

Quick stats

Average **173 claims** per year

Average cost: **\$6 million** per year

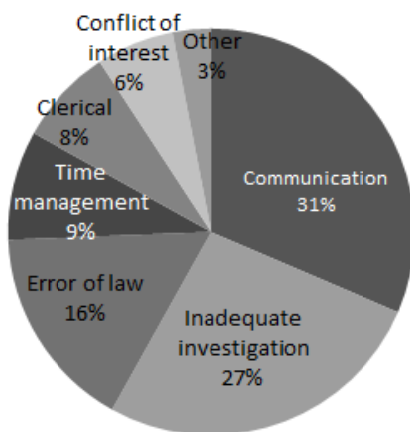
Average cost per claim: \$34,400

#4 claims area by cost

#5 claims area by count

Average of 4 years before claim reported

Common errors



Malpractice claims in wills and estates practice have increased steadily over the last decade, nearly doubling in frequency.

Communications issues (often at the time the will is drafted) are the biggest source of these claims. Too many lawyers are not truly listening to the client's instructions and not probing and questioning the client to uncover facts that may cause problems later. It's important to read between the lines instead of simply filling in the elements of a will template or precedent.

Wills and estates is an extraordinarily complex area. Lawyers who practice in this area must maintain a working familiarity with wide range of statutes and must apply complex provisions of the *Income Tax Act*. Law-related errors are more than twice as likely to occur in the wills and estates area as compared to other areas of practice.

Ensuring you understand the client's needs, knowing the relevant law and avoiding shortcuts can help prevent claims. Detailed documentation of your conversations with, and instructions from, the client can support a lawyer's defence should a claim be made.

See reverse page for the most common wills and estates errors and more steps that can be taken to reduce exposure to a malpractice claim.

Speakers and resource materials

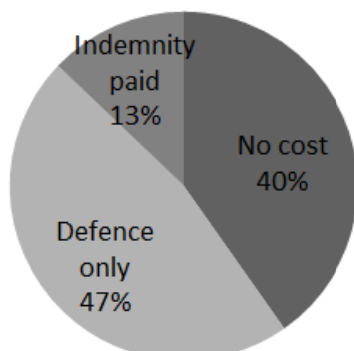
We can provide knowledgeable speakers who can address claims prevention topics. Email practicePRO@lawpro.ca

Visit practicePRO.ca for resources including LAWPRO Magazine articles, checklists, precedents, practice aids and more.

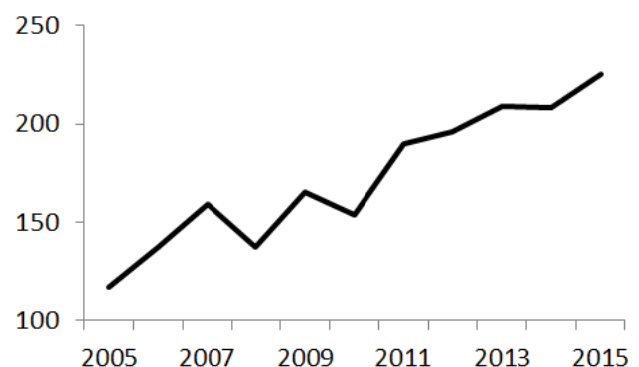
Hot topics in wills & estates law claims

- Proper investigation requires that you ask yourself the question: "what does my client really want?"
- Ask your client what their assets are (and insist on an answer).
- Law-related errors are twice as likely to occur in this area of practice than in others. Make sure you know statute and case law.

Resolution of claims



Count of wills & estates claims



Risk management tips

Ask more probing questions when meeting with a client to prepare a will

Too many lawyers are not asking the questions that could uncover facts that could cause problems later, or making clear to the client what information they need to provide. Was there a prior will? Are all the beneficiaries identified correctly? What about gift-overs? Were all assets identified, and how are they registered? Was there a previous marriage? Ask, ask, ask. And then do a reporting letter to confirm everything that was discussed.

Take time to compare the drafted will with your notes

It sounds like obvious advice, but we see claims where the will did not adequately reflect the client's instructions, or overlooked some important contingencies. Many of these errors could have been spotted by simply reviewing the notes from the meeting with the client. It can help to have another lawyer proofread the will, or set it aside for a few days and re-read it with fresh eyes. When you review it, consider the will from the position of the beneficiaries or disappointed would-be beneficiaries. Ask yourself if you were going to challenge this will, on what basis would you do so?

Confirm as best you can the capacity of the testator and watch for undue influence

With greater numbers of elderly clients, lawyers need to be vigilant about these issues. Meet with the client separately from those benefiting from a will change, and have written proof that the client understands what they are asking and the advice you've given. And while it is difficult to be completely certain of capacity, be sure to document what steps you've taken to satisfy yourself that the client's capacity has been verified.

Don't act for family members or friends

We see claims where lawyers didn't make proper enquiries or take proper documentation because they assumed they had good knowledge of their family or friends' personal circumstances. It's best not to act for them, but if you must, treat them as if they were strangers. And remember if a claim arises it will likely not be from the friend or family member, but from a disappointed beneficiary with no personal relationship with you.

Most common malpractice errors

Lawyer/client communication errors (31%)

- Failure to compare the draft will with the instructions notes to ensure consistency
- Failing to ensure that the client understands what you are telling him and that you understand what he is telling you, particularly if there is a language barrier
- In estate litigation: failing to communicate and document settlement options

Inadequate investigation of fact or inadequate discovery (27%)

- Failure to ask the testator what their assets are
- Failure to ask about the existence of a prior will
- Not digging into more detail about the status of past marital relationships, other children or stepchildren, or whether a spouse is a married spouse or common law spouse

Failure to know or properly apply the law (16%)

- Not being aware of key provisions of the *Income Tax Act* (and not obtaining the appropriate tax advice)
- Drafting a complex will involving sophisticated estate planning when you do not have the necessary expertise;
- Failing to properly execute documents

Time Management and procrastination (9%)

- Missing the six-month deadline for making an election and issuing the necessary application under Section 6 of the *Family Law Act*
- Delay in preparing a will
- Delay in converting assets into cash in an estate administration