

University of Michigan Law School
University of Michigan Law School Scholarship Repository

Other Publications

Faculty Scholarship

1970

Don't Speak of Love

John W. Reed

University of Michigan Law School, reedj@umich.edu

Available at: <https://repository.law.umich.edu/other/88>

Follow this and additional works at: <https://repository.law.umich.edu/other>

 Part of the [Legal Profession Commons](#), and the [Litigation Commons](#)

Recommended Citation

Reed, John W. "Don't Speak of Love." Proceedings, American Bar Association, Section of Insurance, Negligence and Compensation Law (1970): 441-50.

This Speech is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Other Publications by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

DON'T SPEAK OF LOVE

JOHN W. REED
Ann Arbor, Michigan

I was asked to speak to you this morning about communication in the courtroom. Specifically I was told that this group, keenly interested in the trial process, would like to hear any comments I might offer on problems of persuading judges and jurors. If your delegate who invited me misread your interest, you still have time to move to the Lewis and Clark Room, down the hall, where, indeed, some of the most able communicators in the trial business are demonstrating what I shall only describe.

You have been told that I am a teacher and have been for all of my time since law school, except for four years in practice in Kansas City. In those Kansas City years I was not a trial lawyer, nor have I ever been; but I have taught that delightful course called Evidence for more than two decades. Moreover, in my work in continuing legal education—especially as author and participant in the trial demonstrations at the famous Annual Advocacy Institutes in Ann Arbor for the past ten years—I have had an unparalleled opportunity to observe this nation's outstanding barristers in action and to hear them explain their strategies and methods. Because of these occasions and others, my acquaintance with the trial bar is extensive if not intensive. Indeed, it may well be broader because of my vantage point than if I were engaged in active practice in a given community. In any event, it is out of these experiences, such as they have been, that I offer my observations.

Problems of communication in the trial courtroom are both simple and complex, traditional and novel. Let me offer first some observations about the simple and traditional.

We have always known that the outstanding, highly successful trial lawyer had something extra, a plus, in his courtroom practice. Was it thorough preparation? Yes, of course. But there was something more—a remarkable ability to get through to the jurors.

Some four years ago in a speech before the International Association of Insurance Counsel, which some of you heard, I suggested that the extra something, the plus, of spectacularly successful barristers is in the area of nonverbal communication. I criticized lawyers for paying too much attention to words and not enough to all the other signals we give

one another through our nonverbal communication—our eye movements, our posture, facial expressions, pitch and tone of voice, and the like. I noted that we need not only to be aware that we are sending nonverbal messages (often at variance with our words), but also to believe in the sensations, the feelings we get when we deal with others—because these are real and valid and important. If one will pay attention to all these things he will be an eminently better advocate.

I find some pleasure in the fact that what I was describing four years ago has recently become a kind of movement. In the last six or eight months there has been a spate of books dealing with so-called body language. The book page of the *New York Times* on any given day now has one or more advertisements and reviews of books dealing with kinesics or body language both in ordinary discourse and in group sensitivity sessions. The show-and-tell of kindergarten days is the adults' "show, tell, touch, and feel" session. No wonder Bob and Carol and Ted and Alice had such a good time!

One other thing about the earlier speech: I suggested that it is especially hard for lawyers to develop an awareness of and a faith in nonverbal clues or messages because lawyers have been trained to use words precisely and exactly and to believe in the rational processes to the virtual exclusion of feeling and emotion. Lawyers are highly verbal people and language is their god.

Now if I were to make that speech today rather than in 1966, I am not sure I would push the point so hard—certainly not to laymen and certainly not to the young. At a pace that is all too familiar in the latter third of the twentieth century, there has been a whirlwind change in the habits of discourse of our people. In what seems to me to be a millennial if not secular retrogression, we are tending to enthrone feeling and downgrade reason. Care, thoroughness, craftsmanship, and, above all, willingness to work hard on the nitty-gritty details of complex problems seem to be going down the drain; and an early casualty is the careful use of language. It may well be, then, that law schools will have to increase their attention (which four years ago I called an overemphasis) on precision in the use of words.

This may not mean much to you in the over-thirty generation—unless you have adolescent children, and, in that event, you already know what is happening to language.

The problem may or may not have begun in the schools fifteen or twenty years ago, but I recall a conversation in the mid-fifties with a college English teacher who said that it was more important to get the thought across than to worry about syntax and grammar. A paper with imaginative ideas earned a high mark even though filled with misspellings and with singular subjects and plural verbs. Naturally, in such a climate, "infer" and "imply" can be used interchangeably, and the latest

dictionaries have come to agree. (The making of dictionaries these days reminds me of the time-honored recipe for preventing rape: relax.) It never seems to occur to anyone that good grammar *is* good taste. And more careful use of language might contribute to the resolution of problems. It was a quarter century ago that George Orwell, in his essay "Politics and the English Language," said: "One ought to recognize that the present political chaos is connected with the decay of language, and that one can probably bring about some improvement by starting at the verbal end."

We had a Woodstock-type gathering near Jackson, Michigan last weekend, not far from Ann Arbor. Some 200,000 individuals came to a place called Goose Lake for what is now common fare at such festivals. The Detroit papers gave the event a lot of space and reporters asked a number of young people why they came and why they liked it. I paraphrase but little when I say that the typical response sounded like this:

"Well, y'know, it's like I just wanted to. This is where it's at. Everyone here can do his own thing, and that's what's real, y'know? No one can hassle you—just, y'know what I mean?"

(Incidentally, there was a report of one handsome young man strolling about the grounds nude while playing a flute. When asked who he was and why he was there, he said simply, "I am Lenny from Chicago." And that seemed to explain it all.)

I wish I could say that the law students of 1970 were not guilty of this kind of nonthink and nonspeak. They are not like Lenny; but many—I dare say most—are deficient in the use of language and in their reluctance to undertake tasks that do not produce immediate results. Only about a month ago I had a conversation with a June graduate of a major university who was seeking admission to The University of Michigan Law School. Although his record was sound, he had applied so late that he stood almost no chance of being admitted. He spoke to me at length of his great desire to study law, and I must tell you that he was inarticulate almost to the point of unintelligibility. Yet he is, in fact, going to attend one of this country's better law schools this fall, and may in three years be seeking a position in your firm. This may remind you of the man who sought a divorce and complained that his wife "talks and talks and talks, all the time." "What does she talk about?" asked the judge. "That's just it, your honor, she doesn't say." I have no doubt that many students like my young friend do gain admittance to even the famed schools. A Harvard law student describing his first year there recently said with reference to classroom discussions that his fellow students "seemed to have read the *New York Times* but not their cases."

And so, I may have to carry two different messages, one to you and one to students. The one to *you* is that you probably ought to read the books about body language and nonverbal communication, and you

ought to gain at least a limited understanding of psychodynamics in order that you may be more balanced than the typical graduate of the traditional law school curriculum. The message to *students* will be that communication is not only feeling but also words, and that care and precision in the use of language are indispensable if one is to be more than a well-meaning oaf. I think it was Karl Llewellyn who said that techniques without ideals are a menace but ideals without techniques are a mess. And though this latter message is for the law students, I shall not blame you for eavesdropping because these students will one day soon be your new associates. We shall do the best we can and shall try to do more than we have done; but you know better than we ever can how unfinished is the task.

Now, if I may, let me quit preaching and make a few observations about problems of communication in the courtroom in the new breed of cases—the cases that touch on the new technology and new concerns in our society.

To mention demonstrative evidence is to remind you of countless articles, speeches, and tired arguments of the last twenty-five years dealing with the way personal injury lawsuits are tried. Demonstrative evidence became an emotional phrase that connoted a carnival atmosphere and spectacular performances by headline-grabbing lawyers. It became popular to denigrate these practices as unworthy, unprofessional, and even unethical. On pragmatic grounds, a circus atmosphere is bad business. As G. K. Chesterton once said, "There is such a thing as being too clever by half." According to Helen Wills Moody, "If you see a tennis player who looks as if he's working very hard, that means he's not very good." And, of course, there are ethical dangers. There is greater likelihood of a miscarriage of justice when emotional appeal overloads the jurors' ability to understand and respond to the so-called rational aspects of proof. But, as I have said on other occasions, the fact remains that there is imposed on the trial lawyer no professional obligation to be dull. The American Bar Association's new Code of Professional Responsibility does not adjure him to be unimaginative in the process of communicating with the fact finders. And if there is value in the imaginative nonverbal kinds of proof offered by the more flamboyant lawyers in the traditional personal injury litigation, there is vastly more value in the new breed of cases. Indeed, imaginative proof—in words or not—becomes indispensable when subject matter is at the edge of the fact finder's comprehension or beyond.

The new technology is, of course, pervasive. Business, government, professions, the consumer—all are deeply involved in and affected by it. Citizens and corporations and governments engage in activities touching on (and touched by) the new sciences. Inexorably the courts will have to deal with cases and controversies arising out of highly technical operations and with other matters which, though not technical themselves,

can best be resolved by the application of new devices, new apparatuses, or new learning—most of which has emerged from work in disciplines other than law.

Thus, like it or not, all of us who labor within the litigation process will have to deal increasingly with technical and technological materials. A few cases may be tried as always—perhaps a simple divorce case, or a simple private promissory note case, or a suit to quiet title—cases like these may be little different. But any case that deals with medical testimony may run into computerized medical records or videotaped depositions. The facts in a commercial paper case may all be lodged in the lender's data bank. And the felonious assault case, once decided by evidence of powder burns and eyewitness testimony, may now involve psychiatric opinions, evidence of neutron activation analysis, and evidence of spectrograph voice-prints and of the statistical improbability that there could be another person than the accused fitting the description provided by the prosecution's witness.

But it is not alone a question of finding new learning to solve old and familiar problems. The times we live in, and the rampant technology of these times, present types of cases scarcely dreamed of ten or twenty years ago, cases that are themselves technical or technological, cases that absolutely require lawyer and judge (and perhaps juror) to master and use the new learning. I refer to cases dealing with such matters as radiation injuries, conservation and environmental utilization, sonic boom damage, insecticide consequences, contamination of water and of air (indeed the whole range of environmental pollution), and product failure. (Speaking of product failure, I wonder if you have heard of the tragic case of the woman who bought the giant economy size can of "Poof," the aerosol underarm spray deodorant, and blew her arm off.)

The issues in these cases must be met and dealt with. Professionally responsible counsel must grapple with the problems of proof and must search for imaginative and effective ways of communicating to court and jury the technical data on which his case depends.

There are, of course, questions of admissibility. We must not overlook the importance of discovery in these technical cases; and all of us know that the major share of admissibility problems should be resolved before trial, probably at the pretrial conference. Admissibility *does* have to be resolved at some point, however; and whether the "crunch" comes early or late, the judge has to decide whether evidence objected to is to be received.

But I do not have time to explore the admissibility of numerous kinds of evidence in a variety of cases. Indeed, that is not my assignment. Rather, assuming, for now, the admissibility of evidence, I ask you to think about difficulties of getting judges and jurors to understand these technical matters.

Lawyers who would be effective trial advocates in a modern trial have

no alternative but to seek constantly for better ways of communicating this difficult, sometimes amorphous, sometimes esoteric, stuff to the fact finder. Whether judge or juror, he is a layman in these matters, and imaginative, clear, simple communication is enormously important if he is to understand at all.

Each one of you knows the difficulties in getting most experts to speak in terms that a layman can understand. And this is probably more acute in the new breed of cases. Sometimes one simply gives up. A very successful trial lawyer told me the other day that in the proof of computer printouts he had found it so difficult to get an expert to explain computer operations to a jury (he described it as "a swamp") that he foregoes any attempt to get into underlying principles. Rather, he simply has the expert or record custodian testify to the facts, and report that they are based on computer runs. That may be a counsel of despair—or a despairing counsel.

A recent essay dealt with the use of "buzz words," and described them as words designed to create a pleasant buzzing sound in the ear without communicating anything very specific. Typical buzz words and buzz phrases currently popular are model, construct (accent on the first syllable), meaningful, involvement, ghetto, multi-faceted programs, and direct action. The planner speaks of "diversification, synergistic effects of disparate affiliates, eclectic approaches to planning strategy, and * * * serendipity." He uses "management by objectives to overcome the planning gap. An in-depth resources analysis will reveal how the strategic plans should interface with the tactical plans." And, of course, the computer expert analyzes the "inputs to the system" and insists on getting "machineable records." Other buzz words in his vocabulary are heuristic, response time, turnaround time, real-time systems, and the data bank. Although the planner's vocabulary includes terms like information explosion and management information system, the average judge and juror are likely to find more explosion and system than information. The danger, of course, is that the expert (and even the expert's lawyer, who may have become immersed in the subject matter) fails to realize he is using buzz words. As T. H. Barton recently wrote, "A new wave of buzz words often is hard to detect when you are immersed in them. Water was never discovered by fish."

If words are not understandable by the layman, not only no communication, but even miscommunication, may take place. Some of you may recall the story of the man who, on his wife's insistence, went to see the family physician. After examining the patient, the doctor said, "Your problem is simple; you have been drinking too much." The patient said, "Sure, I know that, Doc; but my wife doesn't know it, and I don't want her to find out. Can't you give me some Latin name or some technical term that she won't understand so that I can have a chance to quit, without her nagging me?" "Nope," said the Doc, "too much drinking is

your problem, and I'm not going to give you some phony way of lying to your wife." On his way home, the man saw a music store with a sign in the window advertising "Special sale, all the latest syncopated hits." "That's it," he said to himself, "I'll tell her I've got 'syncopation.'" When he got home, he told his wife that the doctor had diagnosed his case as a temporary spell of "syncopation" and that he was supposed to go to bed for 24 hours with lots of tender, loving care from his wife. Dutifully she got him in bed, fed him a meal, and then tiptoed out while he took a nap. Her curiosity led her to the dictionary, however, and she found as the first definition of "syncopation": "irregular movement from bar to bar."

With technical or amorphous information hard to understand and even harder to communicate, a greater challenge than ever before is placed on trial advocate to be inventive and creative in the process of communication with the fact finder.

For example, suppose yourself to be the plaintiff's lawyer seeking to enjoin construction of a new paper mill near a residential community. You have done your homework and are prepared to show that so much pulp waste will be spilled into the nearby lake, that so much noise will be produced, that so many people will be brought by the plant and will make demands on barely adequate public services. But your star witness is an expert whose studies show that because of prevailing winds during certain periods of the year the concentration of mill-released sulfite will be so many parts per million in the air over the town, and that this amount will produce a noxious smell. So far so good, but why stop there? Do the jurors understand the word "noxious"? Should the witness say "stench" or "stink"? Will the jurors really understand how unpleasant the smell will be? Why not show them the smell itself? Offer "odor testimony." The expert can easily calculate the cubic feet of air in the courtroom and, from the stand, release a measured amount of sulfite to duplicate the amount of sulfite concentration that would hang over the town. A smell, like a picture, may be worth many words.

But this is familiar stuff to an experienced trial lawyer. Surely you have brought a trailer hitch or a blown tire or a miniature railroad train into a courtroom. Like the producers of "Son et Lumiere," you know that the sound and light together are better than either alone. And there are three other senses yet unused. Every new case presents some opportunities and some challenges to find more effective ways to communicate your client's version of the case.

But let us consider a broader illustration, one involving our new found concern about injuries to the environment. I trust that most of you are aware of the controversy regarding the building of a power company reservoir in the Hudson River Valley near West Point. Numerous conservation groups have sought to block construction of the so-called Storm King Reservoir. Assume for the moment that you and I are

counsel for a party opposing the construction (although almost all of what I have to say would be applicable to Consolidated Edison's side as well). We find that the power commission and the courts are prepared to balance the utility of the project against what is called "the basic concern" of "the preservation of natural beauty and of national historical shrines." How would we go about establishing, for the commission and for the record, that the area is naturally beautiful and that the proposed reservoir would significantly impair that beauty? How should we proceed? Well, pictures and maps are going to be used. Conceivably there will be a trip to the site for a view. But somehow this all has to be brought into focus and given point and a sense of authority. It's going to be necessary to use words, and to use them well. Whom do we call and what do we ask him to say?

Well, the processes of proof actually employed were described recently by David Sive, one of the participants in the Storm King litigation. As he noted, the scenic beauty cannot be measured quantitatively. But neither can it be claimed to be a purely subjective matter, for there then would be no standard by which the power commission or a court could hold Storm King Mountain to be more deserving of preservation than any other piece of real estate which someone might hold particularly dear.

The process involved the use of some seven experts. Four were active leaders in the conservation movement, and the other three were a professor of planning, a professor of art history, and an expert cartographer. As reported by Mr. Sive, the testimony of these experts was a mixture of dry analysis and eloquence. Attempts at eloquence in the courtroom may lead, of course, to flowery, turgid prose that is more impressive than intelligible. On the other hand, a sensitive craftsman of language can multiply the effectiveness of communication many times over by imagery that lends beauty and forcefulness to otherwise prosaic facts. An excellent illustration of this effective use of words is contained in the testimony of Vincent J. Scully, a professor of art history at Yale. Describing Storm King Mountain, he testified that:

It rises like a brown bear out of the river, a dome of living granite, swelling with animal power. It is not picturesque in the softer sense of the word but awesome, a primitive bodiment of the energies of the earth. It makes the character of wild nature physically visible in monumental form. As such it strongly reminds me of some of the natural formations which mark sacred sites in Greece and signal the presence of the Gods; it recalls Lerna in Argolis, for example, where Herakles fought the Hydra, and various sites of Artemis and Aphrodite where the mother of the beasts rises savagely out of the water. While Breakneck Ridge across the river resembles the winged hill of tilted strata that looms into the Gulf of Corinth near Calydon.

Hence, Storm King and Breakneck Ridge form an ideal portal for the grand stretch of the Hudson below them. The dome of one is balanced by the horns of the other; but they are both crude shapes, and appropriately

so, since the urbanistic point of the Hudson in that area lies in the fact that it preserves and embodies the most savage and untrammled characteristics of the wild at the very threshold of New York. It can still make the city dweller emotionally aware of what he most needs to know: that nature still exists, with its own laws, rhythms, and powers, separate from human desires.

Except for his unfortunate use of the word “urbanistic”—which conveys only a very murky message—this lovely language is a model of persuasive prose.

One of the conservationists simply described the area from the gateway at Storm King Mountain to Dunderberg downstream as “the most beautiful stretch of river scenery in the United States”: and he went on to say of the uniqueness of the Hudson River:

* * * [T]here are rivers that run through deeper gorges, the Colorado, the Snake, the Yellowstone, the Salmon, and the Columbia, to name a few. But none of them, except perhaps the Columbia, is so great a river of history, of commerce, and of empire, connecting great mountains and wilderness with a great city and seaport at its mouth.

A major problem in the use of this kind of evidence from experts lies in maintaining—as one must if expert testimony is to be admitted—that the testimony does not deal with matters of common knowledge. The beauty of a mountain or of a river or of any other natural feature, it has been argued, is a matter of common knowledge, and any truck driver, as well as a professor of aesthetics, is entitled to his opinion. It is difficult to counter such an argument without the appearance of condescension or conceit. And, even if the evidence is admitted, the fact finder must be given some theory under which the testimony will be granted weight. In the Storm King case, the theory advanced was that “beauty created by nature is equal in value to, and to be accorded reverence equal to that of, the beauty of music, art or poetry of man; and experts are available to testify as to degrees of natural beauty just as they are able to testify to the quality of mortals’ art.” And so, it may be argued that it is as legitimate to admit and to attach weight to the testimony of a professor of art history concerning Storm King Mountain as it is to admit and attach weight to the testimony of a professor of literature as to the literary merit of an allegedly obscene book or to the testimony of a symphonic conductor as to the value of a work of music being litigated in an estate tax proceeding.

One needs objective evidence also, and the Storm King parties presented literally hundreds of pages of testimony concerning the precise degree of visibility of the proposed installation from many different angles and locations, in all seasons, at all times of day and night, and in all weather conditions.

Clearly, the individual with a Marlon Brando-Goose Lake type of vocabulary and speech pattern will have a tough time persuading anyone

about simple facts, much less the complex problems of proof in an environmental utilization case. Few of them would be able, for example, to formulate the remarkably effective statement made by Estella Leopold, a paleobotanist, who, while testifying in support of an injunction to prevent land developers from destroying 34-million-year-old fossil beds, testified that "the Florissant Fossil Beds are to geology, paleontology, and evolution what the Rosetta Stone was to Egyptology and what the Dead Sea Scrolls are to Christianity."

Were more time available, I could go on to relate to you other instances of remarkably effective verbal communication in the courtroom. I think they would be illuminating, but they would add up to a simple proposition, namely, that what is required is imagination in finding evidence and imagination in communicating emotional, abstract, or highly technical information to the fact finder. It is not enough for the modern barrister to follow Noel Coward's recipe for success in acting: "Speak clearly and do not bump into people."

I have found myself somewhat embarrassed by the selection of the title of these remarks, "Don't Speak of Love." The phrase comes, of course, from "My Fair Lady," when Eliza Doolittle, wearying of a flood of words, asks her suitor for action instead: "Don't speak of love, Show me!" But what I had in mind when I provided that title many months ago was an emphasis on nonverbal communication. As you have seen today, the intervening months have persuaded me that, in preparation for practice of law at least, more rather than less attention to careful use of words is needed. I continue to be concerned about the failure of most lawyers now practicing to be aware of the emotional and nonverbal overtones of their verbal communications. But recent events have given me a new concern that the pendulum has swung too far, and the law schools will have to continue—for the present at least—in their emphasis upon the careful use of language.

And so I would say, when you speak of love (or of anything else, for that matter), speak eloquently, speak imaginatively, but remember also that, like Eliza, the fact finder is saying, "Show me!"