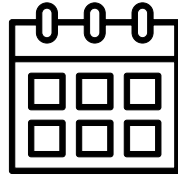
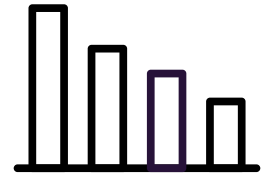


**# 3 claims area by cost**

- average total cost \$10.7 million per year

**Average 297 claims  
per year****# 3 claims area by count****RISK MANAGEMENT TIPS****Ask client probing questions**

Some lawyers are not asking the questions that could uncover facts that could cause problems later. They also do not make it clear what information the client needs to provide. Are all the beneficiaries identified correctly? What about giftovers? 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 can be 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 reread 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 the 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 make 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. 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.

# COMMON MALPRACTICE ERRORS

## Inadequate investigation - 37%

- 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

## Communication - 25%

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

## Errors of law - 13%

- 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

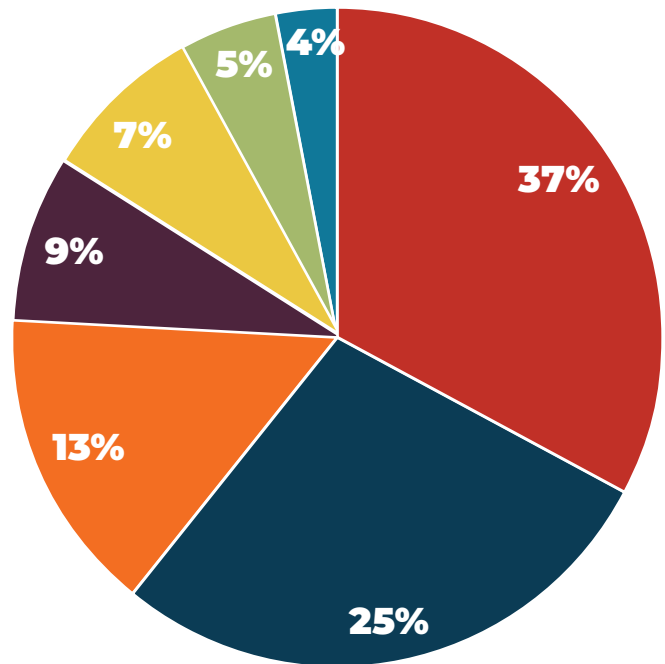
## Time management - 9%

- 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

## Clerical and delegation - 7%

## Other - 5%

## Conflict of interest - 4%



Visit [practicepro.ca](https://practicepro.ca) for resources including LAWPRO Magazine articles, checklists, precedents, practice aids and more

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\*All claim figures from 2012-2022. All cost figures are incurred costs as of April 2023

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