you must do it all with words. So, too, you will be called to inspire, soothe, or heal, all on the instant and all with words.

Think, too, how unforgiving that world will be. Every word – every single word – lawyers say in court, in depositions, and elsewhere is taken down. And once there, it is forever public. Without good and proper words, even the best case or cause will fail, and even the most deserving person

will go unaided. Clients won’t pay for sloppy words, and neither will law firms. Mistakes, once done, will not be forgiven.<sup>2</sup>

## Clarity and Brevity

Lawyers often tend to be verbose in trying to make a point when brevity would be more effective. One of the greatest examples of oratory in modern times is Lincoln’s famous Gettysburg Address. It is a model of impact and brevity. The Gettysburg Address summarized the Civil War in 10 sentences and 272 words, 206 of which were only one syllable long. According to one writer, Lincoln’s years of practicing law “taught him the intertwined qualities of clarity and brevity. He used clear, simple language when arguing a case before a jury. He avoided technical language, but instead used a conversational tone. Lincoln did not waste his arguments. He saved his words, and used just the necessary number of those words, for the most essential matters.”<sup>3</sup>



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Roosevelt's "date of infamy" speech lasted just six and a half minutes. Against the advice of his Secretary of State, Cordell Hull, Roosevelt kept the speech short in the belief that it would have a more dramatic effect.<sup>4</sup>

Brevity and power words make the presentation that much stronger. In one study of federal appellate justices commenting on the quality and effectiveness of briefs, it was concluded that "[w]hat judges really want is shorter, harder hitting briefs."<sup>5</sup>

### The Choice of Words

In a classic psychology experiment,<sup>6</sup> subjects watched a film of an automobile accident and then answered questions about events occurring in the film. One question on the post-viewing questionnaire was "About how fast were the cars going when they *X* into each other?" where *X* was either *smashed*, *collided*, *bumped*, *hit*, or *contacted*. Subjects who were asked how fast the cars were going when they *smashed* into each other estimated the speed of the vehicles at 9 miles per hour faster than those who were asked how fast the cars were going when they *contacted* each other.

In a related experiment reported in the same study, a week after viewing the film, the subjects were asked whether they had seen any broken glass. Although in fact there was no broken glass, the subjects who were asked how fast the cars were going when they *smashed* into each other were more likely to answer "yes" to the question of whether they saw any broken glass than the subjects who were asked less powerful verbs.<sup>7</sup>

Not all words and phrases are acceptable, however. They must not be prejudicial. The most obvious example of this is the "golden rule" argument, in which the attorney asks the jury to place themselves in the shoes of the victim.<sup>8</sup> A prosecutor, while free to strike hard blows, is not at liberty to strike foul ones.<sup>9</sup> A conviction was overturned because the prosecutor repeatedly used the word "lie" and its variants during opening statement and closing argument: "We have observed that [t]he word 'lie' is such a strong expression that it necessarily reflects the opinion of the speaker. When spoken by the State's representative in the courtroom, the word 'lie' has the dangerous potential of swaying the jury from their duty to determine

the accused's guilt or innocence on the evidence properly presented at trial."<sup>10</sup>

My mentor and former employer, the legendary San Francisco lawyer Melvin Belli, probably the best trial lawyer in the mid-1900s (in 1954, a writer for *Life* magazine crowned him the "King of Torts") once had a case involving a below-the-knee amputation due to a streetcar accident. The defense lawyer argued that with these wonderful new artificial limbs, Belli's client could do almost anything she could before: drive cars; play with her kids; swim; dance with her husband; make love.

Belli's closing argument was classic: "Ladies and gentlemen of the jury, this is what my pretty young client will wear for the rest of her life. Take it." He dumped the artificial limb in the lap of the first juror. "Feel the warmth of life in the soft tissues of its flesh, feel the pulse of the blood as it flows through the veins, feel the marvelous smooth articulation at the new joint and touch the rippling muscles of the calf."

The first juror gingerly passed on the prosthesis to the next juror and he to the next, and as he did so, Belli continued to talk: "Don't be alarmed by all the harnesses and straps and the creaking of the metal. My client is no longer frightened. She will wear this artificial leg for the rest of her life in exchange for that limb which God gave her as she started life and which she should have worn for the rest of her days." This was in 1941. Ten years earlier, the loss of a leg below the knee might have been worth \$1,000, \$5,000, and at most \$10,000. Belli asked for \$100,000 – and got it. Ironically, the first trial was overturned on the basis the jury's award of \$65,000 was excessive!<sup>11</sup>

### Words and Memory<sup>12</sup>

Contrary to popular belief, memory is not reproductive and does not work like a video-recorder, faithfully capturing the past to be played back unerringly at a later time. Rather, even when we are accurate, we are reconstructing events from the past when we remember.<sup>13</sup>

When we remember something, it is not given its own special "slot" or storage area. Rather, it is spread out among numerous neurons (brain cells). Our brains contain about 100 billion of these cells, and each neuron is interlinked with other neurons via thread-like axons and cord-like dendrites. Within such an interwoven network,

where the number of connections runs into the trillions, the number of potential patterns is literally infinite.

Memory does not record events exactly as they occurred, and faithfully and accurately reproduce the event when you hit the rewind button, that is, when you are asked questions about a previous event. "Subjectively, memory feels like a camera that faithfully records and replays details of our past. In fact, memory is a reconstructive process prone to systematic biases and errors – reliable at times, and unreliable at others."<sup>14</sup> Memory is malleable. Psychologists cannot tell the difference between a true memory and a false memory without corroborating evidence.

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Questions asked about an event shortly after it occurs may distort the witness's memory for that event and influence the answer to different questions asked at some later time.<sup>15</sup> Our memories are vulnerable to "post-event information": to details, ideas, and suggestions that come along after an event has happened. People integrate new materials into their memory, modifying what they believe they personally experienced or observed. When people combine information gathered at the time of an actual experience with new information acquired later, they form a smooth and seamless memory and thereafter have great difficulty telling which facts came from which time.<sup>16</sup>

In one case, a criminal robbed a hardware store and on his way out grabbed a calculator and a hammer. Before the police arrived, a witness who had seen the crime talked to another customer about the robbery. The other customer told the witness that she saw the robber grab a calculator and a screwdriver, stuffing them into his satchel as he left the store. When the police arrived and questioned the witness about

what he had seen, the witness recounted the robbery at some length: He described in detail the weapon, the money, and the calculator. When the police asked him about a tool they heard had been taken, they asked the witness, "Was it a hammer or a screwdriver?" The witness answered that it was a screwdriver.<sup>17</sup>

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This discrepancy can be explained by one of four possibilities: (1) The witness did not see the hammer in the first place, but he mentioned the screwdriver because he remembered hearing about it; (2) he could have remembered both the hammer and the screwdriver, but mentioned the screwdriver because he trusted the other customer's memory more than he trusted his own; (3) he could have failed to see either a hammer or a screwdriver and not heard the other customer's mention of a screwdriver, and simply guessed about the tool when questioned by the police; or (4) he could have initially had a memory of a hammer, but when the other customer mentioned the screwdriver, his memory was altered, suppressed, or impaired in some way.<sup>18</sup>

A witness to an automobile accident may talk with other witnesses prior to the arrival of the police. Although the witness did not see it, another witness may state that she believed the driver of the car was talking on his cellular phone at the time

of the accident. The witness adds this information to her memorial representation of the event, causing a reconstruction or alteration of her memory. When the police officer investigating the accident asks whether the witness saw whether or not the driver was using his cellular phone, the witness will remember something about a cell phone and answer in the affirmative.

The length of time that passes between the original witnessing of the event and being questioned about it can detrimentally affect recall, as the memory decays. It is an example of the "use it or lose it" phenomenon.

### Conclusion

Words can make or break a case, or result in a verdict of tens of thousands of dollars rather than hundreds of thousands of dollars. You must think of yourself as a wordsmith. You should have a good thesaurus on your desk so that you can find a power word. You should pick your words thoughtfully and carefully, maximizing the effect of each word. Additionally, you should, except in rare cases, be brief and succinct both in your motions to the court, examination of witnesses, and presentations to the jury. ■

<sup>1</sup> Allstate Ins. Co., 18 Fla. Weekly D2398, D2398-99 (Fla. 5th Dist. Ct. App. (Nov. 12, 1993) Baker, J.P. dissenting, withdrawn, 634 So.2d 787 (Fla.5th Dist. Ct. Appeal 1994).

<sup>2</sup> [www.law.indiana.edu/instruction/dongjerd/tortsvault/words.of.lawyers08.pdf](http://www.law.indiana.edu/instruction/dongjerd/tortsvault/words.of.lawyers08.pdf).

<sup>3</sup> Julie Oseid, The Power of Brevity, 2 St. Thomas Lawyer (Summer 2009), available at <http://www.stthomas.edu/lawmagazine/2009/Summer/Brevity.html>. For a further discussion on brevity and Lincoln, see Julie A. Oseid, The Power of Brevity: Adopt Abraham Lincoln's Habits, 6 J. Ass'n Legal Writing Directors 28 (2009), available at <http://ssrn.com/abstract=1434735>.

<sup>4</sup> Robert J. Brown, *Manipulating the Ether: The Power of Broadcast Radio in Thirties America* 117-120 (McFarland & Co. 1998).

<sup>5</sup> Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 J. Legal Writing Institute 257, 257 (2002), available at [www.law2.byu.edu/law\\_library/jlwi/archives/2002/rob.pdf](http://www.law2.byu.edu/law_library/jlwi/archives/2002/rob.pdf).

<sup>6</sup> Elizabeth F. Loftus and John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. Verbal Learning and Verbal Behavior 585 (1974).

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., *Lawson v. State* (2005) 570 Md. 593 n. 11.

<sup>9</sup> *Berger v. United States* (1935) 295 U.S. 78, 88.

<sup>10</sup> *Wend v. People* (2010) 235 P.3d 1089, 1096.

<sup>11</sup> Melvin M. Belli with Robert Blair Kaiser, *My Life on Trial* 106-109 (William Morrow & Co. 1976).

<sup>12</sup> This article will not discuss false memory syndrome, in which a psychotherapeutic patient claims to have been sexually molested by, e.g., her father, subject to satanic rituals, etc., years or decades earlier. That topic is deserving of an entire article in itself. See, e.g., *Taus v. Loftus* (Cal. 2007) 54 Cal.Rptr.3d 775; Elizabeth F. Loftus, *Creating False Memories*, 277 *Scientific American* 70 (March 1997).

<sup>13</sup> Henry L. Roediger, III, *Reconstructive Memory, Psychology of*, in Neil J. Smelser and P.B. Baltes, Editors, *International Encyclopedia of the Social & Behavioral Sciences* 12844-12849 (Elsevier 2001).

<sup>14</sup> Elizabeth F. Loftus et al., *Reconstructive Memory*, [www.education.com/reference/article/reconstructive-memory](http://www.education.com/reference/article/reconstructive-memory).

<sup>15</sup> Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report*, 7 *Cognitive Psychology* 560, 560-561 (1975).

<sup>16</sup> Elizabeth F. Loftus, *Memory Faults and Fixes*, *Issues in Science and Technology*, 41, 43 (Summer 2002).

<sup>17</sup> Elizabeth F. Loftus and Hunter G. Hoffman, *Misinformation and Memory, The Creation of New Memories*, 118 *J. Experimental Psychology: General* 100 (March 1989).

<sup>18</sup> *Id.* at 100.

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