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Journal

THE ROLE OF RHETORIC

Inside

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ON THE COVER

The montage on this month's cover symbolizes the classic uses of rhetoric and the questions raised about the validity of rhetorical devices.

Cover Design by Jill Murphy.

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President's Message

LORRAINE POWER THARP

Priorities for the Profession

Gathered amongst the pines of Saratoga in September, the Executive Committee contemplated the numerous issues affecting the profession. The question before the committee: Of all these concerns, what legislative actions need our Association's priority attention? Without hesitation, a chorus of voices identified the assigned counsel crisis and legal services funding. There was no doubt that obtaining up-to-date counsel rates for indigent defendants and regularized legal services funding should be among the matters for our intensive advocacy.

In future messages, I will discuss what will no doubt be another legislative priority for us this year, the counter to the assault on the tort system at the federal and state level. For this message, however, let us take a look at our history in the fight for legal services.

There is no cause closer to the hearts of bench and bar than assuring access to justice. It has been a matter of concern and action throughout the pages of our history.

> *Any state of society or any system of government which does not look to the enforcement of law and the protection of rights for the poor and weak and friendless is wanting in the keystone of the arch upon which a stable society and government rests. Where this essential is lacking you shake the faith of the people in government and bring in question the fundamental fairness of our institutions.*
>
> - Robert Grier Monroe, Chair
> 1919 report of Committee on Legal Aid Societies

This initiative was much more than a statement of principle. The Association was working with local bars to survey legal needs and availability of counsel for the indigent; it was pressing for establishment of legal aid programs, notably in the more populated areas; it was urging bar associations to support such programs and provide assistance in smaller communities. Our legal aid committee pointed out that legal services to the poor cannot be pursued efficiently without organization and without the experience and expertise of attorneys whose primary duty focuses on poverty law.

> *It is highly desirable that the young lawyers, as they come out of law school or while they are in law school, shall have some concept of what is being done in this field so as to interest them, as well as to give them the opportunity of actively working with legal aid organizations.*
>
> - George S. Van Schaik, Chair
> 1948 report of Committee on Legal Aid

Taking this approach, the Association called on law schools to provide instruction in poverty law issues and involve students in such programs. Additional resolutions that year reaffirmed the Association's work with local bars to assure that the poor have a source of prompt and competent legal help in each county.

> *[T]he best, the strongest and the most effective volunteer efforts have evolved at a local level, when the local bar, paid legal services staff and the local judiciary have come together cooperatively to address the local need and to tailor a local solution.*
>
> - Justin L. Vigdor, Chair
> 1989 report of Special Committee to Review Proposed Plan for Mandatory Pro Bono Service

Commenting on the proposal of a committee appointed by the Chief Judge that recommended a minimum 40-hour biennial requirement of qualifying pro bono service, the Vigdor committee not only took the position that such service should be voluntary but presented a 20-point plan of concrete actions to increase the New York bar's pro bono work. Upon House of Delegates approval, the Association immediately undertook implementation of the plan, which placed an emphasis on public-private partnerships and involvement by state and local bar associations, members of the bench and bar, legal educators and law students, and the community. Citing this constructive approach, the Chief Judge did not proceed with mandatory pro bono.

> *[T]he public-private partnership of dedicated and involved voluntary attorneys complementing staff attorneys in assuring that counsel is available for those in need . . . is the element that I believe has enabled us to do as much as we have in the face of enormous challenges of funding cutbacks and restrictions while caseloads grew in number and complexity.*
>
> - Lorraine Power Tharp, President
> October 25, 2002 remarks
> Chief Judge's Pro Bono Convocation

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This retrospective offers us several important lessons – some heartening, some disappointing. A review of the evolution of the assigned counsel program tells a similar story. We have remained committed to our ethical responsibilities to assist in making legal counsel available.[1] We have remained, as the communications gurus stress, "on message" that to be effective and in light of the daily burdens on practitioners, this service should be voluntary in nature, supplementing staffed programs. We have underscored that access to legal services must be society's concern – it is a matter of doing justice and a matter of maintaining and building public confidence in the legal process. We have expanded our outreach to actively involve all elements of the profession as well as social service and community groups, and we have built and nurtured public-private alliances. We also have devoted increased resources of the Association, providing staff assistance plus forums to educate, to exchange information, and to work together, identifying ways in which individual attorneys, bar associations, law offices and others can foster pro bono service. We have kept this at the forefront of our discussions with lawmakers and the media. This torch has been passed from president to president in the ensuing years.

And in so doing, we have made progress in the development of programs statewide and in public understanding that this is a societal issue, not a matter to be shouldered in service or financially solely by the legal profession. Despite all these efforts, there is a cloud of disappointment that the legal services programs so carefully forged remain in jeopardy with the nebulous state of government funding. Despite these actions, we must do more to bring these points home and to secure adequate and regularized sources of funding. Likewise, we will continue to develop ways to facilitate supplementary volunteer service.

As I pointed out to the Pro Bono Convocation participants, even during the strong fiscal climate of the past decade, persons living in poverty in the state increased from 13% to 14.6% – to 2.7 million New Yorkers, including 535,935 families.[2] The current economic downturn clearly is resulting in more problems and more cases of legal need. That we are not alone in feeling the effects of these fiscal problems is not sufficient reason to slacken our stride. It is not a source of comfort to those in need of legal help.

We are at a critical juncture that requires careful direction but decisive steps. In discussions at the Pro Bono Convocation and in meetings with bar leaders, government officials and others, I have made the following points:

• The State Bar Association will pursue access to justice with concrete actions. These are steps most effectively taken in sync, and we welcome collaboration statewide and locally, by organizations and individuals.

• We are strengthening our legislative advocacy and our media and public communications to raise our voice above the crowd. As I indicated, assuring availability of legal counsel in criminal and civil matters is a priority, and we will be developing outreach strategies specific to these issues that involve multi-pronged communications, statewide and on a grassroots basis, by our Association leaders and members. These strategies will be focused on lawmakers, the media and other public venues. We aim to depict the human face of these needs and the human cost of not taking action. We invite cooperative efforts on this front.

• The series of convocations by the Unified Court System is intended, as stated, to bring together the best thinking to design a statewide pro bono system. These forums are being held in four locations across the state. Gaining information on the diverse conditions and needs in the state and factoring these into any proposals are essential.

• Any such plans should preserve and expand on the positive partnerships created over the years and continue to seek the input and involvement of bar associations in education, outreach, and devising plans for assuring access to justice. Tapping the practical experience and input of the lawyer out in the field is critical to an effective legal services initiatives that effectively involves the bar and takes into consideration the demands placed upon members of the profession today.

And I made one more point. We as an Association will be there, chipping away at this boulder of government funding that frustrates the goal of meeting today's legal needs of New York's poor and of truly fulfilling society's responsibility.

On the television news the other evening, an activist was photographed telling the crowd to spread the word for her cause, by informing lawmakers, meeting with reporters, submitting op-ed pieces and letters to editor, participating in talk shows, speaking out in the community, and giving examples of the need at hand. We will be doing that on behalf the Association. Consider this message as my bullhorn to do likewise. Please share your experience and counsel with me in moving forward. Your involvement will make a difference.

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1. The Lawyer's Code of Professional Responsibility, Canon 2, EC 2-25.
2. Deepti Hajela,. *Number of State's Poor Rose in 1990s*, Times Union (Albany, NY) June 2, 2002 at D6.

Rhetoric Is Part Of the Lawyer's Craft

BY SUSAN MCCLOSKEY

Rhetoric has a bad reputation among lawyers. At best, rhetorical devices seem merely decorative, the verbal equivalent of colorful jimmies sprinkled over the plain vanilla of one's prose. At worst, *rhetorical* describes the unscrupulous methods of an adversary who manipulates words to obscure the hollowness of his argument.

That *rhetoric* is most often modified by adjectives such as *mere*, *overheated*, and *political* does nothing to rehabilitate its image. For most lawyers, it says everything about rhetoric that its best-known figure is the rhetorical question – something that looks like a question and sounds like a question, but isn't really a question. What's the use of that?

Such skepticism is puzzling, because rhetoric is essential to the practice of law. It is the art of using language to move your readers in the direction you want them to go. Seldom can you simply write *Do this* or *Stop doing that* and expect your wish to be carried out. Far more often, you achieve your ends by changing your readers' minds or moving their hearts. Rhetoric supplies the means. When you convince a judge to rule favorably on your motion, persuade an unreasonable client to enter a reasonable agreement, gain a patent for an inventor, or dissuade a colleague from an ethically questionable act, you perform a rhetorician's tasks.

You use the verbal means at your disposal to make a persuasive case, appeal to your reader's interests, and express your key points vividly. The question for lawyers, then, is not whether to use rhetoric, but how to use it well.

Risky Rhetoric

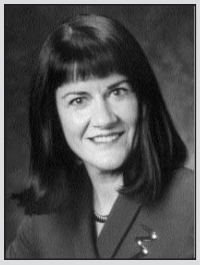
That said, it's true that some rhetorical devices warrant your healthy skepticism. They deserve careful handling – or no handling at all. For instance, the hyperbole familiar to us from advertisements and the speech of teenagers is best avoided in legal documents, because exaggeration can undermine a reader's confidence in the writer. An on-the-job mishap that causes your client to miss a week's work probably doesn't qualify as a *life-threatening injury*. Making much of little is a bad idea, but so is making little of much. If a plaintiff has indeed sustained a life-threatening injury, it won't do for defendant's counsel to dismiss it as a *temporary indisposition*.

Other devices, such as irony, are risky because they are open to misconstruction. If your opponent makes a claim that you regard as absurd, it may be tempting to slide tongue into cheek and praise his sagacity or the rapier-like keenness of his wit. But it is better to resist the temptation and instead do the work of demonstrating the absurdity. Remember that when the master ironist Jonathan Swift suggested in *A Modest Proposal* that famine in Ireland could be prevented by eating Irish children, some of his readers took him seriously.

Emphatic Devices

The rhetorical devices of greatest use to legal writers are those that enable you to focus your reader's attention. Just like you, your readers are busy people, prone to distraction. Given a reason to read inattentively, or to stop reading altogether, many will seize it. Even in the ideal legal document, where every point is essential to your argument or analysis, some points are more essential than others. Your readers need to know which they are. Your challenge is to emphasize them without disrupting your reader's progress through the document.

Typographic emphasis Many legal writers try to meet this challenge by exploiting the typographic resources of their word-processing programs. Halfway through a document, they will present the reader, who has been attentively reading words in 12-point Times Roman, with a passage TYPED IN CAPITAL LETTERS AND LITTERED WITH UNDERLININGS, **BOLD-FACINGS**, AND *ITALICS*. A



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little of this excitement goes a long way. When an extended passage such as this – a whole paragraph or more – elbows itself onto the page, most readers step out of its way, skipping the very words that the writer wished most urgently to call to their attention. The passage looks like shouting, and the effort of reading it seems unlikely to yield a commensurate reward.

The best way to conquer the typographic habit is to go cold turkey. Commit yourself to producing documents in which only the headings and the names of cases diverge from the uniform appearance of the text. Stripped of annoyance and distraction, the text will then be easy to read – and likely to be read. After a penitential month or two without boldface type, you can afford the occasional typographic emphasis, provided you remember that its effectiveness depends on its infrequency. One or two highlighted points in a long document should suffice.

Repetition Legal writers also favor repetition as a means of emphasis, perhaps on the theory that what works at the podium should also work on the page. Public speakers are routinely advised to follow the Rule of Three: Say what you're going to say, say it, then say what you've said. In spoken presentations, such repetition is necessary, because listeners can't refresh their memories by turning back to an earlier page. Speakers who follow the Rule of Three compensate their hearers for the lack of a written text and help them follow the argument and retain what they've heard.

When you gain nothing by repetition, venturing it is pointless. Reserve its power for sentences that matter.

Sometimes spoken repetition works to highlight a theme or heighten emotion, as the words *I have a dream* did in Martin Luther King's famous speech. Such verbatim repetition works less successfully in legal documents. Consider this typical instance:

> The notice to quit is defective for three reasons. First, the notice to quit is defective because it fails to properly identify the properties involved in this dispute. Second, the notice is defective because the reason given for the notice, "nonpayment of rent," fails to comply with the mandatory requirements of the statute. Finally, the notice is defective because there is no lease or rental agreement in this matter and thus, there is no landlord/tenant relationship between the parties.

The writer of this passage perhaps hoped that stressing the notice's defectiveness would work readers up against its nameless drafter. But the repetition here is likelier to make the reader impatient with the writer. Surely the first assertion of the notice's defectiveness is enough. The second, third, and fourth assertions suggest that the writer didn't trust readers to get the point. The passage lacks rhetorical power because it accomplishes nothing that a nonrepetitive statement would not better accomplish. Remove the repetition, and you're left with a concise, clear statement of the problem:

> The notice to quit is defective because (1) it fails to properly identify the properties in this dispute; (2) the reason for the notice, "nonpayment of rent," fails to comply with the statutory requirements; and (3) no lease or rental agreement figures in this matter, so there is no landlord/tenant relationship between the parties.

The writer needed to recall a basic rhetorical rule of thumb: When you gain nothing by repetition, venturing it is pointless. Reserve its power for sentences that matter.

Written repetition is generally most effective when the writer repeats not words, but grammatical structures. Parallelism is the general term for this device, which belongs in every legal writer's rhetorical tool kit. Sometimes its power depends on the compression of meaning, as when Justice Brandeis illustrated the proposition, *Fear of serious injury cannot alone justify suppression of free speech and assembly*, with the sentence *Men feared witches and burnt women*.[1] Here, the structure of the sentence, with its single subject *Men* and its compound verb *feared* and *burned*, emphasizes the crucial distinction between the direct objects *witches* and *women*. Imagine how much less effective the sentence would be had he written, *Men were afraid of witches, and so they burned women at the stake*.

Sometimes parallel grammatical structures derive their power from elaboration rather than compression:

> The Constitution of the United States is the law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.[2]

The first half of the passage focuses on a set of balanced pairs, *rulers and people*, and *war and peace*, both of which share the same grammatical structure as objects of prepositions. The compound verbs *is* and *covers* echo these pairings. The phrases *all classes of men, at all times, and under all circumstances* neatly elaborate the pattern of pairs into a closing triplet, in which the repeated *all* acquires its force by modifying three different nouns, all of which function as the direct objects of the verb *covers*. Here the writer uses rhetoric appropriate to his serious subject, the Constitution, and the stateliness of the passage depends on the interplay of changing words in identical structures.

Which Passage Reflects Your Attitude Toward Rhetoric?

Rhetoric is the art of ruling the minds of men. – *Plato*

[This man] plunges into scientific questions with which he has no real acquaintance, only to obscure them by an aimless rhetoric, and distract the attention of his hearers from the real point at issue by eloquent rhetoric and skilled appeals. – *Thomas Henry Huxley*

Rhetoric is nothing but reason well dressed and argument put in order. – *Jan Zomoiski*

For rhetoric, he could not ope
His mouth, but out there flew a trope.
For all a rhetorician's rules
Teach nothing but to name his tools.
– *Samuel Butler*

The duty and office of Rhetoric is to apply Reason to Imagination for the better moving of the Will. – *Francis Bacon*

Proverbial expressions, and trite sayings, are the flowers of the rhetoric of vulgar men. – *Lord Chesterfield*

Rhetoric is the art of transacting a serious business of the understanding as if it were a free play of the imagination. – *Immanuel Kant*

If you have a logical argument to back up a conclusion, there is nothing wrong with stating it in such a way that your audience will endorse it with their feelings as well as their intellects. Good writers and speakers combine logic and rhetoric to produce exactly that effect. – *David Kelley*

What is called eloquence in the forum is commonly found to be rhetoric in the study. The orator yields to the inspiration of a transient occasion, and speaks to . . . those who can hear him; but the writer, . . . who would be distracted by the event and the crowd which inspire the orator, speaks to the intellect and heart of mankind, to all in any age who can understand him.
– *Henry David Thoreau*

Histories make men wise; poets, witty; the mathematics, subtle; natural philosophy, deep; moral, grave; logic and rhetoric, able to contend. – *Francis Bacon*

My strong point is not rhetoric, it isn't showmanship, it isn't big promises – those things that create the glamour and the excitement that people call charisma and warmth. – *Richard Nixon*

Sentence length and placement Other means of emphasis require less rhetorical finesse. The simplest way to emphasize a point is to express it in a short, simple sentence. An independent clause with a single subject-verb pair, unburdened by subordinate phrases or clauses, focuses the reader's full attention on the proposition it contains. *The plaintiff misrepresents the* Gaffin *court's findings* is not in itself an especially striking sentence. It employs no rhetorical devices, but instead presents straightforwardly what the writer regards as a fact. But in its plainness it is a more powerful statement than the same thought introduced by a phrase (*In a bald-faced attempt to buttress a weak argument*) or a clause (*Having ignored the defendant's conscientious review of the relevant case law*). Longer versions of this sentence would blunt its force by qualifying the fact of the misrepresentation.

When such qualifications are essential and you must express your idea in a complex sentence, typically with a subordinate clause modifying an independent clause, you can assure proper emphasis by placing the main thought in the main clause. Notice in the following pair of sentences how the emphasis shifts, depending on which clause functions as the main clause:

> *Version 1*: Although the Plaintiff requests over two thousand dollars in attorney's fees, the matter never proceeded to a due-process hearing.
>
> *Version 2*: Although the matter never proceeded to a due-process hearing, the Plaintiff requests over two thousand dollars in attorney's fees.

The first version tells us that the lack of a due-process hearing is the essential point. The second version focuses instead on the plaintiff's request. In the throes of composition, it is easy to misplace the emphasis, so take time in revision to check that you're calling your reader's attention to the point you wish to stress.

The position of a point within a sentence or a passage can also assure proper emphasis. In both units, what comes last bears the greatest degree of emphasis. The end of the sentence generally contains the new information that advances the writer's argument or analysis. The end of the paragraph often serves a summary role, distilling its point. If you want to downplay an unfortunate fact or a weak but necessary argument, place it mid-sentence or mid-paragraph or even mid-section, points that bear little if any emphasis. If you want to emphasize a point, place it last.

The sentence that follows illustrates the importance of placement:

> Another court analyzed the issue of presenting the case in phases before the same jury and, even though it denied the motion for bifurcation of the trial into separate trials with different juries, it determined instead that all

> parties would be served by bifurcating the trials into phases before the same jury.

Of the three points in this sentence, which is most important: That another court analyzed the issue? That it denied the motion for bifurcation into separate trials with different juries? Or that it decided that the same jury should hear both phases of the trial? The writer seems to want to emphasize point three, because he places it at the end of the sentence. But points one and three compete for emphasis, because each appears in an independent clause.

You can solve the problem by dividing the sentence in two and emphasizing the second point by placing it in the main clause. The third point will then bear the greatest emphasis, both because it occupies its own sentence and because it appears last:

> Analyzing the issue of presenting the case in phases before the same jury, another court denied the motion for bifurcation of the trial into separate trials with different juries. It determined that all parties would be served instead by bifurcating the trials into phases before the same jury.

This revision gets the emphasis right: The second point is more significant than the first, the third more significant than the second. Such attention to emphasis provides crucial guidance to readers, helping them see not only what matters to the writer, but also how much it matters.

Devices within sentences While rhetorical emphasis is in part a function of the length and placement of sentences, striking rhetorical effects are also possible within individual sentences. When the writer inverts the customary word order of subject, then verb, then object, he disrupts the reader's expectation of how the sentence will unfold and calls attention to the sentence's point. For instance, *The plaintiff could not have known that the defendant would defraud her* can be inverted to read *That the defendant would defraud her the plaintiff could not have known*. The unexpected syntax of the second version slows readers down and makes them focus on the writer's meaning. The second version also shifts the emphasis from the defendant's fraud to the plaintiff's lack of knowledge, the point that now appears last.

Interrupting the sentence has a different effect, emphasizing the inserted word, phrase, or clause. Suppose the writer wants to emphasize the plaintiff's lack of culpability for her fate. He might interject a comment such as this: *The plaintiff could not have known – nor could any honest business owner – that the defendant would defraud her.* Effects such as these – inherently dramatic, arresting in their unexpectedness – lose their force – how could they not? – through overuse, as this sentence demonstrates. Not every point is worth a drum roll and a trum-

Rhetoric Bibliography

Edward P.J. Corbett. *Classical Rhetoric for the Modern Student*. 3rd Edition. New York: Oxford University Press, 1990. This book offers a comprehensive discussion of rhetoric, with abundant illustration of the principles of logical argument and rhetorical tropes and figures.

Bryan A. Garner. *The Elements of Legal Style*. Oxford: Oxford University Press, 1991. Chapter 6, "Rhetorical Figures in Law," contains fine illustrations of rhetorical tropes and figures.

Joseph M. Williams. *Style: Ten Lessons in Clarity and Grace*. 3rd Edition. Glenview, Illinois: Scott, Foresman and Company, 1989. Lesson 8 of this indispensable book, "A Touch of Class," deals with emphasis, rhythm, and metaphor.

pet fanfare. Be sure that the point you're emphasizing deserves the emphasis you give it.

In the quest for maximum accuracy and precision, legal writers too often rely on a different form of interruption, the parenthetical remark set off from the main sentence by round brackets. It is not at all unusual to find in a legal document a passage such as this one, liberally larded with parentheses:

> We may want to specify that the request relates only to the § 401(k) deferrals (and the earnings on them). The Savings Plan permits the distribution of the company matching contribution (and earnings) upon termination of employment (or completion of five years of service). It appears clear (at least to the best of our knowledge) that the affected individuals have terminated employment. We have already distributed (either directly or as a transfer to ABC's plan) the company matching contribution of the affected individuals (other than those who elected to leave the match in the Savings Plan).

Not one of these parentheses is necessary, and all of them are distracting. Unlike dashes, which emphasize the material they enclose, round brackets *de*-emphasize their contents. They indicate to the reader that the bracketed material is inessential to the sentence's meaning and can be skipped altogether. Seldom is this the message that the writer wishes to send. When you're revising your draft, check to see if you can eliminate round brackets altogether, by removing them, replacing them with commas, or moving the parenthetical material into a sentence of its own.

Issuing a command or posing a rhetorical question helps a writer emphasize a point simply by varying the pattern of one declarative sentence after another that characterizes almost any piece of prose. Like other pieces of heavy rhetorical artillery, these should be rolled out infrequently. A polite command, such as *Consider the implications of this ruling*, interrupts the run of declarative sentences and invites the reader to do something other than passively absorb the writer's meaning. A rhetorical question works obliquely to affirm or deny what it questions. At the close of a hair-raising recital of an employer's barbarous treatment of an employee, you can choose to assert that the employee should not have to endure such treatment. Or you can encourage your readers to reach that conclusion for themselves by asking, *Was the plaintiff simply to endure in silence the abusive behavior of her employer?* Such questions are risky only when the questioner leaves the answer up for grabs. Asking *Should this court grant the defendant's motion to exclude the testimony of plaintiff's experts?* is an ill-advised rhetorical move, because a *no* is as likely as a *yes*.

Concretizing Devices

While most legal writers recognize that rhetorical devices can replace typographic emphasis and repetition as means to highlight key points, many resist the rhetorical means to counter the abstract tendency of legal prose. As soon as the discussion turns to devices of analogy, such as simile and metaphor, lawyers get nervous. Such figures of speech seem risky because they are hard to pull off, seem self-consciously literary, and may distract a reader from the writer's point to the manner of its making. These objections are sometimes warranted. When a writer assures us that his opponent's argument is as transparent as Saran Wrap or has the consistency of day-old oatmeal, a groan or a grimace is the reader's proper response. The management of kitchen leftovers finally doesn't have much to do with the practice of law.

Analogies An apt analogy, however, is a marvelous thing. It can clarify your point, distill an argument, lodge it in your readers' memories, or offer them a moment of pleasure – or do all four things at once. For example, to counter the plaintiff's argument that doing business with the defendant credit union aggravated her hypertension, the Mississippi attorney representing the defendant found the right analogy: *A high school student may find it stressful to apply for admission to Ole Miss, but stress hardly gives him a cause of action against the university*. The comparison so neatly exposes the absurdity of the plaintiff's claim that little more needs to be said.

Examples Such analogies usually come easily to a writer, or come not at all. Other concretizing devices depend less on inspiration. In the midst of a complicated legal analysis, few words are more welcome to the reader's eye than *for example*. A good example illustrates an abstract point, enabling the readers to test their understanding of it. All the writer needs to do is invent a case in point. A patent attorney wishing to clarify the

proposition that narrow claims about an invention offer an inventor greater protection than do broad claims, buttressed his point as follows: *A claim that includes elements A, B, and C covers any device with those elements, even if the device has additional elements. Thus, a device with elements A, B, C, D, E, and F would infringe the claim that includes A, B, and C. But a device with only elements A and B would not infringe this claim, because it lacks the required element C*. By translating his point into concrete terms, the writer helped the inventor see both why and how his patent application needed to be revised.

Verbs and nouns A highly effective means to vivify a point requires the simplest technique of all: your reliance on strong verbs and concrete nouns. The right word is easier to find than a simile or a metaphor, or even an example. All you need to do is rummage around in your vocabulary until you locate it. You can give some oomph to a run-of-the-mill sentence, such as *The underlying litigation arises out of a collision between two Consolidated vehicles and the resulting spillage of a portion of their cargo onto the highway*, by turning the nouns into hard-working verbs: *The underlying litigation arose when two Consolidated vehicles collided and spilled part of their cargo on the highway*. You can soberly advise a client that he is mishandling his estate in language such as this:

> The disclaimer would require you to surrender all control of and gain no income from the disclaimed property. It is my understanding that your preference is not to surrender control and therefore you will not disclaim any portion of your spouse's bequest. You understand that this decision has the potential to increase taxes at the time of your passing, because the property will be part of your estate.

Or you can drive the point home with language better calculated to get your client's attention:

> The disclaimer requires you to give up control of the disclaimed property and its income. Your refusal to sign the disclaimer could increase the tax burden on your estate when you die, because the property at issue will be part of it.

The second version may not result in your client's disclaimer, but the snap and crackle of its verbs (*requires*, *give up*, *increase*, and *die*) and the pop of the nouns *refusal* and *burden* will better focus his mind.

That's what good writing can do, and that's what rhetoric is for. Among the myriad verbal devices at your disposal, you need to select those best suited to your purposes, and you need to use them with intelligence and care. But to disclaim them altogether as mere ornament or shady practice is shortsighted and self-defeating. You probably wouldn't reject a jack and a wrench to help you change a flat tire on a highway. Rhetorical tools have the same practical value. They can help you change a mind.

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1. *Whitney v. California*, 274 U.S. 357, 376 (1927).
2. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1879) (Davis, J.).

Changes to Estate Laws in 2002 Affected Families of Terror Victims, Adoptions, Accountings and Trusts

BY JOSHUA S. RUBENSTEIN

Many of the legislative changes made in 2002 to the laws affecting estate planning and administration were designed primarily to provide relief to the families of those who died in the terrorist attacks on September 11, 2001. The others were largely procedural, affecting adoptions, guardianships, charitable trusts, contested accounting proceedings and the attorney-client privilege. The following is a review of each such change.

Surrogate's Court Procedure Act

Jurisdiction and Powers

1. Surrogate's Court Procedure Act (SCPA) 205 has been amended by adding a new subdivision 3, which provides that the Surrogate's Court of any county has jurisdiction over, and is a proper venue for, the proceedings of any decedent who died as a result of wounds or injuries incurred as a result of the terrorist attacks on September 11, 2001, and was a domiciliary of the state at the time of his or her death. This change took effect immediately.[1]

Letters

2. A new subdivision 12 has been added to SCPA 711 to provide that a fiduciary's letters may be suspended, modified or revoked if he or she fails to account in the time and manner directed by the court. This change took effect November 1, 2002.[2]

3. Subdivision (1) of SCPA 719 has been amended to provide that the letters of a fiduciary, or the powers of a lifetime trustee, may be modified, suspended or revoked if he or she fails to account in the time and manner directed by the court. This change took effect November 1, 2002.[3]

Guardians and Custodians

4. SCPA 1750 has been amended to provide that every professional who certifies a person's mental retardation must also certify the person's capacity to make health care decisions. This change is effective March 16, 2003.[4]

5. A new section, 1750-b, has been added to the SCPA to provide that unless specifically prohibited by the court, every guardian of a mentally retarded person shall have the authority to make any and all health care decisions on behalf of a mentally retarded person who is incapable of doing so for himself or herself. The decision-making standard shall be the best interests of the mentally retarded person and, if reasonably knowable, the person's wishes. The guardian shall have the right to receive all relevant patient information and may decide to withdraw or withhold life-sustaining treatment, subject to the right of certain individuals to object. A guardian may commence a special proceeding to resolve any dispute under this section. Immunity is granted to any health care provider or guardian who acts in good faith. This change is effective March 16, 2003.[5]

Miscellaneous Proceedings

6. Both Houses passed, but the governor vetoed, a bill that would have added a new subdivision 5 to SCPA 2110 providing that in any proceeding in which the court determines the compensation of an attorney, the court shall allow the attorney reimbursement for certain expenses that are necessarily and appropriately incurred, including but not limited to (1) photocopying and binding; (2) computerized legal research; (3) same-day or express courier or messenger service; (4) postage, including certified, registered, or express mail; (5) telecopy; (6) long-distance telephone; and (7) service of process and other papers. To be reimbursable, the expenses (1) must have been paid to outside providers, or have been actual direct costs (excluding overhead) incurred by the attorney or his or her firm; (2) must have been traced and allocated separately to the client; and

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(3) must not have been considered in determining the attorney's billing rates. This change would have been effective immediately and would have applied to all pending or future proceedings involving the determination of attorney compensation, irrespective of when the services were performed or when the expenses were incurred.[6]

Accounting

7. SCPA 2206(1) has been amended to permit a petition for a compulsory accounting to request (1) the suspension and/or removal of a fiduciary who fails to account in the time and manner directed by the court, (2) the appointment of a successor to the fiduciary whose letters are suspended and/or revoked, and (3) the taking and stating of an account of a noncompliant fiduciary. This change took effect November 1, 2002.[7]

SCPA 2206(2) has been amended to permit the order compelling account to suspend the letters of a fiduciary who fails to account.

8. SCPA 2206(2) has been amended to permit the order compelling account to (1) suspend the letters of a fiduciary who fails to account in the time and manner directed by the court, (2) appoint a successor to the fiduciary whose letters are suspended, (3) schedule a hearing for the modification and/or suspension of the letters of the noncompliant fiduciary, and (4) schedule a hearing to take and state an account of a noncompliant fiduciary. This change took effect November 1, 2002.[8]

Costs, Allowances and Commissions

9. SCPA 2307(2) has been amended to provide that the recovery of awards from the September 11th Victim Compensation Fund of 2001 will not be considered as money in computing commissions, and that such awards shall be valued at zero for purposes of that section. This change took effect immediately.[9]

Estates, Powers and Trusts Law

Charitable Trusts

10. Paragraph (s) of Estates, Powers and Trusts Law (EPTL) 8-1.4 has been amended to provide that a trustee is not qualified to make application for funds or grants or to receive such funds from any department or agency of the state without certifying compliance with paragraphs (d), (f) and (g) of EPTL 8-1.4 and all applicable registration and reporting requirements of article 7-A of the Executive Law. Previously, that paragraph did not require certification of compliance with article 7-A. This change took effect August 1, 2002.[10]

11. Paragraphs (b), (c), (d), (g), (h), (i), (k), (m) and (r) of EPTL 8-1.4 have been amended to make those paragraphs gender neutral. Those paragraphs substitute "he or she" for "he," "him or her" for "him," and "his or her" for "his." These changes took effect August 1, 2002.[11]

Actions By or Against Personal Representatives

12. A new paragraph (e) has been added to EPTL 11-4.7. It provides special rules for personal representatives of victims of the terrorist attacks on September 11, 2001.

Any such personal representative who files a claim with the September 11th Victim Compensation Fund of 2001 (the "Fund") shall have no liability to any person resulting from any actions taken reasonably and in good faith under the Federal Air Transportation Safety and System Stabilization Act (Public Law No. 107-42), including but not limited to (1) the submission or prosecution of a claim to the Fund; (2) a decision not to submit such a claim, or to withdraw a claim previously submitted; (3) the waiver of the right to file a civil action for damages sustained as a result of the terrorist attacks; (4) the failure to identify or locate any person designated for receipt of notice, provided that the personal representative made a reasonable and good faith effort to identify and locate such person; and (5) the payment or distribution of any award received from the Fund. This change took effect immediately.[12]

Any such personal representative is authorized to file and prosecute a claim with the Fund, and the filing of such a claim, and the resulting compromise of any cause of action pursuant to the Act, shall not violate any restriction on the powers granted to the personal representative relating to the prosecution or compromise of any action, the collection of any settlement, or the enforcement of any judgment. This change also took effect immediately.[13]

Tax Law

Procedure and Administration

13. Section 696 of the Tax Law has been renamed "Income taxes of members of armed forces and victims of certain terrorist attacks," and a new subsection (h) has been added, providing that any "specified terrorist victim" (a decedent who dies as a result of wounds or injuries incurred from the terrorist attacks on September 11, 2001, other than an individual identified by the attorney general to have been a participant or conspirator in any such attack or a representative of such individual) dying on or after September 11, 2001, but before January 1, 2002, is generally exempt from the New York State, New York City, and Yonkers personal income taxes for both the 2000 and 2001 taxable years. Surviving spouses, personal representatives or executors of speci-

fied terrorist victims may file amended personal income tax returns for 2000 and 2001 to claim a refund of tax paid. This change took effect immediately.[14]

Estate Tax

14. Section 951 of the Tax Law has been amended to provide that, for purposes of the New York State estate tax, any reference to the Internal Revenue Code means the United States Internal Revenue Code of 1986, not only with all amendments enacted on or before July 22, 1998, but also with all amendments enacted by the federal Victims of Terrorism Tax Relief Act of 2001 (Public Law No. 107-134) insofar as the Act relates to the estate of a specified terrorist victim. This change took effect immediately.[15]

15. The unified credit for New York State estate tax purposes has been increased to $345,800, an amount equal to the estate tax due on a taxable estate of $1 million. The increase appears to be the result of federal, rather than state, legislation. Tax Law § 951(a) specifies that the amount of the unified credit allowed against the New York State estate tax is the amount allowed under the applicable federal law in effect on the decedent's date of death. On June 7, 2001, President George W. Bush signed into law the Economic Growth and Tax Relief Reconciliation Act of 2001 (Public Law No. 107-16), which increased the federal unified credit to $345,800 for estates of those dying in 2002 and 2003. Therefore, because the New York State unified credit is tied to the federal unified credit (with a ceiling of $1 million), the unified credit for New York State estate tax purposes for estates of those dying in 2002 and 2003 is $345,800. This change took effect immediately.[16]

September 11th Victim Compensation Fund

16. Effective immediately, no state or local tax of any kind, including but not limited to income and estate taxation, may be imposed on any payment from the September 11th Victim Compensation Fund of 2001.[17]

Civil Practice Law and Rules

Evidence

17. Subdivision (a) of section 4503 of the Civil Practice Law and Rules (CPLR) has been amended to provide that, for purposes of the attorney-client privilege, if the client is a personal representative,[18] and the attorney represents the personal representative in that capacity, then in the absence of an agreement between the attorney and the personal representative to the contrary: (1) no beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and (2) the existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client. This change took effect immediately.[19]

Domestic Relations Law

Effect of Adoption

18. Subdivisions 1 and 2 of Domestic Relations Law § 117 have been amended to change the phrase "natural parent," wherever it is found in those sections, to "birth parent." Subdivisions 1 and 2 set forth the inheritance and succession rights of adopted children, and that of their adopted parents and birth parents. This change took effect immediately.[20]

Public Health Law

19. A new section 4368 has been added to the Public Health Law, establishing a program for the annual public recognition of organ, tissue and bone marrow donors. This change took effect immediately.[21]

Workers' Compensation Law

20. A new section 4 has been added to the Workers' Compensation Law, extending death benefits to domestic partners of persons who perished as a result of the terrorist attacks on September 11, 2001. This change took effect immediately and is deemed to have been in effect after September 10, 2001.[22]

Social Services Law

21. Social Services Law § 209(b) has been amended to clarify that the recipients of medical assistance who may establish irrevocable trust funds for their funeral and burial may reside in any state. This change took effect immediately.[23]

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1. 2002 N.Y. Laws ch. 73, S7356, A11290, signed on May 21, 2002. For a complete listing of all state tax relief available to terrorist victims, and the applicable procedural rules, see Publication 59.
2. 2002 N.Y. Laws ch. 457, S6934, A10756, signed on August 20, 2002.
3. *Id*.
4. 2002 N.Y. Laws ch. 500, S4622B, A8466D, signed on September 17, 2002.
5. *Id*.
6. S2938, A10737, vetoed August 6, 2002.
7. 2002 N.Y. Laws ch. 457, S6934, A10756, signed on August 20, 2002.
8. *Id*.
9. 2002 N.Y. Laws ch. 73, S7356, A11290, signed on May 21, 2002.
10. 2002 N.Y. Laws ch. 43, S5611, A871, signed on April 30, 2002.
11. *Id*.
12. 2002 N.Y. Laws ch. 73, S7356, A11290, signed on May 21, 2002.
13. *Id*.
14. 2002 N.Y. Laws ch. 85, S6260, A9762, signed on May 29, 2002; TSB-M-02(3)M (July 9, 2002). In order to claim such relief, a form IT-59 must be filed.
15. 2002 N.Y. Laws ch. 85, S6260, A9762, signed on May 29, 2002.
16. TSB-M-02(2)M (Mar. 21, 2002).
17. 2002 N.Y. Laws ch. 73, S7356, A11290, signed on May 21, 2002.
18. For purposes of CPLR 4503(a), "personal representative" means (1) the administrator, administrator c.t.a., ancillary administrator, executor, preliminary executor, temporary administrator, or trustee to whom letters have been issued within the meaning of subdivision 34 of SCPA 103, and (2) the guardian of an incapacitated communicant if and to the extent that the order appointing such guardian under Mental Hygiene Law § 81.16(c) or any subsequent order of any court expressly provides that the guardian is to be the personal representative of the incapacitated communicant for purposes of CPLR 4503(a).
19. 2002 N.Y. Laws ch. 430, S2784, A5658, signed on August 20, 2002.
20. 2002 N.Y. Laws ch. 312, S7203, A4739, signed on August 6, 2002.
21. 2002 N.Y. Laws ch. 497, S2820-A, A10753, signed on September 17, 2002.
22. 2002 N.Y. Laws ch. 467, S7685, A11307, signed on August 20, 2002.
23. 2002 N.Y. Laws ch. 317, S7412-A, A11391-A, signed on August 6, 2002.

Wills and Estate Plans Require New Flexibility to Reflect Tax Changes and Uncertain Future

By Lawrence P. Keller and Anthony T. Lee

Since its passage in June 2001, the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) has had, and will continue to have, a dramatic impact on the methods and techniques used for estate planning generally and on the drafting of wills and trusts in particular.

Estate planners must now concern themselves with drafting estate tax plans that will provide for maximum flexibility because of (1) the increasing estate tax applicable exclusion amount; (2) the uncertainty as to whether EGTRRA will be allowed to sunset as of January 1, 2011; (3) the uncertainty about whether the estate tax will be permanently repealed after December 31, 2010; (4) the inability to predict whether future legislation will be passed before January 1, 2011, affecting the estate and gift tax laws; and (5) the inability to predict when in the next 10 years a testator or spouse is likely to die. Wills and trusts drafted before the enactment of EGTRRA must also be revisited, and most likely revised, to provide for the same flexibility sought in new wills and trusts.

Impact on Planning and Drafting

Married clients with combined taxable estates in excess of $1 million (the applicable exclusion amount in 2002 and 2003) still need estate tax planning – wills or trusts designed to shelter the applicable exclusion amounts of both spouses from federal estate taxes.

Although the applicable exclusion amount will rise to $1.5 million in 2004, $2 million in 2006 and $3.5 million in 2009, these clients may continue to need such wills or trusts, even if their combined taxable estates are worth less than the applicable exclusion amount, because of the possibility that EGTRRA will sunset and the applicable exclusion amount will revert to $1 million on January 1, 2011.

Wills with pre-residuary marital gifts For married clients who have wills or trusts that use pre-residuary marital deduction gifts and non-marital residuary gifts (designed to use the applicable exclusion amount of the first spouse to die), as the applicable exclusion increases in future years, the non-marital share will increase dramatically and the marital share will decrease dramatically.

If the one-year repeal of the estate tax actually occurs in 2010 (and thereafter, assuming EGTRRA does not sunset), the marital deduction gift will disappear entirely and the entire estate will pass to the non-marital share. Unless the marital and non-martial shares both exclusively benefit the surviving spouse, this is probably not the testator's intent. The result could be a partial or complete disinheritance of the surviving spouse.

Even if the marital and non-marital shares do both exclusively benefit the surviving spouse, the plan might result in the needless creation and funding of a credit shelter trust at a time when such trust is not needed to avoid estate taxes.

Wills with pre-residuary non-marital gifts On the other hand, for married clients with existing wills or trusts that use pre-residuary non-marital gifts (designed to use the applicable exclusion amount of the first spouse to die) and marital residuary gifts (disposing of everything in excess of the applicable exclusion amount), as the applicable exclusion amount increases

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the non-marital share will likewise increase dramatically and the marital share will likewise decrease dramatically.

If the one-year repeal of the estate tax occurs in 2010 (and thereafter, if EGTRRA does not sunset), a complete reversal of momentum will occur – the non-marital share will disappear and the entire estate will pass to the marital share. Unless the marital and non-marital shares both exclusively benefit the surviving spouse, this is probably not the testator's intent. Initially, as the applicable exclusion amount increases, there could be a partial or complete disinheritance of the surviving spouse. Subsequently, upon repeal of the estate tax, there will be a complete disinheritance of non-spousal beneficiaries (if any).

Furthermore, if the testator dies in 2010 when only a temporary revocation of the estate tax is in effect, and assuming that EGTRRA sunsets as of January 1, 2011, all opportunity for estate tax planning through the use of a credit shelter trust or other non-marital taxable gift will be irrevocably lost.

Flexible Drafting Alternatives

These problems can be avoided by using drafting alternatives designed to build maximum flexibility into the client's estate plan. Although the following alternatives are not all-inclusive, at this point they appear to provide some of the best flexibility options in light of the unpredictable future.

Disclaimer wills Disclaimer wills provide clients with a "second look" at their estate tax planning needs and at the status of estate and gift tax laws when the first spouse dies. As a result, disclaimer wills may become the primary estate planning documents of choice for most married clients whose combined estates are worth more than $1 million.

Under a disclaimer will, the testator's spouse is designated to receive the testator's entire residuary estate if the spouse survives. However, the will goes on to provide that if the spouse renounces or disclaims all or any part of the testator's residuary estate, the portion so renounced or disclaimed passes to either a credit shelter trust or outright to non-spousal beneficiaries.

Disclaimer wills may further provide that, if the surviving spouse not only renounces or disclaims all or some portion of the testator's residuary estate, but also any interest in the credit shelter trust created as a result of such disclaimer, the renounced or disclaimed portion of the testator's residuary estate then passes to non-spousal beneficiaries (typically, the testator's children). This second disclaimer provision gives the surviving spouse the option of making tax-free gifts of the credit shelter trust assets to non-spousal beneficiaries shortly after the death of the first spouse to die. As a result of the second disclaimer, the credit shelter trust assets are deemed to pass to the non-spousal beneficiaries directly from the decedent's estate and, consequently, there are no gift tax ramifications.

If married clients who decide to sign disclaimer wills own life insurance policies, they should be advised to name their credit shelter trusts under their will as the contingent beneficiary of such policies (presuming each spouse has named the other as the primary beneficiary of his or her policy). If this contingent beneficiary designation is in place with respect to a policy on the life of the first spouse to die, the surviving spouse can direct the life insurance proceeds to the decedent's credit shelter trust by renouncing or disclaiming his or her right to receive such proceeds as the primary beneficiary.

Likewise, clients signing disclaimer wills who own retirement benefits (such as 401(k) plans and IRAs) might also be advised to designate their credit shelter trusts under their will as the contingent beneficiary of such benefits (again, presuming that each spouse has named the other as primary beneficiary). With such a contingent beneficiary designation in place with respect to retirement benefits owned by the first spouse to die, the surviving spouse can, by disclaiming such benefits, pass the retirement benefits directly to the decedent's credit shelter trust. It should be noted, however, that funding a credit shelter trust with retirement benefits can be problematic and will result in the loss of the ability to further extend the income tax deferral on such benefits (*e.g.*, by way of a rollover by the surviving spouse). It might therefore be prudent, in cases where the surviving spouse will not need such retirement benefits for support, to make the contingent beneficiaries of such plans non-spousal beneficiaries (typically, the testator's children) for purposes of maximizing income tax liability deferral.

In some circumstances, it may be advisable to provide the surviving spouse with significant access to the credit shelter trust in order to encourage the surviving spouse to make an optimal disclaimer. This can easily be done by creating a "maximum rights" credit shelter trust that provides the surviving spouse with all income, the annual right to withdraw the greater of $5,000 or 5% of the trust principal, and by authorizing the trustee to "liberally" distribute principal, in the trustee's sole and absolute discretion, to the surviving spouse. If an independent trustee is selected, it is not necessary to limit principal invasions to an ascertainable standard, such as "health, education, maintenance and support."

Finally, even where clients have signed disclaimer wills, as the applicable exclusion amount increases between now and 2009, it will still be necessary for these clients to readjust the registration of their assets frequently in order to ensure that each spouse will be able

to optimally fund his or her credit shelter trust by way of a disclaimer by the surviving spouse.

Capping the credit shelter Although disclaimer wills may provide the greatest estate tax planning flexibility, they may not be appropriate for everyone. For instance, a spouse may not be willing to disclaim, either because he or she is not able to understand the reason for doing so or simply because he or she does not wish to relinquish full control over the assets owned by the first spouse to die (even where some portion of such assets may pass to a "maximum rights" credit shelter trust). A surviving spouse in a second marriage, where both spouses have children of their own from prior marriages, may be particularly reluctant to disclaim if, as a consequence of the disclaimer, assets will pass to or vest a future interest in the children of the first spouse to die.

One planning alternative that avoids the need for a disclaimer while also avoiding the uncertainties associated with EGTRRA, is to draft a credit shelter trust with language that subjects the trust to an overall cap of either a dollar amount or a percentage of the testator's estate. For example, after providing for a *pre-residuary marital deduction gift* designed to reduce the federal estate tax on the testator's estate to the smallest possible amount, the marital deduction gift provision could contain the following language governing the subsequent funding of a *residuary credit shelter trust*:

> The aforesaid notwithstanding, and notwithstanding the possible repeal of the federal estate tax after the execution of this Will pursuant to the Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16 (hereafter "EGTRRA"), if my [husband/wife] survives me, in no event shall the non-marital gift hereinafter made by residuary disposition be funded with more than:
>
> (1) one million dollars ($1,000,000) if, at the time of my death, the federal estate tax has been repealed pursuant to EGTRRA and if no legislation has been enacted pursuant to Title IX, § 901 of EGTRRA to prevent the sunsetting of the estate tax revocation provisions of EGTRRA; or
>
> (2) the lesser of the federal estate tax applicable exclusion amount or 50% of my gross estate less administration expenses, indebtedness, and unreimbursed casualty and theft losses if the estate tax has not been repealed at the time of my death; or
>
> (3) 50% of my gross estate less administration expenses, indebtedness, and unreimbursed casualty and theft losses if the federal estate tax has been repealed and if legislation has been enacted pursuant to Title IX, § 901 of EGTRRA to prevent the sunsetting of the estate tax revocation provisions of EGTRRA.

Without this optional limiting language, as the applicable exclusion amount increases, the credit shelter trust will increase dramatically and the marital deduction gift will decrease dramatically. If the one-year repeal of the estate tax occurs in 2010 (and thereafter, if EGTRRA does not sunset), the outright marital deduction gift will disappear entirely and the estate will pass entirely to the credit shelter trust.

This optional language is designed to ensure that (1) in 2010, the residuary credit shelter trust will be funded with the amount of the sunset exemption and no more, so that the testator's estate tax planning opportu-

Summary of EGTRRA Provisions

The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), as approved on June 7, 2001, provided for the applicable exclusion amount in computing estate taxes to rise to $1 million in 2002, $1.5 million in 2004, $2 million in 2006, and $3.5 million in 2009, together with phased-in reductions in the federal estate, gift and generation-skipping transfer tax (GSTT) rates. It also provided for at least a one-year repeal of the federal estate and GSTT taxes applicable to the estates of those who die after December 31, 2009.

It did not repeal the federal gift tax, however. That is retained, although the legislation did permanently increase the federal gift tax exemption to $1 million and provide for a phased-in reduction of federal gift tax rates.

EGTRRA also provided that effective January 1, 2010, when the federal estate tax is due to be repealed for at least one year, the current step-up in basis rule will be replaced by a modified carryover basis regime for capital gains on property acquired from a decedent.

Under a "sunset" provision in Title IX, § 901 of EGTRRA, all of the changes expire for estates of those who die after December 31, 2010. Future legislation will thus be required if the provisions of EGTRRA are to remain effective beyond that date. If no such legislation is adopted, the estate, gift and generation-skipping transfer tax laws will revert to what they would have been if EGTRRA had not been passed. Under those rules, the applicable exclusion amount would have been $1 million by 2006 and thereafter, and thus would be in force, and the graduated tax rate brackets that had applied through 2001 would be restored.

(A fuller description of the EGTRRA changes appeared in the September 2001 *Journal*.)

nity will not be lost if EGTRRA sunsets; (2) if the estate tax is still in effect at the time of death, the size of the credit shelter trust will be limited so that the marital gift will not be inadvertently eliminated or reduced to an unacceptably small amount; and (3) if the estate tax is permanently repealed, neither the non-marital nor the marital gift will be inadvertently eliminated or reduced to an unacceptably small amount – particularly in cases where the beneficiaries or remainderpersons of those gifts are not identical.

The "reduce-to-zero" marital deduction formula clause in many wills before EGTRRA could result in unintentionally overfunding the credit shelter trust.

In using this optional language, bear in mind that (1) there is no "magic" to the 50% limitation (any appropriate percentage could be used); (2) the optional language is most important where marital and non-marital beneficiaries or remainderpersons are not the same; and (3) if the estate tax is permanently repealed, trusts may be created that, while possibly useful for management purposes, will not be needed for tax-planning purposes.

Likewise, where a client's will provides for *a pre-residuary non-marital gift* in the amount of the applicable exclusion amount to a credit shelter trust and a *residuary marital gift* to the surviving spouse, whether outright or in trust, the pre-residuary credit shelter trust could be capped at either a specific dollar amount or a specific percentage of the total estate by adding the following language to the provision governing the funding of the credit shelter trust itself:

> The aforesaid notwithstanding, and notwithstanding the possible repeal of the federal estate tax after the execution of this Will pursuant to the Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16 (hereafter "EGTRRA"), if my [husband/wife] survives me, in no event shall the pre-residuary non-marital gift be funded with:
>
> (1) less than one million dollars ($1,000,000) if, at the time of my death, the federal estate tax has been repealed pursuant to EGTRRA and if no legislation has been enacted pursuant to Title IX, § 901 of EGTRRA to prevent the sunsetting of the estate tax revocation provisions of EGTRRA; or
>
> (2) more than the lesser of the federal estate tax applicable exclusion amount or 50% of my gross estate less administration expenses, indebtedness, and unreimbursed casualty and theft losses if the estate tax has not been repealed at the time of my death; or
>
> (3) less than 50% of my gross estate less administration expenses, indebtedness, and unreimbursed casualty and theft losses if the federal estate tax has been repealed and if legislation has been enacted pursuant to Title IX, § 901 of EGTRRA to prevent the sunsetting of the estate tax revocation provisions of EGTRRA.

Without this optional limiting language, as the applicable exclusion amount increases, the credit shelter trust will increase dramatically and the marital deduction gift will decrease dramatically. If the one-year repeal of the estate tax occurs in 2010 (and thereafter, if EGTRRA does not sunset), a complete reversal of momentum will occur – the credit shelter trust will completely disappear and the entire estate will pass to the surviving spouse.

This optional language is designed to ensure that (1) in 2010 the pre-residuary credit shelter trust will be funded with the amount of the sunset exemption so that the testator's estate tax planning opportunity will not be lost if EGTRRA sunsets; (2) if the estate tax is still in effect at the time of death, the size of the credit shelter trust will be limited so that the marital gift will not be inadvertently eliminated or reduced to an unacceptably small amount; and (3) if the estate tax is permanently repealed, neither the non-marital gift nor the marital gift will be inadvertently eliminated or reduced to an unacceptably small amount – particularly in cases where the beneficiaries or remainderpersons of those gifts are not identical.

Again, in using this optional language, bear in mind that (1) there is no "magic" to the 50% limitation (any appropriate percentage could be used); (2) the optional language is most important where marital and non-marital beneficiaries or remainderpersons are not the same; and (3) if the estate tax is permanently repealed, trusts may be created that, while possibly useful for management purposes, will not be needed for tax-planning purposes.

"One-lung" QTIP trusts Where married clients (1) are amenable to passing all or some portion of the residuary estate of the first spouse to die to a Qualified Terminable Interest Property (QTIP) trust for the benefit of the surviving spouse, and (2) intend that the terms and beneficiary of the credit shelter trust (created by way of a partial QTIP election) will be identical to the terms and beneficiary (*i.e.*, the surviving spouse) of the QTIP trust itself, another planning alternative in light of EGTRRA is to draft wills leaving the entire residuary estate of the first spouse to die to a so-called "one-lung" QTIP trust. (A one-lung QTIP trust is a QTIP trust that is the only trust created under the terms of the will.)

Upon the death of the first spouse to die, the decedent's executor can take a second look at the status of

the estate and gift tax laws as well as the value and nature of the assets owned by the decedent and his or her surviving spouse and, if need be, make a partial QTIP election in order to create a credit shelter trust to use all or some portion of the decedent's unified credit (if any such credit exists at that time under the current estate and gift tax laws).

The one-lung QTIP trust avoids the risk discussed above, namely that in a second marriage where both spouses have children from prior marriages, the surviving spouse may not disclaim where appropriate and, having received assets outright under the will of the first spouse to die, will thereby disinherit the other spouse's children.

Obviously, the loss of full control over the QTIP trust assets may not be desirable for many clients. If that is the case, disclaimer wills or wills that cap the amount of the credit shelter trust would appear to be better alternatives.

Note, however, that it is risky to disclaim retirement benefits to a one-lung QTIP trust as contingent beneficiary. If minimum required distributions are taken by the trust from the retirement plan and if such distributions could result in less than all plan and all trust income being distributed by the trust to the surviving spouse, the QTIP trust will not qualify for the estate tax marital deduction. In order for the one-lung QTIP trust to qualify for the estate tax marital deduction, the QTIP trust must contain language ensuring that the surviving spouse will receive all income annually both from the trust itself and from the retirement plan, the retirement plan document must not contain any language preventing that result, and the decedent's executor must elect QTIP treatment on the estate tax return for both the QTIP trust and for the retirement plan.

Clayton *contingent QTIP election* As noted above, the traditional "reduce-to-zero" marital deduction formula clause in many wills before EGTRRA could result in unintentionally overfunding the credit shelter trust and underfunding the marital gift. This outcome can be particularly undesirable where the surviving spouse is not a beneficiary of the credit shelter trust.

Another alternative to the traditional "reduce-to-zero" marital deduction formula is the use of a so-called *Clayton*[1] contingent QTIP election. Like the one-lung QTIP trust, this strategy involves leaving the residue of the decedent's estate – after satisfaction of all pre-residuary gifts and administration expenses – to a QTIP trust for the benefit of the surviving spouse. When a *Clayton* contingent QTIP election is available, the decedent's executor can determine how much of the QTIP trust should be qualified for the marital deduction. Unlike a plain-vanilla partial QTIP election, however, the *Clayton* contingent QTIP election, because of the express provi-

sions of the testator's will, results in a credit shelter trust with different terms and/or beneficiaries (*e.g.*, non-spousal beneficiaries) than the QTIP trust itself. In other words, the provisions of the will allow the testator's executor, by way of a contingent partial QTIP election, to pass trust assets to a credit shelter trust having terms and/or beneficiaries that would otherwise disqualify the assets passing to such trust for QTIP treatment.

The flexibility of the *Clayton* contingent QTIP election arose in 1997, when the IRS, in response to decisions by the Fifth Circuit in the *Clayton* case and by the Sixth and Eighth Circuit Courts of Appeals in two other cases,[2] issued Regulations effective with respect to QTIP elections made after February 18, 1997. The Regulations allow the surviving spouse's income interest in a trust to qualify for QTIP treatment even though such interest is contingent on the QTIP election being made by the decedent's executor. That portion of the property for which the QTIP election is not made can pass to a credit shelter trust for the benefit of the surviving spouse and/or other beneficiaries.[3]

Both the *Clayton* contingent QTIP election and the plain-vanilla partial QTIP election (using a one-lung QTIP trust) in some respects provide greater post-mortem flexibility than does a disclaimer will. Greater flexibility is created because the decedent's executor generally has up to 15 months (the nine-month due date for filing the decedent's federal estate tax return plus a six-month extension) after the decedent's death to take a second look at the current situation and determine the appropriate response in terms of whether to make a QTIP election. A disclaimer will is not quite as flexible in terms of timing because a qualified disclaimer must be signed, if at all, within nine months after the date of the decedent's death. On the other hand, a one-lung QTIP trust and a *Clayton* contingent QTIP election will be desirable planning alternatives only for those clients who are amenable to passing assets to a QTIP trust for the benefit of the surviving spouse. If that is not the case, then disclaimer wills or wills that cap the amount of the credit shelter trust appear to be better alternatives.

Planning for Carry-over Basis in 2010 (And Possibly Beyond)

For those who die after December 31, 2009, EGTRRA replaces the current step-up in basis rule with a modified carry-over basis regime with respect to capital gains realized on the sale of assets inherited from a decedent. A decedent's estate generally will be permitted to increase the basis of assets transferred to non-spousal beneficiaries by up to a total of $1.3 million. In addition, the basis of property transferred to a surviving spouse can be increased by an additional $3 million. Therefore, the basis of property transferred to a surviving spouse can be increased by a total of $4.3 million.

In no case, however, can the basis of an asset be adjusted above its fair market value as of the decedent's date of death. A decedent's executor has broad discretion to elect which assets will receive a step-up in basis and also to determine the extent to which each asset receives such an increase in basis. Leaving the allocation of the basis increases to the discretion of the decedent's executor could result in inequitable allocations that might lead to objections from certain beneficiaries, potentially followed by protracted estate administrations or even litigation. To avoid this dilemma, it may be prudent for clients to include provisions in their wills that give their executors specific directions or recommendations regarding how to address basis allocations. The following illustrates the type of direction that might be provided:

It may be prudent for clients to include provisions in their wills that give specific directions or recommendations regarding how to address basis allocations.

> I hereby authorize my Executors to allocate any aggregate increase in the basis of property owned by me at the time of my death as follows:
>
> 1. My Executors may, in their sole and absolute discretion, allocate any aggregate basis increase allowed by Internal Revenue Code § 1022(b) first to property passing to my surviving spouse, whether such property passes pursuant to the terms of this Will or otherwise, but only to the extent that any spousal property basis increase allowed by Internal Revenue Code § 1022(c) shall not be available to eliminate unrealized gain on such property.
>
> 2. My Executors shall thereafter allocate any aggregate basis increase allowed by IRC § 1022(b) to property passing to non-spousal beneficiaries, whether such property passes pursuant to the terms of this Will or otherwise, pro-rata, based upon the ratio that the unrealized appreciation in each asset acquired from my estate bears to the unrealized appreciation in all assets acquired from my estate by non-spousal beneficiaries.
>
> 3. It is my preference, but not my direction, that my Executors allocate any IRC § 1022(b) aggregate basis increase [to the extent that the IRC § 1022(c) basis increase shall not be available] first to my surviving spouse and thereafter to other estate beneficiaries as provided in Paragraphs "1." and "2." of this Article.
>
> 4. My Executors shall allocate any spousal property basis increase allowed by Internal Revenue Code § 1022(c) to qualified outright transfer property or to qualified terminable interest property passing to or for

the benefit of my spouse, whether such property passes pursuant to the terms of this Will or otherwise.

5. My Executors shall allocate basis without the necessity of making adjustments or reimbursements between principal and income and without the necessity of making adjustments or reimbursements among the property interests of the various beneficiaries of my estate upon final account, settlement and distribution.

6. I exonerate my Executors from any liability arising from the claim of a beneficiary of my estate whose entitlement to receive property from my estate, under the terms of my Will or otherwise, has been diminished by my Executors' elections regarding the allocation of basis.

7. I authorize my Executors to make the aforesaid allocation of basis even if property to which the allocation of basis is made is in the actual or constructive possession of another, is held in trust, passes by right of survivorship or otherwise passes outside the provisions of this Will.

The objectives of the language contained in paragraphs 1 and 2 are (a) to give a preference to the surviving spouse over all other estate beneficiaries with respect to the allocation of the aggregate basis increase and (b) thereafter to treat all non-spousal beneficiaries equally with respect to allocation of the aggregate basis increase. Because the $3 million aggregate spousal property basis increase permitted under IRC § 1022(c) is an "additional" basis increase and is available only to a surviving spouse, care has been taken not to "waste" any portion of the $1.3 million basis increase permitted under IRC § 1022(b) on the surviving spouse, if assets passing to the surviving spouse have unrealized gain that is less than or equal to $3 million and, therefore, can be adequately "stepped-up" using IRC § 1022(c).

Despite this preference in favor of the surviving spouse over all other estate beneficiaries with respect to the allocation of the $1.3 million basis increase under IRC § 1022(b), the allocation of the $1.3 million basis increase between the spouse and non-spousal beneficiaries has been left in the discretion of the executors to avoid a mandatory allocation of basis increase to a spouse with a short life expectancy, whose own executors may soon be able to allocate an additional $1.3 million basis increase to assets with unrealized gain in the spouse's own estate. However, there is a mandatory, non-discretionary pro-rata allocation of the $1.3 million basis increase to non-spousal beneficiaries based on the ratio of the unrealized appreciation in each asset acquired from the estate and the unrealized appreciation in all assets acquired from the estate.

Conclusion

The current flux and uncertainty in the estate and gift tax laws created by EGTRRA has made estate planning even more challenging than it was before the new laws went into place. Given that the estate tax applicable exclusion amount under EGTRRA is a moving target and the provisions of EGTRRA will sunset unless further legislative changes are made, flexibility has become the necessary cornerstone of any well-drawn estate plan. The requirement for flexibility applies equally to new estate plans and to existing plans as well.

Disclaimer provisions, the capping of credit shelter trusts, an increased reliance upon one-lung and *Clayton* contingent QTIP trusts, and the use of powers and directives regarding the future allocation of basis increases are all excellent ways to provide for such flexible planning.

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1. Named for *Estate of Clayton v. Comm'r*, 976 F.2d 1486 (5th Cir. 1992), *rev'g* 97 TC 327 (1991), in which the Internal Revenue Service said the marital deduction should be disallowed because the will provided for an alternate disposition of the marital trust assets if the executor failed to elect QTIP treatment for the trust.
2. *See Estate of Spencer v. Comm'r*, 43 F.3d 226 (6th Cir. 1995); *Estate of Robertson v. Comm'r*, 15 F.3d 779 (8th Cir. 1994).
3. *See* Treas. Reg. § 20.2056(b)-7(d)(3). See also Treas. Reg. § 20.2056(b)-7(h), ex. 6, which illustrates the operation of a contingent QTIP election.

New Allocation Rules And "Indirect Skips" Now Apply To Generation-Skipping Transfers

BY SANFORD J. SCHLESINGER AND DANA L. MARK

The generation-skipping transfer (GST) imposed on transfers that "skip" one or more generations is intended to tax the transfer of wealth on a generation-by-generation basis and is imposed in addition to the estate and gift tax on such transfers. The GST tax is calculated using the highest estate tax rate in effect on the date of the transfer, currently 50%.[1]

Under § 2631[2] of the Internal Revenue Code (IRC), up to $1.1 million is exempt from the tax in 2002 and 2003.[3] The Economic Growth and Tax Relief Reconciliation Act (EGTRRA) raises the exemption amount to $1.5 million in 2004 and 2005, $2 million in 2006 through 2008 and $3.5 million in 2009.[4] Optimal use of the GST exemption can maximize the value of property passing to grandchildren and other younger generation beneficiaries.

A transfer subject to the GST tax includes a direct skip, which is defined as a transfer of an interest in property to a skip person[5] that is subject to estate or gift tax.[6] An outright transfer to a skip person during life or at death is a direct skip, as well as a transfer to a trust that meets the definition of a skip person. Under IRC § 2632(b), a transferor's GST exemption is automatically allocated to any transfer during life that is a direct skip unless he or she elects not to have the automatic allocation apply.

EGTRRA modified the allocation rules applicable to the GST tax, amending IRC § 2632, generally effective for transfers subject to estate or gift tax after December 31, 2000. It also introduced a new defined term "indirect skips"[7] and requires that the transferor's GST tax exemption be automatically allocated to these indirect skips[8] unless the transferor, on a timely filed gift tax return, elects not to have the automatic allocation rules apply.[9]

IRC § 2632(c) defines an indirect skip as a transfer of property (other than a direct skip), subject to the gift tax made to a "GST trust." A GST trust is a trust that could have a generation-skipping transfer unless the trust meets one of the six statutory exceptions. A trust is not a GST trust where:

1. The trust instrument provides that more than 25% of the trust corpus must be distributed to or may be withdrawn by one or more individuals who are non-skip persons before attaining the age of 46 or on or before the date specified in the instrument prior to the person attaining the age of 46 or upon the occurrence of an event in accord with Treasury regulations;

2. The trust instrument provides that more than 25% of the trust corpus must be distributed to or may be withdrawn by one or more individuals who are non-skip persons who are living on the date of death of another person identified in the instrument who is more than 10 years older than such individuals;

3. The trust instrument provides that if one or more individuals who are non-skip persons die on or before a date or event described in (1) or (2), more than 25% of the trust corpus either must be distributed to the estate or estates of one or more of such individuals or is subject to a general power of appointment exercisable by one or more of such individuals;

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4. The trust is a trust any portion of which would be included in the gross estate of a non-skip person (except the transferor) if such person died immediately after the transfer;

5. The trust is a charitable lead annuity trust, a charitable remainder annuity trust or a charitable remainder unitrust; or

6. The trust is a charitable lead unitrust, the non-charitable beneficiary of which is a non-skip person.[10]

The definition of a GST trust is further modified to provide that the value of transferred property is not to be considered as included in the estate of a non-skip person or subject to the right of withdrawal by a non-skip person by reason of such person's holding a withdrawal right up to the amount of the gift tax annual exclusion (a *Crummey*[11] power) and it is assumed that powers of apportionment held by non-skip persons will not be exercised.

The intention of Congress in expanding the automatic allocation rules was to make it less likely that an inadvertent failure to allocate GST exemption would occur.

Exceptions to Automatic Allocation

A transferor can opt out of this automatic allocation only if he or she elects on a timely filed gift tax return for the calendar year in which the transfer was made or deemed to have been made, not to have the automatic allocation rules apply. However, the Treasury secretary is authorized to extend the time to file an election.[12]

> In determining whether to grant relief . . . the Secretary shall take into account all relevant circumstances, including evidence of intent contained in the trust instrument or instrument of transfer and such other factors as the Secretary deems relevant. For purposes of determining whether to grant relief . . . the time for making the allocation (or election) shall be treated as if not expressly prescribed by statute.[13]

In addition, instead of requiring a taxpayer to elect out of the automatic allocation rules every year, the transferor can elect not to have the automatic allocation rules apply to any transfers he or she makes to a trust on a permanent basis.[14] Such an election "may be made on a timely filed gift tax return for the calendar year for which the election is to be effective."[15]

The intention of Congress in expanding the automatic allocation rules was to make it less likely that an inadvertent failure to allocate GST exemption would occur. According to the House Committee Report,

> [t]he Committee recognizes that there are situations where a taxpayer would desire allocation of generation-skipping transfer tax exemption, yet the taxpayers had missed allocating generation-skipping transfer tax exemption to an indirect skip, e.g., because the taxpayer or the taxpayer's advisor inadvertently omitted making the election on a timely-filed gift tax return or the taxpayer submitted a defective election. Thus, the Committee believes that the automatic allocation is appropriate for transfers to a trust from which generation-skipping transfers are likely to occur.[16]

An inadvertent result of the automatic allocation rules is the potential waste of exemption to transfers that are unlikely to ever skip a generation. An automatic allocation of the GST tax exemption may occur with respect to a trust that could potentially, but not necessarily, result in a generation-skipping transfer. If, in fact, a generation-skipping transfer never occurs (*e.g.*, the trust property ultimately passes to children rather than to grandchildren who had been designated to take the property only if the children were not living at a certain age) the GST exemption automatically allocated will have been wasted.

This issue is likely to arise with respect to a trust – for example, where the distribution of the trust property does not take place until the later to occur of the death of the donor or the child reaching a specified age.

One of the more problematic aspects of the automatic allocation rules exists in relation to life insurance trusts. In a typical life insurance trust, the life insurance proceeds are paid to the trust on the death of the donor and it is at that time that distribution is determined, *i.e.*, although the trust instrument itself may provide for distribution to a non-skip person (a child) at age 35, the trust property may in fact not be paid to the child until after the child is 46. Generally, the intent of such a trust is that the trust property will be distributed to the children of the donor. It is not intended to skip a generation; however, a skip might occur if a child predeceases his or her parent.

Such a trust would be subject to the automatic allocation rules even though there is no intention for such an allocation to occur. To avoid automatic allocation, the donor should file a gift tax return expressly providing that it is not intended that the automatic allocation rules apply.

Lifetime Transfers

IRC § 2642(f) provides that no GST tax exemption can be allocated to a lifetime transfer of property that would be includable in the gross estate of the transferor (for any reason other than IRC § 2035 relating to transfers

within three years of death) if the transferor were to die immediately after making the transfer. This period during which the value of the property transferred would be so includable is the "estate tax inclusion period" or ETIP.[17] In addition, IRC § 2642(f)(4) provides that, except as provided in regulations, references in § 2642(f) to an individual or transferor shall be treated as including a reference to the spouse of such individual or transferor, thus preventing allocation of GST exemption if, immediately after the transfer, the transferred property will be included in the estate of the transferor's spouse, *i.e.*, a spousal ETIP rule.

The ETIP will end on the first to occur of (a) the time at which no portion of the property would be includable in the transferor's gross estate, (b) the date on which there is a generation-skipping transfer with respect to the property, (c) the date of the transferor's death, or (d) if an interest is held by the transferor's spouse, the death of the transferor's spouse or the time at which no portion of the property would be includable in the spouse's gross estate.[18] The creation of a GST trust for which there is an ETIP will automatically be allocated GST tax exemption at the close of the ETIP.[19] The value for purposes of determining the inclusion ratio will be the fair market value of the trust property at the close of the ETIP period.[20]

This can potentially pose a problem for trusts whose ETIP periods end after December 1, 2000. If the trust is a GST trust and none of the exceptions are applicable, the donor must file a gift tax return for the year the ETIP ends if he or she desires to elect out of the automatic allocation rules.

A transferor must also be wary of the allocation rules in situations where it has been determined that a late allocation of GST exemption would be more advantageous. For example, if the property transferred to a trust has decreased in value from the date of the gift, the transferor may prefer to make a late allocation of GST exemption. If a transferor makes a late allocation of GST to a trust, the value of the property transferred to the trust is the fair market value of the trust assets determined on the effective date of the allocation of GST exemption and the transferor may, solely for purposes of determining the fair market value of the trust assets, elect to treat the allocation as having been made on the first day of the month during which the late allocation is made.[21] A late allocation of GST exemption is effective on the date the gift tax return is filed.[22] The ability to make a late allocation of GST exemption may be lost under the automatic allocation rules and accordingly the transferor would need to elect out of the automatic allocation rules on a timely filed gift tax return.

Conclusion

Although the enactment of EGTRRA simplified some aspects of allocating exemptions, it also created certain traps for the unwary. It is important that an informed decision be made about whether to allocate the GST exemption to gifts made to a trust, because the automatic allocation may be undesirable. It is necessary to determine whether a transfer is exempt from the new allocation rule or whether a gift tax return on which the appropriate allocation can be selected should be filed.

Any decision regarding gifts to a trust must consider both the terms of the trust and the impact of all the tax rules, many of which are highly technical and complex. Failure to take action risks wasting the value of the GST tax exemption.

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1. The Economic Growth and Tax Relief Reconciliation Act (the "Act") enacted on June 7, 2001, reduced the top estate and gift tax rate from 55% to 50%. It is scheduled to be reduced to 49% in 2003, 48% in 2004, 47% in 2005, 46% in 2006 and 45% thereafter until scheduled repeal in 2010 and re-enactment at 55% in 2011.
2. Section references are to the Internal Revenue Code of 1986, as amended.
3. As originally enacted in 1986, the exemption from the GST tax was $1 million. With the Taxpayer Relief Act of 1997, the GST exemption was indexed for inflation for years after 1998.
4. Under the Act, the estate, gift and GST taxes will be repealed in 2010 but without further legislative action will return to 2001 levels in 2011.
5. A skip person is a person assigned to a second or more remote generation below the transferor or a trust all of the present interests in which are held by skip persons. IRC § 2613(a).
6. IRC § 2612(c).
7. IRC § 2632(c)(3)(A).
8. IRC § 2632(c)(1).
9. IRC § 2632(c)(5).
10. IRC § 2632(c).
11. *Crummey v. Comm'r*, 397 F.2d 82 (9th Cir. 1968).
12. IRC § 2632(c)(5)(B)(i).
13. IRC § 2642(g)(1)(B).
14. IRC § 2632(c)(5)(A)(i)(II).
15. IRC § 2632(c)(5)(B)(ii).
16. H.R. Rep. No. 107-37.
17. IRC § 2642(f)(3).
18. Treas. Reg. § 26.2632-1(c)(3).
19. IRC § 2632(c)(4).
20. *Id.*
21. Treas. Reg. § 26.2642-2(a)(2).
22. Treas. Reg. § 26.2632-1(b)(2)(ii).

Purchase Money Mortgages Require Careful Drafting To Avoid Later Difficulties

By Bruce J. Bergman

Your clients are selling their house (or other property) and moving to Florida. The prospective purchaser has some cash and is obtaining financing from a lender, but doesn't quite have all the money required to complete the transaction. So your clients are invited to "take back a purchase money mortgage." To assure a sale, your clients are inclined to do this, especially because an above-market rate of interest can be something like an annuity and so adds additional appeal.

Sellers' counsel (you) will prepare that mortgage. Title companies (among others) disseminate forms of mortgages, so Panglossian reliance on such paper might seem sufficient. After all, they were drafted by skilled people very familiar with such transactions . . .

Ah, but there really is more to it than that, a lesson that may be learned only when there is a default on the mortgage and foreclosure becomes necessary. This article addresses concepts counsel needs to understand and drafting skills to accommodate those concepts. A number of salutary thoughts follow.

Some Mechanics

First, the need to prepare a purchase money mortgage is probably more common than might be imagined. Sellers don't just move (or retire) to Florida; there is Arizona, North Carolina and so many other places in the Sun Belt or otherwise. (Long Islanders, for example, might look to the bucolic Hudson Valley or the shores of Lake Cayuga.) And some sellers specifically use the equity in their houses (or other properties) as an investment to yield a solid rate of return – all the more reason why the purchase money mortgage must be a well-crafted document. That bank mortgages encountered at residential closings – or those *quasi omnium gatherum* books generated by typical commercial mortgage closings – dwarf the stationery store variety of mortgage should be a pointed alert that an attorney-prepared purchase money mortgage needs to be somewhat more prolix.

Both typical and customized forms provide that the fee to prepare a purchase money mortgage is to be paid by the purchaser. How much that should be depends in part on the amount of the mortgage and its complexity, although in the end it will be negotiable. Particularly important from an efficiency perspective is inserting the agreed-upon fee in the contract of sale so that there is no opportunity for dispute at the closing.

If the form of contract of sale in turn recites the form of mortgage to be used, seller's counsel needs to be sure that its provisions provide all the protection desired. Whether that is a standard form, a standard form embellished with a rider, or a version developed by the office of seller's counsel, it needs to be annexed to the contract with agreement to its terms recited. That then avoids dispute at the closing about the terms of the purchase money mortgage.

The Issue of Personal Liability

Personal liability for the mortgage debt is a question the sellers-mortgagees will ask, although even if they do not it could become relevant upon default if somehow the value of the property deteriorates to less than the obligation due. In other words, should foreclosure be necessary, if the debt is greater than the equity in the property, the mortgagee suffers a loss (the deficiency) which the mortgagee could pursue upon a post-foreclosure deficiency judgment motion.[1]

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The purchasers become personally liable for the debt by virtue of signing a mortgage note, which is a promise to pay. Even if a note is never signed, standard language in most mortgages provides that the mortgagor covenants to pay the debt.[2] Therefore, signing the mortgage alone would usually create that personal liability.[3] Should the purchaser insist upon having the mortgage recite that the mortgagee must look solely to the property for recompense – or words to like effect – then personal liability evaporates and no deficiency would be available.[4]

Applicable Interest Rate; Usury

In recent months, interest rates are exceptionally low. It is unlikely, therefore, that civil usury would even be a consideration. Mindful, however, that inevitable cycles will ultimately cause rates to rise, awareness of usury principles is appropriate. Although usury is a vastly more extensive topic than could be reviewed here,[5] even brief comment can be helpful.

The legal rate of interest is 16%.[6] An interest rate beyond 16% (taking into account items includable as interest, such as points, among others) becomes civil usury and in excess of 25%, criminal usury.[7] The overriding principle applicable here, however, is that a true purchase money mortgage is excepted from New York usury law proscriptions.[8]

A true purchase money mortgage has been defined as "a mortgage executed at the time of purchase of the land and contemporaneously with the acquisition of the legal title, or afterward, but as part of the same transaction, to secure an unpaid balance of the purchase price."[9] For there to be a true purchase money mortgage, the lender must be the actual seller of the property and must take back a mortgage to secure money used to acquire the property. The true purchase money mortgage is deemed not to constitute a loan or forbearance within the meaning of General Obligations Law (GOL) § 5-501,[10] so that even should the interest assessed on such a purchase money mortgage be above the legal maximum, it does not constitute usury.[11]

Prepayment

Insofar as a purchase money mortgage may represent a favorable investment, the mortgagee might prefer that it never be prepaid. As a rule of general application in New York, a mortgage may not be prepaid unless the mortgage documents specifically grant the right.[12] Although prepayment may be allowed if authorized by statute,[13] or where permitted by the conduct of the parties,[14] there is no statutory authority allowing the mortgagor upon a non-residential commercial loan to satisfy the obligation before maturity.[15] But GOL § 5-501(3)(i) and 5-501(3)(b) provides that for a one- to six-family residence the mortgage may be prepaid at any time.

For purchase money mortgages generally then, upon the noted type of property, prepayment is allowed by statute. That statute refers, however, to "the unpaid balance of the loan or forbearance."[16] Because a true purchase money mortgage does not fit the definition of a loan or forbearance,[17] the statute appears to have no application in the true purchase money mortgage situation. Because case law has not yet tested the point, there might be room for some uncertainty, but the better assumption may remain that, absent language specifically permitting it, even the residential purchase money mortgage cannot be prepaid.

Legal Fees[18]

Should the sellers-mortgagees ever be constrained to foreclose, they are likely to be chagrined if they must incur legal expenses for the privilege. The American rule, of course, is that each party to a lawsuit must bear its own counsel fees.[19] But this general rule can be changed either by statute or contractual agreement of the parties.[20] Although no statute in New York obligates a mortgagor in a foreclosure to pay the plaintiff's legal fees, that mandate can appear in the mortgage. Critically, it has consistently been held that legal fees are awardable to a foreclosing plaintiff where the documents so provide.[21]

A common standard form inexplicably provides for legal fee recompense for everything, but recites in parenthesis "except for foreclosure of this mortgage." It is therefore important to determine whether the form employed provides clearly for legal fee reimbursement. If it does not, consider adding the clause.

For such a contemplation there are a few vital basics to observe. A legal fee clause in the mortgage note alone will be ineffectual for a foreclosure; it must be in the mortgage.[22] Using a percentage legal fee language (such as 15% of the sum due) is not recommended. It is not dispositive,[23] and reasonableness is always the court's standard.[24] And if the legal fees reasonably incurred are greater than the percentage would provide, they are nonetheless not awardable because the percentage serves as a cap.[25] The best approach is to insert a clause in the mortgage or the rider which clearly states that the foreclosing plaintiff is entitled to an award of reasonable legal fees for any collection efforts upon the mortgage including foreclosure.[26]

Late Charges

Lenders generally collect late charges when a mortgage payment is delinquent – and with good reason. There is some cost attendant to pursuing tardy remittances, and a lender would not be well-served to grant a borrower unfettered leisure to submit payments with no threat of cost for regular or exceptional lateness. Still further, when payments are late, interest is effectively lost because use of the money was delayed.

Pursuant to statute,[27] a late charge of 2% of the overdue installment may be assessed for payments more than 15 days overdue. This means that the mortgage must provide a 15-day grace period and the cap of 2% applies only for one- to six-family dwellings.[28]

Due on Sale

Much of this discussion has assumed that the purchase money mortgage held by the seller represented an investment decision. Even if it did, interest rates could rise in the future, rendering the return on the mortgage below market. It is, of course, also possible that the purchase money mortgage arose as an accommodation to the purchaser or to facilitate a transaction that might otherwise have been difficult or impossible. If this latter motivation prevailed, then the seller, while amenable to have this purchaser (and his credit) as the obligor, might be unwilling to continue the mortgage relationship with a stranger who buys the property from the original purchaser. And this may not even be a function of a possible dubious credit rating for the new owner. It may simply be that the deal was exclusive to the original purchaser – or that this is no longer a prudent investment.

The drafter of a purchase money mortgage should address the issue of interest on default and prepare a clause to specify the rate.

The seller-mortgagee's solution is a due-on-sale or due-on-transfer provision whereby the mortgagee is given the option (it should not be automatic) to declare the entire mortgage balance due if the property is sold or title transferred in any manner. Such a provision has been consistently enforced in a clear majority of cases in New York.[29] Moreover, federal statute – the Garn-St. Germain Depository Institutions Act of 1982, specifically § 341 – has preempted any state law prohibitions against enforcement of a due-on-sale provision. Thus, the mortgage drafter can be confident that the clause will serve the purpose.[30]

Default on Senior Mortgage

The possibility of a default on a senior mortgage seems obvious, but it still needs attention. If the purchase money mortgage is a second mortgage, as can often be the case, a default on the senior mortgage portends extinguishment of the junior purchase money mortgage. It is also more than a theoretical possibility that the borrower could default on the first mortgage while keeping the second current.

To protect the seller-mortgagee in such a situation, default on the senior mortgage (or any prior mortgages) must be recited as an act of default on the junior – that is, failing to honor some provision of a superior mortgage will offer the option to accelerate. Although standard forms of second mortgages can be expected to contain such a protective provision, other forms would not, and it is a clause to consider for inclusion.

The Further Role of Interest

The rate of interest borne by the mortgage is only a part of the issue of interest when a mortgage goes into default – a subject that tends to be obscure for most practitioners who do not specialize in the field. A few basics uncover issues that merit attention when a purchase money mortgage is prepared.

Some time after a mortgagor defaults, the mortgagee will declare due the entire balance, that is, accelerate the debt.[31] Upon acceleration, if the mortgage is silent regarding the interest rate that applies, the judgment rate (currently 9%) will control.[32] If, however, the mortgage contract provides for a default rate of interest to apply, that designated rate will prevail[33] (at least until issuance of the judgment of foreclosure and sale). Once the foreclosure judgment issues, the mortgage merges into that judgment so that interest then accrues at the judgment rate (9%).[34] An exception to this latter rule is that if the parties intend to avoid this merger, the note or default rate can control[35] so long as the applicable mortgage provision is clear and unequivocal.[36]

Interest on default or maturity A mortgage loan matures in one of two ways. Either its natural term expires (10, 15 or 30 years for example), or an earlier maturity is declared by acceleration, which can occur at any time during the term of the mortgage. As noted, if the mortgage makes no reference to interest upon maturity, the note rate controls. In times of low interest rates, the judgment rate *may* represent an appropriate return. In cycles of higher interest, however, the judgment rate could be woefully deficient and might even provide comfort to a defaulter able to invest money not paid to the lender at a higher rate than is imposed for the default.

In short, the drafter of a purchase money mortgage should address the issue of interest on default and prepare a clause to specify the rate. Bear in mind that even where the interest rate upon maturity would otherwise be usurious, it remains enforceable and cannot be deemed violative of usury statutes.[37]

Interest after judgment Regardless of the generous default rate of interest that may have applied, once the foreclosure action proceeds to judgment, the sum due bears interest at 9% – which may or may not be an ap-

propriate yield depending upon the circumstances. Although obtaining a foreclosure judgment portends a rapid conclusion of the action, it is hardly uncommon for the case to remain mired in dilatory litigation. The longer the delay from judgment to foreclosure sale (or settlement), the longer the sum due bears interest at 9%. It could be a higher rate if the mortgage definitively addresses the point – which the drafter may wish to consider.

Interest on advances A mortgage holder may be constrained to pay any number of expenditures to protect the lien of the mortgage. If the mortgage is silent in this regard – as standard forms are – then the advances will yield 9%. Again, that percentage may or may not be pleasing to the lender, depending upon when the advances are made and what circumstances prevail, not the least of which is the lender's cost of funds. Here too, the mortgage can specify a rate of interest upon advances greater than the note rate and greater than the judgment rate.

Possible significant categories of advances a lender might make include hazard insurance premiums, real property taxes, sums due on senior mortgages, and costs to cure municipal violations on the property.

Additional Provisions

Are there yet other provisions beyond the standard forms to include in the purchase money mortgage? The perhaps obvious answer is a qualified yes, depending as always on the particular circumstances or needs of the clients. Harkening back to mention of commercial mortgages, which can often approach book size, variations on mortgage provisions are, if not limitless, certainly enormous. Although some might have relevance, many are far too obscure to have practical significance in most purchase money mortgage situations. But here are a few more clauses worthy of brief mention.

If the borrower will be afforded the right to prepay, the lender may want to consider a prepayment penalty to compensate for earlier receipt of funds that had been expected to generate interest for a longer period.

If the purchase money mortgage is a first mortgage, or if a senior mortgagee will not be escrowing for taxes, the purchase money mortgage holder may wish to do so. That assures payment of taxes and avoids the possibility of extinguishment of the mortgage through tax defaults.

Should the property be non-residential, the faster and less expensive power of sale foreclosure[38] would be available in the event of default — but *only* if the mortgage contains a power of sale provision.[39]

Particularly if the property is residential, illegal use, such as if it becomes a drug den, can allow some local municipalities to attack the violation and create a lien senior to the mortgage for those costs. With such an eventuality possible, assuring provision for acceleration and foreclosure in the event of illegal use can be critical.

A clause to avoid Because so many mortgages are sold on the secondary market, the borrower friendly Fannie Mae/Freddie Mac form of mortgage is ubiquitous. One of its provisions that has seeped into the lexicon of mortgage commerce is a 30-day notice to cure or breach letter. In sum, this clause mandates that a condition precedent to acceleration is the mailing of a letter to the borrower advising of all rights afforded the borrower and setting forth the nature of the default, what the borrower needs to do to cure the default and giving the borrower 30 days to do so.

In part because the provision is common, and because notice is a typical constituent of contracts generally, borrowers' attorneys understandably may demand such a clause in the purchase money mortgage. Aside from the fact that no law in New York requires notice as a prerequisite to foreclosure, the infirmities of the 30-day cure requirement are numerous.[40] Among the objections, it presents the borrower with the opportunity to claim that the letter was never received. Where regular mail is the mode of notice transmission, the lender will need to prove the mailing – sometimes a burden for which a non-professional lender is unprepared.

Then too, should the borrower be chronically late with payments (hardly unheard of) the mortgagee becomes a mortgage-serving clerk forced to prepare and send these notices month after month, year after year – certainly an unexpected and unwanted chore. Should the seller somehow become convinced that a pre-acceleration notice is reasonable, at the very least the drafter should consider confining its applicability to either the first default alone or a very limited number of breaches thereafter.

Conclusion

Most standard forms are unlikely to address the needs of or provide the requisite protection for a seller-purchaser money mortgagee. Although possible additional provisions are legion, experience suggests that a relatively few exigent clauses focus upon the real concerns of the lender. The recommendations here should both help and provide the proverbial food for thought.

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1. RPAPL § 1371. For a full review of deficiency liability and pursuit of the deficiency judgment, see 3 Bergman, *Deficiency Judgments, in* Bergman on New York Mortgage Foreclosures, ch. 34 (rev. 2002).
2. *See* RPL § 254(3).
3. *Neidich v. Petilli*, 71 A.D.2d 999, 420 N.Y.S.2d 301 (2d Dep't 1979); *Carrara v. Carrara*, 29 Misc. 2d 907, 214 N.Y.S.2d 80 (Sup. Ct., Westchester Co. 1961), *aff'd*, 16 A.D.2d 695, 227 N.Y.S.2d 895 (2d Dep't 1962); *Goldman v. Rhoades*, 122 Misc. 567, 203 N.Y.S. 548 (1934).

4. *See* 3 Bergman on New York Mortgage Foreclosures, § 34.05[1] (rev. 2002); *Stern v. Itkin Bros*, 87 Misc. 2d 538, 385 N.Y.S.2d 753 (Sup. Ct., N.Y. Co. 1975).
5. See 1 Bergman, *Usury*, *in* Bergman on New York Mortgage Foreclosures, ch. 6 (rev. 2002).
6. GOL § 5-501(1), which refers to Banking Law § 14-a.
7. Penal Law § 190.40. *See* 1 Bergman on New York Mortgage Foreclosures § 6.03[7].
8. *Szerdahelyi v. Harris*, 67 N.Y.2d 42, 499 N.Y.S.2d 650 (1986); *Mandelino v. Fribourg*, 23 N.Y.2d 145, 295 N.Y.S.2d 654 (1968).
9. *Szerdahelyi*, 67 N.Y.2d 42.
10. *Mandelino*, 23 N.Y.2d 145.
11. *Id.*; *Dry Dock Bank v. Am. Life Ins. & Trust Co.,* 3 N.Y. 344 (1850); *Skidelsky v. Merendino*, 133 A.D.2d 149, 518 N.Y.S.2d 822 (2d Dep't 1987).
12. *Allstate Ins. Co. v. Peterson*, 226 A.D.2d 528, 641 N.Y.S.2d 543 (2d Dep't 1996).
13. *2550 Olinville Ave., Inc. v. Crotty*, 149 Misc. 2d 806, 566 N.Y.S.2d 500 (Sup. Ct., N.Y. Co. 1991).
14. *Geller v. Fairmont Assoc.*, 172 A.D.2d 915, 568 N.Y.S.2d 202 (3d Dep't 1991).
15. *Poughkeepsie Galleria Co. v. Aetna Life Ins. Co.*, 178 Misc. 2d 646, 680 N.Y.S.2d 420 (Sup. Ct., Dutchess Co. 1998).
16. GOL § 5-501(3)(b).
17. *Mandelino v. Fribourg,* 23 N.Y.2d 145, 295 N.Y.S.2d 654 (1968).
18. For a complete discussion of legal fees in the mortgage foreclosure case, see 2 Bergman on New York Foreclosures, ch. 26 (rev. 2002).
19. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *First Nat'l Bank v. J & J Milano, Inc.*, 160 A.D.2d 670, 553 N.Y.S.2d 448 (2d Dep't 1990).
20. *Chapel v. Mitchell,* 84 N.Y.2d 345, 618 N.Y.S.2d 626 (1994); *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 549 N.Y.S.2d 365 (1989).
21. *In re Nicfur-Cruz Realty Corp.,* 50 B.R. 162 (Bankr. S.D.N.Y. 1985); *Green Point Sav. Bank v. Tornheim*, 261 A.D.2d 360, 689 N.Y.S.2d 193 (2d Dep't 1999); *Kenneth Pregno Agency, Ltd. v. Letterese,* 112 A.D.2d 1032, 492 N.Y.S.2d 824 (2d Dep't 1985).
22. *Lipton v. Specter*, 96 A.D.2d 549, 465 N.Y.S.2d 59 (2d Dep't 1983), *appeal denied*, 61 N.Y.2d 608, 475 N.Y.S.2d 1026 (1984); *Fourth Fed. Sav. Bank v. Nationwide Assocs., Inc.*, 183 Misc. 2d 165, 701 N.Y.S.2d 814 (Sup. Ct., N.Y. Co. 1999).
23. *Coniglio v. Regan*, 186 A.D.2d 709, 588 N.Y.S.2d 888 (2d Dep't 1992).
24. *Kamco Supply Corp. v. Annex Contracting, Inc.,* 261 A.D.2d 363, 689 N.Y.S.2d 189 (2d Dep't 1999); *First Nat'l Bank v. Brower*, 42 N.Y.2d 471, 398 N.Y.S.2d 875 (1977).
25. *Mead v. First Trust & Deposit Co.*, 60 A.D.2d 71, 400 N.Y.S.2d 936 (4th Dep't 1977).
26. For examples of such provisions which do and not suffice, see 2 Bergman on New York Mortgage Foreclosures § 26.05 (rev. 2002).
27. RPL § 254-b.
28. For a more detailed review of late charges, see 1 Bergman on New York Mortgage Foreclosures § 1.10 (rev. 2002).
29. *See*, *inter alia*, *Beacon Fed. Sav. & Loan Ass'n v. Marks*, 91 A.D.2d 1010, 457 N.Y.S.2d 881 (2d Dep't 1983); *Bonady Apts., Inc. v. Columbia Banking Fed. Sav. & Loan Ass'n*, 119 Misc. 2d 923, 465 N.Y.S.2d 150 (Sup. Ct., Steuben Co. 1983).
30. Because there is much nuance to the subject of the due on sale clause, attention is invited for more detail to 1 Bergman on New York Mortgage Foreclosures § 4.11 (rev. 2002).
31. The concept of acceleration is multifaceted and further explanation is found at 1 Bergman, *Default and Acceleration*, *in* Bergman on New York Mortgage Foreclosures, ch. 4 (rev. 2002).
32. *See*, *inter alia, Metropolitan Sav. Bank v. Tuttle,* 290 N.Y. 497, 49 N.E.2d 983, *reh'g denied*, 291 N.Y. 634, 50 N.E.2d 1018 (1943); *Title Guarantee & Trust Co. v. 2846 Briggs Ave., Inc.*, 283 N.Y. 512, 29 N.E.2d 66, *reh'g denied*, 284 N.Y. 685, 30 N.E.2d 725 (1940); *Ferris v. Hard*, 135 N.Y. 354, 32 N.E. 129 (1892); *Heimbinder v. Berkovitz*, 263 A.D.2d 466, 693 N.Y.S.2d 200 (2d Dep't 1999).
33. *See inter alia*, *Heimbinder v. Berkovitz, 263* A.D.2d 466, 693 N.Y.S.2d 200 (2d Dep't 1999) (citing, *inter alia*, *Kaiser v. Fishman*, 187 A.d.2d 623, 590 N.Y.S.2d 230 (2d Dep't 1992)); *Marine Mgt. v. Seco Mgt., Inc.*, 176 A.D.2d 252, 574 N.Y.S.2d 207 (2d Dep't 1991), *aff'd*, 80 N.Y.2d 886, 587 N.Y.S.2d 900 (1992); *Ward v. Walkley,* 143 A.D.2d 415, 532 N.Y.S.2d 426 (2d Dep't 1988); *Citibank, N.A. v. Liebowitz,* 110 A.D.2d 615, 487 N.Y.S.2d 368 (2d Dep't 1985).
34. *See inter alia, Taylor v. Wing*, 84 N.Y. 471 (1881); *Banque Nationale De Paris v. 1567 Broadway Ownership Assocs.*, 248 A.D.2d 154, 669 N.Y.S.2d 568 (1st Dep't 1998); *European Am. Bank v. Peddlers Pond Holding Corp.*, 185 A.D.2d 805, 586 N.Y.S.2d 637 (2d Dep't 1992); *Emery v. Fishmarket Inn of Granite Springs, Inc.*, 173 A.D.2d 765, 570 N.Y.S.2d 821 (2d Dep't 1991).
35. *Banque Nationale De Paris v. 1567 Broadway Ownership Assocs.*, 248 A.D.2d 154, 669 N.Y.S.2d 568 (1st Dep't 1998); *Marine Mgmt. v. Seco Mgmt.*, 176 A.D.2d 252, 574 N.Y.S.2d 207 (2d Dep't 1991).
36. *Id.*
37. *Klapper v. Integrated Agric. Mgmt. Co., Inc.,* 149 A.D.2d 765, 539 N.Y.S.2d 812 (3d Dep't 1989); *Flynn v. Dick*, 13 A.D.2d 756, 215 N.Y.S.2d 382 (1st Dep't 1961). For further explanation and case law authority explaining why interest upon default does not violate usury proscriptions, see 1 Bergman on New York Mortgage Foreclosures § 6.02[3][g].
38. RPAPL Art. 14. For a complete review of power of sale foreclosure, see 1 Bergman *Non-Judicial Foreclosure*, *in* Bergman on New York Mortgage Foreclosures, ch. 8 (rev. 2002).
39. For a form of power of sale provision see 1 Bergman on New York Mortgage Foreclosures § 8.02[2] (rev. 2002).
40. These are too broad to review here, but for further discussion, see 1 Bergman on New York Mortgage Foreclosures §§ 1.07, 4.40A (rev. 2002).

Development Agreements Are Vital To Prevent Later Disputes Over Proprietary Interests in Web Sites

BY JOSHUA H. WARMUND

As newly created technologies add layers of functionality and complexity to the now-required e-storefront, the creation of correspondingly complex web design and development agreements is a necessary consequence. Yet, many hiring parties still often fail to pay adequate attention to copyright and other proprietary issues when entering into web site development arrangements, focusing instead upon added functionality or design and marketing concerns.

Too often, the hiring party or developer uses boilerplate contractual language that lacks the subtleties needed in a contract involving potentially competing proprietary interests. Others have only informal verbal agreements. Indeed, determining the status of these proprietary issues is crucial because it is not uncommon for the hiring party or web site developer, or both, to wish to part company, leaving the legal question of web site ownership unanswered.[1]

When a web site development arrangement disintegrates, it is also not uncommon for the hiring party to want continued use of the site, despite the developer's objections. Under these circumstances, the hiring party must know whether the firm is legally authorized to continue using and updating the site. Correspondingly, the developer must determine when it can assert its ownership rights. Clearly, the breakdown of a web site development arrangement leaves behind a trail of proprietary claims.

This article examines the proprietary issues that arise regarding the ownership of code and content when parties enter into an agreement to develop a web site in the absence of a written contract. The focus is on three critical considerations: (1) web site development agreements (WDAs) and provisions that take on added importance in the context of ownership principles; (2) proprietary concepts involving work-for-hire concerns, rules for derivative works, joint authorship concepts and licensing issues, together with their application to web site development; and (3) the consequences of entering into a transaction in which a site is developed without a WDA. This third consideration, which involves the ownership questions relating to object/source code and content, uses the decision in *Holtzbrinck Publishing Holdings, L.P. v. Vyne Communications, Inc.*,[2] by the U.S. District Court in New York, to illustrate how proprietary rights can be fairly apportioned in the relatively uncharted legal landscape of web design.

Ownership Provisions in an Agreement

Proprietary interests commonly dominate a web site development negotiation. Trademark and copyright principles will often define the scope of each party's propriety rights.[3]

Typically, the hiring party is most concerned about owning the content, *i.e.*, the copyrightable expressions included in the web site.[4] To protect its rights in its web site, the hiring party usually obtains an assignment of rights from the web site developer and/or enters into a written work-for-hire agreement.[5]

Simultaneously, a web site developer normally has a proprietary interest in the software, tools, and technology underlying the web site.[6] As a result, although the hiring party usually owns the final product and associated copyrights, the web site developer often insists on a carve-out granting it a proprietary interest in the technology created in developing the site.[7] The granting of appropriate non-exclusive licenses can satisfy these needs.[8]

Furthermore, both the content provider (typically the hiring party) and the code programmer (typically the web site developer) must obtain the proper third-party consents to include their respective works in the web site.[9] Accordingly, the hiring party must identify and ne-

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gotiate with the owner of the content, while the web site developer must also clear any rights in any of the underlying tools and technology incorporated into the web site.[10]

In addition, the developer may access information confidential to the hiring party while developing the web site.[11] The WDA must therefore carefully define which information is confidential, and require reasonable measures to prevent its disclosure, including requiring employees to sign non-disclosure or non-compete agreements.[12]

Proprietary Interests in a Web Site

The parties' proprietary interests in a web site are dictated by how 17 U.S.C. § 101 (the "Copyright Act") defines the code and content of the web site.

Work-for-hire Section 201(b) of the Copyright Act provides that the person for whom a work is prepared is considered the author of the work in a work-for-hire arrangement. Thus, the hiring party, and not the web site developer, is treated as the creator of the web site under the Copyright Act.

17 U.S.C. § 101 provides two definitions of work-for-hire. The second definition is the clearer of the two: a work "specially ordered or commissioned" for use as an "audiovisual work" is a work-for-hire if "the parties expressly agree in a written instrument . . . that the work shall be considered a work made for hire."[13] This is the case whether the contract is referred to as a "Work-For-Hire Agreement" or merely contains a work-for-hire provision.[14]

Under the first definition, a work-for-hire constitutes any work prepared by an employee within the scope of his or her employment.[15] However, the Copyright Act fails to define "employee" or "scope of employment." The seminal case concerning the 17 U.S.C. § 101 definition of a "work made for hire," *Community for Creative Non-Violence v. Reid* ("*Reid*"),[16] explained that "to determine whether a work is a 'work made for hire' within the Section 101 definition, a court should first apply general common law of agency principles to ascertain whether the work was prepared by an employee or an independent contractor."[17] Citing the Restatement of Agency, the court listed a non-exhaustive set of factors to be considered.[18] After *Reid*, a hiring party could hire someone to create a work and yet retain no proprietary interests in the work.

An analysis of the *Reid* decision could support an argument that the web designer is merely an employee of the hiring party. After all, the design detail is controlled by the hiring party; the term of the relationship is usually open-ended; updates and maintenance needs are dictated by the hiring party; payment is normally accomplished periodically; and the services provided over the site are part of the regular business of the hiring party.[19]

Alternatively, however, a court could view the web designer as an independent contractor, free from the proscriptions of 17 U.S.C. §§ 101 and 201(b). Normally, the developer controls the web-design artistry; the technology developed and used in the preparation of the web site is created by the web developer; under certain circumstances, the web developer receives royalty payments; and the web developer is free to hire himself out to others who seek his services. Specific skills and, ultimately, control are the most persuasive factors.[20] The more a hiring party supervises and controls the development of the web site, the greater the likelihood that a court will find that there is an employee/employer relationship, and therefore a work-for-hire.[21]

The author of a derivative work must add an original contribution to the pre-existing work that is more than merely trivial.

Derivative work Under 17 U.S.C. § 106, the owner of a valid copyright can prepare derivative works based upon a pre-existing copyrighted work.[22] A derivative work is defined in 17 U.S.C. § 101 as "a work based upon one or more pre-existing works,[23] such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."[24] The definition is wide-ranging. However, a work is not a derivative work merely because it is based on a pre-existing work; the derivative work must borrow substantially from existing works.[25]

At the same time, a derivative work must substantially vary from the pre-existing work so that it is sufficiently original to warrant copyright protection.[26] More explicitly, the author of a derivative work must add an original contribution to the pre-existing work that is more than merely trivial, such that the pre-existing work has been recast, transformed or adapted.[27]

The copyright owner must grant its consent in order for another party's derivative work to be granted copyright protection,[28] thereby restricting the scope of works available for derivative work status under 17 U.S.C. § 101.[29] Furthermore, the copyright in a derivative work extends only to the original contributions of the author of the derivative work and does not affect in any way the copyright protection in the original material.[30] Thus, the author of the derivative work gains no rights what-

soever in the pre-existing work by virtue of the copyright in the derivative work.

Application to web sites Courts have held that newly created computer programs (theoretically including HTML, XML or any other mark-up language) based on pre-existing programs can warrant copyright protection as derivative works[31] if they contain sufficient amounts of new programming material. Indeed, merely adapting a computer program within the prescribed terms of a license can create a valid derivative work.[32] However, if a computer program's system requirements constrain any adaptation of the program, then any newly created program cannot contain sufficient originality to warrant copyright protection.[33]

Joint authorship Another way to vest proprietary rights in a work is to be a joint author. 17 U.S.C. § 101 defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[34] Few other restrictions exist beyond the merger intent.[35] If an author's contribution recasts, transforms or adapts the work, then the work is inseparable.[36] If the author assembles a collective whole out of the respective contributions, then the work is interdependent.[37]

Because the contribution of graphs, pictures, music and text all have independent, substantial meaning, a web site is probably an interdependent joint work.[38] However, if the contributions of the web site developer were originally intended for use in another context, and were later reused or recycled in the web site, then no intent could be inferred.[39]

Accordingly, a web site could be a joint authorship.[40] The web site developer would be the dominant party; although, the outside party that was hired to create the web site seldom expects any credit of authorship.[41] The lack of accreditation does not, however, indicate a lack of intent.[42]

Ultimately, the quality and quantity of the various contributions to the creation of the web site are likely to be the most dispositive factor in a joint work analysis.[43] Although courts have differed on the amounts and levels of quantity and quality involved, a joint work can be created as long as the author makes more than a *de minimis* contribution.[44] Still, the greater the quality and quantity of the hiring party's contribution to the development of a web site, the more likely such hiring party will be considered a joint author.[45]

The quality and quantity of the various contributions to the creation of the web site are likely to be the most dispositive factor in a joint work analysis.

An illustrative case is *Napoli v. Sears, Roebuck and Co.* ("*Napoli*").[46] Sears employees developed a computer program by providing the layout and graphic design of the data and screen displays and selecting the data to be included in the program.[47] However, Sears retained an outside contractor to complete the job.[48]

Napoli focused upon whether the contribution by Sears established joint authorship even though the web site developer was the only author of the source code.[49] Although intent was a non-issue, the court analyzed whether the graphic design of the screens and reports qualitatively established joint authorship in the program.[50]

The *Napoli* court concluded that copyright protection could be extended to screen displays and reports without the literal code used to create them.[51] Thus, individuals other than the programmer who created the source code may also be authors for purposes of the Copyright Act.

Licenses In the absence of these other methods of ownership, proprietary interest in a web site vests through copyright transfer. Without a license, a hiring party in a WDA cannot legally reproduce, derive or display the copyrighted work publicly.[52]

Under 17 U.S.C. § 204, a copyright cannot be transferred unless there is a writing signed by the owner,[53] and no such transfer will be implied from the circumstances.[54] However, a grant of license differs from a transfer of ownership.[55] The original copyright holder in a license grant does not lose his or her proprietary interests in the work; he or she simply permits a specific use of the work to another entity. Nevertheless, the Copyright Act precludes a transfer of an exclusive license in the absence of a signed writing.[56]

Yet, a non-exclusive license is permitted in the absence of a written agreement.[57] Thus, the grantor of a non-exclusive license permits multiple parties to enjoy the rights of ownership described in 17 U.S.C. § 106.[58] Furthermore, a non-exclusive license may be granted orally or be implied.[59]

An implied license occurs when (1) the creation of a work is requested; (2) the work is created and delivered; and (3) the creator of the work intends that the recipient copy and distribute the work.[60] WDAs typically incorporate these factors.[61] Theoretically, the work to be created pursuant to the WDA performs a desired function. Even if not expressly stated, however, the specific purpose is implied.[62] Clearly, a hiring party would not pay

consideration to have a web site created without the correlating intent to use it.

The *Holtzbrinck* Decision

Holtzbrinck Publishing Holdings, L.P. v. Vyne Communications, Inc.[63] presented the case of a web site development arrangement in which no written WDA was formed, raising questions about the ownership of various aspects of the web site. Holtzbrinck Publishing orally retained Vyne Communications to develop and maintain a web site for its publications.[64] Pursuant to an oral agreement, Vyne created files, code, graphics, and maintenance designs for the web site of Holtzbrinck's subsidiary Scientific American up until its transfer to Holtzbrinck, while Scientific American provided the editorial materials.[65] Shortly after launch, Vyne placed Scientific American's copyright notice on the web site.[66] When Vyne completed the transfer, it never claimed any interest in, or ownership of, any part of the Scientific American web site, including the programming, code, or script files.[67] Although written contracts were discussed and prepared, none were ever signed.[68]

Eventually, Vyne sought to renegotiate its compensation in connection with maintenance work on the Scientific American web site.[69] At that point, Vyne registered a copyright in the Scientific American web site and claimed that it owned all the coding, programming, and graphics contained therein.[70] Vyne allegedly threatened to shut down the site unless additional fees were paid.[71] Not only did Vyne claim ownership of the site, it also sought the right to deny Holtzbrinck the use of the site.[72]

Because the ruling in *Holtzbrinck* responded to summary judgment motions, several of the analyses were not fully developed. However, the court did provide some illuminating responses to the questions raised by *Holtzbrinck*'s particular set of circumstances: Who "owns" the web site? What does "ownership" entail? Was there any transfer of ownership rights? How are such rights, if any, defined?

Work-for-hire The *Holtzbrinck* court examined whether Vyne could be considered Holtzbrinck's employee under the work-for-hire doctrine.[73] The court initially concluded that Vyne's work could not be a work-for-hire.[74] There was no written agreement between Scientific American and Vyne; indeed, there were no written agreements between any of the subcontractors who actually performed the programming and maintenance of the site and either Vyne or Scientific American.[75]

In the absence of a written agreement, the court turned to the first definition of work-for-hire: whether the work was prepared by an employee within the scope of his or her employment. The court referred to the Supreme Court's holding in *Reid* that the term "employee" should be scrutinized in the context of agency common law, pursuant to several general factors.[76]

The court intimated that despite the Supreme Court's holding that no work-for-hire existed in *Reid*, a case involving the creation of a web site under the direction of a hiring party may be distinguishable.[77] For example, the fact that Holtzbrinck had control over the Scientific American web site display might indicate that Vyne was functioning as an employee.[78] In the end, the court concluded that a deeper analysis of the parties' conduct was necessary in order to determine whether Vyne's work was in fact a work-for-hire.[79]

Joint authorship The *Holtzbrinck* court also examined whether Scientific American and Vyne were joint authors.[80] In seeking to determine whether the Scientific American web site satisfied the joint work doctrine, the court noted the Second Circuit's requirement that (1) the contribution of each joint author must be independently copyrightable; and (2) the parties intended to be joint authors.[81] The intent that the two works be merged must exist when the work is prepared and is, the court remarked, arguably the case in the creation of content and code for a web site.[82] In fact, a joint work can be created even if the collaborative efforts of the authors are unequal.[83] Because the authors of a joint work are co-owners of the copyright in the work, neither joint owner can be held liable for copyright infringement to the other joint owner.[84]

Both Holtzbrinck and Vyne allegedly contributed independently copyrightable work to the Scientific American web site. Vyne claimed that it contributed the computer codes necessary to enable the web site to be web-accessible.[85] Conversely, Holtzbrinck claimed that *Scientific American*'s editors compiled the content that ultimately appeared on the Scientific American web site.[86] In addition, Holtzbrinck alleged that Scientific American employees provided the necessary links, layout, and design of the Scientific American web site.[87]

The court concluded that the parties most likely intended for each side's contribution to be merged in the production of the Scientific American web site.[88] Any other result, the court said, would render each side's contribution worthless.[89] To the extent that the parties each contributed copyrightable work, the Scientific American web site would be a joint work and both authors would be co-entitled to copyright protection.[90] The court noted, however, that the record was still too undeveloped to determine whether the parties' contributions were in fact independently copyrightable.[91]

Licenses In addition, the court analyzed the facts under a licensing analysis. As noted above, a non-exclusive license can be granted orally or be implied from the

conduct of the parties.[92] Non-exclusive licenses do not constitute a transfer of ownership rights and generally are beyond the purview of copyright law.

The *Holtzbrinck* court determined that the factors sufficient to create a non-exclusive license had been satisfied.[93] Vyne's undisputed admissions and conduct throughout the course of its work with Holtzbrinck demonstrated that it granted Holtzbrinck an implied, non-exclusive license in the programs and files comprising the Scientific American web site.[94]

First, Holtzbrinck requested that Vyne create a web site for *Scientific American Magazine* after Vyne had completed other similar projects for other Holtzbrinck entities.[95] Clearly, therefore, Holtzbrinck and Vyne were familiar with each other, and with their respective intentions.[96]

Second, Vyne agreed to program, code and host a web site specifically for Holtzbrinck and it was compensated well for such work.[97] The work product was delivered when the site was launched and Holtzbrinck employed the site.[98]

Third, the codes and files were intended solely for Holtzbrinck's use on the Scientific American web site.[99] Any other use, the court reasoned, would serve no function for Holtzbrinck.[100] Holtzbrinck would not have compensated Vyne for the code unless it used it for the Scientific American web site.[101] Indeed, Vyne's copyright registration title indicated that the code was intended for the use of the Scientific American web site.[102]

The court turned to Ninth Circuit reasoning to determine that if Vyne did not convey a license to use the code on the Scientific American web site, then its contribution would have been of minimal value.[103] The court noted, however, that such a conclusion would ignore the fact that Holtzbrinck paid Vyne a substantial amount of money for its work.[104] Holtzbrinck would not have tendered good consideration to have a web site created that it could not use.[105]

Moreover, the court noted evidence suggesting that when the parties sought to memorialize their discussions, Vyne intended to permit Holtzbrinck the use and badges of ownership over the Scientific American web site.[106] In fact, in two separate writings, a Vyne employee acknowledged that it was his continuing understanding that Holtzbrinck would own the Scientific American web site and all of the programs and files contained therein.[107]

It is especially important that companies wishing to establish themselves online do not cut corners, thereby improvidently exposing themselves to potentially costly proprietary losses.

Furthermore, Vyne permitted password access to the Scientific American web site, placed a copyright notice on the site indicating that Scientific American was the copyright owner without reserving any similar notice of its own claim to any ownership rights, and eventually transferred files to Holtzbrinck in anticipation of the eventual transfer of the entire Scientific American web site to the Holtzbrinck server.[108] Clearly, the court noted, Vyne intended for Holtzbrinck to use the files, if not to own them.[109] The court concluded that Vyne's history and course of dealing with Holtzbrinck indicated conduct commensurate with granting Holtzbrinck a non-exclusive implied license.[110]

Conclusion

Despite the burst of the dot-com bubble, a healthy e-presence remains crucial to any going business concern.[111] It is especially important, given the current economic climate, that companies wishing to establish themselves online do not cut corners, thereby improvidently exposing themselves to potentially costly proprietary losses. Indeed, such a scenario would be ironic, given that the increasing complexity in web technology and design warrants more stringent – not relaxed – scrutiny of the proprietary provisions in a WDA. The use of boilerplate language or oral agreements will lead to many legal challenges as these web development arrangements break down and start unraveling.

Holtzbrinck's response was to fashion a remedy by implying a non-exclusive license into an oral contract. The *Holtzbrinck* decision presents an initial attempt to craft a judicial response to the competing proprietary interests left unresolved when a web development arrangement goes awry. *Holtzbrinck*, therefore, is an instructive case for those seeking guidance in properly apportioning proprietary rights in an increasingly complicated and developing area of the law. As the shift towards an integrated online business paradigm gains in complexity and use, the importance of contextualizing these principles will become increasingly apparent and relevant.

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1. Rinaldo Del Gallo III, *Who Owns the Web Site?: The Ultimate Question When a Hiring Party Has a Falling-Out with the Web Site Designer*, 16 J. Marshall J. Computer & Info. L. 857, 868–69 (1998). Del Gallo points out that there may come a time when the hiring party no longer wants to employ the designer to update the web site. *Id*. Or, perhaps, while the web site is first being constructed, the hiring party decides to employ a different designer to con-

tinue constructing the site. *Id*. Alternatively, the designer may have a dispute with the hiring party. In certain circumstances, the web designer may be looking for attribution and integrity rights to ensure that he receives the credit he deserves and to guarantee that the integrity of his work is not compromised. *Id.* Payment issues are also common. *Id*.

2. 2000 U.S. Dist. LEXIS 5444 (S.D.N.Y. 2000).
3. Julian S. Millstein et al., Doing Business on the Internet: Forms and Analysis, § 2.04(4)(h).
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*. In general, the developer should be required to use at least the same measures it would use to protect its own confidential information or trade secrets. *Id*.
13. 17 U.S.C. § 101.
14. Del Gallo, *supra* note 1, at 872.
15. 17 U.S.C. § 101.
16. 490 U.S. 730 (1989).
17. *Id*. at 731.
18. *Id*. at 751–53. These factors included:

    1. The skill required (more likely to be an independent contractor if skill level is high);

    2. The source of instrumentality and tools (more likely to be an independent contractor if hired party uses his own tools);

    3. The location of the work (more likely to be an independent contractor if hired party works at a place other than hiring party, especially if it is at the hired party's own facility);

    4. The duration of the relationship between the parties (more likely to be an independent contractor if the duration is short);

    5. Whether the hiring party has the right to assign additional projects to the hired party (more likely to be independent-contractor if there is no right to assign additional projects);

    6. The extent of the hired party's discretion over when and how long to work (more likely to be an independent contractor if the hiring party decides when and how long to work);

    7. The method of payment (more likely to be an independent contractor if paid in one final lump sum upon completion, more likely to be an employee if paid routinely);

    8. Whether the work is part of the regular business of the hiring party (more likely to be an independent contractor if the work is not part of the services or products that hiring party sells to others);

    9. Whether the hiring party is in business (more likely to be an independent contractor if the hired party sells the particular products or services on a regular basis as part of an ongoing business);

    10. The provisions of the employee benefits (more likely to be an independent contractor if there are no employee benefits); and

    11. The tax treatment of the hired party (more likely to be an independent contractor if an IRS 1099 form was used instead of a W-2)).

19. Del Gallo, *supra* note 1, at 874.
20. *Id*. at 875. Del Gallo points out, however, that "one should keep in mind that the amount of control exhibited in CCNV [*Reid*] was very exacting and yet still there was no work for hire found." *Id*.
21. *Id*. Although the amount of control is an issue of fact. *Id*. at 876.
22. 17 U.S.C. § 106.
23. Derivative works may be based on a work which is already duly copyrighted or upon a work which is in the public domain. The failure of a derivative work to be based upon a preexisting work which is copyrighted or in the public domain is fatal to a claim for copyright protection. *See Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775 (2d Cir. 1994); *JBJ Fabrics, Inc. v. Brylane, Inc.*, 714 F. Supp. 107 (S.D.N.Y. 1989); *Peter Pan Fabrics, Inc. v. Rosstex Fabrics, Inc.*, 733 F. Supp. 174 (S.D.N.Y. 1990); *Odegard, Inc. v. Costikyan Classic Carpets, Inc.*, 963 F. Supp. 1328 (S.D.N.Y. 1997). *In Gates Rubber Co. v. Bando American, Inc.*, 798 F. Supp. 1499 (D. Colo. 1992), *aff'd in part on other grounds, vacated in part on other grounds*, 9 F.3d 823 (10th Cir. 1993) *and related reference*, 855 F. Supp. 330 (D. Colo. 1994), the court ruled that a computer program was not derivative of works that were not previously published.
24. 17 U.S.C. § 101. "A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a derivative work . . . as well." *Id*.
25. *M.H. Segan Ltd. Partnership v. Hasbro, Inc.*, 924 F. Supp. 512 (S.D.N.Y. 1996).
26. *See L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976). *See also Eden Toys, Inc. v. Florelee Undergarment Co.*, Inc., 697 F.2d 27 (2d Cir. 1982), *on remand to* 1984 WL 2120 (S.D.N.Y. 1984); *Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366 (2d Cir. 1993); *Raffoler, Ltd. v. Peabody & Wright, Ltd.*, 671 F. Supp. 947 (E.D.N.Y. 1987); *M.H. Segan Ltd. Partnership v. Hasbro, Inc.*, 924 F. Supp. 512 (S.D.N.Y. 1996).
27. *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980); *Eden Toys, Inc.*, 697 F.2d 27; *Weissmann v. Freeman*, 868 F.2d 1313 (2d Cir. 1989); *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775 (2d Cir. 1994); *Woods v. Bourne Co.*, 60 F.3d 978 (2d Cir. 1995); *Mister B Textiles Inc. v. Woodcrest Fabrics, Inc.*, 523 F. Supp. 21 (S.D.N.Y. 1981); *Kenbrooke Fabrics, Inc. v. Material Things*, 1984 WL 532 (S.D.N.Y. 1984); *National Broadcasting Co., Inc. v. Sonneborn*, 630 F. Supp. 524 (D. Conn. 1985); *Past Pluto Prods. Corp. v. Dana*, 627 F. Supp. 1435 (S.D.N.Y. 1986); *Dolori Fabrics, Inc. v. Limited, Inc.*, 662 F. Supp. 1347 (S.D.N.Y. 1987); *Hearn v. Meyer*, 664 F. Supp. 832 (S.D.N.Y. 1987); *Bates v. Actors Heritage, Inc.*, 1989 WL 206430 (S.D.N.Y. 1989); *Conan Props., Inc. v. Mattel, Inc.*, 712 F. Supp. 353 (S.D.N.Y. 1989), *reconsideration denied*, 1990 WL 209366 (S.D.N.Y. 1990); *JBJ Fabrics, Inc. v. Brylane, Inc.*, 714 F. Supp. 107 (S.D.N.Y. 1989); *Peter Pan Fabrics, Inc. v. Rosstex Fabrics, Inc.*, 733 F. Supp. 174 (S.D.N.Y. 1990); *Folio Impressions, Inc. v. Byer California*, 752 F. Supp. 583 (S.D.N.Y. 1990), *aff'd*, 937 F.2d 759 (2d Cir. 1991); *GB Marketing USA Inc. v. Gerolsteiner Brunnen GmbH & Co.*, 782 F. Supp. 763 (W.D.N.Y. 1991); *Tempo Music, Inc. v. Famous Music Corp.*, 838 F. Supp. 162 (S.D.N.Y. 1993); *Agee v. Paramount Communications, Inc.*, 853 F. Supp. 778 (S.D.N.Y. 1994), *related reference*, 869 F. Supp. 209 (S.D.N.Y. 1994), *as amended*, (July 27, 1995) *and*

motion to vacate denied, 932 F. Supp. 85 (S.D.N.Y. 1996) *and appeal dismissed*, 114 F.3d 395 (2d Cir. 1997) *and aff'd in part, rev'd in part*, 59 F.3d 317 (2d Cir. 1995) *and related reference*, 1995 WL 790313 (S.D.N.Y. 1995).

28. *Durham Indus., Inc.*, 630 F.2d 905; *Eden Toys, Inc.*, 697 F.2d 27; *JBJ Fabrics, Inc. v. Brylane, Inc.*, 714 F. Supp. 107 (S.D.N.Y. 1989); *Peter Pan Fabrics, Inc.*, 733 F. Supp. 174; *Wolff v. Institute of Elec. and Elecs. Eng'rs, Inc.*, 768 F. Supp. 66 (S.D.N.Y. 1991); *M.H. Segan Ltd. Partnership*, 924 F. Supp. 512; *Odegard, Inc. v. Costikyan Classic Carpets, Inc.*, 963 F. Supp. 1328 (S.D.N.Y. 1997), *related reference*, 1997 WL 391214 (S.D.N.Y. 1997).
29. *See Mirage Editions, Inc. v. Alberquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1998) (holding that tile seller's failure to obtain copyright holder's consent to remove his artistic prints from compilation book so that they could be mounted on tiles for sale to the public violated 17 U.S.C. § 106).
30. *Weissmann*, 868 F.2d 1313; *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775 (2d Cir. 1994); *Mister B Textiles Inc. v. Woodcrest Fabrics, Inc.*, 523 F. Supp. 21 (S.D.N.Y. 1981); *Kenbrooke Fabrics, Inc. v. Material Things*, 1984 WL 532 (S.D.N.Y. 1984); *Conan Props., Inc. v. Mattel, Inc.*, 601 F. Supp. 1179 (S.D.N.Y. 1984), *related reference*, 619 F. Supp. 1167 (S.D.N.Y. 1985), *related reference*, 712 F. Supp. 353 (S.D.N.Y. 1989), *reconsideration denied*, 1990 WL 209366 (S.D.N.Y. 1990); *National Broadcasting Co., Inc. v. Sonneborn*, 630 F. Supp. 524 (D. Conn. 1985); D*ynamic Solutions, Inc. v. Planning & Control, Inc.*, 646 F. Supp. 1329 (S.D.N.Y. 1986), *related reference*, 1987 WL 6419 (S.D.N.Y. 1987), *related reference*, 1988 WL 9918 (S.D.N.Y. 1988), *related reference*, 1990 WL 71477 (S.D.N.Y. 1990); *Dolori Fabrics, Inc. v. Limited, Inc.*, 662 F. Supp. 1347 (S.D.N.Y. 1987); *Raffoler, Ltd. v. Peabody & Wright, Ltd.*, 671 F. Supp. 947 (E.D.N.Y. 1987); *Bates v. Actors Heritage, Inc.*, 1989 WL 206430 (S.D.N.Y. 1989); *JBJ Fabrics, Inc. v. Brylane, Inc.*, 714 F. Supp. 107 (S.D.N.Y. 1989); *Wolff*, 768 F. Supp. 66; *Computer Assocs. Intern., Inc. v. Altai, Inc.*, 775 F. Supp. 544 (E.D.N.Y. 1991), *aff'd on other grounds*, *vacated in part on other grounds*, 982 F.2d 693 (2d Cir. 1992); *GB Marketing USA Inc. v. Gerolsteiner Brunnen GmbH & Co.*, 782 F. Supp. 763 (W.D.N.Y. 1991).
31. *See, e.g., In re C Tek Software, Inc.*, 127 B.R. 501, 15 U.C.C. Rep. Serv. 2d (CBC) 271 (Bankr. D.N.H. 1991).
32. *Aymes v. Bonelli*, 47 F.3d 23, 33 U.S.P.Q.2d (BNA) 1768 (2d Cir. 1995); *but* see *AS Institute, Inc. v. S & H Computer Systems, Inc.*, 605 F. Supp. 816, 225 U.S.P.Q. (BNA) 916 (M.D. Tenn. 1985).
33. *Secure Servs. Tech., Inc. v. Time and Space Processing Inc.*, 722 F. Supp. 1354, 12 U.S.P.Q.2d (BNA) 1617, 36 Cont. Cas. Fed. (CCH) para75764 (E.D. Va. 1989). Likewise, where a second computer program based on a pre-existing program is so different from the first that it is itself an original work, the second program cannot be a derivative work of the first program. *Integral Systems, Inc. v. Peoplesoft, Inc.*, 1991 WL 498874 (N.D. Cal. 1991); *Service & Training, Inc. v. Data General Corp.*, 737 F. Supp. 334 (D. Md. 1990), *aff'd*, 963 F.2d 680 (4th Cir. 1992). Further, one court held that a computer program that used only a very small amount of the programming code of another program and was designed to serve a completely opposite function could not be derivative of the preexisting program. *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 7 U.S.P.Q.2d (BNA) 1281 (5th Cir. 1988).
34. 17 U.S.C. § 101.
35. Del Gallo, *supra* note 1, at 881 (citing Melville B. Nimmer & David Nimmer, Nimmer on Contracts, § 6.03 (1996) ("Nimmer")).
36. Nimmer, *supra* note 35, at § 6.04.
37. *Id.*
38. Del Gallo, *supra* note 1 at 881–82. Del Gallo notes that "the contributions of the hiring party can be distilled from the web site and still be left with a meaningful whole in the way that lyrics may be separated from the melody." *Id.*
39. *Id.* at 882.
40. *Id.*
41. Del Gallo, *supra* note 1 at 884. Moreover, "a potential reader, through his home computer, a telephone line, and the services of an online service provider, normally assumes, as he browses through a web site, that the work was created by the company or partnership that is sponsoring that particular web site." *Id.*
42. *Id.*
43. *Id*. at 885.
44. *Id.* (citing David Bender, Computer Law § 4.04[3]).
45. *Id*. at 886.
46. 874 F. Supp. 206 (N.D. Ill. 1995), *vacated*, 926 F. Supp. 780 (N.D. Ill. 1996).
47. *Napoli v. Sears, Roebuck & Co.*, 874 F. Supp. 206, 208 (N.D. Ill. 1995).
48. *Id*. This procedure is very similar to the process a hiring party employs when developing a web site with a contracted programmer who is capable of programming in hypertext. Del Gallo, *supra* note 1, at 890.
49. *Napoli*, 874 F. Supp. at 208.
50. *Id.* at 206.
51. *Id*. at 211.
52. Del Gallo, *supra* note 1 at 895.
53. 17 U.S.C. § 204.
54. *Id*.
55. Del Gallo, *supra* note 1, at 896.
56. 17 U.S.C. § 204(a).
57. Del Gallo, *supra* note 1, at 898. The Copyright Act explicitly declares that a "transfer of ownership" will not include a nonexclusive license, thereby circuitously exempting it from the copyright statute of frauds since only transfers of ownership require a writing. *Id*.
58. *Id*.
59. *See Viacom Int'l Inc. v. Fanzine Int'l, Inc.*, 2000 WL 1854903 at *3 (S.D.N.Y.); *Johnson v. Jones*, 149 F.3d 494, 501 (6th Cir. 1998); *I.A.E, Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996); *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990); *Keane Dealer Servs., Inc. v. Harts*, 968 F. Supp. 944, 947 (S.D.N.Y. 1997); *Design Options, Inc. v. BellePointe*, 940 F. Supp. 86, 92 (S.D.N.Y. 1996); Del Gallo, *supra* note 1, at 898.
60. *Viacom Int'l Inc.*, 2000 WL 1854903 at *3; *Smithkline Beecham Consumer Healthcare, L.P. v. Watson Pharmaceuticals, Inc.*, 211 F.3d 21, 25 (2d Cir. 2000) (quoting *Effects Assocs.*, 908 F.2d at 558).
61. Del Gallo, *supra* note 1, at 898.
62. *Id*. at 899.
63. 2000 WL 502860 (S.D.N.Y.).

64. *Holtzbrinck*, 2000 WL 502860 at *1.
65. *Id.*
66. *Id.* at *2.
67. *Id.* at *1.
68. *Id.* at *2.
69. *Id.*
70. *Id.* at *2–3.
71. *Id.* at *2.
72. *Id.*
73. *Id.* at *9.
74. *Id.*
75. *Id.* at *10. It was undisputed that Vyne hired outside consultants to develop programs, codes, and scripts for the Scientific America web site. *Id.* Further, Vyne did not produce any written agreements that would satisfy the work-for-hire doctrine. *Id.*
76. *Id.* at *9.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at *10.
81. *Id.* (citing *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991)).
82. *Id.*
83. *Id.* (citing *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640 (S.D.N.Y. 1970)).
84. 17 U.S.C. § 201(a).
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Graham v. James*, 144 F.3d 229, 235 (2d Cir. 1998); *Viacom Int'l Inc. v. Fanzine Int'l, Inc.*, 2000 WL 1854903 at *3 (S.D.N.Y.); *Johnson v. Jones*, 149 F.3d 494, 501 (6th Cir. 1998); *I.A.E, Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996); *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990); *Keane Dealer Servs., Inc. v. Harts*, 968 F. Supp. 944, 947 (S.D.N.Y. 1997); *Design Options, Inc. v. BellePointe*, 940 F. Supp. 86, 92 (S.D.N.Y. 1996).
93. *Holtzbrinck*, 2000 WL 502860 at *4.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* (stating that "if a license is not implied to permit HPH's use of the work, Vyne's work would be worthless to Holtzbrinck, for the code was created to display the magazine's content on the Website"); *see also Design Options, Inc. v. Bellepointe, Inc.*, 940 F. Supp. 86, 92 (S.D.N.Y. 1996).
101. *Holtzbrinck*, 2000 WL 502860 at *4.
102. *Id.* The Certificate of Copyright Registration was entitled: "Scientific American: Working Knowledge Custom Written Software for the Scientific American Magazine Internet Web Site." *Id.*
103. *Id.* at *5.
104. *Id.* (citing *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 559 (9th Cir. 1990)).
105. *Id.*
106. *Id.*
107. *Id.* In a follow-up letter to HP's attorney, the employee stated that the company would "have no problem with the idea that Scientific American owns all files created for this project." *Id.* at fn. 6.
108. *Id.* at *5.
109. *Id.*
110. *Id.* The Court tempered this conclusion by noting that an implied license is revocable absent consideration. *Id.* (citing *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 772 (7th Cir. 1996)). Accordingly, the Court cautioned that if Vyne exceeded the scope of its original agreement and produced work for which it was not adequately compensated, then HP's license to use that work product would have been revocable. *Id.* The extent of HP's consideration was not clear, and not possible for determination on summary judgment. *Id.*
111. Anne Hairing, *Intellectual Property Issues in Internet Content Licensing*, Prac. L. Inst. 503 (2001).

Index to Articles—1999-2002

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

TOPIC/ARTICLE **AUTHOR** **ISSUE/Pg.**

Ethics and the Law

Evidence

Family Law

(*See also* Matrimonial Law)

Freedom of Information

Government and the Law

Health Law

Helpful Practice Hints

History in the Law

Humor Column – *Res Ipsa Jocatur*

Index to Authors—1999-2002

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 42.*

Language Tips

By Gertrude Block

Question: Recently, in a biography published by a reputable firm, I have seen sentences with the following used over and over. All of the sentences contained the conjunction "and" instead of "to." For example: "I will try and answer your question." Shouldn't that be "try to answer"?

Answer: The short answer to Attorney Theda V. Snyder's question is "yes." I answered her question in another state *Bar Journal* column sometime ago; but, as will be seen below, it is as pertinent today as it was then. The reason that *and* should not be substituted for *to* is that *and* implies two acts, while the infinitive form *to,* a short form of the phrase *in order to,* implies only one act. In the sentence the reader submitted there is no problem with understanding the speaker's intent, but in the sentence below, for example, there might be.

> In *Henningson*, the court held for the plaintiff and eliminated the privity requirement between the manufacturer and the consumer.

As the sentence is written, the court may have done two things: held for the plaintiff and eliminated the privity requirement. For clarity the sentence should read:

> In *Henningson*, the court held for the plaintiff, eliminating the privity requirement between the manufacturer and the consumer.

The sentence could also be modified in at least three other ways, slightly changing its emphasis, but avoiding ambiguity:

> In holding for the plaintiff, the *Henningson* court eliminated the privity requirement between the manufacturer and the consumer.
>
> The *Henningson* court eliminated the privity requirement between the manufacturer and the consumer when it held for the plaintiff.
>
> Eliminating the privity requirement between the manufacturer and the consumer, the *Henningson* court held for the plaintiff.

Another ambiguous sentence from the same article reads:

> If the landlord was guilty and violated the rule, his conduct constitutes constructive eviction.

Has the landlord committed two acts or one? A redraft, in which the ambiguous *and* is eliminated, clarifies the intent of the drafter:

> If the landlord was guilty in violating the rule, his conduct constitutes constructive eviction.

The following sentence, from a state supreme court decision, illustrates the legal ambiguity that results from the use of the conjunction *and*:

> The plaintiff's mother and the only surviving party to the agreement testified.

Did two persons testify? A re-write omitting the ambiguous *and* would clarify that only the mother did:

> The plaintiff's mother, the only surviving party to the agreement, testified.

A recent article in *The New York Times* ("Congressional Memo," by Christopher Marquis, September 25) confirms that at least some legislators are quite aware of the distinction between *and* and *to*. Senator Trent Lott, the Senate minority leader, commented that he and half a dozen of his colleagues had debated whether to replace or omit the first *and* in the text of a Congressional resolution authorizing force against Iraq. President Bush had asked for authority to attack Iraq "*and* restore international peace and security in the region." (Emphasis mine.)

These senators worried that the conjunction "and" would give President Bush carte blanche to widen the war. They argued that substituting the word *to* would limit his authority. Congressman Henry Hyde commented that, with the conjunction *and* deleted, the President's ability to authorize war was limited to the country of Iraq. Congressman Dick Armey, the House majority leader said, "You try to get to an understanding not only in terms of what is written, but how it can be interpreted." And *The New York Times* noted that a three-letter conjunction might spell the difference between a war in Iraq and a regional conflagration.

Both political parties recognize that the choice of language often makes the difference between the acceptance and the rejection of a concept. Sometime ago, also in the *Times*, Lizette Alvarez presented a glossary she called "The Language Barrier," in which the names Democrats and Republicans assign to certain issues made the parties seem to be talking about different things.

DEMOCRATS	REPUBLICANS
School vouchers	Opportunity scholarships
The estate tax	The death tax
Fast-track authority	Trade-promotion authority
Tax cuts	Tax relief
Affirmative action	Quotas and preferences
A ban on abortion procedures	Partial-birth abortion

Mark Mellman, a Democratic pollster, commented, "There ought to be some relationship between labels and underlying reality or you are into Orwellian double-speak." And Republican pollster John McLaughlin said, "You can't change reality with wallpaper."

That's one subject Republicans and Democrats agree upon – and they're both right. As you know, George Orwell was not an admirer of political language – or of politicians. Incidentally, the quotation that Mark Mellman referred to was, "Political language . . . is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind."

Gertrude Block is the writing specialist and a lecturer emeritus at Holland Law Center, University of Florida, Gainesville, FL 32611. Her e-mail address is Block@law.ufl.edu.

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Shall and Will

Shall, will, should, would in the first, second, and third persons:

Affected Americans and the educated British distinguish between "shall" and "will" and between "should" and "would." Think of Her Royal Majesty's Naval Commander Bond, James Bond: "I should like my martini shaken, not stirred."

In the first person, "shall" is used to express a prediction or intention: "I [or *we*] shall write the brief tomorrow." In all other persons, "will" is used to express a prediction or intention: "They will write their briefs tomorrow."

Similarly, "should" is used in the first person to express a preference: "I [or *we*] should like to write the brief tomorrow." "Would" is used in all other persons to express a preference: "They would like to write their brief tomorrow."

In America today, the distinctions by person between "shall" and "will" and between "should" and "would" sound pretentious. "Will" and "would" are used for all persons – and by all but the affected. In legal writing, "will" will do and "would" should suffice.

Cardozo Law School Professor Weisberg gives (*gave?*) the following "if . . . then" subjunctive and conditional constructions:[3]

- "If the court is reasonable" (present) "then plaintiff will prevail" (future).
- "If the court was reasonable" (past) "then plaintiff would prevail" (conditional).
- "If the court had been reasonable" (pluperfect) "then plaintiff would have prevailed" (conditional past).
- "If the court be reasonable" (subjunctive present) "then plaintiff will prevail" (future).
- "If the court were reliable" (subjunctive past) "then plaintiff would stand a chance" (conditional).

Time Frames

From the Department of Redundancies Department. *Temporal redundancies:* "Am (*is*, *are*) going to" *becomes* "will." "As of this date" *becomes* "today." "As yet," "as of yet" *become* "yet." "At about" *becomes* "about." "At an early date" *becomes* "soon." "At approximately" *becomes* "about." "At the present time" *becomes* "now." "At the present writing" *becomes* "at present," "currently," "now." "At this particular point in time" *becomes* "now." "At the time when" *becomes* "when."

Currently, presently. Currently means *now*. *Presently* means *soon*. It is redundant to use the present tense *is*, *am*, or *are* with *currently*. Excise accordingly: "[Currently] I am an associate." Soon after you learn this rule you will cut currently presently. *A tip:* Use *now* or *soon* rather than the pretentious *currently* or *presently*.

"Teenage boy" *becomes* "Teenage*d* boy." "Middle-age referee" *becomes* "Middle-age*d* referee." "Ice tea" *becomes* "Ice*d* tea." The rapper is "Ice-T," but the drink has a "d." *But:* "Ice cream." Written correctly it should be "iced cream," not "ice cream." People eat the ice of the cream, not the cream of the ice. But the mispronunciation has now become standard. You will get the cold shoulder and icy stares if you write "iced cream."

As the Chinese proverb teaches, "The best time to plant a tree is ten years ago. The second best time is today." Unless you're past your prime, therefore, there's no time like the present to stop tense structure from tensing you up. You can set your clock by that. Being current with the past is not *passé*. It used to be, but that's behind us now.

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1. Isn't this phrase an oxymoron? The future is unforeseeable.
2. Franz Kafka, The Trial 3 (Willa & Edwin Muir trans., 1937) (opening line).
3. Richard H. Weisberg, When Lawyers Write § 5.4, at 68 (1987).

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THE LEGAL WRITER

If I Were a Lawyer: Tense in Legal Writing

BY GERALD LEBOVITS

Timing is everything. At least in the foreseeable future,[1] those who forget the past are doomed to be made redundant by it. Is repeating the past a bad thing? Not if you want to be current with the law. This column will presently present readers with some presents about the present – all to help with the here and now.

State current rules in the present tense.

State past rules and past facts in the past tense.

State permanent, immutable truths (truths that never change) in dependent clauses in the present tense.

State permanent, immutable truths in independent clauses in the past tense.

Examples:

• *Past fact, present rule:* "The court *held* in *X. v. Y.* that the rule against perpetuities *is* still alive."

• *Past fact, past rule*: "Until *A. v. B. was* reversed, the rule in New York *was* that . . . ."

• *Past fact:* "The suspect *ran* [not *runs*] from the police."

• *Past and still-valid rule:* "This court *has* held that . . . ."

• *Past but no-longer-valid rule:* "This court *had* held that . . . ."

• *Past fact, permanent truth in dependent clause:* "Albert Einstein *proved* that E *equals* mc^2."

• *Past fact, permanent truth not in dependent clause:* "Albany *was* where the late Chief Judge Albert Conway *presided*."

When quoting indirectly, the quotation goes in the past tense.

• *Direct quotation:* "Judge X said, 'I am deciding the case today.'"

• *Indirect quotation:* "Judge X said that he was deciding the case today."

• *Tense shifts lead to incoherence:* "Last year the majority *applied* the Fourteenth Amendment, but the dissent argued that the majority *was* [not *is*] wrong." *Tense shift:* "When the Wall Street partner learned how to use e-mail, she *gets* frustrated." (Shift from past tense to present tense.) *Becomes:* "When the Wall Street partner learned how to use e-mail, she *got* frustrated."

• *Discard the double past:* "I *was* a *former* prosecutor." Becomes: "I *am* a former prosecutor." *Or* "I *was* a prosecutor."

Using *Has* and *Had*

The retrospective present (present perfect) refers to a past action that extends to the present. "He had died." No. Unless he was reborn. *Correct:* "He died."

"We have finished the brief" refers to something begun in the past but which recently concluded. Use "We finished the brief" to refer to something concluded in the remote past.

"If Judge X *would have been* more patient, she would not have been reversed." Becomes: "If Judge X *had been* more patient, she would not have been reversed." *Or*, better, "If Judge X *had been* more patient, she would have been affirmed."

You had better get this right. In "You Better, You Bet," the rock band The Who conversationally sang "You better, you better, you bet." Formally sung, it is "You *had better*, you *had better*, you bet."

You have got to get this right. The Beatles sang conversationally using the lyrics "I *got* to get you into my life." Formally sung, it is "I *have got* to get you into my life" *or*, better, "I *have* to get you into my life" *or*, best, "I *must* get you into my life."

Got grammar? "I have *got* no memory for case law" *becomes* "I have no memory for case law."

Correct use of "having done," from Kafka: "Someone must have traduced Joseph K., for without having done anything wrong he was arrested one fine morning."[2]

Using *Was* and *Were:*

The subjunctive "were." "If he were" introduces a falsity. Do you recall Tim Hardin's song, "If I were a carpenter, and you were a lady"?

"If the law clerk *were* a good writer [*read: he is a poor writer*], he would leave his ego at the door and let me edit his work."

State permanent, immutable truths in dependent clauses in the present tense.

"If I *were* a rich man . . . . [*read: I am a poor man*]." (From Tevye, in *Fiddler on the Roof*.)

Simon & Garfunkel used poetic license but erred in their hit, "Homeward Bound." They should not have sung, "I wish I *was* homeward bound." Because they wanted to go homeward but were not traveling in that direction, they should have sung, "I wish I *were* homeward bound."

Use "was" in an "if" clause not contrary to fact:

"If the witness *were* lying, the judge did not see it." *Becomes:* "If the witness *was* lying, the judge did not see it."

When a clause introduced by "if" is a condition, whether true or not, use the indicative mood, which takes things as fact. *Correct:* "If the attorney was [not *were*] not at her desk, she was probably in the library."

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