Heckerling Institute 2007
Reports from the event, as posted to the ABA-PTL List Serve

Report #4

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

As we have done in January for the last ten years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 41th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 8-12, 2007 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute this year. A complete listing of the proceedings and speakers will be published here later and is also available on the Institute's Web site at http://www.law.miami.edu/heckerling.

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Eratta: Tuesday morning "Free" Life Insurance by Stephan Leimberg - here is a correction from Reporter Kimon Karas: In the 2nd full paragraph above recent developments, in the third sentence, the word "investor" should be "insured."

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This Report contains coverage of the Wednesday morning Question and Answer sessions

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Question and Answer Session Wednesday morning, January 10, 2007 Panelists: Steve R. Akers (SA), Carlyn S. McCaffrey (CM) and Louis A. Mezzullo (LM)

Reporter: Merry H. Balson, Wade Ash Woods Hill & Farley, PC, Denver, Colorado

This session was presented by a panel of Steve Akers ("SA"), Carlyn McCaffrey ("CM") and Lou Mezzullo ("LM"). The questions, comments and answers were as follows.

Q: Given the disparities among the states relating to the repeal of the state death tax credit, it seems that states (governors or state estate tax administrators especially) have not lobbied as heavily as they might. The suggestion in the question (which seemed to be more of a comment) was that the state lobbies should be able to impose on Congress to reinstitute the state death tax credit at the federal level. A: SA thought that might be effective, and that the states have been taken the impact of this repeal and have done little to lobby for reinstatement. The problem is that reinstatement would have a huge impact on federal revenue. None of the panelists have seen this issue in any of the reform discussions.

Q: Does a charity have to be taken into account for purposes of determining whether there is a designated beneficiary for retirement plan purposes where the beneficiary designation states that the charity is the beneficiary only if a child does not reach a certain age? A: Yes. Charity would be taken into account and there would be no designated beneficiary. LM referred to PLR 200228025 in which an IRA was payable to a trust for the benefit of minor children, which terminated when a child reached age 30. If children died before age 30, an uncle, age 67 was to take. The IRS ruled that the uncle was the designated beneficiary because he was the oldest beneficiary. Natalie Choate's special session program may cover this issue in more detail.

Q: What is the preferred method for creating an intentional grantor trust (aka defective grantor trust) that avoids estate tax inclusion? A: LM said that the right to substitute assets is used frequently, although there is no authority on point to authorize this, and there may be an issue with reacquiring assets, so he suggests using another method to make the trust a grantor trust. There are varying preferences on this issue, but LM likes to give an independent person the right to add beneficiaries (e.g., spouses of descendants who are already beneficiaries of the trust, or charitable organizations where the client is already charitably inclined). CM mentioned that some would disagree on LM's conservative approach, and although there is no specific authority on the ability to reacquire assets being a 2036 problem, Jordahl says if the power is held in a fiduciary capacity, there is no problem. Most estate planners agree that so long as the grantor is required to use assets that are equal in value to those exchanged there should be no 2036 problem. SA noted that in Jordahl it was not that the person had the power in an absolute fiduciary capacity, but that they acted in fiduciary capacity and exchanged assets for fair market value. There was a recent PLR along these lines where the IRS refused to rule unless the power was held in a fiduciary capacity. SA agreed that as along as fair value must be given, it would be tough to say there is a 2036 problem. LM disagrees because a grantor could substitute illiquid non-income producing real estate for a liquid income producing CD affecting the character of the property, but CM believes there is only a problem if the trustee is prohibited from selling the real estate and reinvesting it. SA likes to use related persons as trustees, but noted that if a spouse is the third party with power to substitute assets then there is definitely a reacquisition problem because powers held by a spouse are deemed to be held by the grantor, plus if the spouse dies, you need to have a backup provision to retain grantor trust status.

Q: CM was asked to review the example of a sale of a remainder in a GRAT to a grantor trust. A. Grantor establishes a 20 year GRAT funded with asset worth $20M, the annuity payment is $12,100 and is scheduled to increase by 20% each year, with the remainder to pass to a separately funded existing grantor trust. If the assets increased in value by 20% during the GRAT term, at end of the term there would be $2.4M in the GRAT, and the present value of the remainder interest, assuming a 5.6% 7520 rate, would be $1.15M. The grantor could either purchase the remainder interest at its $1.15M present value with the consent of the trustee, or if he had the power, could substitute assets and reacquire the remainder interest, protecting the $1.15M from the mortality risk of the grantor dying before term has ended. To use this technique the GRAT must be drafted without a spendthrift clause and you need a separate beneficiary (here the separately established grantor trust) to deal with. The risk is that the IRS may characterize this as a form of commutation which is prohibited by the regulations. The risk disappears if the transaction occurs after the statute of limitations has run following the reporting on a gift tax return.

Q. Questioner understands that Revenue Ruling 77-454 does not seem to apply to a Walton GRAT, is this correct, and if so what does it mean? A: CM reminded us that Rev. Rul 77-454 establishes a limit on an annuity. The payments are set above the 7520 rate unless the fund is large enough to last up to 107th birthday of the annuitant. The value of the annuity has to be the value of the right to receive the annuity for the lesser of a term or the life of annuitant. The revenue ruling does not apply to a Walton type GRAT because it is payable for fixed term, and you do not need to take life expectancy into account.

Clarifications SA: SA clarified the Focardi (sp?) case, where they used a baseball arbitration approach for valuation. The theory is each party will be more reasonable because a third party will select one of the suggested appraisals. SA had previously said that the Tax Court is the one making the determination here, and when in fact, the field agent and the taxpayer agreed to select 3 appraisers each, and a 3rd party selected one of those appraisers. You may want to use this as a strategy or settlement opportunity in audit.

Update by SA: SA received an update on the Senda argument, relating to the integrated transaction. Theoretically, 1 day between formation and gift should be enough time to prevent the step transaction argument, so long as you make it clear the asset went into entity before the gift. SA had mentioned the Holden case, where the gift was made 8 days later and was rejected, and another case where the gift was made 8 months later and was rejected. The IRS agent in the Holden case argued that no discount applied because there was an undivided interest in the asset. That will be appealed to the Tax Court. The lesson here is that while analytically 1 day should be sufficient, the IRS is making these arguments. LM mentioned that other abusive factors may have been involved, and until we know all the facts he would not be concerned. SA noted that one question in the audit that has not been seen in the past was what attorney set up the transaction and how much the attorney was paid. LM, as the Chair of the business planning committee of ACTEC had appointed a subcommittee to develop an FLP checklist, but after it was created, he decided he did not want that checklist in the client file as it may be viewed as evidence of a purpose to save taxes. He noted that the Church case had a substantial nontax purpose, but the formation mechanics had many problems, yet the Court held 2036(a) did not apply.

Q: If you file a gift tax return when creating a grantor trust doesn't that imply a gift was made? A: LM said it does not, and it is simply notification of the transaction. Incidentally, there may already be a reportable gift of seed money in these transactions.

Q: CM was asked to walk through the steps for a deferred GRAT. A: When the GRAT is created, usually payments start in the first year. If you expect there may be liquidity problems with the assets in the GRAT in early years, one way around this is to create a long term GRAT, with increasing payments at 20% per year so you have small payments up front. A better solution yet is to provide that payments do not begin for a certain period of time (usually short term, e.g., 3 years). Section 2702(b) says you will have a qualified interest if there is a right to receive payments not less frequently than annually, but says nothing about when the payments must start. The GRAT regs require payments be fixed and ascertainable, for life, a period of years, or the shorter of the two, but says nothing about when the payments must start. Regulation section 25.2702-3(d)(2) states that the annuity must be paid to or for the benefit of the holder with the exception of certain contingencies. One exception permits a survival contingency which seems to implicitly sanction deferred GRATs. CM is not aware of these kinds of GRATs coming up on audit as of yet, but suggests it is an appealing strategy.

Q: If a client has a GRAT where the trustee failed to make annuity payments within 105 days, what is problem and what does CM recommend to cure the problem? A: The problem is the IRS may take the position that the failure to make the payment within the required period violates the regulations and may argue this goes to intent to make the payments. There is no authority supporting this position in the GRAT area, but there is some authority in the CRT arena. The IRS has held that a CRT was not a qualified CRT from the outset when payments were not made in time. What can you do if payments are not made timely? The best approach is to have the GRAT pay the client ASAP and memorialize why the payment did not occur so that there is some evidence of an honest mistake. CM suggests considering paying interest on the payment as well.

Q: Is there an adverse effect on the marital deduction if assets in an FLP that are pulled back into the estate at full value under 2036? A: SA stated that the theory here is that 2036 could to include the full value of the FLP in the estate, while the marital deduction is given only for the discounted value, resulting in a potential estate tax due on the 1st death. In the Bongard case, where a gift of a 7% LLC interest to a spouse was brought back into the decedent's estate under 2035, the Trial Court raised the question of whether the IRS could allow a marital deduction for the full value, not just the discounted value. Similarly, in the Korby Estate, the issue was raised when husband and wife, both of whom had contributed to an FLP, died, and prior to litigation, the parties stipulated that if only 32% of assets would be included in the wife's estate then no marital deduction would be allowed. There are other anticdotal cases raising this issue as well. What can be done? One option is to undo the partnership if before the alternate valuation date so that you value the assets of on the alternative valuation date at the full value, removing the argument. LM noted that if you dissolve, you concede the issue up front, before you even know if there will be an audit. He also noted that the marital trust can be disqualified if the value under the buy-sell agreement differs from the fair market value (See the Renaulti (sp?) case).

Q: If a client has a 2036 issue with an FLP or LLC what is the recommended course of action to divest control over the entity? A: LM stated that 2036(a)(2) should not be a problem if Byrum is still good law and you have not negated the fiduciary duty the general partner has, particularly if you have other owners who hold an interest that is more than de minimus (in Strangi third parties owned only a .53% interest). Question is whether controlling interest should be gifted implicating 2035 by the release of power, or should the controlling interest be sold. If there is a sale, the question is what is full and adequate consideration. Cases have held that full and adequate consideration is the actuarial value of the interest in property. However, the property could be more valuable, or could be worth less than that value, so LM would not stake his license on a sale. Another option is to collapse the entity and form a new entity where the grantor does not hold a controlling interest, however, there are income tax consequences on liquidation, the 3 year rule would probably apply because grantor is giving up a right to control enjoyment of income, and the IRS might treat this as a step transaction and exchange of interests. CM noted that Pam Schneider came up with a solution to the problem of determining the what has been given away. Pam suggests that you could amend the partnership agreement to provide that anyone could withdraw at any time, eliminating the valuation discounts. The trustee of a children's trust could then sell the interest to the transferor for the nondiscounted amount. The client's estate is depleted by the nondiscounted amount, and she gives up the discount on the portion transferred to the trust, but she achieves protection for the amount given to the children. SA mentioned that in the December Trusts and Estates Magazine, an article suggests that the spouse could have the unilateral power to cause a liquidation of the partnership, so that the spouse can receive an interest that is undiscounted. CM noted that this not only solves the problem, but also gives the spouse a full step-up in basis of the underlying assets. LM note that in 2006 he was an expert witness in a case where a bank trustee of two QTIP trusts holding marketable securities was sued by adult children remaindermen asserting the bank had a duty to create an FLP to reduce the value of the widow's estate, even though widow did not want an FLP. SA mentioned the Texas Supreme Court held that there was no absolute privity, opening claims against the attorney by beneficiaries, where an FLP was not formed.

Q: Has the IRS taken the position that an original discount should not be available when FLP assets are transferred to a GRAT on a discounted basis, and an independent trustee later redeems the interests in exchange for the capital account such that the GRAT then holds undiscounted marketable securities? A: CM was not sure whether this has occurred and not aware of any specific authority to support this position, but she believes this could be a problem on an audit. This could be viewed as an understanding between the parties if it is too easy to get the assets out of the GRAT, and it is a significant risk. LM noted that a PLR in the 1990s the IRS required a discount be taken, but he has not seen any rulings on this point since.

Q: Can the IRS use the Fontana case to aggregate a decedent's property with an interest held under a GRAT such that decedent is deemed to own a majority interest, rather than 2 separate minority interests? A: In Fontana decedent owned an interest in a family entity, and was the beneficiary of a trust owning the same interest. CM stated the issue was whether the interests should be aggregated, and the Tax Court determined they should be, based on the decedent's actual control over the stock through a power of appointment. There is no similar control in a GRAT, but some GRATs do give the grantor a power of appointment over assets includible in the estate if the marital deduction does not apply. In that case, Fontana would be on point and would aggregate interests. However, if there is no power of appointment there should be no problem. She noted Revenue Ruling 79-7 dealt with section 2035 and whether an interest in an entity owned by the decedent should be aggregated with an interest in an entity he had given away within 3 years of death. That ruling held that the interests would be aggregated even hough the decedent had no control because the purpose of 2035 was to treat the asset as if it had not been given away. It is unclear whether this would apply to 2036, but CM would not be surprised if the IRS took that position. LM noted that in Bonner, there was no aggregation of a QTIP's interest with a spouse's outright ownership, but one of the reasons was that assets came from different sources. CM pointed out that Fontana was not looking at voting control but at dispositive control.

Q: Elaborate on why the delay in contributions in the Rosen case was a problem. A: SA said many of the decisions come down to a smell test with the judges. This may have been the case in Rosen where the delay in funding was mentioned in several old FLP cases and the Court used that to support its decision. He mentioned the mechanics in forming this partnership were very bad, and the form was not respected. The lesson is to follow the mechanics under state law as closely as possible. LM stated that all of the 2036(a)(1) factors in the outline should be followed, but practically, parties don't always do these things.

Q: Many real estate attorneys use single member LLCs for real estate - does this give you a step up in basis? A: LM under the check the box regulations, a single member LLC is disregarded for all federal tax purposes, and the member is treated as owning the asset outright so they will get a step up.

Q: If real estate in a state that has state estate tax is placed in an LLC to convert it to intangible personal property can you avoid the state estate tax? A: LM said it depends on the state law. In the partnership area, some states look through the partnership. LM suggested not to place FL real estate in a NY LLC because it will be taxed in NY. Jonathan Blattmachr noted that if you have a business reason for the formation of the FLP it should be considered intangible property, but if the entity is formed just to avoid estate tax it may not work.

Q: If FLP is created in year 1, with $10M in underlying assets, after discounting value is $5M for gift tax purposes, but the IRS audits, claiming retained interests, tiered discounts, etc., but during the audit assets depreciate significantly, can you undo the FLP and distribute the assets to make the audit go away? A: SA says absolutely not. The asset is valued on the date of gift, and you do not want to create the implication that the FLP can be undone.

Q: Can 2036 be used in gift tax realm? A: No, it is not a gift tax issue. Q: Can a GRAT or entity owned by a GRAT lend money to the transferors spouse, with a note to be repaid prior to the end of the GRAT, if other assets are available to make the payments, and then the borrowed funds are used to buy an apartment with the grantor or the trust? A: CM first noted that the use of the funds is not important. So long as the spouse and the trustee can show a genuine loan, and it is not a distribution to the spouse which would be a problem under the regulations there should be no problem with this. The GRAT can purchase an interest in the apartment like any other investment decision. CM does not believe this would be a commutation problem so long as it is a commercially viable transaction. SA asked what interest rate should be used and CM responded that the AFR should be sufficient under 7872. SA noted that if the GRAT purchases an undivided interest in the real estate the spouse's estate will get an undivided interest discount for the asset.

Q: When forming an LLC, how do you avoid the Senda issues? A: LM tries to have all family members or trusts contribute consideration when forming the LLC, so that it is protected from creditors at the outset, rather than starting with a single member LLC which is not protected from creditors and then converting to multi-member. This also avoids the gift on formation argument that might be made under the tax rules that provide the entity is formed when it becomes a multi-member entity. SA notes that several years ago the IRS argued gift on formation, but the IRS lost on this point and the argument has not been made for some time.

Q: GRAT is for 6 year term, with 2 years remaining, and is funded with illiquid rapidly appreciating assets. The trustee wants to borrow money to make the GRAT payment, but the bank refuses unless the grantor guarantees the debt. Can the grantor make this guarantee for a fee without being in violation of section 2702? A: CM is not sure. The IRS has taken the position that when 1 person guarantees a loan the transaction is treated as if the guarantor borrowed the money and then reloaned it to the lender. The IRS may try to make the same argument in this context.

Q: If you wait up to 105 days to make the GRAT annuity payment and you pay in kind, what is the valuation date of assets used to pay the annuity? CM said that reasonable people disagree on this. As a matter of state law, if the trustee has the obligation to pay a fixed amount to a beneficiary, then the trustee must satisfy that obligation with assets worth the amount owed to the beneficiary, so you would have to use the date of distribution value.

Q: Will submitting to a required physical exam be treated as notice and consent to purchase insurance under the new requirements? A: LM would use that as a backup argument but would not rely on this as a planning tool.

Q: Client who intends to sell LLP interest to a grantor trust has used his gift tax exemption. Can he fund the trust with $1M but retain the right to determine who will receive that money so that the gift is incomplete, and then later distribute the $1M to the grantor's spouse that qualifies for the marital deduction so that none of the assets in the trust are included? A: LM stated that this would require very careful drafting and it is probably not a good idea. CM agreed and noted that if the seed money is an incomplete gift, then there is no basis for arguing the entire trust is not an incomplete gift. LM disagreed, saying the sale of the assets cannot be a gift. SA noted that this was a novel approach, but he would be skeptical, because if we could make a specific dollar value incomplete, we wouldn't need GRATs.

Q: Why do people think you can allocate GST exemption to a 2 year GRAT? If you can allocate, how much do you allocate, the gift amount or the funding amount? If you allocate the full amount, do you need to elect out of the automatic GST allocation rules when the remainder is a GST trust? A: CM began by explaining that the ETIP rules prevent allocation of GST exemption to a GRAT until the termination of grantor's interest. This seems to apply to GRATs because if the grantor dies immediately after the GRAT is created, at least a portion of the property will be included in the grantor's gross estate under 2033, 2036 or 2039. However, an exception to the general rule under Treas. Regs. 26.2632-1(c)(ii) says the value of transferred property is not subject to inclusion in the gross estate of the transferor if the possibility of of inclusion is so remote as to be negligible. Under the regulations, this means that there must be less than 5% probability of inclusion, and a transferor would have to be over age 68. Taken literally, the regulation says that GST can be allocated to many GRATs. While some believe that GST need only be allocated to the value of the gift portion of the interest, CM disagrees and notes that the regulations require the determination of the applicable fraction, where the numerator is the amount of GST allocated to the trust, and the denominator is the value of property transferred reduced by the value of charitable transfers. The regulations do not say to reduce the denominator by the value of any retained interest. Thus, CM believes there is no basis for taking the position that the denominator is anything less than the full value of assets held by the GRAT. Usually, allocating GST is not a good idea, unless the GRAT has highly appreciating assets that will at least double in value by the end of the term. Assuming you do not want to allocate GST exemption, you should elect out of the automatic allocation rules which will apply when assets pass to nonskip persons or to a trust that is a GST trust.

Q: Please repeat the patent number relating to the CRT. A: SA repeated that the patent number is 7149712 issued 12/12/06. Although this was a specialized annuity, it is worth looking reviewing.

Q: Husband wants to create a QTIP for a second spouse, with minimum mandatory payout and corpus distributions of 5%, is this a problem? A: SA said it was not.

Q: Will a trust providing for mandatory income to spouse, discretionary power to pay principal to spouse for health, support, maintenance and education, and a 5 x 5 power qualify for QTIP treatment? A: SA says yes, but in the year of death, if the spouse dies owning the right to withdraw, the spouse will have a general power of appointment (with no impact on the tax). CM noted that there could be problems if you wanted to make a reverse QTIP election.

Q: Client's GST exemption has been exhausted and does not want to give a child/beneficiary a general power of appointment - what does the panel recommend? A: CM pointed out that a general power of appointment does not have to give the holder any real powers. For example, the power could be exercised only with the consent of an independent trustee under 2041.

Q: If a private trust company is a trustee and pays an investment advisory fee the panel mentioned that the 2% floor does not apply. Is the result the same if a commercial bank serves?   A: CM said this is a section 67 issue. Trustee fees are not caught by the 2% rule. If investment fees are not separately charged and instead are part of the overall trust services provided as part of the trustee fee, the trustee commissions would be fully deductible under section 212 without incurring section 67 limitations. The problem is that trust companies unbundle their fees now. If an institution is wiling to rebundle their services and that bundle includes investment advice they can avoid the section 67 limitations. This concept should work with a commercial trustee, but they may not be able to incorporate the investment fees into their overall trustee fee given the external pressures on fees. Where the trustee pays an outsider for investment advice, there is a greater chance the IRS may require unbundling of fees and subject that fee to the section 67 limitations. SA noted that the Rudkin case brief cited authority that Treasury could require unbundling, so the regulations may incorporate this.

Comment by SA: SA addressed the impact of a powerholder to exercise a lifetime power of appointment over a trust where there is a mandatory income beneficiary. If the person holding the power is not a beneficiary there are no implications of exercising the power during life. If the powerholder is a beneficiary, then appointment is a gift under the 2514 regulations of the mandatory income portion. The discretionary principal authority is unclear. No cases suggest that this would be a gift, but a few mid-80s PLRs say it could be a gift. One solution is to give a limited power of appointment to someone other than a beneficiary.

Q: How is a life insurance trust used in a buy-sell agreement and if multiple shareholders use trusts is there a reciprocal trust problem?   A: SA noted that if a buy sell agreement is funded with life insurance and the arrangement is an entity purchase arrangement, there is a cascading value problem as each shareholder dies. With each death, the insurance needed increases, and the proceeds may be included in all shareholders' estates. This can be avoided by using a cross purchase agreement, and by acquiring life insurance in a manner that is not subject to estate tax. Each shareholder can create a life insurance trust for the benefit of his/her family and that trust can hold policies on other shareholders' lives. At the death of a shareholder, the trust will then purchase the stock under the buy-sell agreement and the proceeds are not in anyone's estate. SA does not believe there is a reciprocal trust issue here. LM mentioned that Monroe v. Patterson case should be reviewed on the potential transfer for value issue. SA pointed out that partners of a partnership are excluded from rule.

Q: What are the transfer tax and income tax consequences of domestic partnership?   A: LM addressed CCM 200608038 where the IRS said that an individual who is a domestic partner must report income for the performance of services. Domestic partners in CA have all rights and benefits, and are subject to all duties and responsibilities of a spouse. Other states have similar laws and even same sex marriages. For gift tax purposes, as a domestic partner acquires property treated as community property, there should be no gift of one-half of the value because the rights accrue under state law. However, the IRS could say that becoming a domestic partner was voluntary and treat this as a gift. The federal "Defense of Marriage Act" states that marriage means only 1 woman and 1 man, and a spouse can only be a person of the opposite sex, so if this argument is made by the IRS, there would probably be no marital deduction. If a person attempts to transmute property into community property, there probably would be a gift. For estate tax purposes, state community property law may be a problem because 100% is included in the decedent's estate, but under CA law, all property would be treated as community property, but they may not get a step up in basis under section 1014 because the Defense of Marriage Act would prevent the partner from being a "spouse" under 1014.

SA referred folks to Pennell's book (specifically page 15) to answer questions regarding the effect a joint brokerage account has on basis.

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Our on-site local reporters who are present in Orlando this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Herb Braverman Esq. of Walter & Haverfield, LLP in Cleveland, Ohio, Merry Balson Esq.of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Paul Hood Esq. of L. Paul Hood Jr. (APLC) in Mandeville, Louisiana, Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio. Jason Havens Esq. of Havens & Miller PLLC in Destin, Florida, Alan Rothschild Esq. of Hatcher, Stubbs, Land, Hollis and Rothschild, LLP in Columbus, Georgia, and Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co., LPA in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado, who also is the Chief Moderator of the ABA-PTL List.

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