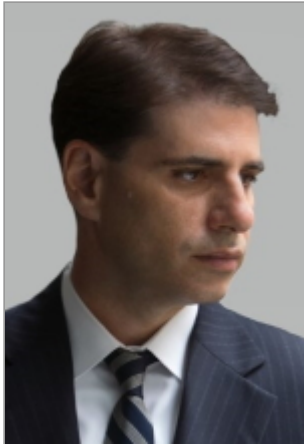


Legal Innovation

Avoiding mistakes: Estate planning technology plus and minus

By Gregory Sidlofsky and Peter Askew



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(May 19, 2020, 8:35 AM EDT) -- As we discussed in the first article of this series, claims against wills and estates practitioners in Ontario have been on an upswing in the last decade. This is our second article on how technology can protect against malpractice claims.

Technology, *if used properly*, has the potential to reduce the occurrence of many of the errors that often lead to negligence claims. The effectiveness of communication between lawyer and client is greatly improved using software like eState Planner, a recently launched technology platform created by Jordan Atin of Hull & Hull LLP. This is because the technology can transform the process by which an estate plan is created from the traditional method whereby a lawyer consults with the client, asks a series of questions and later drafts the required documents using the notes from the consultation, into one whereby the lawyer and client create the estate plan together in real time with the software actually recording the interaction.



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The client is able to view the plan in visual form as it is being created, rather than simply reviewing a densely worded legal document after it has been drafted. The client and lawyer are also prompted to conduct an appropriate investigation into the relevant facts forming the basis of the estate plan as they fill out the initial questionnaire.

Moreover, in the event that a malpractice claim is commenced, eState Planner provides protection for the lawyer should he or she decide to record the consultation during which the estate plan is created using a videoconferencing service. This video recording would show the lawyer acting on the client's instructions, probing into any areas of concern as prompted by the technology's adviser alerts and walking the client through the various implications of their instructions. This would arguably provide more compelling evidence that the lawyer acted in accordance with the standard of care than a traditional reporting letter and/or notes. It would also, possibly, help address some of the indicia of knowledge and approval, including:

- The testator's level of understanding of the dispositive provisions of the will;
- The hearing of the testator;
- The comprehension of the testator; and
- Whether there was someone else in the room influencing the decision.

Clearly, this method is not foolproof. It will not guarantee that the lawyer asks appropriate questions covering the full range of necessary areas that have to be covered. It will not indicate whether someone is outside the vision of the frame who is prompting the testator to give certain answers or is otherwise unduly influencing the testator. It also may not assist in determining if the testator is suffering from delusions.

Does it eliminate errors of law?

While this kind of software is not a substitute for a lawyer's responsibility to apprise themselves of developments in their area of law, it does provide a measure of protection against potential errors of law through its adviser alerts, which are specific to each client's particular circumstances. These alerts are constantly updated according to changes in the case law and legislation and provide warnings when certain actions may trigger tax owing or create other unintended consequences. For example, among many others, the system will alert the lawyer to inquire as to whether other wills have been previously executed by the testator, whether the testator is engaged to be married, whether administrative powers are appropriately limited to maintain qualifying trust provisions under the *Income Tax Act*, whether a transfer may be subject to the presumption of resulting trust set out in the *Pecore v. Pecore* 2007 SCC 17 decision, etc. These prompts are helpful, but they will not relieve the solicitor from his/her duties to probe and verify the information provided.

Does it eliminate clerical errors?

The likelihood of clerical errors is greatly reduced using this kind of software, as client information is not being transcribed by the lawyer after being relayed orally by the client, but rather directly inputted into the portal by the client and then reviewed by the lawyer. The documents that are generated by the software will exactly reflect the information entered, which largely eliminates human error with respect to spelling, paragraph numbering, etc.

Limitations of technology

While software tools can provide a powerful means of mitigating common errors, they are no substitute for a lawyer's skill and judgment with respect to certain areas of concern.

Capacity and undue influence

While eState Planner has adviser alerts which prompt practitioners to make appropriate inquiries into clients' capacity and the potential for undue influence, the software does not and cannot replace a lawyers' judgment with respect to these issues and how to ask questions and follow-up questions to try to ensure capacity and absence of undue influence. Lawyers must continue to take necessary steps to satisfy themselves that clients possess the requisite capacity to execute testamentary documents and are not subject to undue influence, which requires them to ask the right questions in fact-specific ways and potentially delve deeper into the answers they get.

Language issues and legal delusions

Wills are sometimes challenged because the testator's knowledge of English is limited, and while the testator may have had capacity, s/he may have not had the language skills to understand the dispositive provisions of the will. There are also times when testamentary decisions are rooted in an illness or legal delusion which may provide a reason to set aside the testamentary document. Technological innovations are of limited assistance in such situations. Lawyers must use their own judgment to identify and deal with these issues.

Formalities of execution

Lawyers using technological tools in their wills and estates practice should continue to be mindful of the formalities of execution required under the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, ss. 3-4.

Conclusion

As described in the foregoing, as litigators, we believe that wills and estates solicitors may find existing technological innovations useful in mitigating common malpractice errors. Software tools can address many of the issues that often lead to malpractice claims by keeping lawyers and clients quite literally "on the same page" as an estate plan is created, thereby improving communication. In addition, alerts provided by the platform may be of assistance in preventing errors of law.

But there is a limit to what technology can do to insulate lawyers from negligence claims. Solicitors must continue to use their training and common sense, as well as the latest and greatest software tools, to ensure that down the road they can satisfy disgruntled beneficiaries and judges that they did their job competently.

This is the second of a two-part series. Read part one: [Avoiding mistakes: How technology can help wills and estates practitioners](#).

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