

A Plain English Lawyer's Oath (Part 2)

By George Hathaway

In our May 1998 column, we discussed the Lawyer's Oath that new lawyers take in their admission ceremonies to the State Bar of Michigan. We noted that some judges who administer this oath believe that it is written in archaic language and does not effectively convey the ideas it should. And we said that at the suggestion of Judge Chad Schmucker of Jackson County Circuit Court, the Plain English Committee had helped to rewrite the oath in plain English.

Since then, the Representative Assembly of the State Bar of Michigan approved the optional plain English Lawyer's Oath at its September 17, 1998 meeting. The Supreme Court will now review the proposal and decide whether it should be published in the *Bar Journal* for comment. After the comment period of 60 days, the Supreme Court will vote on the matter. If the optional oath is approved, the Supreme Court will issue an Administrative Order.

The plain English movement in the law has come a long way since David Mellinkoff wrote *The Language of the Law* in 1963. Actions of the Representative Assembly illustrate this progress. In 1990, the Representative Assembly (by a majority of about 2 to 1) voted *against* a proposal that "Real lawyers never say *Now Comes*." But in September 1998, the Assembly (by a majority

of about 2 to 1) voted *for* an optional plain English Lawyer's Oath. This proposal was presented by Judge Schmucker and was supported during discussion on the floor by the Treasurer of the State Bar and by a former Commissioner of the State Bar. And the Assembly then voted *yes* and *no*, rather than *yea* and *nay*. Nevertheless, the plain English movement still has a long way to go. The progress and the challenges are illustrated by the following excerpts from the transcript of the Assembly discussion on the Lawyer's Oath:

CHAIRPERSON BRINKMEYER: At this point we will move to what was topic 7, consideration of a proposed amendment to Rule 1.5, Section 3(1) of the Supreme Court Rules concerning the State Bar of Michigan, which would add the plain English lawyer's oath as an optional version for admission ceremonies for new lawyers. The proponent will be represented by the Honorable Chad C. Schmucker. Judge Schmucker.

JUDGE SCHMUCKER: In the last seven years, I have sworn in most of the new lawyers in Jackson County. I know this may seem quaint to attorneys from larger counties, but we often conduct individual ceremonies. The families and friends of the new lawyer often fill the courtroom. Many of these bright new lawyers stumble over the oath. I have asked several of them after they are done, while we are signing some of the paperwork, if they know the meaning of *lucre*, and I get some blank stares from these young lawyers. Some of them have said it's a form of *euchre*. They passed the Bar because they have a sense of humor, but they don't understand much of it. The words in the oath seem to make little impression on the lawyers, and I assume even less on the audience.

Now, I think it's clear that we have a problem with civility. Should we ask new lawyers to abstain from offensive conduct, which is in the current oath, or should we ask them to practice law civilly? Should the oath merely be repeating of words, or should it have a clear meaning which res-

onates with the speaker and listeners? This proposal doesn't take away the old oath. Some believe it should, but this is simply proposed as an alternative so that both oaths would be available.

This month's *Bar Journal* notes that last year's Bench-Bar conferences, which I know many of you were involved in, presented 20 goals to the Board of Commissioners. I note that three of them concern civility. Once again, that's a word that's not mentioned in the present oath.

I think this is a much clearer oath that would be much more meaningful to the lawyers and the other people who hear it, and I would urge you to support this proposal. Thank you.

MS. FERSHTMAN: Julie Fershtman from the 6th circuit. The Plain English Committee, I am sure we would agree, is a wonderful committee and a very important component of the State Bar of Michigan; however, I would submit to all of you by this proposal the Plain English Committee has simply gone too far. Its mission, the essence of its mission, to put it in plain English, is to protect the public, to protect the public from, at worst, being deceived and, at best, being a barrier or drowning the public in legalisms that nobody can understand, but now the committee is trying to stretch its reach.

This committee is coming to us today in an attempt to change or at least propose an optional change to the lawyer's oath. Well, this optional lawyer's oath, I would suggest to all of you, should be rejected, and I have four key reasons for this.

Number one, let's face it, is there anything that's really broke here? If any attorney anywhere in Michigan has violated the oath, has he or she ever looked back and said, gee, I didn't understand the lawyer's oath, I didn't really know what the oath was all about?

But, number two, there is, I submit to all of you, a very rich tradition that underlies the existing lawyer's oath. It's a tradition I would hope we all agree ought to be maintained. Why meddle with it?

"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. For information about the Plain English Committee, see our web site—www.michbar.org/committees/penglish.

Number three, now, if members of the general public may not understand what the lawyer's oath means, that's certainly unfortunate, but what really matters, what really matters is whether the lawyers understand our own lawyer's oath, and let's face it, except for the word *lucre* it's a pretty understandable lawyer's oath.

And, finally, the most important thing by far is whether lawyers will adhere to what the lawyer's oath says to begin with. That, I submit to you, is what the focus of the State Bar of Michigan is, not tinkering with the lawyer's oath itself, but focus its efforts to make sure lawyers live up to that oath from the moment they practice law until the moment they retire.

And, finally, I would submit to all of you that I stand before you as a member of the State Bar of Michigan Professionalism Committee. The views that I have shared with you today are the views of the majority of the Professionalism Committee of the State Bar of Michigan.

MR. WEINER: James Weiner from the 6th circuit. I have a couple of comments on the plain English version. I realize it might

be better—item 2, I will promote respect for courts and court officers. That all of a sudden gives us a sudden duty to give respect to court and court officers. I hope everybody realizes that item 4(b), 7(b), which says, "I will never mislead a judge or a jury, and will never delay a case for money or malice"—I think it should be changed [to] "I will never intentionally mislead a judge or jury." Some of us with our legal arguments could [mislead?] unintentionally. And then item number 3 on the plain English version, "I will pursue a claim only if it is just, and will offer a defense only if it may be honestly argued under law." I am a little concerned about extensions of the law in terms of arguing for a new position and changes in the law and whether that will give us under the auspices of our oath enough leeway to argue for extensions of the law, and those are my concerns with the specific language of the new plain English lawyer's oath, and while it's not bad, while I think it should be in plain English, I somewhat agree that the rich tradition of the State Bar should be, and of the Bar, should be maintained, and

I think it's actually a good quiz for new lawyers to try to understand what the word *lucre* is.

MR. ROSENFELD: Jim Rosenfeld of the 3rd circuit. I share the view, really, that I believe in the tradition. I think the old language is imbued of a feeling that this has been said by our fathers and mothers and grandparents through the history of the State Bar. I like that. On the other hand, I do like the idea of the plain English. Maybe here, as we embark on the new century, there will be a tradition in the latter part of the 20th century saying this has been going on for 100 years. Number 7, if we are making some changes in the language, I am just curious as we are making a bit of a record as we look at this where it says "I will not, for personal reasons, reject the cause of the defenseless or oppressed." As we look at that, "personal reasons" is so open and vague. Does that mean for political reasons you wouldn't represent a certain group that may be deemed oppressed? I just was looking for commentary, and obviously the original language has similar form and consideration. I am just



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looking for some guidance as to what's the intention of that, and certainly [it] probably shouldn't apply to people who are not taking a case for a political reason, and clearly we do have under, I think it's Rule 6.1 or 6.2 of the Professional Rules of Conduct, standard for taking *pro bono* cases. Looking for some comment on that. Thank you.

MR. ULRICH: Greg Ulrich from the 3rd circuit. I wasn't going to stand up and speak to the Assembly on this. In fact, my suggestion to George was that the entire process should be short and sweet.

I am the person who, back about 15 years ago, brought in the proposal for letter-sized paper that actually you guys passed. Frankly, when I did that it was because I had never spoken before the Assembly and I thought this is something that coincidentally had come to my attention as being a potential change that was beneficial to the profession. The rest of the world was already moving in that direction.

I am sitting here now. I am getting agitated. I am getting, I guess, somewhat perturbed because at one point I leaned over to George and I said, Were the people who originally drafted the oath going through this same process? Were people criticizing *lucre* at that time? Were there criticisms of particular words chosen? Probably, but they still went ahead and they produced an oath.

This is simply to provide an optional oath that I believe signifies change that the profession is willing to go through—change that is in some way symbolic of us going toward mandatory continuing education, recognition of ourselves needing to move ahead to fill in some gaps and to serve our clients and the public all the more.

When I heard some of the comments that were just made, I looked at the comparison that is in the agenda, and I am looking and I am saying these are the same things. If it's optional, I don't believe that we should be sitting here pulling it apart and trying to restructure it, because if we

are doing that we are trying to restructure the original oath.

As far as tradition, we don't have yellow legal pads anymore. We have yellow letter-sized pads. We have court forms that are plain English, and they are continuing in that vein. Our clients are demanding it. Our corporate clients are demanding it. I don't think that we should sit here and debate an optional oath, because I think the usage of the oath will demonstrate whether or not it's accepted, worthwhile, and meaningful to the people who want it. Thank you.

MR. BURDICK: Carl Burdick, 2nd circuit. I find the old oath poetic. I think we should also have the new oath as an option. I think that there is something about going through ceremonies and rites that adds a dimension of meaning to what we do, and my question really is to the proponent. I am hoping that he will answer this as part of his response. Whose option is it? I would like, if I were being sworn in, somebody to be able to choose the old oath. Is it going to be the option of the judge to decide which one the judge wants or will the newly sworn-in lawyer be able to select which oath is taken?

MR. NECKERS: My name is Bruce Neckers, treasurer of the State Bar. I would like to stand to say this option, which is what it is, should be passed by the Assembly because it gives an opportunity for people to have whatever oath they wish to have administered to them, and whether it's the judge that does it or whether it's the person that does it, I think that it's important for us to recognize that plain English has its day, and it is now, and tradition is there, and if you want the traditional method, use the traditional method. If you don't want the traditional method, use the plain English method, but I think this is a very carefully drafted and well-done oath that we could all be proud to take.

MR. REED: The English language is rich. The original oath is written in rich language. The new oath is rather pedestrian. The problem with administering either a rich oath or a pedestrian oath is that if you read the language carefully, take for example, "I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust," would be changed at the discretion of whoever is administering "I will pursue a claim only if it is just, and will offer a defense only if it is honestly argued under the law." Having served on the Grievance Committee for—Commission

for a number of years, I am well aware that there is that provision that each of us owes to our profession as part of your responsibilities not to engage in conduct which, in essence, obloquy, which is a word we really use, and contempt. The person who is before the commission for having violated the obloquation or not to commit obloquy will be examined in light of either one of two oaths, the first of which allows the person to maintain the suit if it appears to that person to be just, the second of which has no such rich nor appropriate language. I believe in plain English, but I also believe that our language ought not to be short-changed, and we ought not to give up items of substance in pursuit of form.

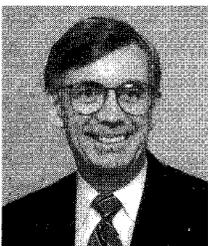
[At this point the Assembly passed several floor amendments to the proposed plain English Lawyer's Oath.]

CHAIRPERSON BRINKMEYER: We are now back to the main motion as amended, and the proponent has the last opportunity to speak.

JUDGE SCHMUCKER: The Plain English Committee was trying to turn this into plain English. We weren't trying to rewrite the rules of professionalism, because that really isn't the function of our committee. Some of the comments in terms of whether we should have "intentionally mislead" as opposed to "mislead," that's a problem with the oath that we are presently using. It just says "mislead." It doesn't say "intentionally mislead." Saying what's personal to myself or personal reasons means, I don't know that that's any real difference. I mean, those are problems with the original oath. We weren't trying to change the meaning of the original oath, just trying to make it, turn it into plain English, and I still think this is worthwhile passing. I know there is some tradition and history, but I think this is going to be much more meaningful to those who join us in practice in law.

CHAIRPERSON BRINKMEYER: We now have to move to a vote on the motion as amended submitted by the Plain English Committee for the optional oath. All those in favor of that motion signify by saying *yes*. All those opposed signify by saying *no*. That carries. ■

Author's update: On December 10, 1998, the Michigan Supreme Court indicated that it was not persuaded that the rule should be supplemented in such a manner, and thus has closed the file. So it continues to be a long, lonely, thankless job...but somebody has to do it.



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