Using Technology For The Modern Estate Planning Practice

Authors Thomas Tietz, Barron K. Henley, and Martin M. Shenkman address a variety of vital issues concerning the use of technology in the modern estate planning practice, and they present ethical issues raised by new technology.

1. Introductory Comments.

- a. Not suggesting standard of practice.
  - i. This paper is not intended to imply that any approach is essential, or a standard of practice that anyone should follow. Rather the objective is merely to present points estate planners and other practitioners might consider in managing their practice with a particular emphasis on technology and some of the ethical issues they raise.
  - ii. The primary goals are to give practitioners practical ways to use technology to:
    - 1. Make practices more efficient.
    - 2. Provide better quality services to clients.
    - 3. Practice more safely to reduce malpractice risks.
  - iii. The secondary goal is to identify tech issues that some practitioners might wish to address in their practice, e.g. in their form retainer agreement, ancillary forms, procedures, etc.
- b. Technology and profitability.
  - i. As push back from prospective clients grows, the time allocated to drafting documents, and handling paper in the estate practice, will have to be reduced in order for attorneys to remain profitable. Increasing automation of the estate planning practice is only part of story. There will have to be other operational efficiencies incorporated into the process, and in some cases, a rethinking of the planning process. Many clients are quite tech savvy and expect you to mirror their savviness. In the age of "LegalZoom," some clients will view what is required for estate planners to generate estate planning documents as being far simpler and quicker than it actually is. Personally, we do not subscribe to the worries that consumers who hire estate planning attorneys will flock to any internet solution. The wealth and sophistication of the clients most estate planners serve is such that their clients would not consider using an internet based web service. However, that does not mean that the construct does not impact how they view what their planners provide. Attorneys will have to demonstrate the value of the counsel provided, over and above the production of the actual documents. No doubt, estate planners have a myriad of skills to offer their clients. What this really should translate to is a transformation of the perception of the "product" the estate planner is offering. It will be the counsel and guidance, not the physical documents, that is paramount in providing value to the client. Reducing the cost and time of generating and processing documents will provide attorneys the ability to spend more time in client facing activities: meetings, conferences, and so forth. Serving as a trusted adviser is a role for which clients should continue to appreciate the value provided by the estate planner. That is a role that technologies, social or economic change will not supplant. Further, greater operational efficiency allows the estate planner to serve lower net worth clients without sacrificing profitability. As we all know, it's much easier to keep a client you've worked with before they were wealthy than to find a new client who is already there.
- c. Retainer agreements should reflect technology and ethics concerns.
  - i. Practice Suggestion: It is advisable for practitioners to periodically review estate planning retainer agreements (engagement letters) to update them to reflect new ethics rules, changing practices, integration of new technology into their practice, and other factors. The majority of states have adopted the ABA Model Rule changes from 2012 which relate to technology. Rule 1.1 was modified to require technical competence 1 ; and Rule 1.6 now requires lawyers to use "reasonable efforts" to prevent the inadvertent or unauthorized disclosure of confidential client data. Very importantly, ABA Model Rules 1 state that a client can require a lawyer to implement "special security measures not required by this Rule 2 ." You definitely want to know a prospective client's disposition on this issue before beginning your representation. Consider advising clients of

what your default approach is in your retainer agreement so that you are on record with the client as to how matters are handled.

- ii. Retainer agreements can be used as a framework for the discussion of a potpourri of estate and tax practice management technology, and ethics and related considerations, since many of the ideas in this presentation may warrant addressing in retainer agreements (engagement letters).
- iii. Practitioners should not ignore the changes technology and other developments are having on retainer agreements, practice forms, and related practice management steps.
- iv. Engaging in discussion with clients and providing information on how the practitioner protects confidential data can help assuage any concerns the client has and allow the client to provide commentary on what uses of technology they are comfortable with. As each practitioner utilizes technology in unique ways, the engagement letter should be customized by the practitioner.
- v. Sample Clause: A sample provision for an engagement letter could include, "You authorize the back-up and storage of records on cloud-based back up services, including but not limited to those provided by ShareFile, Microsoft 365, SugarSync, Datto and NetDocuments and others, posting PDFs of your documents in the cloud on ShareFile or a similar service, and emailing of unencrypted confidential records. If you wish us to use encrypted electronic communications, we can do so through ShareFile."

- d. Great variability by practice.
  - i. The ideas presented must be adapted and modified for every practice. Every practice is unique in terms of the nature of the typical clients, the practitioner's comfort level with technology and change, capabilities of the administrative staff, etc.
  - ii. A paperless, cloud-based practice will necessarily have to handle these issues differently than a practice that still has yellow pads, Redwelds and other analog tools.
  - iii. A practice that predominantly focuses on a large volume of flat-fee, lower-wealth clients will have a different emphasis then a boutique firm serving a limited number of ultra-high net worth clients seeking a different level of service and relationship.
  - iv. Ancillary administrative implications of many of the points addressed concerning technology and the state of practice management are adapted at different rates in different firms. Some practitioners might view something as excessive, while others view it as a mundane task long ago addressed.
  - v. Practice Suggestion: It is important that each practice identify where it is on the technology spectrum, where it wants to be, and how to get there in a practical manner. It will be disruptive, but unless each practice makes the commitment, and a specific plan that it updates periodically, the practice will fall further behind the technology curve and that, if it has not already, will adversely affect the practice, profitability, risk profile, and service quality. The reality is that upgrading an analog practice to a modern, digital one is ALWAYS disruptive because most humans detest change. Further, almost anything can be judged "unreasonable" by someone who doesn't want to do it.
  - vi. Each practitioner has to find the technology road map that works for them. This depends upon your style, how technologically savvy you are today, what changes are appropriate, and how you anticipate evolving. Many practitioners only reluctantly and partially adapt a technology strategy. Too often practitioners have opted for steps that were recommended to them rather than being proactively engaged in crafting a process that fits their unique needs. If you can find your comfort zone and the path that works for you, the process does not have to be intimidating. Remember, there is no right or wrong approach. The only wrong approach is to take no action. Perhaps the next worse approach is just to implement what someone, who is unfamiliar with your practice, recommends. Find what fits your style and comfort zone. Then identify a logical sequence to approach the process, and steps that are small enough to be actionable.
  - vii. Practice Suggestion: A firm's efficiency (or lack thereof) is largely a function of the practice's technology, processes and people. As such, it would be a mistake to examine one's technology in a vacuum. Spending money on technological improvements will yield little benefit if a practitioner's processes are inefficient, or the wrong people are in the wrong seats. For example, upgrading technology often requires that users upgrade their skills. However, some users may be unable or unwilling to upgrade their skills, even if good training is provided. If that situation exists, then it cannot be ignored.

2. Paperless vs. Paper-Less.

- a. For most practices, it is impossible to go completely paperless. However, nearly every practice can operate more efficiently with less paper. Paper-less or paper-lite might be a better option, or certainly a transition point, for some practices.
- b. Set goals to proceed towards the less paper but also be realistic in recognizing that there will still be situations where paper documents are required for signatory or other purposes. The objective for most practices will be to proactively identify categories of documents that will henceforth be stored and managed exclusively in electronic format. Correspondence, faxes and pleadings are typically good examples for this. However, you also will need to evaluate how to address the volumes of paper documents already accumulated. For many practices, it may not be worth scanning all of the old or closed files, but it's definitely worth scanning every document for active matters going forward. Regardless, the best way to achieve less paper is to phase it in, keeping in mind that it may be impossible to eliminate all of it.
- c. As creatures of habit, many documents are maintained as hard copies simply because the practitioner has always done it that way. But, that mindset needs to be broken to take advantage of technology advances that allow you to streamline operations and reduce costs within the office. Developing a paperless/paper-lite approach for your firm could result in reducing your paper files by as much as 90%. This is accomplished by designing a paperless/paper-lite plan that will work for your office environment. Making simple adjustments to how you handle your files could result in transitioning as much as 90% of your paper files to an electronic format. But as is the case with making changes that have a positive impact on your bottom line, you need to have a plan. Do not try to tackle everything at once because it sometimes results in getting mired in the details and derailing the process. Points of consideration should include a plan that not only moves forward with active client files but one that also addresses converting existing paper files into an electronic format and getting them out of the redwelds in the file room or off-site storage.
- d. Practice Suggestion: Many practices scan everything but also keep all of the paper out of paranoia that they may lose access to the electronic files. Because this approach obviously requires more work (maintaining two filing systems instead of one), and is quite costly, it should be avoided. While no one can guarantee that you'll never lose access to your electronic files, redundant backup systems, excellent cyber defenses, and hosted or cloud servers can make it extraordinarily unlikely. The important point here is that a practitioner never realizes any benefit from creating complete electronic case files unless they stop hanging onto every shred of paper.
- e. Taking steps in the paper-lite direction is particularly important to the practitioner endeavoring to profitably and cost effectively serve moderate wealth clients who are likely to prove more fee conscious post-ATRA. "Paper-less" may be a better descriptive term then "paperless," much less paper, but not necessarily no paper. Each practitioner will find the level of paper or paper-less that is optimal to his/her practice. Making slow, steady progress is really the smarter approach.
- f. A practitioner who wants to convert thousands of paper documents into electronic documents has three basic options: 1) scan the documents internally, 2) out-source the scanning, or 3) some combination of internal and out-source. While it's hard to argue that sitting in front of a scanner for hours on end is a good use of a lawyer or skilled support staff time, out-sourcing can be expensive. Some firms find that a good solution is to hire a low-wage, temporary worker for the sole purpose of scanning in paper files. For example, a college student off for the summer might be able to scan an entire file-room of files in one summer break. That option should at least be compared against the cost of out-sourcing the task. If out-sourcing is roughly the same cost as hiring a temporary worker to handle it, then out-sourcing is probably the better option simply because it represents less annoyance for the practitioner. Also, if you use lower cost help you should be certain that they are trained to do the tasks involved. Consider creating a simple roadmap of the steps involved in each of the tasks they will do.
- g. Practice Suggestion: It is important that any paper reduction system relies upon searchable PDFs rather than image-only PDFs. Searchable PDFs contain an image of the original document along with actual text. If you create a PDF from Word or WordPerfect, then you will always get a searchable PDF. Image-only PDFs contain only the image of the original, but no layer of searchable text. Unfortunately, most copiers and scanners create image-only PDFs which means that they can be found in the future solely by their file names. On the other hand, searchable PDFs can be found based upon their file names or any text contained within them. Using any search software or even Windows Instant Search (included with the Windows

operating system) or Spotlight (included with the Mac operating system) will allow one to find searchable PDFs based upon their textual content. If a practitioner's copiers or scanners are creating image-only PDFs, those PDFs can be converted to searchable PDFs by a variety of software programs including Adobe Acrobat, Nuance/Kofax Power PDF, Foxit PhantomPDF, Nitro Pro, Trumpet Symphony OCR and DocsCorp ContentCrawler (among others). If a practitioner continues creating image-only PDFs, they are simply making future accessibility more difficult.

- h. Practice Suggestion: If a practitioner has no means of conveniently bringing an electronic client file to a conference room or transporting it off-site, then the electronic file loses a lot of utility. In view of this, if a practitioner intends to rely upon an electronic case file, then laptops or tablets are going to be important. With the continued evolution of "2-in-1" laptops, it's pretty easy to find one device that offers the combined functionality of a powerful laptop and tablet 3 .

3. Communications.

- a. Communication requirements under RPCs 4 .
  - i. A lawyer shall fully inform a prospective client of how, when and where the client may communicate with the lawyer.
  - ii. A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
  - iii. Practice Suggestion: Technology can provide a myriad of ways to meet these RPCs (all of which are just good practice and probably safer practice). Following is a listing, detailed examples are provided later:
    - 1. Use your firm website to indicate how a client may communicate.
    - 2. Use initial form letters to prospective clients to outline communication policies.
    - 3. Include communication considerations in retainer agreement.
    - 4. Use detailed time entries into your billing system to communicate status to clients.
    - 5. Use newsletters and other electronic communications to keep clients informed.
    - 6. Add footers to invoices with important information the practitioner believes clients should know.
- b. Ethics Opinion 477. 5
  - i. Each device and each storage location offers an opportunity for the inadvertent or unauthorized disclosure of information relating to the representation, and thus implicate a lawyer's ethical duties under Rule 1.1 of the ABA Model Rules concerning competency, confidentiality, and communication.
  - ii. As previously mentioned, the RPC was modified recently to include that lawyers should keep abreast of changes in the law and its practice "including the benefits and risks associated with relevant technology 6 ."
  - iii. Practice Suggestion: One simple solution to consider- have your IT consultant prepare annually a summary of improvements made and steps to take. Use this letter to document that you are keeping current and addressing new threats and issues.
  - iv. Lawyers must take reasonable efforts to ensure that communications with clients are secure and not subject to inadvertent or unauthorized security breaches.
  - v. Lawyers must use "reasonable efforts" to ensure the security of client information. Citing the ABA Cybersecurity Handbook, the opinion explains that the reasonable efforts standard is a fact-specific inquiry that requires examining the sensitivity of the information, the risk of disclosure without additional precautions, the cost of additional measures, the difficulty of adding more safeguards, and whether additional safeguards adversely impact the lawyer's ability to represent the client.
  - vi. What is "reasonable" is a gray area.
  - vii. Practice Suggestion: As a result, practitioners should have their IT or cybersecurity consultant prepare an annual letter, as suggested above, to review matters in the office and suggest improvements. Then be certain to follow up on the improvements recommended to assure implementation. A process of periodic review and follow up documented in this manner may provide corroboration that the practitioner has acted with "reasonable efforts."

- viii. The opinion notes that generally lawyers may use unencrypted email when communicating routinely with clients.
- ix. Practice Suggestion: However, there are technology solutions that permit certain sensitive emails, e.g. those with tax identification numbers, to automatically be encrypted. There are also efficient encryption services that make the use of encrypted email easy and efficient, e.g. through an extra button on the regularly used email interface, e.g. Outlook.
- x. Practice Suggestion: Practitioners should consider adoptingn a written policy for internet and email usage, secure passwords, mobile device security, and electronic equipment disposal. There are many free or low cost sources on the web which can provide starting points for these policies. You might also provide basic cyber security training for all employees. Again, there are many options available for this including the free online courses on cybersecurity best practices from ESET (see https://www.eset.com/us/cybertraining/).
- xi. Practice Suggestion: Security experts recommend password managers as an easy and effective way to upgrade any individual or office's security 7 . Anyone can sign up for an individual plan but many password manager providers also offer business plans which enable the employer to grant (or deny) access to firm resources. Good options here include Dashlane, LastPass, 1Password, Sticky Password, True Key and Roboform.
- xii. Opinion 477 included several aspects to consider when sending unencrypted emails:
  - 1. Understand the nature of the threat.
  - 2. Understand how client confidential information is transmitted and where it is stored.
  - 3. Understand and use reasonable electronic security measures.
  - 4. Determine how electronic communications about clients should be protected.
  - 5. Label client confidential information. This should include digital files.
  - 6. Train lawyers and non-lawyer assistants in technology and information security.
  - 7. Conduct due diligence on vendors providing communication technology.
  - 8. Practitioners should consider how else they may demonstrate efforts to stay abreast of technology. Some practitioners may be sufficiently steeped in technology to address many issues based on their own expertise. It is likely that this is not the case for most practitioners. While firms of sufficient size may have an on-staff technology consultant, smaller firms will likely rely on outside IT consultants. But is relying on a staff or outside IT consultant sufficient? Practice Suggestion: Practitioners might consider adopting a policy, even in small firms, of mandating some professional education in the application of technology to estate planning (or specially law or accounting) practices even if there is no mandatory allocation required by the applicable authorities.

- c. Using technology to communicate with clients.
  - i. Practice Suggestion: Save covering emails into the client file to corroborate communications. For example, if a practitioner emails a draft will to a client, if the email system doesn't automatically save that email, adopt a policy to do so in order to prove that the document was sent to the client in advance of the signing. This may be valuable to demonstrate that there was time for the client to review the document in advance of signing.
  - ii. Practice Suggestion: You can avoid repeatedly running through the Opinion 477 email encryption considerations by simply using encryption any time you're emailing something not already in the public domain. As previously mentioned, a good encryption service makes it easy for you to send encrypted email and for your clients to receive them.
  - iii. If you use a system that saves all emails, how readily accessible are they? Employing a cataloguing system that allows the practitioner, or administrative staff, to find the required email without excessive effort will save cost and aggravation.
  - iv. Practice Suggestion: Use the calendaring system to document efforts to communicate with clients. For example, if a client cancels a meeting do not delete that meeting entry from the calendar. Rather, mark it as "Canceled by Client." An easy way to document the cancelation is to enter a "no charge" time entry for the communication whereby you were informed of the cancelation (email or phone call). This is also a gentle reminder to the client of their appointment cancelations when they receive your invoice. Consider excluding historical calendar data from document destruction policies. Save calendar data indefinitely. Example: Searching the client name

in a case management system, or even Outlook, can provide a history of meetings, attempted meetings, meetings the client cancelled, etc.

- v. Practice Suggestion: Mark all client follow up in the billing system even if as a no charge notation entry to create a history of efforts to communicate with the client. For example, if administrative staff is calling a client to schedule an update meeting, the call should be noted in the billing system as a no charge entry so that there is a record of efforts to reach the client. Many practices do not have administrative personnel record any activities in the billing system. Technology has transformed how we all practice. Even if historically having only professional staff time entered may have been the norm, technology has transformed the nature of practice and the roles of everyone. Further, any good case/matter management system makes it easy for anyone in your office to document successful and unsuccessful attempts to communicate with the client.
- vi. Practice Suggestion: Use regular monthly billing as a means of communication, not only as a means of billing. Of course, this is more effective if everyone enters detailed time entries. Example: Footers with information about new tax developments and limitations on liability to the extent feasible.
- vii. Sample Footers on a Bill.
  - 1. Sample Clause: A sample protective billing footer could include the following:, "Results of any plan are never guaranteed. Aspects of many, if not most, estate and related plans are not only uncertain, but subject to a wide spectrum of different views by other advisers, the courts, the IRS, and other authorities. Even many common strategies, techniques and transactions are subject to tax, legal, financial, and other risks and uncertainties. While we endeavor to identify some of the risks of a plan, all risks and issues with each component of a plan are not possible to identify or communicate. Creating a collaborative team will help identify more issues with your plan. Further, the fact that we communicate verbally or in writing certain risks should never be interpreted as an indication that any such listing or communication is a comprehensive listing or communication of every risk involved. The risks of any transaction can be further compounded by improper administration of the plan, failure to meet annually to review and update the plan, changes in the tax and other laws, that reduce hoped for benefits or even result in more costly results then had no planning been pursued. Annual meetings with a collaborative advisor team may identify existing or new risks, help modify the plan to address changes in the law, mitigate risks, but still cannot provide certainty. If you do not meet regularly with a collaborative team of advisers your plan may not succeed."
  - 2. Important changes in the law could be included in the billing footers as a way to inform clients. As an example, after the Tax Cuts and Jobs Act of 2017, and the subsequent repeal by New Jersey of the state estate tax (or whatever is appropriate for the particular practice), the following provision could be used to inform clients of potential effects of the changes, "Credit Shelter Trusts (under a will or revocable trust for a decoupled state as NJ had been, and as NY remains) will be funded with up to approximately $11.4 million in 2019, not the $675,000 (or another number) that may have been anticipated when the will or revocable trust was completed. Careful thought should be given to the specific provisions of a credit shelter trust, assuring adequate financial provisions for each intended beneficiary (e.g., the surviving spouse) may affect choice of trustees, distribution provisions, the use of trust protectors, trustee removal powers, powers of appointment given to a surviving spouse or other people, and more. You MUST review all formula clauses in existing wills and trusts, including those applicable to funding credit shelter trusts."
- viii. Practice Suggestion: Technology can assist practitioners in meeting communication requirements in RPC 1.4. Consider:
  - 1. Use retainer agreements for more than just setting and collecting fees. Include information on how you practice so prospective clients are informed.
  - 2. Post articles and memorandum explaining matters of general interest to your clients on the firm website.
  - 3. Conduct webinars on planning matters that clients can join to keep clients informed of changes in the law and other planning they might consider.

        - 4. Use web meetings to provide a convenient and cost effective means to provide clients an overview of complex documents. Document the review to corroborate what was discussed.
        - 5. Consider recording and transcribing web meetings to provide a record of what was discussed. Almost all web meeting services allow one to easily record the audio and video. Consider the cost of cleaning up a transcription to provide a client with a summary of the web meeting to make it easy for the client to review what was discussed. This can all be done easily and inexpensively with technology options discussed later.
        - 6. Provide a summary of key provisions of complex documents. Document generation systems may provide this automatically.
        - 7. Use schematics to illustrate complex transactions. These can readily be created in Microsoft Excel, flow chart software such as SmartDraw, or web services like Lucidchart.
        - 8. Email drafts of documents in advance of meetings and signings and save the covering email as proof that the clients were provided documents to review in advance.
- d. Email communication.
    - i. Practice Suggestions:
        - 1. Use email marketing tools, e.g. MailChimp or ConstantContact, to inexpensively and quickly disseminate updates, planning information and other communications to educate and inform clients.
        - 2. What if regulations or other changes may affect past transactions? What can practitioners do? Attorneys have an ethical obligation to keep clients informed of significant changes in the law. Use client communications above (e.g., MailChimp or ConstantContact), footers on bills (see sample provisions above), articles or memorandum enclosed with bills can be used to inform (and a reference to the materials provided in the footers on the bills).
    - ii. The key is that technology makes it easy and inexpensive to communicate information to clients and to corroborate that you have done so.
- e. Email Retention And Other Policies.
    - i. Rules based on paper file storage no longer make sense.
    - ii. We asked 12 practitioners about their email retention policies, and received the following responses:
        - 1. One knew and said they keep every email forever.
        - 2. Three had their IT people get back to me and the policies ranged from 90-days to forever, from emails saved to the DMS to all emails.
        - 3. Seven had no idea.
        - 4. One, a partner in a 10 person firm replied, “What is an email retention policy.”
    - iii. Software and other technology options.
        - 1. If you choose to retain emails forever, one option that can be used is Microsoft Outlook’s “Litigation Hold” feature, which retains all emails until the option is turned off. This may help prevent inadvertent deletion.
        - 2. If you use Office 365, you could read Set up an archive and deletion policy for mailboxes in your Office 365 organization here (http://bit.ly/2Z3uW5a).
        - 3. Consider an add on service like Veeam that can archive and save Outlook data.
    - iv. Litigation considerations.
        - 1. Is it an advantage or disadvantage to having every email record?
        - 2. Will the Plaintiff have the email you are missing?
        - 3. Consider the cost of having to review every single email.
        - 4. From one firm’s document retention policy statement: “For efficient identification, retrieval, and deletion of email and other electronic documents pursuant to this policy, attorneys and staff are required to organize and store all business record email and other electronic documents in separate folders designated for each client matter in the firm’s electronic document management system.”

4. Policies on Hiring Outside Consultants for Technology.

a. RPC 5.3 addresses an attorney retaining nonlawyer assistance, and the ethical requirements regarding that assistance. An attorney must make reasonable efforts "to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer." 8

b. If you retain an outside IT consultant, be certain the firm has familiarity with issues faced uniquely by lawyers. Does the IT firm represent other law firms? Are they familiar with the RPC?

c. What happens if an outside consultant violates the attorney ethics rules, such as client confidentiality? The RPC indicates that an attorney may be ethically liable for the conduct of an outside consultant, as an attorney is responsible for any violations of the RPC by the nonlawyer if "the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved." 9

d. There may be numerous attorneys, non-attorney staff and outside consultants accessing the firm network, including sections with confidential client data.

e. While there is no prohibition against members of the same firm maintaining data on the same network, the RPCs state that any partner in a firm needs to take reasonable measures "to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." 10

f. Consider establishing a firm policy on when an attorney, or non-lawyer staff, can be given access to the firm network, partitioning off sections of the network based on need for each staff member, as well as policies on vetting outside consultants before they are given access to the firm network.

g. Consider when employing third party vendors the kind of information they may have access to. Would they have the ability to retain these files? Do they have the ability to remotely access your network (such as with IT consultants)? Consider the use of Non-Disclosure Agreements ("NDA") for any vendors that have access to sensitive information to show reasonable effort made to protect confidential data. Also consider having the NDA include a provision that requires the third-party vendor to destroy any confidential information they may have stored, either in paper or electronic format, separately from your files as part of their assisting you within a reasonable amount of time. You can determine a reasonable amount of time based upon the kind of work the third-party vendor is performing.

5. Client Property; Original Documents; Electronic Storage.

a. Safekeeping of client property.

i. ABA Model Rule 1.15(a) provides that complete records of client trust account funds and other property shall be kept and preserved by the lawyer for a certain period of time after the termination of the representation. The number of years varies by jurisdiction, e.g. 7 years.

ii. A lawyer must hold client entrusted property separate from lawyer's property, e.g. client trust accounts, and original documents, e.g. a will. Original documents retained are subject to RPC 1.15, e.g. storing wills.

iii. Perhaps a question estate planners in a less-paper firm (or transitioning to one), might ask is whether it is beneficial for the firm to retain original wills and perhaps other key documents?

iv. What is the liability of retaining original wills? What is the real all-in cost of retaining original documents?

v. Does holding an original will create any additional responsibility or liability for the firm with respect to notifying the client of changes in the law that affect the will the firm is holding?

b. Client records – file destruction.

i. Simply because you can destroy the file after 7 years (or some other period) does not mean that you should. Consider self-protection when deciding to what to do with the file. If there is the possibility of a malpractice claim at some point, might the file be critically important for the lawyer's defense? Or might it be harmful? The policy established should be consistent.

ii. If any portions of the file are destroyed, care should be taken to preserve the confidentiality of the information contained in the documents. If there is a litigation hold all electronic records should be preserved until the litigation has been concluded.

iii. It should be noted that storing paper files indefinitely is definitely expensive and the expense is likely to increase over time. Further, making copies of paper records as a backup is also very expensive. On the other hand, storing electronic files indefinitely and making additional copies of them is very inexpensive. For perspective on the storage issue, a 1 page PDF document typically occupies 30 kilobytes of data. An average banker's box holds 2,500 pages; and there are 1,099,511,627,776 bytes in a terabyte. Therefore, a 6 terabyte external hard drive one can buy for a mere $110 can hold 87,960,930 banker's boxes of documents. It's hard to even wrap one's head around that. The point is that in most cases, all of the files a law firm has ever created could be backed up on 5 different external hard drives for a total cost of $550.

iv. An index of the file records that have been delivered to the client or destroyed should be maintained. When original documents are returned if they are accompanied by a cover letter that may suffice. That letter is also a simple and cost efficient document to quickly corroborate that the originals were turned over when family calls years later looking for the originals the firm already turned over.

v. Sample Clause: One large firm's retention/destruction policy: "Unless otherwise specified by the Billing Partner, a destruction date equal to ten years from the date the matter is designated closed will be assigned to all files, with the following exceptions… estate plan, estate administration, …. files will be permanently retained." Some view retaining estate planning documents as different then retaining documents in other areas of practice. 11

c. Personal Laptops.

i. Every device of any kind that holds client data should be encrypted. Further, if I have a home computer that is encrypted but to which my wife has access (because she knows the password), it is not okay to store client data on that computer if she can access it via the appropriate password.

ii. Sample Clause: Consider the following policy: "An attorney or staff member is specifically prohibited from storing electronic business records of the firm on a home computer or other device to which others have access and which is not encrypted. If an attorney or staff member creates or edits an electronic business record using a home computer, laptop, or other device, that person must save the record on the firm's electronic document management system as soon as possible. No firm attorney or staff member is permitted to store electronic business records anywhere other than the firm's electronic document management system."

iii. Remote access programs such as "GotomyPC" by Citrix, and hosted server arrangements (from companies such as ProCirrus or Uptime Legal) can allow access to a device on the firm's protected network without storing confidential client information on personal devices.

d. Using technology to assist with the safekeeping of client property.

i. The contents of a client's file belong to the client and, upon request, an attorney must provide the client with the file.

ii. During the process of going paperless or paper-lite, care should be taken to avoid accidental destruction of client property.

iii. Record retention rules evolved in a paper environment. As the cost of electronic storage becomes insignificant (as contrasted with in-office and offsite paper storage) will the ethical rules evolve to require permanent storage of client data?

iv. Is electronic storage really moving to no cost? Consider the cost of finding relevant information if everything is saved forever. On the other hand, high-powered search programs like Copernic Desktop Search (which costs only $56 per year) would allow one to find any document by file name or the words contained within it within seconds (even if millions of documents were being searched).

e. The client "file" in the new technological environment.

i. Rules are provided that govern what a lawyer must do when asked by the client for the file 12 . When a lawyer withdraws from representation he or she must take reasonable steps to avoid foreseeable prejudice to the client's rights, which includes delivering to the client all papers and property to which the client is entitled. The rule does not specify what papers and property the client is entitled to receive. What is a "client file" in a paperless office?

ii. Maintaining a client file has historically been an important part of the service counsel provided clients, but electronic storage is essentially free for clients as well. So, clients can also readily store all their documents permanently.

iii. If a client has all original documents, has received all memoranda, letters and emails, what is left that the lawyer must turn over to the client?

iv. In a paperless office, is there any client property? If you have returned original wills and signed documents in a paperless office, you may have no client property to monitor or return. Consider the cost savings if you are not quite there.

v. Sample Clause: Consider the following paragraph for follow up letters to clients, "We have previously provided you with copies of all documents we have retained in our file. Thus, you have been provided with the entirety of your client file. Any drafts of documents or internal notes regarding your estate planning that have not been previously provided to you are agreed to be our work product and shall not be provided. If you believe that there are any documents that comprise your file that you have not yet received, please contact our office and we would be happy to review the file to confirm whether any such documents exist."

f. Cloud Storage.

i. A law firm is permitted to store the electronic materials relating to the client on a remote server under third-party control as long as the law firm carefully selects the third-party company to ensure that the information is kept confidential.

ii. What should be done to corroborate the selection?

iii. Attorneys must take reasonable care to protect a client's information in a cloud environment. 13

6. Confidentiality of Information in the Electronic Age.

a. Confidentiality of information. 14

i. The RPC indicated that "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized to carry out the representation, and except as stated in paragraphs (b), (c) and (d)."

ii. ABA Model Rule: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." 15

iii. A comment to the rule requires a lawyer to competently act to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure. 16

iv. What are reasonable efforts? This is a nebulous statement that needs both common sense applications, judgment, and to review what opinions consider reasonable to determine your technology policies moving forward.

v. Reasonable efforts may be interpreted to include due diligence regarding technology procedures. Required training for employees, thoughtful policies implemented and followed, etc. all show that due diligence and that reasonable efforts were made to prevent disclosure.

b. Technology crime statistics.

i. In the first half of 2018, 4.5 billion data records were lost or stolen, reflecting a 133% increase over the first half of 2017. 17

1. 65% of the compromised records were identity theft.

2. North America constituted 57 percent of all breaches in the world, which included 72 percent of all records stolen.

ii. Of those records, only about 4% were encrypted and thus protected from outside access when stolen. 18

iii. The FBI's Internet Crime Complaint Center in 2018 received complaints of 351,936 malicious incidents, over 900 per day, causing a loss of $2.7 billion. 19

c. Protecting confidential information.

i. Consider using encrypted emails, e.g. ShareFile, to transmit documentation with TINs, etc.

ii. Take precautions to protect the physical office facilities.

1. Defensive measures employed are only as strong as their "weakest link." Even if sufficient electronic safeguards are created, if the physical location of the firm's devices and network are not also protected, the data could potentially be compromised.

2. The use of an alarm system on office locations would provide notification of a break in and reduce time a bad actor would have access to any devices.

3. Disabling the USB ports on any devices connected to the network, unless proper authorization has been provided, would prevent a weak point in protection from either an inadvertent infection of a network, or malicious actions.

iii. If flash drives or external hard drives are necessary, consider buying encrypted versions of those devices which are readily available. For example, see the Apricorn Aegis Secure Key flash drive or the Apricorn Aegis Padlock Fortress external hard drive. In some instances, firms might limit the use of USB drives solely to non-client data such as powerpoints taken to speeches.

iv. Take precautions to protect the integrity of electronic data. This might include:

1. Encryption and password protection of laptops, smartphones and other equipment.

2. Providing internet access, which is password protected and outside the firm firewall, for clients and other visitors.

3. Protect all systems with appropriate virus protection, spam filters, intrusion protection, etc.

4. Multi Factor Authentication provides additional protection beyond the use of a password. Even the strongest password can be defeated by programs such as keyloggers, which provide a third party with all keystrokes made on the computer if compromised. The use of Multi Factor, such as requiring an additional numerical password sent to the user's cell phone, may prevent the compromised password being used to access confidential data, while also potentially providing the practitioner with warning that the password has been compromised when access is attempted without the proper multi factor access.

5. Dark Web Scanning. Compromised information is often uploaded to the dark web, where information brokers sell the stolen information. If the practitioner has regular scans performed, and information is identified on the dark web, it would provide the practitioner with warning a breach has occurred and allow corrective action to be taken.

6. As discussed above, consider requesting that a memorandum be prepared by IT department or consultant outlining steps already taken to protect electronic systems and confidential information, and have additional suggested steps included in the memorandum. Subsequent memoranda should show efforts made to implement the suggestions made in previous years. Establishing a history of activity taken and due diligence performed may show that actions taken by the practitioner in protecting electronic information was reasonable.

v. Use best judgment regarding when you need to take extra security measures. Consider the following reasonable efforts factors:

1. Sensitivity of information.

2. Likelihood of disclosure if you do not employ additional safeguards.

3. Cost of employing additional safeguards.

4. Difficulty of implementing additional safeguards.

5. Extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g. difficult to use).

d. Actions to take.

i. The ABA rules state that if a data breach occurs that involves client information, lawyers have a duty to notify current clients of that data breach. 20 However, if the data accessed was encrypted, there would be nothing for the client to worry about and the breach notification laws in most states wouldn't be triggered (because they only require notification if "unencrypted" data is accessed by an unauthorized party).

ii. Attorneys have a requirement to monitor for data breaches so current clients can be informed if one is discovered.

iii. There are programs that can be used to assist in monitoring the practitioner's various devices and network to attempt to identify data breaches and end unauthorized access to confidential data as quickly as possible. One example would be Vijilan. 21

iv. Interestingly, there is no requirement to notify former clients. Practitioners might wish to consider what action is appropriate. Notification might be advisable regardless of whether it is required.

7. Collaboration and the Attorney Client Privilege.

- a. The world is too complex and inter-related to practice without collaboration.
  - i. Collaboration might have been merely a footnote not too many years ago.
  - ii. Today it warrants prominent consideration and is an integral part of many estate planning practices.
  - iii. Estate planning is more complex and intricate considering changing demographics and what seems to be a permanent state of uncertainty as to the tax laws.
  - iv. Attorneys are obligated to safeguard the confidences of their clients.
  - v. Generally, the attorney is responsible to protect all communications between the client and the attorney from disclosure without the permission of the client.
  - vi. A client intake form might include an authorization to be certain clients understand the importance of collaborative disclosures and provide the relevant contact at the outset of the engagement.
  - vii. Many clients do not know how to protect their own data. If PDF copies of estate planning documents are provided to clients after signing, it may be worth providing guidance on how and where they should be stored, how they can be safely shared with loved ones, etc.
  - viii. The mere fact that the estate planner has authorization to collaborate does not mean other advisers have obtained permission. Other advisers may refuse to collaborate until they have authorization from the client.
  - ix. Counsel could prepare a letter from the client to all advisers authorizing and directing collaboration that the client can sign, and counsel can distribute. Sample Clauses that could be used in the letter include:
    - 1. "The undersigned has hired [firm name] to assist with estate planning. The undersigned understand the benefits of collaboration and request that you communicate and collaborate as reasonably necessary with [practitioner's name], his/her office, and each other, as a planning team, in order to enhance effectiveness and efficiency, and to foster a better outcome for planning by leveraging and coordinating the knowledge, skills and insights of all of you in a manner that allows for a more comprehensive view of planning for the undersigned's circumstances, issues, as well as communicate some of the risks regarding any planning proposed by a member of the collaborative team. The undersigned acknowledges that there are no guarantees for any plan and every plan entails risks."
    - 2. "The undersigned understand the advantages this collaborative approach has to protecting people and finances and authorize you to all collaborate on reviewing and commenting to each other on draft letters, memorandum or documents circulated to the team, as well as on the proposal and implementation of any planning. Please accept this as the undersigned's authorization and direction to collaborate."
- b. Preserving the attorney client privilege.
  - i. The Privilege belongs to the client as opposed to the lawyer. The communication of confidential information and the privilege can both play an important role in a range of estate planning matters. Address, with some specificity, in the engagement agreement and other communications. 22
  - ii. Technology has complicated the potential implications of Privilege in designating acceptable forms of communication. Technology has also provided some solutions to these challenges as well.
  - iii. In an age where many routine communications occur electronically, the client might not pause to consider the implications of a mode of communication.
  - iv. For example, a client might communicate with her personal (not business) counsel through her company email account, saving documents on a company file server, or using a company computer to engage in such communications.
- c. Assisting disabled clients in light of the electronic age.
  - i. The attorney's duty to represent a client does not end merely because of a client's disability. 23 An attorney, as far as reasonably possible, is to maintain a normal client-lawyer relationship with a disabled client. An attorney can take protective actions for their client depending on the circumstances. 24

- ii. An attorney may reveal confidential information about a client when doing so to the extent reasonably necessary. 25 This is generally limited to situations where the client is at risk for substantial physical, financial or other harm. Therefore, it may be advisable for a client to authorize greater latitude in order for the attorney to take steps the client might wish taken in less onerous circumstances.
- iii. A power of attorney prepared for clients comes into effect when the client is disabled. Often, when an agent needs to act in their capacity under the power of attorney, they will reach out to the practitioner that drafted the document for assistance and information. Consider whether the client is or should be willing to waive the attorney client privilege. If not, there may be an issue with you as attorney disclosing information to the agent which may become essential for the agent to have to act to protect your clients interests under the Power.
- iv. Sample Clause: Consider the following sample clause: "By executing this Power of Attorney the Principal agrees and acknowledges that Principal hereby waives the attorney client privilege with the law firm who prepared this document, solely for the purposes of permitting said attorneys and firm, or its employee attorneys and any successor firm (collectively, "Attorney") to communicate with the Agent and Alternate Agents hereunder, including disclosing Principal's confidential information to them, and providing Principal's confidential documents to them with respect to their carrying out their duties hereunder. Attorney shall have the right, but no obligation under any circumstance, to act hereunder (including but not limited to distributing any copy or original of this Power of Attorney). Attorney shall be held harmless for any good faith action, or refusal to act, hereunder."
- v. Carefully consider if any exceptions should be made to the waiver of conflicts discussed. Example: Have another Agent or successor Agent act with respect to a business, for example, in which the initial Agent holds an interest. Alternatively, the interested Agent could be permitted to act but could be required to give notice of the actions to a successor agent and/or at least one person (or more than one) who could be a beneficiary of the Gift provisions in this Power (presuming that such persons are objects of your largess).

- d. Privilege can affect the attorney personally.
  - i. Similar issues can also affect practitioners.
    - 1. If the attorney sends personal emails from a work email address or stores personal documents or communications on a laptop that is a practice laptop, in later litigation, discovery and data searches might reveal the practitioner's personal emails and estate planning documents.
    - 2. If a practitioner is terminated from their employment, usually a firm will immediately cut off the practitioner's access to the firm network. If personal data was stored by the practitioner on the firm's network, access to those documents may be lost, and potentially deleted by the firm.
  - ii. Practice Suggestion: As previously discussed, for personal computers, tablets and phones, consider a written policy to save no client work there, and a requirement to transfer all of it to the office system to be saved in accord with whatever the firm document retention policy states. Consider documenting the characterization of personal equipment as personal in the firm's technology records.

8. Billing Rates, Billing Methods and the Impact of Technology.

- a. Hourly billing may no longer be fair to the practitioner considering the impact of technology, e.g. document generation software.
- b. Various tasks that use to be quite costly, may be more efficient and routine because of technological changes. Thus, some tasks that had been billed on an hourly basis might now be billed on a flat fee or hybrid basis in order to be fair to the practitioner/client.
- c. As practices evolve to paperless, cloud-based document generation driven models, the traditional paradigms for billing will be unfair to clients in some instances, and unfair to practitioners in others. Modifications to billing practices may continue to evolve over time.
- d. Assure that the client has a clear understanding of how they will be billed specified in a written retainer agreement.

- e. Sample Clause: If the practitioner chooses to include document generation fees, in addition to hourly billing, a sample paragraph could be, "The following fees will be charged as supplemental fees, in addition to regularly hourly rates for work completed, for the preparation of the documents indicated below. These fees are charged in addition to our regular hourly fees to address the substantial and ongoing investment of time and cost we have, and continue to make, in technology, forms, and other matters that have and continue to provide substantial efficiencies to clients. If you wish to discuss the rationale or application of these fees, please call."
- f. Practice Suggestions:
    - i. When rates or fee structures are changed, a footer could be incorporated on the bill explaining that an increase or other change has been put into effect.
    - ii. Many billing systems easily accommodate the addition of standard footers to some or all bills to facilitate such communication. In fact, footers designed to appear on all bills can provide an important and no-cost way to communicate important billing, administrative and even tax development information to many clients.
    - iii. Firm newsletters and announcements can also be put to similar use. If the latter is done, consider saving copies of all such general client communications in a single file to assure an accessible record of all general communications.

9. Aging Clients and Technology.

a. The evolution of aging clients and how estate planners can use technology to be a more substantial and important part of the planning team, render services that remain relevant to the large swath of aging clients who are indifferent to estate tax planning and just won't get excited about the latest mantra from the estate planning world of "basis maximization." While most if not all practitioners have, or will, use Uber, Lyft or other such services, how can these and other technologies provide a model for service delivery for estate planners to aging or infirm clients?

b. Why is this all so necessary? Estate taxes are irrelevant for most clients and that driver for business has largely dissipated. Document generation software is growing more sophisticated and allows less experienced practitioners to create plans and draft documents that can replicate the results of what the most sophisticated practitioners can do. Artificial intelligence has barely nipped at the heels of estate planners, but in short order it will likely obviate many of the services and guidance clients have traditionally sought from practitioners. Estate planners can discuss the merits maximizing the basis of assets transferred to family members (not to say that it is not important) but many clients don't care, and many if not most who do care still view income tax planning as in the purview of their CPA not their estate planner. That will not lessen the need to incorporate basis maximization planning in estate plans, but it does not seem that such income tax planning will ever be a driver to push clients to their estate planner's office. Aging clients do fear the impact of dementia, elder physical abuse, elder financial abuse, identity theft and more. Aging clients universally want to retain their independence. Estate planning, in a somewhat broader and more holistic manner, can help address these concerns.

c. Following is a blog post about seniors using Uber that can provide a construct that estate planners should all embrace: 26

i. "Driving to the doctor, the supermarket, to visit friends or just to see the change in seasons through Mother Nature's eyes is something many of us take for granted. When our senior loved ones no longer drive, whether they are no longer safe behind the wheel, choose to give up their keys, or can't afford to own a car, they still need to get from one place to another. How can they get to essential services like the grocery store or just to places that will help them enjoy life, like visiting friends or the ice cream shop, especially if they live in suburban or rural cities without a transportation infrastructure? Not being able to get where they need to go or having to rely on family or friends to get there, can rob seniors of their independence and maybe even the ability to age in place… Unfortunately, a large majority of community dwelling seniors have no access to public transportation or walkable city services and need to find a solution to meeting their needs without a car to rely on each day. It is estimated that by the age of 75, 31% of seniors need to find alternative forms of transportation because they no longer drive… There is a way for our senior loved ones to get on the road again! Yes, we are talking about Uber."

d. Uber is far from the only illustration of the growing sharing economy: 27

i. Instacart is the personal grocery shopping service that will deliver your grocery order to your door for a nominal fee. Consider seniors for whom travel is difficult, or because of arthritis or other challenges find mobility painful or too time consuming.

ii. Poshmark helps women monetize their closet and declutter at the same time. You can list gently used clothing items for sale in less than 60 seconds with their app. Consider the common and growing problem of seniors downsizing. This can provide a cost efficient and straightforward way to do so. Also, consider the financial challenges facing many clients with longevity.

iii. Getaround can make a client's car generate income when they are not driving it. Consider the oft discussed challenge for many aging clients of financial resources as longevity continues to expand. Perhaps that car the senior client cannot yet part with, but which is used less and less, can provide cash flow to offset its carrying cost.

e. Technology provides a range of benefits that can help both aging clients and their caregivers: 28

i. Technology can provide social connections. Video chat and social media can keep seniors in touch with long-distance loved ones. But how many estate planners schedule periodic reviews with clients? Those reviews could be about much more than just updating an estate plan, but rather to have an objective and independent attorney in effect checking in on a client, providing important social connection, and perhaps minimizing the risk of elder abuse. "Have you had your financial adviser or CPA automate your bill paying yet?" How does the client appear? Is there anything worrisome in the client's demeanor? The signs are no different than what any advisor on the planning team might consider in recommending an initial review by a care manager.

ii. Emergency equipment can be vital to the security of aging clients. Surveys consistently show that 80 to 90% of seniors want to stay in their own home as they age. Technological solutions can make doing so safer for them. Every senior that lives alone should have a Personal Emergency Response System (PERS). 29 ADT, for example, provides such devices. A PERS device allows the wearer to call for help with the simple push of a button. How many estate planners recommend this to clients that have health challenges and/or who are aging? If the estate planner is not having this type of frank discussion with the aging client who is? Too often, no one.

iii. According to a 2009 survey by Medco Health Solutions, more than half of the older adults took at least five different prescription drugs regularly, and 25% took between 10 and 19 pills a day. Technological solutions that also provide reminders and "time to refill" alerts can aid adherence to the prescribed medication schedule. Seniors and their caregivers can take advantage of the RxmindMe or Personal Caregiver medication reminder smartphone apps to reduce missed medications and prevent medication errors.

f. So, what do technology, Uber and other sharing economy solutions provide seniors, and how can estate planners adapt similar concepts to their practices to make matters easier?

i. Minimize the need to drive to appointments.

ii. Address the reality that few clients return for annual reviews, which become more critical as clients age.

iii. Facilitate interaction and communication.

iv. Provide additional safety to aging or infirm clients.

v. Assure coordination of a holistic estate planning team.

vi. Minimize or ease check writing and recordkeeping which become more difficult with aging.

vii. Make documents accessible to the client and others who need them in a manner that is convenient to an aging client who might have difficulty locating documents or transmitting them.

g. What are some of the specific ways estate planners can cost-effectively adapt some of these concepts to help aging and infirm clients? How can estate planners broaden the scope of services provided, better assist and protect aging clients, and more?

i. Post short video clips explaining concepts and planning to clients and their loved ones on your website. These can be created inexpensively in the practitioner's office without the cost of expensive marketing and PR firms. These videos can explain the issues each practitioner sees his or her clients needing information on. Using video clips will be much easier for many clients to digest then the traditional newsletters and written materials. For an illustration see www.laweasy.com.

ii. Document management becomes increasingly difficult for seniors and can be simply resolved. For example, ShareFile provides a cost-efficient and simple means for an estate planner to create a secure password protected cloud vault for each client. PDFs of all key client documents can be uploaded to that vault. The client can choose which persons to share that password with. Practitioners can encourage clients to share the password with their wealth advisers and CPAs to foster collaboration, assure that clients can easily facilitate other advisers having documents, and avoid the need to copy, scan, email or otherwise do so themselves. For practitioners, this approach can virtually eliminate calls and emails by third parties requesting copies of documents. Those inquiries can raise issues of obtaining approvals to provide the documents and create time drains that are difficult to bill for.

iii. ShareFile has an app for smart phones which practitioners can make available to clients. If a client or client's spouse/partner is rushed to an emergency room, his or her health care proxy and other key documents can readily be downloaded from their smart phone to provide to a hospital. Not only with this capability give clients peace of mind but it will also eliminate the urgent document requests inquiries that can be difficult for practitioners to respond to.

iv. Web based meetings are a simple and cost-effective way to meet with clients to maintain communications and eliminate the need for clients to drive to the attorney's office or for the practitioner to drive to the client's home thereby increasing the cost of services. When a web-based meeting is combined with cameras, the visual makes the interaction more personal and provides much more insight to the practitioner (than a mere telephone call). These services are readily available from many provides and quite inexpensive. For example, GoToMeeting and Zoom are popular web meeting services (there are many more good options - these are just examples). They're online meeting, desktop sharing, and video conferencing software services that enable the user to meet with customers, clients or colleagues via the Internet in real time. 5 million seniors are subject to financial scams every year. While most perpetrators are family, friends or home health aides, scammers include fake lotteries, home improvement scams and more. The Federal government passed "The Senior Safe Act." 30 The theory is that financial advisers can spot signs of elder financial abuse. Advisers need protection from liability and violations of privacy if they alert authorities about potential fraud. FINRA Rules 2165 and 4512 became effective in 2018. Why shouldn't estate planners be part of this protective effort as well? By communicating through web conferences, visually seeing and hearing clients in their home environments, estate planners may identify issues that financial professionals who may only see clients in their offices, when they are groomed and perhaps rehearsed for the occasion, may miss.

v. The aforementioned GoToMeeting and Zoom can easily record a client meeting. Many practitioners have shied away from video recording of client meetings to confirm a client's dispositive intent or capacity. Videos can sometimes be picked apart by a forensic psychiatrist, are costly, and many clients are uncomfortable with formality. That discomfort can readily be translated into questionable capacity on the recording. But has anyone considered the impact of periodic recordings of a client on a web conference from the comfort of their home, at no cost? How might that translate into a different perspective on corroborating capacity or testamentary intent? One option to consider to potentially ensure the client's wishes in his or her testamentary documents are carried out is to consider pre-mortem probate and declaration of validity of a revocable trust. But few have bothered to use it. More certainly should.

vi. To foster collaboration of the planning team, vital to the protection of many aging clients or clients with health challenges such as cognitive issues or chronic disease, a web meeting of the advisers can be quick and cost-effective. It eliminates the costs of travel time being billed and the social niceties that precede any meeting but add to billable time to the client.

vii. Firms that do not take credit cards for payment should, as it provides an easier means for an aging client to handle payments then writing checks. There are many excellent credit card processing services that also understand a lawyer's trust accounting rules such as LawPay.

10. Vetting the Prospective Client.

- a. The internet changes the dynamic of accepting new clients.
- b. Some practitioners take steps in advance of being retained. Some refer to these preliminary steps as "pre-engagement."
- c. Turning away a bad case or client is important to the security, success and atmosphere of every firm.
- d. Example: if the prospect has significant assets overseas what issues might this suggest? Has the prospect complied with all the requisite reporting requirements?
- e. If the engagement involves the potential creation of Domestic Asset Protection Trusts ("DAPTs") could providing assistance place the attorney at risk of being an aider and abettor?
- f. It may be advisable to perform some due diligence on a prospective client before the prospect becomes an actual client.
- g. The internet has made the vetting process easy and, other than staff time, relatively cost free.
- h. Have staff search the client's names, and business names, prior to accepting the engagement.
- i. If issues are identified, address them before accepting the prospect as a client.
- j. If a prospective client searches raise worries, e.g. a physician prospect who has scores of negative complaints that sound substantive, perhaps the firm should consider whether that reputation risk is something it is willing to take on in the context of estate planning that typically will entail transferring assets into entities and irrevocable trusts. If the firm is willing to accept the client, it might choose to discuss these concerns up front as well as steps and costs of addressing them.
- k. To avoid any prospective client claiming that for an inappropriate reason they were singled out, it may even be advisable to perform the same procedures for all clients.

11. Document Generation Transforms Estate Planning. 31

- a. How document generation changes drafting and practice.
    - i. Estate plan deliverables often involve complex documents.
        - 1. Initial intake forms.
        - 2. Recommendations with asset schedules and flowcharts.
        - 3. Trusts, wills, and asset change documents.
    - ii. What's wrong with the status quo?
        - 1. Lawyers often draft new documents by pulling up an existing document from a previous matter or transaction, saving it as a new file name, and making changes to it.
        - 2. In 2019, no lawyer should ever draft by pulling up a document prepared for another client and using that as a starting point.
        - 3. Finding the right document can be time consuming.
        - 4. There is a high likelihood that you will leave something in that shouldn't be in the document.
        - 5. There is a high likelihood that something that should be in the document won't make it in.
        - 6. Find and Replace rarely finds everything.
        - 7. Using an old document means you will need to keep fixing formatting issues that are carried forward.
        - 8. Many of these "starting point" documents were designed very specifically, and revised based on discussions, with regard to the specific client the document was drafted for. Such provisions could be "landmines" in another client's document.

- iii. The use of document automation software allows attorneys to create functioning documents for both simple and complex plans more efficiently, allowing the attorney to concentrate their time on discussion with the client to determine what the client's needs and desires are. These conversations allow the attorney to craft a more comprehensive plan for clients than may have not been economically feasible otherwise. This additional "face time" with the client also allows the client to see more of the work being performed by the attorney and may help prevent billing issues raised by clients due to "sticker shock."

- b. Upgrading skills for document drafting.
  - i. Lawyers (and staff) should improve their own word processing proficiency or use speech recognition technology.
  - ii. Lawyers should recognize the limitations of using other client documents and dictation/transcription and seek new and efficient tools.
- c. Document automation is important.
  - i. Document Assembly (or Automation) is the use of software to quickly and accurately generate customized documents in word processing software.
  - ii. Document Assembly adds significant functionality to your existing word processor.
  - iii. Document Automation refers to the process of developing forms into a manner in which they can become part of automated document assembly.
  - iv. You can capture the consistencies in your documents starting with format.
  - v. You can prevent (or capture) irregularities in your documents.
  - vi. Document Automation systems can create a database of client information. You can avoid inputting the same information multiple times.
  - vii. Once you enter the client names in your system, it should be the last time you enter the names. This will prevent the problem of Laurie L. Jones showing up in one place and Lori L. Jones showing up in another.
  - viii. You eliminate the risk of Find and Replace missing Janie Jordan when you are trying to insert Laurie L. Jones.
  - ix. Other improvements.
  - 1. Document accuracy is improved.
  - 2. Client intake can be improved. Electronic intake can create data files for the documents that will be drafted.
  - 3. Document Automation can be integrated with Automated Workflows!
- d. Document assembly options.
  - i. The least expensive (and least powerful) option is to use the features contained within your word processor to automate. Such approach can be useful for simple documents. Some features that can be used to help automate are: Quickparts, AutoText, Text expanders, Macros, Mail Merge, and Microsoft Word Plug-ins
  - ii. Purchase Document Automation Software: Document Automation Software is a tool you can use to automate documents that you already use. Examples include: HotDocs, TheFormTool, Pathagoras, Xpressdox, ActiveDocs, Contract Express. Generally speaking, these tools are complicated to learn and you are probably better off hiring a professional to automate your documents for you.
  - iii. Subscription drafting systems automate document generation, but they include the documents that you will use. That is, you use the forms developed by the subscription service rather than the documents that you developed. Some of the companies that provide these services include:
  - 1. WealthDocx.
  - 2. ElderDocx.
  - 3. Wealth Transfer Planning.
  - 4. Practical Planning System.
  - 5. Lawyers With Purpose.
  - 6. Lawgic.
- e. Questions to ask when shopping for automated drafting solutions.
  - i. Who is "behind" the documents?
  - ii. How frequently are the documents updated?

- iii. Are the documents state-specific? Which states are covered?
- iv. Is the system customizable?
- v. Training and support.
- 1. What type of training is available for new users?
- 2. Is support available for both technical and content-related questions?

- vi. Other resources: What other resources are available to subscribers?

12. Electronic signing of documents.

- a. While electronic signing of wills has only been implemented in Nevada 32 by statute, there has been other instances of electronic methods being used to effectuate a will, such as when in 2013 an Ohio court admitted to probate a will written on a tablet. 33 However, there largely has been resistance against making steps towards allowing more prevalent use of electronic signing for wills.
- b. The E-signing of documents other than wills can be implemented into an estate planning practice both for administrative convenience, and the convivence of the clients. Consider the use of e-signature in the following situations:
  - i. Providing clients with an engagement letter to be signed.
    - 1. This can be used both for an initial engagement letter, as well as to provide a client with an engagement letter to reflect additional work that has been requested.
    - 2. For instance, if a client initially requested only a meeting and a memorandum, but later decides to have planning documents drafted, a practitioner can send an engagement letter specifying the documents to be created. This is a protective measure for the attorney, ensuring written authorization to perform work requested in case of billing issues, as well as a convenience factor for the client.
  - ii. Provide Crummey notices that need to be signed by various family members of the client, oftentimes spread across the country, to sign electronically and return. This can be a faster method and avoid the headache of following up with numerous beneficiaries on the part of either the attorney or the client. In addition, some E-signature services allow the user to send out the document to be signed by several email addresses at the same time, reducing administrative load.
  - iii. Balance sheets. Having a signed balance sheet by a client can be a protective measure for the attorney when preparing an estate plan and documentation. If a balance sheet is either not prepared or not signed at the initial meeting, providing it to the client electronically reduces the burden on the client while giving the attorney the protection desired.

13. Illustrative Additional Service for Clients: Change in Domicile.

- a. Many aspects of planning can involved changing a client's residence, and perhaps domicile. If a client wants to support the use of a self-settled trust, being domiciled in one of the 20 states that have such enabling legislation may support the validity of the domestic asset protection trust ("DAPT"). If a client is seeking to avoid estate tax in a decoupled state, changing domicile to a not tax state may be advantageous. Tracking days in and out of the old home state and the client's new home state, can be important to successfully supporting a change in domicile for the above or other reasons. Technology can help practitioners support the intended result.
- b. For example, TaxBird is an app that helps users keep a real-time count of the number of days they've spent in each state for residency and/or domicile change purposes. As a client approaches a threshold for residency, TaxBird alerts them when they are 90 days, 30 days, and 10 days or less from meeting the limit. These warnings come as in-app alerts, notifications on the phone, and emails. To check progress in between alerts, the app has a very nice, simple dashboard to display a client's current count of days in each state and progress toward the bright line. A future enhancement may give counsel notice as well so that the practitioner can follow up with a client to discuss the status and planning implications.
- c. TaxBird was designed to be easy to use and understand. By using the location services in the client's smart phone, the app is able to keep an accurate record of your locations throughout the year. The only requirement from the user is to add their states of residence and input any historical days (those that have passed this year before the app was installed). After that initial setup, the app does the tracking automatically by running in the background and using a location gathering process, TaxBird is able to keep

a real-time, automated count without requiring any user interaction. This can be valuable for the many clients that become lax on follow up.

- d. At the end of the year, the clieint is able to request a report with a detailed summary of their counts. This is delivered as a PDF to the client's (or a professional's) inbox. This can be used as a supporting document to provide to counsel.
- e. The app is currently available on iOS App Store and Google Play.

14. Illustrative Additional Service for Clients: Longevity Planning; Term of GRATs; etc.

- a. Genivity Halo Health, Life Expectancy and Health Care Costs.
  - i. 1- Clients take the HALO assessment. HALO's self-guided assessment collects all of the information you need without an uncomfortable conversation about client health.
  - ii. 2 - HALO projects clients' health and care costs. They use science to personalize cost projections to each client's unique lifestyle, health and longevity.
  - iii. 3 - Advisors and clients revisit their plans, together. Whatever your targets were before, they were too low. Now that you know the real numbers, rebuild clients' plans to make sure to get there.
- b. Tailoring planning.
  - i. Use the difference between general life expectancy and calculated life expectancy to tailor planning. For example, might you make a GRAT longer term to reflect greater life expectancy?
  - ii. Use real life expectancy in financial forecasts when modeling how much the client can gift away.
  - iii. Consider the years of the client requiring assistance to plan more realistically for success trustees and agents, care providers, etc.

15. Using Transcription Services For More Effective Meetings And Marketing.

- a. How to Use Transcription in Practice.
  - i. Record and transcribe meetings to reduce or eliminate the cost of taking notes or producing a memo. Both the recording of the meeting and the transcription can be used by the client as a reminder of what was discussed, as well as being protective for the attorney by showing that a certain option, or risk, was discussed with the client before planning was implemented. Consider https://otter.ai for an easy-to use application that can transcribe your meetings in real time.
  - ii. Strip audio from marketing and educational videos to turn into blogs and articles. This allows the attorney additional usage of the materials prepared. For example, if the attorney participates in a webinar, if the webinar is recorded the recording can be posted on the attorney's website, and then the audio transcribed to produce additional articles.
  - iii. The voice recordings from a video conference can be quickly (within 10 minutes) transcribed and saved as a Word document using many inexpensive (10 cents per minute of transcription) web-based services, e.g. Temi.com. Zoom web meeting business accounts and above include recording and transcription for all web meetings. Consider how easy a written record of a client conference call or web meeting can be created to corroborate the discussions. If the practitioner wants to send a follow up letter to the client, it is quick and easy to copy and paste key points from the transcription into a confirming memorandum or letter. That same transcription, even in rough form, can be circulated to the advisor team to inform other advisers not on the call of the discussions.
  - iv. Use transcriptions to prepare articles, blogs, etc. Depending on usage, this can be more cost effective than traditional dictation software, as well as less labor intensive if administrative staff time is being used for the dictation.
- b. Outsourcing.
  - i. Consider an offshore outsourcing service for writing cleanup of raw transcriptions. This may save the practitioner time in revising the transcription to account for the difference between speech and written word.
  - ii. Email communications make it seamless.
  - iii. Outsourcing saves money since you don't need extra staff to deal with upswings in work load.

- iv. Cost is substantially less than American workers.
- v. Time difference can permit getting work back more quickly compared to a US outsource service.
- vi. Use transcribing team that are native English speakers so “tone” and “style” are consistent.
- vii. Confidentiality agreements can be used if desired, e.g. for client matters. Care should be exercised in any confidential information provided to the outsourcing company, similar to the outside consultant concerns discussed above.

16. Conclusion.

- a) Technology continues to evolve at an ever-increasing pace. The programs, and the uses of those programs, is a small sample size of the myriad of products and potential applications that the modern estate planning firm can employ to practice more effectively and profitably.
- b) Practitioners should be diligent and thoughtful when employing new technology in their practices. Consider “beta testing” the programs before wide dissemination is performed to ensure that there are no unexpected side effects to use of new technology that could open the firm to issues or liability concerns.
- c) It’s extremely difficult to keep up with the dizzying pace of change related to technology. There are expert companies that can help you with all of these decisions. Lawyers always want their clients to ask for help when dealing with areas of unfamiliarity; and they should be mindful of when it’s prudent to follow their own advice as it relates to technology.