

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

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# GENERAL OVERVIEW

- ✓ The Role of Communication in Estate Planning
- ✓ What are Communication Challenges & How Do They Affect Estate Planning?
- ✓ Call for Estate Planning Guidance
- ✓ Amending the Texas Estates Code and Texas Disciplinary Rules of Professional Conduct

# WHAT IS COMMUNICATION?

## COMMUNICATION:

THE PROCESS OR ACT OF EXCHANGING, EXPRESSING, OR CONVEYING INFORMATION AND IDEAS THROUGH WRITING, SPEAKING AND GESTURING.

## WHAT MAKES COMMUNICATION EFFECTIVE?

- ABILITY TO CLEARLY CONVEY A MESSAGE
- ACTIVE LISTENING TO GAIN THE FULL MEANING OF THE MESSAGE
- UNDERSTANDING EMOTIONS AND INTENTIONS BEHIND THE INFORMATION

# THE IMPORTANCE OF EFFECTIVE COMMUNICATION IN ESTATE PLANNING

1. THE UNIQUE  
RELATIONSHIP  
BETWEEN ESTATE  
PLANNERS AND  
CLIENTS.

2. THE AMOUNT OF  
INFORMATION  
CLIENTS ARE  
REQUIRED TO  
CONVEY.

3. THE COMPLEXITY  
OF ESTATE  
PLANNING LAWS  
AND PROCEDURES.

# COMMUNICATION CHALLENGES

- Communication challenges are difficulties with speaking, reading, writing, and understanding which impact one's ability to transmit and share information.
- Manifestations of such challenges include a considerable variety of physical forms.

## MAIN FOCUS:

- Visual Impairments
- Hearing Impairments
- Illiteracy
- Lack of Proficiency in Understanding English

# Communication Challenges in Texas

## VISUAL IMPAIRMENTS

- Over 700,000 individuals experiencing visual impairment
  - 2.5% of Texas population

## HEARING IMPAIRMENTS

- Over 900,000 individuals experiencing hearing impairment
  - 3.3% of Texas population

## ILLITERACY

- Fourth lowest literacy rate among the United States
  - 81% of adults reported as literate

## LACK OF PROFICIENCY IN UNDERSTANDING ENGLISH

- Second highest population of individuals not proficient in English in the United States
  - Over 3.6 million individuals

# Communication Challenges Affect Effective Estate Planning

1.

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

2.

Adequate Attestation of Testamentary Documents

3.

Effective Communication Regarding Testamentary Intent and Estate Planning Procedures

# Amending the Texas Estates Code to Protect Communicationally Challenged Testators

1

The Texas Estates Code does not explicitly or implicitly address circumstances involving communication challenges in its validity requirements.

2

The Texas Estates Code does not provide guidelines for ascertaining the existence of a communication challenge or working with clients experiencing such challenges.

3

The Texas Estates Code's lack of guidance regarding communication challenges leaves clients and attorneys exposed to considerable risks.



# Amending the Texas Disciplinary Rules of Professional Conduct



**Duty of Communication**

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**Duties of Competence and Diligence**

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**Clients with Diminished Capacity**

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**Lack of Guidelines or Requirements for Attorneys**

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# Support for Amendment: Relevant Statutory Provisions in Other States

## Louisiana Civil Code

Article 1579. Notarial Testament;  
Testator Unable to Read

- Requires written testament be read aloud in presence of testator, notary, and 2 competent witnesses
- Requires specific attestation provision

## Nevada Revised Statutes

Section 136.210. Translation and  
Recording of Will in Foreign  
Language

- Requires the court to certify to a correct translation of the will into English
- The translated will must be recorded in lieu of the original

## New Jersey Practice Series

Section 4023. Testimonium and  
Attestation Clauses; Forms to  
Make Will Self-Proved

- Model attestation provision to include in the will of a blind or illiterate person
- Practical recommendations for publication of deaf, blind, and illiterate testators' wills

# PROPOSED AMENDMENTS TO THE TEXAS ESTATES CODE

## NOTARIAL TESTAMENT; TESTATOR UNABLE TO READ

When a testator does not know how to read, or is visually impaired to the extent that he cannot read, the procedure for notarial testament is as follows:

- (1) The completed written testament must be read aloud in the conscious presence of the testator, a 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. Upon completion of the reading, the testator must declare or signify to the witnesses and notary in some way that he or she heard the reading and confirm that the instrument read was his or her testament.
- (2) In the presence of the testator and each other, the notary and witnesses must sign the following declaration, or one substantially similar: “The foregoing testament was signed, executed, and declared by testator to be his last will. The contents of this will were read aloud in our presence and in the presence of the testator. The will was read at the explicit direction of the testator who was unable to sufficiently read his or her will because he or she is visually impaired, illiterate, or otherwise unable to read. We certify that this testament was accurately and completely read to the testator.”

# PROPOSED AMENDMENTS TO THE TEXAS ESTATES CODE

## NOTARIAL TESTAMENT; TESTATOR EXPERIENCING HEARING IMPAIRMENT

A. For a testator experiencing significant hearing impairment and able to read sign language, written English, or visual English, the procedure for notarial testament is as follows:

(1) In the presence of a notary and two competent witnesses who are at least 14 years of age, the testator shall declare or signify to them that the instrument is his testament and shall sign his name at the end of the testament.

(2) In the presence of the testator and each other, the notary and the witnesses shall sign the following declaration, or one substantially similar: “The testator has signed this testament, and has declared or signified in our presence that this instrument is his testament, and in the presence of the testator and each other we certify that this testament was accurately and completely read by the testator.”

B. A competent witness for the purposes of this Section is a person who meets the qualifications of Section 152.051, and who knows how to sign his name and read the required attestation clause.

# PROPOSED AMENDMENTS TO THE TEXAS ESTATES CODE

## NOTARIAL TESTAMENT; TESTATOR NOT PROFICIENT IN UNDERSTANDING ENGLISH

A. For a testator who does not understand English or has a poor understanding of written English, the procedure for notarial testament is as follows:

(1) In the presence of a notary and two competent witnesses who are at least 14 years of age, the testator shall declare or signify to them that the instrument is his testament and shall sign his name at the end of the testament.

(2) In the presence of the testator and each other, the notary and the witnesses shall sign the following declaration, or one substantially similar: “The testator (who understands [first language of testator] but cannot read English) has signed this testament and has declared or signified in our presence that this is his testament. As witnesses, we signed this instrument in the testator’s presence after it had been read over in English and accurately interpreted to the testator by [full name of person who read instrument to testator] who understands both English and [first language of testator] in our presence when the testator seemed thoroughly to understand and approve the contents.”

# Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct

- **Rule 1.03: Communication**
  - Provision expressly defining the term “communication challenge”
  - Provision providing guidance and for attorneys in ascertaining the existence of various communication challenges
  - Provision providing attorneys an ethical course of action once a communication challenge has been ascertained
- **Rule 1.01: Competent and Diligent Representation**
  - Provision defining competent communication
  - Provision detailing requirements for communicating competently and diligently with communicationally challenged clients
- **Comments**
  - Add comments which illustrate and explain an ethical course of action for the representation of clients experiencing challenges with effective communication

# Conclusion