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Speaking for the Dead: Voice in Last Wills and Testaments

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ARTICLE
SPEAKING FOR THE DEAD: VOICE IN LAST
WILLS AND TESTAMENTS

KAREN J. SNEDDON[†]

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INTRODUCTION

I do now hereby give, bequeath, and devise all items of tangible personal property that I own or may own a right thereonto, which includes, but is not limited to, objet d'art, furnishings, automobiles, and silver, to my surviving issue per stirpes.

A will is arguably the most important and personal legal document an individual ever executes. As the language above illustrates, much of the typical language in a will removes all traces of the individual. This personal legal document is ostensibly the individual's—the testator's—document. For a testator, contemplating the creation and execution of a will is the contemplation of the testator's own death. The resulting document memorializes the individual's personal wishes and hopes for individuals and entities that are important to the individual. The document addresses the individual's property, which many individuals view as an extension of themselves.¹ The document plans for the continued care of loved ones and loved charitable causes. Despite the personal importance of the document and abundant self-referencing—the use of “I,” “me,” “my,” and “mine”—the individual is not typically the document's author. Instead, an attorney drafts the document, facing the challenge of writing a personal document by invoking particular language that ensures the legal fulfillment of the individual's wishes. The typical result is a document that, despite the self-referencing, bears little resemblance to words used by the testator, such as in the example above. “Hereby,” “give, bequeath, and devise;” and “issue” are but a few examples of words that regularly appear in wills, yet are words that would not actually be spoken by the individual. Thus, what is the most important and personal legal document may ironically convey little of the individual testator. The absence of the individual's voice—or worse, the assumption of a “false” voice—diminishes the estate planning experience from the individual's perspective and results in a flat document that may not effectively convey the individual's wishes in a manner that is absorbable by the individual's family and beneficiaries. As a result, a will is “more likely to be the subject of litigation than any other legal

¹ See THOMAS L. SHAFFER ET AL., *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* 19–24 (2d ed. 2007).

instrument.”² In order to maximize the estate planning experience for the individual and implement the will’s directives, the draftsperson can craft a persona that alludes to the individual testator’s personal voice and yet ensures that the document is substantively accurate and operative. The perceived absence of the individual testator’s voice may provoke challenges to the will, damage family relationships, and tarnish the individual’s legacy. Traditional devices, such as in *terrorem* clauses,³ have proved little help to address the rising tide of litigation and the underlying reasons for the litigation.

This Article examines voice in wills. First, this Article considers the function of wills and the continued importance of the will in the age of will substitutes. Second, this Article explores the concepts of voice and persona, including the applicability of these terms to wills. Third, this Article analyzes voice in wills by contemplating voice in both non-attorney drafted wills and attorney drafted wills. Fourth, this Article highlights five opportunities that enable the draftsperson to consciously craft a persona that appropriately injects the individual’s voice into the will while ensuring that the will continues to be both substantively accurate and operative.

I. FUNCTION OF WILLS

A will is the unilateral disposition of one’s property, in whole or in part, that takes effect on the individual’s death. It is generally revocable, and it is generally written.⁴ Moreover, in a will, an individual can also nominate executors, trustees of testamentary trusts, and guardians for minor children.⁵

² Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills To Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 866 (2007).

³ See *infra* note 219.

⁴ See, e.g., DOROTHY WHITELOCK, *ANGLO-SAXON WILLS*, at vii–xi (1930) (noting that so-called Anglo-Saxon wills were oral and were not revocable).

⁵ See Thomas L. Shaffer, *Nonestate Planning*, 42 NOTRE DAME LAW. 153, 153–55 (1966) (providing an annotated will form for an individual with minimal assets and young children).

Today, more individuals die with valid wills⁶ in place than in previous times in America.⁷ Almost nonexistent in nineteenth-century America, the use of wills has steadily increased.⁸ The transformation of wealth from the family farm to human capital and the stretching of familial ties has necessitated the use of wills to transmit property on death.⁹ Originating in oral traditions, wills have become entrapped in a dizzy maze of formalities.¹⁰ To ensure that the testator's will reflects his or her

⁶ "Valid will" means that a court will admit the will to probate and thus give legal effect to the document. ALEXANDER A. BOVE, JR., *THE COMPLETE BOOK OF WILLS, ESTATES & TRUSTS* 4 (3d ed. 2005). Given the universal concern embodied in wills—taking care of loved ones and property—wills likely date to pre-history. See generally ALISON REPPY & LESLIE J. TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS* (1928). Wills are one of the oldest types of legal documents, with one of the oldest known written wills dating to ancient Egypt. For an example of an ancient Egyptian Will, see a discussion of the will of Amenemhat III in VIRGIL M. HARRIS, *ANCIENT, CURIOUS, AND FAMOUS WILLS* 12–13 (1911), and THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 7 (1953) (attributing some of the will execution rituals to ancient Egypt). For the text of a will from ancient Mesopotamia, see Martha T. Roth, *Mesopotamian Legal Traditions and the Laws of Hammurabi*, 71 *CHI.-KENT L. REV.* 13, 32–33 (1995). For more about the historical nature of wills, including the origin of estate planning attorneys, see Malcolm A. Moore, *The Joseph Trachtman Lecture—The Origin of Our Species: Trust and Estate Lawyers and How They Grew*, 32 *ACTEC J.* 159, 160 (2006), and Barbara R. Hauser, *The Tale of the Testament*, *PROB. & PROP.*, Sept.–Oct. 1998, at 58, 59–60. See generally Julius A. Leetham, *Probate Concepts and Their Origins*, 9 *WHITTIER L. REV.* 763 (1988).

⁷ For an examination of the origins of inheritance in America, see generally CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* chs. 5, 8 (1987), and George L. Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, 51 *YALE L.J.* 1280 (1942).

⁸ The majority of Americans, however, still die without a valid will. Based on a national representative sample, one scholar found that sixty-eight percent of individuals surveyed died intestate. See Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 *QUINNIPIAC PROB. L.J.* 36, 41 (2009). Twenty percent had a will drafted by an attorney, and eleven percent had a will drafted by themselves. See *id.*

⁹ See generally John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 *MICH. L. REV.* 722 (1988). The nature of property continues to change. See, e.g., Jonathan J. Darrow & Gerald R. Ferrera, *Who Owns a Decedent's E-Mails: Inheritable Probate Assets or Property of the Network?*, 10 *N.Y.U. J. LEGIS. & PUB. POL'Y* 281, 282–84 (2007); Laura S. Langley & Joseph W. Blackston, *Sperm, Egg, and a Petri Dish: Unveiling the Underlying Property Issues Surrounding Cryopreserved Embryos*, 27 *J. LEGAL MED.* 167, 168, 170 (2006).

¹⁰ For a recent examination of the formalities, see John V. Orth, *Wills Act Formalities: How Much Compliance is Enough?*, 43 *REAL PROP., TR., & EST. L.J.* 73, 73–74 (2008); see also James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 *N.C. L. REV.* 541, 541, 543 (1990); Bruce H. Mann, *Essay, Formalities and Formalism in the Uniform Probate Code*, 142 *U. PA. L. REV.* 1033, 1034 (1994).

wishes, the execution of wills is governed by formalities.¹¹ Even today, at the most basic level, the required formalities are (1) a writing,¹² (2) the testator's signature, and (3) attestation by at least two competent witnesses.¹³

The changing nature of wealth heralded the non-probate revolution with its use of will substitutes, such as pension plans and revocable trusts.¹⁴ Despite the popularity and pervasive use of will substitutes, the will remains the cornerstone of an estate plan.¹⁵

¹¹ For a discussion of the protection of the testator's intent offered by the formalities, see Judith G. McMullen, *Keeping Peace in the Family While You Are Resting in Peace: Making Sense of and Preventing Will Contests*, 8 MARQ. ELDER'S ADVISOR 61, 62-63 (2006).

¹² For a consideration of the policies underlying the writing requirement, see Beyer & Hargove, *supra* note 2, at 875-81. The writing is usually on paper, but wills have been probated written on a variety of materials, such as a hatbox, paper doily, and a shack wall. See ROBERT S. MENCHIN, WHERE THERE'S A WILL: A COLLECTION OF WILLS—HILARIOUS, INCREDIBLE, BIZARRE, WITTY . . . SAD 77-81 (1979).

¹³ See, e.g., UNIF. PROBATE CODE § 2-502(a) (amended 2008). Generally considered, there are four functions of the formalities: (1) ritual function, which impresses on the testator the importance of the act; (2) evidentiary function, which presents a permanent embodiment of the testator's plan; (3) protective function, which ensures that the will represents the testator's wishes; and (4) channeling function, which assures the client that following the proscribed procedures will result in a legally enforceable document. For a discussion of the four functions of formalities, see Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5-13 (1941); see also John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 493-94 (1975) (providing that the channeling function was developed by Professor John Langbein); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167 (1991). For a discussion of the functions of formalities in private adjudication generally, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1690-94 (1976). But see Hanna M. Chouest, Note, *Dot All 'T's and Cross all 'T's: Estate of Tamulis v. Commissioner and the Narrowing of the Substantial Compliance Doctrine to the Technical Compliance Doctrine*, 62 TAX LAW. 259 (2008) (observing the restrictive interpretation of the substantial compliance doctrine to forgive errors in in taxpayer elections).

¹⁴ See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984). As two authors in the middle of the probate revolution observed, "Even those who favor the inter vivos trust as an estate planning device admit that if you use the inter vivos trust 'you'll still need a will.'" WILLIAM D. ROLLISON & ELIZABETH D. ESHELMAN, FORMS FOR WILLS AND ESTATE PLANNING, at iii (1967).

¹⁵ The term "will substitute" is a bit of a misnomer. The vast majority of will substitutes are asset specific, meaning that there are only few will substitutes, such as the revocable trust, that could be used to make a complete disposition of property. For an examination of the issues of "fragmentation" whereby assets are transferred by a variety of estate planning techniques, see Kent D. Schenkel, *Testamentary*

Although more Americans have a valid will than in previous generations, most individuals still die without a valid will.¹⁶ Reasons for not executing a will include failure to understand the significance of the cost associated with a will—both financial and emotional.¹⁷

In the event that an individual fails to execute a valid will, fails to execute a valid will that completely disposes of his or her property, or fails to have valid will substitutes, the property passes via the state statute.¹⁸ These intestacy statutes are

Fragmentation and the Diminishing Role of the Will: An Argument for Revival, 41 CREIGHTON L. REV. 155, 156–65 (2008). Moreover, a will functions as a safeguard to capture those assets that may not be covered by will substitutes. For example, a pour over will is regularly executed when a revocable trust is used. This ensures that the will can capture assets that were not effectively transferred, the estate's unexpected receipt of assets, and the absence of a validly designated beneficiary of the will substitute. Decades have passed since the initial flush of excitement for the non-probate revolution, and wills continue to be vital to the estate planning process. See *id.* at 166, 177–78 (asserting that “[l]egitimizing [w]ill [s]ubstitutes [i]nadvertently [d]ebases the [w]ill”). For a discussion of the continuing non-probate revolution, see Susan N. Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROP. PROB. & TR. J. 529, 534–37 (2006). For analyses of the superwill, see Roberta Rosenthal Kwall & Anthony J. Aiello, *The Superwill Debate: Opening the Pandora's Box?*, 62 TEMP. L. REV. 277 (1989); Cynthia J. Artura, Comment, *Superwill to the Rescue? How Washington's Statute Falls Short of Being a Hero in the Field of Trust and Probate Law*, 74 WASH. L. REV. 799 (1999); Mark L. Kaufmann, Note, *Should the Dead Hand Tighten Its Grasp?: An Analysis of the SuperWill*, 1988 U. ILL. L. REV. 1019, 1021–22.

¹⁶ Approximately sixty percent to seventy-five percent of Americans do not have a valid will. See GERRY W. BEYER, TEACHER'S MANUAL TO ACCOMPANY TEACHING MATERIALS ON ESTATE PLANNING 2 (3d ed. 2005). “Estate planning can be a tough sell because it forces clients to contemplate their deaths, a depressing topic.” Louis S. Harrison & Emily J. Kuo, *Fees: How to Charge, Collect and Defend Them*, TR. & EST., March 2009, at 50, 50.

¹⁷ See generally Gerry W. Beyer, *The Will Execution Ceremony—History, Significance, and Strategies*, 29 S. TEX. L. REV. 413, 419–20 (1988) (describing the psychological effect of the will execution ceremony). For an examination of eleven emotional reasons individuals may be reluctant to visit an attorney to have a will drafted, see John M. Astrachan, *Why People Don't Make Wills*, TR. & EST., Apr. 1979, at 45 (1979) (author is a psychiatrist). For a consideration of the financial cost, see David J. McCabe & Dilip B. Patel, *Is Estate Planning Expensive?*, TR. & EST., June 2004, at 60, 60–61.

¹⁸ See generally Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031 (2004).

legislative defaults that attempt to replicate the presumed intent of an individual and direct the property to be distributed to the individual's family in proscribed proportions.¹⁹

II. VOICE

A. Term Defined

Individuals have a literal voice,²⁰ one used for speaking and singing.²¹ The term "voice" can be applied to written and spoken language.²² "Written words may be silent semiotic signs, but when humans read (and write), they usually infer a person behind the words and build themselves a relationship of some sort with that person."²³ Tracing its origins in the field of rhetoric and composition studies to the 1960s,²⁴ the term "[v]oice

¹⁹ See generally Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057 (1996). For a married individual with children, the beneficiaries under a typical state's intestacy statute are the surviving spouse and children. See, e.g., GA. CODE ANN. § 53-2-1 (2008). Notably, intestate statutes do not contain a mechanism to distribute property to an individual's friends or favored charitable organizations. Further, intestate statutes can be slow to reflect changing perceptions of family. See, e.g., Charles Patrick Schwartz, Note, *Thy Will Not Be Done: Why States Should Amend Their Probate Codes to Allow an Intestate Share for Unmarried Homosexual Couples*, 7 CONN. PUB. INT. L.J. 133, 135 (2008); see also Hirsch, *supra* note 18, at 1054–55. For an examination of statutes that disinherit unworthy heirs, see Anne-Marie Rhodes, *On Inheritance and Disinheritance*, 43 REAL PROP., TR. & EST. L.J. 433 (2008).

²⁰ "[V]oice in the literal sense, the physical properties of human speech and language; in the metaphorical sense, an author's or speaker's attitude toward him- or herself as represented in a work of literature." JACK MYERS & MICHAEL SIMMS, *THE LONGMAN DICTIONARY OF POETIC TERMS* 336 (1989) (emphasis omitted). "In the history of Western tradition beginning with Plato, the spoken voice was often understood as being closer to thought and an authentic self." Darsie Bowden, *Voice*, in *CONCEPTS IN COMPOSITION* 285, 291–92 (Irene L. Clark ed., 2003) [hereinafter Bowden, *Voice*].

²¹ See, e.g., DENTON ROSSELL, *VOICE* 21–29 (1983).

²² See Peter Elbow, *Reconsiderations: Voice in Writing Again: Embracing Contraries*, 70 C. ENG. 168, 180 (2007) [hereinafter *Voice in Writing Again*]; see also DEBORAH BRANDT, *LITERACY AS INVOLVEMENT* 14 (1990); Kathleen Blake Yancey, *Introduction: Definition, Intersection, and Difference—Mapping the Landscape of Voice*, in *VOICES ON VOICE*, at vii, viii–ix (Kathleen Blake Yancey, ed., 1994) ("[V]oice seems to bring to writing and the text a quality we don't have otherwise: the individual human being composed of words in the text.").

²³ *Voice in Writing Again*, *supra* note 22, at 180; see also BRANDT, *supra* note 22, at 2–3.

²⁴ For a consideration of current topics in the field, see generally *COMPOSITION STUDIES IN THE NEW MILLENNIUM* (Lynn Z. Bloom et al. eds., 2003).

helps writers conceptualize some of the intangibles in writing, helping make concrete such abstractions as meaning, power, liveliness, honesty."²⁵ But voice can be described:

as infusing the process of writing;
as a reference for truth, for self;
as a reference for human presence in text;
as a reference for multiple, often conflicting selves;
as a source of resonance, for the writer, for the reader;
as a way of explaining the interaction of writer, reader, and text;
as the appropriations of others: writers, texts;
as the approximations of others;
as a synecdoche for discourse;
as points of critique;
as myth.²⁶

²⁵ DARSIE BOWDEN, *THE MYTHOLOGY OF VOICE* 61 (Charles I. Schuster ed., 1999).

²⁶ Yancey, *supra* note 22, at xviii. "It means so many things to so many people that it leads to confusion and undermines clear thinking about texts. In any given usage, it's seldom clear what the term is actually pointing to." *Voice in Writing Again*, *supra* note 22, at 182. "There are few metaphors as powerful or as embedded in our rhetorical consciousness and national value system." BOWDEN, *supra* note 25, at 139 (exploring the term "voice" as a metaphor). A metaphor "is a trope, or figurative expression, in which a word or phrase is shifted from its normal uses to a context where it evokes new meanings." *THE NEW PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS* 760 (Alex Preminger & T.V.F. Brogan eds., 1993). In other words, metaphors are the abstract grounded in the concrete. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 4-6, 62-65 (1980) (analyzing the grounding of the conceptual metaphor "ARGUMENT IS WAR" in the "knowledge and experience of physical combat"). "One of the hallmarks of enduring metaphors is their flexibility; they can be adopted to suit a range of often conflicting purposes." BOWDEN, *supra* note 25, at 55. A popular magazine stated that a "strong voice" was an attribute of a good summer read. Sara Nelson, *Meet Your New Favorite Book*, *REAL SIMPLE*, June 2009, at 193 (listing voice as the first of four "essential ingredients" for a good summer read).

A popular term, “voice” is used in a variety of settings.²⁷ To quote Peter Elbow, renowned composition studies professor and scholar, “[w]riting *with voice* is writing into which someone has breathed. It has that fluency, rhythm, and liveliness that exist naturally in the speech of most people when they are enjoying a conversation.”²⁸ Thus, voice is “a means of speaking to another, of trying to create a resonance between the reader and an audible voice carried in text.”²⁹ Yet as another scholar observed, “its exact workings can never be pointed to or defined, since to do so would be to reduce them to a kind of mechanical trick, a matter of style or technique—and voice is precisely what transcends all that.”³⁰ What is clear is that voice is more than a rote examination of word choice, point of view, and tone.³¹ Therefore, “voice” is an inescapable—although not necessarily always apt—term.³²

²⁷ For example, voice is a common metaphor of exclusion. See, e.g., David T. Ritchie, *Who Is on the Outside Looking in, and What Do They See?: Metaphors of Exclusion in Legal Education*, 58 MERCER L. REV. 991, 995, 1003 (2007); Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 10 (1998). Voice is also a popular metaphor in the analysis of gender issues. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982). For an example in the law, see Beverly Encarguez Perez, *Woman Warrior Meets Mail-Order Bride: Finding an Asian American Voice in the Women’s Movement*, 18 BERKELEY WOMEN’S L.J. 211, 213 (2003).

²⁸ PETER ELBOW, WRITING WITH POWER 299 (1981). For another example of using the literal meaning of voice to explain the metaphor, Peter Elbow wrote, “[v]oice . . . is what most people have in their speech but lack in their writing—namely, a sound or texture—the sound of ‘them.’” *Id.* at 288.

²⁹ Yancey, *supra* note 22, at xii.

³⁰ JOSEPH HARRIS, A TEACHING SUBJECT 24 (1997).

³¹ These are important aspects to an analysis of voice. For a discussion about these topics, see MARTHA KOLLN, RHETORICAL GRAMMAR 107–28 (5th ed. 2007).

³² “However it is framed, voice is a pivotal metaphor in composition and rhetoric studies because it focuses attention on authorship, on identity, on narrative, and on power.” BOWDEN, *supra* note 25, at viii; see also Jane Danielewicz, *Personal Genres, Public Voices*, 59 C. COMPOSITION & COMM. 420, 422 (2008) (“But despite its shaky foundations, its ideological baggage, and its annoying elusiveness as a concept, we can’t seem to give up thinking about voice.”); *Voice in Writing Again*, *supra* note 22, at 171 (stating that “many critiques seem valid, yet voice stays alive”).

Much analysis in composition theory relates to developing “real” voice in terms of the writer’s personal voice.³³ This consideration of real voice has the most applicability to narrative or descriptive writing.³⁴ But even in a narrative or descriptive text, the writer does not use his or her own voice. For “a writer’s text can be seen not as an expression of some inner reality, some authentic self, but as a kind of performance.”³⁵ Thus, voice, in the sense of *persona*,³⁶ could be described as follows:

[I]t is as if the author, as he “puts on his act” for a reader, wore a kind of disguise, taking on, for a particular purpose, a character who speaks to the reader. This *persona* may or may not bear considerable resemblance to the real author, sitting there at his typewriter[]; in any case, the created speaker is certainly less complex than his human inventor. He is inferred entirely out of the language; everything we know about him comes from the words before us on the page. In this respect, he is a made man, he is artificial.³⁷

³³ See, e.g., Peter Elbow, *How To Get Power Through Voice*, in COMPOSITION IN FOUR KEYS 62, 64 (Mark Wiley et al. eds., 1996) (providing tips and strategies to develop “real voice” in writing); see also DONALD C. STEWART, THE AUTHENTIC VOICE 1 (1972) (stating that self-discovery is necessary to unlock the writer’s authentic voice); Erwin Chemerinsky, *Why Write?*, 107 MICH. L. REV. 881, 893 (2009) (“Writing, even in the often stilted tones of law review articles, is an act of self-definition. What we choose to write about, the voice we employ, the points we choose to make, all are important expressions of self.”).

³⁴ “When people claim that legal writing has no voice, they usually mean that it lacks what could be called a personal voice.” J. Christopher Rideout, *Voice, Self, and Persona in Legal Writing*, 15 LEGAL WRITING 67, 68 (2009). For a discussion of the challenges law students face in assuming a professional voice, see Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 CLINICAL L. REV. 501, 502 (2006).

³⁵ HARRIS, *supra* note 30, at 35; see also WALKER GIBSON, PERSONA: A STYLE STUDY FOR READERS AND WRITERS 52 (1969) (“the voice or *persona*”).

³⁶ “[P]ersona (Latin for ‘mask, person’ . . .) the speaker of a poem who is easily recognized as being different from the poet.” MYERS & SIMMS, *supra* note 20, at 230. The words “person” and “personality” are also derived from the Latin word for “mask.” GIBSON, *supra* note 35, at 4 (emphasis omitted). A famous example of *persona* is Robert Browning’s poem entitled “My Last Duchess” where the author constructs the Duke of Ferrara *persona*. See ROBERT BROWNING, *My Last Duchess*, in MY LAST DUCHESS AND OTHER POEMS 1, 1–2 (Shane Weller ed., Dover Trift ed. 1993). Academics recognize the use of the term *persona*. For instance, on January 5, 2007, at the Annual Meeting of the American Association of Law Schools, a session was entitled “Crafting a Scholarly *Persona*.” See Friday Program AALS 2007 Annual Meeting Index, <http://www.aals.org/am2007/friday/index.html> (last visited Oct. 8, 2011).

³⁷ GIBSON, *supra* note 35, at 3–4 (describing the book as “center[ing] its attention on the author’s created *persona*, his mask or voice”) (emphasis added).

In other words, “[v]oice . . . has to do with feeling-hearing-sensing a person behind the written words, even if that person is just a persona created for a particular text or a certain” reality.³⁸ Accordingly, the writer crafts a persona that is best suited to convey his or her message with appropriate modifications for the particular conventions of a discourse.³⁹ Channeling voice to construct a persona is illustrated in fiction.

Certainly, the reader perceives the writer’s personal voice in works of fiction, especially where the character in the story shares some of the attributes of the author.⁴⁰ Even where autobiographical traits are endowed on the narrator, readers still recognize that the author is assuming traits that are not wholly the writer’s own voice.⁴¹ For example, the “I” in J.D. Salinger’s *The Catcher in the Rye* is not the “I” of author J.D. Salinger, but is rather the personal “I” of the fictional protagonist, Holden Caulfield.⁴² Even if the character of Holden Caulfield contains some of the writer’s own personality and experiences, the reader understands that the writer is assuming a persona that the writer thinks best facilitates the delivery of the message. In one critique of *The Catcher in the Rye*, a scholar asserted that “[t]he amateurish sounding voice of the passage, for example, is

³⁸ BOWDEN, *supra* note 25, at 97–98. Because “[s]ometimes *stance* or *persona* can be substituted for voice; other times, it is *style* or *tone*.” Bowden, *Voice*, *supra* note 20, at 285; see also HARRIS, *supra* note 30, at 27 (discussing “[t]he notion of voice or persona”).

³⁹ See Danielewicz, *supra* note 32, at 420 (equating persona with authority). For an application of this concept, see GIBSON, *supra* note 35, at 18–20 (describing the ability of newspaper reports to construct an authoritative persona).

⁴⁰ This is illustrated in many works of fiction, such as Graham Greene’s *The End of the Affair* where the author’s real life affair followed a plot similar to the plot in the novel.

⁴¹ Consider, for example, Graham Greene’s novel *The End of the Affair*. Several of the experiences of the narrator, Maurice Bendrix, were similar to Greene’s real life, such as Greene’s affair with Vivien Dayrell-Browning, likewise a Catholic. Michael Gorra, *Introduction to GRAHAM GREENE, THE END OF THE AFFAIR*, at vii (Penguin Books 2004) (1951). Even some of the descriptions of the narrator, such as a writer who “has been praised for his technical ability” have an autobiographical ring. *Id.* at 1. On occasion, writers include a caricature of themselves in their work, such as the character of the mystery writer Adriane Oliver who appeared in several Agatha Christie novels.

⁴² See generally J.D. SALINGER, *THE CATCHER IN THE RYE* (1951).

actually a very slick professional achievement; there is no question of Salinger's skill to manipulate dead language in order to produce the illusion of a sensitive and knowing creature."⁴³

This tangling of personal voice and persona is illustrated by Jorge Luis Borges's short story, "Borges and I."⁴⁴ In the three-paragraph story, Borges explores the concept of self and persona, attempting to distinguish the writer's voice and the personal voice. The story ends with the profound statement: "I do not know which of us has written this page."⁴⁵

On occasion, the writer will stretch the concept of persona by appearing to address the reader directly. One need think only of classic childhood reading to see an example of a writer crafting a persona that speaks directly to the author but is not the author's personal voice. For instance, in her tales of precocious animals, Beatrix Potter often included statements from the purported author that were directed to the reader. For example, when describing the mother of Peter Rabbit, who "earned her living by knitting rabbit-wool mittens and muffetees," the purported author modifies this statement with the following: "I once bought a pair at a bazaar."⁴⁶ Such constructions manipulate the discourse to better convey an emotion or thought.

Statements like the examples above are statements mediated through a particular discourse. It is a persona. Another example where the writer seems to speak directly to the reader in a personal voice, which is actually a carefully constructed persona, is *The Princess Bride* by William Goldman.⁴⁷ The constructed persona uses the first person and purports to be reporting "true facts." It is presented through the medium of an "abridgment" of a book from the mythical country of Florin. The

⁴³ WILLIAM E. COLES, JR., THE PLURAL I—AND AFTER 164 (1988). For further examination of the use of voice in *The Catcher in the Rye*, see GIBSON, *supra* note 35, at 5–9 ("Mr. Salinger was of course no teenager when he wrote *The Catcher in the Rye*, but for his particular purpose he took on a teenaged persona, naming him, you remember, Holden Caulfield.").

⁴⁴ JORGE LUIS BORGES, *Borges and I*, in LABYRINTHS: SELECTED STORIES AND OTHER WRITINGS 246, 246–47 (Donald A. Yates & James E. Irby eds., James E. Irby trans., 1964).

⁴⁵ *Id.* at 247.

⁴⁶ BEATRIX POTTER, THE TALE OF BENJAMIN BUNNY 11 (Penguin Books 2002) (1904).

⁴⁷ WILLIAM GOLDMAN, THE PRINCESS BRIDE (2003). The book was the basis for a 1987 movie of the same name starring Billy Crystal, Cary Elwes, Peter Falk, Mandy Patinkin, Robin Writing, and Andre the Giant. See *The Princess Bride*, IMDB, <http://www.imdb.com/title/tt0093779> (last visited Oct. 8, 2011).

writer uses the abridgment as a literary device to present an entirely fictional story, including references to purportedly autobiographical details.⁴⁸ The author expressly injects his own thoughts, sometimes with the help of italics and parentheses, which speak directly to the reader.⁴⁹ This persona is seen throughout the story with asides interspersed throughout.⁵⁰

While the connection of voice to narrative, descriptive, and fictional writing is most easily recognizable, voice still relates to technical and expository writing.⁵¹ Initially, applying the concept of voice to such writing appears to be a stretch.⁵² As Peter Elbow wrote, “[i]t seems especially rare to find essays and reports that take you past an understanding of the ideas actually to hear the music of those ideas.”⁵³ One of the attributes of the so-called professional voice is the absence of “some of the feeling and empathy that are part of ordinary human discourse.”⁵⁴ Regardless of the form of writing, however, a writer constructs a persona—assumes a voice—that best conveys his or her message.⁵⁵

⁴⁸ This type of literary device is also used by J.R.R. Tolkien in *The Lord of the Ring* books.

⁴⁹ For example, one such interjection begins, “*This is me. All abridging remarks and other comments will be in this fancy italic type so you’ll know.*” GOLDMAN, *supra* note 47, at 41.

⁵⁰ *The French Lieutenant’s Woman*, written by John Fowles, also contains similar interjections by the author to the reader.

⁵¹ See ELBOW, *supra* note 28, at 339–40 (discussing expository writing).

⁵² “Moreover, in order to objectify documentation and improve efficiency, corporate writing often uses ‘boilerplates’; that is, technical writers frequently reuse standard sections in more than one document. How can the voice in a document be personal if entire sections are copied from previous documents?” Nancy Allen & Deborah S. Bosley, *Technical Texts/Personal Voice: Intersections and Crossed Purposes*, in VOICES ON VOICE, *supra* note 22, at 80, 80.

⁵³ ELBOW, *supra* note 28, at 342. For an examination of voice in statutes, appellate briefs, and office memos, see generally McArdle, *supra* note 34, at 501–02; Rideout, *supra* note 34, at 67–68.

⁵⁴ Julius G. Getman, *Voices*, 66 TEX. L. REV. 577, 578 (1988) (urging legal education not to neglect the human—and personal—voice); see also Allen & Bosley, *supra* note 52, at 81 (“Although these [technical] writers agree that constraints work to eliminate personal voice in technical texts, they also believe that writers often find ways to counter these forces and interject a personal quality into the documents they create.”).

⁵⁵ After all, as Shakespeare wrote:

All the world’s a stage
 And all the men and women merely players:
 They have their exits and their entrances
 And one man in his time plays many parts

B. *Applicability of Voice to Wills*

Voice is an especially apt concept to apply to wills. The history of wills stretches back to prehistory where the tradition of wills began as an oral tradition, and the wills were literally in the testator's voice.⁵⁶ Anglo-Saxon wills, for example, were oral wills.⁵⁷ Indeed, the old English word of will, "cwide," also means "word" and "saying."⁵⁸ If an individual died without a will, or as a "cwide-leas," the individual was not only intestate, but also without speech.⁵⁹ Accordingly, the will was a voice from beyond the grave.⁶⁰

While the vast majority of wills today are written, the parlance used by estate planners, whether conscious or not, references the term "voice" and the related term "persona."⁶¹ For example, one commentator stated that "[e]state planning also lets people have one last 'conversation' with the ones they love."⁶² When attorneys draft wills, attorneys "are speaking for [their]

WILLIAM SHAKESPEARE, AS YOU LIKE IT act 2, sc. 7. Everyone assumes a persona for particular situations.

⁵⁶ The advent of history did not eliminate the oral traditions of wills. Even today, a nuncupative will, or oral will, can be used in a few jurisdictions in limited circumstances, such as during "last sickness[es]" and during active military service. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.2 stat. n. 3 (1999).

⁵⁷ WHITELOCK, *supra* note 4, at xiv.

⁵⁸ DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 78 (1963).

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ The term voice even pops up in the parlance of trusts and estates professors. For example, in promotional material for a new edition of one of the most widely used casebooks in trusts and estates, the material proclaims that the new co-authors "took great care to preserve the *voice* and spirit of" the original author. *See* Wills, Trusts, and Estates, Eighth Edition Jesse Dukeminier, Robert H. Sitkoff, James Lindgren, http://www.aspenlawschool.com/books/dukeminier_wte/default.asp (last visited Oct. 8, 2011) (emphasis added) (promoting *Wills, Trusts, and Estates* by Robert H. Sitkoff, James Lindgren, and the late Jesse Dukeminier). In pertinent part, the materials state "Co-authors Robert Sitkoff and James Lindgren took great care to preserve the voice and spirit of Jesse Dukeminier, while fulfilling the trust and expectation among users for timely and relevant coverage, cases, and note material." *Id.*

⁶² ROBERT A. ESPERTI ET AL., LOVE, MONEY, CONTROL: REINVENTING ESTATE PLANNING 8 (2004); *see also* Melissa Street, *A Holistic Approach to Estate Planning: Paramount in Protecting Your Family, Your Wealth, and Your Legacy*, 7 PEPP. DISP. RESOL. L.J. 141, 146 (2007) (stating that holistic estate planning permits "[a]ll interested parties [to] discuss the estate plan openly to ensure that everyone's *voice* is heard and that any possible conflicts can be identified and remedied prior to death") (emphasis added).

clients.”⁶³ As a result, an individual should consider “what [his or her] estate plan says to [his or her] family.”⁶⁴ Further, “[i]t has been said that the will an attorney drafts contains the last words a client’s family will ever hear from the deceased.”⁶⁵ Thus, “a will is a man’s one sure chance to have the last word.”⁶⁶ Even when explaining the concept of ambulatory—meaning capable of being altered during life—attorneys explain the will as only “speaking at death.”⁶⁷ The encouragement for the construction of a persona can be seen in a style manual for will drafting, in which the author wrote, “When you draft a will, you are writing in the client’s voice about what the client wants to happen at death.”⁶⁸

When considering the roles of the attorney draftsman and the individual, wills are not written by multiple authors in the strictest sense of collaboration—instead, two or more authors create a document with a unified voice.⁶⁹ The will is the individual’s document,⁷⁰ where the personal “I” refers to the testator, not the personal “I” of the draftsman.⁷¹ A cursory glance at the dispositive provisions of any will reveals extensive self-referencing. The words “I,” “my,” “me,” and “mine” appear in almost every line. But the author of the will is the attorney draftsman, not the individual. Attorneys are familiar with the assumption of an objective, distant professional voice when writing briefs, motions, and memos.⁷² This objective, distant

⁶³ KEVIN D. MILLARD, *DRAFTING WILLS, TRUSTS, AND OTHER ESTATE PLANNING DOCUMENTS* 13 (2006).

⁶⁴ COLLEEN BARNEY & VICTORIA COLLINS, *BEST INTENTIONS*, at xiii (2002).

⁶⁵ Constance D. Smith, *New and Improved Testaments for Estate Planning Documents*, 32 *COLO. LAW.* 73, 73 (2003).

⁶⁶ Harry Hibschan, *Whimsies of Will-Makers*, 66 *U.S. L. REV.* 362, 362 (1932).

⁶⁷ See Frederic S. Schwartz, *Misconception of the Will as Linguistic Behavior and Misperception of the Testator’s Intention: The Class Gift Doctrine*, 86 *U. DET. MERCY L. REV.* 443, 448–49, 458 (2009) (explaining speech-act theory and the interpretation of class gifts).

⁶⁸ MILLARD, *supra* note 63, at 1.

⁶⁹ For a consideration of actual collaborative writing, see generally ANDREA LUNSFORD & LISA EDE, *SINGULAR TEXTS/PLURAL AUTHORS* (1992).

⁷⁰ In terms of ownership and safekeeping of the will, it may even be unethical for the drafting attorney to keep the client’s original will in the firm’s bank vault for safekeeping. Helen W. Gunnarsson, *Should You Store Your Client’s Will?*, 94 *ILL. B.J.* 532, 534 (2006); Gerald P. Johnston, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 *OHIO ST. L.J.* 57, 129–33 (1984).

⁷¹ “Even though the will is the testator’s document, signed by the testator as her own, most testators recognize little of their own voice in the document.” ELIZABETH FAJANS ET AL., *WRITING FOR LAW PRACTICE* 552 (2d ed. 2010).

⁷² See McArdle, *supra* note 34, at 503; Rideout, *supra* note 34, at 81.

professional voice is typically also used in wills and is illustrated in the humorous example above.⁷³ Nonetheless, it can be difficult to detect voice in legal documents because “[d]ocuments like contracts indeed seem voiceless, offering little sense of human agency behind them, especially when the language is boilerplate.”⁷⁴ With regard to the counseling component of estate planning, this professional voice seems so disconnected from the “human voice” that is critical to many practices, especially trusts and estates.⁷⁵

While the concept of persona at first glance seems strange, attorneys regularly assume personas in writing. This persona is assumed when a judicial clerk prepares a draft opinion or when an associate prepares a letter under the letterhead of a particular partner.⁷⁶ At its core, drafting is about “creating voices . . . [and establishing] the interrelationships among writer, audience, subject, and occasion.”⁷⁷ The draftsperson’s role has never been to simply transcribe the individual’s words. Rather, the draftsperson’s role has always been to translate the individual’s wishes into substantively accurate and operative language. To maximize that goal, the draftsperson’s role includes constructing an appropriate persona.

The need for the conscious construction of a persona can be illustrated by considering the following tongue-in-check example of what most laypersons would consider typical will language:

⁷³ Some draftspersons would feel similar to Kenneth Adams, who wrote that “[c]ontract prose is limited and highly stylized—it’s analogous to computer code. It serves no purpose other than to regulate the conduct of the contract parties, so any sort of writerly ‘voice’ would be out of place.” KENNETH A. ADAMS, *A MANUAL OF STYLE FOR CONTRACT DRAFTING*, at xxvii (2d ed. 2008).

⁷⁴ Rideout, *supra* note 34, at 73.

⁷⁵ Getman, *supra* note 54, at 582 (asserting the need to maintain a human voice in the law student assumption of a “professional voice”); *see also* Brandon J. Harrison, *The Lawyer as Professional Writer*, 62 ARK. L. REV. 725, 728 (2009) (regarding writing “lawyers necessarily need a voice that speaks with authority and trustworthiness”); Elizabeth Perry Hodges, *Writing in a Different Voice*, 66 TEX. L. REV. 629, 637 (1988) (“But lawyers, because they communicate with different audiences, need more than a fleeting acquaintance with the voices that make up not merely the law, but their nonlegal selves and their listeners as well.”).

⁷⁶ For a consideration of judicial opinion writing, see Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201 (1990). For an analysis of voice in the Justice Stevens’s dissent in *District of Columbia v. Heller*, 554 U.S. 570, 636–723 (2008) (Stevens, J., dissenting), see Rideout, *supra* note 34, at 101–05.

⁷⁷ DONA J. HICKEY, *DEVELOPING A WRITTEN VOICE* 26 (1993).

I hereby nominate, constitute, appoint, designate, establish, install and specify JOHN JONES as, and authorize, permit, empower and give and grant the right to the said JOHN JONES to be, the Executor of this my Last Will and Testament, and any Codicil or Codicils hereto, and without limiting the foregoing (by implication or otherwise), I hereby state that it is my intent that the said JOHN JONES be the Executor hereof and that he be permitted to act as such notwithstanding anything herein to the contrary, and I hereby direct that this paragraph shall be construed in all respects in such manner as to carry out such intent and that any provision in said paragraph that would in any respect, manner, way, or otherwise, cause the said JOHN JONES not to be such Executor shall be null, void, and of no consequence, ab initio.⁷⁸

Admittedly, this example pushes the ridiculousness of conventional will language, but it exemplifies much of what the individual testator sees when he or she reads a draft of his or her will. Neither the individual nor the individual's family and beneficiaries recognize the voice.⁷⁹ The absence of the person in the most personal of legal documents is problematic. Peter Elbow aptly describes the perils of writing with no voice:

Writing with no voice is dead, mechanical, faceless. It lacks any sound. Writing with no voice *may* be saying something true, important, or new; it may be logically organized; it may even be a work of genius. But it is as though the words came through some kind of mixer rather than being uttered by a person.⁸⁰

Given the nature of estate planning, voice is a critical component of drafting. A will is both part of and the culmination of a process termed "estate planning." An individual may negotiate the path of estate planning without an attorney.⁸¹

⁷⁸ Gordon A. MacLeod, "Being of Sound Mind and Memory?": *With Tongue in Cheek*, TR. & EST., Sept. 1981, at 23, 23. Gordon MacLeod returned to this topic in the following essays: Gordon A. MacLeod, "Being of Sound Mind and Memory"—*Revisited*, TR. & EST., Jan. 1983, at 29, and Gordon A. MacLeod, "Being of Sound Mind and Memory"—*Part III*, TR. & EST., Jan. 1984, at 43.

⁷⁹ Another legal document that is the client's document but is generally incomprehensible to the client is the ketubah. See Paul Finkelman, *A Bad Marriage: Jewish Divorce and the First Amendment*, 2 CARDOZO WOMEN'S L.J. 131, 148 (1995) ("It is a peculiar notion that a valid and binding contract is created when parties sign a ritualistic document, which they are incapable of either reading or understanding, and which no one reads to them or translates for them.").

⁸⁰ ELBOW, *supra* note 28, at 287–88.

⁸¹ For instance, there is no requirement that an attorney draft a will. Individuals may draft their own wills and often do so with the assistance of

However, assisting an individual in the articulation and implications of his or her wishes and the subsequent translation of those wishes into a text is typically done by an attorney when the attorney drafts the individual's will, supervises the execution of the will, and drafts any relating and supporting documents to complete an individual's estate plan.⁸² Therefore, where an individual does not seek the assistance of an attorney, a key figure is removed from the estate planning process: the attorney.⁸³ The role of the attorney draftsman is not simply to generate, in the words of Thomas Shaffer, "a sheaf of paper [the clients] will never read and a funeral ritual they won't understand."⁸⁴ Estate planning involves the management and disposition of assets, but it also involves traditions and values.⁸⁵

books, forms, computer programs, and the Internet. See, e.g., *Suze Orman's Will & Trust Kit*, <http://www.suzeorman.com/igsbase/igstemplate.cfm?SRC=MD002a&SRCN=catalogdetail&ProductID=20&StartRow=1&GnavID=10&SnavID=48&ThavID> (last visited Oct. 8, 2011) (priced at \$29.95, but advertised as a \$2,500 value). For an examination of will drafting software, see Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811 (2002); Marie A. Vida, Comment, *Legality of Will-Creating Software: Is the Sale of Computer Software To Assist in Drafting Will Documents Considered the Unauthorized Practice of Law?*, 41 SANTA CLARA L. REV. 231 (2000). For a review of a popular will drafting software, see Joey Frazier, *Do-It-Yourself Wills: Nolo Press Releases Its Newest Version of Willmaker*, 11 LAW. PC 8, 8 (1994) (observing that during the installation process, "the screen displays lawyer jokes—setting the tone for the vendors [sic] openly antagonistic philosophy about the legal profession").

⁸² For a compilation of clients' stories, including the unintended consequences of intestacy and uncritical use of forms, see generally BARNEY & COLLINS, *supra* note 64. For additional client stories, see BARRY M. FISH & LES KOTZER, *WHERE THERE'S AN INHERITANCE* . . . 12 (2009).

⁸³ For a discussion of the value transactional lawyers add to "deals," see Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 243 (1984).

⁸⁴ THOMAS L. SHAFFER, *DEATH, PROPERTY, AND LAWYERS* 3 (1970). But see Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 138 (2008) (asserting that "the mythical role of the attorney as an advisor and counselor to estate clients is eroded, questionable, uncertain, and to some degree, nonexistent").

⁸⁵ For an examination of the counseling role and the pressures on drafting attorneys, see *infra* notes 93–108 and accompanying text.

When asked, most estate planning clients are quick to confirm that they place a higher value on the preservation of family harmony than on the amount of worldly possessions they pass on to family members following their death. Yet, paradoxically, most estate planning attorneys historically seem to devote little more than a modicum of attention to this issue when counseling clients or drafting estate planning documents.

Timothy P. O'Sullivan, *Family Harmony: An All Too Frequent Casualty of the Estate Planning Process*, 8 MARQ. ELDER'S ADVISOR 253, 255–56 (2007).

It entails the drafting of documents that help the individual accept, recognize, and clarify his or her feelings about individuals, entities, property, and death itself.⁸⁶ “The estate planning process is the closest thing our society has to a rite of passage to the final stage of life.”⁸⁷ Ironically, the very benefit of estate planning may inhibit estate planning. With the move from farms to cities, decreasing infant mortality, and increasing life expectancies, death has become an increasingly remote consideration and has become an increasingly difficult topic to discuss.⁸⁸ “Death is still a fearful, frightening happening, and the fear of death is a universal fear”⁸⁹ The word “death” is practically a taboo word.⁹⁰ Individuals can be superstitious and

⁸⁶ “The testamentary experience is death-confronting, novel, and taboo-defying.” SHAFFER, *supra* note 84, at 72. Further, it is a “personal reconciliation to death.” *Id.* at 73; see also Steuart Henderson Britt, *The Significance of the Last Will and Testament*, 8 J. SOC. PSYCHOL. 347, 352–53 (1937) (studying testamentary dispositions to analyze testator psychology); Victoria J. Koch, *The Specter of Death*, A.B.A. J., Nov. 1998, at 82 (explaining how to handle bereaved clients).

⁸⁷ David Gage et al., *Holistic Estate Planning and Integrating Mediation in the Planning Process*, 39 REAL PROP. PROB. & TR. J. 509, 513 (2004); see also Thomas L. Shaffer, *The “Estate Planning” Counselor and Values Destroyed by Death*, 55 IOWA L. REV. 376, 377 (1969) (discussing the confrontation of one’s death implicit in the estate planning process).

⁸⁸ The difficult nature of conversations about death can also be seen in considerations of advance directives. See generally Werner Gruber, Note, *Life and Death on Your Terms: The Advance Directives Dilemma and What Should Be Done in the Wake of the Schiavo Case*, 15 ELDER L.J. 503 (2007).

⁸⁹ ELISABETH KÜBLER-ROSS, ON DEATH AND DYING 4 (1969) (describing the psychological stages of dying as (1) denial and isolation, (2) anger, (3) bargaining, (4) depression, and (5) acceptance). For a discussion of the planning opportunities and challenges each stage presents to the estate planner, see Georgia Akers, *On Death and Dying: Counseling the Terminally Ill Client and the Loved Ones Left Behind*, 1 EST. PLAN. & COMMUNITY PROP. L.J. 1, 5–9 (2008). “If a man has learned to think, no matter what he may think about, he is always thinking of his own death.” SHAFFER, *supra* note 84, at 109 (quoting Leo Tolstoy).

⁹⁰ For a consideration of the taboo nature of death, see KÜBLER-ROSS, *supra* note 89, at 6–8. Taboo words may actually drop out of use. See KATE BURRIDGE, BLOOMING ENGLISH 44 (2004). Moreover, even words that sound like taboo words may drop out of use. For example, the word “feck” is rarely used. See *id.* Since Victorian times, English has dropped the use of one-syllable words that beginning with the letter “f” and end with the letter “k.” See *id.* Perhaps because of the taboo nature of death, there is also a fascination of death, which can be seen in the number of television shows centering death, such as “Dead Like Me,” “Pushing Daisies,” “Six Feet Under,” and “True Blood.” “Gallows humor” or “grim humor” has always been popular. The slightly macabre fascination of cemeteries also exemplifies the fascination with death. For images of New England grave markers, see A Very Grave Matter, <http://www.gravematter.com> (last visited Oct. 8, 2011); see also Find A Grave, <http://www.findagrave.com> (last visited Oct. 8, 2011) (compiling photographs of the graves of historical figures).

reluctant to mention death, as if the mere contemplation of mortality will make death more imminent.⁹¹ The number of euphemisms for death, dead, dying, or die is practically limitless and underscores the taboo nature of the topic.⁹²

Because of the need to incorporate a client's voice to fulfill the goal of estate planning, counseling is a critical component of the process. Counseling⁹³ is critical in every client representation,⁹⁴ but it is especially important in the context of estate planning. Attorneys are required to possess "the legal

⁹¹ Astrachan, *supra* note 17, at 48 ("Superstition is an old and of course irrational friend to man. Some individuals hold as very precious unconscious fantasies of immortality which would be threatened by making a will."); see also HARRIS, *supra* note 6, at vii (attributing President Abraham Lincoln's failure to execute a will to a fear of the contemplation of death). President Zachary Taylor also died intestate. See MILLIE CONSIDINE & RUTH POOL, *WILLS: A DEAD GIVEAWAY* 100 (1974). Another individual who was reluctant to make her will was Myra Clark Gaines, a woman involved in the most contentious will litigation in U.S. history. See ELIZABETH URBAN ALEXANDER, *NOTORIOUS WOMAN* 1-2 (2001). Despite being a party in more than three hundred lawsuits throughout the nineteenth century, she was reluctant to make her own will. See *id.* at xi, 240. In fact, she made her will only four days before she died at the age of eighty. See *id.* at 3, 241. The Gaines litigation is also an example of the power of a compelling narrative because Myra's arguments were styled in the manner of the then-popular seduction novels and gothic novels. See *id.* at 145-49; see also James Etienne Viator, Book Review, *Notorious Woman: The Celebrated Case of Myra Clark Gaines* by Elizabeth Urban Alexander, 23 *LAW & HIST. REV.* 727, 727-28 (2005). For an examination of the rights of the dead, see Kirsten Rabe Smolensky, *Rights of the Dead*, 37 *HOFSTRA L. REV.* 763, 763-64 (2009). Increasing life expectancies are currently shaping language. For a style guide targeted for journalism, entertainment, and advertising, see INTERNAL LONGEVITY CTR.-U.S. & AGING SERVS. OF CAL., *MEDIA TAKES: ON AGING*, at tit. p. (Nicole S. Dahmen & Raluca Cozma eds., 2009) ("[A]ging is an active verb, a process, not a label . . ."). The style guide states, "[a]void euphemisms" because though "[i]t may seem like a minor issue of semantics, . . . every little bit contributes to the bigger effort to reverse America's bias against aging." *Id.* at 36.

⁹² There is even a website entitled "death slang" that lists over 1,000 euphemisms for death, dead, dying, or die. *Death and Dying Euphemisms*, BORED.COM, <http://www.bored.com/deathslang/> (last visited Oct. 8, 2011). These range from one of the most common "pass[ing] away;" to religious, such as go to the pearly gates; to contemporary, such as "reformatted." *Id.* In a field where the word "death" creates chills, using the word "execute" to refer to the valid creation, signing, and attesting of the documents seems ironic.

⁹³ See also G. NICHOLAS HERMAN & JEAN M. CARY, *A PRACTICAL APPROACH TO CLIENT INTERVIEWING, COUNSELING, AND DECISION-MAKING* § 1.01, at 1 (2009) (asserting that "the skills of interviewing and counseling constitute the heart of client representation"). See generally Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 *GOLDEN GATE U. L. REV.* 345 (1997) (exploring the impact of race on counseling). For a consideration of interviewing in the medical context, see JOHN L. COULEHAN & MARIAN R. BLOCK, *THE MEDICAL INTERVIEW* (5th ed. 2006).

⁹⁴ See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007).

knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁹⁵ Further, attorneys must “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁹⁶ In terms of advising a client, attorneys must “exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social[,] and political factors, that may be relevant to the client’s situation.”⁹⁷ To that end, attorneys should (1) discuss the client’s goals and objectives, (2) educate the client about the process, including the alternatives and implications of each choice, and (3) implement plans to further the client’s goals and objectives. When considering estate planning, “[t]he most important dimension in all of this is not litigation or taxes or even property distribution; it is counseling.”⁹⁸ The estate planning process entails the contemplation—really the confrontation—of mortality and assessment of life, both in terms of relationships forged and bonds broken or assets amassed or squandered. There are both emotional and financial aspects to the process.⁹⁹ In recognition of this emotional aspect, a recent article urged the training of estate

⁹⁵ *Id.*

⁹⁶ *Id.* R. 1.4(b).

⁹⁷ *Id.* R. 2.1; see also Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365 (2005) (discussing the obligation to counsel on non-legal matters and the boundaries of such counsel); Peter Margulies, “Who Are You To Tell Me That?": *Attorney-Client Deliberation Regarding Nonlegal Issues and the Interest of Nonclients*, 68 N.C. L. REV. 213 (1990) (proposing specific guidelines for nonlegal counseling and an affirmative duty to engage in such counsel).

⁹⁸ SHAFFER, *supra* note 84, at 12. For another consideration of the counseling function, see Mary Clements Pajak, *How To Avoid—or Resolve—Beneficiary Complaints: Tips for the Fiduciary*, PRAC. LAW., Mar. 2000, at 11.

⁹⁹ For a compilation of client stories that encompass topics ranging from unintended consequences of the use of will substitutes to the emotional fallout of bequests to children, see BARNEY & COLLINS, *supra* note 64.

planners in “mediation, pastoral care, [and] basic psychology.”¹⁰⁰ This sensitivity could help “slow the probate and fiduciary litigation explosion.”¹⁰¹

The counseling function is at the center of three professions: clergy, medicine, and law.¹⁰² The field of medicine is running ahead of the practice of law, as it has in a variety of situations, including educational reform and malpractice.¹⁰³ A response to the automation of the field of medicine, a return to patient centeredness that reinserts individual patient’s voice,¹⁰⁴ is the

¹⁰⁰ Avi Z. Kestenbaum & Rachel D. Mansdorf, *It's Personal*, TR. & EST., Apr. 2009, at 23, 23, 25 (recommending reading for attorneys “to familiarize themselves with some of the psychological issues involved in estate planning”). Two recommended books are Barbara Blouin and Katherine Gibson’s *The Legacy of Inherited Wealth*, and Judy Martel’s *The Dilemmas of Family Wealth*. See also Kenney F. Hegland, *Unpleasant Conversations: How Three Books by Doctors Can Help Lawyers*, 1 PHX. L. REV. 463 (2008) (reviewing JEROME GROOPMAN, *HOW DOCTORS THINK* (2007); PAULINE CHEN, *FINAL EXAM: A SURGEON’S REFLECTIONS ON MORTALITY* (2008); NICHOLAS A. CHRISTAKIS, *DEATH FORETOLD: PROPHECY AND PROGNOSIS IN MEDICAL CARE* (1999)).

¹⁰¹ Kestenbaum & Mansdorf, *supra* note 100, at 23; see Avi Z. Kestenbaum & Rachel D. Mansdorf, *True Counselors*, N.Y. L.J., Jan. 26, 2009, at 2 (asserting that “arguably, [counseling] is more critical than the complicated tax planning and asset protection advice and legal services that we provide to our clients”); see also Edward D. Re, *The Role of the Lawyer in Modern Society*, 30 S.D. L. REV. 501, 508 (1985) (addressing the role of counselor, the author asserts that “[l]awyers should assert with justifiable pride that they are also ministers of peace”).

¹⁰² See CHARLES R. FOSTER ET AL., EDUCATING CLERGY 18, 20 (2006); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS 101, 115, 174 (2007); see also Charity Scott, *Doctors as Advocates, Lawyers as Healers*, 29 HAMLIN J. PUB. L. & POLY 331 (2008) (considering similarities between the practices of doctors and lawyers). For an overview comparison of law school and medical school, see Jennifer S. Bard, *What We in Law Can Learn from Our Colleagues in Medicine About Teaching Students How To Practice Their Chosen Profession*, 36 J.L. MED. & ETHICS 841, 842–43 (2008). For an overview comparison of law school and seminaries, see Melissa Harrison, *Searching for Context: A Critique of Legal Education by Comparison to Theological Education*, 11 TEX. J. WOMEN & L. 245 (2002).

¹⁰³ Kestenbaum & Mansdorf, *supra* note 100, at 24 (“While everyone associates the phrase ‘bedside manner’ with the medical profession, it’s probably as important for the estate-planning attorney. In fact, the estate-planning lawyer probably needs greater finesse. Because it’s the estate planner, not an illness, forcing clients to contemplate their deaths. Worse, the lawyer is asking clients to address two unpleasant certainties at the same time: death and taxes.”). For a consideration of the role of empathy in both law and medicine, see Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the “Heart” of Lawyering*, 87 NEB. L. REV. 1, 15–29, 41–52 (2008).

¹⁰⁴ Doctors have been perceived as sometimes mechanical. For instance, a 1963 law review article regarding estate planning cautioned that the exploration of facts should be done “more subtly than our medical brethren do in extracting a case history from a patient.” Paul B. Sargent, *Drafting of Wills and Estate Planning*, 43 B.U. L. REV. 179, 194 (1963). This has been the focus of several movements in

growth of narrative medicine.¹⁰⁵ “[N]arrative medicine provides the means to understand the personal connections between patient and physician, the meaning of medical practice for the individual physician, physicians’ collective profession of their ideals, and medicine’s discourse with the society it serves.”¹⁰⁶ As described by an attorney in a manner that reinforces the connection of narrative medicine to client counseling in the legal context, “[i]t’s a way of teaching aspiring physicians how to pay attention to what their patients are saying, whether the message is direct or is offered obliquely through various narrative cues.”¹⁰⁷ In explaining the importance of narrative competence, that is the ability to listen to the stories of the clients, Dr. Charon warns that “[i]f the physician cannot perform these narrative tasks, the patient might not tell the whole story, might not ask the most frightening questions, and might not feel heard.”¹⁰⁸ The growth of narrative medicine and the return to bedside manner is akin to client counseling in the law, and relates to the topic of voice.¹⁰⁹ Each patient—as each client—wants an opportunity to be

medicine. In the Preface to her now infamous book, Dr. Kübler-Ross wrote that her book “is simply an account of a new and challenging opportunity to refocus on the patient as a human being, to include him [or her] in dialogues, to learn from him [or her] the strengths and weaknesses of our hospital management of the patient.” KÜBLER-ROSS, *supra* note 89, at 11.

¹⁰⁵ See Rita Charon, *Narrative Medicine: A Model for Empathy, Reflection, Profession, and Trust*, 286 JAMA 1897, 1897 (2001) [hereinafter *Model for Empathy*] (coining the phrase “narrative medicine” and also a guest lecturer in N.Y.U.’s Lawyering Program). Likewise, the use of narrative medicine may mitigate medical malpractice for “situations of unforeseen injury, or situations in which patients blame their doctors for inevitable disease.” Rita Charon, *Narrative Medicine: Healing the Divides*, in PRACTICING MEDICINE IN DIFFICULT TIMES 253, 260 (Marjorie O. Thomas et al. eds., 2009).

¹⁰⁶ *Model for Empathy*, *supra* note 105, at 1897–98; see also JOHN LAUNER, NARRATIVE-BASED PRIMARY CARE 15–32 (2002) (providing examples of “the narrative practitioner at work”).

¹⁰⁷ Steven Keeva, *What’s the Story*, A.B.A. J., Jan. 2004, at 88, 88.

¹⁰⁸ *Model for Empathy*, *supra* note 105, at 1899.

¹⁰⁹ For a description of the narrative medicine program at the College of Physicians and Surgeons, Columbia University, see *About the Program*, COLUMBIA UNIV., <http://ce.columbia.edu/Narrative-Medicine/About-the-Program> (last visited Oct. 8, 2011). Since the fall of 2009, the College has offered a Masters in Science in Narrative Medicine. See *Narrative Medicine Program*, COLUMBIA UNIV., <http://www.narrativemedicine.org/> (last visited Oct. 8, 2011). The connection between medicine and law can also be seen in ethical wills. One of the leading advocates of ethical wills, Dr. Barry Baines, is a doctor with experience in hospice care. See *About the Ethical Wills Website*, ETHICAL WILLS, <http://www.ethicalwill.com/aboutsite.html> (last visited Oct. 8, 2011) (official website created by Dr. Baines). For the consideration of ethical wills, see *infra* Part IV.A.2.

heard.¹¹⁰ Thus, the estate planner must internalize the client's voice to better tell the client's story to the relevant audience, such as a doctor sharing a diagnosis with a client's family. This story becomes the basis for the well-drafted will.

Similarly, estate planning may re-center on the counseling aspect because of geo-political changes,¹¹¹ the demographic shift,¹¹² and economic pressures.¹¹³ In the wake of national tragedy, political changes, and economic uncertainty, individuals gravitate toward estate planning. A recent poll conducted online by the American Bar Association ("ABA") Journal identified elder law as one of seven practice areas that is thriving in the current economy.¹¹⁴ The nature of estate planning is changing.¹¹⁵ One

¹¹⁰ Therefore, listening has been declared one habit of effective lawyers. Robert D. Rachlin, *Seven Habits of Effective Lawyers*, VT. B.J., Summer 2007, at 22, 22.

¹¹¹ In a book published shortly after the 9/11 terrorist attacks, one of the co-authors wrote that "I believe that now, even more than ever before, we in this country need to focus on what is really important to us. It is not the wealth we accumulate, but it is what we do with that wealth." BARNEY & COLLINS, *supra* note 64, at ix.

¹¹² "The highly educated baby-boomer generation is better acquainted with social and psychological dynamics than their parents." Gage et al., *supra* note 87, at 512. There are also an increased number of grandparents adopting grandchildren. See Gerry W. Beyer, *Avoiding the Estate Planning "Blue Screen of Death"—Common Non-Tax Errors and How To Prevent Them*, 1 EST. PLAN. & COMMUNITY PROP. L.J. 61, 85 (2008) [hereinafter *Blue Screen of Death*] (reminding the estate planner that grandparents adopting grandchildren may trigger pretermitted child statutes). For additional examinations of the changing family, see RALPH C. BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY* (2004); Kristine S. Knaplund, *Legal Issues of Maternity and Inheritance for the Biotech Child of the 21st Century*, 43 REAL PROP. TR. & EST. L.J. 393 (2008). The changing nature of family is reflected in the U.P.C. amendments addressing parentage. UNIF. PROBATE CODE §§ 2-114 to 2-122. For an analysis of these amendments, see Lee-ford Tritt, *Parent-Child Property Succession*, TR. & EST., Aug. 2009, at 14.

¹¹³ See, e.g., David Jacobson, *What Clients Want To Talk About Now*, TR. & EST., Apr. 2009, at 60, 60; see also Lee S. Hausner et al., *Final Loss Syndrome*, TR. & EST., June 2009, at 52, 52 (asserting that "sudden loss of wealth, status and stature" can translate into "thoughtful evaluations and discussions about our relationship to money and its meaning"). But economics could have another impact on the legal profession in general. For example, "[u]nder growing pressure from clients to do more with less, lawyers will use technology not only to streamline and automate existing processes but to invent new ones." Barbara Rose, *No Way Back: Don't Look Now, but a Technology Revolution Is Changing the Way Lawyers Work*, A.B.A. J., May 2009, at 64, 64 (referring to RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* (2008)); see also Robert F. Sharpe, Jr., *Partnering in Philanthropy*, TR. & EST., June 2009, at CGS3, CGS4-5 (addressing the changes in charitable giving); Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657 (1994).

¹¹⁴ Deborah L. Cohen & Julie Kay, *Where the Work Is: Lawyers Recommend These Practice Areas in Recessionary Times*, A.B.A. J., Aug. 2009, at 58, 59-61

practitioner summarizes the change as follows: "Because estate taxes are expected to disappear under current tax law, or at least be drastically reduced, the estate planning attorney should consider alternative needs of the client to create a market for his or her services."¹¹⁶ This may be an overstatement as taxes are unlikely to disappear.¹¹⁷ However, this statement does crystallize some of the concerns of both practitioners and clients about estate planning. When the author refers to a "market," this could be interpreted as the re-centering of estate planning on counseling rather than tax savings. Indeed, the abundance of non-probate devices that individuals may have underscores the need for thorough counseling by attorneys.¹¹⁸ Worried that tax planning overshadowed the core counseling function of estate planning, the former chairman of the ABA Section of Real Property, Probate and Trust Law wrote, "When it is established, after your counseling, what your client wants to accomplish, apart from tax considerations, then, and not until then, should tax planning be undertaken."¹¹⁹ The complexity and emphasis—whether conscious or not—on tax planning can minimize the testator's concerns for nonfinancial matters.¹²⁰ Such reasons have contributed to the interest in "[h]olistic [e]state

(listing (1) alternative dispute resolution, (2) prepaid legal services, (3) environmental and energy law, (4) consumer protection, (5) debt collection, (6) elder law, and (7) labor law).

¹¹⁵ See Douglas K. Freeman, *Guidelines for Developing and Expanding a Successful Estate Planning Practice*, 17 EST. PLAN. 8, 8–9 (1990) (discussing changes to the practice area of estate planning). Two authors suggest that estate planners draw from the area of marketing to educate individuals about the benefits of estate planning. See Michael R. McCunney & Alyssa A. DiRusso, *Marketing Wills*, 16 ELDER L.J. 33, 36–45 (2008) (providing a primer on marketing strategies); see also Stephan R. Leimberg, *Useful Suggestions for Building an Estate Planning Practice*, 25 EST. PLAN. 395, 395–96, 398 (1998) (suggesting the use of marketing strategies by estate planners).

¹¹⁶ Smith, *supra* note 65, at 80. For a consideration of the impact of decreasing assets on estate administration, see F. Ladson Boyle, *Market Crash Impacts Estates in Administration*, PROB. PRAC. RPTR., Feb. 2009, at 1, 1–6.

¹¹⁷ For a humorous look at the issue of repeal, see M.C. Mirow & Bruce A. McGovern, *An Obituary of the Federal Estate Tax*, 43 ARIZ. L. REV. 625 (2001).

¹¹⁸ See Schenkel, *supra* note 15, at 162 ("Estate planning is also increasingly being ceded to those who do not have the expertise or the incentive [such as bank employees, insurance salesmen, and stockbrokers] to properly advise the client.").

¹¹⁹ Joseph Trachtman, *Maxims for Estate Planners*, 1963 U. ILL. L.F. 123, 125.

¹²⁰ "Estate planning concerns death and taxes . . . [b]ut estate planning is primarily about a larger subject, and that is people." JEROME A. MANNING, *ESTATE PLANNING* xi (1992).

[p]lanning.”¹²¹ For wills may be “[m]ade in contemplation of death, they reflect life.”¹²² The will is the most personal document¹²³ because “wills are . . . more than mere legal documents by which the makers give away their property. They are human documents in which men [and women] give away themselves.”¹²⁴ As a result, the mechanized process of estate planning should not result in a mechanized, homogenous product. Incorporating voice into a will can add to the text’s meaning and convey something more about the author.¹²⁵ After all, “[w]ills reflect, as a mirror, the customs and habits of the times when written, as well as the characters of the writers.”¹²⁶

Therefore, even if the terms “voice” and “persona” are somewhat confusing, the terms have resonance in the examination of wills. A will, unlike most other legal documents, is a representation of the individual “speaking.” In some respects, the draftsperson is actually in the role of “Speaker for the Dead” and must navigate a path that portrays the individual while being substantively operative and accurate.¹²⁷

C. Pitfalls

The language used in wills presents challenges to the attorney draftsperson. As one author of a humorous book entitled *Party of the First Part: The Curious World of Legalese* wrote, “It is an article of faith among lawyers who write wills that rigid adherence to words and phrases that have survived for

¹²¹ See, e.g., Gage et al., *supra* note 87; Street, *supra* note 62, at 142–45.

¹²² Hibschan, *supra* note 66, at 369.

¹²³ See, e.g., Lynn B. Squires & Robert S. Mucklestone, *A Simple “Simple” Will*, 57 WASH. L. REV. 461, 461 (1982) (“A will is a highly personal document. Not only should the testator understand it, but he or she should also be able to explain its contents to others, especially family members who may be affected by it.”). “Man’s nature, his prejudice, his interests, his eccentricities and the full range of his virtues and vices, can be found in the pages of wills.” MENCHIN, *supra* note 12, at 20.

¹²⁴ Hibschan, *supra* note 66.

¹²⁵ For examples of judicial opinions reflecting memorable judicial personalities, see generally Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193 (2002).

¹²⁶ HARRIS, *supra* note 6, at viii. For a discussion of “testamentary obsolescence,” see generally Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609 (2009).

¹²⁷ ORSON SCOTT CARD, *SPEAKER FOR THE DEAD* (1991).

centuries will lead to less ambiguity and therefore fewer will contests.”¹²⁸ Furthermore, the thinking of some lawyers can be stated as follows:

Lawyers seldom welcome innovations in document design and language for understandable reasons. Law is complicated. No one knows more than a fraction of the legal principles he might someday need, and practitioners rarely have the time for academic meditation. In the turmoil that surrounds most transactions, lawyers are reluctant to dispense with standard phraseology no matter how obscure. Incomprehensible matters are simply assumed to be important. Anyone who questions a provision may be told, in all sincerity, that the provision and its language are time- or court-tested. The process of drafting a legal document does not encourage tinkering.¹²⁹

Thus, draftspersons may be reluctant to modify language that has the perception of withstanding the test of time.

To a certain extent, attorney draftspersons are justified in their cautious approach to language in wills. The choice of language must be substantively operative and accurate.¹³⁰ One seemingly innocuous word change can alter the meaning of a bequest and can trigger a series of unintended consequences.¹³¹ Part of the cautiousness of language use can be traced to the audiences of wills. All legal documents have a variety of audiences that can be categorized as primary audience, secondary audiences, and unexpected audiences.¹³² Some

¹²⁸ ADAM FREEDMAN, *THE PARTY OF THE FIRST PART* 148 (2007).

¹²⁹ HOWARD DARMSTADTER, *HEREOF, THEREOF, AND EVERYWHEREOF* xi (2d ed. 2008).

¹³⁰ For example, an examination of the drafting issues relating to lapse, class gifts, and survivorship, see generally John L. Garvey, *Drafting Wills and Trusts: Anticipating the Birth and Death of Possible Beneficiaries*, 71 OR. L. REV. 47 (1992).

¹³¹ See, e.g., S. Alan Medlin, *Even a Single Word Can Affect the Construction of a Trust*, PROB. PRAC. RPRT., June 2008, at 1, 1 (stating that “it is difficult[,] if not impossible[,] to draft a perfectly clear document”).

¹³² For example, for an appellate brief, the primary audience is the court, consisting of the rule and the law clerks. See, e.g., LINDA H. EDWARDS, *LEGAL WRITING* 253–59 (5th ed. 2010). Secondary audiences are opposing counsel and the client. An unexpected audience of appellate briefs would be law students who are able to view an electronic copy of the filed brief through such sources as Westlaw. The audiences could also be described as addressees, auditors, overhearers, and eavesdroppers. See Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1134 (2003) (describing Allan Bell’s terminology regarding audience design). The identification of these audiences assists the reader as he or she makes choices. For the most part, the audiences are not conflicting. For a further consideration of audience, see generally Jessica E. Price, *Imagining the*

draftspersons consider the testator the primary audience of the will.¹³³ While the will is to a large extent the testator's document, the will is not drafted solely for the individual testator.¹³⁴ After the testator's death, others audiences routinely read and use the will, such as family members, beneficiaries, other attorneys—both friendly and adverse—executors, trustees, financial institutions, accountants, courts—probate and appellate—court clerks, and possibly members of the public when the probated will becomes public record.¹³⁵ “[K]nowing your audience is the first step to good legal drafting.”¹³⁶ It can be difficult, however, to draft for multiple audiences. Thus, drafting a will means considering multiple audiences, who are approaching the text from different perspectives and at different times. Moreover, most of the audiences are hostile, either because of emotional, financial, or legal implications of the text.¹³⁷ Given the hostile audiences, whether they be unhappy heirs or skeptical courts, it is “[n]o wonder lawyers are so willing to repeat themselves, to plug small holes that might not even exist, to pile on much more information than the [document] requires.”¹³⁸ This results in layered text that attempts to address almost countless incarnations and permutations.¹³⁹

Law-Trained Reader: The Faulty Description of the Audience in Legal Writing Textbooks, 16 WIDENER L.J. 983 (2007).

¹³³ “The primary audience for the documents that we trusts and estates lawyers write is not made up of lawyers. It consists of our clients, their beneficiaries, and the fiduciaries they designate to carry out their directions—most of whom are not lawyers.” MILLARD, *supra* note 63.

¹³⁴ “A will has a succession of audiences.” ELIZABETH FAJANS ET AL., *supra* note 71, at 552 (2d ed. 2010); *see also* SUSAN L. BRODY ET AL., LEGAL DRAFTING 137–39 (1994) (outlining tips to “understand the audiences” of wills).

¹³⁵ Most, if not all, documents have multiple audiences. *See supra* note 132. The identification of these audiences assists the reader as he or she makes choices. For the most part, the audiences are not conflicting.

¹³⁶ DARMSTADTER, *supra* note 129, at xv.

¹³⁷ In the context of contract drafting, one author termed the hostile audience as “potential ‘bad faith readers’ trying to find fault with the document.” M.H. Sam Jacobson, *A Checklist for Drafting Good Contracts*, 5 J. ASS'N LEGAL WRITING DIRECTORS 79, 86 (2008).

¹³⁸ George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 340 (1987).

¹³⁹ Even the author can respond to text differently at different periods of time. In the Preface to the 1959 edition of *Brideshead Revisited*, Evelyn Waugh noted that the period in which the book was written “was a bleak period of present privation and threatening disaster—the period of soya beans and Basic English—and in consequence the book is infused with a kind of gluttony, for food and wine, for the splendours of the recent past, and for rhetorical and ornamental language,

The nature of language also creates problems. Some sentiments may be difficult to express because language is imperfect. Even without an unhappy heir, the language can create problems of interpretation and construction.¹⁴⁰ “[W]ords *always* need interpretation”¹⁴¹ As one scholar wrote,

The law of wills seems to set itself an impossible task. It is premised on the importance of effectuating a person’s wishes as to the disposition of his or her property after death. . . . To ascertain the intent of persons who can no longer communicate with us directly, we must attempt, on some level, to know them, to enter into their personal experiences and the thoughts and feelings resulting from such experiences.¹⁴²

The heavy reliance on “time-tested” language is often misplaced. As one scholar of legal language wrote:

To those accustomed to the cadence of law language, the archaic words mean law and its precision. The fact that they are archaic is a recommendation, as it once was with French and Latin in the law. The deader the better; that means they can’t move around. “Archaic” is taken as another way of saying that

which now with a full stomach I find distasteful.” EVELYN WAGH, *BRIDESHEAD REVISITED 1* (Everyman’s Library 1993) (1945).

¹⁴⁰ See generally Jane B. Baron, *Intention, Interpretation, and Stories*, 42 *DUKE L.J.* 630 (1992); Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready To Listen? The Erosion of the Plain Meaning Rule*, 35 *REAL PROP. PROB. & TR. J.* 811 (2001); Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 *SAN DIEGO L. REV.* 533 (2005); Jeffrey Daniel Haskell, *When Axioms Collide*, 15 *CARDOZO L. REV.* 817 (1993); Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 *CASE W. RES. L. REV.* 65 (2005).

¹⁴¹ JOHN HENRY WIGMORE, 3 *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2470, at 3499 (Chadbourn Revision 1981) (1905) (emphasis added). For a further examination of interpretation in wills, see generally Edward C. Halbach, Jr., *Stare Decisis and Rules of Construction in Wills and Trusts*, 52 *CAL. L. REV.* 921 (1964); Richard W. Power, *Wills: A Primer on Interpretation and Construction*, 51 *IOWA L. REV.* 75 (1965); Daniel M. Schuyler, *The Art of Interpretation in Future Interest Cases*, 17 *VAND. L. REV.* 1407 (1964); Storrow, *supra* note 140.

¹⁴² Jane B. Baron, *Empathy, Subjectivity, and Testamentary Capacity*, 24 *SAN DIEGO L. REV.* 1043, 1043 (1987). As one scholar wrote, “[t]oo many drafting errors are purely semantic in that the language may not be too clear or it may be merely incomplete or perhaps otherwise ambiguous, thus failing to state its intent effectively.” Henry M. Grether, *The Little Horribles of a Scrivener*, 39 *NEB. L. REV.* 296, 305–06 (1960).

these words haven't changed since Coke, and anything that old must be good. Not so. Many words that old have simply been bad longer.¹⁴³

After all, the touchstone of the law of wills is the testator's intent, the individual testator's intent. The Uniform Probate Code proclaims that one of its purposes is "to discover and make effective the intent of a decedent in distribution of his [or her] property."¹⁴⁴ As one former Justice of the Mississippi Supreme Court wrote, "Yet, the search for intent is destined to fall short in the end, for it is ill-conceived and [naïve]."¹⁴⁵ In part, the search of intent is troublesome because the reader cannot engage the testator in a conversation when the will is read after the testator's death.¹⁴⁶ Because each jurisdiction has slightly different approaches and there are a plethora of possible situations, it is difficult to present a complete, accurate set of interpretative guidelines.¹⁴⁷ To this point, some may assert that this underscores the value of forms and stock language. However, the sameness of the language would thereby promote administrative efficiency, which may lull the unsuspecting draftsman into overvaluing stock language.

The hue and cry has frequently been raised for simplicity in legal documents. Evidently many have interpreted this request for simplicity as synonymous with a request for brevity.

¹⁴³ MELLINKOFF, *supra* note 58, at 304 (citation omitted).

¹⁴⁴ UNIF. PROBATE CODE § 1-102(b)(2) (amended 2008).

¹⁴⁵ James L. Robertson, *Myth and Reality—Or, Is It "Perception and Taste"?—In the Reading of Donative Documents*, 61 FORDHAM L. REV. 1045, 1053–54 (1993) (advocating the use of a "circumstanced external approach" to the interpretation of wills). See generally Baron, *supra* note 140; Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611 (1988); Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453 (2002).

¹⁴⁶ Pre-mortem probate, also called ante-mortem probate or living probate, would permit a conversation between the testator and the court. For an examination of pre-mortem probate, see generally Gerry W. Beyer, *Pre-Mortem Probate*, PROB. & PROP., July–Aug. 1993, at 6; John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63 (1978); Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990). However, pre-mortem probate is rarely used. See generally Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066 (1980).

¹⁴⁷ Generally, however, "courts refuse to use extrinsic evidence of a testator's intent so long as the will document, by itself, yields some clues—through its language, structure, or general theme—about the author's wishes regarding his property." Scott T. Jarboe, *Interpreting a Testator's Intent from the Language of Her Will: A Descriptive Linguistics Approach*, 80 WASH. U. L.Q. 1365, 1376 (2002).

Frequently, however, property dispositions cannot be made short and simple without inviting litigation and trouble. Real simplicity always comes through completeness of statement.¹⁴⁸

After all, “[e]ven the familiar, legal-sounding ‘per stirpes’ means different things in different jurisdictions.”¹⁴⁹ So, modifications of stock or form language will not necessarily result in an increased need for construction and interpretation.¹⁵⁰

The rise of malpractice cases has permeated into the consciousness of draftspersons. Because the reaches of liability are not yet fully defined, the specter of malpractice hovers over many attorneys, especially when a change of practice is suggested.¹⁵¹ The privity requirement—meaning that the

¹⁴⁸ A. James Casner, *Construction of Gifts to “Heirs” and the Like*, 53 HARV. L. REV. 207, 250 (1939); see also Grether, *supra* note 142, at 296 (“The first type of common error is extreme brevity which fails for lack of completeness in successfully stating the intentions of the testator.”).

¹⁴⁹ ROGER W. ANDERSEN & KAREN E. BOXX, *SKILLS & VALUES: TRUSTS AND ESTATES* 13 (2009); see also Grether, *supra* note 142, at 310 (“Oftentimes the most frequently used expressions become unclear.”).

¹⁵⁰ In terms of altering language, there is also the notion that, given the expense of legal fees, clients want to see what they perceive to be “bang for their buck.” Gopen, *supra* note 138, at 344–45 (“I have often heard [attorneys] express the fear that if their prose were to lose its arcane, ponderous, and technical qualities, their clients would be likely to protest the stunningly high costs incurred. . . . Clients who pay such prices, the argument runs, want to see their received value in terms of the degree of difficulty of the product.”); see also MARY BARNARD RAY & BARBARA J. COX, *BEYOND THE BASICS* 380 (2d ed. 2003) (“Some attorneys feel that clients want or need ornate language to believe the will is official.”); Wayne Schiess, *The Art of Consumer Drafting*, 11 SCRIBES J. LEGAL WRITING 1, 15–16 (2007). *But see* BRODY ET AL., *supra* note 134, at 138 (“Overblown language may give clients the impression that the lawyer is trying to inflate the value of legal counsel in estate planning. This is particularly true as clients become more educated and less willing to blindly trust a lawyer.”). In some cases, however, a client, for those reasons described above, may want the attorney to muffle the individual’s voice.

¹⁵¹ For an examination of malpractice issues, see Stephanie B. Casteel et al., *The Modern Estate Planning Lawyer: Avoiding the Maelstrom of Malpractice Claims*, PROB. & PROP., Nov.–Dec. 2008, at 46, 48 (noting that the litigation “trend is expected to continue, especially in light of the wealth that is currently being transferred and will increasingly continue to be transferred from the baby boom generation to successive generations”). See generally Martin D. Begleiter, *Attorney Malpractice in Estate Planning—You’ve Got to Know When To Hold up, Know When To Fold up*, 38 U. KAN. L. REV. 193 (1990); Martin D. Begleiter, *First Let’s Sue All the Lawyers—What Will We Get: Damages for Estate Planning Malpractice*, 51 HASTINGS L.J. 325 (2000); Martin D. Begleiter, *The Gambler Breaks Even: Legal Malpractice in Complicated Estate Planning Cases*, 20 GA. ST. U. L. REV. 277 (2003); Joseph W. deFuria, Jr., *Mistakes in Wills Resulting from Scriveners’ Errors: The Argument for Reformation*, 40 CATH. U. L. REV. 1 (1990); Bradley E.S. Fogel, *Attorney v. Client—Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261 (2001);

drafting attorney owes no duty to intended beneficiaries because of lack of privity—translated into a bar of malpractice actions. Most jurisdictions have removed the privity bar because the requirement of privity prevented intended beneficiaries from instituting claims relating to errors of the draftspersons that undermined the the testator's wishes.¹⁵² For example, the Georgia Court of Appeals in *Young v. Williams* permitted an intended beneficiary to institute a malpractice claim, even where the testator failed to read the will and notice the glaring absence of a residuary clause.¹⁵³ While this relaxation of privity is intended to assist the beneficiaries, it may also allow the beneficiary to transfer his or her frustrations from the disposition of the property to the draftsperson, thereby increasing litigation.¹⁵⁴ For instance, the Texas Supreme Court, while maintaining the privity requirement stated that “[t]his will ensure that attorneys may in all cases zealously represent their

David A. Hyman, *What Lessons Should We Learn from the First Malpractice Crisis of the Twenty-First Century?*, 1 DREXEL L. REV. 261 (2009); Angela M. Vallario, *Shape Up or Ship Out: Accountability to Third Parties for Patent Ambiguities in Testamentary Documents*, 26 WHITTIER L. REV. 59 (2004); Michael H. Wald, *Of Malpractice, Ethics, and the “Simple” Will*, 63 TEX. B.J. 534 (2000); Bradley E.S. Fogel, *Estate Planning Malpractice: Special Issues in Need of Special Care*, PROB. & PROP., July–Aug. 2003, at 20. “A client’s trust is probably the best insurance against a malpractice suit, as long as the attorney is not incompetent.” Smith, *supra* note 65, at 80. *But see* S. Alan Medlin, *No Attorney Duty of Care for Failure To Execute Will*, PROB. PRAC. RPTR., May 2009, at 1.

¹⁵² The first jurisdiction to remove the privity bar was California, which did so in 1961. *Lucas v. Hamm*, 364 P.2d 685, 688 (Cal. 1961). At last count, nine jurisdictions have maintained the privity bar. The states are Alabama, Arkansas, Maine, Maryland, Nebraska, New York, Ohio, Texas, and Virginia. Martin L. Fried, *The Disappointed Heir: Going Beyond the Probate Process To Remedy Wrongdoing or Rectify Mistake*, 39 REAL PROP. PROB. & TR. J. 357, 384 (2004). However, some of these jurisdictions have exceptions for the applicability of the privity bar, such as tortuous or fraudulent situations. For a recent case recognizing the validity of the privity defense, see *Estate of Schneider v. Finmann*, 15 N.Y.3d 306, 309, 933 N.E.2d 718, 720–21, 907 N.Y.S.2d 119, 121–22 (2010).

¹⁵³ See *Young v. Williams*, 645 S.E.2d 624, 626 (Ga. Ct. App. 2007). The Indiana Supreme Court recently held that the reformation did not preclude the awarding of damages for malpractice. See *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*, 895 N.E.2d 1191, 1201 (Ind. 2008).

¹⁵⁴ “Anger is frequently associated with grief. Anger resulting from the loss of a family member may also be redirected against other family members regarding elements of the estate or trust administration process deemed to be improper or inequitable.” O’Sullivan, *supra* note 85, at 261 n.13. The anger could also be redirected to the drafting attorney. See, e.g., Sharon B. Gardner, *Project Runaway—One Day You’re in as the Attorney and the Next Day You’re out!*, 1 EST. PLAN. & COMMUNITY PROP. L.J. 111, 112 (2008) (“Disenchanted and disappointed beneficiaries now find it easier to bring claims for professional malpractice.”).

clients without the threat of suit from third parties compromising that representation.”¹⁵⁵ Despite the increased attention to malpractice in the area of estate planning, it is not a concern unique to the twenty-first century.¹⁵⁶ But issues of malpractice have made draftspersons increasingly conscious of potential liability.

Additionally, a draftsperson may worry that the incorporation of voice may fan the flames of a will contest. For

[t]he attorney must always be on guard when drafting instruments that may supply incentive for someone to contest a will The prudent attorney must recognize situations that are likely to inspire a will contest and take steps to reduce the probability of a will contest and the chances of its success.¹⁵⁷

In some situations, the injection of the individual’s voice may create grounds for litigation. A case enshrined in casebooks,¹⁵⁸ *In re Kaufmann’s Will*,¹⁵⁹ illustrates how an individual’s voice may be used against him or her. There, the testator wrote a side letter to his family that read, in part,

Walter[—the individual alleged to have exercised undue influence on the testator—]gave me the courage to start something which slowly but eventually permitted me to supply for myself everything my life had heretofore lacked: an outlet for my long-latent but strong creative ability in painting . . . a balanced, healthy sex life which before had been spotty, furtive

¹⁵⁵ *Barcelo v. Elliott*, 923 S.W.2d 575, 578–79 (Tex. 1996). For an examination of privity in the state of Texas, see *Blue Screen of Death*, *supra* note 112.

¹⁵⁶ For discussion of attorney malpractice in the late 1970s, see Jesse Dukeminier, *Cleansing the Stables of Property: A River Found at Last*, 65 IOWA L. REV. 151, 152 (1979) (“Self-interest is a powerful monitor to duty.”); Neil J. Rubenstein, *Attorney Malpractice in California: The Liability of a Lawyer Who Drafts an Imprecise Contract or Will*, 24 UCLA L. REV. 422, 422–23 (1976) (“As the courts become increasingly sympathetic to plaintiffs in attorney malpractice actions, however, and as clients, spurred at least in part by this new attitude, become more willing to sue their attorneys.”). See generally Luther J. Avery, *Significant Current Trends Affecting Malpractice Liability of Lawyers in the Fields of Real Property, Probate and Trust Law*, 13 REAL PROP. PROB. & TR. J. 574 (1978). Malpractice was also raised as a concern in the 1980s. See generally Gerald P. Johnston, *Legal Malpractice in Estate Planning and General Practice*, 17 MEM. ST. U. L. REV. 521 (1987).

¹⁵⁷ *Blue Screen of Death*, *supra* note 112, at 81.

¹⁵⁸ For example, this case appears in both the following widely used casebooks: JOEL C. DOBRIS ET AL., *ESTATES AND TRUSTS* 473–81 (3d ed. 2007); JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 191–93 (8th ed. 2009).

¹⁵⁹ 20 A.D.2d 464, 247 N.Y.S.2d 664 (1st Dep’t 1964), *aff’d*, 15 N.Y.2d 825, 205 N.E.2d 864, 257 N.Y.S.2d 941 (1965).

and destructive; an ability to reorientate myself to actual life and to face it calmly and realistically. All of this adds up to Peace of Mind—and what a delight, what a relief after so many wasted, dark, groping, fumbling immature years to be reborn and become adult!

I am eternally grateful to my dearest friend-best pal, Walter A. Weiss. What could be more wonderful than a fruitful, contented life and who more deserving of gratitude now, in the form of an inheritance, than the person who helped most in securing that life? I cannot believe my family could be anything else but glad and happy for my own comfortable self-determination and contentment and equally grateful to the friend who made it possible.¹⁶⁰

Ultimately, the testator's own words, signed "love to you all," proved the opposite from what the text of the letter stated. Referring to the letter, the court wrote, "[t]he . . . letter is not based on reality."¹⁶¹ The court continued to dissect the language of the letter, highlighting misstatements, such as the testator's previous art training.¹⁶² The court continued by writing, "Assuming, however, the content of the letter, it completely fails to explain the extent of the testamentary gift to Weiss tantamount to over a half million dollars."¹⁶³ While the result of *In re Kaufmann's Will* is unlikely today because of developed views of society, this case continues to reflect a real concern that the testator's words may be used against him or her.

While considering the audiences is critical, the drafts person should not lose sight of his or her primary goal, which is to translate the testator's wishes into a document that "speaks" for the individual testator. Drafting a document that speaks for the individual does not mean that the role of the drafts person is reduced to taking mere dictation. From the perspective of the clients, "[c]lients . . . are not looking merely for scribes; they want relationships with their lawyers."¹⁶⁴ This relationship includes the articulation and implementation of the individual's

¹⁶⁰ 20 A.D.2d at 470, 247 N.Y.S.2d at 671 (internal quotation marks omitted).

¹⁶¹ 20 A.D.2d at 471, 247 N.Y.S.2d at 672.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Steven Keeva, *A Legacy of Values*, A.B.A. J., Oct. 2005, at 88, 88 (paraphrasing Ira Wiesner).

goals while assisting the testator is recognizing the limits and consequences of his or her estate plan. For example, while the testator enjoys testamentary freedom, this freedom has limits.¹⁶⁵ Testamentary freedom bends to public policy, such as protecting certain family members, reducing waste, and applying the slayer rule.¹⁶⁶ The consequences not only include financial legacy but also emotional legacy.¹⁶⁷ Not every will requires the conscious use of voice and persona, but there are strategies, discussed below, that would not raise these particular concerns.

As a result of these challenges and because of “the nature of the substantive material with the complexity of the concepts, the hostility of the audience, and the time pressures of production,”¹⁶⁸ it is common practice to rely on forms.¹⁶⁹ Computers have been a wonderful development to encourage

¹⁶⁵ See generally Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273. See also Nicole M. Reina, Note, *Protecting Testamentary Freedom in the United States by Introducing into Law the Concept of the French Notaire*, 22 N.Y.L. SCH. J. INT'L & COMP. L. 427, 444 (2003) (proposing use of the notaire to strengthen the force of a will and minimize contests). For a historical consideration of testamentary freedom, see Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959 (2006).

¹⁶⁶ See Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996) (asserting that courts manipulate testamentary freedom to enforce societal norms that shelter certain family members). See generally LAWRENCE M. FRIEDMAN, *DEAD HANDS* (2009); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275 (1999); Abigail J. Sykas, *Waste Not, Want Not: Can the Public Policy Doctrine Prohibit the Destruction of Property by Testamentary Direction?*, 25 VT. L. REV. 911 (2001).

¹⁶⁷ As one author wrote, “Can we not judge a man by his will? Does not such an instrument reflect his character, his nature, and his eccentricities?” HARRIS, *supra* note 6, at xi.

¹⁶⁸ Gopen, *supra* note 138, at 342. Computer programs have “brought the cost of estate planning down, making it affordable to a broader spectrum of the population.” Beyer & Hargrove, *supra* note 2, at 886.

¹⁶⁹ “Legal professionals seldom draft [transactional] documents ‘from scratch.’ Generally, they rely on forms or models that have proven useful in other instances.” DEBORAH E. BOUCHOUX, *ASPEN HANDBOOK FOR LEGAL WRITERS* 193 (2d ed. 2009). “Lawyers often use forms prepared by themselves or other lawyers in practice; it is a way to save time and save the client money.” ANDERSEN & BOXX, *supra* note 149, at 1. The extensive use forms, whether attorney-formulated forms or commercial form books, can be attributable to “convenience, caution, and inertia.” Gopen, *supra* note 138, at 337.

efficient drafting.¹⁷⁰ Before the advent of word processors, there could be said to have even been less voice in wills. For example, older forms routinely used the word “spouse,” rather than “husband” or “wife” as was appropriate.¹⁷¹ Now, draftspersons continue to start with their own form file, but the computers aid in the cutting, pasting, and global searches to help cobble together new documents.¹⁷² While the computer—especially document assembly programs¹⁷³—brings tempting efficiency in terms of both time and money,¹⁷⁴ it does create the temptation for uncritical replicating of documents.¹⁷⁵

¹⁷⁰ “Virtually all wills produced by attorneys are created on a computer today.” Beyer & Hargrove, *supra* note 2, at 886; see also David Beckman & David Hirsch, *The Expense of the New: Why Is Technology Costly? Because It's Worth It*, A.B.A. J., Aug. 2004, at 56. For a book advocating the use of computers before the current digital revolution, see HENRY H. PERRITT, JR., *HOW TO PRACTICE LAW WITH COMPUTERS* 7 (2d ed. 1998) (“Automation of the writing activity is now the most pervasive form of law office computerization.”).

¹⁷¹ MILLARD, *supra* note 63, at 40. One author articulated a humorous justification of the use of the word “spouse” in estate planning documents, rather than “husband” and “wife” as appropriate for that individual.

I patiently explained to my friend and his wife the reasons why the attorney probably used [“my said spouse”].

1. At the time of his death my friend may be a bigamist; “said” makes clear which wife he means.
2. He may have been secretly married before and obtained a divorce of doubtful validity; “said” helps show his intent to favor the present mate.
3. “Spouse” is a broader term than “wife” and would be more appropriate should it develop later that his “wife” is actually a transvestite or hermaphrodite.

MacLeod, *supra* note 78, at 24 (emphasis omitted).

¹⁷² Many drafted documents “are constructed from a form file at high speed, with an emphasis on standardization and low cost.” DARMSTADTER, *supra* note 129, at 207. As another author observed:

Document drafting is a time-consuming and expensive practice. In order to decrease the amount of time spend drafting documents, attorneys utilize forms that contain the boilerplate associated with each document. Unfortunately, the attorney’s secretary still must retype each document. Using a document assembly system[,] . . . attorneys can generate documents without retyping anything except client-specific data[,] such as name, address.

PERRITT, *supra* note 170, at 1043.

¹⁷³ For a description of the workings of a document assembly system, see PERRITT, *supra* note 170, at 463–509; see also Darryl R. Mountain, *Disrupting Conventional Law Firm Business Models Using Document Assembly*, 15 INT’L J.L. & INFO. TECH. 170 (2007).

¹⁷⁴ The use of word processors may be responsible for a decline in the drafting and executing of codicils. See *Blue Screen of Death*, *supra* note 112, at 85–86 (urging drafting attorneys that “[u]nless special circumstances exist, an attorney should avoid the use of codicils because codicils increase the chance of external integration problems.”). With the aid of the computer, if the testator wishes to update his or her

Forms are valuable in the drafting of any legal document. Forms, in one fashion or another, have been used for decades. Indeed, there were even forms used in medieval times to assist in the writing of letters.¹⁷⁶ To a certain extent, most jurisdictions endorse the use of fill-in-the-blank forms such as advance directives and financial powers of attorney.¹⁷⁷ A few jurisdictions have even endorsed a fill-in-the-blank form for wills.¹⁷⁸ Yet, forms can themselves present challenges to the draftsman. As Joseph Trachtman wrote,

As in all writing, you must first have something to say. That something is not acquired by stringing together paragraphs plucked from a form book, because the language sounds good. As “something to go by” forms are indispensable. But forms should never be substitutes for thinking. They are only stimuli for thought.¹⁷⁹

Forms must be used by an attorney as a base, rather than a crutch. Just like generic stationer’s forms should be used with caution, an attorney should be careful not to overuse attorney drafted forms, take care that poor choices do not become calcified because of their persistent appearance in forms. The simple fact is that while clients share certain concerns, each client is unique.¹⁸⁰ As one author wrote, “Those who look for simple formulas or wider generalization end up in trouble, for each

will, and he or she returns to the same attorney, the drafting attorney can readily access and update a copy of the will, so long as the draftsman also checks for changes in the law that may implicate the effectiveness of the document.

¹⁷⁶ ADAMS, *supra* note 73, at xxix–xi (describing the benefits and pitfalls to automation in the world of contract drafting); *see also* Stephen Mecca, *Law Office Automation: A View into the Future*, R.I. B.J., Dec. 1996, at 5.

¹⁷⁷ *See* LUNSFORD & EDE, *supra* note 69, at 77 (referencing *Rhetoric in the Middle Ages* by James J. Murphy and *The Friar as Critic: Literary Attitudes in the Later Middle Ages* by Judson Boyce Allen); *see also* BOWDEN, *supra* note 25, at 28–29 (1999) (referencing medieval form books).

¹⁷⁸ *See* GA. CODE ANN. § 31-32-4 (2010) (form for Advance Directive for Health Care); N.Y. GEN. OBLIG. LAW § 5-1501 (McKinney 2011) (for general power of attorney).

¹⁷⁹ *See, e.g.*, ME. REV. STAT. ANN. tit. 18-A, § 2-514 (2010). For an analysis of statutory wills, *see* Gerry W. Beyer, *Statutory Fill-in Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769 (1993); Gerry W. Beyer, *Statutory Will Methodologies—Incorporated Forms vs. Fill-In Forms: Rivalry or Peaceful Coexistence?*, 94 DICK. L. REV. 231 (1990).

¹⁸⁰ Trachtman, *supra* note 119, at 127.

¹⁸⁰ There are document assembly computer programs that are routinely used by attorneys to generate base forms. For a discussion about the inevitability of “cookie cutter” documents for certain transactional documents, particularly documents relating to mortgage securitization, *see* DARMSTADTER, *supra* note 129, at 212–21.

testator is a separate and unique gathering of cells.”¹⁸¹ Overreliance on computer-generated forms can give rise to a reluctance to customize each will so that each will is crafted for the individual. Another admonishment of the practice of attorneys who use “one size fits all” forms is that

[a]ttorneys who provide these types of documents to their clients are really doing the clients a great disservice.

Proper estate planning requires detailed analysis of each client's assets and personal financial situation, as well as his or her individual hopes, plans, dreams, and ambitions. A true estate planning professional will make certain that the documents are individually tailored to satisfy the immensely personal concerns and goals of each client.¹⁸²

Aptly put, testamentary counseling “cannot be fulfilled with a fill-in-the-blanks system of will interviews, and lawyers who insist on operating their wills practice as if they were taking driver-license applications should get into another line of work.”¹⁸³ Accordingly, estate planners must focus on the particular testator's wishes rather than shunting the client to a pre-drafted form.¹⁸⁴

D. Benefits

Incorporating voice into the will has many benefits. Much discussion of the language of wills is mired in the discussion of Plain English. One thinks of the will of John B. Kelly, father of Grace Kelly, who wrote:

For years I have been reading Last Wills and Testaments, and I have never been able to clearly understand any of them at one reading. Therefore, I will attempt to write my own Will with the hope that it will be understandable and legal. Kids will be called “kids” and not “issue,” and it will not be cluttered up with “parties of the first part,” “per stirpes,” “perpetuities,”

¹⁸¹ Morris L. Ernst, *Foreword to MENCHIN*, *supra* note 12, at 13.

¹⁸² ESPERTI, *supra* note 62, at 456–57.

¹⁸³ SHAFFER, *supra* note 84, at 98.

¹⁸⁴ With regard to the so-called efficiencies, two authors opined: “Too often, lawyers push their clients toward a solution that fits form documents and planning. But, fortunately, our clients' lives are rich and varied and it's our job to ensure that our counsel fits their unique situation. Of course, finding the best fit requires that we know how to ask the right questions, understand the answers we receive, and handle the information with sensitivity.” Kestenbaum & Mansdorf, *supra* note 100, at 25. For a consideration of the use of stereotypes and medical patients, see JEROME GROOPMAN, *HOW DOCTORS THINK* (2007).

“quasijudicial,” “to wit” and a lot of other terms that I am sure are only used to confuse those for whose benefit it is written.¹⁸⁵

Although polarizing the legal community within the last few decades, the concerns of the Plain English movement are long-standing. In fact, seventeenth-century poet “John Dryden was already advocating a shift toward a middle style, a more ‘natural,’ less Latinate style in both vocabulary and syntax.”¹⁸⁶ The phrase “Plain English” has become an emotive phrase whose mere mention overshadows almost all examination of language.¹⁸⁷ The Plain English movement¹⁸⁸ has galvanized the language debate, without explicitly considering the role of voice.¹⁸⁹ The use of voice incorporates some aspects of the Plain English movement.¹⁹⁰ A will that is written in Plain English may

¹⁸⁵ Last Will and Testament of John B. Kelly, *reprinted in* CONSIDINE & POOL, *supra* note 91, at 119. Although the will states that the testator wrote it himself, he actually wrote the document with the advice and assistance of an attorney draftsman. MENCHIN, *supra* note 12, at 21. He actually dictated it and signed the subsequently typed document. *Id.* at 159.

¹⁸⁶ HICKEY, *supra* note 77, at 128.

¹⁸⁷ See, e.g., David Crump, *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*, 33 RUTGERS L.J. 713 (2002). Because of the emotive nature of the phrase “plain English,” some are using “standard English.” See, e.g., ADAMS, *supra* note 73, at xxvi–vii; MILLARD, *supra* note 63, at 17–19.

¹⁸⁸ Plain English typically consists of the consideration of ten elements: “(1) a clear, organized, easy-to-follow outline or table of contents, (2) appropriate caption or headings, (3) reasonably short sentences, (4) active voice, (5) positive form, (6) subject-verb-object sequences, (7) parallel construction, (8) concise words, (9) simple words and (10) precise words.” George H. Hathaway, *An Overview of the Plain English Movement for Lawyers*, 62 MICH. B.J. 945, 945 (1983); see also Leon Feldman, “Simple Will” Can Be Simplified Further To Produce a More Concise but Effective Document, 10 EST. PLAN. 290 (1983).

¹⁸⁹ An in-depth analysis of the Plain English movement is beyond the scope of this Article. For a selection of engaging examinations of the Plain English movement, see JOSEPH KIMBLE, *LIFTING THE FOG OF LEGALESE* (2006); Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 LOY. L.A. L. REV. 301 (1987); Kevin D. Collins, Note, *The Use of Plain-Language Principles in Texas Litigation Formbooks*, 24 REV. LITIG. 429 (2005); George Hathaway, *An Overview of the Plain English Movement in the Law—15 Years Later*, MICH. B.J., Jan. 2000, at 30; Dylan Lager Murray, Comment, *Plain English or Plain Confusing?*, 62 MO. L. REV. 345 (1997); Wayne Schiess, Note, *What Plain English Really Is*, 9 SCRIBES J. LEGAL WRITING 43 (2004).

¹⁹⁰ See Thomas S. Word, Jr., *A Brief for Plain English Wills and Trusts*, 14 U. RICH. L. REV. 471, 471–72 (1980) (“By applying plain English principles in our wills (indeed in all our drafting) we can respond to our clients in language they will understand. We will also improve our instruments technically.”).

still lack voice, for voice is more than readability. To inject voice is to craft a persona that translates the individual testator's voice into a substantively accurate and operative written document.

The injection of voice should not be dismissed as solely the province of eccentric testators. Rather, the conscious use of voice is one strategy the attorney may use to facilitate the estate planning process. "Documents that are simply drafted from a sterile, non-biased perspective are impersonal."¹⁹¹ From the individual's perspective, an injection of voice can be beneficial because it maximizes the estate planning experience. The will, as discussed above, is a personal document. Many Americans crave individualism and self-expression, for "[c]ertainly, individualism and self-expression [are] not new phenomena; they have been part of American identity since pre-Revolutionary War days."¹⁹² The majority of testators today are from the Baby Boom Generation, Generation X, and the Millennial Generation.¹⁹³ These generations have a greater need for and an expectation of the use of their voices in their wills.¹⁹⁴ The focus on voice began to receive attention in the 1960s,¹⁹⁵ and at least in part, can be

¹⁹¹ Smith, *supra* note 65, at 80.

¹⁹² Bowden, *Voice*, *supra* note 20, at 287.

¹⁹³ Although the birth dates of these categories vary slightly, Boomers were typically born from 1946 to 1960, Xers were born from 1961 to 1979, and Millennials were born 1980 to the present. *Space Planning: What Does Your Office Space Say About Your Firm?*, LAW OFFICE MGMT. & ADMIN. REP., Apr. 2006, at 1, 2. For an examination of the challenges and opportunities facing the Baby Boom Generation, see KENNEY F. HEGLAND & ROBERT B. FLEMING, *ALIVE AND KICKING: LEGAL ADVICE FOR BOOMERS* (2007). The current seminal book about the Millennial Generation is Jean M. Twenge, *GENERATION ME* (2006); see also JEAN M. TWENGE & W. KEITH CAMPBELL, *THE NARCISSISM EPIDEMIC* (2009).

¹⁹⁴ See generally *Voice in Writing Again*, *supra* note 22, at 171 ("On blogs and websites such as MySpace, lots of people eagerly use written words to reveal 'who they really are,' while just as many use the same websites to 'construct' a self."). Advertisements targeted to these generations use language relating to the individual services and uniqueness of the individuals. See, e.g., Scott E. Schayot, *Individual Solutions from Independent Advisors*, RAYMOND JAMES FIN. SERV., INC., <http://www.raymondjames.com/schayot/> (last visited Oct. 9, 2011) ("No two investors are alike. . . . [I]t's important that you have a financial plan that is specifically designed to reflect your life, your goals and your personal legacy."). The Baby Boom Generation, in particular, has changed many institutions and promoted the development of the practice area of elder law. See generally Nina A. Kohn & Edward D. Spurgeon, *Elder Law Teaching and Scholarship: An Empirical Analysis of an Evolving Field*, 59 J. LEGAL EDUC. 414 (2010).

¹⁹⁵ When tracing the origins of voice to the 1960s, it should be remembered that the 1960s was not only a time of "Kennedy, King, Vietnam, urban riots, student protests, and Watergate," but also a time of "[o]pen admission programs, community colleges, and increased forms of financial aid" to open access to higher education to

attributable to changes in the generations.¹⁹⁶ This timing also means that many of the individuals who are executing wills today are familiar with the metaphor of voice from their personal experiences in composition courses. While any discussion of generations tends toward stereotypes, these generations have a greater sense of self—as can be seen in the array of individuals posting on blogs, Facebook, MySpace, and Twitter.¹⁹⁷ Thus, individuals in these generations will crave the counseling aspect of estate planning and expect the personalizing of their most personal legal document.¹⁹⁸

Unsettling current events, such as the war on terror and the recession, have forced individuals to reprioritize life. For instance, individuals crave the opportunity to transmit more than mere financial assets. For instance, voice can play a role in preserving family harmony and maintaining the deceased's legacy. Such use of voice is illustrated in the following example:

In this document I can only give you things, but if I had the choice to give you worldly goods or character, I would give you

non-traditional students. HARRIS, *supra* note 30, at 26. In such an environment, voice equated to personal expression. As Peter Elbow in 1973 wrote, "Many people are now trying to become less helpless, both personally and politically: trying to claim more control over their own lives. One of the ways people most lack control over their own lives is though [sic] lacking control over words." PETER ELBOW, *WRITING WITHOUT TEACHERS*, at v (2d ed. 1998); see also Bowden, *Voice*, *supra* note 20, at 286–89.

¹⁹⁶ See generally Jeffrey N. Pennell, *The Joseph Trachtman Lecture—Estate Planning for the Next Generation(s) of Clients: It's Not Your Father's Buick, Anymore*, 34 ACTEC J. 2 (2008).

¹⁹⁷ See, e.g., Melody Finnemore, *Meet the Millennials: Young Attorneys Prompt Need for Firms To Explore New Ways of Doing Business*, OR. ST. B. BULL., Nov. 2005, at 9, 9 (discussing Millennials in the law firm setting); Eric Hoover, *The Millennial Muddle: How Stereotyping Students Became a Thriving Industry and a Bundle of Contradictions*, THE CHRONICLE OF HIGHER EDUCATION (Oct. 11, 2009), available at <http://chronicle.com/article/The-Millennial-Muddle-How/48772/> (noting the sometimes conflicting stereotypes offered by experts).

¹⁹⁸ The appearance of the Millennials in law schools has engendered a rethinking of law teaching and even legal education in general. For a selection of recent articles about the Millennials in law schools, see generally Joan Catherine Bohl, *Generations X and Y in Law School: Practical Strategies for Teaching the "MTV/Google" Generation*, 54 LOY. L. REV. 775 (2008); Ian Gallacher, *Forty-Two: The Hitchhiker's Guide to Teaching Legal Research to the Google Generation*, 39 AKRON L. REV. 151 (2006); Susan K. McClellan, *Externships for Millennial Generation Law Students: Bridging the Generation Gap*, 15 CLINICAL L. REV. 255 (2009).

character. The reason I say that, is with character you will get worldly goods because character is loyalty, honesty, ability, sportsmanship and, I hope, a sense of humor.¹⁹⁹

Although family harmony in particular has been receiving increased attention, it is not a new concern. For example, in a 1985 article an attorney wrote, "Tax planning should not be the first priority in estate planning. It should share equal footing with a myriad of non-tax family planning issues which are crucial to family harmony."²⁰⁰ Yet, in the era of decreased wealth, the intangibles, such as relationships with siblings and favored causes, are even more important to the individual.

Voice may also be another technique to minimize destructive will contests, malpractice claims, or other complaints, such as the fiduciaries being more transparent during the administration process.²⁰¹ A will is "more likely to be the subject of litigation than any other legal instrument."²⁰² Most consider common litigation in the trusts and estates area to be restricted to will

¹⁹⁹ Last Will and Testament of John B. Kelly (father of Grace Kelly), reprinted in CONSIDINE & POOL, *supra* note 91, at 123.

²⁰⁰ David R. Frazer, *Five Myths of Estate Planning*, TR. & EST., Dec. 1985, at 16, 18 (emphasis omitted).

²⁰¹ See Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*, 9 CARDOZO J. CONFLICT RESOL. 237, 255 (2008); see also Paul Fisher, *The Power Tools of Estate Conflict Management: Recharging the Culture of Estate Conflicts, Part I*, PROB. & PROP., May–June 2010, at 42, 42, 44; Paul Fisher, *The Power Tools of Estate Conflict Management: Recharging the Culture of Estate Conflicts, Part II*, PROB. & PROP., July–Aug. 2010, at 42, 42–43; Gail E. Mautner & Heidi L. G. Orr, *A Brave New World: Nonjudicial Dispute Resolution Procedures Under the Uniform Trust Code and Washington's and Idaho's Trust and Estate Dispute Resolution Acts*, 35 ACTEC J. 159, 159 (2009); Michael P. Bruyere & Meghan D. Marino, *Mandatory Arbitration Provisions: A Powerful Tool To Prevent Contentious and Costly Trust Litigation, But Are They Enforceable?*, 42 REAL PROP. PROB. & TR. J. 351, 358–61 (2007) (analyzing the enforceability of mandatory arbitration provisions in trust agreements). For a discussion of the benefits of providing information to trusts beneficiaries and suggestions on the forms to be used, see Robert Whitman, *Providing Information to Beneficiaries (With Sample Forms)*, A.L.I.-A.B.A. EST. PLAN. COURSE MATERIALS J., Feb. 2009, at 5, 6. See generally Robert Whitman, *Resolution Procedures to Resolve Trust Beneficiary Complaints*, 39 REAL PROP. PROB. & TR. J. 829 (2005); Robert Whitman & Kumar Paturi, *Improving Mechanisms for Resolving Complaints of Powerless Trust Beneficiaries*, 16 QUINNIPIAC PROB. L.J. 64 (2002); Jo Ann Engelhardt & Robert W. Whitman, *Administration with Attitude: When To Talk, When To Walk*, PROB. & PROP., May–June 2002, at 12.

²⁰² Beyer & Hargrove, *supra* note 2; see also Manning, *supra* note 120, at vx (observing that with regard to will contests, "[t]oday, everything and everyone is fair game"). For an examination of the historical function of will contests, see Lewis M. Simes, *The Function of Will Contests*, 44 MICH. L. REV. 503, 505–11 (1946).

contests.²⁰³ “Will contest” is actually a specific term that refers to a challenge to the validity of the will. Just as the estate planning process is emotionally difficult for the individual, the result of the estate plan can be emotionally difficult for those left behind.²⁰⁴ The combination of familial emotions and money can prove to be fertile sparks for litigation. This emotional aspect often relates to the perceived fairness of the disposition of property, especially considering the testator’s familial relations.²⁰⁵ Ironically, the intestacy schemes, which are intended to present a default scheme of property disposition, may actually increase litigation. However, if a beneficiary is listed as an intestate taker, he or she will have standing to contest the will.²⁰⁶

Litigation in the area of trusts and estates is continuing to increase.²⁰⁷ Demographic and social changes prompt estate litigation.²⁰⁸ “Litigation may arise from a construction of the

²⁰³ Edwin M. Epstein, *Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform*, 35 TEMP. L.Q. 231, 241 (1962) (“The attack on the testator’s mental capacity is often a mere litigative trapping which the contestants assume to give them a pretext for challenging the will, since the law presently provides no procedure by which they can argue the real basis of their claim—i.e., that the will is unfair to them and they are unhappy with the provisions made for them in it.”); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 577 (1997) (asserting that the doctrine of undue influence prevents the exercise of testamentary freedom where the testator seeks to benefit non-family members); see also Jeffrey G. Sherman, *Can Religious Influence Ever Be “Undue” Influence?*, 73 BROOK. L. REV. 579, 638 (2008) (proposing that the relationship between a testator and his or her spiritual advisor be treated, per se, as a confidential relationship).

²⁰⁴ The emotional toll of a loved one’s death is explored further in Akers, *supra* note 89, at 35–39. Some of these emotions are related to the testator’s attempt to continue to exercise control over the beneficiaries. For a discussion of dead hand control, see generally Ronald Chester, *The Psychology of Dead Hand Control*, 43 REAL PROP. TR. & EST. L.J. 505 (2008).

²⁰⁵ In examining the “emotional element,” Jonathan Blattmachr attributed these societal forces to three causes: (1) expectation and sense of entitlement by the beneficiaries; (2) “there are more marriages than ever before where either or both spouses have a descendant from a different union”; and (3) “three generations living together,” which Blattmachr interprets to mean that “[g]randchildren expect continued support from grandparents and some grow to believe that they should share any inheritance equally with their parents who are the children of the grandparent.” Blattmachr, *supra* note 201, at 239–40.

²⁰⁶ “A child who, under the instrument offered for probate, would receive less than his or her sibling may feel emotionally ‘disinherited.’” *Id.* at 245.

²⁰⁷ Casteel et al., *supra* note 151, at 46.

²⁰⁸ Jeffrey P. Rosenfeld, *Will Contests: Legacies of Aging and Social Change*, in INHERITANCE AND WEALTH IN AMERICA, 173, 174–75 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998); see also FRIEDMAN, *supra* note 166, at 85

instrument, the choice of fiduciaries, or how the fiduciaries administer the estate or trust.”²⁰⁹ There is some evidence that will contests may not be increasing as rapidly as thought.²¹⁰ However, the most recent ABA Report on the “Profile of Legal Malpractice Claims” indicates that for the number of malpractice claims, “Estate, Trust and Probate” claims are fourth.²¹¹ The top four practice areas are personal injury-plaintiff, real estate, family law, and estate, trust and probate.²¹² Also relevant is the fact that small firms—those firms with five attorneys or fewer—account for seventy percent of all malpractice claims filed.²¹³ While these statistics offer insights, the statistics fail to capture claims with respect to uninsured attorneys.²¹⁴ While much litigation may not be solely due to financial considerations, the downturn in the economy will likely increase litigation. For example, the Uniform Principal and Income Act has the potential to increase lawsuits by the beneficiaries against trustees.²¹⁵ Sometimes the judicial mechanisms intended to protect beneficiaries can actually fan the flames of litigation. For example, requiring the executor or trustee, as the case may be, to

(“Contemporary will contests reflect this weakness in traditional family structure, and the complexities of the structures that replaced it.”).

²⁰⁹ Blattmachr, *supra* note 201; *see also* Bruyere & Marino, *supra* note 201 (analyzing the enforceability of mandatory arbitration provisions in trust agreements).

²¹⁰ Rosenfeld, *supra* note 208, at 174 (stating of will contests that “[s]tatistically, they are rare events, occurring in fewer than [three] percent of probated estates”).

²¹¹ AM. BAR ASS’N STANDING COMM. ON LAWYERS’ PROF’L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS 2004–2007, at 4 (2008). “Estate, Trust, Probate Law” includes “all aspects of the analysis and planning for the conservation and disposition of estates.” *Id.* at 21. This includes “preparation of legal instruments . . . administering estates, including tax-related matters . . . trust planning, guardianships, custodianships, and conservatorships.” *Id.* Forty-six percent of malpractice claims filed are attributed to “substantive errors,” which includes failure to know the law and failure to anticipate tax consequences. *Id.* at 10–11.

²¹² *See id.* at 4. Estate, Trust and Probate is approximately one thousand claims ahead of the fifth practice area, Collection and Bankruptcy. *See id.*

²¹³ *See id.* at 18.

²¹⁴ *See id.* at 3. Another practice area showing a steady increase in claims is criminal law. *See id.* at 18.

²¹⁵ Shari A. Levitan & Howard J. Castleman, *There Will Be Litigation*, TR. & EST., Dec. 2008, at 56, 61 (“When times are as good and returns abundant as they were for quite some time, beneficiaries tend to be happier and less likely to sue trustees. Unfortunately, the current economic crisis may have erased that rosy picture for some time. Now, we can expect tighter budgets and more tension. And the UPIA cuts both ways. While it’s a valuable tool, it also complicates the job of the trustee and can fuel litigation.”).

prepare and distribute a detailed accounting of his or her actions is intended to ensure that the beneficiaries are apprised of the fiduciary's actions.²¹⁶ This form requires judicial approval and causes individuals to seek legal assistance.²¹⁷ Whatever the statistics reveal, "the litigation process can be emotionally and financially draining to the parties involved, and it can result in irretrievable damage to family relationships."²¹⁸

Current provisions aimed at preventing will contests have not proved effective. For instance, the standard in *terrorem* clause²¹⁹ has not been a panacea to litigation. In part, ineffectiveness of the clause is due to the narrow construction of these provisions.²²⁰ A tremendous amount of litigation may be filed before invoking the clause.²²¹ The mere inclusion of an *in terrorem* clause in a will may incite beneficiaries to question the will and ultimately file some form of litigation. The concern for

²¹⁶ See, e.g., N.Y. Surr. Ct. Proc. Act Law § 2205 (McKinney 2010) (compulsory account). The website of the N.Y. Surrogate Court provides sample forms for administration, such as Petition for Letters of Administration and Petition for Probate.

²¹⁷ "[B]eing made a party to a lawsuit may well trigger that party into seeking legal advice. Also, the form of the accounting 'required' by New York law is essentially not comprehensible except by those who have had considerable experience with it. Hence, an interested party who receives such an accounting (sometimes at least as thick as the Manhattan telephone directory) may turn to a lawyer for advice about it and that increases the chances of litigation with respect to matter disclosed in it (or matters which the beneficiary is advised should have been disclosed)." Blattmachr, *supra* note 201, at 243.

²¹⁸ Brian M. Deutsch, *Collaborative Law in Probate Disputes—An Alternative to Litigation*, GA. PROB. NOTES, July–Aug. 2009, at 7, 7.

²¹⁹ "In *terrorem*" means "[b]y way of threat" BLACK'S LAW DICTIONARY 836 (9th ed. 2009). In *terrorem* clauses, also referred to as no-contest clauses and forfeiture clauses, are clauses that purport "to rescind a donative transfer to, or a fiduciary appointment of, any person who institutes a proceeding challenging the validity of all or part of the donative document" and are "enforceable unless probable cause existed for instituting the proceeding." RESTATEMENT (THIRD) OF PROP. § 8.5 (2003); see also Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough To Send the Final Threat*, 26 ARIZ. ST. L.J. 629, 629–30 (1994); Gerry W. Beyer et al., *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. REV. 225, 227–28 (1998); David M. Swank, *No-Contest Clauses: Issues for Drafting and Litigating*, COLO. LAW., Dec. 2000, at 57, 57.

²²⁰ Three recent cases narrowly construed the applicability of *in terrorem* clauses. See *Harrison v. Morrow*, 977 So. 2d 457, 462 (Ala. 2007); *Lopez v. Lopez (In re The Lopez Family Trust)*, No. B208083, 2009 WL 400360, at *4 (Cal. Ct. App. Feb. 19, 2009) (holding that a breach of fiduciary duty claim did not trigger a no contest clause); *Safai v. Safai*, 78 Cal. Rptr. 3d 759, 768–69 (Ct. App. 2008).

²²¹ See Peter G. Billings, Note, *Infants and In Terrorem Clauses: Rethinking New York Estate Powers and Trusts Law Section 3-3.5*, 22 QUINNIPIAC PROB. L.J. 397, 409 (2009).

preserving the drafted scheme has lead estate planners to insert not just the standard in terrorem clause, but also explore mediation clauses.²²² Another attempt to preserve the drafted scheme is use of the living, or ante-mortem, probate.²²³ Only a few jurisdictions have adopted ante-mortem probate procedures.²²⁴ Even where it is permitted, individuals may be reluctant to create a confrontation.²²⁵

Since much of the draftsman's energy is directed toward preventing successful litigation against the will,²²⁶ voice could be another tool that might reduce litigation. Accordingly, voice could be a tool to facilitate both the estate planning process during the individual's lifetime and the orderly distribution of the estate after the individual's death.

III. VOICE IN WILLS

A. *Voice in Non-Attorney Drafted Wills*

Even wills written by the individual testator may lack voice. For a will to truly reflect the individual's voice, the answer seems to be for the individual testator to write the document. As one author noted, "Every man who knows how to write thinks he knows how to write a will."²²⁷ However, in most cases, do-it-

²²² For an examination of mediation clauses, see generally Roselyn L. Friedman & Erica E. Lord, *Using Facilitative Mediation in a Changing Estate Planning Practice*, EST. PLAN., Dec. 2005, at 15; Gage, et al., *supra* note 87; Susan N. Gary, *Mediating Probate Disputes*, PROB. & PROP., July-Aug. 1999, at 11; Lela P. Love & Stewart E. Sterk, *Leaving More Than Money: Mediation Clauses in Estate Planning Documents*, 65 WASH. & LEE L. REV. 539 (2008); Ray D. Madoff, *Mediating Probate Disputes: A Study of Court-Sponsored Programs*, 38 REAL PROP. PROB. & TR. J. 697 (2004); Robert N. Sacks, *Mediation: An Effective Method to Resolve Estate and Trust Disputes*, EST. PLAN., June 2000, at 210. For a sample provision, see Blattmachr, *supra* note 201, at 261-63.

²²³ See, e.g., Langbein, *supra* note 146, at 63; Leopold & Beyer, *supra* note 146, at 138; Calvin Massey, *Designation of Heirs: A Modest Proposal To Diminish Will Contests*, 37 REAL PROP. PROB. & TR. J. 577, 578 (2003). *But see* Fellows, *supra* note 146.

²²⁴ See, e.g., N.D. CENT. CODE § 30.1-08.1-01 (2010).

²²⁵ See Massey, *supra* note 223, at 579.

²²⁶ Many Continuing Legal Education Seminars focus on the topic of preventing estate litigation. See, e.g., Mark A. Robertson & Laura M. Twomey, *Drafting to Win: How to Win the Will Contest at the Drafting Stage*, Address to the American Bar Association Section of Real Property, Trust and Estate Law (Feb. 3, 2009); see also Judith G. McMullen, *Keeping Peace in the Family While You Are Resting in Peace: Making Sense of and Preventing Will Contests*, 8 MARQ. ELDER'S ADVISOR 61 (2006).

²²⁷ HARRIS, *supra* note 6, at 205 (quoting John Marshall Gest, *Practical Suggestions for Drawing Wills*, 55 AM. L. REG. 465, 465 (1907)).

yourself wills—meaning wills drafted by non-attorneys—rely extensively on form language and have no voice. These forms may be devoid of personality and lead the individual into making troubling omissions and errors. This Part will highlight some of the concerns with the wills most commonly written by the testator: nuncupative wills, ethical wills, holographic wills, fill-in-the-blank forms and computer programs, and video wills. While these wills may be written by the individual, they still do not contain the individual's voice. The testator often cannot create a persona that effectively and appropriately channels the testator's voice because the testator is not familiar with the discourse.

1. Nuncupative Wills

A nuncupative will is literally in the individual's voice. A nuncupative will, also called an oral will, is a will that is orally declared in front of witnesses.²²⁸ Although nuncupative wills can be traced to the origin of wills, the use of nuncupative wills today is limited. Today, nuncupative wills are valid in only certain circumstances. The use of nuncupative wills is generally limited to particular testators, such as soldiers, or to instances where the testator is disposing of personal property that is of a relatively low dollar amount.²²⁹ Because of the limited availability of nuncupative wills, they are not a satisfactory solution for testators.

2. Ethical Wills

Rooted in biblical tradition, an ethical will is a nonbinding document that an individual writes to his or her loved ones.²³⁰ Not in fact a will at all, ethical wills are a letter that is written by

²²⁸ See RESTATEMENT (THIRD) OF PROP. § 3.2 cmt. h (1999).

²²⁹ See, e.g., IND. CODE ANN. § 29-1-5-4 (West 2010) (for nonmilitary personnel, personal property less than \$1,000 and for military personal, personal property less than \$10,000); WASH. REV. CODE ANN. § 11.12.025 (West 2011) (personal property less than \$1,000).

²³⁰ For a compilation of ethical wills, including Holocaust ethical wills, see SO THAT YOUR VALUES LIVE ON—ETHICAL WILLS AND HOW TO PREPARE THEM (Jack Riemer & Nathaniel Stampfer eds., 1991). For additional examples of ethical wills grouped based on the author's age, see BARRY K. BAINES, ETHICAL WILLS, at app. I (2d ed. 2006). The appendix containing the ethical wills is entitled "Voices of the Heart: Modern Ethical Wills." *Id.*; see also Kathleen M. Rehl, *Help Your Clients Preserve Values, Tell Life Stories and Share the "Voice of Their Hearts" Through Ethical Wills*, J. PRAC. EST. PLAN., June–July 2003, at 17.

the individual, who may or may not be assisted in the writing of the letter by estate planners or other individuals.²³¹ Put simply, “[l]egal wills bequeath valuables, while ethical wills bequeath values.”²³² The benefits of an ethical will include “empowering the client, making the estate planning process one in which the client could participate, and recognizing the human legacy which each client could share with future generations.”²³³ Although each ethical will is unique, typically the author includes expressions of love, highlights personal values, family stories, lessons learned, and blessings.²³⁴

While not all estate planners have embraced ethical wills,²³⁵ ethical wills provide an opportunity for the individual to pass on his or her values, in addition to his or her valuables. Part of the conflict could be the somewhat confusing term “ethical will,” which should not be interpreted to mean that it has a legal effect or that attorney drafted wills are not ethical within the meaning of the Codes of Professional Conduct.²³⁶ To that end, some individuals refer to these documents as “a personal legacy statement,”²³⁷ “a legacy letter,”²³⁸ “[l]egacy,”²³⁹ a “family

²³¹ Because these documents are private letters, they do not become public records like a will. For an examination of the public aspect of probate, see Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 562–66 (2008).

²³² BAINES, *supra* note 230, at 14; *see also* Keeva, *supra* note 164; UNIV. OF KY. COLL. OF AGRIC., ETHICAL WILLS—PASSING ON VALUES IMPORTANT TO YOU 1 (1996), available at <http://www.ca.uky.edu/HES/fcs/FACTSHTS/FAM-GW.107.pdf>.

²³³ Judith A. Frank, *The Human Legacy: Using Ethical Wills To Enhance Estate Planning*, 6 T.M. COOLEY J. PRAC. & CLINICAL L. 65, 66 (2003).

²³⁴ BAINES, *supra* note 230, at 17; *see also* Zoe M. Hicks, *Is Your (Ethical) Will in Order?*, 33 ACTEC J. 154, 154 (2007); Patricia Wilhite McCartney, *What Every Lawyer Should Know About Ethical Wills*, WYO. L., Dec. 2005, at 56.

²³⁵ Some estate planners may be reluctant to embrace ethical wills for the following reasons: (1) ethical wills are not legally binding documents; (2) ethical wills may be of a genre of writing that is uncomfortable for the estate planner; and (3) the creation of ethical wills are difficult documents to bill. Frank, *supra* note 233, at 77 (summarizing an interview with a consulting firm that raises awareness of ethical wills). *But see* SHAFFER ET AL., *supra* note 1, at 109–10 (drafting textbook that briefly references the opportunities presented by ethical wills).

²³⁶ Ethical wills may have been used as a substitute when the author had no legal ability to write an actual will. For example, ethical wills written by medieval women have been found. BAINES, *supra* note 230, at 13.

²³⁷ ESPERTI ET AL., *supra* note 62, at 32.

²³⁸ For a template of a “legacy letter,” *see* Todd Peterson, *Writing a Personal Legacy Letter*, CREATING YOUR LIFE LEGACY, July 18, 2006, <http://yourethicalwill.blogspot.com/2006/07/writing-personal-legacy-letter.html>.

²³⁹ Scott E. Friedman & Alan G. Weinstein, *Going Beyond the Will: A Primer on Legacy Planning for Attorneys*, N.Y. ST. B. ASS'N J., Oct. 2007, at 30, 30.

philosophy,²⁴⁰ or “testament.”²⁴¹ However, a “side letter”²⁴² and a “letter of wishes,”²⁴³ are letters that are more familiar to attorneys and can be viewed as forms of ethical wills.²⁴⁴ Ethical wills remind the individual that he or she has a nonfinancial legacy to pass onto his or her beneficiaries. Contemplating legacy encourages an individual to become fully engaged in the estate planning process. For example, penning an ethical will may help an individual confront his or her fears of dying.²⁴⁵ Ethical wills thus serve a therapeutic purpose by reminding an individual of his or her nonfinancial assets and encouraging an individual to fully engage in the estate planning process.²⁴⁶

Naturally, ethical wills can do damage as well as good. For example, if the ethical will is overly sermonizing and patronizing, it may alienate loved ones.²⁴⁷ Care should be taken that the ethical will does not conflict, revoke, or question the validity of an existing will. While an ethical will is a vehicle that showcases

²⁴⁰ Keeva, *supra* note 164 (attributing this phrase to attorney Eden Rose Brown of Salem, Oregon).

²⁴¹ Smith, *supra* note 65 (defining “testaments” as “the personal written statements an individual makes in the context of estate planning”).

²⁴² See generally EVE PREMINGER ET AL., TRUSTS AND ESTATES PRACTICE IN NEW YORK, N.Y. PRAC. SERIES §§ 1:63, 1:83 (promoting the use of non-binding side letters that share the client’s wishes to the fiduciaries).

²⁴³ For instructions for writing a letter of wishes and sample letters, see *Letters of Wishes to Trustees*, PERSONAL LEGACY ADVISORS, LLC, <http://www.personallegacyadvisors.com/knowledge-base/letters-of-wishes-to-trustees/> (last visited Oct. 10, 2011).

²⁴⁴ See Alexander A. Bove, Jr., *The Letter of Wishes: Can We Influence Discretion in Discretionary Trusts?*, 35 ACTEC J. 38, 39 (2009) (defining a “letter of wishes” as “a written communication from the settlor to the trustee designed to offer the trustee of a discretionary trust some guidance in the exercise of his [or her] discretion”); see also Frank L. Schiavo, *Does the Use of “Request,” “Wish,” or “Desire” Create a Precatory Trust or Not?*, 40 REAL PROP. PROB. & TR. J. 647, 664 (2006).

²⁴⁵ See ESPERTI ET AL., *supra* note 62, at 32 (noting that “[t]he process of writing the statement can help [the client] to identify [his or her] priorities”); see also SO THAT YOUR VALUES LIVE ON, *supra* note 230, at xxv (stating that “in order to write an ethical will, one must come to terms with one’s own mortality”); Frank, *supra* note 233, at 78–79 (citing two examples provided by Dr. Baines for the proposition that preparing an ethical will can help a client crystallize his or her wishes for an estate plan).

²⁴⁶ See generally BAINES, *supra* note 230. Dr. Baines also has a workbook to facilitate the writing of ethical wills. Other resources, including a list of workshops, are available on his website at, www.ethicalwill.com.

²⁴⁷ “On occasion, ethical wills have been written that ‘reach out from the grave’ to instill guilt or blame, or to denounce survivors or attempt to control their lives. I think of these ethical wills as being ‘unethical.’” BAINES, *supra* note 230, at 61. A quick check of the use of the second person “you” reveals that it can be an indication of such sermonizing and patronizing tone. *Id.* at 62.

the individual's voice, not every individual feels comfortable writing an ethical will. The ethical will, because it is not legally binding, may not be safeguarded appropriately so that it may not be available upon the individual's death.

3. Holographic Wills

A holographic will is a will that is handwritten by the testator and is not witnessed.²⁴⁸ This long-standing civil law implant seems to be the best opportunity for the will to incorporate the individual testator's voice because the holographic will is literally handwritten by the individual.²⁴⁹ However, holographic wills can be problematic and may suffer from both a surplus and deficient voice.²⁵⁰ In terms of legal effectiveness, laypersons may neglect to include critical components of a will, such as disposing of the residue and nominating an executor.²⁵¹ Holographic wills may inadvertently conflict or revoke a prior testamentary instrument. For example, a suicide note may be interpreted as a holographic will and unintentionally destroy previously prepared plans.²⁵²

Some holographic wills may be the result of reluctance to see an attorney.²⁵³ Other holographic wills may be the result of the inability to seek the advice of an attorney, either because of

²⁴⁸ See, e.g., UNIF. PROBATE CODE § 2-502(b) (amended 2008) (requiring that material portions of the document be in the testator's handwriting); see also Kevin R. Natale, Note, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 159 (1988).

²⁴⁹ For an examination of the history of holographic wills, see generally R.H. Helmholz, *The Origin of Holographic Wills in English Law*, 15 J. LEGAL HIST. 97 (1994); Reginald Parker, *History of the Holograph Testament in the Civil Law*, 3 JURIST 1 (1943).

²⁵⁰ See Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 102–06 (2006).

²⁵¹ See Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 47–49 (2008). But see Julie M. Cochran, Case Note, *Property Law—Wills—Effect of Lapsed Residuary Gifts in the State of Tennessee*, 73 TENN. L. REV. 711, 714 (2006) (discussing liberal interpretation by courts of lay drafting in holographic wills); Hegland & Fleming, *supra* note 193, at 167 (stating that while holographic wills can be “a stop-gap measure[,]formal [w]ills are preferable to get things right”).

²⁵² See Smith, *supra* note 65, at 78; see also Gerry W. Beyer, *Wills and Trusts*, 59 SMU L. REV. 1603, 1608 (2006) (examining a purported holographic will found on the computer of an estate planning attorney).

²⁵³ See, e.g., Hirschman, *supra* note 66, at 365 (quoting the sentiments of such a person who wrote in his will, “To employ an attorney I ne’er was inclined/ They are pests to society, sharks of mankind/ To avoid that base tribe my own will I now draw/ May I escape coming under their paw”).

financial inability, emotional inability, or physical inability. An infamous example of physical inability is the case of Cecil George Harris, who composed his holographic will while trapped under the wheel of a tractor.²⁵⁴ While trapped under the tractor wheel, Harris scratched the following in the tractor fender: "In case I die in this mess, I leave all to the wife. Cecil George Harris."²⁵⁵

While the common conceptions about holographic wills may not be justified, the holographic will removes the attorney draftsman from the process.²⁵⁶

4. Commercial Fill-in-the-Blank Forms and Computer Programs

Although commercial fill-in-the-blank forms and computer programs allow an individual to prepare his or her own will, such forms and programs do not facilitate the incorporation of the individual's voice.²⁵⁷ Rather, these materials provide for the rote generation of documents. For instance, Norman Dacey's infamous book entitled *How To Avoid Probate*, contained perforated pages with fill-in-the-blank forms.²⁵⁸ The blanks, serving as prompts for specific material, were sandwiched between phrases typical of a will. Rigidly structured forms, by their nature, permit little customization.²⁵⁹ In a book directed to individuals contemplating estate planning, the authors warn about overuse of fill-in-the-blank forms because, in the words of the authors, "famil[ies] [are] unique, and they have unique

²⁵⁴ See W.M. Elliot, *Wills—Writing Scratched on Tractor Fender—Granting Probate*, 26 CANADIAN B. REV. 1242, 1242–43 (1948); see also MENCHIN, *supra* note 12, at 86 (noting that the deceased pocket contained a knife with traces of the fender).

²⁵⁵ See MENCHIN, *supra* note 12, at 86. For examples of other unusual holographs, see Elmer M. Million, *Wills: Witty, Witless, and Wicked*, 7 WAYNE L. REV. 335 (1960).

²⁵⁶ One scholar recently analyzed the use of holographic wills in Allegheny County, Pennsylvania and determined that legislatures should relax formalities to permit more extensive use of holographic wills. See Clowney, *supra* note 251, at 28.

²⁵⁷ LegalZoom, an online source that generates legal documents, such as wills, is currently embroiled in litigation regarding the unauthorized practice of law. See Debra Cassens Weiss, *Suit Claims LegalZoom's Document Prep Is Unauthorized Practice*, A.B.A. J., Feb. 19, 2010, available at: http://www.abajournal.com/news/article/suit_claims_legalzooms_document_prep_is_unauthorized_practice.

²⁵⁸ For part of the bar's reaction to Norman Dacey, see N.Y. Cnty. Lawyers' Ass'n v. Dacey, 28 A.D.2d 161, 283 N.Y.S. 2d 984 (1st Dep't 1967), *rev'd*, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S. 2d 422 (1967).

²⁵⁹ "Self-help books compress life's complexity into three or four choices." HEGLAND & FLEMING, *supra* note 193, at 156.

issues, which can't be addressed through a generic form."²⁶⁰ Likewise, the computer programs, though widely available, permit few opportunities to incorporate voice.²⁶¹ Addressing the use of software programs, the same authors noted, "Forms, whether they are preprinted or programmed software, are no substitute for experience, judgment, and legal training."²⁶² Whether the form comes from a statute, a book, or a computer program, the form is essentially a fill-in-the-blank document. While such a form may serve as a good base, exclusive reliance on the structured form creates a will devoid of voice.

5. Video Wills

In this digital age, the will, a written document with signatures, seems anachronistic.²⁶³ Further, an examination of the voice appears to support the use of video wills.²⁶⁴ Video wills resemble oral wills where the "document" was literally in the individual's speaking voice.²⁶⁵ Video wills raise the following concerns: (1) the testator's rambling may create confusion as to the dispositions and (2) the testator's overly scripted speech may

²⁶⁰ ESPERTI ET AL., *supra* note 62, at 12; see also Melissa Borrelli, *Estate Planning Advice for Young Lawyers: Are You Protected?*, YOUNG LAW., July 2009, at 1, 2 ("Be wary of 'trust mills' that promote one-size-fits-all estate planning kits. An estate plan created by the unqualified can have unintended consequences and may sometimes be worse than not having any estate plan at all.").

²⁶¹ While computer programs may be used by both attorneys and non-attorneys to prepare wills, the wills are printed and executed in hard copy. For an examination of the problems of electronic wills, including hardware and software obsolescence, see generally Beyer & Hargrove, *supra* note 2. For a proposed model electronic wills act, see Grant, *supra* note 84; see also Christopher J. Caldwell, Comment, *Should "E-Wills" Be Wills: Will Advances in Technology Be Recognized for Will Execution?*, 63 U. PITT. L. REV. 467 (2002).

²⁶² ESPERTI ET AL., *supra* note 62, at 455 ("In the end, a computer program is only as smart as the operator; if you're not already an expert in estate planning, a software program isn't going to make you a competent estate planner.").

²⁶³ See FRIEDMAN, *supra* note 166 ("In this age of computers, satellites, and trips into space, there does seem something a bit archaic about the will."). The discussion of an electronic will should be discussed from the digital storing of signed wills. The digital storing is typically a scanned copy of the original, actual document that is then kept on an off-site server. Digital storage of wills, to be probated in the event the actual will cannot be located, is nevertheless a recording of the actual, signed document.

²⁶⁴ See, e.g., Gerry W. Beyer, *Video Requiem: Thy Will Be Done*, TR. & EST., July 1985, at 24; Jodi Granite Nash, *A Videowill: Safe and Sure*, A.B.A. J., Oct. 1984, at 87. A will recorded on a filmstrip serves as the basis for the 1985 movie "Brewster's Millions" starring Richard Pryor and John Candy. See *Brewster's Millions*, IMDB, <http://www.imdb.com/title/tt0088850/> (last visited Oct. 10, 2011).

²⁶⁵ See *supra* notes 56-58 and accompanying text.

create confusion as to the dispositions. For those reasons, video wills invite claims of incapacity. The video will is an unmoderated communication that may not reference discourse conventions. In contrast, in a written text, the drafts person can craft a persona that injects voice without jeopardizing substantive accuracy and operative effect. Moreover, the history of wills has calcified perceptions and expectations of what a will is. The possibilities of videotaped or digitally recorded wills, for example, have never been adopted by jurisdictions as an actual will.²⁶⁶ Such recordings of the execution of a written will may be considered in terms of the due execution of the will; however, even such recordings are not conclusive.²⁶⁷ Thus, despite movements to drag the will into the digital era, the will remains, and likely will remain for the foreseeable future, an actual written document with only a mental image of the testator.²⁶⁸

B. Voice in Attorney Drafted Wills

The injection of voice into a will requires the attorney drafts person to develop a persona through strategies²⁶⁹ that at once convey a sense of the individual and yet is both substantively accurate and operative. The use of the word “strategies” emphasizes that voice may not be appropriate in every will and certainly not be appropriate in every provision in a will. For the drafts person “cannot exercise too much care in drafting a will, whether for a small estate or a large estate. The making of a will is an important event in one’s life.”²⁷⁰ Building on the client counseling discussion above, it is through client counseling that an attorney can determine the appropriate use of voice for a particular individual that still acknowledges

²⁶⁶ See, e.g., Grant, *supra* note 84.

²⁶⁷ See FRIEDMAN, *supra* note 166, at 67–68; Gerry Wayne Beyer, *Videotaping the Will Execution Ceremony—Preventing Frustration of the Testator’s Final Wishes*, 15 ST. MARY’S L.J. 1 (1983); Lisa L. McGarry, Note, *Videotaped Wills: An Evidentiary Tool or a Written Will Substitute?*, 77 IOWA L. REV. 1187 (1992). But see Chad Michael Ross, Comment, *Probate—Taylor v. Holt: The Tennessee Court of Appeals Allows a Computer Generated Signature To Validate a Testamentary Will*, 35 U. MEM. L. REV. 603 (2005).

²⁶⁸ Nevada enacted an Electronic Wills Act in 2001. See NEV. REV. STAT. § 133.085 (West 2011). But, the Act has never been implemented or used.

²⁶⁹ “Strategies is a good rhetorical word, because it implies the choice of available resources to achieve an end.” EDWARD P.J. CORBETT & ROBERT J. CONNORS, *CLASSICAL RHETORIC FOR THE MODERN STUDENT 2* (4th ed. 1999).

²⁷⁰ ROLLISON & ESHELMAN, *supra* note 14, § 1–2, at 6.

discoursal conventions of wills.²⁷¹ By its nature, this exemplifies the customization of the will. The end product is not a one-size-fits-all form, or even a one-size-fits-most form, but a unique document for a unique individual.²⁷²

Writers naturally respond to this as one composition studies scholar noted:

Just as you dress differently on different occasions, as a writer you assume different voices in different situations. If you're writing an essay about a personal experience, you may work hard to create a strong personal voice in your essay If you're writing a report or essay exam, you will adopt a more formal, public tone. Whatever the situation, the choices you make as you write and revise . . . will determine how readers interpret and respond to your presence in the text.²⁷³

The word "strategies" also conveys the fact that there may be breaks in the persona.²⁷⁴ Accordingly, the drafts person will weave the persona through selected provisions and temper the persona where needed to acknowledge those conventions. For example, the exordium²⁷⁵ and the testimonium²⁷⁶ assume a ceremonial voice that sounds little like the individual testator's conversational voice.²⁷⁷ This ceremonial voice is solemn, slightly old-fashioned, and it lends a sense of the profound to the occasion and supports the channeling function of the formalities.²⁷⁸ For

²⁷¹ "The major task [of the drafts person], however, is to create a plan that suits the people involved, with their particular problems, goals, personalities, biases, and characteristics." MANNING, *supra* note 120.

²⁷² "Good lawyers treat each client as an individual, not just another in a stream who all need 'standard' wills. A client's will may be one of hundreds to the lawyer, but it may be the only one the client ever has, and it reflects the reality of someone facing their own mortality." ANDERSEN & BOXX, *supra* note 149, at 19.

²⁷³ LISA EDE, *WORK IN PROGRESS* 158 (1989). In this book primarily for undergraduate writing students, Lisa Ede allocates only three and one-half pages to the topic of "Adjusting Your Voice to the Rhetorical Situation." *Id.* at 157-60.

²⁷⁴ Addressing personal voice and technical writing, two authors caution, "[a] writer cannot manipulate language structures to achieve a feeling of individuality within a discourse community until he or she becomes familiar with the ways language conventions within that community operate." Allen & Bosley, *supra* note 52, at 90.

²⁷⁵ The exordium is also called the exordium clause, the introductory clause, the introduction, the preamble, and the overture.

²⁷⁶ The testimonium is also called the testimonium clause, the testum clause, the witness clause, and the date and signature clause.

²⁷⁷ To a certain extent, even the title "Last Will and Testament" embodies a ceremonial voice.

²⁷⁸ An example of a ceremonial voice in a context outside of the law is the presidential inaugural address. The presidential inaugural address is "intended to

the individual, it reinforces the solemn nature of the event and furthers the function of the estate planning process. In much of the same way, the exordium and the testimonium inspire confidence in the testator for those individuals who read the will when it takes effect. The exordium contains many ritualistic incantations, but usually also contains the testator's name and the testator's capacity to make a valid will. Consider the following traditional exordium:²⁷⁹ "In the name of God, amen. I, Matthew E. Silver, residing in Macon County, Georgia, being of sound and disposing mind hereby declare, make, and publish this as my Last Will and Testament, hereby revoking all prior wills and codicils by me heretobefore made."²⁸⁰

However, even while invoking a ceremonial voice, a draftsman may adapt the language.²⁸¹ Streamlined, the typical exordium could look like the following: "I, Matthew E. Silver,²⁸² of Monroe County, Georgia, declare that this be my Will and

please and inspire his [or her] audience (as well as inspire confidence in his [or her] leadership)." HICKEY, *supra* note 77, at 124–25.

²⁷⁹ William Shakespeare's will begins with "In the name of god Amen." A. Wigfall Green, *Shakespeare's Will*, 20 GEO. L.J. 273, 273–74 (1932) (providing a detailed analysis of William Shakespeare's will dated June 22, 1616). The will of George Washington also begins with this opening. See HARRIS, *supra* note 6, at 439. As late as the 1930s, this beginning was still used. See Hibsichman, *supra* note 66, at 367. Another antiquated, although less religious, opening that has fallen out of use is "Know all men by these presents." The will of John Quincy Adams uses this opening. See HARRIS, *supra* note 6, at 324 (internal quotation marks omitted) (quoting the Last Will and Testament of John Quincy Adams).

²⁸⁰ The following is an example of an even lengthier traditional opening:

In the name of God, Amen: Know all men by these presents: That I, _____, of the City of _____, County of _____, and State of _____, being in good bodily health and of sound and disposing mind and memory and not acting under duress, menace, fraud or undue influence of any person whomsoever, calling to mind the frailty of human life, and being desirous of disposing of my worldly estate with which it has pleased God to bless me, while I have strength and capacity so to do, do make, publish and declare this my Last Will and Testament, hereby revoking all other wills, legacies, bequests, or codicils by me heretobefore made, in the manner and form following

RAY & COX, *supra* note 150, at 384.

²⁸¹ SHAFFER ET AL., *supra* note 1, at 182 (asking the draftsman to consider whether "the principal objective exhibited in the history of this part of the law [is] a vague notion that will-drafting is a form of magic—that the instrument certainly will fail if the testator says 'I give' instead of 'I give, devise and bequeath in fee simple absolute,' just as the cave door would not open until Ali Baba said 'open sesame'").

²⁸² Unless otherwise noted, sample provisions are used for illustration purposes only and do not represent any actual documents. Fictitious names are used. For an amusing analysis of the most popular fictitious name, see David Mellinkoff, *Who Is "John Doe"?*, 12 UCLA L. REV. 79, 79–81 (1964).

revoke all my prior wills and codicils." A similar approach could appear in the testimonium and select the administrative provisions so long as due care is taken to ensure that language critical to the operation of the administrative provisions, especially tax-related provisions, are not inadvertently affected.

Voice can be consciously injected in several places in a will. Because the need to invoke particular language is almost the justification for the administrative provisions of a will, this Article does not attempt to address the complexities of those provisions that would typically appear after the dispositive section. This Section analyzes examples of voice in wills and opportunities to strategically inject the individual's voice.

1. Order of Provisions

The order of the provisions is an opportunity to incorporate voice.²⁸³ While there are some conventional restraints, such as starting with the exordium and ending with the testimonium, the draftsperson has some flexibility to use the order of the provisions to help convey the testator's wishes.²⁸⁴ Rather than relying on the order of the provisions in stock forms, the order of provisions could be slightly modified for each individual by front loading the document with those provisions that are most important to that particular testator.²⁸⁵ For example, for a young

²⁸³ See O'Sullivan, *supra* note 85, at 320-22 (discussing "[r]estructuring the [t]estamentary [i]nstrument" to promote family harmony). Further, the order of the provisions of a will reflects an identification of the primary audience. Identifying the primary audience is difficult, and not everyone will agree. The author of this Article, in part because of her experiences, views the client as the primary audience. In a course entitled, "Trusts and Estates Drafting," the author distributed twenty-four strips of paper containing twenty-four selected provisions. The students were instructed to order the provisions. The instructions were purposely kept vague. The vast majority of the students ordered the will in such a way that the executor would have been the primary audience.

²⁸⁴ This translation could be thought of as constructing the means of effectively telling the client's story. See Sandra Craig McKenzie, *Storytelling: A Different Voice for Legal Education*, 41 U. KAN. L. REV. 251, 257-59 (1992) (equating a draftsperson with a storyteller).

²⁸⁵ One text about drafting terms this "client-oriented organization." BRODY ET AL., *supra* note 134, at 151. "Many lawyers simply follow the organization included in form books when drafting, even though it may not enhance accuracy or readability. The document will be more readable for your client, however, if you organize it to proceed from what is most important to the client to what is least important or least understandable." See RAY & COX, *supra* note 150, at 381.

family client who has minor children²⁸⁶ and relatively few assets, the will may lead with the nominations of guardians for the minor children. In another situation, an individual may have a large family or a blended family. For such an individual, starting with an identification of all family members may be most appropriate. For another individual, the will may begin with specific bequests of tangible personal property to a lifelong friend. For another individual, it may mean beginning with those items of tangible personal property that he or she had inherited from other loved ones.

Admittedly, the attorney drafts person is operating within some substantive limitations. For instance, per the doctrines of abatement, distribution, and lapse, the residue of the estate must appear after all the other bequests. However, there is still great latitude for the attorney drafts person to customize the order of the provisions.

2. Deliberate Self-Referencing

The will contains an abundant amount of self-referencing. One author even advocated for the use of first person in all estate planning documents, including a trust, which is typically written in third person. The author stated, "Writing in the first person will sound more natural and, because you will be writing in your client's voice, you will be more attuned to writing in a style that your client will understand."²⁸⁷

A conscious placement of "I" can underscore the individual's voice. Consider the following excerpt:

I define my Residuary Estate as all of my property after the payment of debts and taxes [and legacies] under Article III above, including real and personal property whenever acquired

²⁸⁶ See Shaffer, *supra* note 5, at 153 (presenting and examining a will form for a testate with "a non-estate of children and debts"); see also Thomas L. Shaffer, *Will Interviews, Young Family Clients and the Psychology of Testation*, 44 NOTRE DAME LAW. 345, 345 (1969); Eugene C. Gerhart, *A New Look at Estate Planning: The General Practitioner and Mr. Average*, A.B.A. J., Nov. 1964, at 1043, 1045-46.

²⁸⁷ MILLARD, *supra* note 63, at 25. For further examination of the relationship between revocable trusts and the law of wills, see Ira Mark Bloom, *Unifying the Rules for Wills and Revocable Trusts in the Federal Estate Tax Apportionment Arena: Suggestions for Reform*, 43 REAL PROP. TR. & EST. L.J. 447 (2008); Brian Layman, *The Traditional Wills Doctrine of Ademption and Its Exceptions Should Be Extended to Revocable Trusts*, 13 OHIO PROB. L.J. 119, 119 (2003); Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP. TR. & EST. L.J. 523 (2008).

by me, property as to which effective disposition is not otherwise made in this will, property as to which I have an option to purchase or a reversionary interest, and property over which I have a power of appointment.²⁸⁸

The use of the phrase "I define my Residuary Estate," rather than "My Residuary Estate is defined as," places emphasis on the testator by starting the sentence with "I."

3. Explanations and Expressions

Conventional wisdom dictates that recitals have no place in a will.²⁸⁹ Yet, this ignores the nature of the will. The will is the last words spoken by the testator. Due to the ambulatory nature of wills, many provisions and terms remain secret until the testator's death. This secrecy in its provisions can disrupt family harmony by rupturing family bonds and tarnish the memory of the testator. Admittedly, a draftsman must ensure that no ambiguous language, incorrect information, or conflicting provisions are included. However, an explanation or an expression may clarify the reason for the testator's choices and prevent the rupturing of family bonds and tarnishing of the memory of the testator.

Although a living person has no heirs, all living persons have heirs apparent. This expectancy is often seen in familial relationship; thus, even though the individual is not necessarily legally obligated to give property to their descendants, most descendants will expect it.²⁹⁰ For example:

²⁸⁸ SHAFFER ET AL., *supra* note 1, at 299–300.

²⁸⁹ Part of this concern may have been imported from the drafting of contracts where "[o]fficially, recitals are not part of the contract." BRODY ET AL., *supra* note 134, at 205. Some draftspersons extend this concept to precatory language. As one scholar wrote: "Precatory language has no place in a will. If the testator wishes to express non-mandatory desires, then the attorney should use a separate non-testamentary document. If the testator insists on placing such language in the will, then the attorney should add language indicating that the suggestions are merely precatory and have no binding effect." *Blue Screen of Death*, *supra* note 112, at 88. For an analysis of the use of precatory language and gender, see Alyssa A. DiRusso, *He Says, She Asks: Gender, Language, and the Law of Precatory Words in Wills*, 22 WIS. WOMEN'S L.J. 1, 2–4 (2007).

²⁹⁰ See Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 254 (2001); see also Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 2–3 (1996) (examining the reasons why forty-nine states fail to protect against the disinheritance of minor children).

Reposing especial confidence in my beloved wife, Mattie Bruskie, with whom I have lived so long in peace and happiness, and who has been a good, faithful and affectionate wife to me, I give and bequeath to her all of my property, believing that it is for the best interest of my two children and such other children, who may be born to me by my said wife, Mattie Bruskie.²⁹¹

An explanation for an unusual bequest can help the beneficiaries recognize the deliberate choices made by the individual. An unusual bequest may be unequal bequests to individuals of the same relationship to the testator.²⁹² While there are numerous choices by the individual in a will that may implicate family harmony, one of the most common is the equality of shares to children.²⁹³ In a book designed to give advice to Boomers, the authors explicitly endorse the use of explanations in wills.²⁹⁴ The authors write, “[t]o avoid bitterness (there is nothing worse for a child than to think their parents loved a sibling more), consider putting in your [w]ill why you are treating your children unequally.”²⁹⁵ Although the inclusion of an explanation is beneficial for the changing dynamics of family, explanations have appeared in wills for decades. Consider the following example from the Will of Benjamin Franklin:

²⁹¹ Last Will and Testament of John D. Bruskie dated Apr. 1, 1913 (copy on file with the author).

²⁹² “This view is based in large part on the children’s perspective that the share they receive is the final measure or ‘report card’ of their parents’ love and approval.” O’Sullivan, *supra* note 85, at 308; *see also* Susan N. Gary, *The Greatest Heritage Is the Love of a Family: The Larson Case and the Mediation of Probate Disputes*, 1 PEPP. DISP. RESOL. L.J. 233, 233 (2001) (highlighting the damage to sibling relationships and other family relationships when there are unequal bequests under a will).

²⁹³ “Lopsided wills can lead to bitter family quarrels.” FRIEDMAN, *supra* note 166, at 96. Other decisions that may implicate family are the nomination of a fiduciary, transfer of a family farm or family business, lifetime giving, and loans to relatives. *See* O’Sullivan, *supra* note 85, at 257–60, 290–305; *see also* Robert M. Hughes, *Preserving Family Harmony in Estate Planning*, J. KAN. B.A., Mar. 2007, at 18, 18.

²⁹⁴ HELGAND & FLEMING, *supra* note 193, at 170. In the context of ethical wills, discussed below, one author remarks, “The baby boomer generation is gaining an awareness of their personal yearning to find, express, and pass on the meaning and purpose in their lives, as well as to capture the stories, values, and meaning of their aging parents.” Baines, *supra* note 230, at 26.

²⁹⁵ HELGAND & FLEMING, *supra* note 193, at 170; *see also* BRODY ET AL., *supra* note 134, at 138 (suggesting that a draftsperson “may deflect some hostility by softening the tone of [the] documents”).

It has been an opinion, that he who receives an estate from his ancestors is under some kind of obligation to transmit the same to their posterity. This obligation does not lie on me, who never inherited a shilling from any ancestor or relation: I shall however, if it is not diminished by some accident before my death, leave a considerable estate among my descendants and relations. The above observation is made merely as some apology to my family for making bequests that do not appear to have any immediate relation to their advantage.²⁹⁶

Benjamin Franklin left a considerable sum to the city of Boston, Massachusetts, and the city of Philadelphia, Pennsylvania.²⁹⁷ The will also explains Franklin's connections to these cities.²⁹⁸ A more conventional explanation is illustrated by the following provision from a 1869 will:

I have already given my children as much as I am able except my son George & yet he has been as good & obedient son as any of my children & therefore I do wish my Executrix to let him have my interest in the Charlestown farm that is one half of that interest & my dear wife the other half. I have purchased all the interest my son Emmanuel has in that farm by exchanging for his interest lands in Dade County in the state of Georgia.²⁹⁹

Explanations are not limited to bequests to children. The following is an explanation from an actual probated Will of Marie Causey Norman that was executed on October 7, 1997:

My estate will be just a modest estate in size. I love all my brothers and sisters and their children. For good reasons known to all, I have singled out my sister's, Dolores Causey Morgan's, two grandchildren Garard Davis (born May 5, 1986) and Kendra Jolley (born August 26, 1990) and my two brothers, Cicero Causey Jr. and Ed Miller Causey, to be beneficiaries of this will. Dolores is a handicapped person. She is helped by all surviving family members who are seeing that her two grandchildren, Garard and Kendra, are cared for during

²⁹⁶ Codicil dated June 23, 1978 to the Last Will and Testament of Benjamin Franklin dated July 17, 1788, reprinted in CONSIDINE & POOL, *supra* note 91, at 93 (1974); see also BENJAMIN FRANKLIN, A BENJAMIN FRANKLIN READER 388 (Walter Isaacson ed., 2003).

²⁹⁷ See FRANKLIN, *supra* note 296, at 388-89.

²⁹⁸ For an excerpt of the language relating to Boston, Massachusetts, see *infra* note 337 and accompanying text.

²⁹⁹ Last Will and Testament of Samuel T. Bailey dated December 8, 1869, recorded November 14, 1870 in Bibb County, Georgia (maintaining original punctuation and spelling) (copy on file with the author).

Dolores' lifetime and during the minority and young adulthood of Garard and Kendra. Garard and Kendra are orphans. Dolores is able to provide some of the motherly care Garard and Kendra need in their growing-up years; however, because of her disability, she can do just so much. Her remaining siblings and some of her other family members help with Dolores and the two grandchildren. This will is made leaving my property in trust for the benefit of the education and care of Garard and Kendra with remainder to my brothers Cicero Causey Jr. and Ed Miller Causey, share and share alike, after Garard and Kendra have completed their college education or have received as much of an education as they will take or until Kendra reaches the age of 21, whichever comes first.³⁰⁰

In a later provision in the same will, the explanation of the disposition continues:

Dolores as a handicapped person draws SSI income. As such she is a most deserving person. What she draws is not enough to keep her up as she needs to be provided. This means that my living siblings and other family members from time to time have to make—and do in fact make—contributions in money and services help for Dolores, Garard and Kendra. All of us together have to make personal sacrifices which we are scarcely able to make but which we do make out of love for Dolores, Garard and Kendra. The bequest of my residual estate to the trustees is done on a long-time-planning design As long as my health permits, I will continue as I have done over the years to make doctors' and dentists' appointments for Dolores, Garard and Kendra and take them to such appointments or see that transportation is arranged. This is a "community" family affair. All of us must continue to do our respective parts in this connection.³⁰¹

This language goes beyond the typical, desultory "for reasons he or she will understand."³⁰² This language, appearing below the heading of "Family and Personal History," also illustrates

³⁰⁰ *Id.* The will was received by the Clerk's Office of the Probate Court of Bibb County, Georgia on February 8, 2006 (copy on file with the author.)

³⁰¹ *Id.*

³⁰² Another example of a hurtful explanation, and inappropriate use of voice, is the following: "Where distributions are to be made to my son, bear in mind that, although he is a fine person, he has demonstrated bad judgment, is of weak character, and could easily be adversely influenced by outside sources. I prefer that you place as little funds as possible under his direct control. Also consider that my daughter, who has never been gainfully employed and has been married three times, has obvious difficulty with responsibility and relationships. Accordingly, you should keep 'strings attached' to all distributions made to her." Bove, *supra* note 244, at 43.

that some drafting attorneys have already cultivated a sense of voice. The sentiments expressed could have appeared in other forms, such as an ethical will or a letter to the beneficiaries. Having the language appear in the will endows additional authority to the voice. However, including such personal information in a document that becomes public record may not be appropriate for all testators. This is particularly true for testators who achieve some sort of fame during their lifetime, and it can be anticipated that their last will and testament will be sought out.³⁰³

Inclusion of such language in a will does not mean that the testator should not share his or her wishes with his or her family during the testator's lifetime.³⁰⁴ Indeed, repetition may help various beneficiaries—or potential beneficiaries—understand the plan. However, it may not be productive for the testator to share his or her thoughts, either because the beneficiaries are too young to participate in a dialogue about the testator's wishes or because the testator is not yet ready to discuss these issues openly with the beneficiaries.

Because of the public nature of a will, care must be taken in articulating the explanation. Care should be taken not to include language that is insulting, hurtful, inaccurate, or libelous.³⁰⁵ For, as one scholar wrote that the testator

is often like the man who calls his enemy on the telephone, tells him what he thinks of him, and then hangs up the receiver. For

³⁰³ For a compilation of a variety of celebrity wills from Ted Williams to Richard Nixon to Diana, Princess of Wales, see Sean W. Scott, *Famous Wills*, <http://www.virtuallawoffice.com/wills.html> (last visited Oct. 11, 2011); see also Green, *supra* note 279 (providing a detailed analysis of William Shakespeare's will dated June 22, 1616).

³⁰⁴ See HEGLAND & FLEMING, *supra* note 193, at 172 (advising Boomers to have a family conversation to "reduce misunderstandings and hurt feelings").

³⁰⁵ An additional example of a hurtful explanation is the following: "[B]efore anything else is done fifty cents be paid to my son-in-law to buy for himself a good stout rope with which to hang himself, and thus rid mankind of one of the most infamous scoundrels that ever roamed this broad land or dwelt outside of a penitentiary." John Marshall Gest, *Some Jolly Testators*, 8 TEMP. L.Q. 297, 311 (1934) (internal quotation marks omitted) (quoting will No. 2249 of 1908, Philadelphia, Pa., Register of Wills). For this quote and others, see Paul T. Whitcombe, *Defamation by Will: Theories and Liabilities*, 27 J. MARSHALL L. REV. 749, 751 n.13 (1994).

a will is a man's one sure chance to have the last word. In it he can vent his spite in safety without his victims[] having a chance to answer back.³⁰⁶

One need only think of explanations such as the following language:

"To my second sister Sally, the cottage that stands beyond the said field with its garden, because as no one is likely to marry her it will be large enough to lodge her. . . .

. . . .

To my brother Ben, my books, that he may learn to read with them. . . .

. . . .

To my brother-in-law Christopher, my best pipe, out of gratitude that he married my sister Maggie whom no man of taste would have taken."³⁰⁷

Without denigrating the individuals, a will could articulate concrete, rational reasons that underscore the testator's choices. Reasons could include the differing financial and physical needs of the individuals or the care provided by one of the individuals. Providing reasons minimizes speculation on the part of the beneficiaries as to the reason for the differing treatment.³⁰⁸ Again, care should be taken because of the nature of the public documents.³⁰⁹

Likewise, care should be taken so that the explanation does not create ambiguities. In a certain respect, conditional wills are examples of explanations that could create problems. A conditional will, generally not drafted by an attorney, is a will that contains a clause such as, "This is my Will should I die on my trip to California." The problem arises when the testator dies six years after the execution of the will on a trip to Maine. Despite seemingly clear condition on the applicability of the

³⁰⁶ Hibschan, *supra* note 66. In a sense, the beneficiary's voice is gagged because the beneficiary is in the passive receiving role of the diatribe.

³⁰⁷ HARRIS, *supra* note 6, at 179 (quoting the will of Dr. Dunlop).

³⁰⁸ The bequest a child receives under a will "will be the last memory the child has of the parent, which if not resulting in an enduring resentment not previously present, will create a permanent feeling of rejection that could exact a costly emotional toll on the child." O'Sullivan, *supra* note 85, at 309-10.

³⁰⁹ Wills by celebrities become public fodder. Indeed, celebrity wills may even be available for purchase. See, e.g., *The Celebrity Archive—Authentic Celebrity Last Wills, Autopsies & Divorces*, CELEBRITY COLLECTIBLES, <http://www.celebritycollectables.com> (last visited Oct. 10, 2011) (advertising copies authentic celebrity wills for sale).

document, the courts take the common sense view that the language expresses the motive for making a will, rather than a true condition. This, in some sense, is an explanation as to why the will was drafted, albeit a clumsily drafted one.

Related to explanations are expressions of love.³¹⁰ For example, a will may include:

I want my children to know that I loved them deeply and they were my greatest blessing and are my legacy. I was always proud of their accomplishments, their character, and their choices. I acknowledge my daughter's courageous decision to turn from addictions to a life of health and responsibility.³¹¹

The famous opening of Napoleon's will could also be categorized as an expression of love. The will opens: "It is my wish that my ashes may repose on the banks of the Seine, in the midst of the French people, whom I have loved so well."³¹²

Sometimes draftspersons can create problems when they incorporate expressions to loved ones in wills, especially if the expressions are not coming from the testator. For example, J. Seward Johnson's will contained a clause to his children that stated:

"It was my wish to provide my children with financial independence at an early age, and, accordingly, I created a substantial trust for each of them during my lifetime. It has been a source of pleasure to me to see my children pursue their interests independent of me and in a way that would not have been possible if I had not provided for them in this way."³¹³

The statement did not embody the testator's actual sentiments, but were the attorney's attempt to forestall a will contest. During the will contest, this language came back to haunt the will proponents and provided grounds for contesting the will.³¹⁴ Thus, this example illustrates that an injection of a

³¹⁰ See Smith, *supra* note 65, at 77 ("The attorney of the deceased may provide the voice of reason in a dysfunctional or grieving family through a will or estate planning document drafted to include healing words from the decedent.").

³¹¹ *Id.*

³¹² Last Will and Testament of Napoleon Bonaparte dated April 15, 1821, reprinted in CONSIDINE & POOL, *supra* note 91, at 104.

³¹³ DAVID MARGOLICK, *UNDUE INFLUENCE* 142 (1993).

³¹⁴ In dispensing general advice, two authors cautioned that "[w]hile that [explanation] might make it easier for your heirs to understand your choices (and hence resent them less), you make your Will more vulnerable to attack." HEGLAND & FLEMING, *supra* note 193, at 170.

false voice does not further the testator's interests.³¹⁵ As George Orwell wrote, "The great enemy of clear language is insincerity."³¹⁶ Along the same line, when someone contests the will, the contestant asserts that the will is not what the individual actually wanted to say. Instead, the contestant is asserting that the "impersonal choice of words . . . sound[] like someone put words in the decedent's mouth."³¹⁷ In some respects, "that is exactly what happened" in the estate planning process.³¹⁸ The draftsman is translating the words of the individual into a document where the draftsman creates a persona that does not reference the individual's own voice.

Similarly, when specific justifications for a particular bequest or division of property is included, care should be taken that if the justification serves to undercut the validity of the bequest if the justification changes. For instance, the following justification could create problems: "I have made no provision under this Will for my husband, _____, because he is adequately provided for financially and is a joint tenant with me on our home and other assets."³¹⁹ At the time of the wife's death, if the husband's stock portfolio has not rebounded or the house was sold as part of a short sale, this justification, interpreted as a condition, could be used by the husband to challenge the will for his elective share.³²⁰

By exploring and incorporating a testator's reasons, a drafting attorney may "avoid involvement in or liability for a contested will," and a malpractice action.³²¹ However, a factually inaccurate or incomplete recital may lead a court to entertain a

³¹⁵ The author of CLE material explores the opportunities of outlining reasons for the bequests but, at the same time, cautions against the inclusion of erroneous information. The author provides the following as an example of a problematic explanation: "Although my cousin Jane Doe brought me dinner every day for ten years, she told me that she did this out of love and affection for me and that she did not expect anything in return. Accordingly, I am certain she will not be disappointed that I have not included her as a beneficiary in this will." Brian D. Bixby, *Will Contests, Compromises, and Practical Steps To Avoid Litigation*, in MASS. CONTINUING LEGAL EDUC., INC., 1 MASS. PROB. MANUAL § 4.4.2 (Hanson S. Reynolds & Joseph P. Warner eds., 2009).

³¹⁶ GEORGE ORWELL, *POLITICS AND THE ENGLISH LANGUAGE* (1946), available at http://mla.stanford.edu/Politics_&_English_language.pdf.

³¹⁷ Smith, *supra* note 65, at 74.

³¹⁸ *Id.*

³¹⁹ RAY & COX, *supra* note 150, at 388.

³²⁰ *See id.*

³²¹ Smith, *supra* note 65, at 76.

claim of undue influence.³²² Likewise, it would not be appropriate, for example, for the attorney draftsman to include libelous statements.³²³

Consequently, the draftsman must find, as Philip Larkin wrote, “[w]ords at once true and kind, / Or not untrue and not unkind.”³²⁴ When so used, explanations can channel the testator’s voice in a manner that facilitates the contemplation of mortality—and hence finality—by the testator and the absorption of the testator’s wishes by the beneficiary.

4. Description of People and Entities

The provisions of a will must describe the beneficiaries with sufficient specificity for the executor to later identify the proper beneficiaries. So, for instance, an individual’s complete name, rather than a nickname, should be used.³²⁵ The individual’s relationship to the testator may also be included. To further identify the individual or entity, many draftsmen include addresses of the beneficiaries.³²⁶ Just like specific property, the draftsman must balance the description with the potential trouble that could be raised from a particular description. For example, it could be problematic to describe a niece as a “favorite niece” when the testator has multiple nieces. This description, while true to the individual’s voice, can be damaging to relationships. Descriptions of individuals could include

³²² See, e.g., *Lipper v. Weslow*, 369 S.W.2d 698, 702–03 (Tex. Civ. App. 1963) (noting that factual discrepancies about the nature and number of personal contacts did not support the finding of undue influence). See generally Ronald J. Scalise Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT’L L. 41 (2008).

³²³ See Marc S. Bekerman, *Points To Ponder for that “Simple Will,”* PRAC. LAW., Mar. 1998, at 43, 44.

³²⁴ PHILIP LARKIN, TALKING IN BED (1964), available at <http://www.poemhunter.com/best-poems/philip-larkin/talking-in-bed>.

³²⁵ See, e.g., *Moseley v. Goodman*, 195 S.W. 590, 592 (Tenn. 1917). The description of the beneficiary was the heart of the murder motive in Agatha Christie’s *Peril at End House* where the name Magdala Buckley caused so much trouble. AGATHA CHRISTIE, PERIL AT END HOUSE 128, 169 (Bantam Books 1988) (1932).

³²⁶ Including the address in the will serves not only to further identify the beneficiary, but also allows for the subsequent tracing of the beneficiary’s current location. See, e.g., MD. INST. FOR CONTINUING PROF’L LEGAL EDUC. OF LAWYERS, INC., WILL DRAFTING IN MARYLAND, at 4.7.1.1 (2007) (recommending the use of city and state designations when naming beneficiaries); RAY & COX, *supra* note 150, at 385 (“Providing an address assists the executor of the will in contacting the beneficiaries.”).

references to “my dear [and] faithful wife,”³²⁷ “my namesake,”³²⁸ “my friend since grade school,” or even “my most considerate friend and best helper.”³²⁹

The use of class designations, such as children, can maximize the individual’s objectives. Crafting a document a document with consideration for the changes in family and assets ensure the viability of the estate plan. However, these class designations may overstate the individual’s wishes by creating too open of a class or creating a too ambiguous class. Moreover, the use of class designation may mask the individual’s voice. Take, for example, the word “issue.”³³⁰ Extremely flexible, the word “issue,” at once both singular and plural, is commonly used by draftspersons. And yet, “issue” is a term that is baffling to most testators.³³¹ In conversations with attorneys, the term “issue” is frequently defined as “descendants.” Thus, descendants could be used instead. Concerns as to the problems arising from the substitution of a commonly used term, with associated statutory and judicial meaning, for another term are valid. But, because the will includes a definitions section, the draftsperson can link the term used in the will to the substantive law and proscribed meaning of the other term.

It may be appropriate to shy away from class designations to actually name the individuals. For example: “I give my Residuary Estate in equal shares to my son, David Meriwether, if he survives me, and to my daughter, Ruth Simms, if she survives me. If either my son or my daughter does not survive me, then I give such child’s share, in equal shares, to the children of such child who are living at the date of my death. If either my son or my daughter does not survive me and is not survived by children

³²⁷ Last Will and Testament of Samuel T. Bailey dated December 8, 1869, recorded on Nov. 14, 1870 (copy on file with the author).

³²⁸ Last Will and Testament of Alice Domingos Evans dated March 17, 1976, recorded on Sept. 23, 1983 (copy on file with the author).

³²⁹ Last Will and Testament of Julia Pepper dated May 1, 1899, recorded on Apr. 1, 1901 (copy on file with the author).

³³⁰ For an analysis of the use of the word “heirs,” see generally A. James Casner, *Construction of Gifts to “Heirs” and the Like*, 53 HARV. L. REV. 207 (1939); see also A. James Casner, *Class Gifts—Definitional Aspects*, 41 COLUM. L. REV. 1 (1941); William F. Fratcher, *Class Gifts to “Heirs,” “Issue,” and Like Groups*, 55 ALB. L. REV. 1205 (1992).

³³¹ “Oftentimes the most frequently used expressions become unclear.” Grether, *supra* note 142, at 310 (highlighting common mistakes in drafting, such as extreme brevity and overspecificity).

who survive me, I give such child's share to my surviving son or daughter or to the children of such child who survive me, in equal shares."³³²

With the changing demographics and the changing nature of family, individuals are seeking to give bequests to individuals outside of the family.³³³ Included in the description of the person could be the motivation for the bequest. This reinforces, for the beneficiary, the reason he or she was named in the will. For example, a bequest might be to "Margaret Willows, who helped me through Paul's death." As with the explanations and expressions of love discussed above, care must be taken not to disrupt family harmony or raise grounds for a will contests. For bequests to caregivers,³³⁴ caution should also be exercised so that there is not ambiguity as to whether the provision in the will is a bequest or compensation. After all, "old age means more than new relationships. It also means new strains and conflicts."³³⁵

While the examples above relate to individuals, descriptions of entity-beneficiaries could also be expanded to incorporate the testator's voice. To properly identify a charitable organization, care is taken to use the organization's recognized tax-exempt name, which may be slightly different from the commonly-used name. For example, the tax-exempt name of Stanford University is the Board of Trustees of the Leland Stanford Junior University.³³⁶ In an effort to further identify the organization, the EIN can be used. Incorporating the individual's voice can mean the inclusion of a phrase that illustrates the importance of the organization to him or her. In the will of Benjamin Franklin, in which he gave considerable sums to the cities of Philadelphia, Pennsylvania, and Boston, Massachusetts, Franklin stated, in part:

³³² This provision is modified from an example in SHAFFER ET AL., *supra* note 1, at 299-300.

³³³ See generally Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1 (2006); Harry D. Krause & David D. Meyer, *What Family for the 21st Century?*, 50 AM. J. COMP. L. 101 (2002).

³³⁴ See Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 129-30 (2008) (asserting that the demographically aging population requires strengthening of testamentary freedom to allow testators "to reward caregivers") (emphasis omitted).

³³⁵ Rosenfeld, *supra* note 208, at 176.

³³⁶ The proper tax-exempt names of charities can be located using IRS Publ'n. 78, available at <http://www.irs.gov/charities/article/0,,id=96136,00.html>.

I was born in Boston, New England, and owe my first instructions in literature to the free grammar schools established there. I have therefore already considered these schools in my will. But I am also under obligations to the state of Massachusetts for having unasked appointed me formerly their agent in England with a handsome salary which continued some years³³⁷

Other examples include: “to the charity where I often volunteered for the annual telephone drive” and “to the Zoo Atlanta where I enjoyed taking my children on excursions.” Rather than attempting to restrict the use of the gift by adding a condition, this language simply passes on those values that were important to the testator.

The language must identify the beneficiaries with sufficient specificity for subsequent identification. By elaborating on the relationship of each beneficiary to the testator, the testator’s voice resonates throughout the document.

5. Description of Property

In the will, property must be described with sufficient specificity to permit the executor to identify the property and distribute it to the designated individual. The specific bequests³³⁸ of tangible personal property³³⁹ are often the most important from the testator’s point of view. For example, one testator specifically bequeathed “my knitted bed spread and typewriter,”³⁴⁰ and another specifically bequeathed government bonds.³⁴¹ Essentially, these bequests transfer those items of

³³⁷ CONSIDINE & POOL, *supra* note 91, at 92–93.

³³⁸ A “specific bequest” is a testamentary gift of a particular—or specific—item of property. BLACK’S LAW DICTIONARY 180 (9th ed. 2009).

³³⁹ “Tangible personal property” is property “that can be seen, weighed, measured, felt, or touched, or is in any other way perceptible to the senses.” *Id.* at 1337–38. Examples of tangible personal property are paintings, furniture, dishes, and books. *Id.* at 1338.

³⁴⁰ Last Will and Testament of Melissa E. Jones dated April 27, 1942 (copy on file with the author).

³⁴¹ Last Will and Testatment of Iva W. Ivey dated July 19, 1948 (copy on file with the author).

great value to the testator, whether it be monetary or sentimental value, to individuals who have great importance to the testator.³⁴²

An opportunity to incorporate the voice comes in the form of the description of property, particularly tangible personal property. Items of property need to be described with specificity so that the property can be identified by the executor. While some draftspersons may see the particular item of tangible personal property or read descriptions of the tangible personal property on insurance riders, the majority of descriptions are furnished by the testator. In an article about ethical wills, the author noted an instance when writing an ethical will allowed an individual to think about the significance of tangible personal property.³⁴³ The following example represents the type of description that incorporates voice: "The stemware that Grandma gave me should be split between A and B, one half to each . . . Grandma saved S & H Green Stamps to buy them in 1965 or 1966. They were the first stemware I ever owned."³⁴⁴ Another example of voice in a specific bequest is the following language: "the sterling silver candlesticks with the engraved initials 'AG' that I regularly placed on the Thanksgiving Day table." Another example is the following: "my antique desk set with mother of pearl handle that my husband gave to me when I returned to work after the birth of our first child." These examples identify the property and further inform the beneficiary of the significance of the item to the testator.³⁴⁵

Because the nature and extent of one's property may change over time, draftspersons regularly include broad categories of property. Because the number and particular items in the category may change during a person's life, it would be

³⁴² See Joseph M. Scheuner & Olen M. Bailey Jr., *A Legal and Practical Guide to the Disposition of Tangible Personal Property at Death*, PROB. & PROP., May-June 2006, at 66, 66. Individuals often see property as an extensive of themselves. See SHAFFER ET AL., *supra* note 1, at 22-23; see also Jeremy A. Blumenthal "To Be Human": A Psychological Perspective on Property Law, 83 TUL. L. REV. 609, 610-11 (2009).

³⁴³ See Frank, *supra* note 233, at 80.

³⁴⁴ *Id.* (alteration in original).

³⁴⁵ For additional examples of bequests of heirlooms and keepsakes, see GEORGE W. THOMPSON, *THE LAW OF WILLS* § 762, at 843 (3d ed. 1947) ("I will and bequeath to my nephew, D.S.P., my fowling piece, which was presented to me by Colonel Riano, of the Spanish Royal Army; then to my nephew, W.P., I will and bequeath my sword and pistols, being the same which I used at the siege of New Orleans; these I wish to have retained by the family.")

impossible to accurately list the items that would be in the estate on the date the will is probated. For that reason, draftspersons regularly include language such as “I give all my jewelry to my daughter, Rebecca Yates.” Nonetheless, the necessity of including broad categories does not preclude the opportunity to inject voice.³⁴⁶ For example, the provision could become: “I give my daughter Rebecca Yates all my jewelry, including the opal ring that my mother gave to me for my sixteenth birthday.”

Expanding the description of specific property serves the purpose of further identifying the property for the executor while also incorporating the testator’s voice. Upon reading the bequest, the testator, and ultimately the beneficiary, will recognize the value of that property to the testator, both the monetary and sentimental value.

Furthermore, the customary definitions of general types of property may also be modified to incorporate the testator’s voice. For example, a typical provision would state, “I give all of my tangible personal property, including any furniture, furnishings, jewelry, personal effects, and automobiles owned by me at my death . . . to my daughter.”³⁴⁷ The definition could be customized. For example:

I give and bequeath and devise to my four daughters, to-wit: Mary (Mrs. J.H. Wilcox) Minnie (Mrs. G.T. Holt) Elizabeth and Willa, share and share alike and equally all the following personal property. All merchandise, store fixtures, cattle, mules, hogs and live stock of all kinds, machinery of all kinds, tools, farming implements, corn, wheat, oats and all kinds of grain, fodder, wagons, trucks, cars and every and all other personal property of whatever I may die possessed including household and kitchen furniture, including all stocks and bonds, accounts and other evidence of indebtedness.³⁴⁸

³⁴⁶ Using a similar rationale although not adopting either the terms “voice” or “persona,” the authors recommend the revision of a clause stating: “I bequeath to Sylvia Smith all my jewelry and artwork or handmade items in my possession at the time of my death.” to the following: “I bequeath to Sylvia Smith, Route #1, Box 470, Ashland, Missouri, my wedding rings, my inlaid turquoise ring, my turquoise pendant, and any artwork or handmade items created by me and in my possession at the time of my death.” RAY & COX, *supra* note 150, at 385 (internal quotation marks omitted).

³⁴⁷ MARY F. RADFORD & DANIEL HUNTLEY REDFEARN, *WILLS AND ADMINISTRATION IN GEORGIA*, § 17:30, at 205 (7th ed. 2008).

³⁴⁸ Last Will and Testament of A.B. Van Valkenburg dated June 14, 1934 (copy on file with the author).

Property must be described with sufficient specificity to allow for subsequent identification. The draftsman can expand the description of the property. This expansion permits the beneficiary to hear the testator's voice through the draftsman's skillful construction of a *persona*.

CONCLUSION

Wills are one of the oldest forms of legal documents. At the same time, the will is arguably the most important and personal legal document an individual ever executes. The will is the culmination of the estate planning process where an individual contemplates his or her death and assesses his or her life, including the evaluation of relationships and assets. The will becomes the last words spoken by the testator. Yet, the typical will reflects little, if any, of the individual testator's voice. The draftsman can craft a *persona* that conveys a sense of the testator's personal voice while moderating that voice to ensure that the document is substantively accurate and operative. The crafting of a *persona* maximizes the estate planning personal experience for the individual testator and maximizes the function of the document to express the individual testator's wishes. Not only might voice defuse the likelihood of litigation, it helps further the goals of estate planning by conveying an individual's financial and personal legacy.