

President's Message

by Jay B. Myerson



Words Are Magic—Handle with Care

I RECENTLY HEARD A TELEVISION commercial during a show that was on as background noise. I was attracted to the commercial by its unusually strident use of inflammatory, demagogic words and tone. This communication was clearly intended to appeal to fear and emotion, rather than reason, reflection, or meaningful discourse. Sadly, the “advocacy” was not election advocacy, where we have become accustomed to such negative vitriol, but rather about a bill before Congress. It seems our intemperate discourse has expanded to issues in addition to electoral advocacy.

The words caused me to reflect on the perilous times in which we live, how we often dash off emails or texts without reflection on the words we have chosen, whether they accurately reflect what we wish to convey, what unintended interpretation and impact they may have on the recipient, and on my long-held belief that words are magic.

As attorneys, our stock in trade are the words we use and how we use them. I submit our choice of language needs to be handled with care, as the words and the contexts in which we use them are capable of doing great harm or great good, providing inspiration or crushing the spirit of the listener.

To impress this view of words on our clients, I frequently ask them to consider how their formative life experiences differ from mine. We typically grew up in different parts of the United States, hold different religious beliefs, may be of different races, and not infrequently hold very different political views. I am often 30–40 years older

than many of my clients and have been practicing law for over 45 years. Yet I am trying to recreate in the client’s mind an image identical to the one in mine. What are the tools available to accomplish this? Words. The same process they will need to replicate with the finder of fact, who will have had vastly different life experiences from either of us.

That we can successfully transplant a concept from our mind and successfully implant it in the mind of another is indeed magic. The imprecise use of words can prevent us from properly communicating the concept we wish to convey.

The words we select, even if they reflect the intended message, may convey a different meaning to the listener as perceived through her or his life experiences. This, in turn, also can result in unintended consequences.

The words we choose to speak/write, or the meaning they will convey to the listener, can harm or heal. Depending on circumstances, the mere uttering of the words can have serious ramifications, for the well-being of our clients or for our clients’ perception of the legal system.

One of the most obvious examples relates to contracts. Two parties prudently wish to memorialize their understanding with a written agreement. After time passes, a disagreement arises. The parties and their attorneys consult the written agreement for guidance. If the parties are of good will, and the words in the contract were chosen precisely to reflect their agreement, the matter will hopefully be quickly resolved. If an ambiguity exists, a business relationship may deteriorate or dissolve, and expensive litigation may result. Sometimes, when an agreement is drafted, words are intentionally selected to smooth over or

defer addressing a problem, whether to manipulate a future outcome or simply to avoid the potential conflict involved in addressing the lack of a true meeting of the minds.

We, as attorneys, through the words we choose and the tone we adopt, can be peacemakers, advancing the parties to a reconciliation of their differences or derailing the process entirely. At the extreme end of that spectrum, years ago *Virginia Lawyers Weekly* reported a decision by a judge on the Fairfax Circuit Court about a discovery exchange outside of court. The Court noted that one attorney yelled at the other in a telephone conversation and demanded, “... the f—king documents, the g-dd__n documents.” A material factor was the language used by the attorney and its inevitable detrimental impact. The Court wrote, “Of even greater concern to the court is that such language shuts off reasonable efforts to settle the issue in controversy. In the long run, it exacerbates all issues in the suit and makes settlement of the entire case even more difficult...” The matter was resolved by the offending attorney making a contribution to a charity.

Similarly, domestic attorneys are painfully aware that when a party testifies (whether in a deposition or at trial) against the other spouse, the uttered words cannot be unsaid and can have a negative impact long after the case has concluded. All too often in a hotly contested divorce, words are said that prolong the battle. Worse, the testimony can impact future events in the lives of the parties’ children that should be celebrations (such as graduations and weddings) but instead, at best, are events where everyone walks on eggshells—if both parents even

President *continued on page 48*

NOTICES TO LAWYERS

Supreme Court of Virginia Amends Military Spouse Rule

On December 28, 2021, the Supreme Court of Virginia amended Part One A, Rule 1A:8. Military Spouse Provisional Admission of the Rules of Court, governing the admission of military spouses to the Virginia State Bar. The amended rule takes effect on February 26, 2022.

www.vsb.org/site/news/item/SCV_military_spouse_122821

SCOVA Amends Rules of Court Effective February 2022

On Wednesday, December 22, 2021, the Supreme Court of Virginia amended three of its Rules of Court effective on February 20, 2022. The Court's Orders amend Part Six, Sect. II, Rules 1.8, 1.10, and 1.15 once in effect.

www.vsb.org/site/news/item/scv_rule_022022

Supreme Court of Virginia Amends Judicial Canons

On December 15, 2021, the Supreme Court of Virginia amended Part Six, Section III of its Rules on the Canons of Judicial Conduct for the Commonwealth of Virginia, to be effective January 1, 2022. The amendments reflect a complete replacement of the Canons up to the Judicial Ethics Advisory Committee provisions.

www.vsb.org/site/news/item/SCV_canons_121621

SCOVA Approves LEO 1896 and Amends Rules

On Tuesday, January 11, 2022, the Supreme Court of Virginia approved Legal Ethics Opinion 1896 effective immediately and amended its Rules to be effective March 12, 2022.

www.vsb.org/site/news/item/

[SCV_leo_1896_amends_rules_011121](http://www.vsb.org/site/news/item/SCV_leo_1896_amends_rules_011121)

Virginia Lawyer: Digital Edition

Tired of paper piling up, but want all the great information your member magazine provides? We've got great news! In your member portal, you can opt out of receiving *Virginia Lawyer* by mail if you prefer to read it online. The digital edition archives are available at bit.ly/VirginiaLawyerarchive, and contain back issues from October 2011 to present.



President *continued from page 8*

attend—and may even impact how the children themselves evolve and later respond to issues in their own relationships/marriages.

Domestic attorneys are also all too aware of the impact that emails and texts sent to the opposing party can have on relations between the parties, or how the court will perceive their clients when those emails are later introduced as evidence.

Accidental choice of words in an opening argument can undermine an entire case. Consider the trial of a gas station robbery in Fairfax County. The trial ended in a hung jury, with most jurors voting to acquit. Although not the sole reason for the mistrial, a contributing factor was that in his opening statement, the assistant commonwealth's attorney referred to the station

as an Exxon station when it was in fact a Mobil station. Post-trial, the jury foreman explained that many jurors felt they could not trust the prosecutor again as to the facts of the case or the arguments he made.

A problem all litigators face is how do you, as counsel, explain a loss to the client?

Recently, I learned of two matters where losing attorneys expressed the belief that they lost because their clients could not receive a fair hearing. Race, religion, or sexual orientation were not factors in either matter. There is a substantial difference between sharing a view that the tribunal erred and suggesting that the system is corrupt. How we react to the result—suggesting that a fair hearing was not possible—can have a tremendous impact on how our judicial system is perceived. What untold damage is

done to faith in the rule of law from such statements, which surely would have been relayed to others? We must always remain mindful that to our clients and others, we are the embodiment of the Rule of Law, the system to which they have entrusted their case.

So, please, consider with great care the words you use, whether you are drafting a contract, speaking with a client, an opposing counsel, or the tribunal. The words you choose can advance rational discourse or make it impossible; they can advance or sabotage your case at the outset; they can facilitate amicable resolutions or preclude them; they can reinforce faith in our judicial system or undermine it.

The words you choose are magical, and with them, you have the power to do great good or great harm. Choose wisely. ☪