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Opinion & Dissent: Magic Words

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More thoughts on professionalism and civility

To the Editor:

I read with great interest Lori Buiteweg's President's Page column in the September issue of the *Michigan Bar Journal* ("Navigating Hostile Waters: Parting Thoughts on Professionalism and Civility"). I was honored to be presented with my 50-year pin by President Buiteweg at last year's SBM Annual Meeting and, after being an active member of the Bar for nearly 40 years, have been an emeritus member for the last 10 years or so. My own thoughts on her observations date back to my early days as a young, wet-behind-the-ears attorney.

By way of background, my dad was killed in an industrial accident in 1960, and a family friend and neighbor, Norm Zemke, referred my mom to a young attorney who was becoming a force in the area of personal injury law, Albert Lopatin. I never met Albert during that time, but he was able to accomplish a most satisfactory result for us which, not coincidentally, allowed me to realize my dream of going to law school.

After I graduated from the University of Michigan Law School, I bounced around for a couple of years before joining a firm that represented the now-defunct Peoples Community Hospital Authority, for which we were not only general counsel but also did their malpractice defense. I finally had the opportunity to meet Albert when I was designated to respond to a motion that he filed in relation to one of his cases against the hospital authority. I can no longer recall what the issue was, but afterward, I

reminded him of who I was and was surprised that he remembered the details of my family's case and my mom and older brother. Frankly, I was most taken with him (despite his years of later difficulties).

Over the next several years, we went up against one another on numerous occasions. During our first trial together, after going at each other tooth and nail for two or three days, he invited me out for a drink. Although I was somewhat hesitant, I agreed. Albert taught me a lesson that I tried my best to follow throughout the rest of my

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effective advocate
and still be a
good person.

career: No matter how rabidly an attorney may advocate for his or her client, counsel can never make it a case of me against you. As long as your arguments and conduct comply with the court rules, the law, and, most especially, accepted decorum, one can still vehemently represent one's client without being a total jerk. I tried my best during my years of practice to follow that advice, and I think I did quite well.

The case is not about me or you. The case is about your client. If an attorney allows himself or herself to be baited by any kind of ad hominem attack, he or she is showing a fatal weakness that can only result in a bad decision for the client.

I believe it was Mark Twain who said something like, "Never argue with stupid people. They will drag you down to their level and will beat you with their experience." I've always tried to follow that advice, and I would suggest that current practitioners keep that mantra in mind. You can be an effective advocate and still be a good person. The concepts are not mutually exclusive.

Daniel J. Andrews
The Villages, Florida

Less is almost always more

To the Editor:

Kudos to Mark Cooney for his Plain Language article, "The Architecture of Clarity" (September 2016 *Michigan Bar Journal*). As an award-winning journalist, I could not have expressed the process any better. "Clarity comes from a firm grasp on substantive meaning... it requires an acute ambiguity radar and a host of fine editorial techniques."

I am familiar with Mark not only from the *Bar Journal* but also as a member of Scribes. After the writer follows Mark's suggestions and guidelines, re-read your draft and re-edit. It is a painful but necessary exercise to put the scalpel to one's own writing. Edit and re-edit and you will find that less is almost always more.

James A. Johnson
Southfield

Magic Words

To the Editor:

I would like to respond to Chadwick C. Busk and Michael Braem's article, "Curiouser and Curiouser Excuses for Legal Jargon," published in the October 2016 edition of your journal. The article both misstates my positions and oversimplifies nuanced issues.

In educating law students on contract drafting, I've sought to prepare them to act as "chameleons," adapting to the drafting styles and preferences of senior attorneys and clients. This was also my approach throughout my years as a big-firm transactional lawyer. I teach students to remove from contracts, whenever possible, meaningless jargon that has a plain-language equivalent, such as "herein, therein, hereby, and thereof."

I thus hardly provide "excuses" for such jargon, contrary to what Busk and Braem assert. Yet, when it comes to terms of art in contracts, those heavily litigated terms that serve as shorthand for more complex legal concepts, I take the approach of Bryan Garner that there exist certain "unsimplifiable terms of art." Although Busk and Braem lump together terms like, say, "best efforts" and "whereas," those terms pose different problems that require different solutions.

Articles and letters that appear in the *Michigan Bar Journal* do not necessarily reflect the official position of the State Bar of Michigan and their publication does not constitute an endorsement of views that may be expressed. Readers are invited to address their own comments and opinions to inovak@mail.michbar.org or to "Opinion and Dissent," *Michigan Bar Journal*, Michael Franck Building, 306 Townsend St., Lansing, MI 48933-2012. Publication and editing are at the discretion of the editor.

Throughout my years of teaching, students have often asked, "How will I know the difference between meaningless jargon and a term of art?" This question goes to the core of my scholarship, which Busk and Braem misunderstand in their article. I use methods of language analysis to determine both the motivations and the potential ethical implications of removing or rephrasing specific terms of art in the sophisticated commercial context.

In doing so, I hope to help transactional attorneys, those who have partners and clients to please, billable hours to consider, and various constituencies fighting for their attention. And, yes, I also want to help those who simply cannot rephrase into plain language every clause of a client's preferred form, and those who operate in the gray area between a laudable desire to modernize and streamline contract prose on the one hand, and the demands of client representation on the other.

My article "Say the Magic Word" thus makes no "fanciful argument" despite what Busk and Braem suggest. To the contrary, I use rhetorical analysis to understand why a busy lawyer might rely on certain tested terms. In my article "The Ethics of Non-Traditional Contract Drafting," I caution lawyers who hope to modernize contracts that they need to engage in adequate research and client counseling before arbitrarily rephrasing terms of art into untested, modern prose. These articles are available in the *Syracuse Law Review* and forthcoming in the *University of Cincinnati Law Review*, respectively.

In both articles, I aim to educate students and practicing transactional lawyers about how to best represent their clients while still adhering to the goals of the plain-language movement. I posit that there is some gray area between the black and white of traditional and modern terms, and hope that students and lawyers will think critically about contract modernization. Busk and Braem's view of the world of contract drafting as a simple "us" versus "them" is truly the more "fanciful" approach. Practicing transactional lawyers and law students need to deal with nuance. We all share the objective of matching contract language with client goals.

Lori D. Johnson
Las Vegas, Nevada

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MCL 600.6013 governs how to calculate the interest on a money judgment in a Michigan state court. Interest is calculated at six-month intervals on January and July of each year, from when the complaint was filed, and is compounded annually.

For a complaint filed after December 31, 1986, the rate as of July 1, 2016 is 2.337 percent. This rate includes the statutory 1 percent.

But a different rule applies for a complaint filed after June 30, 2002 that is based on a written instrument with its own specified interest rate. The rate is the lesser of:

- (1) 13 percent a year, compounded annually; or
- (2) the specified rate, if it is fixed—or if it is variable, the variable rate when the complaint was filed if that rate was legal.

For past rates, see <http://courts.mi.gov/Administration/SCAO/Resources/Documents/other/interest.pdf>.

As the application of MCL 600.6013 varies depending on the circumstances, you should review the statute carefully.