AUTOMATING LEGACY
AI'S IMPACT ON ESTATE PLANNING
BY BRITTANY M. PAYNE & VERONICA T. GAROFOLI

Over the last decade, the use of Artificial Intelligence ("AI") has enhanced our lives in many ways. From Siri and Alexa, to Chat-GPT, AI has made tasks easier and more efficient. With AI's ever increasing presence, it's no surprise that we often receive questions from curious clients and professionals on the impact of AI on estate planning.

It is important to first understand what artificial intelligence is and what the estate planning process entails. According to Merriam-Webster dictionary, artificial intelligence is the capability of computer systems or algorithms to imitate intelligent human behavior.[1] This could come in the form of machine learning, which allows for a computer to identify patterns based on data and produce a result based upon information provided. Over time, AI might use the information provided to identify patterns, improve efficiencies, and produce a final product that can be used. While helpful, AI is less personal than interacting with a human, and it relies heavily on the accuracy of the information provided to it in creating a final response and product.

Estate planning is often a deeply personal process that involves understanding a client, their assets and intended beneficiaries for their assets, and details regarding the management and disposition of those assets during periods of incapacity and at death. Depending on the value of a client's estate and the client's goals, an estate planner may also be focused on providing transfer tax planning as a part of the estate planning process.

Generally speaking, AI is already used to assist in the estate planning process. Financial professionals may use AI to manage assets and recommend asset allocation, reduce taxes, and model a client's current estate flow. Estate planners can use this information to help clients develop or modify an estate plan to meet the client's objectives. Some planners even use AI to automate initial document production and create efficiencies in their practice. In our research, we have found that the key to the effective use of information produced by AI is the analysis that accompanies it by a trained professional. Without a trained eye, there may be hidden dangers to a user's reliance on AI for a task as important as estate planning.

To test AI, we took to Chat-GPT to ask everyone's favorite chatbot to draft a durable power of attorney for finances and a last will and testament based upon Ohio law. The result? A decent structure, but overall flawed documents to a trained eye and lack of explanation to the user that could lead to various pitfalls.

For example, the AI generated last will and testament calls for the signature of two witnesses but doesn't inform the user of who should serve as a witness and the formalities required by Ohio law to execute the last will and testament. Without meeting these formalities, this draft AI generated last will and testament may be found invalid. The AI generated last will and testament also includes the exercise of all powers of appointment applicable to the user. Powers of appointment are incredibly powerful estate planning tools that carry important tax consequences. Powers of appointment allow for the holder of such a power to redirect assets among a particular class of individuals or entities, determined by the grantor of the power. Sound complicated? It can be, which is why the expertise of a trained professional in estate planning is of utmost importance.

The AI generated durable power of attorney for finances offered little improvement. The overall structure of the document was reasonable, but when it came to the powers the user could grant to an agent, the draft specifically stated the user should "List specific powers and limitations, if any, such as banking, real estate transactions, investments, etc." The chatbot assumes that the user knows what powers can be granted to an agent under Ohio law or knows how to locate the powers to include them. When prompted to provide common powers and limitations, the chatbot produced a short list of common powers and limitations, but certainly did not provide an exhaustive list of common powers and limitations that a lawyer might include in their own draft. The chatbot also didn't discuss the pros and cons of including particular powers, nor did it address so called "hot powers," which are extraordinary powers that can be granted to an agent which have the ability to alter an individual's overall estate plan.

To its credit, the chatbot did get one thing right. It informed the user that the drafts produced should only be used as a starting point and should be reviewed by a trained legal professional to ensure appropriate compliance with the user's state law. Overall, AI powered tools can aid estate planning in many ways but cannot replace the human touch, empathy, and expertise that estate planning lawyers provide to their clients.

Remaining cautious while using AI is not just for individuals looking to simplify the estate planning process, but also for lawyers who are choosing to use AI to assist them in creating efficiencies in their practice. Using AI in estate planning creates the risk of data breaches and cyber-attacks that could comprise a client's sensitive information and could lead to potential liability.

As previously mentioned, sometimes AI is used to collect a client's personal data to produce an intended result, such as a draft estate plan. With an increasing number of cyberattacks, it is important that a lawyer working with a client ensures that there are appropriate safeguards in place to protect such information. Lawyers also have a responsibility to reasonably protect a client's personal and financial information. Rule 1.6(c) of the Ohio Rules of Professional Conduct states that "a lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to information related to the representation of a client." In using a third-

party application to produce a draft estate plan, you might consider asking questions about how a client's information is protected and secured by the company producing the application. If the response seems inadequate, it might require the lawyer to pass on its use. Lawyers should also be careful to ensure that they have adequate insurance coverage in the event of a breach.

Overall, while we have come quite a long way with AI, estate planning is a deeply personal, nuanced, and legally technical process. Individuals should be cautious in using AI without the expertise of a trained professional, and trained professionals should remain vigilant to ensure the protection of confidential client information.

[1] https://www.merriam-webster.com/dictionary/artificial%20 intelligence.

Brittany Payne is a member of Schneider Smeltz Spieth Bell LLP's Trusts and Estates practice group. With over a decade of experience, she focuses on the areas of trust and estate administration and estate planning. She has been a CMBA member since 2019. She can be reached at (216) 696-4200 or bpayne@sssb-law.com.

Veronica Garofoli focuses her practice in the areas of probate litigation, probate and estate administration, and estate planning at Schneider Smeltz Spieth Bell LLP. She provides representation for issues that can complicate the settling of an estate or trust. She has been a CMBA member since 2016. She can be reached at (216) 696-4200 or vgarofoli@sssb-law.com.