Wills and estates law:

Claims slowly on the increase


Deborah Petch

In both count and cost, wills and estates-related legal malpractice claims have slowly increased over the last several years. By area of law, wills and estates is the fifth most common area of claims: Only litigation, real estate, corporate and family claims are higher.

Over the last five years, wills and estates-related claims averaged 6.0 per cent of LawPRO's claims count (112 claims per year), and 5.4 per cent of our claims costs ($3.9 million per year). On average, resolving a wills and estates claim costs LawPRO $34,404.

This article examines the reality behind the numbers: It highlights the most common errors, and the steps you can take to reduce the likelihood of a claim.

The most common errors

In the wills and estates area, the most common causes of claims are the following:

- lawyer/client communication failures;
- inadequate discovery of facts or inadequate investigation;
- failure to know or properly apply the law;
- time and deadline-related errors;
- conflicts of interest; and
- clerical/delegation.

Figure 1 illustrates the relative proportion of these errors. What is striking to most lawyers is that law-related errors rank third. Lawyer/client communication-related errors are actually the most common, representing almost 40 per cent of the errors in the wills and estates area.

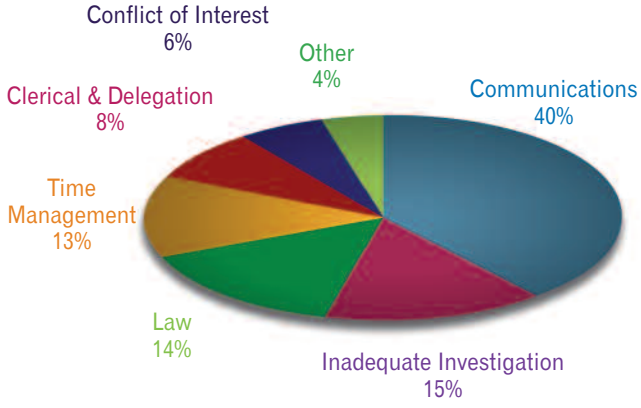
Communications-related errors

Lawyer/client communication-related errors fall into three categories:

- A failure to follow a client's instructions;
- Poor communication with the client; and,
- A failure to inform the client or obtain the client's consent.

A review of common fact scenarios for each type of error will give you a good understanding of why these errors happen and the steps you can take to avoid a communications-related claim.

Figure 1.
Wills & estates by type of error (2001 to 2005)



Failure to follow client's instructions

A "failure to follow client instructions" is the most common communications-related error. It really amounts to nothing more than a simple failure to follow a client's specific instruction. The most frequent scenarios for this error (and what you can do to avoid it) include:

- Not comparing the drafted will with your will notes to ensure that they match. Make and take the time to cross-check the draft will with your notes.
- Not ensuring that the number of parts, in a division of residue, matches the number of beneficiaries, or that the percentages add up to 100. Do the math.
- In the same vein, failing to proofread the drafted will to ensure, as much as possible, that there is no ambiguity in the wording. If it is not practical to have someone else in your office review the will, then try to review it yourself a few days after the initial proofreading so that you might be able to look at it with fresh eyes.
- Failing to proofread the will to ensure that there are dispositive provisions in it and that there is a residue clause.

Poor communication with client

Poor communication with client is the second most common communications-related error. Common scenarios for this error include:

- Failing to delineate for whom you are acting: e.g., the executor as representative of the estate or the executor personally.
- In estate litigation, failing to document options available to the client regarding settlement.
- In preparing a will, if you are relying on information provided by a testator, it would be best to confirm in writing that reliance. For example, if the testator advised that his estate is the beneficiary of his insurance policies, and you are relying on those assets for making the dispositions the testator wants, confirm this in your reporting letter.
- 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 client or get consent

The final type of communications error involves a failure to obtain the client's consent or to inform the client. Examples of this type of error include:

- In estate litigation, failing to advise the client of the possibility of his personal liability for costs. It is no longer a certainty that the estate will be responsible for all costs in estate litigation.
- Failing to advise the executor of the deadline for filing tax returns.
- Failing to clarify what steps you will be taking and what steps are the responsibility of the executor, in the administration of an estate.

Avoiding communications errors

When it comes to avoiding or reducing the likelihood of a communications-related claim, the importance of putting things in writing cannot be over-emphasized. While the failure to have written confirmation of instructions and advice is not negligence in and of itself, such written communication can be extremely helpful in defending you in the unhappy event that a claim is made against you. Why? Because more often than not, this type of claim involves the lawyer recalling that one thing was said or done, or not said or not done, and a disappointed beneficiary that alleges something different. This type of claim is very hard for LawPRO to defend successfully. At the end of the day it essentially comes down to a question of credibility. Unfortunately, we frequently find inadequate documentation in the lawyer's file to back up the lawyer's version of what occurred. All too frequently, we see files with no correspondence or reporting letters whatsoever.

Fortunately this error is one of the easiest to prevent. You can significantly reduce your claims exposure by documenting your work. Confirm the information that your client provided to you, your advice to the client, the client's instructions to you, and what steps were taken on those instructions. Document the time spent reviewing the provisions of the will, including what issues were discussed. This can be done in your notes, and in interim or final reporting letters, or even in an e-mail message.

Even taking a few seconds to make more detailed dockets can be a lifesaver. "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: We do see claims on these matters, and quite often 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 them; 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, rather it is 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 an "inadequate discovery of facts or inadequate investigation."

This error has become much more frequent over the last eight years, and examples include:

- Not adequately inquiring, or documenting that inquiry, into the testator's mental capacity. Ask the questions, and make note of the answers, regarding general knowledge, assets, relatives, etc.
- Failing to document your inquiry into the possibility of undue influence.
- Failing to meet with the testator alone. Ask your client the usual questions to satisfy yourself that there has been no undue influence.
- In administering an estate, making distributions without ensuring that sufficient money is held back to pay the taxes. Err on the side of caution when making an interim distribution.
- In acting for the spouse of a deceased, making a *Family Law Act* election prematurely, before sufficient information is known about the deceased's net family property. If necessary, consider obtaining an order extending time for making the election.
- Not making the usual inquiries when acting for friends and family. The best advice would be not to act for family or friends, but if you do, be extra vigilant about documenting the answers to your inquiries.

Don't take shortcuts – they can and will come back to haunt you. Lack of attention to details also arises when there are time pressures created by lawyers, clients or the courts – and details get missed or drafting errors occur. Take the time to do the job right, even if it takes a bit longer or involves coming back on another day.

Failure to know or properly apply the law

Wills and estates is one of the more 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. 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 most frequently see are the following:

- In estate administration, not being aware of some 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.

Time and deadline-related errors

Time and deadline-related errors are the fourth most common error we see in the wills and estates area.

They fall into one of two distinct types: missing deadlines or limitations; and just not completing tasks in an appropriate amount of time (aka 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-month-from-probate deadline for bringing a dependant's relief claim under the *S.L.R.A.*
- The two-year deadline to sue a trustee under the *Trustee Act*

The procrastination-related errors we frequently see include:

- Delay in preparing the 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.

As a piece of general advice, it would be a good idea to review your file before closing it and/or putting it into storage to ensure that nothing still needs to be done. If there is, you should ensure that either 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.

Conflicts of interest

The wills and estates area is not immune to conflicts of interest claims, and 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 many members 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.

When it comes to avoiding conflicts, you need to be vigilant from the very start of the matter. Follow firm conflicts checking procedures religiously. In most cases conflicts checking systems catch potential conflicts, and the warning is ignored because of poor judgment and/or greed. Don't fall into this trap – listen to your instincts. Ask yourself – who is my client? Is there a real or potential conflict? Also, remember that you probably can't objectively judge your own conflicts – get input from someone who is outside the matter.

Lastly, take appropriate action when real or potential conflicts arise. This includes declining the retainer or getting 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.

When preparing a will, from a conflicts point of view and otherwise, think of what will happen when the testator client dies and what the reaction will be of the beneficiaries and wannabe beneficiaries. That may help you to foresee potential claims and thereby take steps to prevent claims from being made, or at least from being successful.

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

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

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. And remember, best practice is not to turn your file over without a court order. We can assist in ensuring that the court order is worded appropriately to protect your interests. It is interesting to note that we close about 85 per cent of our wills and estates claims without any indemnity payments.

Your marching orders

With the changing demographics of the population at large, there is more work in the wills and estates area, and at the same time, more exposure to a malpractice claim. 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.