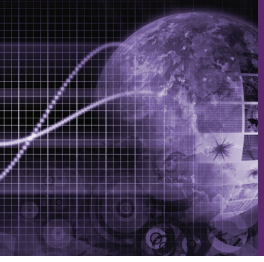


POINT/COUNTERPOINT

Document Assembly Systems: Friend or Foe?

Document assembly systems (DAS) automate the creation of documents by generating them from intelligent templates. Do the advantages of using DAS outweigh the disadvantages? Read the below two articles. Then, you decide.

DAS Are a Must

Are there reasons not to use them?

By **Jonathan G. Blattmachr** & **Martin M. Shenkman**

One of the country's most famous estate-planning lawyers prohibited attorneys in his firm from using word processing when preparing wills and trusts. He felt that using essentially preprinted forms would be a disservice to the firm's clients because the lawyers wouldn't focus as carefully as they should on the specific provisions that would be best for clients.

However, he eventually conceded that clients were better served with documents prepared via word processing, which provided a type of standardization that starting with a blank page couldn't, thereby reducing the risk of errors. Indeed, many firms provided guidance (usually by footnotes) on particular provisions contained in their standard forms so the drafting attorney could know what a provision was intended to do and make informed choices. Word processing also reduced the cost of preparing documents, because even practitioners who charged flat fees for standard estate-planning documents had to charge more if they didn't use word processing.

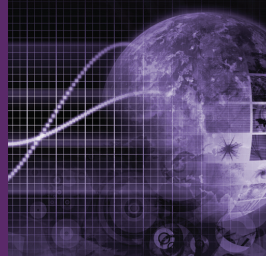
Francis Musselman, while the chair of Milbank, Tweed, Hadley & McCloy in New York City, developed the first word processing system for a law firm. In 1986, he spoke before hundreds of lawyers at the Association of the Bar of the City of New York. He concluded his remarks by saying that any lawyer who didn't adopt word processing within the next five years would be out of business. There was an uproar at that remark, with one lawyer saying, "My secretary and I will use our IBM Selectric [an advanced typewriter that allowed instant corrections] until the cows come home!" Well, we know that the cows eventually did come home. No attorney could practice today without word processing.

Document Assembly Process

Today's lawyers, however, must face the fact that word processing is no longer enough. To keep up with the changing landscape of the practice of law and provide the best representation to clients, lawyers must begin to adopt a document assembly approach to drafting. Document assembly is a process in which a lawyer (or other legal professional acting under a lawyer's supervision) prepares a document by answering questions and selecting from various options. Document assembly systems (DAS) then use artificial intelligence to generate a document containing provisions corresponding to the answers and selections inputted by the draftsperson. In short, document assembly is to word processing what word processing was to the IBM Selectric.

If a firm fails to use document assembly, it makes the same mistakes that lawyers who failed to adopt word processing made: less consistency in forms and more expense for clients. There's simply no case for not using DAS. Any firm not using such a system is failing to best serve its clients—more errors will occur and more expense will be passed on to the client.


Jonathan G. Blattmachr, left, is a former member of the New York City law firm of Milbank, Tweed, Hadley & McCloy LLP, and **Martin M. Shenkman** is an attorney in Fort Lee, N.J.



Two Choices

There are two broad choices for DAS: a firm-created system and a commercial system. Several firms (large and small) have developed their own DAS using HotDocs or another commercial document automation product. These firms often say that they're building their own system because they or their clients prefer the firms' language to that in commercial systems, such as InterActive Legal, Lawgic or Wealth Counsel. To contend that clients prefer one document's language to another is ridiculous: Clients don't give a hoot about the language in their estate-planning documents. (In fact, it's probably a fair observation that most clients don't read—or at least don't really understand—the language in their estate-planning documents.) They want a document that accomplishes their goals and that's been prepared as quickly and efficiently as possible. Further, no law firm is going to build in all options it should offer to its clients, such as an anti-*Hubert* regulation provision, an incomplete non-grantor trust or extra *Crummey* trust, cascading *Crummey* powers, a supercharged credit shelter trust or even a *Clayton* qualified terminable interest property trust. Indeed, many (if not most) firms are unaware of some of those options. Yet, a commercial system may offer all of these as part of its standard package. Even if the firm contends that it needs those options only rarely, it means either they aren't offering them to clients as often as they should or, if they do them piecemeal, the cost will be much higher than if they were available in an automated system. The building block approach provided in robust DAS readily and efficiently facilitates customizing an almost unique configuration of provisions to address a particular client's circumstances, which would be impossible to create (cost effectively) by modifying the limited configuration of standard documents most firms would have available.

One other advantage of commercial DAS is a form of crowdsourcing: Hundreds of lawyers review the language and find ways to improve it and make it more precise. A firm that builds its own forms isn't likely to have that kind of constant review.

The greatest advantage of commercial DAS, compared to "in-house" DAS created by a firm, is efficiency. Maintaining DAS that are current on changes in the law and emerging trends in the practice requires a professional to devote hours of work to that task every month—hours that aren't devoted to revenue-generating work for clients. By purchasing a commercial system, the firm effectively outsources this maintenance work to a third party at a fraction of the cost the firm would incur, in the form of lost revenue, if it maintained its own system.

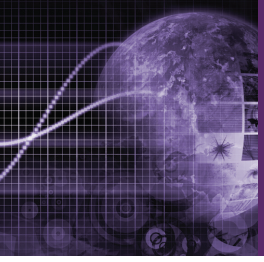
Still, many lawyers contend they prefer their own language. What does that mean? It means they're used to it and feel comfortable with it. Their clients don't care. Indeed, the major cost of adopting DAS isn't the price paid to the vendor, it's the time and effort to learn how the system operates and become familiar with the language it uses. However, the time spent in learning the "new" language in the commercial product will be much lower than the cost of a firm building (and maintaining) its own system with its own language.

The bottom line is that attorneys who don't use DAS aren't best serving their clients and will charge their clients more.

If a firm "must" have certain unique language, there are two options available in virtually all commercial systems. First, the language in specific documents can be changed, or other language added, in word processing. Second, almost all systems allow changes to the system's standard language, creating a template for each firm's preferred terminology.

Priced Out of the Market?

The bottom line is that attorneys who don't use DAS aren't best serving their clients and will charge their clients more. A firm may choose to build its own system, but no firm has a monopoly on its language (and it's likely that much of the language in a firm's forms has been derived from others in any event). The time and effort entailed in creating and maintaining a firm-built system necessarily takes lawyers away from billable client time and, the firm will, consequently, have to charge more for its documents to justify the lawyers' non-billable time. Attorneys increasingly must compete not only with other lawyers but also with



non-legal "estate planners" and other "do-it-yourself" DAS. If a firm is unable to keep prices relatively low by leaning on the efficiencies afforded by commercial DAS, it will soon find itself priced out of the market.

The Slippery Slope Of DAS

Overlooked risks and dangers

By **Douglas J. Paul**

"We become what we behold. We shape our tools, and thereafter our tools shape us."

—Marshall McLuhan

In the modern practice of estate-planning law, few attorneys haven't considered the benefits of document assembly systems (DAS). The allure of quicker document creation, alleviating the maintenance of forms and the potential cost savings are appealing. However, embedded within DAS are often overlooked risks and dangers. While there's no question that document assembly has left an indelible mark on the practice of estate-planning law, the way in which attorneys service the needs of their clients can become collateral damage. Like all tools, the tool itself is neither good nor bad. The larger question becomes how the tool impacts the attorney and the way in which the attorney practices. In this regard, the combination of DAS with other factors, such as fixed fee billing, impact the practice of estate-planning law by: 1) recasting the attorney's role in estate planning; 2) outsourcing attorneys' responsibility for their own documents; and 3) substituting technology for the attorney's expertise.

The Attorney's Role

The greatest potential impact of DAS for the estate-planning practice can be the unintentional recasting of the attorney's role. The attorney's role may be recast by shifting focus from estate planning being a process guided by the attorney to a product that should be delivered to the client at the lowest possible cost (or at the attorney's highest possible profitability). In the past, the attorney performed as a guide to the client, explaining the options, risks and benefits of any given planning structure and safely shepherding the client's estate-planning journey. Under the pressure to produce estate-planning documents more quickly, the attorney's role may migrate to that of a cab driver—asking the client where he wants to end up and getting him there as quickly and efficiently as possible. This view is founded in the document being the end result of the engagement. In practice, the document should be the byproduct of the completion of a process of counseling and advice regarding the client's goals and options.

In this movement to reduce the time involved in the creation of estate-planning documents, many practitioners have moved to a fixed fee billing system for the creation of documents. The combination of these factors creates a clear transition to the attorney providing "X" estate plan for "Y" dollars. This shift, while potentially very profitable to the attorney, often results in the attorney fixing his fee to a specific dollar amount for a particular plan—with such fee being based more on the maximum fee the attorney believes will be acceptable in the market, as opposed to the time or skill necessary to complete the client's planning needs. To the extent the client's needs extend beyond the scope of the initial fixed fee, the attorney faces the unenviable task of working at a reduced rate or trying to explain to the client that "fixed fees" aren't always as fixed as previously explained.

In contrast, the attorney who works through a form with which he has comfort, examining each clause or portion for its applicability, crafts a document based on the interaction with the client. This work by the attorney adds value to the client and should be included in the billing process. By completing the process, while it may yield a document similar to DAS, the activity both trains the attorney and forces the attorney to apply his skill and knowledge to the client at hand. In this regard, for the less experienced attorney, DAS can perform a great disservice by failing to force the attorney to apply himself and instead allowing reliance on the system. The exercise of learning the integration of the component

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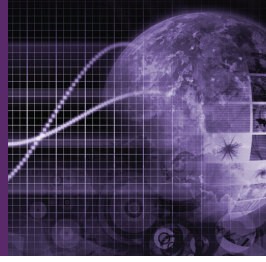


parts of an estate plan create not just better plans but also more skilled attorneys to advise clients.

While the impact of fixed fee billing on the practice of law extends far beyond the scope of this discussion, the combination of the increased reliance on technology and the fee structure employed may distort the attorney-client relationship in the context of estate planning. Implementing use and practice strategies rests exclusively on the attorney. However, the underlying concept of doing more legal work quicker for a higher fee jeopardizes the attorney-client relationship. For those attorneys who operate in firms, the risk is that the developing attorney (who'll ultimately serve the current client's family) may never mature to appreciate the process and his role as the attorney to guide that process.

In the end, if the goal of the attorney is to produce the estate-planning document as quickly as possible, the attorney should be reducing the rate for the documents to be created to pass along the efficiency to the client. This creates an environment of commoditization of the estate-planning attorney's services. If the attorney sees his own services as a commodity (being delivered to the client as quickly as possible at the lowest possible cost), the client has no choice but to view the attorney as a commodity. From this position, it's not a leap to simply compare the attorney's fee for his product to those fees available from non-attorneys such as Legalzoom and other mass marketed platforms—again shifting the focus from the process to the product.

Responsibility for Documents

In preparation of any legal document, the attorney assumes the responsibility for the content of such documents. In the context of DAS, the responsibility may become compromised. Most DAS attempt to be all things to all users. Often, among the benefits advertised, systems will claim to provide the ability to create documents in every state or several states. In practice, the document created frequently provides an imperfect fit into the state law where it's used. This reality results in either reduced efficiency by causing the attorney to customize the assembled document or an inferior document.

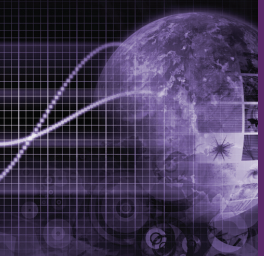
The creation of forms among attorneys in a firm or even in a locale springs from a shared understanding of the state's law and its implications on a particular client's needs and concerns. In contrast, a document that's created to be effective in most if not all states relies by necessity on generalizations among the law of the various jurisdictions. Moreover, this issue can become exacerbated by the complexity of a particular issue presented. Attorneys in community property states have grown to expect an inadequate or incomplete addressing of these overriding property issues in forms created by common law attorneys. Further, the community property issue becomes only more glaring when documents are prepared with forms that fail to appreciate the differences among competing community property jurisdictions.

The ease and efficiency of DAS can lure the attorney into a false confidence in his document without thoroughly understanding the document—or the revisions made to the document by its editorial board as time passes.

The ease and efficiency of DAS can lure the attorney into a false confidence in his document without thoroughly understanding the document—or the revisions made to the document by its editorial board as time passes. This illusion of safety can be an impediment to the attorney's development. While Jonathan G. Blattmachr and Martin M. Shenkman in their companion article may be correct that clients don't care and don't need to know the content of their estate-planning documents, they do expect their attorneys to thoroughly know and understand their documents. Few things are as uncomfortable as watching an attorney flip through his own document searching for a particular clause, making it apparent the attorney is unfamiliar with his own document.

Substituting Tech for Expertise

As Jonathan and Martin illustrate, few in-house forms



could mirror the potential level of options for clients that DAS can provide. The editorial boards of most systems spend substantial time adding options and refining their process. This creates a system that can create documents providing very complex and sophisticated planning merely by the selection of certain options in the interview window. While this ease of use provides a great level of power, it presents an equally present danger.

Without DAS, the attorney is limited to provide the planning that he has or is willing to master. While this may limit the options the attorney can provide, it can also provide a governor for the attorney and an incentive to learn new skills he hasn't already mastered.

By contrast, the use of DAS can provide the drafting attorney with a false sense of expertise. In effect, the attorney may be convinced that because he knows the right buttons to push in the software, he understands all the implications of the technique employed. From this basic confusion of expertise and technology, many clients have been provided with estate plans more complex than necessary or that create unintended consequences. While subsequent attorneys may prosper from the unwinding of inappropriate planning, clients bear the cost and pain of ill-conceived and over planned estate plans.

Final Thoughts

The use of technology and its integration into the practice of law has made its way down an irreversible path. The impact of technology on the practice provides attorneys with the ability to expand the scope and depth of services offered. It allows attorneys to serve clients who couldn't be reached in prior generations. The introduction and improvement of DAS provide a very helpful tool for estate planners. However, like all tools, DAS are only as effective or dangerous as the attorney using them. To analogize from a well-known saying: DAS don't kill good estate plans; complacent attorneys relying on them kill good estate plans.