

Clarity Awards for 1995

By the Plain English Committee

In September 1994, we reviewed consumer finance and other contracts, and selected two examples of these contracts for Clarity Awards. In October 1994, we reviewed wills and trusts, and selected two more for Clarity Awards. These awards, and three others, were officially announced on Law Day, May 1, 1995, and are discussed in more detail below.

Bank Credit-Card Application and Disclosure Statement

Carl Good, Deborah McCormick, and Michele Mulder of NBD Bank, the largest bank in Michigan, developed the plain-language NBD Bank credit-card application and disclosure statement. According to Carl Good, Deborah McCormick, and Michele Mulder:

It is increasingly important in our credit-oriented society to ensure that the bank and its customers understand their contractual rights and responsibilities. To achieve this goal, the bank and its customers must be able to easily understand the contracts prepared by the bank. Contracts that are difficult to understand can lead to more disputes between the bank and its customers. The use of plain English permits the bank to more easily communicate with its customers.

Employment Agreement

Lou Kasischke of Dykema Gossett, the largest law firm in Michigan, has written a plain-language employment agreement and many other plain-language agreements

"Plain Language" is a regular feature of the Michigan Bar Journal, edited by Joseph Kimble for the State Bar's Plain English Committee. The assistant editor is George Hathaway, chair of the Committee. The Committee seeks to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901.

and forms in his book *Michigan Closely Held Corporations* (Institute of Continuing Legal Education, 1987). As Mr. Kasischke wrote in his Preface:

Some critics will say that the language does not look and sound like the language of lawyers. For example, the usual and tiresome "Witnesseth," "Whereas," and "Now therefore" are missing. Some lawyers will even feel that it is harder to justify their fees if they draft short and simple documents. Just the opposite is becoming true, however. Many clients feel that lawyers overdo many legal assignments, especially the drafting of legal documents. The attorney who overdoes documentation risks frustrating the proposed business transaction, running up unjustifiable time charges, and losing a client whose patience runs out. Lawyers must learn that clients will no longer tolerate legal documents written in legalese and covering a seemingly endless stream of remote contingencies.

Michigan Statutory Will

Perry Bullard, while a member of the Michigan House of Representatives, sponsored the Michigan Statutory Will Act. Fred Sytsma of Varnum, Riddering, Schmidt & Howlett, one of the ten largest law firms in Michigan, led the efforts of the Probate and Estate Planning Section of the State Bar of Michigan in developing and writing the plain-language Michigan Statutory Will, 1986 PA 61, MCL 700.123c; MSA 27.5123(3). According to Mr. Sytsma:

We were trying to develop a form that non-attorneys could readily use without becoming confused. We knew that in order to succeed, we were going to have to make everything as simple as we could possibly make it, and then make it simpler yet. We took the trouble to have our drafts reviewed by potential customers, and apparently the effort paid off.

Designation of Patient Advocate Form

John A. Cook of Cook, Goetz & Rogers, along with Virginia Benner, developed and wrote the plain-language Designation of Patient Advocate Form for the Health Care Committee of the State Bar of Michigan. According to John Cook:

Shortly after the Patient Advocate Act, MCL 700.496, became law, I suggested to the Health Law Committee of the State Bar of Michigan (now the Health Law Section) that a standard form be drafted. We needed one that could confidently be relied upon by health care facilities, laypersons and attorneys. To get the necessary consensus, we organized a work group of representatives from the Committee and the Michigan Hospital Association, the Michigan Association of Osteopathic Physicians & Surgeons, and the Michigan State Medical Society.

To reduce controversy and gain general acceptance, we used concepts and some language that had been used in similar forms from other state and national organizations, adding several innovations of our own. Since the form would be used in a variety of settings, mostly by laypersons, we were determined to use language that could easily be understood and still conform to the statute. Clarity was an issue in numerous meetings of the group as we went through draft after draft.

The final product was reviewed and approved without changes by the Board of Commissioners of the State Bar and by all of the other organizations, and was published in April 1991. The next year, it was reviewed by an Ad Hoc Committee composed of the same organizations and several others representing health care providers and patients. Information was gathered on whether any problems had been encountered in understanding or using it in practice. Since no material problems came to our attention, no changes were recommended, and the form has continued in general use throughout the state.

Changes and Choices: Legal Rights of Older People

Bradley Geller, counsel to Washtenaw County Probate Court, is the author of an excellent 200-page book that explains legal rights for older people. The book is written in user-friendly plain English, and it includes forms for the Michigan Statutory Will, Health Care Proxy (designation of patient advocate form), Living Will, and Declaration of Anatomical Gift. Over 500,000 copies of this book are in print. As counsel

to the Michigan House Judiciary Committee, Mr. Geller promoted a legislative agenda on issues of concern to older adults. He helped write the Michigan Statutory Will and Health Care Proxy (designation of patient advocate form). According to Mr. Geller:

Changes and Choices began as a series of pamphlets in 1979, first published in book form in 1982. I began drafting the pamphlets upon realizing that many clients had the same questions on issues such as wills, Medicare and health insurance, and guardianship. Since the publications were to be directed at clients, not practitioners, it was important to keep the language simple. I found a challenge in balancing brevity, simplicity, and accuracy.

Much credit for promoting Changes and Choices and the Michigan Statutory Will belongs to former State Representative Perry Bullard. He realized that legal rights mean little unless individuals have a meaningful opportunity to exercise them. That opportunity required getting understandable information and legal forms into constituents' hands.

Bullard sponsored the Michigan Statutory Will Act. He was the first legislator in the nation to develop and distribute pamphlets with fill-in-the-blanks forms for wills and for advance directives. Using his work, more than 100 state legislators have distributed 3 million copies of various pamphlets and booklets to Michigan residents.

Durable Power of Attorney and Will

The Private Banking Division of Comerica Bank, the second largest bank in Michigan, provides an *Estate Planning Forms* book, in hard copy and computer disk, free to Michigan attorneys. Mike Love and Joan Dindoffer, officers in the Private Banking Division, have been developing plain-language forms to include in the book. Comerica's recent version of *Estate Planning Forms* contains the usual traditionally worded forms for general durable powers of attorney, wills, and trusts. However, the revision also includes plain-language versions of a general durable power of attorney and of a will. Furthermore, Comerica is now working on a plain-language version of a trust that will be added to *Estate Planning Forms* in the next revision. Both the will and the trust are works in progress, and they will improve over time. (See Figure 1 for a comparison of traditional and plain-language

Figure 1

Traditional general durable power of attorney

1. General Grant of Power. To exercise or perform any act, power, duty, right, or obligation whatsoever that I have or may hereafter acquire, relating to any person, matter, transaction, or property, real or personal, tangible or intangible, now owned or hereafter acquired by me, including, without limitation, the following specifically enumerated powers. I grant to my Agent full power and authority to do everything necessary in exercising any of the powers herein granted as fully as I might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that my Agent shall lawfully do or cause to be done by virtue of this Power of Attorney and the powers herein granted.

Plain-language version

1. General Grant of Power. To do anything that I have a right or duty to do, now or in the future.

Traditional will

Article II. I direct that all debts enforceable against me during my lifetime and duly allowed in the administration of my estate, the expenses of my last illness and funeral, including the cost of a suitable monument at my grave, unpaid charitable pledges whether or not the same are enforceable obligations of my estate, and the costs of administration of my estate be paid as soon as practicable after my death. My Personal Representative may, in its sole discretion, pay from my domiciliary estate all or any portions of the costs of ancillary administration and similar proceedings in other jurisdictions.

Plain-language version

Article 2. Debts. I direct my Personal Representative to pay all my legally enforceable debts, the expenses of my last illness and funeral, including the cost of a suitable monument at my grave, and all my unpaid charitable pledges even if the pledges are not enforceable obligations of my estate. My Personal Representative may pay from my estate in Michigan all or part of the cost of administering my estate outside Michigan.

wording in the general durable power of attorney and the will.)

According to Mike Love and Joan Dindoffer:

The conversion to plain language has several benefits. Clients are better able to determine if their desires have been accurately communicated to the attorney and set out in the document. Beneficiaries can more easily see for themselves what they are to receive and when they are to receive it. The lawyers using the forms can more quickly familiarize themselves with the forms and adapt the forms to the client. Plain-language documents also provide more easily understood guidance to fiduciaries.

An important benefit of the conversion to plain language is a close review of the purpose and effectiveness of document provisions. The conversion goes beyond eliminating redundant words and phrases. The need for and value of each provision is an issue in the process. The simpler sentence structure of a plain-language document is not always met just by dividing up cumbersome sentences. Simple structure often depends on careful

analysis of what is to be written. A readily understood document requires that the object of the instrument and each of its parts always be kept in mind.

Thumbs Down Award

This year, in addition to our Clarity Awards for clear writing, we are also beginning a Thumbs Down Award for unclear writing. The said Thumbs Down Award hereby means, signifies, and denotes "thumbs down on legalese" and/or "giving the thumb to legalese." Our Clarity Awards recognize both the writing and the individual who wrote it; the Thumb points only to the writing. Next year, we will give as many Thumbs Down as people care to send us nominations.

The first Thumbs Down goes to the following:

This is to confirm my statement to you that on reviewing the November 27, 1987, Second Amendment to the... November 18, 1982, Restatement of Trust Agreement and



Recipients of the 1995 Clarity Awards were recognized in Detroit recently. Pictured (left to right) are Plain English Committee member Prof. Joseph Kimble, John A. Cook, Michele Mulder, Joan Dindoffer, Michael Love, and Committee Chair George Hathaway.

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the First February 18, 1986, Amendment thereto I found that the Second Amendment is in error in providing for the Amendment of Paragraph A of Article IV. The Second Amendment is one of paragraph A of Article VI of the Restated Agreement as amended by the First Amendment. In short, the Second Amendment to the Restated Trust Agreement as amended by the First Amendment revises Paragraph A of Article VI and not of Article IV of the Restated Trust Agreement as amended by the First Amendment.

There is a danger in publicizing bad writing. The danger is that because people like to criticize bad writing so much, it far overshadows all the good writing that people take for granted. But we give the Thumbs Down Awards to illustrate the enormous problems that the Clarity Award writings have overcome. It's easy to look at clear writing and not appreciate the work it took. You don't appreciate clear writing until you look at bad writing and try to rewrite it into something that makes sense.

Conclusion

This year we have given many of our Clarity Awards to members of the traditional legal establishment: namely, large law firms, large banks, and the state Legislature. The best proof that legalese is unnecessary is when the legal establishment voluntarily eliminates legalese and prepares its documents in clear language. Citibank in New York City was one of the companies that started the Plain English movement in the 1970s. Citibank proved that a bank could write all of its legal documents in clear language. Now, for the first time, two of our Clarity Awards have been given to lawyers who work for the two largest banks in Michigan. NBD's legal services division and Comerica's Private Banking Division are the first two groups that we have identified in Michigan banks that have voluntarily eliminated legalese from their legal documents and that use and promote clear writing in those legal documents. ■

ANSWERS TO TAKE FIVE

1. False, MCR 9.115(c)
2. True, Matter of Lupiloff, DP 34/85, 3/24/88
3. False, SBM Rule 4
4. False, MCR 9.107(B)
5. False, MCR 9.115(J)(2)