

THE DUTY TO CARE: AMENDING THE TEXAS ESTATES CODE AND DISCIPLINARY RULES TO PROTECT COMMUNICATIONALLY CHALLENGED TESTATORS

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I.	INTRODUCTION	328
II.	BACKGROUND.....	331
	A. <i>Communication as an Integral Building Block of Estate Planning</i>	331
	B. <i>Communication Challenges Affecting Estate Planning</i>	333
	1. <i>A Considerable Proportion of Testators in Texas Experience a Form of Communication Challenge</i>	335
	2. <i>Reasoning Behind the Neglect of Communicationally Challenged Testators in Texas</i>	336
	3. <i>Legal Implications of Increasing Protection for Communicationally Challenged Testators</i>	338
	C. <i>The Texas Estates Code Requirements of a Valid Will</i>	339
	D. <i>Testamentary Capacity Under the Texas Estates Code and in Texas Courts</i>	340
	E. <i>The Guiding Hand of the Texas Disciplinary Rules of Professional Conduct</i>	341
	1. <i>The Process of Amending the Texas Disciplinary Rules of Professional Conduct</i>	343
III.	ARGUMENT	344
	A. <i>Amending the Texas Estates Code to Protect Communicationally Challenged Testators</i>	344
	B. <i>Aspects of Estate Planning Affected by Communication Challenges</i>	346
	1. <i>Demonstrating a Testator's Sufficient Knowledge of the Contents of Executed Documents</i>	346
	2. <i>Adequate Attestation of Testamentary Documents</i>	348
	3. <i>Valid Testator Signature on Testamentary Instruments</i>	349
	C. <i>Statutory Requirements in Other States Supporting Amendment to the Texas Estates Code</i>	350

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D. <i>The Texas Disciplinary Rules of Professional Conduct Do Not Provide Adequate Protection for Communicationally Challenged Testators</i>	354
1. <i>Amending the Texas Disciplinary Rules of Professional Conduct to Protect Communicationally Challenged Testators</i>	354
E. <i>Potential Language for Statutory Amendments to the Texas Estates Code</i>	357
F. <i>Utilizing Technological Advancements in the Implementation of Proposed Amendments to the Texas Estates Code</i>	360
1. <i>Relevant Technological Advancements Benefitting Visually Impaired Testators</i>	361
2. <i>Relevant Technological Advancements Benefitting Hearing Impaired Testators</i>	362
3. <i>Relevant Technological Advancements Benefitting Testators Who Primarily Communicate in Languages Other than English</i>	363
4. <i>Relevant Technological Advancements Benefitting Illiterate Testators</i>	365
IV. CONCLUSION	366

I. INTRODUCTION

John, a seventy-five year old Texas resident, decides to hire Amy, an estate planning attorney, to help him draft a will for the disposition of his property.¹ John meets with Amy to discuss the details of his will and his intentions regarding the disposition of his property.² During their meeting, Amy takes diligent notes and asks John several questions relating to his testamentary intent and the disposition of his property.³ Using her notes and the information she obtained regarding John's testamentary intent, Amy spends several hours drafting a will for John.⁴

After Amy completes her draft of John's will, she schedules a meeting with him to conduct the execution of the will.⁵ John brings two of his friends, Bill and Cathy, to the meeting to serve as witnesses to the will execution.⁶ Upon his arrival, Amy asks John to thoroughly read through the will that she has drafted and confirm that its provisions are in line with the needs and desires he previously communicated.⁷ After asking John to read through the

1. Author's original hypothetical.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

will, Amy noticed a shift in his behavior.⁸ Amy asked John several questions to figure out if something was wrong, but John assured her there were no problems.⁹ Amy noticed that John spent a relatively short amount of time reading through the will she drafted, which consisted of several pages.¹⁰ However, as John had insisted that there were no issues, Amy resisted her urge for further questioning and the group continued with the execution of John's will.¹¹

About ten years after the execution of his will, John passed away.¹² Shortly after, the executor of John's estate admitted the will into probate.¹³ Following the admission to probate, Sam, John's son, who was expressly omitted from John's will, challenged the will with claims of fraud and undue influence.¹⁴ Sam decided to challenge the will because he was dissatisfied and found the fact that his father omitted him from the will extremely unfair.¹⁵

Sam's claims of fraud and undue influence were founded on his father's illiteracy.¹⁶ Amy, upon learning of Sam's challenges to the will she drafted, was both shocked and confused.¹⁷ In all their time working together, John never informed Amy about his illiteracy.¹⁸ However, it did make John's strange behavior on the day of his will execution seem more reasonable and understandable to her.¹⁹

The probate court ended up setting aside John's will, ruling that John's inability to read, coupled with the lack of evidence proving his knowledge of the will's contents, rendered the will invalid and unenforceable.²⁰ As his will was set aside, the disposition of John's property was governed by Texas intestacy laws, and Sam received a considerable portion of John's estate.²¹

This hypothetical situation highlights the potential turmoil that communicationally challenged testators might experience if their estate planners do not take proper precautions.²² In order to prepare effective wills for clients facing certain challenges to effective communication, estate planners must exercise vigilance and take extra steps to ensure the validity of such wills.²³ Without a heightened level of attention and care from estate

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. See Gerry W. Beyer, *The Communicationally Challenged Testator*, EST. PLAN. DEVS. FOR TEX. PROS. 1, 1 (2009).

23. See *id.*

planners, communicationally challenged individuals face unsettling possibilities of having their wills declared invalid or challenged in probate.²⁴

Currently, communicationally challenged testators do not receive adequate statutory protection in Texas.²⁵ The Texas Estates Code lacks provisions that might give estate planners guidance in successfully handling the needs of communicationally challenged clients.²⁶ It remains imperative that the considerable proportion of communicationally challenged individuals in Texas receive proper legal counsel.²⁷ Thus, the Texas Legislature should amend the Texas Estates Code to provide guidelines and requirements for Texas estate planners which will give protection to the significant proportion of individuals experiencing challenges with communication.²⁸

Part II discusses the importance of effective communication in estate planning as well as the potential negative impacts of specific communication challenges in will drafting and execution, estate planning, and the probate process.²⁹ Further, Part II highlights current requirements for estate planning under the Texas Estates Code and examines how Texas courts have interpreted the Estates Code's guidelines regarding testamentary capacity.³⁰ Finally, Part II discusses the scope of guidance offered by the Texas Disciplinary Rules of Professional Conduct.³¹

Part III argues in favor of amending the Texas Estates Code to provide testators experiencing challenges with communication an adequate level of statutory protection.³² In support of this argument, Part III includes an examination of statutes from other states which offer guidance for testators experiencing certain communication challenges.³³ Further supporting this argument, Part III discusses the inadequacies of the Texas Rules of Professional Conduct in protecting the vulnerable class of clients facing communication challenges.³⁴ Finally, Part III acknowledges the importance of recent technological advancements and their potential positive impacts on communication between clients and estate planners.³⁵

24. *See id.*

25. *See id.*

26. *See* TEX. EST. CODE ANN. §§ 251.001, .051.

27. *See* Beyer, *supra* note 22.

28. *See id.*

29. *See* discussion *infra* Section II.A–B.

30. *See* discussion *infra* Section II.C–D.

31. *See* discussion *infra* Section II.E.

32. *See* discussion *infra* Section III.A–B.

33. *See* discussion *infra* Section III.C.

34. *See* discussion *infra* Section III.D.

35. *See* discussion *infra* Section III.F.

II. BACKGROUND

A. Communication as an Integral Building Block of Estate Planning

To sufficiently meet clients' various needs and desires, estate planning practitioners must exercise effective communication.³⁶ Communication involves the imparting or exchanging of information from one source, place, person, or group, to another.³⁷ Effective communication entails "understanding instructions, acquiring new skills, making requests, asking questions and relaying information with ease."³⁸ Effective communication remains essential, specifically in the estate planning process, because testators are required to communicate what property is currently in their possession, what plans and desires they have for the disposition of such property, the people they would like to include as beneficiaries, the people they desire to omit from inheriting their property, as well as a myriad of other points of information.³⁹ In addition, estate planning remains a relatively complicated field and effective communication is an integral part of an estate planner's explanation of certain processes, details, and caveats which could potentially be at play.⁴⁰

Effective communication remains the responsibility of an estate planning practitioner to any individual seeking to utilize their services.⁴¹ However, engaging in practices to bolster effective communication provides benefits far outweighing the consequences associated with abstaining from such practices.⁴² The first notable benefit of engaging in effective communication practices with clients is an attorney's considerable increase in awareness of both a client's circumstances as well as the applicable law which comes into play as a result.⁴³ To achieve such awareness, an estate planning practitioner can employ effective communication strategies

36. See Bradley T. Klontz, *The Psychology of Communication in Estate Planning*, J. Fin. Plan. (Jan. 2017), <https://www.financialplanningassociation.org/article/journal/JAN17-psychology-communication-estate-planni>; see generally Gwynn W. Guzzeeau, *Communication Counts: Coaching Strategies for Estate Planning Practitioners*, Prob. & Prop. 52, 52 (2012) (explaining that undervaluing communication in the estate planning and probate practice is to the detriment of clients).

37. See *What is Communication?*, SKILLS YOU NEED, <https://www.skillsyouneed.com/ips/what-is-communication.html> (last visited May 16, 2023) (defining communication and explaining the communication process).

38. *Id.*

39. See Guzzeeau, *supra* note 36.

40. See *id.*

41. See Eric Mayfield, *Sign Language Interpreters: Who Pays?*, 33 <<Colo. Law.>> 29, 29 (2004) (explaining that effective communication is the responsibility of an attorney to any person who seeks his or her services).

42. See Guzzeeau, *supra* note 36.

43. See *id.*

including engaged and active listening, speaking with clarity, open-mindedness, patience, respect, and awareness.⁴⁴

Employing effective communication practices also results in the development of deeper relationships with clients.⁴⁵ As attorneys and their clients work toward achieving the same goals, clear and straightforward communication strategies increase productivity considerably and accelerate problem solving by reducing or eliminating misunderstanding and confusion altogether.⁴⁶ Moreover, effective communication with clients increases and encourages trust, truth, and authenticity.⁴⁷ Increased trust with clients is beneficial for attorneys because it increases the likelihood that such clients will utilize their services for any future problems.⁴⁸ Earning clients' trust also allows attorneys to build a strong, positive reputation within the community they serve.⁴⁹

In addition, estate planners should have an alertness of stigmas surrounding certain communication challenges.⁵⁰ An awareness and understanding of society's stigmatization of such challenges will help estate planners work and communicate more effectively with such clients and strengthen their ability to ascertain the existence of specific communication challenges.⁵¹ For example, people with communication difficulties are often "stigmatized for being less intelligent, less educated and less capable" than people who do not experience such challenges.⁵² Estate planners must learn to avoid stigmatizing testators as it will lead to an increase in trust, cooperation, understanding, and effective communication.⁵³ In addition, a testator will be less likely to attempt to conceal a communication challenge they might be somewhat embarrassed of if they feel comfortable and understood.⁵⁴ Attempting to understand clients' perspectives and prioritizing empathy are small steps which could make a world of difference for both attorneys and the clients with whom they work.⁵⁵

44. See Jennifer Lombardo, *Elements of Effective Communication in the Workplace*, STUDY.COM, <https://study.com/academy/lesson/elements-of-effective-communication-in-the-workplace.html> (last visited Jan. 2, 2023) [<https://perma.cc/3NZZ-5WQ6>].

45. See *Top 5 Benefits of Developing Communication Skills*, PRAC. (Sept. 12, 2022), <https://practice.do/blog/benefits-of-communication-skills> [<https://perma.cc/YR7S-BFCB>].

46. See *id.*

47. See *id.*

48. See *id.*

49. See *id.*

50. See Marion Hersh, *Deafblind People, Stigma and the Use of Assistive Communication and Mobility Devices*, 25 TECH. & DISABILITY 245, 249–52 (2013); Daine Taylor, *Day in the Life: Understanding the Experiences of People With Speech & Language Disorders*, INCLUSIONHUB (Sept. 22, 2021), <https://www.inclusionhub.com/articles/understanding-experiences-speech-language-disorders> [<https://perma.cc/KY3U-3PMZ>].

51. See Hersh, *supra* note 50; Taylor, *supra* note 50.

52. Taylor, *supra* note 50; see Hersh, *supra* note 50.

53. See Hersh, *supra* note 50; Taylor, *supra* note 50.

54. See Hersh, *supra* note 50; Taylor, *supra* note 50.

55. See Taylor, *supra* note 50.

Estate planners have a unique responsibility to ascertain and meet clients' legal needs as well as their human needs.⁵⁶ To accomplish these goals, estate planning practitioners engage with clients as active participants, working together to draft plans which will play a role in clients' lives long after any documents are signed.⁵⁷ The relationship between estate planners and clients requires trust and involves assisting clients in understanding the complexities inherent in estate planning and probate procedures.⁵⁸ Estate planning attorneys have a responsibility to facilitate effective communication with all clients, but especially with those experiencing challenges with communication.⁵⁹ As stewards of relatively complicated and consequential law, effective communication between estate planners and testators remains a necessity that cannot be overlooked or undervalued.⁶⁰

B. Communication Challenges Affecting Estate Planning

Clients experience a broad range of propensity for engaging in effective communication practices.⁶¹ Among other things, effective communication requires an understanding of how multiple factors, including culture, level of education, role identities, and individual personalities, influence a person's method of communicating.⁶² Developing a firm grasp on the impacts of each of these factors requires a considerable amount of both dedication and experience.⁶³ While knowledge of the existence and impacts of such factors bolsters effective communication, estate planners must be aware of specific communication challenges their clients might experience.⁶⁴

Among the different types of attorneys, estate planners experience a relatively high likelihood of working with clients experiencing some form of communication challenge.⁶⁵ For instance, a majority of the baby boomer

56. Guzzeau, *supra* note 36.

57. *See id.*

58. *See id.*; Hardy & Ireland, *supra* note 37.

59. *See* Maxfield, *supra* note 41.

60. Guzzeau, *supra* note 36.

61. *See id.*

62. Eric Coggins, *Eight Factors Impacting Cross-Cultural Communication in the Workplace*, TOUGHNICKEL (Sept. 7, 2022), <https://toughnickel.com/business/Factors-that-Impact-Cross-Cultural-Communication> [<https://perma.cc/A62C-N7GQ>]; *see How Does Culture Affect Communication?*, UNIV. OF HOUS.-VICTORIA (July 15, 2020), <https://online.uhv.edu/articles/undergraduate-studies/does-culture-affect-communication.aspx> [<https://perma.cc/E9JR-KWPM>].

63. Guzzeau, *supra* note 36; *see Empathy—a Key to More Successful Communication*, LEADERSHIP & PERFORMANCE DEV., <https://leadershipmanagement.com.au/empathy-a-key-to-more-successful-communication/> (last visited Nov. 30, 2022) [<https://perma.cc/NE3R-3HW7>].

64. *Communicating with Deaf Individuals*, NATIONAL DEAF CENTER, <https://www.nationaldeafcenter.org/resource-items/communicating-deaf-people/> (last visited Oct. 25, 2022) [<https://perma.cc/T3QB-C7U4>]; *Tips for Effective Communication*, DEAF-HEARING COMMUN. CENTRE, <https://dhcc.org/resources/communication-tips/> (last visited Oct. 25, 2022) [<https://perma.cc/38GC-XRLJ>].

65. *See* Charles Scott et al., *Estate Planning Fundamentals: Practical Challenges & Perspectives*, ASPATORE 1, 4 (2009); *see* Abby White, *How to Communicate with People Who are Blind or Visually*

generation is currently aged in their seventies.⁶⁶ Commonly, old age is associated with both declines in cognition and participation in the formation of an estate plan.⁶⁷ The growing population of relatively older individuals experiencing cognitive challenges brings about an increase in estate litigation.⁶⁸ As “family members and other intended beneficiaries might use a testator’s age and age-related behavior as reasons to challenge a will or other testamentary document[.]” estate planners should be vigilant to prevent communication challenges from negatively influencing their work and their clients’ intents.⁶⁹ Thus, estate planning attorneys should have a heightened alertness for the potential presence of communication challenges, specifically visual or hearing impairments, when beginning work with clients who are relatively older.⁷⁰

A considerable portion of Texas residents experience significant communication challenges.⁷¹ Communication challenges are difficulties with speaking, reading, writing, and understanding, which impact one’s ability to transmit and share information.⁷² Manifestations of such challenges include a considerable variety of physical forms.⁷³ Specific communication challenges tending to present difficulties for testators include visual impairments, hearing impairments, illiteracy, and a lack of proficiency in understanding English.⁷⁴

Testators’ difficulties with communication can present problems affecting multiple aspects of will execution.⁷⁵ For example, communication challenges might affect a testator having adequate knowledge of the contents of a testamentary document.⁷⁶ In addition, such challenges may present issues affecting the proper attestation of testamentary documents in the presence of the testator.⁷⁷ Finally, certain communication challenges might also impact

Impaired, WORLD EYE CANCER HOPE (Oct. 12, 2020), <https://wechope.org/resources/how-to-communicate-with-people-who-are-blind-or-vision-impaired-part-2/> [<https://perma.cc/X36C-D7XE>].

66. Randall L. Nash, *More to Come: Dementia and Estate Litigation*, 89 WIS. LAW. 22, 23 (2016).

67. *Id.* at 22.

68. *See id.* at 23.

69. *Id.* at 22.

70. *See id.* at 23.

71. *See generally People with Disabilities: A Texas Profile*, TEX. WORKFORCE INV. COUNCIL 3 (June 2016), https://gov.texas.gov/uploads/files/organization/twic/Disabilities_Profile.pdf (discussing disability data in Texas as of 2016) [<https://perma.cc/47VM-KVMT>]; *Effective Communications for People with Disabilities: Before, During, and After Emergencies*, NAT’L COUNCIL ON DISABILITY (May 27, 2014), https://rems.ed.gov/docs/Effective_Communications (discussing programs for people with disabilities different state have implemented or are developing) [<https://perma.cc/QY4U-3PN4>].

72. *See Amy Govoni, Communication Challenges*, UNIV. TOLEDO, <https://www.utoledo.edu/depts/csa/caringweb/communication.html> (last revised 2012) [<https://perma.cc/6S5Y-7KRQ>].

73. *See id.*

74. Beyer, *supra* note 22, at 1–4.

75. *Id.* at 1.

76. *Id.* at 1, 3; Nash, *supra* note 66, at 24.

77. *See Beyer, supra* note 22, at 2.

the validity of a testator's signature on testamentary instruments.⁷⁸ As specific communication challenges have the power to impact several aspects of the estate planning and will drafting processes, mitigating the potential impacts of such challenges remains an important and necessary task for estate planners.⁷⁹

1. A Considerable Proportion of Testators in Texas Experience a Form of Communication Challenge

In Texas, over 700,000 individuals experience some level of visual impairment.⁸⁰ Individuals with reported visual disabilities constitute more than 2.5% of the total population of Texas.⁸¹ Additionally, over 350,000 people in Texas experience a hearing impairment.⁸² Individuals experiencing hearing impairments comprise over 3.3% of Texas' total population.⁸³ Texas also has the fourth lowest literacy rate among the United States, with only 81% of adults reported as literate.⁸⁴ Finally, among the United States, Texas has one of the highest population of individuals who are not proficient in English, with over 4.9 million people experiencing a limited ability to speak or understand English.⁸⁵

Millions of individuals in Texas face significant challenges to effective communication.⁸⁶ Moreover, many communication challenges, such as visual impairments and hearing impairments, tend to disproportionately affect members of older populations.⁸⁷ Thus, it remains highly likely that Texas estate planners will encounter and work with communicationally challenged testators.⁸⁸ As the population of individuals experiencing a communication challenge comprises a considerable proportion of the Texas

78. See *id.* at 2–3; *Armendariz de Acosta v. Cadena*, 165 S.W. 555, 558 (Tex. App.—El Paso 1914, writ ref'd).

79. See Scott et al., *supra* note 65; Guzzeeu, *supra* note 36, at 52.

80. *Blindness Statistics*, NAT'L FED'N OF THE BLIND, <https://nfb.org/resources/blindness-statistics> (last updated Jan. 2019) [<https://perma.cc/NX5F-TLX7>].

81. K. Lisa Yang and Hock E. Tan, *2018 Disability Status Report: Texas*, CORNELL UNIV., https://www.disabilitystatistics.org/reports/2018/English/HTML/report2018.cfm?fips=2048000&html_year=2018&subButton=Get+HTML#summary (last visited Feb. 27, 2023) [<https://perma.cc/47RS-XCKS>].

82. Heather Hughes, *Let's Talk: Texas' deaf community wants to dialogue*, TRIBTALK (Sept. 29, 2017), <https://www.tribtalk.org/2017/09/29/lets-talk-texas-deaf-community-wants-to-dialogue/> [<https://perma.cc/7LSY-E4F5>].

83. See *id.*; see also Yang & Tan, *supra* note 81.

84. *U.S. Literacy Rates by State 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/us-literacy-rates-by-state> (last visited Oct. 16, 2022) [<https://perma.cc/6GMB-J9AD>].

85. See *Texas–State Demographics Data*, MIGRATION POL'Y INST. (2019), <http://www.migrationpolicy.org/data/state-profiles/state/language/TX> [<https://perma.cc/62TN-D5EF>].

86. See *id.*; NAT'L FED'N OF THE BLIND, *supra* note 80; Hughes, *supra* note 82; WORLD POPULATION REV., *supra* note 84.

87. See Pamela R. Champine, *My Will be Done: Accommodating and Erring the Atypical Testator*, 80 NEB. L. REV. 387, 392–95 (2001).

88. See Beyer, *supra* note 22, at 1.

population, the laws in Texas must adequately acknowledge, reflect, and protect the needs of such populations.⁸⁹

2. Reasoning Behind the Neglect of Communicationally Challenged Testators in Texas

Although a considerable proportion of Texans experience some sort of communication challenge, namely visual or hearing impairments, the laws in Texas have not adequately addressed or protected their needs.⁹⁰ Laws are currently in place to serve testators who do not experience any form of communication challenge as well as testators on the other end of the spectrum who are classified as having diminished capacity.⁹¹ However, there are no provisions in either the Texas Estates Code or the Texas Disciplinary Rules of Professional Conduct aimed at serving members of the communicationally challenged community for a myriad of reasons.⁹²

First, the community of individuals experiencing difficulties with effective communication exists in a sort of middle ground.⁹³ Such individuals do not receive proper protection under the laws in place for those individuals who do not experience any challenges with communication, yet they are also not afforded the protections in place for those individuals experiencing diminished capacity.⁹⁴ As communicationally challenged testators do not experience difficulties to the extent of those with diminished capacity, the Texas Legislature has not afforded such individuals the proper attention in drafting and amending laws.⁹⁵

Another reason for the lack of legislation is society's historical lack of emphasis on the importance of communication.⁹⁶ In the past, emphasis was focused primarily on estate planning practitioners' analytical and advocacy skills.⁹⁷ In the world of estate planning, communication as a whole has been undervalued as a strategy for success.⁹⁸ Recently, however, more emphasis has been placed on the value of effective communication in estate planning and practitioners are beginning to realize that strengthening communication skills will both increase the impact of legal counsel and enhance attorneys' effectiveness.⁹⁹

89. *See id.*

90. *See* TEX. WORKFORCE INV. COUNCIL, *supra* note 72; Beyer, *supra* note 22, at 1.

91. *See* TEX. EST. CODE ANN. §§ 251.001, .051; Tex. Disciplinary Rules of Prof'l Conduct R. 1.16, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A, art. 10, § 9.

92. *See* EST. CODE §§ 251.001, .051; Tex. Disciplinary Rules of Prof'l Conduct R. 1.16.

93. *See* Tex. Disciplinary Rules of Prof'l Conduct R. 1.16.

94. *See id.*; EST. CODE §§ 251.001, .051.

95. *See* EST. CODE §§ 251.001, .051; Tex. Disciplinary Rules of Prof'l Conduct R. 1.16.

96. *See* Guzzeeau, *supra* note 36, at 52.

97. *See id.*

98. *See id.*

99. *See id.*

One final significant reason for the lack of legislation regarding the protection of testators experiencing many forms of communication challenges is society's historic treatment and perception of individuals experiencing significant disabilities.¹⁰⁰ In colonial America, individuals experiencing disabilities were lumped together under one roof in facilities that were frequently overcrowded and unsanitary.¹⁰¹ Such individuals did not receive the proper care, attention, and protection they deserved.¹⁰² These negative attitudes towards individuals experiencing many forms of disabilities lingered in society for centuries.¹⁰³ However, the emergence of the disability rights movement in the twentieth century sparked a shift in the treatment of individuals experiencing disabilities.¹⁰⁴ Americans began demanding equal rights and protection for those facing disabilities which has served to change the societal perception of care.¹⁰⁵ As American society has advanced, increased emphasis has been placed on the treatment and perception of those experiencing disabilities.¹⁰⁶ As society's perceptions and priorities shift and evolve, the laws protecting and regulating them should as well.¹⁰⁷

Although there are several reasons for the historical lack of statutory protection of testators experiencing difficulties with effective communication in Texas, the laws must change now.¹⁰⁸ The increasing focus on the importance of effective communication as well as the shift in public perception of individuals requiring a higher duty of care offer strong support for amending both the Texas Estates Code and the Texas Disciplinary Rules of Professional Conduct.¹⁰⁹ Now is the time for Texas to adopt a broader definition of professional responsibility in the legal profession, and estate planning practitioners must lead the way.¹¹⁰

100. See Perri Meldon, *Disability History: Early and Shifting Attitudes of Treatment*, NAT'L PARK SERV., <https://www.nps.gov/articles/disabilityhistoryearlytreatment.htm> (last updated Oct. 31, 2017) [<https://perma.cc/7WT3-VMF7>].

101. See *id.*

102. See *id.*

103. See *id.*

104. See Perri Meldon, *Disability History: The Disability Rights Movement*, NAT'L PARK SERV., <https://www.nps.gov/articles/disabilityhistoryrightsmovement.htm> (last updated Dec. 13, 2019) [<https://perma.cc/DYU7-X5MW>].

105. See *id.*

106. See *id.*

107. Daniel M. Katz et al., *Complex societies and the growth of law*, SCIENTIFIC REPORTS (Oct. 30, 2020), <https://www.nature.com/articles/s41598-020-73623-x> [<https://perma.cc/43US-YWK3>].

108. See *Disability History: Early and Shifting Attitudes of Treatment*, *supra* note 100; Guzzeau, *supra* note 36.

109. See *Disability History: The Disability Rights Movement*, *supra* note 104; Guzzeau, *supra* note 36.

110. Guzzeau, *supra* note 36.

3. Legal Implications of Increasing Protection for Communicationally Challenged Testators

Increasing statutory protection for the considerable population of individuals experiencing communication challenges would have a plethora of positive implications within the realm of estate planning.¹¹¹ First, one of the primary purposes of estate planning and will drafting is to ensure that testators have control over the disposition of their property upon death.¹¹² Enacting legislation to protect communicationally challenged testators would help ensure that all individuals have the ability to reap the benefits offered by estate planning and will drafting.¹¹³

Second, amending the Texas Estates Code or the Texas Disciplinary Rules of Professional Conduct to provide requirements for attorneys would provide necessary clarity and guidance in the realm of estate planning.¹¹⁴ As a result, there would likely be less will challenges in probate proceedings.¹¹⁵ Thus, probate courts would be less flooded with individuals making baseless challenges to the wills of testators experiencing communication challenges.¹¹⁶ Judges presiding over probate courts could then focus their attention on more pressing issues and individuals' time spent dealing with probate proceedings could be lessened.¹¹⁷

Finally, amending the current Texas legislation to provide protection for testators experiencing difficulties with communication would offer more structure for attorneys practicing estate planning.¹¹⁸ Neither the Texas Estates Code nor the Texas Disciplinary Rules of Professional Conduct currently provide estate planners with instructions or steps on sufficiently drafting wills or planning estates for testators experiencing visual or hearing impairments, illiteracy, or a limited proficiency in understanding English.¹¹⁹ Therefore, estate planning practitioners are exposed to the considerable risk of being sued for malpractice.¹²⁰ Having statutory requirements in place would

111. Author's original thought.

112. See Julia Kagan, *What Is Estate Planning? Definition, Meaning, and Key Components*, INVESTOPEDIA, <https://www.investopedia.com/terms/e/estateplanning.asp> (last updated Apr. 2021) [<https://perma.cc/R379-C457>].

113. See Emily S. Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 U.C. DAVIS L. REV. 2511, 2514 (2020).

114. See Gerry W. Beyer, *Will Contests—Prediction and Prevention*, 4 EST. PLAN. & CMTY. PROP. L.J. 1, 9 (2011).

115. See *id.*

116. See *id.*; Beyer, *supra* note 22.

117. See Douglas Davis, *Why Probate Takes So Long and How to Avoid It*, DAVIS L. GRP. (Sept. 17, 2020), <https://www.dlgva.com/why-probate-takes-so-long-and-how-to-avoid-it/> [<https://perma.cc/BW32-DDWJ>].

118. See Beyer, *supra* note 114.

119. See TEX. EST. CODE ANN. §§ 251.001, .051.

120. See Jonathan B. Bruno & Rivkin Radler, *Risk Management – Tips on How to Avoid Being a Defendant in a Legal Malpractice Lawsuit*, N.Y.C. BAR ASS'N (2017), <https://nysba.org/NYSBA/Coursebooks/Spring%202019%20LPM%20Coursebooks/Legal%20Malpractice%202019/4%20-20Bruno%20->

encourage estate planning attorneys to exercise risk management and conduct their practice in such a way to avoid making inadvertent or accidental mistakes when working with communicationally challenged testators.¹²¹

There exists a considerable variety of important reasons for amending either (or both) the Texas Estates Code or the Texas Disciplinary Rules of Professional Conduct to protect communicationally challenged testators.¹²² The implications of such amendments on the field of estate planning and its practicing attorneys remain poignant and far-reaching.¹²³ Such amendments would have positive impacts for communicationally challenged testators, their estate planning attorneys, probate judges, and beneficiaries.¹²⁴

C. The Texas Estates Code Requirements of a Valid Will

The Texas Estates Code chiefly governs will drafting and estate planning practices in the state of Texas.¹²⁵ The Estates Code went into effect in 2015 and contains a multitude of provisions that guide estate planners in drafting instruments and working with clients.¹²⁶ For example, the Estates Code contains the requirements for the drafting and execution of a valid will.¹²⁷ To be considered valid, a will must be:

(1) in writing; (2) signed by: (A) the testator in person; or (B) another person on behalf of the testator: (i) in the testator's presence; and (ii) under the testator's direction; and (3) attested by two or more credible witnesses who are at least 14 years of age and who subscribe their names to the will in their own handwriting in the testator's presence.¹²⁸

A will is sufficiently attested if two or more individuals witness the performance of statutory requirements for the valid execution of a will.¹²⁹ A credible witness is an individual competent to testify to the will's execution who does not receive any pecuniary benefit under the will.¹³⁰ A witness's credibility is determined at the time the will is executed, and when a witness does not receive any pecuniary benefit under the will, the will itself is

%20Outline%20-%20Risk%20Management.pdf [https://perma.cc/6LG5-C6E9].

121. See *id.*; Beyer, *supra* note 22, at 14–15.

122. See Beyer, *supra* note 114; Davis, *supra* note 117; Bruno & Radler, *supra* note 120.

123. See Beyer, *supra* note 114; Bruno & Radler, *supra* note 120.

124. See Beyer, *supra* note 22; Guzzreau, *supra* note 36; Davis, *supra* note 117; Bruno & Radler, *supra* note 120.

125. See TEX. EST. CODE ANN. §§ 21.001–.006.

126. See *id.* § 21.001.

127. *Id.* § 251.051.

128. *Id.*

129. See 74 TEX. JUR. 3D *Wills* § 111; Brown v. Traylor, 210 S.W.3d 648, 661 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

130. See 74 TEX. JUR. 3D *Wills* § 114.

evidence that the witness was validly credible.¹³¹ As it exists now, the Estates Code validity requirements for a will do not expressly or implicitly address circumstances involving a testator experiencing any form of communication challenge.¹³²

D. Testamentary Capacity Under the Texas Estates Code and in Texas Courts

To make a valid will in Texas, a testator must have the requisite testamentary capacity.¹³³ The Estates Code contains a provision including each of the requirements for the necessary testamentary capacity.¹³⁴ In Texas, “a person of sound mind has the right and power to make a will” if such person: “(1) is 18 years of age or older; (2) is or has been married; or (3) is a member of the armed forces of the United States, an auxiliary of the armed forces of the United States, or the United States Maritime Service” at the time of the will execution.¹³⁵ Texas courts have interpreted the term “sound mind” to mean that one must possess “testamentary capacity” at the time of the will execution.¹³⁶

To meet the “testamentary capacity” threshold, a testator must have the mental capacity to sufficiently meet the following objectives:

- (1) Understand the business in which the testator was engaged;
- (2) understand the effect of the act in making the will; (3) understand the general nature and extent of the testator’s property; (4) know the testator’s next of kin and natural objects of the bounty as well as their claims upon the testator; and (5) collect in the testator’s mind the elements of the business to be transacted, and to hold them long enough to perceive at least their obvious relation to each other, and to be able to form a reasonable judgment as to them.¹³⁷

Regarding testamentary capacity, a distinction must exist between a testator’s inability to exercise his or her statutory right to make a will and a testator’s unsoundness of mind.¹³⁸ Additionally, when the probate of a will is challenged on grounds of a lack of testamentary capacity, “the trial court is

131. *See id.*

132. TEX. EST. CODE ANN. § 251.051.

133. *Id.* § 251.001.

134. *Id.*

135. *Id.*

136. *See Beyer, supra* note 22.

137. *In re Estate of Lynch*, 350 S.W.3d 130, 136 (Tex. App.—San Antonio 2011, pet. denied); *see Estate of Danford*, 550 S.W.3d 275, 281 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

138. *See Payne v. Chance*, 4 S.W.2d 328, 329 (Tex. App.—Amarillo 1928, no writ).

limited to determining whether the testatrix's mental capacity measures up to the legal standard of testamentary capacity."¹³⁹

In Texas, the general law remains well settled that clients experiencing communication challenges are not deemed to lack testamentary capacity solely because such challenges exist.¹⁴⁰ For instance, American Law Reports expressed that "testamentary capacity, depending as it does on soundness of mind and memory, is not affected by the fact that the testator is blind."¹⁴¹ Moreover, the fact that a testator is both deaf and blind "does not render her incapable of making her will."¹⁴² As long as a testator facing a communication challenge has testamentary capacity, such challenge will not prevent an individual from having the opportunity to execute a valid will.¹⁴³

E. The Guiding Hand of the Texas Disciplinary Rules of Professional Conduct

Along with the Texas Estates Code, the Texas Disciplinary Rules of Professional Conduct (the Rules) provide guidelines for Texas attorneys' conduct in working with and representing clients.¹⁴⁴ The Rules contain a provision specifically regarding an attorney's duty of communication.¹⁴⁵ Under this provision, lawyers are required to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."¹⁴⁶ Moreover, the provision provides that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."¹⁴⁷ While this specific rule offers broad guidelines for communication, it does not adequately address the existence of communication challenges or include requirements for attorneys in the representation of clients facing such challenges.¹⁴⁸

In addition, the Rules contain a provision concerning attorneys' competence and diligence in the representation of clients.¹⁴⁹ Specifically, lawyers are generally not permitted to "accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's

139. 74 TEX. JUR. 3D *Wills* § 45; *Chambers v. Chambers*, 542 S.W.2d 901, 907 (Tex. App.—Dallas 1976, no writ).

140. See *Priem v. Adams*, 352 S.W.2d 324, 325 (Tex. App.—Austin 1921, writ ref'd n.r.e.) (holding that deaf testator had testamentary capacity and had not been unduly influenced); *Oliver v. Williams*, 381 S.W.2d 703, 709 (Tex. App.—Corpus Christi 1964, no writ).

141. *Will of Blind Person*, 9 A.L.R. 1416 (1920).

142. *Id.*

143. See *Beyer*, *supra* note 22.

144. See Tex. Disciplinary Rules of Prof'l Conduct Preamble: Scope.

145. *Id.* R. 1.03(b).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

competence.”¹⁵⁰ Competence is defined in the Rules as “possession of the legal knowledge, skill, and training reasonably necessary for the representation.”¹⁵¹ The Rules require attorneys to meet a threshold of competence regarding knowledge and application of the law necessary for their representation of clients.¹⁵²

However, this specific rule fails to provide guidance regarding an estate planner’s representation of communicationally challenged testators as it addresses attorneys’ competence of legal matters and not of clients’ ability to communicate effectively.¹⁵³ The rule regarding competence and diligence lacks requirements for attorneys to adequately ascertain and address the wide range of needs their clients may potentially present.¹⁵⁴ In light of the considerable population of individuals experiencing communication challenges, the competence and diligence rule should require attorneys to take certain steps in order to ensure the needs of all clients are properly met.¹⁵⁵

Finally, the Rules include a provision with requirements for attorneys in representing clients with diminished capacity.¹⁵⁶ Such rule instructs an attorney who reasonably believes a client’s capacity is diminished to take action which could include, but is not limited to:

[C]onsulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client . . . When taking protective action pursuant to (b), the lawyer may disclose the client’s confidential information to the extent the lawyer reasonably believes is necessary to protect the client’s interests.¹⁵⁷

However, testator’s facing communication challenges are not generally regarded as having diminished capacity.¹⁵⁸ Thus, this rule does not adequately address the needs presented by clients experiencing communication challenges in drafting and executing a will or estate plan.¹⁵⁹ Although the Rules adequately acknowledge and address the needs presented by clients experiencing diminished capacity, they leave a gap regarding the

150. *Id.* R.1.01(b).

151. *Id.* Preamble.

152. *See id.* R. 1.01(b).

153. *See id.*

154. *See id.* R. 1.01.

155. *See Beyer, supra* note 22.

156. Tex. Disciplinary Rules of Prof’l Conduct R. 1.16.

157. *Id.*

158. *See Priem v. Adams*, 352 S.W.2d 324 (Tex. App.—Austin 1921, writ ref’d n.r.e.) (holding that deaf testator had testamentary capacity and had not been unduly influenced); *Oliver v. Williams*, 381 S.W.2d 703, 709 (Tex. App.—Corpus Christi 1964, no writ).

159. *See Priem*, 352 S.W.2d at 325.

protection of clients who have specialized needs, but do not meet the threshold requirements for diminished capacity.¹⁶⁰

While the Rules offer guidance and requirements for attorneys in representing most types of clients, they leave much to be desired in regard to the treatment of clients facing communication challenges.¹⁶¹ The failure of the Rules to address the existence of communicationally challenged clients or provide any relevant guidelines for lawyers who represent such clients offers further support for the amendment of the Texas Estates Code.¹⁶² Amending the Texas Disciplinary Rules of Professional Conduct and adding interpretive comments to specific rules remain viable options for alternative solutions to the problems communicationally challenged testators currently face.¹⁶³ However, in light of these alternate sources of potential solutions, it remains imperative that the Estates Code is amended to adequately provide for and protect testators experiencing difficulties with communication in drafting and executing wills and planning estates.¹⁶⁴

1. The Process of Amending the Texas Disciplinary Rules of Professional Conduct

The Supreme Court of Texas adopted the Rules in 1990.¹⁶⁵ Since their initial promulgation, the Rules have been amended several times.¹⁶⁶ These amendments have occurred for several reasons, including the heightening of responsibility requirements and the increasing of consistency with the American Bar Association's Model Rules of Professional Conduct.¹⁶⁷ The Texas State Bar, courts, and lawyers are familiar with the process and threshold of purpose regarding amendment of the Rules.¹⁶⁸

Amending the Rules requires adherence to a relatively simple set of steps.¹⁶⁹ Generally, the Supreme Court of Texas appoints a task force to study and analyze the Rules in order to make recommendations for improvements.¹⁷⁰ The appointed task force then compiles and submits its recommendations to the court for review in conjunction with the ABA Model Rules, the existing Texas rules, and other relevant and applicable law.¹⁷¹

160. See Tex. Disciplinary Rules of Prof'l Conduct R. 1.01.

161. See *id.*; see also R. 1.16.

162. See discussion *infra* Section III.D.

163. See discussion *infra* Section III.D.

164. See discussion *infra* Section III.D.

165. Kennon L. Peterson, *Proposed Texas Disciplinary Rules of Professional Conduct: An Overview of the Amendment Process and a Comparison of the Proposed Rules with the ABA Model Rules*, 23 APP. ADVOC. 268, 269 (2010).

166. *Id.*

167. See *id.*

168. See *id.*

169. See *id.*

170. See *id.* at 270.

171. *Id.*

Then, the Court invites the public to comment on the proposed rules and completes any proposed interpretive comments for the proposed rules.¹⁷²

The Court, in conjunction with the State Board of Directors, the Discipline and Client-Attorney Assistance Program Committee, and task force, then analyzes and reviews the proposed rules and comments once again.¹⁷³ Upon satisfaction with the state of the proposed rules, the Court issues a referendum of the proposed rules.¹⁷⁴ Members of the State Bar of Texas are allowed to participate in the referendum and vote on whether to approve the proposed amendments to the Rules.¹⁷⁵

If the proposed rules receive approval from a majority of the votes cast, the State Bar of Texas Executive Director submits a Petition for Order of Promulgation requesting the Court to adopt the proposed rules.¹⁷⁶ Generally, the Court then approves and adopts the proposed rules, as well as the interpretive comments, as set forth in the petition.¹⁷⁷ Upon the Court's acceptance and adoption, the proposed rules officially become a part of the Rules.¹⁷⁸

Although the Rules have only existed for about thirty years, they have successfully received several amendments and interpretive comments.¹⁷⁹ Amending the Rules and adding a scope-narrowing interpretive comment remains a relatively efficient way to ensure that clients experiencing communication challenges receive high-quality, fair legal representation.¹⁸⁰

III. ARGUMENT

A. Amending the Texas Estates Code to Protect Communicationally Challenged Testators

The Texas Estates Code requires amendment in order to ensure that clients experiencing communication challenges—such as visual impairments, hearing impairments, illiteracy, and proficiency in languages other than English—receive adequate representation and protection in drafting and executing wills and planning estates.¹⁸¹ The amendments to the Estates Code should include language providing guidelines for estate planners in ascertaining whether and to what extent a client experiences

172. *Id.* at 272.

173. *Id.*

174. *Id.* at 273.

175. *Id.*

176. See Final Approval and Adoption of Amendments to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure 1, 1, Misc. Docket No. 21-9061 (May 25, 2021).

177. See *id.*

178. See Peterson, *supra* note 165, at 273.

179. See *id.* at 264.

180. See *id.* at 272.

181. Author's original thought.

difficulties with effective communication.¹⁸² In addition, amendments to the Estates Code should provide requirements for estate planning practitioners' representation of testators who have been deemed communicationally challenged.¹⁸³ As the Estates Code currently exists, communicationally challenged testators remain exposed to considerable risks, including failure to meet the requirements of a valid will or having their wills contested on the basis of such challenges.¹⁸⁴

Texas estate planning attorneys owe communicationally challenged clients a higher duty of care than that which is required in working with clients who do not face such challenges.¹⁸⁵ When working with communicationally challenged testators, estate planning practitioners must be required to take specific steps to ensure the adequate preparation of estate plans and wills.¹⁸⁶

First, an estate planner must make determinations concerning whether a client is experiencing any communication challenges, and if so, to what extent such challenges will impact the drafting, executing, or planning processes.¹⁸⁷ Amendments to the Estates Code should be made to put guidelines and requirements in place for estate planners in determining the existence of communication challenges in clients.¹⁸⁸ Certain challenges will be relatively easy to ascertain while others might be more difficult to detect.¹⁸⁹

For example, a visual impairment may be evidenced by a guide who aids the testator, a testator's inability to read certain documents, or the testator's own admission.¹⁹⁰ However, it is often more difficult to determine whether a client is illiterate or has difficulty reading because many of these clients have tendencies to hide their illiteracy.¹⁹¹ If an estate planner suspects that a testator is illiterate or has difficulty reading proficiently, the practitioner should politely inquire about the testator's reading abilities.¹⁹²

If an estate planning attorney ascertains that a client is communicationally challenged, he or she should consider what actions to take to prevent such challenges from affecting the validity of a will or estate plan.¹⁹³ The Estates Code must be amended to include language instructing estate planners to take specific action after making determinations that the

182. See Beyer, *supra* note 22.

183. See *id.*; Champine, *supra* note 87, at 461.

184. See Beyer, *supra* note 22.

185. See *id.*

186. See *id.*; Champine, *supra* note 87, at 464.

187. See Martin M. Shenkman et al., *What Every Lawyer Should Know About Clients with Disabilities*, 25 PROB. & PROP. 24, 27 (2011); Champine, *supra* note 87, at 395.

188. See Beyer, *supra* note 22.

189. See *id.*

190. See Shenkman et al., *supra* note 187, at 28.

191. Beyer, *supra* note 22.

192. See *id.*

193. See Beyer, *supra* note 22; Beyer, *supra* note 114, at 8.

testator faces challenges with communication.¹⁹⁴ Requiring estate planners to exercise vigilance in drafting, executing, and planning for testators experiencing struggles with communication will help ensure the validity of their wills and estate plans as well as the effectuation of their testamentary intent.¹⁹⁵

For instance, potential amendments to the Estates Code could require estate planners to read aloud the will of a testator experiencing visual impairment or illiteracy.¹⁹⁶ In addition, amendments to the Estates Code could require estate planners to provide a translation of the will to testators who are proficient in languages other than English.¹⁹⁷ With such requirements in place, the likelihood of the effectuation of a communicationally challenged testator's intent increases while the probability of challenges to their wills decreases.¹⁹⁸

B. Aspects of Estate Planning Affected by Communication Challenges

1. Demonstrating a Testator's Sufficient Knowledge of the Contents of Executed Documents

Estate planning practitioners must be prepared to adequately handle the difficulties of showing that communicationally challenged testators had sufficient knowledge of the contents of the executed documents.¹⁹⁹ Amendments to the Estates Code requiring vigilance from estate planners in working with communicationally challenged clients would make it much easier to show that such a testator had sufficient knowledge of a document's contents.²⁰⁰

If it cannot be determined that a testator was knowledgeable as to the actual text comprising the will instrument, testamentary intent will be deemed as lacking.²⁰¹ Testamentary intent remains a requirement for the execution of a valid will; thus, the will would then be considered invalid altogether.²⁰² In addition, although a presumption of a testator's awareness of a will's contents arises from its due execution, the blindness of a testator has been used to rebut such a presumption.²⁰³ Similarly, a general presumption of a testator's knowledge of will contents arises when "a person of sound mind, able to read and write, and in no way incapacitated to acquire

194. See Beyer, *supra* note 22; Beyer, *supra* note 114, at 52.

195. See Beyer, *supra* note 22; Beyer, *supra* note 114, at 24.

196. See Beyer, *supra* note 22.

197. See *id.*

198. See *id.*; Beyer, *supra* note 114.

199. See Beyer, *supra* note 22.

200. See *id.*

201. See 10 LAW OF WILLS § 51.34.

202. See TEX. EST. CODE ANN. § 251.051.

203. See *Warren v. Ellis*, 137 S.W. 1182, 1183 (Tex. App.—Galveston 1911, no writ).

knowledge of the contents of a paper, by exercising the faculties he has, signs a testamentary paper, and has it witnessed as required by the statute.”²⁰⁴ Such presumption may not apply to illiterate testators who are not able to read will documents.²⁰⁵ Thus, estate planners must draft wills for communicationally challenged clients which sufficiently demonstrate the testator’s awareness of the will’s contents.²⁰⁶

When working with communicationally challenged testators, practitioners must also prepare for potential difficulties that may arise in proving that attestation occurred in the presence of the testator.²⁰⁷ Texas courts have held that attestation is valid only if occurs in the “conscious presence” of a testator.²⁰⁸ For testators experiencing a visual impairment, attestation is sufficient as long as the testator is capable of hearing or touching the signing witnesses.²⁰⁹ As a safeguard, when working with a client who experiences a communication challenge, an estate planner should always include an attestation provision.²¹⁰ The proposed amendments to the Estates Code should include a requirement for an attestation provision for any testator experiencing a communication challenge.²¹¹

Estate planning attorneys must give extra attention in drafting wills and estate plans for communicationally challenged testators to ensure that individuals who are not satisfied with the will cannot use communication challenges as grounds for claims of fraud or undue influence.²¹² In drafting and executing wills for such clients, practitioners must be cognizant of the possibility that a court might subject the will to a higher level of scrutiny, even in the absence of other evidence.²¹³ If the proper care and attention is not given in will drafting and execution, communicationally challenged testators are at risk of not having their testamentary intents carried out.²¹⁴ The proposed amendments to the Estates Code would decrease the likelihood of communicationally challenged testators having their wills challenged in probate on baseless claims.²¹⁵

204. *Boyd v. Frost Nat’l Bank*, 196 S.W.2d 497, 507 (Tex. 1946) (quoting *Kelly v. Settegast*, 2 S.W. 870, 872 (Tex. 1887)).

205. *Id.*

206. *See* TEX. EST. CODE ANN. § 251.001; *Stephen v. Coleman*, 533 S.W.2d 444 (Tex. App.—Fort Worth 1976, writ ref’d n.r.e.).

207. *See* TEX. EST. CODE ANN. § 251.051.

208. *See Nichols v. Rowan*, 422 S.W.2d 21, 24 (Tex. Civ. App.—San Antonio 1967, writ ref’d n.r.e.).

209. *See id.*

210. *See Beyer, supra* note 22.

211. *See id.*

212. *See id.*; *Beyer, supra* note 114.

213. *See In re Estate of Shumway*, 9 P.3d 1062, 1066 (Ariz. 2000) (testator’s visual impairment played a significant role in the determination that contestants had probable cause for challenging the will).

214. *See Beyer, supra* note 22.

215. *See id.*

A higher duty of care must be required for estate planning attorneys working with clients facing communication challenges.²¹⁶ However, no existing Texas statute imposes such a duty on estate planning practitioners.²¹⁷ Thus, the significant proportion of Texans experiencing communication challenges face considerable risk and lack proper protection in drafting and executing wills and estate plans.²¹⁸

To mitigate such risk and provide adequate protection for communicationally challenged testators, the Texas Estates Code must be amended.²¹⁹ The current language of the Estates Code does not require practitioners to take any additional steps when working with clients who experience visual impairments, hearing impairments, illiteracy, or the inability to effectively understand English.²²⁰ To effectuate the testamentary intent for such challenged individuals and ensure that baseless claims are not made against a will's validity, attorneys must be required to work vigilantly and use a higher standard of care than usual.²²¹

2. Adequate Attestation of Testamentary Documents

Communication challenges may present issues for estate planners in ensuring the attestation of their clients' wills meet statutory requirements.²²² Proper attestation occurs when at least two credible witnesses, age fourteen or older, witness the performance of the statutory requirements to a valid will execution.²²³ Texas courts have held that attestation is sufficient "where the testator, unless blind, is able to see it from his actual position at the time, or at most, from such position as slightly altered, where he has the power readily to make the alteration without assistance."²²⁴ Attestation functions to support the presumption that a will was duly executed without fraudulent interference.²²⁵

In particular, clients experiencing some level of visual impairment face the highest level of risk in having their wills deemed invalid for lack of proper attestation.²²⁶ As such clients experience a range of difficulties in visually witnessing the attestation of their wills, future challenges could be made on the basis of one's failure to adequately meet the "conscious presence"

216. *See id.*

217. *See generally* TEX. EST. CODE ANN. (no provision in the Texas Estates Code currently addresses or acknowledges individuals experiencing any form of communication challenge).

218. *See* Beyer, *supra* note 22.

219. *See* discussion *supra* Section III.A.

220. *See* TEX. EST. CODE ANN. §§ 251.001, .051.

221. *See* Beyer, *supra* note 22.

222. *See id.*

223. TEX. EST. CODE ANN. § 251.051.

224. *Nichols v. Rowan*, 422 S.W.2d 21, 24 (Tex. App.—San Antonio 1967, writ ref'd n.r.e.).

225. *See* Beyer, *supra* note 22.

226. *See In re Estate of Shumway*, 9 P.3d 1062, 1065 (Ariz. 2000) (testator's visual impairment played a significant role in the determination that contestants had probable cause for challenging the will).

requirements.²²⁷ Thus, estate planners must be aware of steps to take during the attestation of a testator experiencing a communication challenge, namely a visual impairment, to ensure its validity cannot possibly be questioned.²²⁸

If an estate planner ascertains that a client is experiencing some sort of visual impairment, the language amending the Estates Code would require a heightened level of care in the execution of adequate attestation.²²⁹ To meet the requirements of this proposed amendment, estate planners could include an attestation clause specifically addressing a client's visual impairment.²³⁰ Such a clause would disclose a testator's visual impairment and witnesses would sign certifying that despite the testator's visual difficulties, the will received proper attestation in the conscious presence of the testator.²³¹ The current provisions of the Estates Code do not include any guidelines for estate planners to ensure proper attestation for clients experiencing challenges with effective communication.²³²

3. Valid Testator Signature on Testamentary Instruments

In addition to proving knowledge of the will's contents and sufficiently meeting the requirements for proper attestation, a communicationally challenged testator could potentially experience difficulty meeting the signature requirements in the Estates Code.²³³ For instance, a testator may be unable to sign for many reasons.²³⁴ In such a case, the testator may require a proxy signature.²³⁵

Another individual may sign a will on the testator's behalf so long as the signature occurs in the presence of the testator and under the direction of the testator.²³⁶ While the Estates Code expressly allows for signatures by proxy, Texas courts acknowledge in some cases that this act raises suspicions of invalid will execution.²³⁷ Moreover, if it cannot be sufficiently shown that a testator is able to write, the will is likely to be subjected to very close scrutiny in Texas courts.²³⁸ Thus, the Estates Code requires amendment as estate planners currently have no guidelines for certifying adequate signatures on the wills of communicationally challenged testators and

227. See Beyer, *supra* note 22.

228. See *id.*

229. See *id.*

230. See *id.*

231. See *id.*

232. TEX. EST. CODE ANN. § 251.051.

233. See Beyer, *supra* note 22.

234. See *id.*

235. See *id.*

236. TEX. EST. CODE ANN. § 251.051.

237. See *Franklin v. Martin*, 73 S.W.2d 919, 919–20 (Tex. App.—San Antonio 1934, writ ref'd).

238. See Beyer, *supra* note 22.

lessening the likelihood of a court's suspicion regarding such a testator's signature.²³⁹

Amendments to the Estates Code could include a range of potential required actions which ensure the validity of a signature on the will of a communicationally challenged testator.²⁴⁰ For instance, an amendment to the Estates Code could require the presence of a notary at the time a communicationally challenged testator signs his or her will.²⁴¹ Conversely, amendments could require the inclusion of a written statement ensuring the sufficiency of the signature, whether made by the testator or a proxy, for a testator experiencing difficulties with signing.²⁴² These potential amendments provide avenues toward protecting the intent of testators facing communication challenges.²⁴³

C. Statutory Requirements in Other States Supporting Amendment to the Texas Estates Code

Proposed amendments to the Texas Estates Code gain further support from the fact that other states have statutes addressing the duty of care required for working with communicationally challenged testators.²⁴⁴ As Texas remains the second most populous state in the United States, the population of communicationally challenged individuals is also relatively high.²⁴⁵ The Texas Legislature must have initiative and be at the forefront of states providing statutory protections for clients, specifically testators, who experience communication challenges.²⁴⁶

For example, Article 1579 of the Louisiana Civil Code provides separate requirements to execute a will for a testator who “does not know how to read or is physically impaired to the extent that he cannot read.”²⁴⁷ Under Article 1579, the procedure for execution of a valid will is as follows:

- (1) The written testament must be read aloud in the presence of the testator, the notary, and two competent witnesses. The witnesses, and the notary if he is not the person who reads the testament aloud, must follow the reading on copies of the testament. After the reading, the testator must declare or signify to them that he heard the reading, and that the instrument is his testament . . .
- (2) In the presence of the testator and each other, the notary and witnesses must sign the following declaration, or one substantially

239. *See id.*

240. *See id.*

241. *See* LA. CIV. CODE ANN. art. 1579 (1999).

242. *See id.*

243. *See* Beyer, *supra* note 22.

244. *See* LA. CIV. CODE ANN. art. 1579 (1999).

245. *U.S. States – Ranked by Population 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/states> (last visited Oct. 21, 2022) [<https://perma.cc/CPM5-UGBL>].

246. Author's original thought.

247. LA. CIV. CODE ANN. art. 1579 (1999).

similar: “This testament has been read aloud in our presence and in the presence of the testator, such reading having been followed on copies of the testament by the witnesses [, and the notary if he is not the person who reads it aloud,] and in our presence the testator declared or signified that he heard the reading, and that the instrument is his testament, and that he signed his name at the end of the testament and on each other separate page; and in the presence of the testator and each other, we have subscribed our names this ____ day of ____, ____.”²⁴⁸

This statute provides proper protection to communicationally challenged testators and gives attorneys guidance in working to adequately meet the needs and desires of such testators in Louisiana.²⁴⁹ The Texas Estates Code should be amended to include language similar to the Louisiana Civil Code.²⁵⁰ Although every state does not currently impose statutory requirements for communicationally challenged testators, the relatively high proportions of Texans experiencing significant communication challenges highlight the necessity of amending the Texas Estates Code.²⁵¹

Although many states do not currently have statutory requirements in place to protect testators experiencing certain communication challenges, support for amending the Estates Code exists in various other sources.²⁵² For instance, the New Jersey Practice Series includes a variety of forms which serve as guidelines for estate planners experiencing different circumstances.²⁵³ These forms include a provision that estate planners can include in a blind or illiterate testator’s will to increase the likelihood of validity and provide a source of added protection.²⁵⁴

Specifically, this provision provides certification from the attesting witnesses that the will was “correctly and completely read to the said testator and that upon the completion of such reading, the testator stated and declared his understanding and approval of such instrument as his Last Will and Testament,” and that the testator, though communicationally challenged, was “of sound and disposing mind, memory, and understanding, under no restraint or coercion whatsoever, and that he was fully competent to make the will.”²⁵⁵ Although including this provision in communicationally challenged testators’ wills is not currently required, this form still serves as guidance for estate planners to assure effectuation of their clients’ intents.²⁵⁶ Moreover, this form supports the need for amending the Estates Code because it

248. *Id.* art. 1579(1)–(2).

249. *Id.* art. 1579.

250. *Id.*

251. See WORLD POPULATION REV., *supra* note 245; MIGRATION POL’Y INST., *supra* note 85.

252. See LA. CIV. CODE ANN. art. 1579 (1999).

253. See 8 A N.J. PRAC., *Wills and Administration* § 4023 (Rev. 3d ed., 2022).

254. See *id.*

255. *Id.*

256. See *id.*

highlights that precautions must be taken when working with communicationally challenged testators, specifically those who are blind or illiterate.²⁵⁷

In addition, New Jersey's statute including requisites for an individual's ability to make a will, coupled with the courts' interpretation of such legislation, highlight a primary source of reasoning behind the argument for adopting legislation to protect communicationally challenged testators.²⁵⁸ The New Jersey statute provides that "[a]ny individual 18 or more years of age who is of sound mind may make a will and may appoint a testamentary guardian."²⁵⁹ The brevity of this provision gives New Jersey courts ample space for interpretation.²⁶⁰ Such interpretations have had considerable and relevant impacts on communicationally challenged testators.²⁶¹

In *Merritt v. Johnson*, the court faced the task of determining the validity of the will of an ill woman who did not possess the ability to read or write at the time her will was executed.²⁶² The court held that because the testator did not have the ability to read the will, "it was incumbent on the defendant to prove that it had been fairly read or fully explained to her . . . and this rule ought to be insisted on because . . . one of the executors . . . expressly prohibited the testamentary witnesses from reading the same to [the] testatrix before she signed it."²⁶³

In following their duty to interpret the existing law, courts have a wide range of discretion.²⁶⁴ Therefore, statutory requirements should have a high level of clarity and precision to prevent gaps in the protection of individuals, specifically those experiencing relatively higher levels of vulnerability.²⁶⁵ Statutes failing to adequately address the higher level of needs posed by communicationally challenged individuals leads to a heightened exposure to risk for such individuals in the world of litigation.²⁶⁶ The language of New Jersey's statute and the courts' interpretation of it show the importance of amending the Estates Code to prevent similar situations in Texas.²⁶⁷

Another source of statutory requirements which supports amending the Texas Estates Code exists in Nevada.²⁶⁸ Section 136.210 of the Nevada

257. *See id.*

258. *See* N.J. STAT. ANN. § 3B:3-1 (2005).

259. *Id.*

260. *Id.*

261. *See* *Merritt v. Johnson*, 5 N.J.L. 454, 455 (1819).

262. *Id.*

263. *Id.*

264. *See* Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 3-4 (2004).

265. *See* *Judicial Discretion*, LEGAL INFO. INST. (June 2020), https://www.law.cornell.edu/wex/judicial_discretion [<https://perma.cc/2CLV-2N66>].

266. *See* *Statutory Interpretation: General Principles and Recent Trends*, EVERYCRSREPORT.COM (Sept. 24, 2014), <https://www.everycrsreport.com/reports/97-589.html> [<https://perma.cc/4YCM-4TFS>].

267. *See id.*

268. NEV. REV. STAT. ANN. § 136.210 (West 2021).

Revised Statutes requires the translation of wills written in foreign languages.²⁶⁹ More specifically, the Nevada statute states that “[i]f the will is in a foreign language the court shall certify to a correct translation thereof into English and the certified translation shall be in lieu of the original.”²⁷⁰ This specific Nevada statute exists in order to prevent confusion and ensure the effectuation of a deceased individual’s testamentary intent.²⁷¹

Section 136.210 of the Nevada Revised Statutes supports an amendment to the Estates Code as it decreases the likelihood that an individual’s testamentary intent will not be effectuated during probate proceedings.²⁷² Wills written in foreign languages have a high likelihood of coming from testators who primarily speak and understand a language other than English.²⁷³ Requiring a translation of wills originally written in a language other than English obligates estate planning attorneys to engage in effective communication with such clients.²⁷⁴ A statute requiring an English translation of a will written in a foreign language compels an estate planner to develop a thorough understanding of the testamentary intent of a testator who primarily understands a language other than English.²⁷⁵ An estate planning practitioner must have a comprehensive understanding of such testator’s intent in order to ensure that there are no discrepancies between the original will and the will translated into English.²⁷⁶

While many states have not yet enacted statutory provisions with guidelines for will drafting and execution, estate planning, or probate for testators experiencing difficulties with effective communication, there still exists considerable support for amending the Texas Estates Code.²⁷⁷ Texas has one of the highest state populations among the United States, thus amending the Estates Code would ensure the availability of adequate protection for a significant number of people.²⁷⁸ Further, amending the Estates Code would likely catch the attention of legislators and estate planners in other states, likely inspiring a wave of legislative amendments in support of those facing communication challenges.²⁷⁹

269. *See id.*

270. *Id.*

271. *See id.*

272. *See id.*

273. *See* Beyer, *supra* note 22.

274. *See* Joanne E. Joiner, *Habla Espanol? Language Issues in Dealing with Individuals with Limited English Proficiency and Individuals with Hearing Impairments*, AM. HEALTH LAWS. ASS’N (2003); Guzzreau, *supra* note 36; Beyer, *supra* note 22.

275. *See* Joiner, *supra* note 274; Guzzreau, *supra* note 36; Beyer, *supra* note 22.

276. *See* Beyer, *supra* note 22; Guzzreau, *supra* note 36.

277. *See* LA. CIV. CODE ANN. art. 1579 (1999).

278. *See* WORLD POPULATION REV., *supra* note 245.

279. *See* LA. CIV. CODE ANN. art. 1579 (1999).

D. The Texas Disciplinary Rules of Professional Conduct do not Provide Adequate Protection for Communicationally Challenged Testators

The Texas Estates Code requires an amendment to ensure that estate planning attorneys in Texas are engaging in ethical behavior when drafting wills and planning estates.²⁸⁰ The Rules were adopted by the Supreme Court of Texas in 1990 for the purpose of providing lawyers a framework for conducting an ethical practice of law.²⁸¹ Under the Rules, attorneys have a duty to communicate effectively with their clients, engage in representation of clients with competence, to work diligently in such representation, and not to reveal a client's confidential information during or after representation.²⁸² In addition, the Rules impose specific duties on attorneys in the course of dealing with clients experiencing diminished capacity.²⁸³

The Rules regarding an attorney's duties of communication, competence and diligence, and confidentiality do not adequately address the unique needs presented by clients experiencing communication challenges, especially in the realm of estate planning.²⁸⁴ Additionally, the duties imposed on attorneys working with clients experiencing diminished capacity do not apply to clients facing communication challenges, as such challenges do not constitute diminished capacity.²⁸⁵ Thus, the Rules do not impose any specific duties on attorneys working with clients experiencing any form of communication challenge.²⁸⁶ These imposed lack of duties on estate planning attorneys exposes communicationally challenged testators to a considerable risk of receiving unethical legal aid.²⁸⁷

I. Amending the Texas Disciplinary Rules of Professional Conduct to Protect Communicationally Challenged Testators

Although the best solution for long term success regarding the issues experienced by communicationally challenged testators and their estate planners remains amending the Texas Estates Code, alternate actions could also be taken to provide necessary protection.²⁸⁸ For example, amendments could be made to the Rules, specifically those regarding communication,

280. Author's original thought.

281. See Tex. Disciplinary Rules of Prof'l Conduct Preamble: Scope; Peterson, *supra* note 165.

282. Tex. Disciplinary Rules of Prof'l Conduct Rs. 1.01(b), 1.03(b), 1.05.

283. *Id.* R. 1.16.

284. See Beyer, *supra* note 22; Champine, *supra* note 87.

285. See Tex. Disciplinary Rules of Prof'l Conduct R. 1.16; Stephen v. Coleman, 533 S.W.2d 444, 447-48 (Tex. App.—Fort Worth 1976, writ ref'd n.r.e.).

286. See generally Tex. Disciplinary Rules of Prof'l Conduct (the Texas Disciplinary Rules do not contain any provisions acknowledging or addressing individuals who experience any form of communication challenge).

287. *Id.*

288. See Peterson, *supra* note 165.

competence and diligence.²⁸⁹ In addition, a more practical solution could include the addition of an official comment to the Rules detailing an attorney's duty of care in working with clients facing communication challenges.²⁹⁰

The Rules operate as rules of reason for Texas attorneys, describing and outlining "proper conduct for purposes of professional discipline."²⁹¹ Further, the Rules include official comments which give attorneys context regarding the correct adherence to and practice of relevant disciplinary rules.²⁹² Specifically, the comments "illustrate or explain applications of the rules, in order to provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules."²⁹³ However, the rules "are imperatives, cast in the terms of "shall" or "shall not"," while the comments "are cast often in the terms of "may" or "should" and are permissive, defining areas in which a lawyer has professional discretion."²⁹⁴ Moreover, the comments do not themselves "add obligations to the rules and no disciplinary action may be taken for failure to conform to the comments."²⁹⁵ However, comments to the Rules remain extremely effective in increasing attorneys' awareness of the presence of particular issues and the need to take specific action in response to such issues.²⁹⁶

The Rules, promulgated in 1990, have previously been amended with additions of various sections and interpretive comments.²⁹⁷ The process for adding interpretive comments to the TDRPC is substantially the same as amending the Rules themselves.²⁹⁸

Amending the Rules remains a practical alternative solution for a plethora of reasons.²⁹⁹ First, while there is a comprehensive process in place for amending the Rules, the time required to amend is generally significantly less than that required for legislative amendments to a statutory code.³⁰⁰ Second, as amendments to the Rules are voted on by members of the State Bar of Texas, there is a higher likelihood of approval than that of a vote by the Texas Legislature.³⁰¹ Finally, the process for amending the Rules allows

289. Tex. Disciplinary Rules of Professional Conduct Rs. 1.01(b), 1.03(b), 1.05.

290. See Peterson, *supra* note 165.

291. See *Texas Disciplinary Rules of Professional Conduct: Preamble*, TEX. MUN. CTS. EDUC. CTR., https://www.tmcce.com/programs/prosecutors/texas_disciplinary_rules_of_professional_conduct/ (last visited Nov. 11, 2022) [<https://perma.cc/YLV2-R34Z>].

292. See *id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. See *id.*

297. See Peterson, *supra* note 165.

298. See discussion *supra* Section II.E.1.

299. See discussion *supra* Part II.

300. See Peterson, *supra* note 165.

301. *Id.*

for comments and recommendations from the public, likely increasing the overall effectiveness and applicability of the proposed rules.³⁰²

Another alternate solution, adding interpretive comments to the Rules, remains a plausible and practical choice.³⁰³ Similar to an amendment of the Rules themselves, adding a comment to the Rules would likely take less time than amending the Estates Code.³⁰⁴ Additionally, as they primarily exist to clarify and explain, adding comments to the Rules is easier than amending a statutory code.³⁰⁵ While adding comments to various rules in the Rules remains a favorable alternate solution, the highest likelihood of adequately protecting communicationally challenged individuals would come from adding comments in conjunction with the proper amendments to the Estates Code.³⁰⁶

Amendment to Rule 1.03 regarding an attorney's communication with a client could provide communicationally challenged testators with higher protection.³⁰⁷ As it exists now, Rule 1.03 is relatively short and vague in the guidance it provides practicing attorneys.³⁰⁸ As a solution, language expressly defining a communication challenge, offering guidance for ascertaining the existence of various communication challenges, and providing steps an attorney could take in the event of working with a communicationally challenged testator should be added to the Rule.³⁰⁹

In addition, an amendment to Rule 1.01 regarding an attorney's competent and diligent representation could offer increased protection for communicationally challenged testators.³¹⁰ Currently, this Rule states that an attorney must not "frequently fail to carry out completely the obligations that the lawyer owes to a client."³¹¹ However, the vagueness of this language leaves much room for interpretation and fails to provide the level of guidance that it should afford attorneys.³¹² Amendment to include a provision defining competent communication and detailing its requirements would improve effective communication between attorneys and clients experiencing any challenges with communication.³¹³

While amending these particular rules would likely have a beneficial impact on ensuring the effectuation of communicationally challenged testators' intents, more practical solutions to this particular problem do

302. *Id.*

303. *See id.*; TEX. MUN. CTS. EDUC. CTR., *supra* note 291.

304. *See* Peterson, *supra* note 165.

305. TEX. MUN. CTS. EDUC. CTR., *supra* note 291.

306. *See id.*; Peterson, *supra* note 165.

307. *See* Tex. Disciplinary Rules of Prof'l Conduct R. 1.03; Beyer, *supra* note 22.

308. *See* Tex. Disciplinary Rules of Prof'l Conduct R. 1.03.

309. *See* Peterson, *supra* note 165.

310. *See* TEX. MUN. CTS. EDUC. CTR., *supra* note 291.

311. Tex. Disciplinary Rules of Prof'l Conduct R. 1.01(b).

312. *See id.*

313. *See id.*

currently exist.³¹⁴ As the Rules remain applicable to the conduct of practicing attorneys in all fields, this proposed solution would only indirectly affect the increase of protection for the specific population of communicationally challenged testators.³¹⁵ However, adding an interpretive comment to either of these Rules could potentially have a more direct impact on the estate planning process for communicationally challenged testators.³¹⁶

Adding interpretive comments to either or both of the Rules on communication, competent and diligent representation would help to illustrate the proper and ethical course of action for the representation of clients experiencing challenges with effective communication.³¹⁷ Such comments could include language explaining the existence of communication challenges.³¹⁸ Further, interpretive comments may be added to illustrate situations involving communicationally challenged clients and provide guidelines for attorneys representing such clients.³¹⁹ Adding illustrative comments to the Rules might be a good starting point in working toward equal protection for clients facing communication challenges, but further action must also be taken.³²⁰ Thus, amending the Texas Estates Code remains the primary mode of mitigating risk and providing protection for testators experiencing communication challenges.³²¹

E. Potential Language for Statutory Amendments to the Texas Estates Code

The Texas Estates Code must be amended to protect testators experiencing various communication challenges, including visual and hearing impairments, illiteracy, and difficulty understanding English, and mitigate the risks they are currently exposed to in the realm of estate planning.³²² To properly amend the Texas Estates Code and provide such protection, the Texas Legislature should add multiple provisions to the section regarding the requirements of a valid will.³²³

The first amendment the Texas Legislature should make to the Estates Code involves adding a provision specifically regarding testators who cannot read.³²⁴ Similar to the provision in the Louisiana Civil Code, this addition would specifically cover testators experiencing some level of visual

314. See Peterson, *supra* note 165.

315. See TEX. MUN. CTS. EDUC. CTR., *supra* note 291.

316. See Peterson, *supra* note 165.

317. See TEX. MUN. CTS. EDUC. CTR., *supra* note 291.

318. See *id.*

319. See TEX. MUN. CTS. EDUC. CTR., *supra* note 291.

320. Author's original thought.

321. See discussion *supra* Section III.A.

322. See Beyer, *supra* note 22.

323. See TEX. EST. CODE ANN. § 251.051.

324. See LA. CIV. CODE ANN. art. 1579 (1999).

impairment or illiteracy.³²⁵ This provision should be titled “Visually Impaired Testator or Testator Unable to Read” or something substantially similar.³²⁶ The provision should include special requirements for the execution of a will of a visually impaired or illiterate testator.³²⁷ Similar to the Louisiana provision, the amending language could be the same or substantially similar to the following:

The [completed] written testament must be read aloud in the [conscious] presence of the testator, the notary, and two competent witnesses [who are at least 14 years of age]. The witnesses, and the notary . . . must follow the reading on copies of the testament. After the reading, the testator must declare or signify to them he [or she] heard the reading, and that the instrument is his [or her] testament.³²⁸

This proposed language includes a further requirement that a notary be present at the execution of a will for testators experiencing these specific communication challenges.³²⁹ Requiring a notary to be present in such cases will decrease the chances that a communicationally challenged testator’s will could be successfully challenged in probate.³³⁰

In addition, this proposed amendment should expressly address the signature requirement of the visually impaired or illiterate testator.³³¹ The added language should include the following: “If the testator knows how, and is able to do so, he or she must sign their name at the end of the testament and on each separate page of the testamentary instrument.”³³² Additionally, the amendment should include language regarding a proxy signature for a communicationally challenged testator:

If the testator is unable to sign, the absence of the testator’s signature does not affect the validity of the . . . will if the testator indicates the reason for the testator’s inability to sign and the authorized person makes note of the inability on the will. In that case, it is permissible for any other present person, including an attorney or one of the witnesses, at the direction of the testator, to sign the testator’s name for the testator if the authorized person makes note of this on the will . . .³³³

325. *Id.*; see discussion *supra* Section III.C.

326. See LA. CIV. CODE ANN. art. 1579 (1999).

327. See *id.*

328. LA. CIV. CODE ANN. art. 1579(1) (2011).

329. See *id.*

330. See *id.*; Beyer, *supra* note 22, at 3–4.

331. See discussion *supra* Section III.B.3.

332. Author’s original proposal.

333. MONT. CODE ANN. § 72-2-903(4) (2021).

This proposed amendment should also include a provision requiring an attestation clause within the will of a visually impaired or illiterate testator.³³⁴ A required attestation clause would increase the likelihood that such a testator's intent would be effectuated in the probate process.³³⁵ The statutory amendment should require an attestation clause with language substantially similar to the following:

The foregoing instrument consisting of [number] pages was signed, published, and declared by [testator] to be [his] [or] [her] last will. We now, at [his] [her] request, in [his] [her] presence, subscribe our names as witnesses this the [day] day of [month]. For identification, we have each initialed or signed each page of this will. We read this will and heard the full contents of this will read to [testator] by [name of testator's attorney or computer software product] at the express direction of [testator] who was unable to read [his] [her] will because [he] [she] is blind [visually impaired], [illiterate, or otherwise unable to read]. We certify that the will was accurately [and completely] read to [the] [testator].³³⁶

The addition of such language to the Texas Estates Code would provide a considerably higher level of protection for testators experiencing certain communication challenges.³³⁷

In addition, amendment to the Estates Code could include similar requirements and sample provisions for testators experiencing hearing impairments.³³⁸

Finally, the Estates Code should be amended to include a provision specifically aimed at providing guidelines and requirements for estate planners in working with testators who are unable to understand English.³³⁹ Requiring a detailed attestation clause specifically addressing the testator's difficulties and execution of the will would increase statutory protection and decrease the likelihood of successful challenges to such testator's wills.³⁴⁰ More specifically, the Texas legislature should add a provision to the Estates Code aimed at protecting this population as Texas has an extremely high proportion of individuals who primarily speak Spanish.³⁴¹

334. See Beyer, *supra* note 22, at 2.

335. See *id.*

336. *Id.*

337. See *id.*

338. See *id.*

339. See *id.*

340. See *id.* at 2.

341. See MIGRATION POL'Y INST., *supra* note 86.

*F. Utilizing Technological Advancements in the Implementation of
Proposed Amendments to the Texas Estates Code*

In February 2019, the Supreme Court of Texas adopted an amendment to one of the comments following the Rules on competence and diligence.³⁴² The comment discusses attorneys' ongoing duty to maintain competence, and includes the following language:

Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology. To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in continuing study and education.³⁴³

This amendment emphasizes Texas attorneys' obligation to educate themselves on and utilize technology in a professionally competent manner.³⁴⁴ Moreover, this amendment places a responsibility on attorneys to understand and develop proficiency regarding the relevant benefits of technological advancements.³⁴⁵ Relatively recent technological advancements provide a plethora of benefits that can considerably increase attorneys' ability to communicate effectively with clients, especially those facing communication challenges.³⁴⁶

The considerable technological advancements present today provide further support for the proposed amendments to the Texas Estates Code.³⁴⁷ Estate planning attorneys can utilize a myriad of forms of technology to ensure effective will drafting and estate planning for their clients facing communication challenges.³⁴⁸ As technological advancements are becoming increasingly rapid, attorneys can easily obtain many forms of technology at relatively low prices.³⁴⁹ The technology currently available and accessible will allow estate planning attorneys to easily meet a higher duty of care in working with communicationally challenged testators.³⁵⁰

342. Jett Hanna, *Amended Comment 8 to Rule 1.01 Brings Lawyer Technological Competence to the Forefront*, TEX. LAW. INS. EXCH., <https://www.tlie.org/amendedcomment8/> (last visited Jan. 5, 2023) [<https://perma.cc/V2VM-R35G>].

343. Tex. Disciplinary Rules of Prof'l Conduct R. 1.01 cmt. 8.

344. See Hanna, *supra* note 342.

345. See Tex. Disciplinary Rules of Prof'l Conduct R. 1.01 cmt. 8.

346. See Mary Frances Lapidus, *Using Modern Technology to Communicate with Clients: Proceed with Caution and Common Sense*, 34 HOUS. L. 39–40 (1996).

347. See *id.*

348. See *id.*

349. See *id.*

350. See *id.*; see also Beyer, *supra* note 22, at 2.

1. Relevant Technological Advancements Benefitting Visually Impaired Testators

The rapid advancements in technology over the last twenty years provide estate planning attorneys ample opportunities to establish effective communication with all clients, but especially with those experiencing some sort of visual impairment.³⁵¹ As advancements in technology have decreased the difficulty and cost associated with effectively communicating with communicationally challenged testators, amending the Estates Code to include communication requirements would not place an unreasonable burden on Texas estate planners.³⁵² There are many ways that estate planning attorneys can utilize technology and its benefits to ensure effective communication with visually impaired clients.³⁵³

For instance, to successfully demonstrate that the requirements of a valid will have been met and prevent baseless claims against the wills of visually impaired testators, estate planners can execute a video recording of the will execution.³⁵⁴ Performing a video recording of the execution of a visually impaired testator's will can be achieved with relative ease and at a low cost.³⁵⁵ Moreover, a video of the will execution could be extremely useful in evidencing that the testator had knowledge of the contents of the will and executed the will in the absence of undue influence or fraud.³⁵⁶

Another form of technology that estate planners could implement when working with visually impaired testators is a computer software product with the ability to read a testator's will aloud.³⁵⁷ This specific form of technology would be helpful as it could serve as evidence that the visually impaired testator had adequate knowledge of the contents of his or her will.³⁵⁸ Similar to a video recording of the will execution, this form of technology remains widely available, low cost, and simple to use.³⁵⁹ As many technological advancements exist which can improve communication between estate planners and their visually impaired clients, requiring a higher duty of care for such clients would not unduly burden attorneys.³⁶⁰

351. See Lapidus, *supra* note 348; see also Beyer, *supra* note 22, at 2.

352. See Lapidus, *supra* note 348, at 39.

353. See *id.*; see also Beyer, *supra* note 22, at 2.

354. See Gerry W. Beyer, *Videotaping the Will Execution Ceremony—Preventing Frustration of Testator's Final Wishes*, 15 ST. MARY'S L.J. 1, 10–13 (1983).

355. See *id.*

356. See *id.*

357. See Beyer, *supra* note 22, at 1.

358. See *id.*

359. See *id.*

360. See Lapidus, *supra* note 346.

2. Relevant Technological Advancements Benefitting Hearing Impaired Testators

Technological advancements made and developed in the last twenty years provide estate planning attorneys with a myriad of resources to bolster effective communication with testators experiencing a wide range of hearing impairments.³⁶¹ Such technologies provide support for amending the Texas Estates Code as providing the requisite level of care for clients with hearing impairments because they are both cost effective and relatively easy to achieve for estate planners.³⁶² In fulfilling their obligation to maintain competence of the relevant benefits of technology, estate planners can utilize one or more of the available technological resources to ensure their hearing impaired clients' needs are met.³⁶³

For example, when working with clients experiencing a hearing impairment, estate planners may utilize a form of technology known as video remote interpreting.³⁶⁴ Video remote interpreting exists as "a form of sign language interpreting that allows people who are deaf or hard of hearing to communicate with a hearing person at the same site via videoconferencing."³⁶⁵ Video remote interpreting is a fee-for-service business that can be utilized as an alternative to an in-person interpreter.³⁶⁶ The use of video remote interpreting involves a qualified interpreter generally located at a call center who signs everything the hearing person says to a web camera.³⁶⁷ The deaf or hearing impaired person then replies via web camera and the interpreter voices their response to the hearing person or people.³⁶⁸ Video remote interpreting provides many benefits, including its availability in locations where there might be a lack of available qualified interpreters or at times when an interpreter is needed immediately or on short notice.³⁶⁹

Another form of technology that could considerably benefit estate planning attorneys working with hearing impaired testators is known as video relay service.³⁷⁰ Video relay service is similar to video remote interpreting, however, it differs in that it is utilized in the context of telephone

361. See Matthew S. Compton, *Fulfilling Your Professional Responsibilities: Representing A Deaf Client In Texas*, 39 ST. MARY'S L.J. 819, 858 (2008).

362. See *id.*

363. See *id.*

364. *Id.* at 865–66.

365. *What is video remote interpreting?*, DISABILITIES, OPPORTUNITIES, INTERNETWORKING, & TECH., <https://www.washington.edu/doit/what-video-remote-interpreting> (last updated May 24, 2022) [<https://perma.cc/NE6F-7P2T>].

366. See Compton, *supra* note 361, at 865–66.

367. See DISABILITIES, OPPORTUNITIES, INTERNETWORKING, & TECH., *supra* note 367.

368. *Id.*

369. *Id.*

370. See Compton, *supra* note 361, at 908.

communication.³⁷¹ In the utilization of video relay services, “The hearing user communicates by voice, the non-hearing user communicates by video using ASL, and the relay operator serves as a liaison, communicating by voice to the hearing party and by video using ASL to the non-hearing party.”³⁷² Video relay service offers several significant benefits, including its availability twenty-four hours a day, the required confidentiality of calls, and the fact that providers do not charge either attorneys or clients for calls.³⁷³

In addition, estate planning practitioners may also utilize the benefits of technological advancements by performing a video recording of the will execution.³⁷⁴ Although it is not always necessary, videotaping the will execution of a hearing impaired testator can be extremely useful in demonstrating that such testator had the requisite knowledge of the will’s contents as well as providing evidence that fraud or undue influence was not at play.³⁷⁵ Videotaping the execution of a will provides many benefits and can be achieved easily at a very low cost to attorneys and their clients experiencing any form of hearing impairment.³⁷⁶

Utilizing such forms of technology when working with hearing impaired testators remains a desirable option for estate planners as it lessens the likelihood of will challenges based on fraud or undue influence.³⁷⁷ Employing online services and third-party interpreters as opposed to allowing a testator’s friend or family member to interpret communication between the testator and his or her attorney protects against such claims as these individuals may have an incentive to translate inaccurately.³⁷⁸ Current services available due to recent technological advancements serve to ensure that the testamentary intent of testators facing hearing impairments are accurately effectuated.³⁷⁹

3. Relevant Technological Advancements Benefitting Testators Who Primarily Communicate in Languages Other than English

Recent technological advancements also provide an array of resources for estate planning attorneys who are working with clients that have a primary understanding of a language other than English, or who do not understand English at all.³⁸⁰ As Texas has the second highest population of individuals

371. *What are relay services, and how do I access them?*, DISABILITIES, OPPORTUNITIES, INTERNETWORKING, & TECH., <https://www.washington.edu/doit/what-are-relay-services-and-how-do-i-access-them?11111> (last updated May 22, 2022) [<http://perma.cc/9QV6-MJ6N>].

372. *Id.*

373. *See* Compton, *supra* note 361, at 908.

374. *See* Beyer, *supra* note 354, 27–28.

375. *Id.*

376. *See* Beyer, *supra* note 22.

377. *See id.*

378. *See id.*

379. *See id.*

380. *See id.*

who are not proficient in English, taking advantage of the benefits provided by such technological advancements remains highly important for estate planning practitioners in the state.³⁸¹ Similar to those available for visual and hearing impaired testators, technological resources remain easily accessible to estate planners at little to no cost.³⁸² The ease of accessing the considerable benefits of such technologies supports the proposed amendments to both the Texas Estates Code as well as the Rules.³⁸³

For example, several different foreign language translation services remain easily accessible through the internet.³⁸⁴ Such online translation services offer the assistance of translators with proficiency in a myriad of different languages and knowledge of a range of industries.³⁸⁵ Estate planners can arrange video conferences with reliable and knowledgeable translators when meeting with clients who have a limited proficiency in English to ensure effective communication.³⁸⁶ The utilization of a knowledgeable third-party translator can serve as useful evidence that a communicationally challenged testator had thorough knowledge of the contents of their will or estate plan and was not subject to any undue influence or fraud.³⁸⁷

In addition, after drafting a will or any other estate planning documents for a testator with limited proficiency in English, estate planning attorneys can make use of technology to ensure the client's intents are fulfilled.³⁸⁸ A wide range of online services exist which have the ability to translate documents from one language to virtually any other language.³⁸⁹ However, estate planners must remain vigilant in selecting which translation services they would like to utilize as the contents of a will may be translated differently depending on the translator.³⁹⁰ After utilizing the benefits of technology to translate the contents of a will to any foreign language, estate planners should have testators thoroughly review the instrument to ensure that their testamentary intent is not "lost in translation."³⁹¹ Taking such steps will bolster effective communication and provide extrinsic evidence ensuring that baseless challenges are not made against the wills of those primarily speaking languages other than English.³⁹²

381. See MIGRATION POL'Y INST., *supra* note 85.

382. See *Foreign Language Translation Services*, THE TRANSLATION CO., <https://thetranslationcompany.com/foreign-language-translation.htm> (last visited Jan. 6, 2023) [<https://perma.cc/23QP-ZJ3W>].

383. See Maxwell Alan Miller et al., *Finding Justice in Translation: American Jurisprudence Affecting Due Process for People with Limited English Proficiency Together with Practical Suggestions*, 14 HARV. LATINO L. REV. 117, 153–84 (2011).

384. See THE TRANSLATION CO., *supra* note 382.

385. See *id.*

386. See *id.*

387. See Beyer, *supra* note 22.

388. See *id.*; Lapidus, *supra* note 346.

389. See THE TRANSLATION CO., *supra* note 382.

390. See Beyer, *supra* note 22.

391. See *id.*

392. See *id.*; Miller et al., *supra* note 383.

Finally, estate planners can utilize certain forms of technology which can read the contents of a will aloud in a language other than English.³⁹³ In the utilization of such technologies, testators with a limited proficiency in understanding English are afforded the opportunity to object to any discrepancies between an attorney's draft of a will or estate plan and their actual testamentary intent.³⁹⁴ Using such forms of technology would ensure a testator's knowledge of the will's contents and evidence of the use of such processes could be used as support to any will challenges.³⁹⁵

4. Relevant Technological Advancements Benefitting Illiterate Testators

Several technological advancements made in the last twenty years provide substantial benefits to estate planning attorneys working with clients who are illiterate.³⁹⁶ Taking advantage of such advancements in technology will aid in the establishment of effective communication with illiterate testators with relatively high simplicity and low cost.³⁹⁷ Utilizing such technologies allows estate planning attorneys the opportunity to certify that the testamentary intents of their illiterate clients are fulfilled and provide support that such clients had the necessary knowledge of the contents of their will.³⁹⁸

Similar to clients experiencing visual impairments, testators experiencing illiteracy will have difficulty with thoroughly reading the contents of their own will.³⁹⁹ However, if their estate planners take the proper steps, such testators will have no problem developing a comprehensive understanding of the contents of their wills.⁴⁰⁰ First, estate planners can employ computer software programs which have the ability to dictate written documents.⁴⁰¹ The use of such programs can serve as extrinsic evidence proving that the illiterate testator had the requisite knowledge of the contents of his or her will.⁴⁰² Additionally, estate planners can perform a video recording of the will execution in order to document the testator's knowledge of the contents of the will and dismiss any suspicions of fraud or undue influence.⁴⁰³ To ensure the effectuation of their clients' testamentary intents, estate planning practitioners should be vigilant and employ both of these

393. See Lapidus, *supra* note 346.

394. See Beyer, *supra* note 22.

395. See Beyer, *supra* note 354.

396. See Lapidus, *supra* note 346; Beyer, *supra* note 22.

397. See Lapidus, *supra* note 346; Beyer, *supra* note 22.

398. See Beyer, *supra* note 22.

399. *Id.* at 3.

400. See *id.*

401. See *id.*

402. See *id.*

403. See Beyer, *supra* note 354.

technologies to ensure that issues do not arise in the probate proceedings for illiterate testators.⁴⁰⁴

The advanced technology present and widely used today highlights the urgent need for amendment to the Texas Estates Code.⁴⁰⁵ Advancements in technology and shifts in societal expectations should be reflected in Texas' laws and regulations.⁴⁰⁶ Well-known and easily accessible forms of technology presently exist which can strengthen and ensure effective communication between estate planners and testators experiencing visual and hearing impairments, illiteracy, and a limited proficiency in comprehending or reading English.⁴⁰⁷ Estate planners have a responsibility to maintain competence regarding the benefits presented by various forms of available technology.⁴⁰⁸ The implementation of technology into an estate planner's practice would be a relatively easy way to increase the likelihood of drafting and executing valid wills and estate plans that cannot be easily challenged for testators experiencing difficulties with communication.⁴⁰⁹

IV. CONCLUSION

Communicationally challenged testators have as much of a right to the effectuation of their testamentary intent as anyone.⁴¹⁰ The importance of the effectuation of an individual's testamentary intent is evidenced by several factors, including the heightened requirements for a valid will and the relatively high levels of scrutiny exercised by probate courts.⁴¹¹ In light of the high standards for valid wills and estate plans, there exists a surprising lack of duties imposed on estate planning attorneys in working with clients experiencing difficulties with communication.⁴¹² As with the hypothetical testator, John, and his estate planner, Amy, this lack of statutory guidance has resulted in increased difficulty in ensuring the effectuation of communicationally challenged testators' intents.⁴¹³

As communicationally challenged testators do not receive adequate protection under the current duties imposed by the Texas Estates Code or the Rules, amendments to the Texas Estates Code are imperative to mitigate the risk of improper effectuation of such testators' testamentary intents.⁴¹⁴

404. *See id.*

405. *See discussion supra* Section III.F.

406. *See* Lapidus, *supra* note 346.

407. *See* Beyer, *supra* note 22.

408. Hanna, *supra* note 342.

409. *See discussion supra* Section III.F.

410. *See* Beyer, *supra* note 22.

411. *See* TEX. EST. CODE ANN. §§ 251.001, .051; Beyer, *supra* note 22.

412. *See* Beyer, *supra* note 22.

413. *See id.*; *see also discussion supra* Part I.

414. *See* Beyer, *supra* note 22.

Amending the Texas Estates Code or the Rules would ensure more equality in the realm of estate planning and will drafting.⁴¹⁵

415. See discussion *supra* Part III.