

## **Wills and estates claims: best practices for malpractice avoidance**

Malpractice claims grounded in wills and estates practice have increased significantly over the last several years. By area of law, wills and estates is the fifth most common area of claims and is the area of practice in most likely to generate a claim based on insufficient knowledge of the law.

From 2005 to 2009, wills and estates related claims accounted for an average of 7.0 per cent of LAWPRO's claims count (142 claims per year), and 8.3 per cent of our claims costs (\$5.9 million per year). The average cost of resolving a wills and estates claim is about \$42,000.

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*. Just as importantly, wills and estates practitioners must have well-honed interpersonal skills: they must be able to uncover clients' true motivations; assess testators' capacity; and craft legal solutions that support clients' wishes while minimizing the potential for challenges to documents and transactions.

Thriving as a wills and estates practitioner means doing all of these things while avoiding claims. By understanding the malpractice pitfalls and claims trends specific to your area, you will be in the best possible position to avoid a claim.

### ***The most common errors***

Wills and estates malpractice claims are most likely to result from:

- poor communication with the client;
- inadequate discovery of facts or inadequate investigation;
- failure to know or properly apply the law;
- time management errors;
- conflicts of interest; or
- clerical errors or improper delegation.

Figure 1 illustrates the relative proportion of these errors.

Despite our efforts over the years to educate lawyers about the hazards of poor lawyer/client communication, claims flowing from communication problems continue to top the list, representing approximately 36 per cent of errors in wills and estates practice.

While failure to understand or apply the law generates fewer than 10% of claims in any area of practice, this error occurs more frequently in wills and estates than it does elsewhere. An in-depth discussion of the main error categories, along with specific tips for minimizing these errors, follows here.

### ***Communications-related errors***

Lawyer/client communication errors break down this way:

- failure to follow a client's instructions;

- poor or insufficient communication with the client; and
- failure to inform the client of key issues or to obtain the client's consent.

#### *Failure to follow a client's instructions*

In many cases that have led to claims, the will prepared by a lawyer simply did not adequately reflect the client's expressed wishes, or failed to deal with important contingencies. Many of these deficiencies can be avoided by simply reviewing the client's instructions after the first draft of the will is complete, and then proofreading the will with the instructions in mind.

Specifically, the lawyer must:

- compare the draft will with the instructions notes to ensure consistency;
- ensure that the number of parts, in a division of residue, matches the number of beneficiaries, and that the percentages add up to 100;
- ensure that the will includes a full set of dispositive provisions and that gift-over circumstances, the residue clause, and associated instructions are clear and unambiguous; and
- ensure that legacies do not exceed the funds in the estate.

An ideal practice for ensuring a will is clear and complete is to have another lawyer read it over. If there is no-one available to do this, you should set the will aside for a day or so and then re-read it with fresh eyes.

In reviewing the will, consider the provisions from the perspective of beneficiaries, or disappointed would-be beneficiaries. If you wanted to challenge this will, on what basis would you do so? Revise accordingly.

#### *Poor communication with client*

Establishing a relationship of trust and mutual respect with the client helps prevent both errors and the claims that flow from them. The nature of wills and estates work places an additional obligation on lawyers to get to know clients and their needs, because it is the lawyer's duty to assess subjective human factors like the client's degree of capacity and the *bona fides* of the client's personal advisors (for example, those who hold power of attorney).

Here are some of the specific problems that may arise in the lawyer-client business relationship:

- allowing ambiguity to arise about for whom the lawyer is acting: who is the client, and in what capacity? (For example: is it the executor as representative of the estate, or the executor personally?);
- in estate litigation: failing to communicate and document settlement options;
- in preparing a will: problems can arise where the lawyer relies on the testator's information without viewing supporting documentation. If it is necessary to do this, the lawyer should document this reliance (for example, if the testator advises that her estate is the beneficiary of her insurance policies, and the lawyer must

- rely on those assets when planning dispositions, the lawyer should confirm his reliance on the testator's information in the reporting letter); or
- 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.

*Failure to inform a client or to get consent*

Some claims arise because a lawyer has either failed to properly inform the client of key issues, or has failed to obtain the client's consent to a particular course of action.

Examples of this type of error in the wills and estates context include:

- Failing to advise a client who commences estate litigation of the potential that the client will be held personally liable for costs. It is no longer guaranteed that the estate will be responsible for all costs in estate litigation.
- Failing to advise an executor of the deadline for filing tax returns.
- Failing to clarify which task are the lawyer's responsibility and which are the executor's, in the administration of an estate.

*Documenting meetings, instructions, advice, and work helps limit exposure to communication-based claims*

Proper documentation of conversations with the client and work completed on the file is an essential practice habit. Detailed documentation can both prevent communications-related errors and support a lawyer's defence should a claim be made.

Communications-based claims frequently require courts to consider the lawyer and the client's (or disappointed beneficiary's) conflicting evidence about what was said or done. These claims can be difficult to defend successfully, because a court will often prefer the claimant's testimony, since the claimant – who is not involved in dozens of estates matters each year – will almost always have a better recollection of events. These disputes come down to credibility. Unfortunately, we frequently find inadequate documentation in the lawyer's file to support the lawyer's version of what occurred. Many files that lead to claims contain no correspondence or reporting letters whatsoever.

For your protection, each file should contain:

- notes describing the information received from the client;
- notes describing the advice given based on the client's information;
- details of the client's instructions; and
- notes describing issues encountered in the work, details of communication of those issues to the client, and actions taken to resolve the issues.

This documentation can be in the form of notes to file, interim or final reporting letters, or even e-mail messages.

As an additional strategy, you should consider incorporating more detail into your docket. "Conference with client re review of draft will, including provisions re cottage" is much better than just "Conference with client re draft will."

A special caution is warranted for matters involving family members and close friends. LAWPRO does see claims on these matters, and often we find almost no documentation in the file. This probably happens because the lawyer is familiar with the personal circumstances of the client and fails to make and document all appropriate enquiries. It would be best not to act for these parties at all; but, if you feel that you must, treat them as though you had never met them before. Remember, often it is not your client who is the potential claimant, but rather a beneficiary or disappointed beneficiary, with whom you have no personal relationship.

### ***Inadequate discovery of facts or inadequate investigation***

The second most common malpractice error in the wills and estates area is inadequate discovery of facts or inadequate investigation.

It's important to remember that most clients who retain lawyers to draft wills do not simply want to give instructions for the lawyer to blindly follow. Instead, most clients expect to receive knowledgeable advice about how best to achieve their estate planning goals. A lawyer cannot provide this advice without having a clear understanding of the client's circumstances and objectives. To develop that understanding, the lawyer must make -- and document -- detailed inquiries establishing:

- a testator's capacity (or lack thereof);
- the absence of undue influence;
- the details and value of the testator's assets;
- details of the testator's family, including marital history: have there been any previous marriages? Are there family law contract terms that must be taken into account?
- details of other dependents and relationships (for example, is there an undisclosed common law relationship? Is the testator *in loco parentis* to a dependent?)
- the identity of beneficiaries under insurance policies;
- accurate names and details of will beneficiaries (especially charities); and
- the reasons behind a request for changes to a previous will.

Proper investigation requires that you ask yourself the question: "what does my client really want?" Sometimes answering that question will require reading between the lines instead of simply filling in the elements of a will template or precedent.

To investigate and counter undue influence, the lawyer must arrange to meet with the testator alone before the will is finalized.

Take the time to exercise independent judgment when considering the information provided, especially where there are signs that something does not add up. If any aspect of the instructions seems unusual or unexpected, it is the lawyer's duty to ask clarifying questions.

Be careful to make these same inquiries even when acting for friends and family. It is dangerous for the lawyer to assume that he or she already knows the answers to important questions, and it is equally dangerous to refrain from asking questions out of an

unwillingness to pry. As noted previously, it is a lawyer's duty to handle work for friends and family as though it were provided to an arms-length client.

Finally, don't take shortcuts: they can and will come back to haunt you. Lack of attention to detail may also occur due to time pressures created by lawyers, clients or the courts. This lack of attention often leads to forgotten details or drafting errors. Take the time to do the job right, and consider setting the work aside for a day or so before finalizing it to allow the proper perspective for review.

While the above list will assist in uncovering most issues, there are two specific investigation pitfalls worth noting. Be careful to avoid these:

- Poorly-planned interim distributions can leave insufficient money in the estate to cover taxes. Err on the side of caution.
- When acting for the spouse of a deceased, be sure you have sufficient information about the deceased's net family property before making a *Family Law Act* election. If necessary, consider obtaining an order extending time for making the election.

### ***Failure to know or properly apply the law***

Wills and estates is one of the most complex areas of practice. It involves many different federal and provincial statutes and voluminous case law. The third most-common type of error in the wills and estates area is a failure to know or apply the law. In fact, law-related errors are more than twice as likely to occur in the wills and estates area as compared to other areas of practice.

The law-related mistakes we see most frequently are:

- in estate administration, 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; or
- making distributions without ensuring that sufficient funds are held back for taxes.

### ***Time-and deadline-related errors***

Time and deadline-related errors are the fourth most common error we see in the wills and estates area. These errors fall into one of two distinct categories: missing deadlines or limitations; and failing to complete tasks in an appropriate amount of time (procrastination).

Commonly-missed limitation periods include:

- the six-month deadline for making an election and issuing the necessary application under Section 6 of the *Family Law Act*;

- the six-months-from-probate deadline for bring an dependant's relief claim under the *S.L.R.A.*; and
- the two-year deadline to sue a trustee under the *Trustee Act*.

The procrastination-related errors we frequently see include:

- delay in preparing a will. Liability will depend on a number of factors such as complexity of the will, length of time between instructions and preparation of the will and whether you were aware of any urgency;
- delay in converting assets into cash in an estate administration, assuming that it was part of your retainer; or
- delay in distribution of estate assets.

Before closing and storing a file, it is good practice to review the file to ensure there is no unfinished work. If there is, you should ensure that you complete the outstanding work, if it is part of your retainer; if it is not, confirm in writing to the client that it is the client's responsibility to complete the work.

### ***Clerical and delegation errors***

A fairly steady percentage of claims in the wills and estates area result from errors classified as clerical or flowing from improper delegation.

Wills are complex documents that, in order to properly reflect the testator's intention, must be free of clerical errors and ambiguous language. While it is useful to ask a person who did not draft the will to review it, the lawyer should always be certain to proofread the final version.

When proofreading, be sure to check for:

- properly-spelled names of beneficiaries, including charities;
- accurate numbers and figures, especially percentage shares;
- missing, duplicate, or inconsistent terms; and
- lack of proper execution.

Where a lawyer delegates aspects of wills and estates work to employees, that work must always be carefully checked before it is finalized. As noted earlier, wills and estates work requires the exercise of independent legal judgment informed by significant expertise. While it may be appropriate to delegate certain aspects of legal work to employees, it is the lawyer's duty to properly supervise and check that draft work.

In some cases, aspects of wills and estates work may be delegated to outside professionals: for example, to tax or finance specialists. If the work of these individuals is being passed along to the client as included in the wills and estates lawyer's work product, it must be checked as carefully as if it were the lawyer's own work, and to the extent that any part of it is outside the lawyer's expertise, the client should be so informed.

### ***Conflicts of interest***

The wills and estates area is not immune to conflicts of interest claims. These claims tend to be very expensive to resolve as they involve complex issues. They often arise when a lawyer who has done extensive work for more than one member of a family, usually also in the context of doing work for a family business, attempts to act for one of the family members on a wills or estates matter.

To avoid a conflict:

- Follow firm conflicts checking procedures religiously.
- Do not ignore conflict red flags due to poor judgment or greed.
- Listen to your instincts. Ask yourself: who is my client? Is there a real or potential conflict?
- Because you may not be able to objectively judge your own conflicts, get input from someone who is outside the matter.
- Finally, take appropriate action when real or potential conflicts arise: decline the retainer or get off the matter if it is appropriate to do so, even if it means turning down work from a good client or a matter that will involve substantial fees.

A few specific conflict of interest “danger zones” are as follows:

- acting for more than one party: for example, where the lawyer has done other work for members of a family business and then is retained to prepare the will of one family member;
- lending estate funds to other clients;
- a lawyer is retained by an executor in relation to a will that the same lawyer prepared (especially where there is any ambiguity in the will); or
- breach of fiduciary duty in the transfer of a matrimonial home.

When preparing a will consider, from a conflicts point of view, the likely reaction to the will from beneficiaries and disappointed beneficiaries. This step may help you to foresee potential claims and to take steps to prevent them.

### **Should a problem arise**

#### ***Even if no allegations are made...tell us!***

If you become aware of a challenge on the basis of lack of testamentary capacity or undue influence to the validity of a will that you prepared, you should immediately report it to LAWPRO, even if no allegations of negligence are made.

Remember: if a will is being challenged, the appointment of executors under the will is also thrown into doubt.

Putting us on notice will help us help you, and will most likely help reduce the damages on any potential claim. We may retain counsel to assist you and protect your interests, including assisting you in drafting an affidavit and attending with you if you are examined as a witness. It is worth noting that we close about 84 per cent of our wills and estates claims without any indemnity payments.

***If you are asked to surrender a file***

If you are asked to surrender a wills and estates file, you should immediately contact LAWPRO. For privacy reasons, it is best not to turn a file over unless and until a court order requires you to do so. We can assist in ensuring that any court order is worded appropriately to protect your interests.

***Your marching orders***

The changing demographics of the population at large mean there is more work in the wills and estates area and, at the same time, more exposure to malpractice claims. You can't totally eliminate the risk of a malpractice claim. However, you can substantially reduce your risk of a claim by improving your lawyer/client communications and documenting your work. Review and consider the types of errors that occur in the wills and estates area and set aside time to integrate the various risk management strategies outlined above into your practice.

*Deborah Petch is Claims Counsel at LAWPRO. Dan Pinnington is Director of practicePRO, LAWPRO's claims prevention initiative.*

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