

9-1-2017

Dennis Belcher's Little Red Book: The Wit and Wisdom of Dennis Belcher

Steve R. Akers

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/actecelj>



Part of the [Estates and Trusts Commons](#), [Taxation-Federal Estate and Gift Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Akers, Steve R. (2017) "Dennis Belcher's Little Red Book: The Wit and Wisdom of Dennis Belcher," *ACTEC Law Journal*: Vol. 43: No. 1, Article 6.

Available at: <https://scholarlycommons.law.hofstra.edu/actecelj/vol43/iss1/6>

This Part II is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in ACTEC Law Journal by an authorized editor of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

PART II



Dennis Belcher's Little Red Book: The Wit and Wisdom of Dennis Belcher

Steve R. Akers*

Dennis Belcher was one of the most popular speakers at estate planning seminars throughout the country. He was both an outstanding planner and outstanding fiduciary litigator. He had a wealth of knowledge about estate planning issues, and more importantly, good judgment in discerning the practical significance of issues for clients and planners in a wide variety of contexts. He had a unique ability to communicate in a witty simple fashion even though dealing with very complex matters—who else could clarify the varying approaches for growing successful estate planning practices by analogy to the *Beverly Hillbillies* and *Star Trek* television shows?¹ Dennis would discuss tax complexities with the best of the technical tax geeks, but then conclude with a one-liner (or perhaps a two-liner) cutting to the core of what the rule or development means for clients in the practical world.

*Harvey Penick's Little Red Book*² was a bestseller in the 1990s and perhaps the most beloved golf book of all time. The book is named for a red notebook that Mr. Penick always kept with him to jot down notes as he observed and taught golf students (including various professionals). The book's description summarizes that "Penick's simple, direct, practical wisdom pares away the hypertechnical jargon that's grown up

* Steve R. Akers, JD, is a Managing Director with Bessemer Trust Company, N.A., in Dallas, Texas, where he is Senior Fiduciary Counsel. Mr. Akers is a member of the Advisory Committee of the University of Miami Philip E. Heckerling Institute on Estate Planning and is the Treasurer of the American College of Trust and Estate Counsel.

¹ The Annual Joseph Trachtman lecture by Dennis at the American College of Trust and Estate Counsel 2016 annual meeting (reproduced in Part I of this issue) addressed changes in estate planning professional practices. A "*Beverly Hillbillies* clientele" is easy to develop and profitable in the short-term, but is not memorable in the long-term and develops little spin off work. The clientele generates a practice with simple matters, one-stop relationships, and price-sensitive commodity clients that pay the overhead. *Star Trek* had complicated plots, and required substantial investment before building its growth opportunities. Building a "*Star Trek* clientele" takes significant investment in clients – it takes time to become a trusted advisor, and the *Star Trek* clientele entails more complex matters (assets and beneficiaries) and less price-sensitive clients with multiple contacts.

² HARVEY PENICK & BUD SHRAKE, *HARVEY PENICK'S LITTLE RED BOOK: LESSONS AND TEACHINGS FROM A LIFETIME IN GOLF* (Anniversary ed. 2012).

around the golf swing.” Similarly, this article is a compilation Dennis’s witty comments that I have jotted down at seminars (mostly from the Philip E. Heckerling Institutes on Estate Planning and at meetings of the American College of Trust and Estate Counsel) —comments reflecting simple, direct, practical wisdom that pares away hypertechnical jargon and gets to the root of human relationships as well as legal issues to focus on the things that matter the most in serving estate planning clients.

For example, some of Dennis’s practice principles include the following:

- (1) Put the client’s interest first. (2) Watch out for your own interest.
- Don’t let your clients’ problems become your problems.
- It’s only money — and it’s somebody else’s.
- Do the right thing. There are the caught and the uncaught. But you cannot rely on being the uncaught.
- Estate planning as a career — Wealthy people will always need solutions, all families are dysfunctional, and Congress cannot repeal greed.

In reminding myself (with hearty laughs) of these observations by Dennis, I am very sad that we will no longer be graced with Dennis’s witty insights at future seminars, but Dennis has left us a wealth of wisdom shining a light on the essence of what we are all about as estate planners.

General Wit and Wisdom

Life Uncertainties. The old Yiddish proverb is that “Man plans, God laughs.”

Too Much. Dennis’s father once told him, “I like a woman with spunk, but son, sometimes your mother has a little too much.”

Lack of Clarity. Where there’s lack of clarity, there’s opportunity.

Just Lucky. There’s the caught and the uncaught.

Remarriage in Later Years of Life. Dennis asked his mom if she would remarry after his father died. She said no. When asked why, she said “at my age, a new spouse is just looking for one of two things—a nurse or a purse. I don’t want to be either.”

That’s Why They’re Rich. Dennis observed that rich people may view their spouse’s gift and GST exemptions as assets (worth up to 40% of

the \$5 million exemption). Dennis reported that he had seen clients in divorce actions negotiate to pay the spouse 30% of the spouse's gift and GST exemption amount to be able to use it prior to the divorce. "The rich view that as an asset. The rich are different. We don't think like that. That's why the rich are rich—they don't think like I do."

Procrastination. ATRA (which left in place the large \$5 million gift exemption) rewarded procrastination. Those clients who did not act did not lose anything. For those who did act we may hear about buyer's remorse.

Perception of Attorneys. The public might view lawyers not as problem solvers but as grit in the wheels of commerce.

Fundamental Principles. In a panel discussion with Dennis and Lou Mezzullo, Lou expressed his three fundamental principles of estate planning: (1) One size does not fit all; (2) Respect the "KISS" principle; and (3) Do not let the tax tail wag the dog.

Financially Dependent Children. Having financially dependent children will be irritating to everyone — the children as well as the parents.

Red Flags. When a client has a child and does not tell anyone, that's what we call a red flag.

The American Dream. During a debate in Congress about the home mortgage interest deduction, one Congressman said that the dream of every American is to own a home. Former House Majority Leader Dick Armey responded: "The American Dream is not to own your own home, but to get your kids out of it."

Wealth or Poverty-The Great Multiplier. Having a great deal of money or a great lack of money exaggerates character strengths and character flaws.

Perpetuity. Perpetuity is a long time. Don't forget that.

Fairness. Fair is not always equal, and equal is not always fair.

What Comes Around . . . How a client has been treated often impacts how the client treats his or her children.

Whose Problem? Do not allow your client's problem to become your problem.

Who Will Feed the Elephant? A client told Dennis, “Everyone likes to have an elephant that he can pull out and ride around on occasion. But I’ve got to feed the elephant.”

My Brother’s Keeper. Are we their legal advisor or are we their keeper? Try to stay in the role of legal advisor, not keeper.

Social Workers. Many times we are just social workers for the wealthy.

The Lawyer’s Keenest Eye. The client has died, and you now look at the document with the keenest eye possible. You immediately spot a typographical error, and you hope it is not significant. There is no lawyer with a keener eye than a lawyer looking at a document that he or she drafted for a client who just died.

Pessimistic Lawyers. The worst thing about being a lawyer is that you always have to think of the worst things that may happen, because many times the worst things do happen and we need to point it out to our clients.

Triggering Events. Why do clients call attorneys saying they are going on vacation in two weeks and need a will? It is not because people die on vacations, but the vacation is a triggering event.

Great to Be a Lawyer in America. Client’s perspective: “I pay you to give me advice about whether to make a gift. Then you charge me to make the gift. Then you charge me for advising it would be best not to have made the gift. Then you charge me for how to undo the gift. Then you charge me to do the gift again.”

Dennis’s perspective: “Isn’t it great to be a lawyer in America?”

The Rich Live Longer. Clients are living longer and longer — especially the rich, mean ones seem to live longer and longer.

Future of Estate Planning. When concerned about the future of estate planning as a career, Dennis told the young associate (Dana Fitzsimons), Wealthy people will always need solutions; all families are dysfunctional; and Congress cannot repeal greed.

It’s All in the Timing. Rich people are rich because they can choose when to buy and sell. Poor people are poor because they cannot choose when they buy and sell. Rich people go to banks and get five-year loans. Poor people go to pawn shops and get pay-day loans.

Lawyer's Best Friends. Thank goodness for greed, sibling rivalry, and jealousy. Those things will not go away.

Do They Just Want My Money? The grandfather was sitting in his favorite chair nodding off. Grandson: "Grandpa, make a noise like a frog." Grandfather: "Why would I want to do that?" Grandson: "Because Mom says when you croak we're going to Disney World."

Golden Age of Estate Planning. Dennis in 2011 believed that the following three years were "the golden age of estate planning." As much as we complain about uncertainty, it certainly gets our clients' attention. It is a bad use of resources, but we're not the ones creating the problem. Clients come to see estate planning attorneys for several reasons: (1) Changes of circumstances (deaths, marriages, births, etc.); (2) Transfer tax changes; and (3) Changes in asset values. (There had been dramatic tax law changes and asset value changes, up and down, over the prior three years). After two years, Dennis was concerned that the level of people coming for estate planning would drop dramatically. (Fortunately, that is one of Dennis's predictions that has not come true, at least yet.)

Uncertainty. Of course, there have been dramatic transfer tax changes. "We all say we need certainty. We need certainty. We need certainty. Thank God we haven't got certainty . . . Once there is certainty, you will see fewer needs to make changes." Despite the effects on attorneys' practices, Dennis reiterated that we know that our clients need some certainty regarding transfer taxes and that ACTEC will continue to push for Congress to provide some certainty.

Commoditization of Estate Planning. A primary concern is that people can go online and draft their own wills. This may lead to increased litigation in the future, but it may result in a drop in planning currently.

Problem Solvers? Attorneys identify problems you didn't know you had and solve them in a way you don't understand.

No End to Treachery. My dad always told me, "You never know how long a snake is until it is dead."

FLP Planning and Herd Mentality. Dennis applied a "herd mentality" approach to FLP planning— analogizing to a herd of wildebeests in Africa; those in the middle of herd survive while stragglers are eaten. "It's like wallabies crossing the Chattahoochee. You just don't want to be the wallaby that gets caught." Plan FLPs so that the plan does not stick out as a "straggler" with red flags flapping at the IRS agent. Control

client expectations; the client must understand that FLPs are high-audit items. The client should be prepared for the possibility of zero discounts and for being stuck locked in an entity (and some family members may not agree with wanting to be stuck in the partnership). But if a family is willing to take risk, some FLPs work and have worked very well.

Dwelling on the Past. It's no good to just look back, driving down the road and looking out the rear-view window.

Active Participation by ACTEC Fellows. One-third of Fellows attend an ACTEC national meeting each year. This shows the high level of commitment of the organization. One-third of Fellows participated in a survey about billing practices. My family does not participate in family reunions at this level.

Farming. All farms lose money. I grew up on a farm. My father told me if you have a friend give him a farm. If you have an enemy, give him two farms.

Congressional Uncertainties. We are always "one election away" from significant changes in the transfer tax environment.

Congressional Stymie. I find it remarkable to listen to the U.S. Senate complain about the inability of the Afghanistan government to act. Am I the only one that finds that remarkable?

Legislative Uncertainty. As to the prospects of estate tax legislation, it is very clear that we don't know what will happen, we don't know when it will happen, and we don't know when it happens whether it will be retroactive. Aren't you glad you paid money to hear that?

Dysfunctional Relief. The estate tax relief worked in late 2010—but we had a dysfunctional Congress.

Politics as Usual. Republicans blame the Democrats for nothing happening, and Democrats blame the Republicans. The President blames Congress and Congress blames the President. The House blames the Senate and the Senate blames the House. (Dennis made that statement in 2008. Some things never change.)

Congress in 2008. As a practical matter, the ultimate reform package will be negotiated by a small group of moderates in the Senate. [In the current environment of 2017, issues seem to be driven by extreme groups, but perhaps if agreement on a reform package is ever reached, it

will indeed be the result of negotiations by a small group of Senate moderates.]

Fear of Retroactive Legislation. Can Congress make changes retroactive? Do I have to rush out and do it last year?

Trusted Advisor

Most Satisfying. The most satisfying legal work is being the “trusted advisor.” There are the fewest complaints about bills, less malpractice claims, and the most planner satisfaction. We should strive to push the “trusted advisor” concept with clients.

Advantages of Being a Trusted Advisor. A trusted advisor gets more legal work, more sophisticated work, more lucrative work, and produces attractive work for training younger lawyers.

Steps in Becoming a Trusted Advisor. Build credibility (such as with the ACTEC designation). Invest in knowing more about each individual client. Spend time with the client without charging for the time. Schedule regular meetings with the client. Get to know the client’s family. (A client can have more than one trusted advisor.)

Complex Work Becomes Commodity Work Over Time. The trusted advisor who handles complex matters needs to stay “ahead of the curve.” Complex transactions being done today will become fairly ordinary in five years.

Professionalism; Practical Pointers in Serving Clients in Professional Practices

Anticipate Problems. Look down the road, and anticipate problems. Spot issues that if not addressed properly will become big problems. Addressing problem situations is much easier when the client is still alive.

Minimizing Risk. Place an emphasis on spotting problems and minimizing risk — both for the client and the planner. Don’t make your clients’ problems your problems.

Conservative Practice Approach. I’m not a “one-handed” lawyer. My clients will hear “the other hand.”

Clients with Various Prior Lawyers. In difficult family and uncooperative client situations, realize that many others have talked to the client before about planning. Why were they not successful? Why do you think you will be more successful?

Screening Prospective Clients. Be very careful before accepting difficult and hostile client situations.

Screening Clients in Ugly Family Imbrolios (the comment refers to a fact scenario in which the attorney drafted documents naming himself as co-executor and co-trustee and the attorney could predict that he would be confronted with difficult contentious business decisions and distribution decisions). The attorney will often take a viewpoint that “I can do some good.” That is true, but it is not the attorney’s money, and the attorney did not create the family mess. This is a difficult decision, but the attorney must be aware he or she is at a tipping point. This is an awkward situation, because the attorney is a trusted advisor to the family, the attorney becomes embedded with them, and the attorney thinks he or she can solve their problems.

At the end of the day: “it’s only money, and it’s somebody else’s.” The attorney should not approach this with the mindset that he is the savior that can solve this family’s problems.

Structuring Client/Beneficiary Meetings. Dennis preferred to send an agenda to beneficiaries before each meeting with beneficiaries. He started each meeting with questions from beneficiaries and asked each beneficiary if he or she had questions. The same procedure was used at the end of the meeting.

In-Person Meetings. Consider the analogy to medical malpractice statistics. If a physician talks to patients, the likelihood of lawsuits against the physician is dramatically reduced. We should learn to have personal meetings with beneficiaries — no matter how painful it might be.

Early Is Not Always Best. Attorneys must resist the temptation to think that it is a best practice or sometimes even advisable that all estate planning be done at the earliest opportunity. Keep things simple. “You do not run trick plays when you are deep in your own territory.”

Taking a Practical Solution that is Contrary to Documents. I’m concerned, the attorney may be left holding the bag if the attorney ignores a provision in a document, even though it designed to achieve a practical result.

The Uncaught. There are the caught and the uncaught. But you cannot rely on being the uncaught. Dennis repeated this maxim (that he said repeatedly) in relation to a situation in which the client refused his advice to get an appraisal, got an accountant to sign the return without an appraisal, and the client got away with it.

Accommodating a Client Regarding Return Positions or Taking Other Questionable Positions. “Don’t let your client’s money be your money. And a corollary to that is, it’s only money, and it’s somebody else’s.”³ In a panel discussion with Dennis and Carol Harrington, Carol wisely advised: “We are in a service business and like to be service-oriented and accommodating to clients. But forget that when filing returns. I don’t go to jail for anybody. Don’t let clients push you around on return issues. It’s just nonnegotiable.”⁴

Billable Hours. The biggest barrier we have in helping clients resolve problems is the billable hour. Clients don’t call us until it’s too late. Or they call and you can hear what they are thinking in the background: tick tick tick tick. When the attorney asks the client about his children, the client must think — why is she paying \$X a minute for the attorney to hear about the children? But the attorney cannot do the job without that information. A much better approach, for selected clients, would be able to bill clients on an annual retainer basis, based on the approximate level of work for the client in the past. The medical profession has been successful in developing concierge practices.

Five Year Rule. Always look at where a particular decision will leave the family five years in the future. Don’t just look at whether an action solves an immediate problem.

Edges. Life is nothing except about edges—who has an edge on whom? When a client has an edge on you, that is the time to get out.

Application of Economic Principles. One maxim that Dennis learned from a weeklong program for management of professional services organizations at Harvard Business School is that there is very little competition for complex planning, but much competition for routine work. Furthermore, all complex planning becomes routine work over time. (For example, GRATs used to be sophisticated strategies and they are now fairly commonplace.) The revenue can be satisfactory for either complex or routine work as long as it is priced correctly. Complex planning involves little leverage with high billable work. Routine work requires lots of staff with technology efficiencies billed at a low fixed fee or else the work will be priced out of the market.

³ Dennis I. Belcher, Carol A. Harrington & Jeffrey N. Pennell, *Question and Answer Session*, 42 U. MIAMI HECKERLING INST. ON EST. PLAN. ch. 12, ¶1212 at 12-17 (2008).

⁴ See *id.* at 12-17 to 12-18.

Structuring for Practice Efficiency. Having a financially successful law firm depends upon having an office structure so that commodity work can be pushed to a lower level at a fair hourly rate while performing sophisticated work at a high hourly rate. A law firm can be profitable doing either lower-level or sophisticated work. A profitable firm can do a lot of work at a low-level if it has a flat compensation structure and pushes lots of work to lower-level staff persons who never expect to become a partner. We cannot satisfy everyone's legal needs. We must figure out where we are on the scale of sophistication and staff and price the work accordingly. That is challenging to do but can be financially fruitful.

Variable Billing Rates. The attorney logically should charge higher rates for complex projects. That is difficult to administer, and most attorneys just charge one uniform hourly rate. The likely response is that the attorney should just do sophisticated matters, and charge a high uniform rate. However, legal work often tends to drift to less sophisticated matters. What is complex today will be a commodity tomorrow.

Keep Going to Seminars. Because what is complex work today will be commodity work tomorrow, attorneys must stay up to date.

Trust Structuring

Most Important. There are three main elements in trust planning: trustees, beneficiaries, and terms. The planner usually focuses on trust terms. The planner should also devote significant attention to the trustees and beneficiaries.

Interim Period as Co-Trustee. One approach to afford children experience in managing assets is to provide that a child can become co-trustee at one age (for example, age 30) and sole trustee at a later age (for example, at age 35). The five-year period gives an opportunity for the child to work with advisers. One client told Dennis that worked very well in a trust created by his parents. He decided to keep the financial institution as a co-trustee after serving with the institution for five years.

Sentimental Items. For assets with special sentimental or emotional value, the estate planning documents must have a detailed discussion of how to dispose of those assets or else there will be future problems. Dennis referred to this as a detailed "pots and pans" provision.

Attorney Serving as Trustee. Ron Aucutt and Dennis in a panel discussion expressed the viewpoint that the attorney should serve just as advisor and not as trustee. Serving in both roles raises serious ethical issues.

In addition, there is the very practical concern that both giving and receiving advice at the same time is very difficult. Another factor is that being aware of relevant personal issues to make distribution decisions as trustee can be difficult. As involved as the attorney should be, and as trusted by everyone that the attorney should be, and however that might qualify him to be the ideal trustee, he ought to be just the advisor and not the advisee. Sometimes the client pushes and implores the attorney to serve as trustee, saying that he or she can do it better than anybody. Dennis's overriding rule was not to allow the client's problem to become his problem. It is much better for the attorney to serve as an advisor rather than as a fiduciary.

Trustee Selection is Critical. The real key is who is in control — a good estate plan and bad trustee results in a failure. Consider the trustee's duties, and then consider who is best able to carry out those duties.

Process Oriented. Fiduciary administration is process oriented. Fiduciaries are not guarantors of performance and can avoid liability by following the right process.

Settlements Preceding Bank Merger. A recent directed trustee case was settled as to an action against a bank trustee. Some have suggested the bank paid because they were going through a merger. Banks want to clear everything up before a merger; that is a very good time to settle lawsuits against a bank.

Divorce Issues

Estate Planners' Involvement in Divorce Matters. Involvement in divorce actions may be a growth area for estate planning practices. Dennis had an active practice in divorce matters, but always in connection with divorce lawyers. ("Our part of it is a lot harder to learn than their part.") In many ways divorces are similar to beneficiaries fighting over assets after the death of a parent, and involve many of the same relationship issues and require similar attorney skills (such as dealing with valuation, business assets, human relationships, etc.). Estate planning attorneys have skills in drafting clear detailed provisions (that are often much clearer than settlement agreements drafted by divorce lawyers). It's all about the money eventually—but a difference is that in divorces the people are fighting over their own money and in trust litigation they are fighting over somebody else's money. A common theme in both types of actions is that one party asks "how much is it going to cost to get past this" and another party says "here's all the bad things the other party has done and why they should not get anything." The counselor responds, "I understand, I understand," but eventually brings the parties

to the realization that it is just about money. Estate planning attorneys may also get involved in addressing income, gift and estate tax issues that arise in the divorce (for example, whether payments qualify as alimony for income tax purposes). Divorce lawyers often seek the advice of estate planning attorneys with respect to trust issues.

Custody Disputes. Remind the couple that “five years from now, this is not going to matter a lot because your children are not going to want to spend much time with either of you.”

Tension in Providing Divorce Protection for Beneficiaries. Estate planning attorneys typically spend as much time discussing protecting beneficiaries from creditors generally as planning for protection from a spouse in a divorce action. That is ironic because very few beneficiaries have experienced creditor attacks on their trusts, but divorce actions are common. Planners should spend more time discussing how to protect beneficiaries from divorce claims if that is important to the settlor. Traditional trust drafting does not do that. Planners often focus on providing control, flexibility and tax savings for the beneficiary. Those provisions hurt with respect to divorce claims. The more control/interest the beneficiary has in the trust, the more likely it will be treated as marital property.

If the beneficiary (i) has a special power of appointment, (ii) is the trustee, (iii) can make distributions to himself for health, education, support and maintenance, and (iv) can appoint an independent trustee who can make distributions for any reason, the beneficiary has a great deal of flexibility and control while still having the trust assets omitted from the beneficiary's gross estate. But a divorce judge will likely view the trust assets as the beneficiary's “property” for purposes of the division on divorce. The attorney can argue the importance of fiduciary duty, but the judge will just view that as an attempt to cheat the divorced spouse.

On the other hand, if there is an independent trustee and the trustee has total discretion in making distributions without any requirement to make support distributions, that interest is more likely to be viewed as not constituting property of the beneficiary for purposes of the divorce action.

Planners should have more detailed discussions with clients about priorities, and whether “divorce-proofing” the trust is more important than giving the beneficiaries control and flexibility.

“Divorce-Proofing.” Because of the uncertainties about where married beneficiaries will live and about the effectiveness of governing law provisions in trusts, planners cannot give assurances that trusts are “divorce-proof.” They can discuss the issues and strategies used to provide

as much protection as possible, but cannot give divorce-proofing assurances.

Put the Client's Interest First, But Watch Out for Your Own Interest. Spouses as clients may be friendly today, but if they later go through a divorce, the divorce lawyer will not be your friend.

Premarital Agreements. Be especially careful with the recitals in premarital agreements. If the recitals are incorrect, does that impact the validity of the agreement? Perhaps, that negates having consideration for the agreement. Use brief recitals.

Pre-Nups. Dennis told his fourth “pre-nup” client that the prior three ended in divorce. Months later, the fourth called Dennis and said “you are now four for four.”

Massachusetts. Perhaps the divorce rate there is so low because it costs so much to get divorced there.

Business Succession

Satisfying and Fulfilling Practice. Despite all of the problems and complexities, estate planning for business owners is very satisfying work. Dennis told his litigator partner “there’ll be a lot more people at my funeral than yours” (and indeed Dennis’s funeral was packed, reportedly with a larger crowd than at Justice Lewis Powell’s funeral in the 1990s).

Leadership at G3 Level. The attorney should have a heart-to-heart discussion with the founder about the incredible difficulty and low odds of a successful cousin consortium at the G3 level. The long-term success of the business may be much more likely if the founder chooses a particular successor to lead the company and does not expect that the leadership will be divided among the siblings, with further division among their descendants at the siblings’ deaths.

Ownership and Governance Control. Ownership equals leadership.

Trust Administration; Fiduciary Litigation

What Beneficiaries Want. Beneficiaries just want to know two things. What do I get and when do I get it.

Warn Beneficiaries Ahead of Time. If the trustee anticipates that trust income will be decreasing, prepare the income beneficiary. We’ve learned — Beneficiaries can live with disappointment but they can’t live

with surprise. The beneficiaries' reaction is that "if the income is going down, we need to know a year in advance, as opposed to receiving checks that just get smaller and smaller and smaller." Disgruntled beneficiaries have a way of finding lawyers who have a way of creating mischief for trustees.

A Fiduciary Litigator's View of Individual Trustees. Fiduciary litigator Robert Goldman, in a panel discussion with Dennis, noted, "Individual trustees don't even know what they don't know. It's a beautiful perfect storm."

Two Straws, One Soda. In one of Dennis's cases involving beneficiaries fighting over a trust, a state supreme court judge told the story that when he was growing up he would go to the drugstore and pay five cents for soda. There were two brothers who would go to the store with only a nickel between them. They would get two straws and one soda, and they would see who could gulp the most. The judge said the beneficiaries of the estate were just like those two brothers – they were just seeing who could suck the most from the estate the fastest.

Defined Value Transfers

"Like Taking Aspirin." Using defined value clauses with transfers of hard-to-value assets should be "like taking aspirin." They should be viewed as a normal everyday alternative. Some are concerned that using a defined value clause creates a red flag for the IRS, but Dennis did not believe so. "You're in the soup anyway." They should be used for large transfers.

Wandry Clauses. The defined value clause was not as simple as just popping an aspirin when a formula allocation type clause was used. Third parties were involved, and the prior reported cases all involved charities, with substantial amounts passing to charities under the clause. If the planner and client are comfortable moving forward with the much simpler formula transfer approach that was used in *Wandry*,⁵ using defined value transfers may truly become commonplace with almost every large transfer of hard-to-value assets.

⁵ *Wandry v. Comm'r*, T.C. Memo. 2012-88, 103 T.C.M. (CCH) 1472 (2012), *nonacq.* 2012-46 I.R.B. 543.

Diversification

Getting Rich and Staying Rich. To get rich—do not diversify. Put all your eggs in one basket and watch that basket. But to stay rich, you must diversify.

Brilliant and Stupid. Dennis recommended that a client make a gift when stock was worth \$17 a share. When the client died the stock was worth \$40 a share. The family thought Dennis was brilliant. They borrowed money to pay the estate tax, and the stock ran to \$70 a share. Dennis discussed the benefits of diversification, but the family did not diversify. “Rich people *get* rich by a lack of diversification. Rich people *stay* rich by diversifying.” The stock decreased to \$25 a share, and the family made more gifts. The stock was trading at \$15 a share when Dennis told this story, and the family thought Dennis was pretty stupid at that point. Dennis emphasized that the economy is volatile, and diversification is quite important for clients to understand.

