

ESTATE PLANNING

Recording Estate Planning in the Digital Age

Audio-visual communication technology has become a powerful tool for many estate practitioners in light of COVID-19. One of the most prominent examples of how this technology has enhanced our ability to practice law is the execution of testamentary instruments - since 2020, lawyers have been able to assist clients remotely using audio-visual platforms like Zoom. With the amendments to the Succession Law Reform Act made permanent in 2021, it appears that audio-visual communication technology is here to stay for the wills and estates bar.¹

In this digital age, there is another way that estate lawyers can, and perhaps should, incorporate audio-visual technology into their practices - by video recording meetings with clients. The primary use for such video is in estate litigation - video recordings can preserve meaningful evidence of

(1) lawyers' meetings with the testator, including the intake process and the testator's estate planning instructions, and (2) the execution of the client's testamentary instruments in compliance with the necessary formalities. Experts also agree that making video recordings "in situations in which there may be doubt about the testator's capacity, or situations in which family members and others may want to contest the will," is good practice.²

While the admissibility of such evidence in estate proceedings is not addressed in the SLRA or the Rules of

Civil Procedure,³ this should not deter practitioners from updating their practice.

Video recordings have been admitted during contested estate proceedings in Alberta,⁴ and the Manitoba Law Reform Commission has expressly endorsed video recordings of the execution of a will, which are considered "admissible in a contested will action as evidence of testamentary intention and capacity, knowledge and approval, and due form and execution."⁵

In 2021, the Ontario Superior Court of Justice also admitted surreptitiously recorded phone conversations into evidence during power of attorney litigation, both confirming that a "general inclusionary rule" applies in civil cases and demonstrating reluctance to decide issues relating to capacity using an incomplete record.⁶

If a lawyer does wish to update their practice to include video recordings, it may be helpful to keep the following points in mind:

- Estate litigation is not always foreseeable. On this basis, it may be advisable to make video recordings a consistent part of a wills and estates practice, rather than only utilizing video recordings when there are immediate concerns about capacity or potential litigation.
- The client must be informed whenever a meeting is being recorded. Rule 7.2-3 of the Rules



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of Professional Conduct expressly provides: "A lawyer shall not use any device to record a conversation between the lawyer and a client or another legal practitioner, even if lawful, without first informing the other person of the intention to do so." If a party is aware that he or she is being recorded, the recording may also have more probative value in estate proceedings.⁷

- Before incorporating video recordings into one's legal practice, it is advisable to ensure that the client intake process is thorough and professionally sound. Otherwise, if the intake process is inadequate, videotaping a client interview may only end up providing evidence of the lawyer's negligence.⁸ Recording a meeting is not intended to serve as a substitute for best practices, but instead to supplement them.
- If a client meeting is recorded, notes and memos regarding the meeting still ought to be prepared. If estate litigation ensues, the lawyer may be called upon to give further evidence about the client meeting beyond what the video recorded, as "[t]here are subtleties and nuances in behaviour that may not be fully captured by the video and audio. The angle, the quality, the view, and other factors related to the physical and technical act of recording can affect the

value of the recording as evidence.”⁹

- If the initial client meeting is recorded, it may also be prudent to record all meetings leading up to the execution of a particular testamentary instrument by the client. If estate litigation occurs, the court may prefer to have access to video of all of the client meetings, rather than be limited to what the lawyer thought would be most relevant to record.¹⁰

Finally, while video recording a client’s testamentary instructions could prove useful in the event of a will challenge, a recording will not constitute prima facie proof of a testator’s capacity, as confirmed in *Schell Estate (Re)*.¹¹ In this

case, the executors of an estate sought summary dismissal of a will challenge, and admitted video recordings of the testatrix meeting with the lawyer prior to executing the disputed will, in addition to video of the will being executed. The Court dismissed the application for summary dismissal, holding:

[84] The video is an important piece of evidence, but it is not by itself conclusive to a degree that makes the Applicant’s position unassailable. It is not a basis for a fair and just determination of the issues. In fact, the video may raise questions about the strength of the Applicants’ case ... The trial judge will assess the degree to which Eileen’s demeanour, responses and the

tenor of the conversation in the video reveal (or do not reveal) Eileen’s mental condition and free choice in her estate intentions.

In this new digital age of practice, it may only be a matter of time until video recording the estate planning process is standard procedure. Now is an apt time for the wills and estates bar to consider how best to professionalize the intake of client information and confirmation of client instructions utilizing audio-visual technology.

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1 Succession Law Reform Act, RSO 1990, c S.26, s 4(1) [SLRA].

2 See Albert H. Oosterhoff et. al, *Oosterhoff on Wills*, 9th ed. (Toronto: Thomson Reuters, 2021) at 224. Also see Brenda Hildebrandt, “Should we really be doing this? Issues of capacity, suspicious circumstances and undue influence” (paper delivered at Advising the Elderly Client, a Law Society of Saskatchewan Continuing Professional Development seminar, September 2003), 2003 CanLIIDocs 522 at 15.

3 Rules of Civil Procedure, RRO 1990, Reg 194, r 75.

4 See *Schell Estate (Re)*, 2018 ABQB 991.

5 Manitoba Law Reform Commission, *Reform of The Wills Act, The Law of Property Act, and The Beneficiary Designation Act, Revisited*, Final Report (Winnipeg: Manitoba Law Reform Commission, March 2020) at 18.

6 See *Rudin-Brown et al v Brown*, 2021 ONSC 3366 at paras 27-36.

7 *Ibid* at para 36. It is also best practice to inform the client whenever video is being recorded, since the courts strongly discourage surreptitious audio and video recordings: para 30.

8 See Christa Clendenning’s blog post, *Virtual Meetings with Will Lawyers* and Dr. Ken Shulman’s blog post, *Videographers Beware (All About Estates, December 28, 2016)*. For further information and tips about the videotaping process, see John E.S. Poyser and Christa Clendenning’s article, “Taping Will Instructions,” which was published in the *Estates, Trusts and Pension Journal* in August 2020.

9 *Schell Estate (Re)*, 2018 ABQB 991 at para. 85.

10 See Justice Williams’ comments in *Rudin-Brown et al v Brown*, 2021 ONSC 3366 at para 35.

11 *Schell Estate (Re)*, 2018 ABQB 991.

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