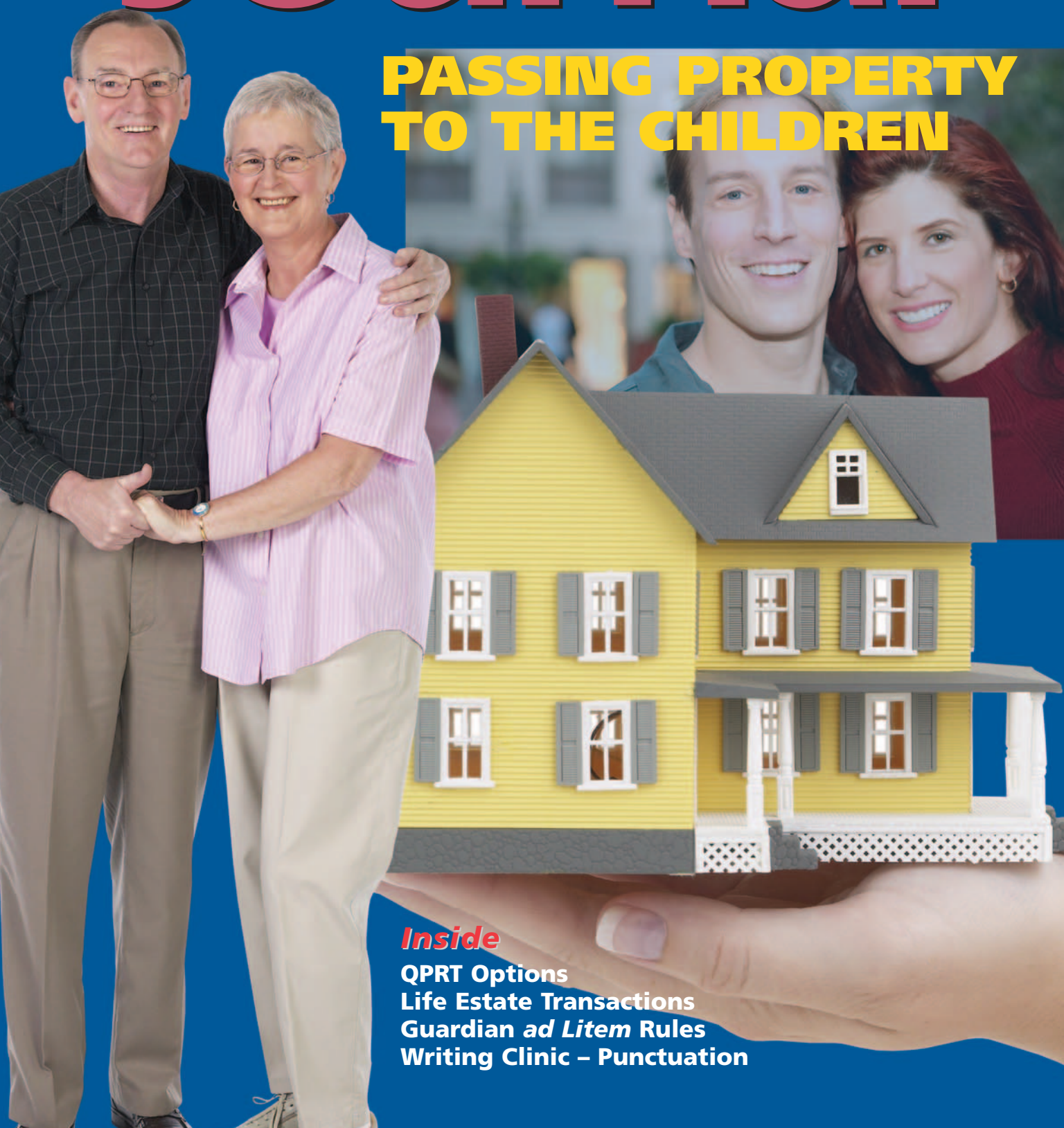
NEW YORK STATE BAR ASSOCIATION

NOVEMBER/DECEMBER 2003 | VOL. 75 | NO. 9

Journal

PASSING PROPERTY TO THE CHILDREN



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On The Cover

This month's cover illustration was prepared to accompany the articles on how Qualified Personal Residence Trusts and deeds with retained life estates provide options for parents to pass property to their children while retaining the right to use the property during their lifetimes.

Cover Design by Lori Herzing.

The *Journal* (ISSN 1529-3769), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $18. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

President's Message

A. Thomas Levin

On Civic Education

A nation of sheep will beget a government of wolves. Edward R. Murrow

Elections belong to the people. It is their decision. If they decide to turn their back on the fire and burn their behinds, then they will just have to sit on their blisters. Abraham Lincoln

The most common way people give up their power is by thinking they don't have any. Alice Walker

If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be. Thomas Jefferson

Our progress as a nation can be no swifter than our progress in education. John F. Kennedy

If you don't know where you are going, you will wind up somewhere else. Yogi Berra

One of the goals I set for myself when I took office was to put an emphasis on public civic education, and in particular to try to inform the public about the importance of the rule of law, and the role of law in our daily civic life. I am pleased to note that we are making progress on this front.

I had the pleasure recently to attend the first Congressional Conference on Civic Education, held in Washington, D.C., under the auspices of the Center for Civic Education and the leadership of both parties in Congress. This wonderful event, attended by nearly 500 people, was dedicated to the development of social studies curricula throughout the country to emphasize basic civic principles.

During this conference, I learned of recent studies which showed that the current teen generation knows little about democracy and civics. A significantly greater number of these "DotNets" can identify the fictional hometown of Homer Simpson[1] than can identify the Vice President of the United States.[2] And yet, speaking with the other attendees at this conference, I found that there is great hope for the future of our youth, and wonderful programs underway throughout the state and the nation.

One of those outstanding programs is the "We The People" program, which promotes civic education in the school curriculum from elementary school through high school. This program educates young people about the rule of law and gives an excellent opportunity for lawyers to participate in the educational process. The New York State Bar Association is proud to have been a co-sponsor of this program for many years, through the dedicated efforts of our wonderful Citizenship Education Committee and our Law, Youth & Citizenship Program. As I learned more about "We The People," I was greatly impressed with what it has achieved to date, and what it promises for our future.

In light of that information, you can imagine how pleased we were when we were offered the opportunity to manage this entire program in the state of New York. Making this offer even more attractive, it includes a grant that will fully fund our participation, so that we can undertake this endeavor with no impact on our budget. Our members will be hearing more good news about this project in the near future.

Our interest in education is not limited to elementary and secondary school students. We also need to devote more effort to educate the public about the important role lawyers play in a democratic society.

It is no understatement to say that lawyers get a substantial amount of negative press. What is most unfortunate is that this negativity is generated by the actions of a small portion of the bar. While the public would have the impression that lawyers spend all their time dreaming up novel litigation theories and are generating amazing amounts of frivolous litigation, the facts are quite to the contrary. Regrettably, publicizing the facts is very difficult to do. Advertising is very expensive, and it isn't reasonable to expect the media to devote substantial attention to the good deeds done by members of the bar. As one reporter said to me when I asked why we can't get more press for the activities of our members which provide the underpinning for our civic and governmental organizations, "it isn't news when the plane lands on time."

So, it is up to us, every one of us, to put out the good word and spread the good news. In the past, I have asked that all of our members join in this effort, doing a part in educating your friends and neighbors about the importance of lawyers in our democratic society. I am

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pleased to be able to report to you that wonderful progress is being made in this effort.

Only recently, I received a letter from one of our members, bringing to my attention an outstanding letter written to a local newspaper by representatives of the Ontario County Bar Association, the Ontario County Assigned Counsel Administrator and the Ontario County Defenders Association, to refute a syndicated column that had appeared in that paper concerning the pending trial of basketball star Kobe Bryant. The article attacked lawyers for defending Mr. Bryant, whom the author had concluded was clearly guilty. The letter was an eloquent and persuasive defense of the role of lawyers. You can read it at our Web site, www.nysba.org, by clicking on "News, Notes and Notices" on the home page. Congratulations to our colleagues in Ontario County on a mission accomplished.

NYSBA is also helping to put out the word about how lawyers play an integral role in maintaining democratic institutions. After an extensive effort, we have this month published *Of Practical Benefit: New York State Bar Association 1876–2001*, covering the first 125 years of our Association's rich history. Information about purchasing this book will be available on our Web site and from the Bar Center.

And we are moving forward on many other fronts as well. We have again launched a four-week radio advertising campaign, consisting of three different 30-second spots on the theme "Lawyers Protect Your Rights." These spots inform the public about how lawyers help people, promote the advancement of justice, serve the public interest and support the legal principles that are the pillars of our society. With the cooperation of the New York State Broadcasters' Association and 240 radio stations around the state, we have been able to secure air time with a value 3,000% (that is not a typo) in excess of the moderate cost of these spots. We ran similar ads last year and have budgeted for more in the coming year.

With the assistance of our Public Relations Committee, media relations staff and our professional consultants, NYSBA has received major media coverage on a regular basis, on a range of issues related to legal trends, activities and issues that affect the legal profession, businesses and the general public. Our activities have been recognized in publications across the state and nation, and overseas. I even did an interview for broadcast on radio in Germany (but in English).

What are you doing to support this effort? Are you still repeating lawyer jokes (or only the good ones)? Are you explaining legal issues in the news to your friends and families, and pointing out how the roles played by lawyers make the American system work? Have you volunteered to speak in your local schools, and at your local civic and religious organizations?

Be a part of the solution, not part of the problem. Join your Association in this ongoing, and never-ending, effort. Be an ambassador for the legal profession. Be proud to be a lawyer.

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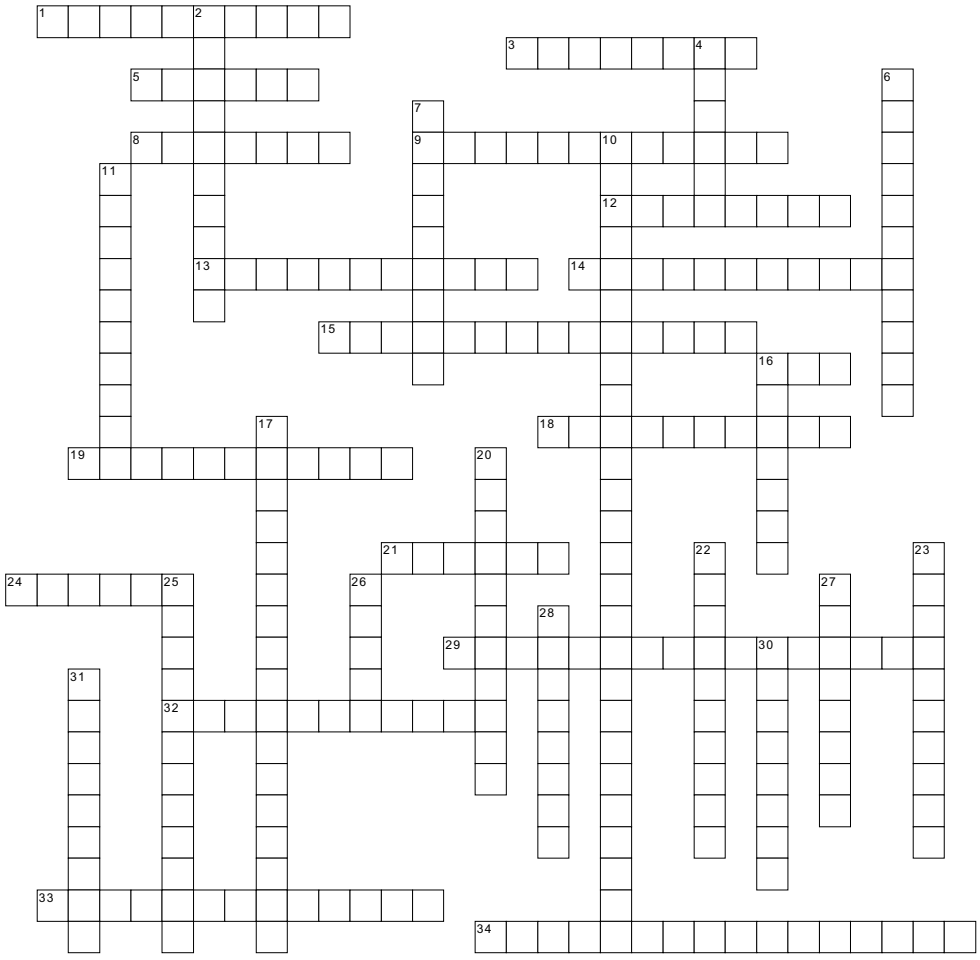
1. Springfield.
2. Dick Cheney, whether in a disclosed or an undisclosed location.

CROSSWORD PUZZLE

The puzzles are prepared by J. David Eldridge, a partner at Pachman, Pachman & Eldridge, P.C., in Commack, NY. A graduate of Hofstra University, he received his J.D. from Touro Law School. (The answers to this puzzle are on page 38.)



Business Basics, by J. David Eldridge

Across

1 When a corporation buys back its own shares
3 The monetary return on your investment of corporate shares (BCL § 510)
5 What is done to the "corporate veil" to acquire personal liability over managing shareholders
8 What shareholders do, with or without cause, to an officer (BCL § 716) or director (BCL § 706)
9 Why unauthorized acts may still be binding upon a corporation
12 Person appointed by a court to oversee and preserve corporate assets (BCL § 1202)
13 The holder of a block of shares owned by others, authorized to vote thereon (BCL § 621)
14 The termination of a corporation's legal existence
15 The individual who owns all assets and runs the business is a _____
16 The stated value of a corporation's shares
18 An act taken by a corporation which exceeds its statutory powers or purpose
19 The paper representing ownership of shares of corporate stock (BCL § 508)
21 Generally, the presence of a majority of shareholders entitled to vote
24 The corporate rules
29 The group of individuals in charge of managing a corporation (BCL § 701)
32 A corporation owned and run by just a few shareholders is _____
33 The rule prohibiting directors from profiting at a corporation's expense
34 The rule protecting directors from liability for rational decisions made with due care and good faith

Down

2 A shareholder's right to be the first to purchase additional shares (BCL § 622)
4 What you must give before holding a special meeting
6 The dissolution of a corporation resulting from a proceeding brought by the Attorney General under BCL § 1101 is _____
7 A class of shares with certain privileges over others (BCL § 502)
10 The document filed with the department of state formally creating a corporation under BCL § 403
11 Voting process whereby each share casts as many votes for directors as there are vacancies (BCL § 618)
16 The person who shares ownership and operation of a business with another is a _____
17 A shareholder's statutory ability to review corporate books (BCL § 624)
20 One or more of the "owners" of a corporation
22 An action brought by a shareholder on behalf of a corporation to enforce corporate rights (BCL § 626)
23 A corporation with a majority of its shares owned by a parent corporation
25 A pre-incorporation promise to buy stocks in a corporation when it is formed
26 Written authorization to vote on behalf of another (BCL § 609)
27 Doctrine holding shareholders personally liable for using a corporation as an instrument to conduct their own personal business
28 A person paid to form a corporation
30 What shareholders do at annual meeting to choose new corporate directors (BCL § 703)
31 The final settling of accounts and sale of assets as part of corporate dissolution

Qualified Personal Residence Trusts Offer Helpful Planning Options For Potentially Large Estates

By Philip J. Michaels and Laura M. Twomey

As property values across New York State have risen sharply, the personal residence has become many New Yorkers' most valuable asset and thus a logical subject for advantageous estate planning.

Making a gift of a personal residence to a Qualified Personal Residence Trust (QPRT) is a straightforward strategy for removing the value of a client's home from his or her taxable estate. A QPRT is an appealing estate planning device because it combines significant estate and gift tax savings with minimal lifestyle changes, while avoiding a client's fears that too much is being given away.

Assume the client owns an apartment in New York City appraised at $2 million, a summer home with a value of $1 million, and a stock portfolio worth $3 million. The client would like to maximize the inheritance passing to children, yet is concerned about giving away too much. A QPRT would allow the client to save estate and gift taxes without directly parting with cash or giving up either of the two homes.

Terms of a QPRT

To create the QPRT, the client would transfer title to either the apartment or the summer home to a QPRT trust.[1] The client would retain the right to live in the home for a specific length of time such as 10 years. During that period, the client would not pay rent, but would be responsible for all of the expenses of the home, including real estate taxes, condominium maintenance fees, and the cost of ordinary repairs.[2] Thus, during the initial 10-year period, the client would not notice any change in day-to-day living patterns.

At the end of the 10-year term, assuming the client has survived, the home would pass to the client's children free of estate tax. The client may remain in the home, if he or she agrees to pay rent to the children at the then going rate for such rentals.

Tax Advantages of a QPRT

Assume that the client creates the QPRT with the $1 million summer home. The transfer of the home to the QPRT is a taxable gift, but the amount of the gift will not be $1 million, because the client is retaining the right to live in the home for 10 years.[3] Instead, the amount of the gift is equal to the actuarial value of the property that will pass to the children at the end of the 10-year term.[4] The actuarial value is determined using tables published by the IRS that take into account the term of the client's retained interest, the client's age, and the monthly interest rate set by the IRS for the month of the actual transfer.[5]

If the client is 50 years old and the relevant interest rate is 5.6%, then the client's gift to the trust would be $537,010. Assuming the client has made no prior gifts, he or she would pay no gift tax on this transfer, because the gift would be applied against the client's $1 million lifetime unified credit.[6] Thus, the client, in effect, receives a discount on the gift.

If the client survives the 10-year term, the entire value of the property will ultimately pass to the children free of estate tax. If the property has appreciated from $1

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The authors wish to thank summer associate Lindsay Brown for her assistance.

million to $2 million by the time the client dies, a $2 million asset will have been transferred to the children for a gift tax value of only $537,010. All of the appreciation on the home will have passed to the client's children tax free.[7] If the children elect to sell the home, they will not receive a stepped-up basis as they would if the client had retained the home until death, but any capital gains tax payable on the sale would be substantially less than the estate tax. The maximum federal capital gains rate is currently 15%, while the federal estate tax rate is 45–48% beginning January 1, 2004.

If the client dies before the 10-year term ends, the entire value of the property will be includable in the client's estate.

On the other hand, if the client dies before the 10-year term ends, the entire value of the property will be includable in the client's estate.[8] The client will not have accomplished anything, but nothing will have been lost, either. The $537,000 originally allocated to the gift will be restored.[9] For this reason, clients should choose a term of years that they are likely to survive.

If a husband and wife own the home jointly, they can enhance the tax benefits of the QPRT.[10] The husband could transfer a one-half interest in the home to a QPRT, and the wife could transfer a one-half interest in the home to a second QPRT. The husband's QPRT would grant him the right to live in the home for a term of years, and the wife's QPRT would grant her a right to live in the home for a term of years. The husband and wife should be entitled to take an additional discount on the value of their gift, because they have each made gifts of an undivided interest in real property (typically in the 10% to 20% range). Furthermore, if the husband dies before the end of the term, only the half of the home that is in the husband's QPRT would be includable in the husband's estate.

Administration of a QPRT

Payment of rent If the client survives the 10-year term and must begin to pay rent to the children, the rent is not troublesome from an estate planning perspective. Paying the rent is actually another way for the client to pass money to the children free of gift and estate tax. The children would have to include the rent as ordinary income, but they could have offsetting deductions.

The QPRT instrument can be structured, however, so that the client's rental payments are not deemed to be taxable income to the children. Instead of passing the home outright to the children at the end of the 10-year term, the QPRT could direct that it pass into a Grantor Trust for the benefit of the children. In this case, rental payments would be made to the trust. Grantor Trust status means that, for income tax purposes, the client is treated as the owner of the income. Thus the rental payments would not be subject to income tax because they would be deemed to be made to the client.[11] Grantor Trust status would also provide two other benefits: (1) the client would be able to take advantage of all of the income tax benefits associated with home ownership, together with the income tax exclusion for sale of a personal residence if the property is sold during the client's lifetime;[12] and (2) if the property is sold, the client will be responsible for the capital gains tax (if any) on the sale, rather than the children.[13]

Alternatively, if the client is married, the QPRT could provide that, at the end of the initial 10-year term, the home would remain in trust for the client's spouse for the spouse's life. During the spouse's lifetime, the client could reside in the home with his or her spouse without paying rent.[14] The spouse would be responsible for the upkeep and expenses of the home. At the spouse's death, the home would pass to the children, either outright or in trust, free of estate tax. In this scenario, the client would not have to pay rent to the children unless the spouse had passed away. And no rent would ever be paid if the spouse survived the client.

Payment of expenses After creating the QPRT, the client will continue to be responsible for paying all utility expenses, maintenance fees, real estate taxes and ordinary repairs on the home during the 10-year term.[15] If the client adds a new wing to the home, however, it will likely be deemed an additional gift to the trust, because major capital improvements are generally considered the responsibility of the remainder beneficiaries of a trust. If, after the initial 10-year term, the client pays rent to a trust for the children, those rent payments may be used to make improvements.

It is worth noting that the client may not purchase the home back from the trust during the initial term.[16]

Sale of the home Assume that the client wants to sell the summer home owned by the QPRT and purchase a new summer home closer to the beach. The trustee of the QPRT (most likely the client's spouse or one of the children) would sell the original summer home and use the proceeds to purchase the replacement home in the name of the QPRT. If the original home sold for $1.5 million and the replacement home cost $2 million, the trustee of the QPRT would purchase a 75% interest in the new home, and the client or the spouse would purchase the remaining one-quarter.

If the replacement home cost $1 million, the trustee of the QPRT would have several options for the $500,000

difference between the $1.5 million sale price of the original home and the cost of the replacement. The $500,000 could be distributed back to the client.[17] This would be simple, but would defeat much of the tax planning that had been done. Second, the $500,000 could be retained in the trust and converted into a Grantor Retained Annuity Trust (GRAT).[18] This means that the client would receive an annuity payment until the end of the initial 10-year term.[19] (See the discussion of GRATs below.)

If a replacement residence is to be purchased, then the purchase must occur within two years from the date the original home was sold.[20] If no home is purchased within that time, the trust will cease to be a QPRT and the trustee must either distribute the proceeds back to the client or convert the trust to a GRAT within 30 days.[21]

If a replacement residence is to be purchased, then the purchase must occur within two years from the date the original home was sold.

Purchase of another residence owned by the client If the client decides not to purchase a substitute summer home, then a portion of the estate planning benefits will be lost whether the proceeds are distributed back to the client or converted to a GRAT, because in either scenario the client would be forced to take back some of the property that had been given away.

Because, however, the client owns a residence outside of the QPRT (in the example used above, a $2 million apartment), he or she has an additional option. The client could sell a portion of the New York City apartment to the QPRT in exchange for the cash in the QPRT.[22] Thus, the client could sell to the QPRT a 75% interest in the New York apartment in exchange for the $1.5 million in cash that the QPRT received from the sale of the summer home.[23] The QPRT will hold a personal residence again and will not need to terminate or convert to a GRAT, while the client will be able to invest or spend the sales proceeds freely. The transaction would not be subject to capital gains tax, because the QPRT would be a Grantor Trust during the 10-year term, and thus will be treated as if the client sold the apartment to himself or herself. The transaction would, however, likely incur a real estate transfer tax in New York.[24]

Not all clients will have this option available to them, because not all clients own a residence outside of the QPRT. With respect to the client used in the example, however, this option seems the most advantageous, because the client will not receive back any of the property initially transferred to the QPRT and therefore will obtain the maximum estate planning advantage.

Conversion to a GRAT Once the trustee of a QPRT determines that all or part of the proceeds from the sale of a property held by a QPRT should be converted to a GRAT, and assuming the trust instrument contains all of the necessary provisions permitting the trustee to make the conversion,[25] the trustee must then determine the amount of the annuity to be paid to the client each year.

The annuity due to the client will begin to accrue on the date the trust sells the initial residence and will continue until the end of the initial term.[26] If, however, the trust instrument permits it, the trustee may defer payment of the annuity until 30 days after the GRAT conversion.[27] The GRAT conversion must occur within 30 days of either (1) the two-year anniversary of the sale of the initial residence, or (2) the purchase of a substitute residence.[28] The deferred payment must bear interest from the date of the original sale at a rate not less than the IRC § 7520 rate in effect on the date of the conversion.[29]

The IRS Regulations provide two methods of calculating the annuity amount: the first is used if no substitute residence is purchased and the whole trust will be converted to a GRAT; the second is used if a substitute residence is purchased with a portion of the trust property and the excess will be converted to a GRAT.

If the entire trust will be converted to a GRAT, the annuity is determined by dividing (1) the lesser of the value of all interests retained by the client as of the date of the original transfer, including any right of reversion; or (2) the value of all the trust assets as of the conversion date by an annuity factor determined (a) for the initial term, and (b) using the IRC § 7520 rate that applied as of the date of the original transfer.[30]

For example, if the client sells the vacation home for $1.5 million and decides not to reinvest any of the proceeds in a new residence, but has provided in the trust instrument for conversion to a GRAT, the annuity calculation will be the lesser of:

$$\frac{\text{\$462,990 (client's retained interest at start of trust including reversion)}}{\text{7.2865 (the annuity factor)}}$$

or

$$\frac{\text{\$1,500,000 (the net sale proceeds)}}{\text{7.2865 (the annuity factor)}}[31]$$

The result would be an annuity payment to the client of $63,541 each year until the end of the initial 10-year term.

If only a portion of the trust is converted to a GRAT, the annuity amount to be distributed to the client is decreased proportionally. To reach the correct result, begin

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by determining the annuity as if the whole trust was to be converted to a GRAT using the formula above. Then multiply that result by a fraction. The fraction is calculated by using a numerator that is the fair market value of the trust assets on the conversion date, less the amount reinvested in the new residence, and a denominator that is the fair market value of the trust assets on the conversion date.[32] For example, continuing with the scenario above where the client sells the summer home for $1.5 million, and assuming that the client reinvested $1 million of the sale proceeds in a new residence, leaving $500,000 to be converted to a GRAT, the calculation would be:

$63,541 (the annuity amount for the whole trust determined above)

multiplied by:

$500,000 (the amount remaining after reinvestment in new residence)

$1,500,000 (the fair market value of the trust on the conversion date)

Thus the annuity for the $500,000 that has been converted to a GRAT would be $21,180.[33]

Generally, and depending on prevailing economic factors, the QPRT tax benefits can be diluted by conversion to a GRAT when the conversion occurs early in the initial term. For example, if the conversion occurs in year two of a 10-year term, the loss of tax benefits will be much greater than if the conversion occurs in year nine of the term.

Finally, because the trust will be a grantor trust for the remainder of the term,[34] the grantor must include all income and capital gains taxes incurred by the QPRT on the grantor's personal income tax return, even if the taxes exceed the amount of the annuity received.

Conclusion

QPRTs are an excellent technique for transferring substantial assets at a discount, with minimal impact on the client's standard of living. Draftspersons should be careful to follow all of the governing instrument requirements so that the tax advantages are assured. The new IRS form QPRT may be relied on for this purpose.[35]

While the QPRT is a flexible vehicle that permits the sale of the home and purchase of a substitute residence, many technical issues may arise on such a sale. Thus, legal counsel handling the sale of property held in a QPRT should be conversant with these requirements and advise clients of their implications.

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1. Treas. Reg. § 25.2702-5(c) creates the concept of a Qualified Personal Residence Trust. All trusts that comply with the regulations are assured of the tax savings described in the next section of this article. Recently, the IRS has issued a sample form of QPRT which taxpayers may rely on to ensure compliance with the regulations. The form can be found in Rev. Proc. 2003-42, 2003-23 I.R.B. 993 (May 9, 2003).
2. *See* Priv. Ltr. Rul. 92-49-014 (Dec. 4, 1992); *see also* Rev. Proc. 2003-42, 2003-23 I.R.B. 993, § 4, Art. II(B)(2) (May 9, 2003). This makes sense as generally under state law these expenses would be the responsibility of a life tenant.
3. Usually transfers of partial interests in property to family members are subject to the special valuation rules of IRC § 2702. Under the general rule of § 2702, when a person transfers a partial interest in property and retains the rest, the retained interest is valued at zero and, thus, for gift tax purposes, the person would have made a gift of the entire fair market value of the property. IRC § 2702(a)(2)(A). However, there are three main exceptions to this rule if (1) the retained interest is an annuity interest or (2) the retained interest is a unitrust interest or (3) the interest transferred is in a personal residence. IRC § 2702(b); IRC § 2702(a)(3)(ii). Treas. Reg. § 25.2702-5(a)(1) specifies that a transfer of a personal residence to a QPRT qualifies for the personal residence exemption and will not be subject to § 2702. As such, the transfer of a partial interest in a personal residence is exempt from the special valuation rules and traditional valuation principles apply.
4. Treas. Reg. § 25.2512-5 governs the valuation of terms of years and reversions and makes reference to the § 7520 rate. Technically, the actuarial value of the remainder is

determined by deducting from the fair market value of the residence both the value of the right to remain in the property for 10 years and the value of the possible reversion to the client which would occur if the client died within the 10-year term and the property reverted to the client's estate.

5. The interest rate is known as the "7520 Rate." It is equal to 120% of the Applicable Federal Rate (AFR) and is published monthly by the IRS in accordance with IRC § 7520.
6. The unified credit amount is the amount that each person may give away tax free. The unified credit amount for gift tax purposes is $1 million. The unified credit amount for estate tax purposes is also currently $1 million; however, it will be increasing to $1.5 million in January 2004 and will continue to increase incrementally to $3.5 million in 2009.
7. In order to avoid the generation skipping tax, the QPRT should provide that if a child is not living on the termination of the trust, the child's share should pass to his or her estate, rather than to grandchildren, since under the ETIP rules no generation skipping tax exemption may be allocated to the QPRT until after the expiration of the initial term. IRC § 2642(f).
8. IRC § 2036(a)(1).
9. The client and the spouse should not split the gift of a QPRT because if the client dies during the initial term, the spouse will have lost the use of a portion of the spouse's unified credit. Additionally, if the spouse is to have an interest in the home at the end of the term, the spouse is not eligible to split the entire gift in any event. *See* Treas. Reg. § 25.2513-1(b)(3). Thus, the client and the spouse would not be able to split any gifts made in the year of creating a QPRT, since couples who elect gift splitting must split all gifts made in the same year. IRC § 2513(a)(2).
10. Interests of spouses in the same residence may be put in one QPRT or into separate ones. Treas. Reg. § 25.2702-5(c)(2)(iv). Each person is permitted to create two QPRTs, one for their principal residence and one for an occasional residence. *See* Treas. Reg. § 25-2702-5(c)(2).
11. Grantor trust status is an income tax treatment only. Thus, the client will not necessarily be deemed the owner for estate or gift tax purposes.
12. Treas. Reg. § 1.121-1(c)(3)(i).
13. For a general discussion of the advantages of grantor trusts, see Arthur D. Sederbaum & Karen C. Hunter, *Reversal of Fortune: The Use of Grantor Trusts in Estate Planning*, 2 Case J. No. 4 (1998).
14. *See* Priv. Ltr. Rul. 97-35-035 (Aug. 29, 1997).
15. *See* Priv. Ltr. Rul. 92-49-014 (Dec. 4, 1992); *see also* Rev. Proc. 2003-42, 2003-23 I.R.B. 993, § 4, Art. II(B)(2) (May 9, 2003).
16. Treas. Reg. § 25.2702-5(c)(9). The client also may not purchase the residence back from the trust at the end of the term if the home passes to the spouse or to a grantor trust. *Id.* The purpose of this rule is to cause the trust to incur capital gain if the client wants to repurchase the residence.
17. Treas. Reg. § 25.2702-5(c)(8)(A).
18. Treas. Reg. § 25.2702-5(c)(8)(B).
19. The option to purchase a substitute residence and the option to convert to a GRAT must be granted to the trustee in the trust instrument. Treas. Reg. § 25.2702-5(c)(7)–(8). If the trust does not grant the trustee these options, the trustee must distribute the sales proceeds back to the

QPRTs at a Glance

How They Work:

The client transfers primary residence or vacation home to a QPRT.

The client retains the right to live in the home for a set number of years (*e.g.*, 10 years).

At the end of the 10-year term, the home continues in trust for the client's spouse.

The client may continue to live in the home rent free during the spouse's life.

After the death of the spouse, the home passes either outright to or in trust for the children.

The client may continue to reside in the home, but must pay rent to the children.

Advantages:

The client's gift to the trust is relatively small compared with the value of the home, because the client's retained right to live in the home reduces the value of the gift.

The client can pass property of large value to children without changing his or her lifestyle.

If rent payments are eventually made to the children, the payments are additional asset transfers not subject to gift or estate tax.

If the client survives the 10-year term, the value of the home at death is not subject to estate tax (only the discounted value of the home at the time of the transfer to the QPRT is counted when computing the applicable unified credit).

grantor. Treas. Reg. § 25.2702-5(c)(7)(ii). Thus, a well-drafted QPRT should include these provisions.

20. Treas. Reg. § 25.2702-5(c)(7)(ii)(A).
21. Treas. Reg. § 25.2702-5(c)(7)–(8).
22. Treas. Reg. § 25.2702-5(c)(8).
23. If the QPRT had purchased a substitute summer home using only a portion of the sale proceeds, the QPRT may not use the remaining assets to purchase a partial interest in the New York apartment, since a QPRT trust may only hold one residence, or a portion of one residence, at a time. Treas. Reg. § 25.2702-5(c)(5).
24. N.Y. Tax Law §§ 1401–1402-a. There should be no real estate transfer tax imposed on the initial transfer of the home to the QPRT because of the "mere change of identity" and the "transfer for no consideration" exceptions. But see Petition of Manda Muller Kalimian, New York State Dep't of Taxation and Finance Real Estate Transfer Tax Advisory Opinion, TSB-A-02(1)R (April 3, 2002), which surprisingly finds that a transfer of real property to a GRAT is subject to the tax because the retained right to receive the annuity payment was deemed to be a transfer for consideration by the Commissioner of Taxation and Finance.
25. The terms of such an annuity must be specifically set forth in the trust agreement, and the trust must contain all provisions required by Treas. Reg. § 25.2702-3 with respect to a qualified annuity interest. The terms of the GRAT must call for annuity payments rather than a grantor's right of withdrawal. Treas. Reg. § 25.2702-3(b)(1)(i). The GRAT must also prohibit additions to the trust, prohibit commutation (prepayment), prohibit principal distributions to persons other than the grantor, and must contain provisions regarding incorrect calculations of annuity amounts and short taxable years. Treas. Reg. § 25.2702-3(b)(1)–(4).
26. Treas. Reg. § 25.2702-5(c)(8)(B).
27. *Id.*
28. Treas. Reg. § 25.2702-5(c)(7)(ii), (8)(i).
29. Treas. Reg. § 25.2702-5(c)(8)(B).
30. Treas. Reg. § 25.2702-5(c)(8)(C)(2).
31. The annuity factor is determined by using tables set forth by the IRS that take into account the 7520 rate at the time of the initial gift (in our example, 5.6%), the client's age at the time of the initial gift (in our example, age 50), and the term of the client's retained interest (in our example, 10 years). Where the trust instrument calls for the annuity to pay more frequently than annually, the annuity factor must be adjusted using certain factors. Many software programs offer quick solutions to these calculations.
32. Treas. Reg. § 25.2702-5(c)(8)(C)(3).
33. Where the residence has appreciated after the transfer to the trust, several commentators have indicated that in order to avoid a completed gift upon conversion to a GRAT, the annuity amount payable to the term holder must be equal to the *greater* of (1) the amount determined under the Regulations above, or (2) the value of the trust assets as of the conversion date multiplied by the § 7520 rate as of the conversion date. This advice seems to derive from Private Letter Rulings in which the IRS approved the terms of a QPRT that contained a "greater of" conversion formula, though the Service did not comment in the rulings that such a formula was required. *See* Priv. Ltr. Rul. 94-41-039 (Oct. 14, 1994); Priv. Ltr. Rul. 94-47-036 (Nov. 25, 1994). The authors, however, do not think this is necessary. The IRS provisions in the new sample QPRT do not contain a "greater of" provision. Rev. Proc. 2003-42, 2003-23 I.R.B. 993 (May 9, 2003) (see Article III D.(1) of the sample trust). Additionally, the IRS has approved QPRTs where the trust did not have a "greater of" conversion requirement. Priv. Ltr. Rul. 2002-20-014 (May 17, 2002). There is no reason to adjust the annuity amount because the regulations essentially back the client into the annuity amount that he or she would have been receiving had the client created a GRAT which resulted in a taxable gift of $537,010 on day one instead of a QPRT. Additionally, the annotations to the new sample QPRT state that "the annuity amount may be greater than the amount identified in the sample trust, but may not be less than that amount." This further supports the position that calculating the annuity amount using the § 7520 rate on the date of the gift is sufficient.
34. *See* IRC §§ 677, 673(a).
35. Rev. Proc. 2003-42, 2003-23 I.R.B. 993 (May 9, 2003).

Make Your Mark With Punctuation

BY SUSAN MCCLOSKEY

In almost every writing seminar I present, matters of punctuation provoke disgruntlement and dismay. Lawyers protest that the rules seem arbitrary, impossibly complicated, or counterintuitive. To illustrate their displeasure, they sometimes invent hypothetical problems, one of which featured a moose in need of legal counsel.

The aggrieved moose wanted an attorney to file a motion on its behalf, because a caribou had infringed its property rights. My questioner conceded that he would have no difficulty forming the singular possessive appropriate to his client. He would file the *moose's* motion. But what if several moose needed his legal assistance? The plural possessive, identical to the singular, would cause confusion about the number of plaintiffs. So should he refer to the *mooses'* motion? My suggestion that he avoid the problem by referring to *the motion of the plaintiff moose* (for the singular) and *the motion of the plaintiff herd of moose* (for the plural) did little to temper his displeasure. Nor did my observation that the practice of law is normally restricted to clients with two legs, not four.

The Matter of the Moose made me wonder why lawyers get so exercised about punctuation. Accustomed to rules, perhaps you're impatient with the merely conventional character of punctuation. It changes over time, not only guiding but responding to the practices of those who use it. For instance, writers once distinguished rhetorical questions from ordinary interrogatives by reversing the question mark so that its familiar right-hand curve appeared on the left. No one ever ruled against this procedure; it merely (and sadly) dropped out of use. And in current practice, it is entirely up to the individual writer to decide whether a comma belongs in a series linked by *and*. No rule dictates that *the butcher, the baker, and the candlestick maker* is correct, while *the butcher, the baker and the candlestick maker* is not. All a reader asks is that the writer consistently apply whichever convention he or she adopts.

Legal writers unhappy with the vagaries of punctuation might come to embrace them after considering an historical alternative. Ancient scribes produced manuscripts for a small population of literate patrons without using any punctuation at all.[1] Nor did they indicate divisions between words or sentences. They practiced their highly specialized craft in a culture where the written word was intimately linked to the spoken, as a transcript of what a speaker had said, as a draft of what he planned to say, or as a work by another author that the patron intended, after study, to read aloud. An unmarked text left the patron free to place his own rhetorical stamp on the manuscript. He would mark it to indicate not only where but also how long he would pause in his oral delivery, which words he would emphasize for dramatic effect, how he would signal the end of one phase in an argument and the start of the next.

According to this scribal practice, known as *scriptio continua*, the first several lines of the statement of facts in *Palsgraf v. Long Island Railroad* would have looked like this:

> plaintiffwasstandingonaplatformofdefendantsrailroad
> afterbuyingatickettogotorockawaybeachatrainstopped
> atthestationboundforanotherplacetwomenranforward
> tocatchitoneofthemenreachedtheplatformofthecar
> withoutmishapthoughthetrainwasalreadymoving
> theothermancarryingapackagejumpedaboardthecarbut
> seemedunsteadyasifabouttofallaguardonthecarwho
> hadheldthedooropenreachedforwardtohelphiminand
> anotherguardontheplatformpushedhimfrombehind
> inthisactthepackagewasdislodgedandfelluptherails

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A literate Greek or Roman might have marked this text in a way that would be only slightly more legible to us than the unmarked version. A hairline slash (/) would indicate the end of a sentence; a point on or above the line a greater or lesser pause:

> plaintiffwasstandingonaplatformofdefendantsrailroad
> afterbuyingatickettogotorockawaybeach/atrainstop
> pedatthestation.boundforanotherplace/twomenranfor
> wardtocatchit/oneofthemenreachedtheplatformofthe
> carwithoutmishap.thoughthetrainwasalreadymoving/
> theotherman.carryingapackage.jumpedaboardthecarbu
> tseemedunsteadyasifabouttofall/aguardonthecarwho
> hadheldthedooropenreachedforwardtohelphimin.
> andanotherguardontheplatformpushedhimfrom
> behind/inthisactthepackagewasdislodgedandfellupon
> therails/

Perhaps the next time you're confused about whether a period belongs inside or outside a quotation mark, you should rejoice that at least you have periods and quotation marks to contend with.

It took more than a millennium for a scheme of punctuation to develop that was less likely than *scriptio continua* to induce eyestrain and headache. The punctuation marks we now recognize and use emerged slowly in the West, over centuries in which the classical link between the spoken and the written word dissolved and the written word assumed an independent status. Literate men and women in late medieval Europe were likelier than their ancient counterparts to read privately and silently. They were also likelier than their remote forebears to regard the understanding of the written word as a matter of supreme importance, one on which the salvation of their souls might depend. Scribes responded to these circumstances by developing marks to assist readers in understanding scriptural and devotional texts. Punctuation, and then word divisions, eased the task.

No matter the form or the era, the purpose of punctuation has always been the same: to aid the reader's task.

The invention of the printing press, which encouraged the spread of literacy, also fostered the standardization of the marks. The basic repertoire of marks that then emerged has since changed little; only the quotation mark, at least in the form we now recognize, awaited development. The upshot of this stability has been resistance to innovation. In our own lifetimes, the attempt to introduce the interrobang, a question mark overlaid by an exclamation point to indicate an astonished query ("You mean he said *that*⁉"), failed almost as soon as it appeared.

No matter the form or the era, the purpose of punctuation has always been the same: to aid the reader's task. This boon to the reader comes at a price for the writer, who must take care to use the marks properly. Proper use begins not with a list of rules and supposed rules, but with a grasp of how the various marks function. The scheme that follows divides the small world of punctuation into three parts, focusing on the editorial, rhetorical, and grammatical tasks the marks perform. It isolates the few troublemakers – the comma chief among them – and thus limits the number of marks you have to worry about when you're editing your own texts. By rationalizing the workings of the marks, this scheme may guide you even when you find yourself navigating in the punctuational equivalent of heavy weather.

Editorial Marks

Most editorial marks indicate that the writer has done something either to his own or another's text. Quotation marks, for instance, signal that the writer has imported another writer's words. If the borrowing requires the omission of part of the quotation, ellipsis points mark the canceled material. Square brackets indicate additions to the quoted text to clarify its meaning. When square brackets enclose the Latin *sic* – [sic], meaning *thus* – they note an error in the original text, making the borrowing writer seem meticulous rather than careless. In their purely editorial function, round brackets or parentheses, the close kin of square brackets, enclose ancillary references, such as defined terms and cross-references in agreements; or explanations, such as brief summaries of decisions in cited cases.

These editorial marks cause difficulty only when you must deploy them in conjunction with other marks. On which side of quotation marks, parentheses, or brackets should another mark appear? The answer is, "It depends." In American as opposed to British practice, periods and commas belong inside quotation marks. Place periods inside parentheses and brackets only when these marks enclose a complete sentence; otherwise, place them outside, to close the framing sentence. Commas belong outside parentheses and brackets if the framing sentence requires them. Question marks and exclamation points go inside only if they are part of the quoted, parenthetical, or bracketed material. Semicolons and colons stay outside in all cases. If the passage you're quoting ends in a semicolon or a colon, simply drop the mark and substitute whichever form of punctuation suits the purpose of your sentence.

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The apostrophe and, as we'll later see, the comma, also work as editorial marks. The apostrophe that figured in the Matter of the Moose indicates the omission of letters within a word. The mark derives its name from the rhetorical term *apostrophe*, the invocation of an absent person or thing. If, in a moment of pique, you have ever invoked the netherworld – *O hell, what was she thinking?* – you've resorted to apostrophe. The apostrophe as a punctuation mark similarly invokes something absent. This function is apparent in contractions – *can't* instead of *cannot*, for instance, where the mark is a placeholder for an absent *n* and an *o*. The same function governs the more troublesome possessive apostrophe, which in the earlier history of our language also signaled the omission of letters. For instance, the Middle English possessive phrase *Goddes lawe* was contracted to the Modern English *God's law*, with the apostrophe marking the space once occupied by letters.

Confusion about the proper use of the apostrophe has led some writers to abandon the mark altogether or to use it to form a plural. Both errors appear in this sentence: *Defense counsels reasoning leaves ample room for the prosecutors counterargument's*. The basic convention is quite simple. Form the possessive of a singular noun by adding an *'s*, even when the noun ends in an *s*: *the judge's opinion, the plaintiff's motion, Jones's deposition, Davis's grievance.* Form the plural possessive by making the noun plural and then adding an apostrophe: *the defendants' claims.* If the plural ends in a letter other than *s*, add an apostrophe and an *s*: *the children's guardian.* This convention will guide you infallibly in almost every case you'll ever confront. While it's true that arbiters of usage, such as *The Chicago Manual of Style*, offer far more complicated guidance, they are dealing with cases that seldom present themselves. Only if Socrates becomes your client will you need to remember that the possessive of many classical and biblical names ending in *s* is an apostrophe alone: *Socrates'* rather than *Socrates's*.

You can also avoid error by remembering that possessive pronouns are possessive by their very form, vestiges of the time in our language's history when nouns and pronouns were inflected, with case endings indicating their function within a sentence. Now as then, *his* is the possessive form of the pronoun *he*; *her*, of *she*; and *its*, of *it. It's* is the contracted form of *it is*, never the possessive form of the pronoun *it*.

Rhetorical Marks

Rhetorical punctuation honors the spirit of those ancient patrons who marked their scribes' texts to indicate the pauses and emphases that would characterize the oral performance of the words. We acknowledge their legacy when we mark our texts to mirror some aspect of our own speech.

Question marks signal the upward inflection of our voices at the close of a question. Though rare in legal prose, exclamation points capture the writer's incredulity or surprise about the thought that precedes them. Commas, discussed below, can indicate a pause that would occur were the sentence spoken aloud. Dashes neatly render sudden shifts in mental direction and the tonal shifts that accompany them: *The defendant claimed – did you ever know a man more out of touch with reality? – that his car drove itself through his neighbor's garage door.* And parentheses supplement their editorial role by enclosing *sotto voce* asides: *The plaintiff wondered aloud (not for the first time) why the defendant failed to recognize his own driveway*.

Legal writers tend to overuse parentheses, usually to handle qualifying phrases and clauses. The following passage from a memorandum is a representative example:

> The Company owns licenses (or other rights) to use the intellectual property necessary to conduct its business (now or in the future), free and clear of liens of any kind. It has no obligations to any person (or entity) for royalties, fees, or commissions. To the Company's knowledge, no claim is pending (and none has been threatened) against it to the effect that the Company's operations infringe upon or conflict with the asserted rights of any other person. The intellectual property (either which the Company owns or licenses or which it otherwise has a right to use) has not been challenged in any judicial or administrative proceeding.

The parentheses here are consistently misused. In every instance, the writer should have omitted them or used commas instead. As a rhetorical mark, the function of parentheses is to *de-emphasize* whatever appears between them, inviting a harried reader to skip what they bracket. They are the opposite of dashes, which summon the reader's particular attention to the material they enclose. Here, commas, which neither emphasize nor de-emphasize, suffice to guide the reader in the few instances where any punctuation is called for. Notice how much less busy the passage seems when the brackets are removed:

> The Company owns licenses or other rights to use the intellectual property necessary to conduct its business now or in the future, free and clear of liens of any kind. It has no obligations to any person or entity for royalties, fees, or commissions. To the Company's knowledge, no claim is pending and none has been threatened against it to the effect that the Company's operations infringe upon or conflict with the asserted rights of any other person. The intellectual property, either which the Company owns or licenses or which it otherwise has a right to use, has not been challenged in any judicial or administrative proceeding.

Grammatical Marks

Where the rhetorical marks imitate the inflections of speech, the grammatical marks reveal the relationships

MARKS	PRINCIPAL FUNCTIONS
Editorial Marks	
Quotation marks	Indicate the borrowing of another writer's words
Ellipsis points	Mark omissions in a quoted text
Square brackets	Mark additions to or errors in a quoted text
Parentheses	Set off defined terms, cross-references, and case summaries
Apostrophe	Indicates omitted letters in contractions and possessives
Comma	Clarifies the elements of dates and place names; distinguishes original from briefly quoted material
Rhetorical Marks	
Question mark	Indicates an upward inflection at the close of a question
Exclamation point	Indicates incredulity or surprise about the point just expressed
Dash	Indicates a shift in the direction of one's thought; emphasizes an element in a sentence
Parentheses	Set off *sotto voce* asides; de-emphasize an element in a sentence
Comma	Indicates where a brief pause would occur if the sentence were spoken
Grammatical Marks	
Hyphen	Links compound adjectives and compound nouns
Period	Marks the end of a sentence
Colon	Signals the end of an independent clause but the continuation of its thought
Semicolon	Links independent clauses without the aid of conjunctions; distinguishes elements in complex series
Comma	Sets off appositives; differentiates nonrestrictive from restrictive clauses; distinguishes dependent phrases and clauses from independent clauses, independent clauses linked by conjunctions, and elements in simple series

between and among words within the structure of a sentence. The marks on which we principally rely for this purpose are hyphens, periods, colons, semicolons, and commas.

The hyphen defines the simplest of these relationships, linking the elements of compound nouns and adjectives. The words *plaintiff* and *appellant*, for instance, enjoy quite distinct meanings until a hyphen links them to designate the party appealing a lower court's decision. The phrase *fast moving van* is ambiguous until a hyphen clarifies what kind of vehicle streaked through the stoplight. Was a Ford Windstar, for instance, improbably moving at a high rate of speed (*a fast-moving van*), or was a U-Haul quickly transporting Smith's household goods from New Jersey to California (*a fast moving-van*)? It is the hyphen's job to tell us.

Periods have an equally straightforward function. Consider a simple sentence, such as *Harrison objected*. The period at the end tells the reader that the thought is complete, that this subject and verb together pass the grammatical litmus test of forming a sentence. Even when we make the sentence more informative by telling the reader that *Harrison objected to the prosecutor's badgering of the witness,* the period is still the only punctuation we need to signal the close of a grammatically complete unit.

Closely allied to the period is the colon – in effect, a double period vertically arranged. Like the period, a colon marks the end of a complete grammatical unit; unlike the period, it introduces words that complete the thought's meaning. That is, we followed with a period the observation that *Harrison objected to the prosecutor's badgering of the witness.* But if Harrison had been put out about a number of things, we would recast the sentence: *Harrison objected to several developments at trial: the prosecutor's badgering of the witness, the judge's slowness to intervene, and the noisy spectators' cheers and catcalls.* The colon tells us that we haven't reached the end of the sentence's *meaning*, even though we've reached the end of a complete grammatical unit.

As soon as we start to perform more complicated grammatical operations on the original sentence – by further modifying its elements, coordinating its ideas, or

subordinating one idea to another – we need to summon marks other than periods and colons to help our readers out. Consider this modification, which provides more information about Harrison's unhappy circumstances:

> *An attorney making his first appearance in court, Harrison objected to the prosecutor's badgering of the panic-stricken witness.*

We need a comma after the introductory phrase about Harrison to mark its status as an appositive, a modifying element equivalent in grammatical function and reference to the element with which it is paired. That is, the phrase *an attorney making his first appearance in court* and the noun *Harrison* act interchangeably as the grammatical subject and alike refer to defense counsel. The other addition, about the witness, requires no punctuation. A modifying adjective, its relationship to *witness* is clear by placement alone.

Many errors in the use of commas occur because writers have trouble with the grammatical distinction between a restrictive and a nonrestrictive clause.

What happens when we add a coordinate grammatical unit, such as a complete thought?

> An attorney making his first appearance in court, Harrison objected to the prosecutor's badgering of the panic-stricken witness; *the judge overruled his objections every time he rose to his feet.*

Here, the writer had the options of beginning a new sentence with the new clause, or of joining the two clauses with the conjunction *but* preceded by a comma. He rejected both options, however, because he wanted us to see Harrison's objections and the judge's response as equivalent, intimately related actions. He therefore enlisted the semicolon to forge the connection.

It is useful to think of the semicolon as a hybrid mark – a period atop a comma. The middleweight in the world of punctuation, it indicates a break in the sentence's unfolding meaning less forceful than the heavyweight period, more forceful than the lightweight comma. It unites what the period would divide and comes to the comma's aid when the comma overextends its resources. For instance, consider this sentence, in which the comma, already drafted to set off a modifying phrase, cannot also perform its customary function of distinguishing items in a series: *Harrison wanted to throttle the judge; the witness he had prepped for hours to no avail; and his aggressive adversary, a snake in a three-piece suit.* The semicolon steps in to clarify that there are only three objects of Harrison's displeasure, not four; his adversary and the snake are different names for a single target of possible assault.

Finally, what happens when we add a subordinate grammatical unit, such as a dependent clause, to the original sentence?

> An attorney making his first appearance in court, Harrison objected to the prosecutor's badgering of the panic-stricken witness; the judge overruled his objections every time he rose to his feet, *although she seemed mildly amused when Harrison started to sputter.*

The new information about the judge's response to Harrison depends grammatically on the preceding independent clause, and the comma indicates that dependency. It tells us that the incomplete *although* clause is grammatically distinct from the main clause, but depends on it for its meaning. A period in the comma's place would announce that the writer had said all he had to say about Harrison's objections and the judge's overrulings. We would then read the *although* clause as the beginning of a new sentence, which the writer would then have to complete: *Although she seemed mildly amused when Harrison started to sputter, she continued to overrule his objections*. Only if the new clause were completed in this way could the writer opt to place a semicolon between the old and the new: *The judge overruled his objections every time he rose to his feet; although she seemed mildly amused when Harrison started to sputter, she continued to overrule his objections*.

The Special Case of the Comma

Although the comma is a weaker mark than the period, colon, or semicolon, it is a great deal more versatile. Indeed, it is so indispensable a form of punctuation that it has already figured prominently in the discussion of the grammatical marks. Its protean nature makes it the bane of many writers, who deploy it by guess and by golly, without fully grasping what it is good for. The essential point to remember is that its task is always to distinguish one element in a sentence from another. These distinctions can take an editorial, rhetorical, or grammatical form.

As an editorial mark, the comma prevents misreading by tidying up a sentence's messy elements. For instance, a single comma prevents us from misreading dates as seemingly random strings of numerals, turning *June 231949* into *June 23, 1949.* The comma likewise distinguishes the elements of an address, separating the street number from the city and the state: *1507 Colfax Street, Evanston, Illinois.* When the date or address appears mid-sentence, another comma belongs after the year or the state. We also use commas to mark the point where our own words yield briefly to those of a quoted

writer. (For block quotations, the colon is the preferred distinguishing mark.)

Writers exploit the mark's rhetorical function when they use the comma to indicate the pauses they would make if they read the sentence aloud. Parenthetical elements, for instance, call for such pauses. The following sentence, without commas, initially suggests that its subject was discussing something in general terms – and then chaos sets in: *The managing partner was generally speaking about as enthusiastic as an ice cube.* When commas mark what would be the spoken pause after *was* and *speaking*, the writer's meaning becomes clear: *The managing partner was, generally speaking, about as enthusiastic as an ice cube*. As with parenthetical elements, so with complementary and antithetical ones:

> The best solution, *and the only one we should pursue,* is to avoid even the appearance of a conflict of interest. We are bound by, *not above,* the ethical strictures of our profession.

In all these instances, you can avoid error and guide your readers by asking yourself, "How would I speak this sentence?" and placing the commas appropriately.

This test can sometimes guide our practice when we deal with the comma in its grammatical role. The reason for a comma in the following sentence is essentially grammatical, not rhetorical: *Having researched her client's problem for five long days, Samantha concluded that its solution would be prohibitively expensive.* The comma here distinguishes one grammatical element – in this case, a participial phrase – from the main clause. In so doing, it clarifies the *structure* of the sentence, helping us to see that the first element depends on the second for the completion of its meaning. Even writers without a robust sense of grammar would likely place a comma after *days*, because the comma *sounds* right at the end of an introductory phrase. But while the comma's rhetorical function in this sentence coincides with its grammatical one, happy accidents make unreliable guidelines.

A different sort of test can help you cross the thicket of punctuating pairs or series of adjectives, where the grammatical question arises of what modifies what, and to what degree. Most writers routinely place commas between adjectives modifying the same noun, as in *The short, bald witness came across like a rock star*. When it would make equal sense to refer to *the short* and *bald witness*, we can be sure that a comma in the place of *and* is correct. But how should the following sentence be punctuated? *Philip found the vital missing index pages in his correspondence file.* The three adjectives here, *vital*, *missing*, and *index*, might tempt a careless writer to place commas after the first two. But the third, *index*, modifies *pages* to define the kind of pages Philip was seeking: index pages, not the contents pages or the *Yellow Pages*. That is, the phrase *index pages* denominates the single concept that *vital* and *missing* modify, so the proper punctuation is as follows: *Philip found the vital, missing index pages in his correspondence file.* Once again, the *and* test can guide you. You would not substitute *and* between *missing* and *index*, but you would do so between *vital* and *missing*.

In some cases, when no test will aid us, grammar alone dictates the proper use of the comma. One of the mark's tasks, for instance, is to distinguish independent clauses that the writer has chosen to link with conjunctions such as *and*, *but*, *or*, *nor*, *neither*, *yet*, *for* and *so*. To use the comma correctly, a writer must recognize an independent clause – a complete thought, capable of standing on its own – when he creates one on the page or screen. If he can, then he'll realize that this sentence is mispunctuated: *Marsha filed her papers, and then drowned her sorrows at Starbucks.* All we have here is a compound verb, *filed* and *drowned*, telling us what Marsha did. No comma is needed between these elements. The mark has a job to do only if the sentence is refashioned to make each clause independent: *Marsha filed her papers, and then* she *drowned her sorrows at Starbucks.* Now, with the addition of the pronoun *she*, we have two complete thoughts with subject-verb pairs. In the revised sentence, the comma does its proper job, showing us where one clause ends and the next begins.

Many errors in the use of commas occur because writers have trouble with the grammatical distinction between a restrictive and a nonrestrictive clause. Re-

strictive clauses do what their name suggests: they restrict the meaning of the word they modify to whatever the clause specifies. For instance, in this sentence, *Lawyers who handle eminent-domain cases care about justice*, the writer is using restrictively the clause *who handle eminent-domain cases*. Out of the general category of lawyers, he is singling out a certain class of litigators, distinguishing them from other kinds of litigators and from transactional attorneys. When commas set off the clause from the rest of the sentence, the clause becomes generally descriptive, rather than defining of a particular class: *Lawyers, who handle eminent-domain cases, care about justice*. Here, the writer makes a false claim about *all* lawyers, as if a license to practice necessarily meant a career of handling property disputes. In cases such as this one, punctuation bears directly on meaning and should be used with care.

The best way to distinguish restrictive clauses from nonrestrictive ones is to ask whether the clause in question could be canceled from the sentence without altering its meaning. If you could cut the clause, it's nonrestrictive; if you can't, it's restrictive. This guideline also helps you determine whether *which* or *that* is the appropriate introduction to a clause. *That* clauses are restrictive (*The agreement that Jamie drafted was 100 pages long*); *which* clauses are nonrestrictive (*The agreement, which Jamie drafted, was 100 pages long*). Guided by this distinction, you will know if commas belong, and where, because one of the mark's important functions is to distinguish the clauses by appearing only in the nonrestrictive sort.

The Marks in Perspective

This classification of punctuation is less concerned with the conventions that govern the use of the marks than with the editorial, rhetorical, and grammatical jobs they perform. The conventions have their value, of course, and it's good to know what they are. When you're in doubt about which mark to make or where to place it, you can consult any one of the myriad reference tools about punctuation. Those designed specifically for lawyers or for academics favor the more rigorous conventions; they recommend, for instance, that every item in a series be punctuated, including the one before the final *and*. Journalists and magazine writers, by contrast, favor minimal punctuation. Guides for their crafts encourage dropping the serial comma before *and* and the comma after a brief introductory phrase, as in *At midnight Falsworthy slumped over his laptop*. If you choose a reference tool appropriate to your work, it will guide you through the maze of a sentence and bring you out unscathed.

But you can also solve your problem by asking yourself what you're trying to do. Every mark exists to ease the reader's task of understanding what you've written. Of the 13 possible marks, one is best suited to the functional requirements of your sentence. Thinking about the job that needs doing helps you narrow the range of possibilities and select the likeliest candidate. If you need to note changes or omissions, most often in a borrowed text, you'll use an editorial mark (quotation marks, ellipsis points, a square bracket, parentheses, an apostrophe, or a comma). If you want to imitate on the page the inflections and rhythms of your speech, you'll use a rhetorical mark (a question mark, an exclamation point, a dash, parentheses, or a comma). And if you want to reveal the structure of a sentence, the way you've arranged and related its components, you'll need one or more grammatical marks (a hyphen, a period, a colon, a semicolon, or a comma). More often than not, you'll choose the right mark automatically. When an unusual circumstance baffles your instincts, you can usually solve the problem by rewriting the sentence. Recall that in the Matter of the Moose, we did not need to invent a new possessive plural; we needed simply to avoid the apostrophe altogether by referring to *the motion of the plaintiff herd*.

If thinking about the functions of the marks is helpful, so is a little perspective. When you're editing a document you've produced, you have more important things to consider than punctuation. Meaning only sometimes depends on the correct placement of a dot or a squiggle. It always depends on the words you select and the clarity with which you arrange them. When you litter a sentence with unnecessary commas or forget that a period belongs inside the quotation mark, you will not send your readers hurtling back to the age of *scriptio continua* to sort things out for themselves. You will simply create a little static on the line of communication between you and your reader. Only the most persnickety reader finds the occasional crackle or buzz so distracting that he simply cannot read on.

Readers, by and large, are remarkably flexible and resilient. They want to understand what you've written, and they're grateful when you make their job as easy as possible. But their desire to understand can overcome a few minor obstacles along the way. Remember this point the next time you find yourself fretting over a semicolon when you could more productively spend your time clarifying an idea. Hold this thought, too: A marooned sailor who places a message in a bottle had better tell his reader where his ship went down. No one will underestimate the urgency of his message because he omitted an exclamation point after the word *Help*.

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1. For my discussion of ancient practice and the evolution of punctuation, I am indebted to M.B. Parkes's scholarly study, *Pause and Effect: An Introduction to the History of Punctuation in the West* (Berkeley and Los Angeles: University of California Press, 1993).

Dividing Real Property Can Lead to Differences Among Competing Interests

By Elizabeth Pollina Donlon

The practice of having parents transfer a home to their children while retaining a life estate for themselves has become a common part of elder law planning. In estate planning, it is not unusual for a spouse in a second marriage to grant a life estate in a residence to the surviving spouse and the remainder interest to his or her children from a prior marriage.

In the typical case, when the life tenant wants to continue to live in the house indefinitely and the remainderpersons are patient, everything proceeds smoothly. Non-typical cases can pose some vexing complications. What happens, for example, if the life tenant wants to relocate? Can he or she force the remainderpersons to agree to a sale? If so, how are the proceeds to be divided between the competing interests?

These and related questions were addressed in *In re Sauer*, a two-part decision of the Nassau County Surrogate's Court,[1] which provides new insights into the treatment of life estates and the standards that apply when a life tenant seeks to sell real property and the remainderpersons are opposed to a sale.

Threshold Question

As a threshold question, the court considered whether the decedent intended to give her surviving husband a true life estate or simply a right of occupancy. A right of occupancy is only a personal privilege,[2] but a life estate imposes additional obligations upon the holder. In this case, the decedent's will said her husband "shall continue to live, for his lifetime should he so choose, in our marital residence and he shall not be asked, forced nor required in any matter to sell the premises until he so desires as long as the maintenance is paid for by my husband, including all taxes and insurance thereon." The court found that these obligations and the right to veto a sale effectively gave the surviving husband a life estate.

The husband and wife had purchased the property as tenants in common, and thus her one-half interest in the property was subject to the provisions of her will. Although case law is sparse, there is considerable statutory authority regarding sales of "divided" property interests. The authority for asking the court for permission to sell real property is found in both the Surrogate's Court Procedure Act 1904 (SCPA)[3] and in Real Property Actions and Proceedings Law § 1601 (RPAPL). Although the husband applied to the Surrogate's Court, proceedings under the SCPA are not deemed exclusive, and the Surrogate's Court has jurisdiction granted to it by the SCPA or other provisions of law.[4] Furthermore, statutes that relate to the same thing are said to be in *pari materia* and are to be construed together. Although the RPAPL provides for the application to be made to the Supreme Court,[5] the Surrogate's Court concluded that it had concurrent jurisdiction to order the disposition of real property for any other purpose the court deems necessary.[6]

SCPA 1918 provides for a determination of the interest of the parties, life tenant and remainderpersons and the protection of their interests in the disposition of real property. Any person interested – including a life tenant[7] – can petition for authorization to dispose of the decedent's real property.[8] In an SCPA Article 19 proceeding involving a life estate, the "'court must determine whether the interests of all the parties will be better protected or a more advantageous disposition can be made of the real property by including the disposition of such right or interest. . . .'"[9] RPAPL § 1602, in turn, provides that when the ownership of real property "is divided into one or more possessory interests and one or more future interests, the owner of any interest in such real property . . . may apply to the court designated

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in § 1603 for an order directing that said real property . . . be . . . sold."

Expediency Test

An application to sell divided real property may be granted, the court stated, if it is satisfied that the act to be authorized is "expedient."[10] *Webster's* dictionary defines *expedient* as "characterized by suitability, practicality and efficiency in achieving a particular end; fit, proper and advantageous under the circumstances." Under SCPA 1902(7), to justify a sale "some estate purpose must be served, the action must serve to carry out the provisions of the Will or be of benefit to those interested in the estate."[11] In determining whether a sale would be expedient, the court looked to a case in which a petition to sell was granted where the purchase price was well in excess of the appraised value, the rent was insufficient to pay the taxes, the house was unoccupied, and the life tenant would have to expend a considerable sum of money for taxes, insurance and maintenance of the house.[12]

Granting, *as opposed to retaining, a life estate in real property may engender unanticipated tensions between the life tenant and the remainderpersons.*

In the *Sauer* case, the surviving husband said he wanted to sell because the real estate market was high and he wanted to relocate. The court reasoned that the only way to carry out the provisions of the will would be to allow him to sell the property. In granting his application to sell the premises over the objections of the executrix, the court wrote: "Granting the application is expedient, as well as suitable, practical and efficient in reaching the end, which is to allow the life tenant to sell the property, the power of which he was given pursuant to the decedent's will."[13]

Valuing and Paying Out the Life Estate

Although the property could be sold, two questions remained: how to value the life estate and whether the holder should be paid a sum "in gross" or be entitled only to the income generated from the investment of the sale proceeds. The husband contended that he was entitled to receive a dollar amount representing the value of his life estate, net of the principal balances of the outstanding mortgage loans and subject to adjustment for customary selling expenses. He maintained that the actuarial value could be readily calculated with reference to the sale price (fair market value) of the underlying one-half interest in the real property.

The executrix argued that if the life tenant were to receive a sum in gross, the remainderpersons would suffer undue hardship due to the loss of approximately one-third of the value of the estate. She also continued to argue that it was not her mother's intention to give her husband the full value of his life estate and that she only intended to give him the "use and occupancy" of the home.[14]

"Unreasonable hardship" Acknowledging a paucity of reported decisions in this area, Surrogate Riordan looked again to statutory authority in examining whether the husband was entitled to a "sum in gross" or another form of value for his life estate. According to RPAPL § 967, a tenant for life is entitled to have a portion of the proceeds of the sale invested, secured or paid over in such manner as the court deems calculated to protect the rights and interests of the parties. Furthermore, RPAPL § 968 provides that "the power to determine whether the owner of a particular estate shall receive, in satisfaction of his estate or interest, a sum in gross or shall receive the earnings, as they accrue, of a sum invested for his benefit in permanent securities at interest, rests in the discretion of the court. . . . The application of the owner of any such particular estate for the award of a sum in gross shall be granted unless the court finds that unreasonable hardship is likely to be caused thereby to the owner of some other interest in the affected real property."[15]

According to the court, RPAPL § 968 was enacted to clarify that when the parties agree on the invested sum or sum in gross, the agreement must be given effect. When the parties disagree, however, the choice is to be made by the court, and "when the life tenant requests the lump sum, the court is required to give it to him 'unless unreasonable hardship is likely to be caused thereby to the owner of some other interest in the affected land.'"[16] The court concluded that payment of a gross sum would be allowed where the withdrawal of the value of the life estate would leave a balance that, with accumulated interest over a period of the life tenant's life expectancy, would restore the fund to its present corpus for the remainderpersons.[17] Thus, the life tenant's application would be denied if the payment of a gross sum resulted in the depletion of the entire fund,[18] or if the remainderpersons showed that the payment of a gross sum to the life tenant would defeat the interest of the testator, or where it appeared that the life tenant could only survive for a short period and it would be "manifestly unjust to the remainderman."[19]

In the *Sauer* case, because the executrix failed to show that granting the life tenant's application would result

in unreasonable hardship to the remainderpersons, the court allowed the life tenant to be paid a sum "in gross" representing the value of his life estate, and it directed the New York Commissioner of Insurance to compute such value based on the life tenant's age at the time the real property was sold.[20] Employing the applicable mortality tables (1980 CSO)[21] and a 4% interest rate,[22] the Insurance Department thereafter determined and certified the value of the life estate to the court. For a 79-year-old male, the resulting factor was .21483 or approximately 21% of the estate's one-half of the net sales proceeds.

Retaining vs. Granting a Life Estate

Retaining a life estate in residential real property is a popular planning technique for many good reasons. Although title vests in the remainderpersons upon the conveyance by deed, the reservation of a life estate allows the life tenant to rest easy, generally assured that no one – *i.e.*, the remainderpersons – can force a sale of the premises during the life tenant's lifetime.

Unless the life tenant's death occurs in 2010, when new estate and income tax rules under IRC § 1022 are scheduled to take effect,[23] the remainderpersons will acquire a stepped-up basis in the property. If the parties agree to sell the property during the life tenant's lifetime, the capital gain and any capital gains tax will be allocated between the life tenant and the remainderpersons in proportion to the values of their respective interests, as determined under the Internal Revenue Code. If the life tenant requires nursing home care and the property is sold, the value of his or her retained life estate, determined under different actuarial tables, will come into play for Medicaid planning purposes. Most estate law and elder law practitioners are aware of these and other planning implications of retaining a life estate.

Granting, as opposed to retaining, a life estate in real property is an entirely different matter, which may engender unanticipated tensions between the life tenant and the remainderpersons. As the *Sauer* decisions demonstrate, the life tenant may indeed be able to force a sale of the premises on the remainderpersons and, unless the remainderpersons can affirmatively demonstrate unreasonable hardship, the life tenant will be entitled to receive a lump sum from the sales proceeds equivalent to the actuarial value of his or her life estate.

The *Sauer* decisions also bring home the attorney's role in the estate planning process: ascertaining and accomplishing the clients' dispositive intentions. When faced with a situation where, at first glance, granting a life estate to one party and a remainder interest to another appears to be an appropriate planning technique, it is critical that the client be aware of the implications associated with conveying divided interests in real property.

Implications of Life Estates

The right to a life estate has a wide variety of implications that need to be considered when the provision is used.

Too much, not enough or just right? Given the lesson of *Sauer*, is it too much to give someone a life estate? It is a valuable property right, defined as an interest in real property that a party holds during his or her lifetime, with an exclusive right of possession, enjoyment and control.[24] It thus involves far more than the mere right to occupy the premises, which is subject to divestiture on the occurrence of a specified event (*e.g.*, failing to pay required expenses, involuntary absence in excess of a specified period, etc.).

The use of a life estate may be required for a particular client's estate tax plan. A life estate passing to a surviving spouse qualifies as "qualified terminable interest property" for which the estate tax marital deduction treatment may be elected under the QTIP rules,[25] whereas a right to occupy or a tenancy for a term of years does not. Now that the estate tax exemption is $1 million and rising, however, the estate tax marital deduction may not even play a small role in deciding whether a life estate is the answer to the estate planning question.

As far as the client's dispositive intentions are concerned, perhaps a life estate is not enough. If the client really wishes to favor the life tenant over the remainderpersons, he or she must be specific. In a footnote in

Sauer Part 1, the court added: "The conveyance of the life estate coupled with a power of sale may in some cases convey fee absolute. In New York, however, there must be some language in the will which indicates that the interest in the property is greater than the life estate or that the testator intended the power of sale benefit the holder of the life estate."[26]

Also, it is important to realize that a life estate is not the same as an income interest in a trust, and different criteria apply before an application to sell is granted. For example, a trustee was allowed to sell a residence in which the income beneficiary was provided with the exclusive possession and use during her lifetime and to distribute to the income beneficiary "that portion of the proceeds commensurate with the actuarial value of her life estate," even though the sale would effectively terminate the trust and frustrate its main purpose.[27]

What if the life tenant lives a very long time? More often than not, it is the remainderpersons who become impatient about selling the house. If the life tenant has longevity on his side, then what? If there is concern about when the remainderpersons will see their interests materialize, perhaps a tenancy for a term of years would be more appropriate. Also, unlike a conveyance subject to a life estate by deed, a bequest under a will allows a testator to select from a variety of alternate dispositions of the real property in the event that the life tenant outlives the remainderpersons.

Tenancies in common are not uncommon when there is a second marriage and children from a first marriage. If the property in question is not disposed of before the life tenant dies, at death the one-half interest that had been subject to the life estate may vest in the surviving issue of the first person to die, or otherwise as set forth in the governing instrument. In the *Sauer* case, six sellers, who were already less than cooperative with each other, would have been involved in negotiating the terms of a sale. And what if one or more of those remainderpersons had predeceased the life tenant? Then, more remainderpersons, and possibly their surviving spouses or minor children, could be involved – a real estate nightmare.

Economic burdens, including encumbrances Surrogate Sobel of Kings County once wrote: "As any Surrogate experienced with accountings at the termination of a legal life estate is aware, a legal life estate in real property is a nuisance and only tolerable where the life tenant is relieved of the burden of amortization of mortgages and the assumption of taxes and other maintenance expenses."[28]

As a life tenant and under the terms of the will, the surviving spouse in the *Sauer* case had to pay the real estate taxes, utility bills, insurance and the interest portion on the two mortgages on his Nassau County house. He found it difficult to do so without his late wife's financial contribution. Depending on the expenses and the life tenant's financial situation, a continuing life estate may prove to be more of a burden to the life tenant than a benefit. Such ongoing costs may prove to be too financially difficult for the life tenant whose only alternative to selling would be to rent out the property – with all the attendant burdens of being an absentee landlord.

If there's a mortgage on the house, the life tenant is responsible for mortgage interest; the remainderpersons are responsible for the principal portion of such indebtedness. Does the client want the life tenant to be in the perhaps untenable position of having to rely on the remainderpersons to pay their ratable share of the principal on the mortgage loans in a timely manner? If the client intends for either the life tenant or the remainderpersons to bear both the interest and principal portions of a mortgage loan, then that intention must be spelled out.

Expect the unexpected A life tenant has a present, possessory interest which, more often than not, he or she will continue to enjoy for life. While the life tenant is alive, the remainderperson's interest is a future interest. If, through a sale, the life tenant wants to convert his or her interest into a financial one, the remainderpersons should not be opposed. Depending on such variables as the life tenant's age and health and the state of the economy (*e.g.*, real estate values and interest rates), however, the remainderpersons may prefer to wait for the life estate's natural conclusion – the life tenant's death – to realize the undiminished value of their future interest in the real property.

Nonfinancial considerations, such as a soured relationship between the life tenant and the remainderpersons, may also come into play. In anticipation of a potential conflict between the life tenant and the remainderpersons arising from a "house divided," the wise testator will take into account the possibility of a lifetime sale of the premises and accordingly set forth how the proceeds are to be divided.

Timing issues The court is authorized to remit the facts to the New York Insurance Department to determine the actuarial value of a life estate.[29] If the court in *Sauer Part 2*, had looked instead to the actuarial tables used for tax purposes, the life tenant's interest would have been considerably greater.

Under the Internal Revenue Code, the value of a life estate in property is computed with reference to the transfer date, the age of the measuring life (which takes into account more current – and unisex – mortality factors), and the applicable IRC § 7520 rate, which changes monthly. For the month of the sale (February 2003), the applicable interest rate was, coincidentally, 4%; for a 79-year-old, the applicable factor was .27670. If the sale had

occurred a year earlier (February 2002), when the life tenant was 78 and the applicable interest rate was 5.6%, the applicable factor would have been .36964.

Mortality tables aside, a delay in a sale generally works against the life tenant as life expectancy decreases. If the interest rate rises substantially, a delay in the sale may work to the life tenant's advantage, despite the decrease in life expectancy. Similarly, if real estate values appreciate substantially during the period between the date of death and the date of sale, it is also possible for both the life tenant and the remainderpersons to benefit from a delayed sale. Although a house divided will not stand, a booming real estate market can generally cushion the fall.

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1. *In re Estate of Sauer*, 194 Misc. 2d 634, 753 N.Y.S.2d 318 (Sur. Ct., Nassau Co. 2002) ("*Sauer Part 1*") *and In re Estate of Sauer*, 195 Misc. 2d 232, 757 N.Y.S.2d 709 (Sur. Ct., Nassau Co. 2003) ("*Sauer Part 2*").
2. *In re Cimino*, N.Y.L.J., Aug. 2, 1995, p. 25, col. 6 (Sur. Ct., Nassau Co.).
3. Under SCPA Art. 19, an interested party may petition for the disposition of a decedent's real property in order to accomplish "any other purpose the court deems necessary." Co-owners of real property may not be interested parties, unless they also take through an estate. If not, then their remedy is to seek a partition of the property. *See* Turano & Radigan, New York Estate Administration (2003 ed.), Lexis-Nexis Group, § 17.02[d], p. 569.
4. SCPA 202.
5. RPAPL § 1603; *Gardiner v. U.S. Trust*, 275 A.D.2d 413, 712 N.Y.S.2d 873 (2d Dep't 2000).
6. SCPA 1902(7).
7. *In re Bolton*, 79 Misc. 2d 895, 362 N.Y.S.2d 308 (Sur. Ct., Tompkins Co. 1974). In *Bolton*, the Tompkins County Surrogate wrote: "While renunciation of her life estate might be an answer to sale of the [subject property], it does not seem necessary that a life tenant be required to consent to a forfeiture of the benefits of a life interest in order to dispose of the existing corpus of the life estate."
8. SCPA 1904(1).
9. *Sauer Part 1*, 194 Misc. 2d 634, 637, 753 N.Y.S.2d 318 (Sur. Ct., Nassau Co. 2002) (quoting SCPA 1918(1)).
10. RPAPL § 1604.
11. *In re Perkins*, 55 Misc. 2d 834, 837, 286 N.Y.S.2d 586 (Sur. Ct., Albany Co. 1967); *Bolton*, 79 Misc. 2d 895.
12. *In re Gaffers*, 254 A.D. 448, 450 (3d Dep't 1938).
13. *Sauer Part 1*, 194 Misc. 2d 634.
14. In a footnote to *Sauer Part 2*, 195 Misc. 2d 232, 757 N.Y.S.2d 709 (Sur. Ct., Nassau Co. 2003), the court observed: "This issue was resolved in the prior decision of the court where one of the considerations of the court was that the executrix conceded that the decedent gave Arthur Sauer a life estate in the home."
15. *Id*. at 232–33 (quoting RPAPL § 968) (emphasis added).
16. 1947 Report of NY Law Rev. Comm. at 308.
17. *Mosher v. Wright*, 200 Misc. 792, 111 N.Y.S.2d 669 (Sup. Ct., Albany Co. 1951); *Jermaine v. Sharpe*, 29 Misc. 258, 61 N.Y.S. 700 (Sup. Ct., Rensselaer Co. 1899); *Wood v. Powell*, 3 A.D. 318, 38 N.Y.S. 196 (2d Dep't 1896).
18. *Wood*, 3 A.D. 318.
19. *Id.* at 321.
20. *In re Fisher*, 169 Misc. 2d 412, 414, 645 N.Y.S.2d 1020 (Sur. Ct., Rockland Co. 1996). In *Fisher*, the life tenant and executor consented to the sale of the premises; the only issue was the date of valuation of the life estate: as of the date-of-death or as of the date of the sales transaction.
21. RPAPL § 403, which has not been amended since 1984, requires the use of mortality tables prescribed by Insurance Law § 4217.
22. RPAPL § 402 mandates the use of a 4% interest rate, compounded annually.
23. *See* Sharon K. Gruer, *Recent Rule Changes Have Negative Impact in Use of Life Estates*, N.Y.L.J., Sept. 9, 2002, p. 9, col. 1.
24. *U.S. v. Baron*, 996 F.2d 25 (2d Cir. 1993).
25. IRC § 2056(b)(7).
26. *Sauer Part 1*, 194 Misc. 2d 639 n.1 (citing *In re Hayes*, 114 N.Y.S.2d 87 (Sur. Ct., Suffolk Co. 1952); *Weinstein v. Weber*, 178 N.Y. 94 (1904).
27. *In re Trust Created by Wible*, 284 A.D.2d 622, 726 N.Y.S.2d 175, 2001 (3d Dep't 2001) (affirming Warren County Surrogate's decision).
28. *In re Seidman*, 88 Misc. 2d 462, 469, 389 N.Y.S.2d 729 (Sur. Ct., Kings Co. 1976).
29. RPAPL § 406 authorizes a court to transmit such statement of facts as is necessary to permit the required computation. Certification under RPAPL § 406 is conclusive evidence that the valuation method adopted therein is correct.

Guardian *ad Litem* Procedures Reflect Traditional Court Concerns For Those Lacking Representation

BY CHARLES J. GROPPE

Protecting the rights of persons unable to represent themselves has always been a special concern of the Surrogate's Court. Article 4 of the Surrogate's Court Procedure Act provides for a guardian *ad litem* to represent persons "under a disability," including infants, incapacitated individuals and unknown heirs.

With the recent adoption of revised procedures for selecting guardians *ad litem*, new opportunities exist for attorneys to obtain these court appointments. This article provides a description of the role played by guardians *ad litem* and the standards that apply to their work.

A guardian *ad litem* (GAL) may be appointed on nomination by an infant over age 14 or his or her parent.[1] More commonly, however, the appointment is made by the court under SCPA 403(2).

Even though an infant party appears by the guardian of his or her property, which is permitted[2] and may obviate the need for appointment of a GAL, the court may nevertheless appoint a GAL if there is a possibility of a conflict of interest between the infant and the guardian of the property.[3]

A GAL in Surrogate's Court must be an attorney[4] and is subject, therefore, to all the rules and ethical norms governing attorneys. However, the GAL often cannot act as a private attorney must in a traditional attorney-client relationship. The GAL is not the proxy or agent of the ward; the ward does not have the privileges of a client and does not control or direct the GAL.[5]

The Chief Administrator of the Courts is empowered to approve and certify education and training courses that prospective applicants must complete as a prerequisite for applying to be placed on the list of individuals eligible for appointment.

Scope of Authority and Responsibility

The GAL's authority is limited to the matter in which he or she is appointed. Unlike a private attorney, who, with the concurrence of the client, can expand or contract the engagement, the GAL's responsibility is set by the court.

The GAL has a duty to investigate and report to the court and perhaps to other participants in the proceeding. He or she may thus have to disclose information that a private attorney would regard as privileged. The GAL is required to make his or her advice and recommendations available to the parties.

The GAL may consult *ex parte* with the court for advice and instructions. As a general principle, the GAL should not hesitate to seek guidance from the court in carrying out her or his duties.

The roles of a GAL have been variously described. No single definition applies. Guardians *ad litem* have been defined as "attorney" for a ward; "more than an attorney"; "officer of the Court"; "trustee ad litem"; and the "protector" of the ward's interests. All these roles overlap and often conflict with each other. Also, the role does not permit the GAL to act fully as an attorney would in a traditional attorney-client relationship.

The characterization of the GAL as "attorney" for the ward has been referred to in numerous cases:

- "It may be said that a special guardian (the former nomenclature for GAL) is in a sense the attorney for his ward,[6] with the supplemental statement that under many circumstances he ought not to go so far as an attorney may go in the making of admissions, for example."[7]
- The GAL's relation to his ward "is in essence the same as that of a regularly retained attorney to an adult client."[8]

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This article is adapted from a new chapter being added to *Harris New York Estates: Probate, Administration and Litigation.*

• "So far as concerns his relation to the litigation for which he is appointed, he acts purely and solely as the attorney for the particular persons whose interest he is designated to protect. The assertion, therefore, of strong partizanship [sic] on behalf of his statutory clients, far from being an aspersion, amounts to a recommendation."[9]

While many standards applicable to attorneys, including standards of care in performance of duties, ethical norms and determination of compensation, apply to a GAL, the two roles are not identical. There are as many differences as similarities.

One court expanded the role of the GAL, stating: "A special guardian [GAL] is more than an attorney. He is a trustee *ad litem*. He must err, if need be, on the side of caution. In bringing on a contest, and attempting to conserve assets, he is answerable to the court, as well as to the incompetent."[10] No elucidation of such a trustee's duties is given in the case, however. Clearly, a GAL is not a trustee in the technical sense of that term.

A GAL is not a party to the suit, but is "an officer appointed by a court of justice in a cause to prosecute or defend for, or otherwise to represent and look after the interests of an infant or an insane person whose property rights are affected by the judgment or decree."[11]

This reference to the role of "officer of the Court" is too general to be useful. It does not compare and distinguish – if a distinction can be made – the role of an attorney, *as* attorney, with that of GAL as an officer of the court.

The best and most succinct description of a GAL was set forth by former Surrogate Hildreth of Suffolk County:

> The [GAL], both in representing the infant and as an officer of the court, is under a duty to make a report to the court of his activities. This would include a report of facts and statements of witnesses which are material to the issues even in the absence of objections. It is the duty of the [GAL] to examine into the facts and to make a thorough and fair report of information obtained. . . . [W]hile the [GAL], in some respects, represents his ward as an attorney represents an adult client, his concurrent obligation to the court and all parties imposes a higher degree of objectivity. In the opinion of the court, he cannot properly take a stance which, in effect, prevents the court or other parties from having a full knowledge of material evidence which he has secured and deems pertinent with respect to the issues in which his ward has an interest.[12]

The Appellate Division has adopted this description of the investigative and reporting role of the GAL, stating in 1981: "Thus, even though the prime allegiance of the [GAL] is to the infant, he is required, as an officer of the court, to make a thorough and fair report of the information obtained."[13]

Although the GAL is in a sense a representative and officer of the court that makes the appointment, "this is strictly limited by the duties which he is called upon to perform, which are to protect the interests of wards of the court whose conservation is enjoined upon it. He is in no particular a judicial officer if that phrase is given the connotation of one who is called upon to weigh the merits of the proceeding and pass on the rights of the respective litigants."[14] The duty of the GAL is to "protect and advance those rights by every honorable means and expedient which is known and available to him, under penalty, if he proves derelict in the performance of his duties, that he may subsequently be compelled to respond in damages to his wards."[15]

As further illustration of the GAL's duty, under certain circumstances, to disagree with and even to oppose the direction of the ward, the Court of Appeals has said:

> It is incumbent on a [GAL] to make an objective evaluation of the circumstances and to take such action as will advance what he perceives to be the best interests of the ward; the wishes of the ward will be relevant but not determinative. In the present case the guardian determined to oppose the [ward]. . . . [The GAL] may of necessity be obliged to act contrary to the desires of the incompetent and to adopt a position adverse to that urged by his ward.[16]

Nature of the GAL's Representation

The "roles" of a GAL may perhaps be better understood in terms of the functions and limitations of the office, and by comparison with the authority of a private attorney for a client. These functions include the terms of the original engagement of the GAL compared with those when a private attorney is being retained; the relationship between GAL and ward and attorney and client; the respective parties' rights to control the matter and to make decisions; the ethical obligations owed by GAL to ward and attorney to client.

The GAL's duty and representation extend only to the proceeding and for the matter for which he or she was appointed.[17]

The GAL's authority ordinarily ceases at the conclusion of the proceeding in question.[18] The authority normally also ceases upon attainment by an infant ward of majority; and presumably the same result would follow on cessation of incapacity due other than to minority. In either case, because the GAL is an "attorney," the provisions of CPLR 321(1), relating to disability of a party's attorney apply. No further proceedings may be taken against the former ward without further order of the court until 30 days after notice to appoint another attorney has been served.[19]

The authority of the GAL does not necessarily cease on the entering of a decree, however. The GAL "was not *functus officio* at the instant of the entry of the decree, but

he becomes party to an appeal. It is equally true that he has the right to take and prosecute an appeal, and that his duties and office continue until the final determination of any appeal from the surrogate's decree."[20] Note, however, that a private attorney may, and is expected to, advise the client whether to take an appeal; the client decides. The GAL, however, is required to obtain consent of the appointing court before prosecuting an appeal.

Ethical Obligations

The provisions of the *Lawyer's Code of Professional Responsibility* appear to impose requirements on an attorney when acting as an attorney that are different from her or his responsibilities as a GAL to a ward.

In carrying out responsibilities as GAL, the attorney will often find that the particular duties will conflict with the Disciplinary Rules and Ethical Considerations of the *Code of Professional Responsibility*, *e.g.*, in matters of disclosure, duty to follow a client's direction, ascertaining client's interests.

Compare the following standards related to objectives, the rights of the client to make decisions, the consideration of consequences and the client's capacity as they apply to an attorney and to a GAL. A provision of the Disciplinary Rules states that a lawyer shall not intentionally "[f]ail to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules."[21]

The Ethical Considerations flesh out the Rule:

> **EC 7-7** In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer.
>
> **EC 7-8** The lawyer may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forgo legally available objectives or methods because of non-legal factors is ultimately for the client and not for the lawyer. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.
>
> **EC 7-12** Any mental or physical condition that renders a client incapable of making a considered judgment on his or her own behalf casts additional responsibilities upon the lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, the lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his or her interests, regardless of whether the client is legally disqualified from performing certain acts, the lawyer should obtain from the client all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for the client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of the client. But obviously a lawyer cannot perform any act or make any decision which the law requires the client to perform or make, either acting alone if competent, or by a duly constituted representative if legally incompetent.

Disclosure of evidence Illustrative of the broader role of a GAL compared with that of a private attorney for a client, is the obligation placed on the GAL to disclose information obtained as a result of her or his investigations to other parties. The information is really the court's information and is accessible by all the parties.

Thus, in a probate proceeding, where the GAL for an infant distributee obtained certain witness statements during his investigation that presumably were unfavorable to his ward and refused to disclose them on the ground that they were "privileged," the court disagreed. The Surrogate held that the court and all the parties were entitled to full disclosure of all evidence bearing on the issues obtained by the GAL as an officer of the court, under a duty to make a report to the court of his activities.[22]

Preserving confidences Compare the following familiar rules relating to client confidences as they apply to an attorney and to a GAL:

> **Canon 4.** A Lawyer Should Preserve the Confidences and Secrets of a Client.
>
> **EC 4-5** A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of the client after full disclosure, such information for the lawyer's own purposes.
>
> **DR 4-101(B)** Except when permitted under DR 4-101 [1200.19] (C), a lawyer shall not knowingly:
>
> 1. Reveal a confidence or secret of a client.
>
> 2. Use a confidence or secret of a client to the disadvantage of the client.
>
> 3. Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

Ward as third-party beneficiary Although the GAL, "by reason of his appointment, is an arm of the court, and his promise to perform runs to the court rather than

directly to his ward, it would be reasonable to consider the ward a third-party beneficiary of the [GAL's] acceptance of the appointment."[23] Thus, it would appear that a cause of action would lie against a GAL, in her or his representative capacity, if the GAL were guilty of negligence to the detriment of the ward.[24]

If a person entitled to commence an action is under a disability of infancy or insanity at the time the cause of action accrues, the statute of limitations is tolled during the period of disability.[25] The GAL should consider the implications of a potential malpractice claim being asserted long after termination of the appointment and after the disability is removed.

Consideration should be given to instituting a proceeding for advice and direction to obtain the protection of a direction from the court.[26] The resulting court order to the GAL may allow the GAL in later litigation to claim protection from liability under the umbrella of judicial immunity.

Whenever a GAL thinks that a specialist of some type must be engaged, the GAL must seek prior approval from the court.

Requirements Under Statutes and Rules

The designated GAL must file a statement that he or she has no interest adverse to or in conflict with the person under disability.[27]

The provisions of the *Lawyer's Code of Professional Responsibility* apply to an attorney acting as GAL.[28]

SCPA 402(2) directs that a person under disability shall appear in a proceeding by a GAL "where no appearance is made as provided in subdivision 1 [*i.e.*, by guardian or other representative] or where the court so directs because of possible adversity or conflict of interest or for other cause."

SCPA 404(3) states that the GAL "shall file an appearance and take such steps with diligence as deemed necessary to represent and protect the interests of the person under disability, and file a report of his activities together with his recommendation upon the termination of his duties or at such other time as directed by the court."

Rule 207.13(a) requires a GAL to qualify within 10 days of notification of appointment and requires that the GAL review the court's guidelines for GALs and "carefully examine all matters affecting the [ward] and all processes and papers . . . [and] report these findings . . . within 10 court days of the [GAL's] appointment or from [the date to] which the proceeding was finally adjourned, unless extended by the court." Always ask for a copy of the court's guidelines and follow them!

Rule 207.13(b) directs that in a proceeding in which a decree directing payment of money or delivery of property has been made, the GAL is to file a supplemental report within 60 days after settlement of the decree, showing whether the decree has been complied with insofar as it affects the ward.

Rule 207.13(c) prohibits allowance of compensation to a GAL until an appropriate report is made.

Rule 207.41 further provides that a GAL appointed in an accounting proceeding shall file a report or objections within 20 days after the appointment unless the time is extended by the Surrogate.

Rules 207.12, *207.13*, and *207.41* have not been amended to reflect Part 36 of the Rules of the Chief Judge. Section 36.4 of Part 36 requires that every person or entity appointed "shall file with the fiduciary clerk of the court from which the appointment is made, within 30 days of the making of the appointment, (i) a notice of appointment and (ii) a certification of compliance with [Part 36] . . ." on a form to be provided.

Limits on Delegation of Responsibilities

Because the court names GALs for their own qualifications, professional skill, and expertise, questions have arisen about how much, if any, of the services they perform can be delegated to others such as associate attorneys or paralegals in the GAL's law firm without prior approval of the court. Also, if some work is delegated, how is compensation to be computed and who is to receive that compensation?

While a court may recognize that "purely administrative and clerical work" can be delegated and that "an efficient law firm will often assign work to an associate attorney," because of the fiduciary nature of the appointment, "most of the work should not be delegated. If a [GAL's] report and its conclusions and recommendations are those of someone else the court will reject the report."[29]

It is unclear how other Surrogates in other counties will apply these decisions. Again, it is wiser to ask for advice and clearance in advance of having substantial work done.

Hiring specialists Whenever a GAL thinks that a specialist of some type must be engaged, the GAL must seek prior approval from the court. Failing to do so leaves the GAL open to criticism and denial of requests for reimbursement for the expense.[30]

The GAL in many cases should consult the court and obtain prior approval before acting. A GAL must, for example, consult the appointing court before retaining an accountant, appraiser, auctioneer, property manager or

real estate broker.[31] The retained professional must then comply with all the provisions of Part 36 of the Chief Judge, including enrollment, disqualification, compensation and filing requirements.

A GAL should consult the appointing court for advice and guidance in doubtful cases before undertaking unusual action.[32]

Similarly, the GAL should seek guidance before incurring costs – *e.g.*, hiring private investigators or appraisers or conducting an appeal. The GAL's role is to investigate and file a report of her or his activities together with recommendations.[33]

If a GAL discovers a conflict of interest after appointment, he or she should promptly request to be relieved.

End of Representation

Although a GAL has characteristics similar to that of a private attorney, a court cannot "remove" a party's attorney – obviously, a court can sanction an attorney. However, given the special nature of the GAL's office and responsibility to the ward, to the parties and to the appointing court, the court's control over a GAL is of a different order.

The SCPA does not provide procedures for removal of a GAL once appointed or criteria to govern removal. Nonetheless, the Surrogate has inherent power to remove a GAL for just cause or where the interests of the ward will be promoted.[34] Other parties to the litigation may petition to remove the GAL.[35]

If a GAL discovers a conflict of interest after appointment, he or she should promptly request to be relieved. Failure to do so will be cause for criticism and denial of all compensation.[36]

Representation after disability According to one authority, "there seems to be no policy reason for objecting to an approach that says that the former infant may continue to make use of the offices of the guardian upon reaching majority."[37] The case for this proposition, *McCarthy v. Anable,* does not seem to be authority for the concept that after removal of the disability the former ward can freely engage the now unnecessary GAL as a private attorney, it merely sets forth a procedure to preserve the status of the proceeding until a guardian is replaced and the matter is continued or ended by the former ward.

Former Surrogate Bennett of Nassau cited *McCarthy* merely as the historical basis for defining the term of office of a guardian and the procedure upon cessation of disability under SCPA 1707. He analogized SCPA 1707 to termination of the office of a GAL.[38]

Later service as private attorney for ward It is at least questionable whether a GAL, who enjoyed a special relationship with the court and the ward, and who had opportunities to investigate facts and interact with the other parties, can or should be able to take advantage of that relationship and become the private attorney for the ward who comes of age or whose disability ceases. See *In re H. Children*,[39] for an analogous rule regarding a law guardian in Family Court.[40] Although there are substantial differences between the respective roles, both must be attorneys and the *Code of Professional Responsibility* is implicated.[41]

The prospect of eventual employment of the GAL as private attorney may dilute the GAL's loyalty to the ward and to the court and adversely affect the advice to be given.[42]

EC 5-20 refers to an analogous situation as follows:

> A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. The lawyer may serve in either capacity after disclosing such present or former relationships. A lawyer who has undertaken to act as an impartial arbitrator or mediator should not thereafter represent in the dispute any of the parties involved.

This suggests that there is or may be an ethical impropriety if the former "neutral" participant later adopts a partisan role. In a federal case where such conflicts arose, New York ethical considerations played a significant role in the decision.[43] Further, such later representation may have disastrous results for the former GAL.[44]

Representing previously unknown distributees A GAL probably should not privately represent distributees discovered in a kinship proceeding. Certainly, a GAL should not represent some but fewer than all such distributees whose interests are in conflict, because information developed as GAL should not be used against parties formerly represented by the GAL.

Aside from the possible effect that the prospect of future employment might have, or create the appearance of having, on the GAL, there will be conflicts of interest. DR 5-105 requires a lawyer to decline or to discontinue employment if it would be likely to involve the lawyer in representing different interests. DR 5-108 bars a lawyer who has represented a client in a matter from representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

The engagement of the GAL as attorney for a discovered next of kin may raise questions of improper solicitation of employment.[45]

Guardian *ad Litem* Compensation

Provisions covering the compensation of a guardian *ad litem* are contained in SCPA 405. The amount is determined by the same standards that apply to attorneys generally in estate matters.[46]

The fee may be limited by the size of the ward's interest; the GAL is entitled to fair and reasonable compensation for services.[47] An interim allowance may be permitted.[48]

SCPA 405 was amended in 1993 to provide that compensation of a GAL as allowed by the court may be payable from any or all of the following in such proportion as the court shall direct: (a) the general estate assets; (b) the interest of the person under disability; or (c) for good cause shown, from any other party. Some examples illustrate how the principle has been applied.

• One-third of fee charged to electing spouse's share and two-thirds to estate generally.[49]

• Fee of GAL for one beneficiary charged *pro rata* among all beneficiaries.[50]

• The court may charge the GAL's fee against the attorneys personally.[51]

• The court held that it had discretion to charge a fee against the attorneys personally, where they had conducted deceptive and manipulative litigation, but chose not to do so in order to forestall any appeal and to close the matter.[52]

• The court charged most of the GAL's fee to the fiduciary personally where the accounting had been completed by the public administrator. The court concluded that it had authority to impose the fee because the fiduciary was an "errant fiduciary" whose wrongdoing had been established.[53]

• The court imposed the fee against the petitioner personally where the petitioner brought a proceeding for administration and the alleged decedent was located by the GAL. The court held that the petitioner "took the risk of initiating the self-serving proceeding."[54]

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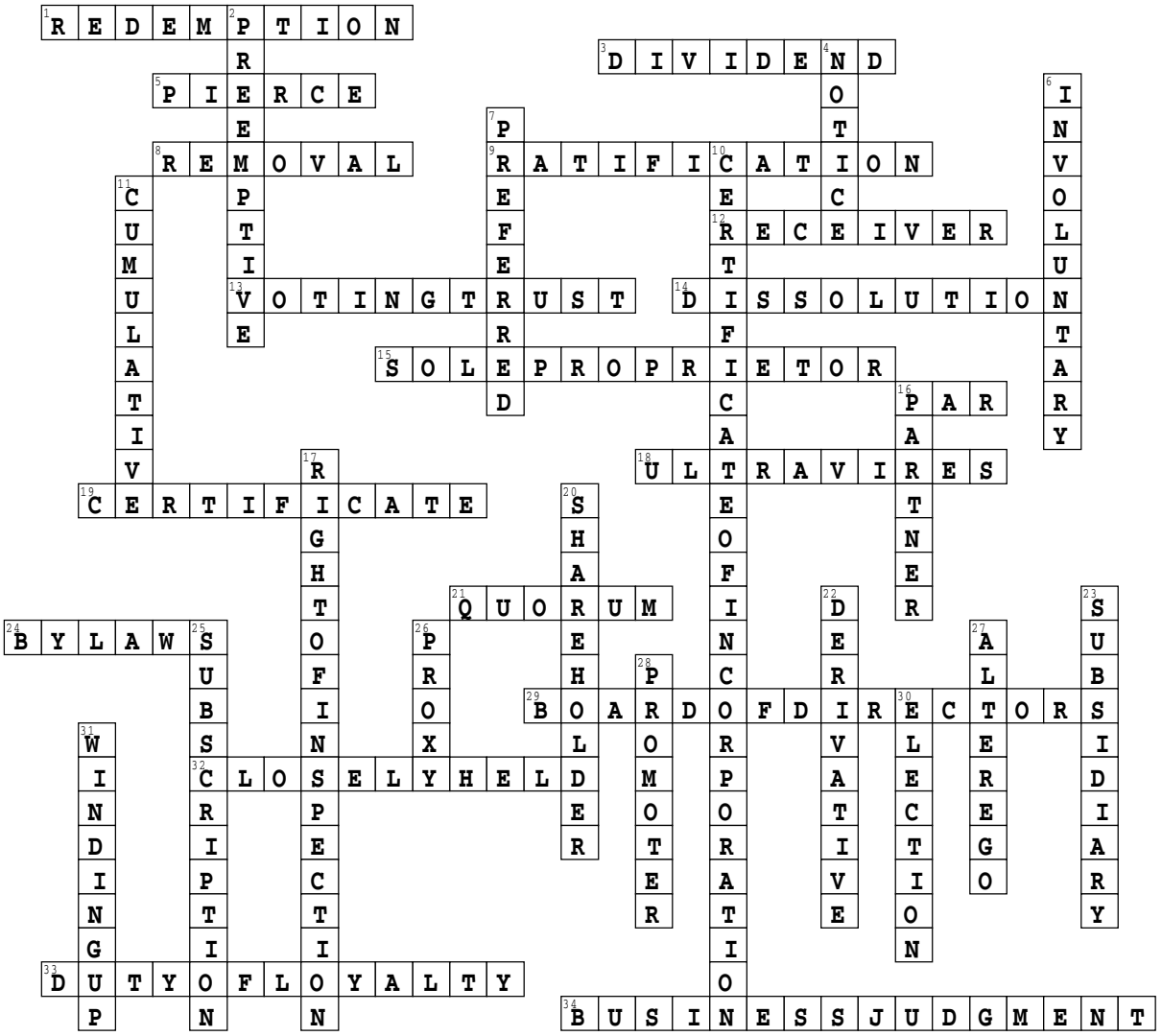
1. SCPA 403(1); *see also* McKinney's New York Rules of Court § 207.12.
2. SCPA 402.
3. *In re Seviroli*, N.Y.L.J., Dec. 17, 2002, p. 21, col. 5 (Sur. Ct., Nassau Co.); *In re Tarantino*, N.Y.L.J., Apr. 24, 1987, p. 14, col. 1 (Sur. Ct., Bronx Co.).
4. SCPA 404(1). CPLR 1202, applicable to proceedings other than in Surrogate's Court, contains no such requirement.
5. Interestingly, McKinney's New York Rules of Court § 207.13(a) refers to the ward as the guardian's "client," which is not technically correct.
6. *In re Mackenzie*, 155 Misc. 822, 280 N.Y.S. 653 (Sur. Ct., Kings Co. 1935).
7. *In re Balfe*, 174 Misc. 279, 20 N.Y.S.2d 474 (Sur. Ct., Orange Co. 1940).
8. *In re Curley*, 161 Misc. 391, 398, 293 N.Y.S. 370 (Sur. Ct., Kings Co. 1936) (citing *Mackenzie*, 155 Misc. 822).
9. *In re Schrier*, 157 Misc. 310, 312, 283 N.Y.S. 233 (Sur. Ct., Kings Co. 1935) (citing *In re Palestine's Estate*, 151 Misc. 100, 104, 270 N.Y.S. 844 (Sur. Ct., Kings Co. 1934) and *Mackenzie*, 155 Misc. at 825). *But see In re Roe*, note 12, *infra*.
10. *In re Burnham*, 114 Misc. 455, 186 N.Y.S. 520 (Sur. Ct., Westchester Co. 1921).
11. *Moore v. Flagg*, 137 A.D. 338, 346, 122 N.Y.S. 174 (1st Dep't 1910).
12. *In re Roe*, 65 Misc. 2d 143, 146, 316 N.Y.S.2d 785 (Sur. Ct., Suffolk Co. 1970).
13. *In re Ford*, 79 A.D.2d 403, 407, 436 N.Y.S.2d 882 (1st Dep't 1981).
14. *In re Schrier*, 157 Misc. 310, 312, 283 N.Y.S. 233 (Sur. Ct., Kings Co. 1935).
15. *Id.*
16. *In re Aho*, 39 N.Y.2d 241, 247, 383 N.Y.S.2d 285 (1976). *See also In re Mangano*, N.Y.L.J., May 17, 1991, p. 31, col. 3 (Sur. Ct., Westchester Co.).
17. *Tate v. McQuade*, 83 Misc. 2d 951, 373 N.Y.S.2d 263 (Sup. Ct., Westchester Co. 1975) (GAL appointed in probate proceeding had no duty to enquire as to ward's rights to contest excessive charitable gift under former EPTL 5-3.3); *In re McGuire*, N.Y.L.J., Jul. 6, 1998, p. 30, col. 2 (Sur. Ct., Queens Co.); *In re White*, N.Y.L.J., Apr. 12, 1996, p. 29, col. 6 (Sur. Ct., Queens Co.).
18. *McGuire*, N.Y.L.J., Jul. 6, 1998.
19. *In re Fassig*, 58 Misc. 2d 252, 295 N.Y.S.2d 146 (Sur. Ct., Nassau Co. 1968).
20. *In re Trevor*, 23 A.D. 17, 48 N.Y.S. 999 (2d Dep't 1897).
21. DR 7-101 [NYCRR 1200.32], "Representing a Client Zealously."
22. *In re Roe*, 65 Misc. 2d 143, 146, 316 N.Y.S.2d 785 (Sur. Ct., Suffolk Co. 1970).
23. 1 Warren's Heaton on Surrogate's Court, § 8.18[2] (6th ed. 2003).
24. *See, e.g., Tate v. McQuade*, 83 Misc. 2d 951, 373 N.Y.S.2d 263 (Sup. Ct., Westchester Co. 1975).
25. CPLR 208.
26. SCPA 2106.
27. SCPA 404(2).
28. *See, e.g., In re Dwyer*, 93 A.D.2d 355, 462 N.Y.S.2d 167 (1st Dep't 1983) (GAL ordered to repay compensation awarded to him after "changing sides" in litigation in conflict with his ward); *In re Merrick*, 107 Misc. 2d 988, 436 N.Y.S.2d 125 (Sur. Ct., Suffolk Co. 1980) (GAL denied all compensation after failing to promptly advise the court of a conflict of interest with adverse party).
29. *In re Kaborycha*, N.Y.L.J., Dec. 31, 2001, p. 24, col. 6 (Sur. Ct., Nassau Co.). *See also In re Semer*, N.Y.L.J., Dec. 31, 2001, p. 24, col. 6 (Sur. Ct., Nassau Co.).
30. *See, e.g., In re Stralem*, N.Y.L.J., Aug. 22, 1995, p. 26, col. 5 (Sur. Ct., Nassau Co.) (hiring private investigator not allowed); *In re DeBernardo*, N.Y.L.J., Dec. 14, 1987, p. 20, col. 4 (Sur. Ct., Nassau Co.); *In re Ford*, 79 A.D.2d 403, 436 N.Y.S.2d 882 (1st Dep't 1981).
31. See Paragraph H of the Explanatory Note appended to the new Part 36 Rules of the Chief Judge. The retained professional must then comply with all provisions of Part 36.
32. *Tate v. McQuade*, 83 Misc. 2d 951, 373 N.Y.S.2d 263 (Sur. Ct., Westchester Co. 1975).
33. SCPA 404(3).
34. *In re Lockwood*, N.Y.L.J., Jan. 25, 2001, p. 32, col. 2 (Sur. Ct., N.Y. Co.). This case is on appeal to the Appellate Division, First Department.

35. *In re Ford*, 79 A.D.2d 403.
36. *In re Merrick*, 107 Misc. 2d 988, 436 N.Y.S.2d 125 (Sur. Ct., Suffolk Co. 1980).
37. 1 Warren's Heaton or Surrogate's Courts (6th ed. 2003), § 8.14 (citing *McCarthy v. Anable*, 169 Misc. 595, 7 N.Y.S.2d 887 (Sur. Ct., Greene Co. 1938)).
38. *In re Fassig*, 58 Misc. 2d 252, 295 N.Y.S.2d 146 (Sur. Ct., Nassau Co. 1968).
39. 160 Misc. 2d 298, 608 N.Y.S.2d 784 (Family Ct., Kings Co. 1994).
40. Family Court Act §§ 241, 249.
41. *See* Sobie, M., *Representing Child Clients: Role of Counsel or Law Guardian*, N.Y.L.J., Oct. 6, 1992, p. 1, col. 1; Bean, L., *'Guardian' and 'Guardian ad Litem': What Are the Differences*, N.Y.L.J., Sept. 4, 1997, p. 1, col. 1.
42. EC 5-1, 5-2.
43. *See Feinberg v. Katz*, No. 01 CIV 2739, 2003 WL 260571 (S.D.N.Y. Feb. 5, 2003).
44. *See In re Dwyer*, 93 A.D.2d 355, 462 N.Y.S.2d 167 (1st Dep't 1983).
45. DR 2-103.
46. *In re Burk*, 6 A.D.2d 429, 179 N.Y.S.2d 25 (1st Dep't 1958); *In re Schoen-Teitell*, N.Y.L.J., Feb. 8, 2000, p. 3, col. 13 (Sur. Ct., Nassau Co.); *In re LaSala*, N.Y.L.J., Feb. 7, 1991, p. 30, col. 5 (Sur. Ct., Nassau Co.); *In re MacKay*, N.Y.L.J., Feb. 24, 1993, p. 23, col. 2 (Sur. Ct., N.Y. Co.); *In re Logallo*, N.Y.L.J., May 12, 1993, p. 31, col. 6 (Sur. Ct., Suffolk Co.).
47. *In re Ames*, 164 Misc. 2d 272, 624 N.Y.S.2d 351 (Sur. Ct., N.Y. Co. 1995); *In re Simpson*, N.Y.L.J., Nov. 3, 1999, p. 36, col. 3 (Sur. Ct., Westchester Co.); *In re Berkman*, 93 Misc. 2d 423, 402 N.Y.S.2d 776 (Sur. Ct., Bronx Co. 1978).
48. *In re Goldenstein*, N.Y.L.J., Dec. 5, 2000, p. 31, col. 1 (Sur. Ct., Westchester Co.); *In re Semer*, N.Y.L.J., Dec. 31, 2001, p. 24, col. 5 (Sur. Ct., Nassau Co.); *In re Kaborycha*, N.Y.L.J., Dec. 31, 2001, p. 24, col. 6 (Sur. Ct., Nassau Co.).
49. *In re Stanton*, N.Y.L.J., Apr. 9, 2001, p. 35, col. 6 (Sur. Ct., Sullivan Co.).
50. *In re Druckman*, N.Y.L.J., Jan. 28, 2000, p. 28, col. 6 (Sur. Ct., N.Y. Co.).
51. *In re Ames*, N.Y.L.J., Oct. 10, 1995, p. 27, col. 4 (Sur. Ct., N.Y. Co.); *In re Ames*, 164 Misc. 2d 272.
52. *In re Stern*, N.Y.L.J., Feb. 18, 1997, p. 32, col. 4 (Sur. Ct., Nassau Co.).
53. *In re Giuliano*, N.Y.L.J., Jan. 10, 2002, p. 30, col. 6 (Sur. Ct., Nassau Co.) (distinguishing *Ames*, 164 Misc. 2d 272).
54. *In re Lewis*, N.Y.L.J., Jan. 12, 1998, p. 29, col. 1 (Sur. Ct., N.Y. Co.).

Answers to Crossword Puzzle on page 8.



POINT OF VIEW

Being Respectful and Respected In the Practice of Law

BY PHILIP H. MAGNER, JR.

As they grow older in the practice of law, most lawyers learn that the real satisfaction of their professional lives is to be found not in the money or the notoriety they may have acquired, nor even in their position in their respective offices. Rather, it lies in the esteem of their fellow lawyers. The true "joi de vivre" to be found in the practice of law is the rich collegiality of these men and women. It is a pleasure readily available to any lawyer who is willing to earn it, and the effort should begin at the outset of a career.

The young lawyer who is both sensible and sensitive learns very quickly that while money and position may come at the beginning, or late, or not at all, one thing that certainly is acquired early on is professional reputation. It is equally true that a good reputation, however dearly won, is easily tarnished, and a poor one is likely to persist for many years. It can exact a personal and economic price that endures far beyond any benefit that might be gained from a quick but questionable profit.

In that regard, a lawyer needs to make certain that his or her personal and professional honesty is beyond question. Her word must always be good; factual statements and representations must always be true; the file should contain what she claims; and her statements of the law must not, in the name of advocacy, exceed permissible bounds. The lawyer needs to see that personal bills and taxes are paid promptly, without the necessity of dunning. He needs to live within his means, and not within his dreams.

A lawyer needs always to be well-prepared, a maxim that may appear obvious but is all too often ignored. It is essential to devote the time and effort required, regardless of the circumstances, so that every client gets a fair shake. No one's matter should receive short shrift. Every matter in which the lawyer is engaged should move ahead expeditiously, and no client should suffer either worry or loss because of an attorney's indolence.

A lawyer ought to be able and willing at any stage of professional life to adapt to new and different circumstances, judges and adversaries. Underlying the need to adapt is the reality that no attorney knows everything, and must be willing, and even anxious, to learn. The goal is to improve. Ideally, a lawyer who asks himself, upon a critical and objective self-appraisal, whether he is a better lawyer than he was last year, should be able to answer "yes."

If honesty is the bedrock of the profession, then courtesy ought to be its hallmark. Each and every lawyer is entitled to it in his dealings with others in the profession. Attorneys ought to treat each other with respect and civility, and to be mindful that legal matters are not wars, and that other attorneys are not enemies. Much of the work performed by lawyers — the drafting of wills and contracts, the handling of estates, real estate rentals and sales, for example — ordinarily involve no "adversary" at all. Even in litigation, a fair disposition, preferably by settlement, ought to be the preferred objective. Indeed, most matters, including those that are litigated, are not, and need not be, personally adversarial. They slip into this unwanted status only if an ill-advised and bad-tempered attorney decides to push in that direction.

"Hardball" should be reserved for a baseball diamond, not for the practice of law. The term is synonymous with unnecessarily adversarial conduct, which is generally both unproductive and unjustifiably expensive to the client. There may be a place for machismo, but it is antithetical to responsible professional conduct. In any single piece of litigation, there are likely to be only a few important things that are truly worth fighting about, and certainly not every incidental subject or event that arises in the course of the matter. Most issues can and ought to be resolved by agreement; indeed, modern court rules more and more require adversaries to explore the possibility of such agreement before seeking court intervention.

If honesty is the bedrock of the profession, then courtesy ought to be its hallmark.

A few simple devices can make life more civilized for everyone. Attorneys ought to grant each other reasonable extensions of time when asked, and should try to be affable and cooperative without sacrificing significant client rights. Younger lawyers ought to be not only willing but happy to treat older lawyers with extra respect, to go to their offices, and to address them as "Mr." or "Ms." until invited to do otherwise.

Every lawyer ought to assume the best of others in the profession until the contrary is demonstrated — which will happen with only a few. Lawyers should to try to see the humor in situations, taking their cases seriously but not themselves. Younger lawyers in particular would do better not to try to compensate for youth and inexperience with unduly aggressive behavior, nor to assume that their professional colleagues will attempt to take advantage of them, remembering always that those who go about expecting slights will almost always manage to find them.

Older and more experienced attorneys will almost always be helpful to younger members of the bar who demonstrate some attentiveness and respect. As a young lawyer, it was my great good fortune to have been befriended and guided by more experienced, mature attorneys. I found that the finest trial lawyers of those days often found the time to offer advice and criticism when asked by a young attorney. The encouragement and direction were invaluable. It is largely because of those associations with those lawyers — even those who were adversaries — that the practice of law has been for me both exciting and satisfying. I do not believe that this has changed today, and the same advantages and help are available to younger lawyers. All they have to do is ask. It sometimes appears that younger attorneys are reluctant to do so, but that is unjustified. With very few exceptions, the best older lawyers are the very ones who will respond well when asked.

Whatever the type of practice that attorneys are engaged in, either by choice or by happenstance, they ought to behave in a way that will reflect well not only upon their profession, but upon themselves. A career in law can and ought to be an experience of professional challenge, replete with intellectual stimulation and fair financial reward. It can even be blessed by the deeper and more enduring rewards of heart and spirit. But it is likely to be a good deal less than that for those who, for reasons of profit or convenience, decide to cut corners and fall below the professional standards we have set for ourselves, and which the public expects us to observe. There are few pleasures greater than a good night's sleep, uninterrupted by worries over professional misconduct already committed and awaiting only discovery.

I think it fair to say that the views expressed here about the practice of law are shared by most seasoned lawyers. After 54 years at the trial bar, the idealism that made me choose a life in this profession, even though it has been shaped by practical concerns, is today essentially unchanged by experience and is undiminished by the years. I continue to believe that law and lawyers are and ought to be vibrant forces in our society. It has been said, and I think with considerable wisdom, that a person begins to understand the meaning of life when he plants a shade tree knowing that he never will sit under it. That ought to mean to us as lawyers that we accept an obligation to leave the practice of law better than we found it, to uphold the traditional standards of our ancient but not always honored profession, and to recognize that the Canons of Ethics, those venerable tenets and maxims of professional conduct, are not so much chains to the past as lamps to the future.

Lawyers need to hear that they owe today, and will always owe, a duty to the profession and to society itself, not just to their clients, employers and partners. It is a debt that never will be paid in full, because ideally the call of the law should be less to fortune than to service, and not nearly so much to fame as to excellence. Many lawyers have learned this lesson well, and have found ways to elevate the profession's standards of practice, maintain its integrity and extend its help to all those who are in need.

What this means in a practical sense is that every lawyer, no matter his or her age, experience, commitments or circumstances, should devote some time to the work of the state and/or local bar associations. They should serve on committees and shoulder the tasks as they would those of their churches or synagogues. So, too, does every person fortunate enough to have achieved a legal education and entered the practice of law owe some part of his or her time to the representation of the indigent, the handicapped and the unfortunate. Indeed, the best ideals and highest purposes of the law are served as well and truly by those lawyers who do so, as by those who argue the great and celebrated causes of our time in the highest courts of the land.

It also is not enough that the law touches people daily, as it does in so many ways. It ought to be part of our purpose as lawyers to help the people touch the law; every lawyer has an opportunity to reduce the complexities of the law to manageable and useful concepts for clients. The layperson can be made to see the law as an instrument of peace in a belligerent world, as a bastion of reason in a tumultuous society and as an argument for order instead of anarchy.

Finally, for the sake of our profession and ourselves, each of us ought to accept, in proportion to our own good fortune and success, the obligation to care about our colleagues at the bar who may not be so secure or successful. There are those who may be deeply troubled in their practices or in their personal lives. They need to know that their profession cares about them, and that it will help them avoid failure, despair or worse. As practitioners of a noble profession, we owe each other more than honesty, courtesy and fair dealing, as vital as they are. We also need to reach out to each other with encouragement and hope and help. More than the wealthy, the powerful or the brilliant, we ought to honor those of our profession who care enough to help their less fortunate brothers and sisters in the law. These concerned lawyers protect both the public and the profession.

By doing all these things, we will learn in the best and finest sense how to be and deserve to be both respectful and respected.

We lawyers, no matter our respective ages, ought always to be in the process of beginning, constantly renewing ourselves through commitment and service, just as the law itself is constantly evolving. For surely, we lawyers know, and we have always known, that only under the rule of law, professed and practiced by honorable men and women, can justice flourish.

Philip H. Magner, Jr., special counsel at Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP in Buffalo, is an emeritus member of the *Journal*'s Board of Editors.

Attorney Professionalism Forum

To the Forum:

I have a couple of friends who live in the Albany area, as I do. For over 30 years we have gone fishing at Tom's vacation place up in Vermont. We get to fish in a great stream, with the best equipment (and go broke in the process). Tom is retiring to Florida and wants to sell his property. Bob, another friend in the group, wants to buy it. Bob and Tom are close friends and have asked me to represent both of them.

I have something of a familiarity with Vermont property, but am not licensed in the state and I have never handled a real estate transaction there; in fact, real estate is not my strength, as I am a negligence attorney. This particular transaction involves a very substantial purchase price, and has a number of complexities, including substantial environmental questions and arcane Vermont rules regarding riparian owners – such as what qualifies a person as a riparian owner in the first place.

On the other hand, Bob and Tom have never had any problems with each other, and I can order a title insurance policy which will take care of most of the legal questions, leaving only the review of the policy. I am concerned that if I decline the matter, Bob may be reluctant to invite me back once he owns the place, thereby ending a 30-year tradition of which I am extremely fond. "Moonlight in Vermont" is more than just a song to me. I am not getting a fee, but I think Bob and Tom will agree to cover my out-of-pocket expenses, such as court fees and costs, the title search, and the like. I know from my own practice that the client ultimately must remain responsible for the expenses of litigation. But I am not certain whether or not an attorney in a real estate matter can pay for the type of expenses that I will encounter in a circumstance such as this, where there is no adversarial relationship between the seller and buyer.

I need to know whether I am ethically prohibited from undertaking the representation.

Sincerely,

The Fisherman from Fonda

Dear Fisherman:

I hope you have enjoyed Vermont, and that you have some pictures – because the advice here is to think Catskills. You should not undertake what you propose, for a number of reasons.

The first problem concerns the lawyer's responsibility to exercise independent professional judgment. This issue is specifically addressed in DR 5-101, "Conflicts of Interest – Lawyer's Own Interest." This Disciplinary Rule restricts you from representing a client if financial, business, property or *personal* interests may interfere with your professional judgment. Your love of fishing with your Vermont comrades, and your resulting personal desire that Bob purchase the property, is likely to cloud your judgment in negotiating the terms of the sale.

A second problem is the dual representation itself. This is addressed by DR 5-105 – "Conflicts of Interest: Simultaneous Representation." How can you negotiate the best possible deal for Bob, the purchaser, at the same time that you are negotiating the best possible deal for Tom, the seller? This also leads us back to the independent professional judgment issue, which is specifically mentioned again in DR 5-105, as it forms another reason for declining a dual representation. It should be noted that there are no ethics opinions or court decisions directly prohibiting a lawyer from representing both a buyer and a seller in a real estate transaction – but there are some cases sanctioning a lawyer who got in trouble doing so.

Both DRs do permit dual representation if "a disinterested lawyer" opines that it is not a problem. (This exception replaced the old standard, which was an "obviousness" test. The latter was a subjective standard in which the lawyer involved made his or her own decision that the representation was okay. It is "obvious" why the older standard was replaced. Often, as in this case, the only thing that is "obvious" is the attorney's own desires – in your case, a desire for trout.) In addition to the opinion of a disinterested attorney, DR 5-105(C) requires the lawyer to discuss the matter thoroughly with his or her clients and to obtain their consent. However, even if an attorney decides to go this route, which is *not* being recommended here, be aware that additional protection is needed. It would be best, and perhaps it is even essential, that you get the opinion of the disinterested lawyer and the consent of the client(s) in writing.

Then there is the question of competency. DR 6-101 – "Failing to Act Competently" – states that a lawyer shall not "handle a legal matter which the lawyer knows or should know that

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism, and is intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

The Attorney Professionalism Committee welcomes these articles and invites the membership to send in comments or alternate views to the responses printed below, as well as additional questions and answers to be considered for future columns. Send your comments or your own questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.

he or she is not competent to handle, without associating with a lawyer who is competent to handle it." When Thomas Jefferson was asked why it took so long for him to become a lawyer, compared to Patrick Henry, who took only one year to be admitted to practice, Jefferson noted that Henry was qualified only to try cases. In your case, one may conclude that a negligence lawyer is not qualified to handle a potentially complex real estate transaction in a foreign jurisdiction (or for that matter, even in New York).

This aspect of your question brings us to the larger issue of how far afield a New York lawyer can wander. This is an extremely vexatious area of professional regulation, which currently carries the innocuous title of "multi-jurisdictional practice." The American Bar, the New York State Bar, and many other Bar Associations have undertaken studies, made reports, and drafted proposals addressing this issue. At present, the law in New York is as stated in a 1957 Court of Appeals decision, which itself involved a two-judge dissent. In *In re Roel* (3 N.Y.2d 224, 165 N.Y.S.2d 31), Judge Froessel, speaking for the majority, stated that "[w]hen counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter, and may not claim that they are not required to know the law of the foreign state . . . [m]oreover, the conduct of the attorneys admitted here may be regulated by our courts and . . . dealt with when they engage in unethical practices; they may not plead in defense that since the matter involved related to the law in New Jersey or Connecticut or anywhere outside of our jurisdiction, they were not practicing law and were therefore immune from disciplinary action." *Id.* at 232.

However, a much more recent case, and one that has the entire national legal community abuzz (and likely motivated the Bar activity noted above) is *Birbrower, Montalbano, Condon, and Frank, P.C.*, 17 Cal. 4th 119, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998). In this case the California Supreme Court issued the most stinging rebuke possible – it denied fees. A New York law firm got nothing for its work, at least to the extent its fees covered activity in California, as the firm was found to be practicing law without a license.

Notwithstanding the foregoing, it is difficult to conclude that you would be involved in the unlawful practice of law, given that both prospective clients are New Yorkers, and that the work could all be done here. However, it is also difficult to give a definitive answer as to how far an attorney licensed in New York can go in representing New York residents in transactions involving activities and law in a sister state – and there can be serious consequences if a court or Grievance Committee finds that you went too far.

DR 3-101(B) states that "[a] lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." If it is determined in Vermont that you were practicing law in that state without a license, you can be disciplined in New York by our own Grievance Committees. And it gets even worse. According to DR 1-105, even if Vermont concludes that you were not practicing law there without a license, you can still be found to have done so under New York rules. In other words, you can be disciplined in New York even for activities that did not occur in New York, and that are not a violation of Vermont rules. This is called getting you coming and going.

The best discussion of your problem is probably that of Harry G. Myer in his article "A Little Learning is a Dang'rous Thing; Drink Deep, or Taste Not the Pierian Spring" (Alexander Pope, 1688–1744 – 'An Essay on Criticism')," published in the *New York Real Property Law Journal*, Summer 2003. Mr. Myer talks about taking care of property in Florida as a convenience to long-time clients and established friends while they are "up North" for the summer. He mentions that is easy to copy from a former deed, to download a title insurance company form, or to have a new deed typed. Easy, yes, but he cautions that "we may have a false sense of security that imaginary concepts known as 'state lines' can be ignored." He then gives some very specific examples of why they cannot. Mr. Myer concludes, "Practical advice: Consult with capable counsel where a property is located to avoid embarrassing yourself."

The advice here goes even further – just don't take the case.

The Forum, by
Peter Coffey, Esq.
Englert Coffey & McHugh
Schenectady

LETTERS TO THE FORUM:

We received the following letter in response to the previous issue's Forum. The question is reprinted for your convenience.

To the Forum:

I am a second-year law student and hope to concentrate my practice in family law.

My sister, Mary, had her divorce finalized about a year ago. She tells me that throughout the legal process of her divorce she was very impressed by her husband's attorney, Mr. Hans Summ. She says that he was very polite, organized and efficient at all the depositions and conferences that she attended and seemed incredibly knowledgeable and sophisticated throughout the proceedings.

Mary believes that Mr. Summ's expertise and professionalism resulted in getting her volatile ex-husband to come to an agreement and thus spared her the trauma of a trial.

As part of Mary's property settlement she received their summer home in Lake Chautauqua in upstate New York. Mary has now decided to sell the summer home and she called Mr. Summ to represent her in the sale. Mr. Summ not only agreed to do so but also asked Mary to go to dinner with him. I know my sister has been very lonely and depressed as a result of her divorce and she was both surprised

and delighted at Mr. Summ's invitation.

Somehow, although I am not sure why, Mr. Summ's agreeing to represent her on the sale of the property and inviting her to dinner don't seem right to me.

Is it proper for Mr. Summ to represent my sister? Is there anything wrong with his asking my sister out to dinner?

Sincerely,

Worried in Williamsville

To the Forum:

Re: Worried in Williamsville

You're kidding, right? We are lawyers. We do not provide advice for the lovelorn. There is absolutely nothing wrong with an attorney having dinner with an opposing spouse one year after the conclusion of a divorce matter. In fact, there is nothing wrong with him having sex with her or, Heavens, representing her in a real estate transaction. While a law student may have some reservations about the motives of the attorney, it has nothing to do with attorney professionalism.

Sure some women, and some men, feel lonely and depressed after a divorce. So what? Sister Mary is obviously attracted to an organized, efficient, knowledgeable, sophisticated lawyer. That's nice. DR 5-111 provides a lawyer shall not require or demand sexual relations with a client or third party incident to or as a condition of any professional representation or enter into sexual relations with a client during the course of the lawyer's representation of the client in a domestic relations matter. It is hard to imagine Mr. Wonderful, Esq. is going to require or demand sexual relations before representing Mary in the sale of a summer home. So, in answer to the questions:

1. Yes, it is proper for the attorney to represent your sister in the sale of property one year after concluding his representation of your sister's husband.

2. There is nothing wrong with the attorney asking your sister out to dinner. She is obviously delighted with the invitation, and you should be happy for her.

So, Worried in Williamsville, study hard at law school, and stop worrying about your sister's social life.

Michael P. Friedman, Esq.

Friedman & Molinsek PC

Delmar, N.Y.

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I really need an answer on this one, and soon. Next month I have to make a sizable payment on my son's college tuition for the spring semester. I just do not have the cash on hand. My credit cards are pretty much maxed out. There is more than enough money in my attorney trust account to cover the payment, and most of those funds are escrowed until a business closing occurs for one of my clients – which is definitely not going to occur for at least two months, probably three. I have settlements on five cases pending. The money for one of them will definitely come in at the end of next month, and would cover the tuition. Two of the others are likely at that time as well. Unfortunately, the tuition is due a few weeks earlier, and my son's college is very strict about timely payment. I don't want him to be embarrassed, or, worse, prevented from registering for his classes.

What I would like to do is borrow just enough to cover the tuition from the trust account for a very brief period, no more than those few weeks, giving the trust account a promissory note in exchange. The note will absolutely be good and will be paid promptly from the settlement proceeds. Is this going to create any problems for me?

Thanks for your advice.

Sincerely,

Maxed Out in Mechanicville

Index to Articles – 1999-2003

This index places the articles in one of the following categories:

Index to Authors – 1999-2003

The following index lists the authors of all articles that have appeared in the Journal *since the January 1999 edition. Below each author's name is the general classification category used for the article. The headline describing the content of the article appears under that classification category in the Index to Articles that begins on page 44.*

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• If you must use acronyms, define them.

• Give a full citation before you give a short-form citation.

• Put the parts of each sentence in logical order.

• Avoid, as if your writing depends on it, and often it does, intrusive phrases or clauses — like the two in this sentence.

• Untangle complex conditionals and negative statements by writing in the affirmative. Actual sign at the judges' elevator bank at the Criminal Courts Building at 100 Centre Street in Manhattan: "NOTICE: USE OF THIS ELEVATOR IS RESTRICTED TO JUDGES ONLY." The sign means that anyone but a judge may use the judges' elevator; no restrictions regarding its use have been placed on anyone else.

• Make comparisons complete and logical.

• Make your presentation pleasing to the eye, but write for the ear, not the eye.

• Resolve ambiguity in words and sentences. "Come in. The door is open." (Is the door open or unlocked?) The legal profession is filled with readers in bad faith. Pharmacists who read ambiguously written prescriptions will telephone the prescribing physician to get clarification. But attorneys in adversary settings will read a judge's order or opinion to benefit their clients and not how the judge intended the order or opinion to read. Judges who write ambiguously invite readers to misinterpret them. In the end, "Good legal writing should never leave the reader puzzled or guessing."[4]

• State whose position is being asserted. "Plaintiff moves for summary judgment because the facts are not in dispute." *Becomes*: "Plaintiff moves for summary judgment because, *he argues*, the facts are not in dispute."

• Shun overspecificity. Overspecificity prevents the reader from distinguishing between the important, the less important, and the unimportant. Overspecificity also bores the reader.

• Write directly, not indirectly. Experts debate the effectiveness of indirect discourse. Loyal, disciplined soldiers close the windows when their commanding officer says, "This room is drafty." They do not wait for their commander to tell them to close the windows. Nor need a good commander issue a direct order. Conversely, polite children will say, "I'm hungry," not "Feed me now!" Solicitous parents feed a child who says, "I'm hungry." They don't wait for their child to say "Feed me now!" On the other hand, a child who gets no reaction from saying, "I'm hungry" will quickly learn to say "Feed me now!"

Whatever the merits of indirect speech among thoughtful, attentive people, legal writers must prefer directness and clarity to politesse. Readers should debate as little as possible the meaning of a judicial opinion or a statute. Example: "Defendant is entitled to a fair trial." *Becomes*: "The People must turn over all exculpatory material by 3:00 p.m. today."

• Be not breezy. To be breezy is to digress. As Judge (and later Attorney General) Bell explained, "We must avoid the breezy manner; it reflects an absence of mental discipline."[5]

• Use headings and subheadings to break up the text of an argument that exceeds a few pages. Divide sections by procedure or issue or both. Make your headings brief and descriptive, or at least use figures or roman numerals if you use no text. If you use textual headings, make them bold. Do not all-capitalize, initial-capitalize, or underline headings. Legal writing can profit from topical headings and journalistically styled informative phrases that break up the text.

One caveat: Headings and subheadings should relate to the text and not be invented to amuse. In *Young v. Lynaugh*,[6] the court opined that "the state has played procedural football" in a case in which the defendant sought to set aside his guilty plea. On that premise, the court's headings included "The Players and the Background," "Jurisdiction on the § 225(a) Playing Field," "Illegal Motion," and "The Final Score." And in *City of Marshall v. Bryant Air Conditioning Co.*,[7] the court created a reason to compose musical headings like John Sebastian's "Summer in the City," The Beatles' "We Can Work it Out," and Burt Bacharach's "Promises, Promises."

• Use concrete nouns to be clear, concise, and subtle. Avoid abstract nouns, unless, as a persuasive-writing device, you wish to de-emphasize a point. Abstract nouns convey intangibles: ideas and concepts ("justice," "transportation," "contact"). Concrete nouns describe tangibles ("automobile," *not* "transportation"; "wrote a letter," *not* "contacted"). The more concrete the writing the better ("1966 souped-up Corvette," *not* "automobile"). Phrases should also be concrete: "After the accident, plaintiffs sought justice" *becomes* "Johnny Smith's parents sued Jones in Part C after Jones's 1966 souped-up Corvette struck 5-year-old Johnny, who was riding his tricycle on a sidewalk in Central Park."

• Feature the subject. Most sentences have two parts: a subject and a predicate. A subject tells who or what the sentence is about. A predicate tells what the subject is or does. Failing to feature the subject in the first part of a sentence is a leading cause of incoherence and ambiguity in every form of writing. "The books were returned when the trial was finished." *Becomes*: "Judge Smith returned the books when she finished her trial." Exception: The subject needn't be featured when the reader knows what or who the subject is or when the writer must write a memorable slogan. Example: "The monarchy should not be allowed to tax us unless we can elect our own representatives." *Becomes*: "No taxation without representation."

Next month: This column continues with plain language, punctuation, and writing like Hemingway.

GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, in Manhattan. An adjunct professor at New York Law School, he has written *Advanced Judicial Opinion Writing*, a handbook for New York's trial and appellate courts, from which this column is adapted. His e-mail address is GLebovits@aol.com.

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1. Correspondence of Mr. Justice Holmes and Lewis Einstein, 1903–1935, at 21 (James Bishop Peabody ed. 1964).
2. Judicial writing, like all legal writing, must also strive for clarity: "The best opinion disdains high-falutin language, skips esoteric asides, avoids analytical meandering, discards marginally helpful research products and side themes, and hopes only to be understood." Richard B. Cappalli, *Viewpoint, Improving Appellate Opinions*, 83 Judicature 286, 321 (2000).
3. Reverend Dr. Martin Luther King Jr., "I Have a Dream," August 28, 1963.
4. Irving Younger, Persuasive Writing 82 (1990).
5. Griffin B. Bell, *Style in Judicial Writing*, 15 J. Pub. L. 214, 215 (1966).
6. 821 F.2d 1133, 1134 (5th Cir.) (Goldberg, J.), *cert. denied*, 484 U.S. 986 (1987).
7. 650 F.2d 724 (5th Cir. 1981) (Goldberg, J.).

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Free at Last From Obscurity: Clarity

By Gerald Lebovits

The most challenging and enjoyable part of legal writing is the prewriting phase, when the writer sorts out how to express and argue fact and law. The most boring part is the editing phase, when the writer clarifies sentences, paragraphs, and sections.

The boring editing phase explains why clear legal writing isn't the norm. As important as clarity is to the reader, writing clearly is tedious to the writer. Justice Holmes noted this problem in a letter to diplomat Lewis Einstein: "One cannot be perfectly clear until the struggle with thought is over and you have got so far past the idea that it is almost a bore to state it."[1]

Writing clearly is critical. Above all else, the lawyer must be understood. This two-part column discusses that tedious but essential part of legal writing: clarity.[2]

• Write only if you have something to say. Simplify your writing by omitting unnecessary law, facts, and procedure. Cut clutter, redundancies, and extraneous words, thoughts, and points.

• Put essential things first, whether in sentences, paragraphs, or sections.

• Assume that your reader knows nothing about your case.

• Go from general to specific. Then be specific, more or less: "Plaintiff made a sufficient showing for relief to be granted." (What is "sufficient"?) "The police had enough probable cause to arrest." (What is "enough"? The police either had probable cause or they didn't.)

• In general, don't generalize. To generalize is to omit. To generalize is to be lazy. To generalize is to be cowardly.

• Give the rule before you give the exception. Give the rule and the exception in separate sentences. Explain any exception you give. Don't simply write that exceptions exist. If you don't want to devote space to explaining exceptions, state your rules so precisely that they admit no exceptions.

• Introduce before you explain. Novices often discuss something before they lay a foundation for it. Your reader won't understand you if you discuss the terms of a contract before you establish that the parties have a contract.

• Prefer defined references to unattributed references. Prefer unattributed references to allusions. A reference points to someone by name (George W. Bush) or by a principal claim to fame (President of the United States). An allusion is an indirect reference (the successor of the husband of the U.S. senator from New York). Allusions flatter those who understand them. To promote clarity, legal writers should define references: "George W. Bush, the President of the United States." Unattributed references and allusions should be used only if the writer is certain that the reader will comprehend them immediately.

But allusions done well can be brilliant. Alluding to President Lincoln's Gettysburg Address, for example, the Reverend King said, on the steps of the Lincoln Memorial, "Fivescore years ago, a great American, in whose symbolic shadow we stand today, signed the Emancipation Proclamation."[3]

• Dovetail (a type of segue) to connect one sentence or paragraph to the next: Move from old to new, from short to long, and from simple to complex.

• State the point before you give the details, raise the issue before you answer it, and answer before you justify.

• Address threshold issues before you address the merits.

• Recite the facts, state the law, and then apply the law to the facts.

• Stress issues, not legal authority. Novices devote one paragraph after another to cases. Good writers organize by issues, not case law. Authority should be used to support conclusions within issues, not as an end in itself. Thus, cite authority as a separate sentence, after the stated proposition, to de-emphasize authority and to emphasize issues.

• Familiarize the reader with the person or entity before you discuss what that person or entity did or didn't do. Give the full names of people and entities the first time you mention them. Use a short-hand variant thereafter. Similarly, familiarize the reader with the concept before you discuss it, familiarize the reader with the case before you draw an analogy or distinguish it, and define technical terms as you use them.

Legal writers must prefer directness and clarity to politesse.

• Keep related matters together. Then say it once, all in one place.

• Begin with an effective introduction, or roadmap, that summarizes your case and the legal principles. Use small-scale transitions — concepts and words — to link sentences, paragraphs, and sections together. Use topic sentences and thesis paragraphs. Assure paragraph coherence by topic and person. Move logically from one sentence, paragraph, and section to the next.

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