LawPRO®

Toronto Lawyers Association

Practice Tips: Wills & Estates

March 7, 2024

Program materials

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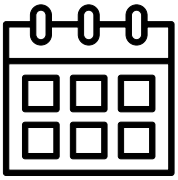
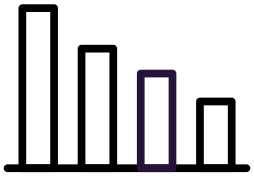
LawPRO® WILLS AND ESTATES CLAIMS FACT SHEET

 # 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

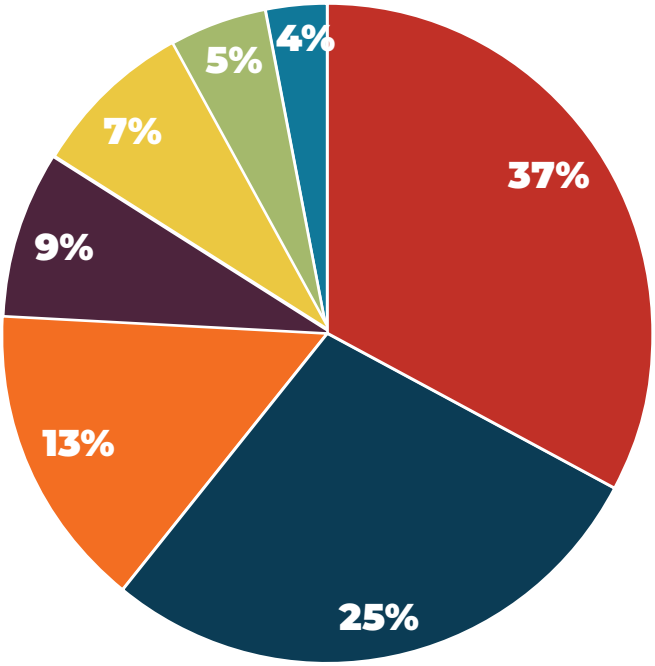
Time management - 9%

- 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** for resources including LAWPRO Magazine articles, checklists, precedents, practice aids and more

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

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

Common practice pitfalls:

How to avoid them

LAWPRO was created to insure lawyers against legal malpractice claims. Most claims are brought by a lawyer's client and include an allegation that the lawyer made a mistake or did not meet the standard of care expected of them when delivering legal services.

Our records suggest that almost half of all lawyers will be the subject of a claim at one point in their career. Malpractice claims can be stressful, can hurt your reputation, and can be costly.

Understanding the common causes of claims so that you can build risk management skills early in your career is your best line of defence.

What kinds of mistakes lead to claims?

Students in the midst of law school, with its mountain of reading on cases and substantive law, might be surprised to learn that "errors of law" are not the biggest pitfall to watch out for in the world of private practice. In fact, only about 12% of LAWPRO malpractice claims are caused by lawyers getting the law wrong, except in very complex areas like family or tax law.

So, if knowing the law isn't the problem, what *is* the danger that new lawyers should be on the lookout for? You could call it "human error": breakdowns in communication, poor calendaring and procrastination, and not digging deeply enough into a client's matter. These types of errors make up around 68% of the claims LAWPRO sees.

Students may not know what area of law they will ultimately practise in, but the causes of claims are remarkably similar in all types of practice, firm size, and geographic location. Here's an overview of the biggest pitfalls:

Client communication

In almost every area of practice, the number one cause of claims to LAWPRO is a breakdown in lawyer-client communication. This ought to be the easiest type of error to guard against, but it is also the most common. Often, these claims arise because the lawyer and client disagree on what was said or done – or not said or done – sometimes because communications are rushed. This is partly the result of lawyers being busier than ever, and partly due to clients who expect fast replies and 'round the clock' responses from their lawyer.

However, much can be done at every stage of the matter to prevent these types of claims. Right from the outset, a well-drafted retainer letter can set the client's expectations of how the matter will proceed and what the lawyer will (and won't) do for them.

As the matter progresses, it is important to document conversations with the client, your advice, and the course of action the client wishes to pursue. This documentation can be a lifesaver in the event of a malpractice claim. Clients may later say they asked the lawyer to do X and it wasn't done; or the lawyer may have done Y and the client claims they didn't authorize this course of action. If there is no documentation of lawyer–client conversations, the claim then turns on credibility, and LAWPRO's experience has been that courts are more likely to believe the client's more specific recollections over the lawyer's typically vague or non-existent memory.

It's an unfortunate fact that while email and other electronic media provide more ways than ever for a lawyer to interact with clients, all these lines of communication seem to result in even more misunderstandings. Clients or lawyers read things into emails that aren't there, miss the meaning of what was said, or read between the

lines and make assumptions. Face-to-face communication is the best way to ensure miscommunications don't happen. If meeting in person isn't possible, at least pick up the phone to avoid misunderstandings when important matters need to be discussed.

Clients whose expectations have been adequately managed are less likely to turn on their lawyers (rightly or wrongly) than those who are taken by surprise by the result of their case or legal fees. Visit practicepro.ca for our resources on managing lawyer–client relationships.

Inadequate investigation

This is a type of error closely related to poor communication and is best described as lawyers not taking the time to uncover all the facts or develop sufficient understanding of a client's matter. It can be considered a symptom of "smartphone legal advice": quick questions and quick answers by lawyers and clients who are both in a rush. These claims go to the very core of what lawyers are supposed to do for their clients – give legal advice based on the client's specific situation – and involve the lawyer not taking extra time or thought to dig deeper and ask appropriate questions about the matter.

These claims can arise in any area of law. We see them most commonly in busy real estate practices, where rushed lawyers miss deficiencies in a condo status certificate, misread a survey, or don't find out what long-term plans a client may have for a property (so that they can ensure those plans are viable); in litigation it could mean not making a reasonable effort to identify all the parties to an action within the limitation period; in wills and estates law it could mean not inquiring into the capacity of an elderly client or failing to ask about the existence of previous wills.

The best way to avoid these claims is to simply slow down. Take the time to read between the lines so you can identify all appropriate issues and concerns. Ask yourself: What does the client really want? Does everything add up? Are there any issues or concerns that should be highlighted for the client? If something doesn't add up, dig deeper.

One way to ensure that the right questions are asked on a matter is to make use of the practicePRO program's articles and checklists. At practicepro.ca/checklists you'll find checklists for domestic contract matters, commercial transactions, and independent legal advice, as well as claims prevention articles from *LAWPRO Magazine* at practicepro.ca/lawpromag

Time management

It seems to be human nature to put off tasks until the deadline is looming (as any student pulling an all-nighter will attest). It's no different for lawyers, which makes missed deadlines a major source of LAWPRO claims. This is most common in plaintiff litigation, which has strict limitation periods and document filing deadlines to manage.

While every lawyer seems to have a dusty file or two in their office that they never quite get around to, time management claims are not always the result of simple procrastination. In some cases the lawyer fails to ascertain the limitation period on a matter, or even if they do know, fails to properly calendar the limitation period or act when it comes up.

There are a number of things you can do to avoid missing a crucial deadline. Familiarize yourself with the *Limitations Act, 2002* by using the practicePRO program's limitations resources at practicepro.ca/limitations. Use practice management software with tickler systems to alert you to approaching deadlines. Be aware of the danger of the registrar dismissing an action for delay under Rule 48 of the *Rules of Civil Procedure*.

Finally, building in a one- or two-day cushion on deadlines and reminders can help prevent this type of error when there are unexpected problems that stop you from meeting a deadline for a filing (e.g. ice storm; or taxi in an accident on the way to courthouse on last day to file).

These are general descriptions of the common causes of LAWPRO claims. If you want to learn more about malpractice claims in particular areas of law, you'll find a wealth of articles at practicepro.ca. There are detailed examinations of claims causes in several areas of law, as well as articles featuring advice from LAWPRO's claims counsel on the common mistakes they see lawyers making and how to avoid them. ■

Tim Lemieux is Claims Prevention & Stakeholder Relations and Claims Analyst at LAWPRO.

CONFLICT OF INTEREST TIPS

A conflict of interest happens when there is a substantial risk that a lawyer's duties to a client will be compromised by the lawyer's own interest or the lawyer's duties to another client, former client, or another third person.

1. DEVELOP AND FOLLOW A CONFLICT CHECKING SYSTEM

- Every new client means new potential conflicts. Implement and follow a rigorous conflicts-checking system that applies to every new client and new file. Also, make sure there are not conflicts with other lawyers at the firm, or with your own business interests. You can't always objectively judge your own conflicts, so it may be a good idea to get the opinion of someone outside the matter.

2. KNOW WHO YOUR CLIENT IS

- Ask yourself "who is my client"? Some family or business disputes find lawyers taking instructions from multiple individuals. Ensure you know which natural or corporate persons you represent in all circumstances. Send clients for ILA when appropriate Remember that conflicts can unexpectedly arise in the middle of a matter.

3. DON'T ACT FOR FAMILY MEMBERS OR FRIENDS

- It's best not to act for family or friends. They are too close to you. It increases the risk that you may have an interest in the matter, be unable to remain objective or manage your client's expectations. We see claims where lawyers don't make proper enquiries or proper documentation because they assumed they knew their family or friends' personal circumstances or didn't treat their friend or family member's matter as they would normally. It's best not to act for them, but if you must, treat them as if they were strangers.

4. DON'T BE AFRAID TO WALK AWAY

- When a real or potential conflict of interest situation arises, it is critical that a lawyer immediately informs the client, and either withdraws, or proceeds with the client's consent where this is permitted.

5. SEEK FURTHER GUIDANCE WHERE NECESSARY

- For further guidance, consult the Law Society of Ontario's Steps for Dealing with Conflicts of Interest Rules resource, the Canadian Bar Association Conflicts of Interest toolkit and our Managing Conflict of Interest Situations booklet.

LEARN MORE ABOUT AVOIDING CONFLICTS AND MANAGING YOUR RISKS:
See the "**Malpractice Claims Fact Sheets**" and the praticePRO **conflicts of interest webpage.**

Ask critical questions to head off will challenges

We all know it's impossible to write an effective will for a client without investigating the details of the client's circumstances and estate.

While this conclusion may seem trite, in recent years LAWPRO has seen an average of 60 claims per year alleging that the lawyer did not investigate key details. This specific error has roughly doubled in the last decade. These claims generally arise after a bequest fails because an asset or a beneficiary has been misdescribed, or when a would-be beneficiary asserts a right that the lawyer didn't contemplate when drafting the will.

Asking critical questions before drafting both ensures that the will accurately reflects the testator's intentions, and − provided the answers to the questions are documented − minimizes the lawyer's risk of a challenge that leads to a claim. What information gaps are most likely to lead to claims?

Spousal and dependent relationships

It's not enough for a lawyer to ask a testator for the spelling of a spouse's name. The lawyer must ask about the client's entire history of marriages and cohabitations to ensure that there are not multiple individuals who could be interpreted as "spouses." It's necessary to know whether the testator has ever made a mutual or mirror will with anyone, whether a property the testator wants to include in the will is jointly owned with anyone (spouse or not), and whether any property meets the definition of matrimonial home under the family law.

The same care must extend to questions about children: are they minors, or adults? Are any of these children stepchildren, adopted, or estranged? Are there adult dependents − for example, a child with a disability? Are there any other individuals – a nephew, a partner's child – who are financially dependent on the testator? When there are children with a former spouse, there may be support obligations under a separation agreement or court order that need to be reflected in the will.

Often, arrangements are made to fund support through life insurance or other investments; but for this to occur, the investment must have an appropriate beneficiary designated – something the lawyer should take steps to confirm.

Ownership and value of assets

When a will mentions specific assets, it is up to the lawyer to confirm that they are capable of being passed through the will. In some instances, a testator has attempted to bequeath assets that turned out to be jointly owned with another person, or owned by a corporation rather than personally. To avoid this, the lawyer can perform searches to confirm ownership. Confirmation of ownership details is also prudent when it comes to corporate shares.

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In other cases, the value of assets is important; for example, where the testator is attempting to divide an estate in specific proportions. Ensuring that the testator's intentions are honoured may require the formal valuation of assets, and it's up to the lawyer to recommend this (and if the testator declines, to make a note in the file). It's also important to ask about mortgages, liens, or other debts that may reduce the value of assets.

Critical clerical errors

Often, the questions we fail to ask are the ones for which we think we already know the answers. The resulting oversights include getting a beneficiary's name wrong, or misdescribing a bequest. For example, a gift to "St. Pat's" may lead to a tug-of-war between St. Patrick's Cathedral, St. Patrick's community school and St. Patrick's animal refuge − all of which may operate in the deceased's hometown! Where a charity is named a beneficiary, the lawyer must take steps to record the charity's correct legal name (perhaps including an address for good measure). Similarly, an ambiguous description of assets can lead to a challenge: where a testator who spends summers in a mobile home on the grounds of a mobile home park of which he is part owner leaves his brother "my share in the trailer park," does the gift include the testator's mobile home?

Influence and capacity

Perhaps the hardest questions for a lawyer to ask relate to testator capacity and potential undue influence. Getting to the bottom of either problem requires a lawyer to listen to and act on gut instincts.

Uncovering undue influence may be best approached indirectly: for example, by asking the reasons for instructions to deviate from a prior will. When listening to the explanation, pay attention to who seems to be left out of the story. That individual is the person most likely to challenge the new will. If the testator protests this kind of probing, the lawyer should explain that it's essential to document reasons for "glaring omissions" at the time the will is drafted.

When capacity is in question, the situation is even more delicate: suggesting that the client submit to an assessment means inviting the possibility that the lawyer will not be able to draft the will that has brought the client into the office in the first place. Ignoring doubts about testator capacity, however, is not the answer. The *Rules of Professional Conduct* require a lawyer to take appropriate steps when dealing with a client under a disability. A sincere attempt to grapple with questions of capacity and to document observations that support capacity is more useful, in the long run, than a file that is silent on the issue. If the testator's cognitive abilities are in decline, the family already know it, and a challenge is likely.

Nora Rock is Corporate Writer and Policy Analyst at LAWPRO.

Preventing Will drafting errors

Ian Hull

There is little doubt that, with the onset of the significant transfer of wealth in Canada, we will see an increase in the number of negligence claims against lawyers doing Wills and Estates work.

That trend is already making itself felt: Wills and Estates claims now represent a significantly larger proportion of claims received by LawPRO than in the past. In 2003, for example, Wills and Estates claims accounted for seven per cent of all claims reported, compared to less than three per cent in 2002. Approximately 22 per cent of all claims received by LawPRO relate to circumstances where the solicitor fails to follow instructions from his or her client. Furthermore, poor communication on the part of lawyers results in approximately seven per cent of LawPRO's claims. Interestingly, only six per cent of claims result from the failure of a solicitor to know or apply the law.

Fundamental to any failure to follow instructions is the timely completion of the client's instructions. Approximately 40 per cent of all claims received by LawPRO relate to issues directly linked to alleged procrastination on the part of the lawyer handling the matter.

In the area of Wills and Estates and Will drafting, the above-noted trends hold true. In my experience defending lawyers, perhaps the most significant source of solicitor's negligence claims results from slip-ups between the time the client leaves the office and the time the Will is executed. The notes a lawyer makes are usually accurate and comprehensive; but something happens along the path to executing the Will and mistakes are made. It may be as simple as the solicitor making a note, at the initial meeting with the client, that the family cottage is to be divided among "my children 'A', 'B' and 'C'" and the Will ends up being signed to include a gift of the cottage to "A" and "C". Omitting "B" was not done purposely; when the Will was executed by the client, everyone in the drafting process, including the client, missed the fact that "B" was not included. But the mistake was made, and the consequences could be significant.

Many of the drafting errors that I have seen could have been avoided if the drafting solicitor simply used the notes made when receiving instructions, and then incorporated an extra checking mechanism along the path to signing a correctly drafted Will.

Practical suggestions

We are all familiar with the numerous helpful client information checklists that exist in regard to taking instructions for Will

drafting. However, these information gathering checklists are not always used and it is almost always the case that handwritten notes are made at the time that instructions are received from the client.

In my view, there are practical drafting steps that can be incorporated in the process of receiving instructions, reviewing the Will document, and attending to its execution.

While one always needs to be mindful of the economics of drafting Wills, the following is a summary of practical steps that may assist in ensuring that your handwritten Will notes make it onto the typewritten pages of the final Will.

1. Initial Meeting with Client and Legible Note Taking

When we receive instructions for a Will, we are expected to take careful notes. Throughout the Will drafting process the notes that you make at this first interview need to be referred to time and time again. As such, it is essential that the notes are accurate, neat and as comprehensive as would be expected in the circumstances. For example, if you are drafting mirror Wills for a husband and wife with a gift-over to their children, your notes will be much less comprehensive than if you are meeting with an elderly client who wants to write one of her children out of her Will.

At the initial meeting with your client, it is often useful to work from an existing information checklist that you are most comfortable with, and to use it as your starting point when reviewing the various estate planning issues and the wishes of the client.

However, as an additional check, at the end of the meeting, I take five minutes with the client to review my notes taken during the meeting, to ensure that I have understood the instructions clearly. Furthermore, this gives me an opportunity to review my notes with the view to ensuring that they are both complete and readable for both my staff and I in the upcoming drafting process.

The next step in the Will drafting process is to meet with my assistant to review the instructions, and guide that individual through the actual drafting process. Once the Will is drafted, I check it over and send a draft copy of the Will to the client for careful review.

In my cover letter I include a short summary of the client's general instructions, including an overview as to the proposed disposition of the assets on death. I also include a glossary of terms so that the client can better understand the terminology in the review process. The glossary terms I use can be found in the Bar Admissions materials. After the client has reviewed the Will, if there are further changes, they are incorporated into the Will, and then I proceed to have my assistant arrange for a meeting at my office to review the Will with the client and have it executed.

2. Will signing date

Before the final meeting with the client, I always have my assistant set aside 15 minutes prior to the meeting for me to take one more look at the Will document. I then meet with the client and take the opportunity to work from my original handwritten notes to ensure that I have followed the client's instructions. I take the opportunity to review the Will document in some detail to ensure that the client understands the Will provisions and that I have correctly identified and spelled the names of the beneficiaries, guardians and executors.

I also pull out my copy of the glossary of terms I have provided and ask if the client has any questions regarding the terms used in the Will.

It is at this stage that I have another opportunity to go back to my notes to ensure that what I wrote down at the initial meeting has indeed ended up in the Will itself.

I then attend to the execution of the Will and, to ensure that the formal validity of the document is preserved, I have my assistant (the second witness) remain in the room at all times with me during the execution ceremony so that there is no doubt as to the propriety of the execution. I use the same procedure of execution each time I have a Will signed. I complete the meeting by attending to the signing of the Affidavit of Execution.

3. Reporting letter

After the Will has been executed and it has been determined as to whether or not my client wishes me to keep the original or take it with him or her, I prepare a comprehensive reporting letter.

In my reporting letter I review the issues discussed and the instructions received.

The Complex Will

In situations where the Will is more complex, I add a few steps along the drafting path.

After the initial instructions are obtained, I have my assistant review my notes and double-check with me that she understands the instructions received. When I send the Will to the client for initial review I set out in detail the instructions received and invite the client to advise me, at this review stage, if I have misunderstood the instructions.

I also add an additional internal review step before the client comes in to execute the Will. After the client has reviewed the Will document and arrangements have been made for a meeting to have the Will signed, I ask a colleague to read through the Will and I always provide him or her with a copy of my notes. This "second set of eyes" is a useful step in the review process and has produced great results in the past when errors are found prior to the client attending.

In summary, the first thing that a lawyer instinctively should do is to begin the whole Will drafting process with the taking of notes. Careful review of well-prepared, legible notes is the cornerstone to the Will drafting process.

Ian Hull is a partner with Hull and Hull in Toronto.

Consider threshold questions before accepting joint retainers in wills

Joint retainers are common in wills practice. Wills and estates lawyers are often asked to prepare mirror or mutual wills for two spouses. While the lawyer is typically assured by the couple that they are in agreement about the proposed estate plan, lawyers should be careful when relying on these assurances, because over the past five years, conflict of interest claims have proven to be the fourth most common type of malpractice claim in wills and estates practice.

A lawyer contemplating accepting a joint retainer should consider three "threshold" questions: is there a conflict of interest in acting for both spouses? Would accepting the retainer be consistent with the *Rules of Professional Conduct*? And finally, how should future retainers by the same parties (individually) be managed, in light of client confidentiality?

Conflicts of interest can arise at various times during the retainer.

Conflicts at the time of drafting

When preparing mirror or mutual wills, the lawyer must be satisfied before accepting the retainer that there is no conflict of interest between the parties. He or she must satisfy himself that the instructions are given freely and without undue influence. If there is any concern about undue influence the lawyer should recommend independent advice be obtained.

To test for conflicts of interest, lawyers must ensure that the clients understand the effect of the proposed will. Do the clients truly intend to restrict the survivor's right to change his or her will? If the intent is that the wills be mutual, should a domestic contract be drafted to confirm the terms? Should the parties have independent advice?

Conflicts down the road

Conflict of interest can arise when the wills are completed and executed. One spouse decides he or she wishes to change a mirror or mutual will. Should the lawyer make changes without advising the other client? And should the lawyer keep the change request confidential? Finally, would accepting a subsequent retainer be contrary to the *Rules of Professional Conduct?*

Any time a lawyer takes on a joint retainer, he or she should remember that the lack of a conflict at the time of the drafting does not mean a conflict of interest will not arise later. The *Rules of Professional Conduct* restrict the circumstances in which a new retainer can be accepted by the lawyer to change the terms of a mutual or mirror will. These restrictions on subsequent retainers and the ability to change the terms of a mutual or mirror will should be explained to the clients at the time of the initial retainer.

The issue of undue influence in the preparation of a will or a conflict of interest in the preparation of a will usually arises on the death of a testator when the will is challenged by the disappointed beneficiaries.

In most cases the lawyer who prepared the challenged will, will be sued or be called to testify at the trial. The best defence for a lawyer is a well-documented file which will include a proper retainer agreement, lawyer's notes on meetings with the clients and a reporting letter on the will.

The caselaw

In *Edell v. Sitzer* (40 E.T.R.(2d) 10, 2001, affirmed (2004) 187 O.A.C. 189) and *Hall v. McLaughlin Estate* (2006 CanLII 23932 (ON SC)), Canadian courts were faced with fact scenarios in which disappointed would-be beneficiaries sought to overturn their fathers' (new) wills by establishing that their parents had created mutual wills when the mothers were alive, but that the fathers had revoked those wills contrary to the provisions of the allegedly mutual wills.

In both cases, the court held that a finding that wills were mutual wills required "clear and satisfactory evidence" of an agreement on the part of the spouses.

In *Edell*, the court preferred the evidence of the father and of the lawyer who had prepared the couple's wills, and who testified that there was no agreement to make mutual wills. The father's new will was upheld. In *Hall*, the court found that evidence of the circumstances surrounding preparation of the wills (the Halls were a "blended family" in which each spouse had children from a previous marriage) and reported conversations between the children were sufficient to establish the necessary "clear and satisfactory evidence" that the original wills were mutual wills. The court imposed a trust on the survivor father's estate in favour of the wife's children.

The bottom line

Joint retainers in the estate planning field create issues which can give rise to potential conflicts of interest for clients and lawyers. Lawyers are advised to take the time to explain and document the advice given to the clients who seek to retain them jointly for estate planning. Any limitations on the retainer should be explained to the clients and documented in the lawyer's notes and reporting letter. Where conflicts of interest are indicated the clients should be instructed to obtain independent advice.

Pauline Sheps is a claims counsel specialist at LAWPRO.

This article originally appeared in the November 30, 2012 issue of the *Lawyers Weekly*.

Landmines for lawyers when drafting wills

When it comes to mistakes and claims, the Achilles heel for lawyers in the wills and estates area is drafting wills: Making will-drafting errors – either because of poor communication, inadequate discovery or errors in law – is the single most common issue in claims reported in this area of law. In many cases, the mistake which led to the claim could have been prevented.

Communication

Communication – or lack thereof – remains the number one reason for claims reported in the wills and estates area. Most communication errors arise from a failure to follow a client's instructions, a failure to obtain consent, or a failure to inform the client.

In the area of will-drafting, commonly reported errors which originate from communication or lack thereof can include:

- failure to compare the lawyer's will instruction notes with the will;
- failure to confirm the assets and debts of the testator, and;
- failure to confirm the marital status of the testator.

Many of these errors can be easily avoided: For example, have someone else review the will to avoid a problem arising out of a failure to follow client instructions. Use checklists or reporting letters that confirm drafting instructions to avoid an error arising from a failure to inquire about assets or the marital status of the testator.

A good way to avoid communication errors in will-drafting: Document the will drafting instructions, review and confirm the instructions with the testator when the will is drafted, and do a final review of the instructions when the will drafting is completed.

Inadequate investigation

Inadequate investigation is a broad category; typical errors include those arising from a failure to properly inquire about the testamentary capacity of the testator and the failure to properly inquire as to the personal circumstances of the testator.

It is your responsibility, as the lawyer preparing the will, to ensure that the testator has the requisite testamentary capacity. The solicitor should ask the testator open-ended questions to determine testamentary capacity. As well, inquiries should be made about any medical conditions to assess if there is any mental or physical impairment.

If you are concerned about capacity, consider obtaining an expert opinion from an assessor or, at a minimum, speak to the family doctor and obtain a medical report. Along with preparing the will, prepare a memo on your observations of the physical and mental state of the testator.

As part of your initial will interview, obtain a list of assets and liabilities of the testator. You should also, where possible, verify ownership and registration of assets as well as any

designated beneficiary of those assets. Special attention should be paid to life insurance, pension plans, RRSP and RRIFs.

Finally, the solicitor should inquire and confirm marital status of the testator and any obligations to dependents. If possible, the lawyer should obtain and review a copy of any separation agreement or marriage contract which may give rise to those obligations.

Know the law

Legal errors arising from lack of knowledge of the law are more prevalent in the wills and estates field than in many other areas of the law. Errors range from the mundane (e.g., failure to properly execute a will) to the more complex (e.g., errors in estate planning).

Some of the most expensive claims for LAWPRO in the wills and estates field arise from errors in estate planning. These errors often occur because the lawyer preparing the estate plan does not understand or have the expertise to properly execute it.

Complex estate planning requires a thorough understanding of corporate and tax law. If you don't have the expertise in these areas, please refer the matter to a lawyer who does. If an accountant asks you to draft certain documents and you don't understand the implications of the documents being prepared, send the matter elsewhere. Asserting that you were merely a scribe is no defence to a negligence claim.

When undertaking any type of estate planning it is imperative that the lawyer confirm how assets are held. Do not rely on the testator to properly describe corporate assets or the title to a piece of land. For example, the lawyer has an obligation where practicable to confirm that real property forms part of the testator's estate and is not registered in the name of a corporation. Similarly, the solicitor should confirm ownership registration of shares and other assets (see *Willhelm v. Hickson* (1999),183 D.L.R. (4th) 45 (Sask. C.A.).

Finally, in light of the decision in *Pecore v. Pecore* (2005), 19 E.T.T. (3d) 162, (Ont.C.A.), [2007] 1 S.C.R. 795, it is crucial that you discuss the implication of joint ownership.

Standard of care

Developments in the current law of solicitor's negligence can be traced to the decision of the House of Lords in *White v. Jones,* [1995] 2 A.C. 207. In *White v. Jones,* the court created a remedy for the benefit of disappointed beneficiaries. The new remedy was necessary because there is no privity of contract between a beneficiary and the lawyer drafting the will who makes an error depriving the beneficiary of his or her inheritance.

In W*hite v. Jones* the court created a duty of care owed by the solicitor to the disappointed beneficiary to fill a "lacuna in the law." The rationale for the duty of care is that it is reasonably foreseeable to the solicitor that the beneficiaries will suffer a loss if the will is not prepared properly or in a timely manner. The solicitor's liability arises from the solicitor's assumption of responsibility to implement the testator's wishes by preparing the will properly and the absence

of a basis, for the disappointed beneficiary who has suffered the loss, to frame a cause of action unless the court provides a remedy.

Common mistakes in will drafting which can give rise to disappointed beneficiary claims include:

i) unreasonable delay in preparation of a will;
ii) preparation of a will for a testator lacking competence; and
iii) clerical errors in drafting a will.

Unreasonable delay

Unreasonable delay in preparing a will is a question of fact. (*Rosenberg Estate v. Black*, 2001 O.J. No. 5051).

The age and health of the testator are of prime importance. In urgent cases the lawyer should consider preparing a holographic will while the lawyer attends to drafting a more formal will.

LAWPRO was recently called upon to assist an insured in a claim where the disappointed beneficiary alleged that the insured was negligent in not preparing a will in a timely manner.

Justice Mulligan in his decision in *McCullough v. Riffert*, 2010 ONSC 3891, reviewed the standard of care for a solicitor drafting a will. Justice Mulligan referred to Brian Schnurr's text, *Estate Litigation*, 2nd ed. (Carwswell; 1994- (looseleaf)) where Mr. Schnurr, when addressing how long is too long, states:

> "If the testator is elderly and it is known to the lawyer (or ought to have been apparent to the lawyer) that the testator is in poor health, there is a higher obligation upon the solicitor to take all reasonable steps to give priority to completing the will quickly."

In these circumstances, Mr. Schnurr suggests that a temporary or holograph will should be prepared immediately while the solicitor attends to the drafting and revision of the formal will. In the case at bar, the judge found that the lawyer met the reasonable standard of care in will preparation. Even though the testator died 10 days after consulting with the lawyer, the judge concluded that the facts did not support a finding that the lawyer should have known that the preparation of the will was necessary immediately, because there was no clear evidence that the testator was in poor health or that his death was imminent.

Incompetent testator

The flipside to the failure to prepare a will are the claims which are reported when the lawyer allegedly prepares a will or a power of attorney for an individual who lacks capacity.

This allegation usually arises in the context of a will challenge. The challenger will allege that the testator lacked mental capacity or was unduly influenced when the will was prepared. The lawyer will usually be added as a party to the proceedings by the challenger who is seeking damages for his lost legacy or costs.

A LAWPRO matter is one of the leading cases in this area. In *Hall v. Estate of Bruce Bennett*, 2003 Can LII 7157 (ON C.A.), the Court of Appeal found that the solicitor properly declined to prepare a will where the testator lacked capacity. The evidence in this case was that the testator did not remember the full extent of his estate and was not alert enough to sign. In coming to this decision, the Court of Appeal found that there was no retainer to prepare a will and, as such, there was no duty owed to the disappointed beneficiary.

However, in cases where a solicitor has improperly refused to prepare a will where there is a retainer, damages have been awarded. In situations involving a potential issue of capacity and a near-death situation, the problem for the lawyer is that he or she is in an impossible situation. If a will is prepared and the testator is found to lack testamentary capacity, the lawyer may be liable for costs to set aside the will. On the other hand, if the lawyer doesn't prepare a will for the testator, there may be liability to disappointed beneficiaries for not completing the retainer.

In these circumstances, where possible, a medical opinion or a capacity assessment should be obtained. Regardless of whether a will is prepared or not in these circumstances, it is imperative to document all advice given to the testator. As well, copious notes should be taken on all aspects of the will preparation, including extensive notes on issues relating to capacity.

In determining capacity, you should ask sufficient relevant questions to satisfy yourself that the testator meets the capacity tests in the legislation. Numerous checklists with lists of relevant questions are available.

Usually where there is a will challenge on the basis of lack of capacity, there is often also an allegation of undue influence.

It is important when drafting a will to ensure that the testator is instructing you and not being directed by an interested party. Be aware of red flags that may suggest undue influence. Examples include a refusal by a "friend" or relative to allow the testator to meet with the lawyer privately or a testator who brings in notes setting forth the terms of the will.

Another red flag would be a radical change in the beneficiaries from a previous will. In these cases, the lawyer should ask the testator the reason for the change and confirm and document the change requested. If you are not satisfied with the answers given for the change, probe further.

Finally, once the will has been drafted, highlight in your reporting letter the changes in the will and the explanation given by the testator for the changes.

Clerical errors

Clerical errors are a continual source of claims at LAWPRO. Common errors include spelling errors in the names of charitable organizations, typographical errors in bequests, errors in the number of parts in the division of a residue and missing dispositive provisions in the document.

Most of these errors can be avoided by reading the will or having someone else proofread the will.

Another “avoidance tip” is to check the math: The division of the residue should total 100 per cent.

Errors in names of charities can result in a charity not receiving its bequest. The solicitor owes a duty to the intended beneficiaries and can be found negligent for misnaming the charity.

When drafting a will with a charitable beneficiary, the lawyer can take steps by reviewing the Canada Donor’s Guide or the Canada Revenue Agency website to confirm the existence of the charity and the proper spelling of its name. It is best practice to include both the name and address of the charity because if there is an error, the court has a better chance of identifying the intended beneficiary.

Recently LAWPRO was successful in a rectification application with respect to a typographical error.

In *Earle Nugent, Estate Trustee under the will of Viola Binkley v Susan Lang et al.*, 2009 CanLII 26604 (ON S.C.), the solicitor had made a typographic error in the preparation of a new will. As a result, the new will left the sum of $25,000 to each of three beneficiaries rather than the intended $2,500. The court granted the request for rectification. The beneficiaries sought leave to appeal but it was denied on the basis that there was no good reason to doubt the correctness of the decision. Although this precedent has been extremely helpful in resolving other similar claims, it was an expensive process which could have been avoided by simply proofreading the will.

Failure to include clauses in the will for disposition of assets and the residue often result in an intestacy. If the matter cannot be rectified or resolved, a claim for negligence will be advanced against the drafting solicitor. Even if it is resolved, a claim for costs will be advanced by the various parties against the lawyer, which can be difficult and costly to resolve.

If the testator has life insurance, RRSP or pension plans where there is a separate designation of a beneficiary, this needs to be discussed and considered when drafting the will. Finally, it is imperative that you inquire and confirm a testator’s marital status. Common-law spouses are often referred to as husband or a wife by a testator. If the testator is separated or divorced, the lawyer should review any agreement to determine any support obligations and discuss the implications of the appropriate family law provisions.

Conflict of interest

Another source of claims in the estates field is conflicts of interest. Often conflicts arise where a lawyer accepting a retainer from both husband and wife or common-law partners to prepare mirror or mutual wills.

If you obtain instructions from spouses or common-law partners to prepare wills, treat the matter as one of a joint retainer. The commentary in the Rules of Professional Conduct under Rule 2.04 states:

> A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992*, S.O. 1992, c.30 to prepare one or more wills for them based on their shared understanding of what is to be in each will, should treat the matter as a joint retainer and comply with subrule (6).
>
> Further, …if only one of them were to communicate new instructions…
>
> a) the subsequent communication would be treated as a request for a new retainer and not part of the joint retainer…
> b) in accordance with rule 2.03 the lawyer would be obligated to hold the communication in strict confidence…;
> c) the lawyer would have a duty to decline the new retainer, unless:
> i) the spouses had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close relationship…;
> ii) the other spouse or partner had died; or
> iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.
>
> After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

Although the sub-rule does not require it, if there is a power imbalance between the two spouses consider recommending that the "weaker" client obtain independent legal advice to ensure that the client's consent is informed and not coerced.

Notwithstanding that the rules do allow a lawyer, in certain circumstances, to act on a subsequent retainer, this is an area fraught with danger and a practice that should be avoided. For example, although it appears to be permitted under the Rules, a problem can arise when one of the partners dies and the surviving partner returns to the lawyer seeking to change his or her will.

An example of the type of situation which can arise was discussed in the case of *Hall v. McLaughlin Estate,* 2006 CanLII 23932 (On. S.C.), 2006 O.J. No. 2848.

In the *Hall* case, the couple had made mutual wills. This was a second marriage for both spouses and both spouses had grown children from previous relationships.

The initial wills were mirror wills which provided that on the death of the first spouse the estate would go to the other. On the death of the last spouse, the estate was to be split equally with one half going to the husband's children and the other half going to the wife's children.

The wife died first and her estate went to the husband. Contrary to the agreement, the husband changed his will and left the entire estate to his children only. The court imposed a constructive trust on the net value of the husband's estate for the wife's children. The court did so because it found there was a binding agreement that the survivor of them would divide his or her estate into two halves between the two families.

There is no mention in the judgment whether or not the same lawyer prepared the 1992 will and the husband's subsequent will. If it was the same lawyer and the estate had been depleted, it is likely that a claim would have been advanced by the disappointed beneficiaries.

Avoiding negligence claims

1. Promptly report to LAWPRO

Preventing claims is in both your best interests and those of all lawyers insured under the LAWPRO program. Claim prevention helps to reduce the cost of the program and ultimately the cost to the profession for the primary insurance program.

To trigger LAWPRO's involvement, the matter must be reported by the lawyer or the named insured in a timely fashion. Failure to report could result in a denial of coverage if LAWPRO is prejudiced by the late report.

Many claims are reported late because the lawyer does not realize that there is a potential claim. This is particularly true in the wills and estates field. The following events should trigger a report by the insured lawyer to LAWPRO:

1. a request for the will file after the testator's death;
2. a request that the lawyer be examined or provide an affidavit in a will dispute.

If the lawyer reports the matter to LAWPRO as soon as a request is made for his or her file, or the lawyer is asked to provide an affidavit, his or her interests can be best protected. LAWPRO will, in many cases, provide counsel to respond to a request to review a file or to examine the lawyer on a claim prevention basis.

We have in our portfolio numerous claims in which an insured has provided an inaccurate statement or affidavit, and in a subsequent lawsuit this becomes the basis for a negligence claim against the lawyer.

If you are asked for your file after the testator has died, or are asked by a lawyer for a beneficiary or executor to provide a statement, it is possible that a will challenge is being contemplated and the potential exists that you may be sued. As well, in the event of a challenge to the will, the appointment of the executor may also be in doubt and the lawyer may be releasing a file to a party who is not entitled to receive it. The best practice in these circumstances is not to give the file to any party without a court order.

2. Document your file

Once you have reported the claim or potential claim to LAWPRO , defence counsel will request a copy of your file. The contents of the file will often determine the strategy defence counsel will

employ to respond to a claim/potential claim. Well-documented files will often provide a viable defence to the claim. The reverse is true with respect to poorly documented files.

3. Use retainer agreements
Consider using retainer agreements in your practice. Through the use of retainer agreements, you specify the terms and conditions of your employment. If there are conflicts of interest, or any issue of privilege, this can be canvassed in the retainer agreement.

4. Write reporting letters
Where possible, confirm will instructions in writing, document telephone calls and e-mails, and prepare comprehensive reporting letters. Reporting letters are extremely important and can be easily created through the use of templates. In some cases, a reporting letter confirming instructions for a new will and the reason for the drafting instructions may provide a defence to a claim from a disappointed beneficiary.

5. Use checklists
Using a checklist will help prevent many of the clerical errors that are reported. Checklists also help ensure that you've asked about all relevant issues including marital status, family history and testamentary capacity.

6. Develop office routines
All personnel involved in will preparation should be aware of the proper steps to be taken for the execution of wills.

Proofreading wills, comparing the lawyer's notes to the drafted document and checking the math for any fractional legacy should be part of the routine before a will is sent to the testator for review. Consider using a tickler system to follow up and ensure that wills are executed in a timely manner.

Conclusion

In summary, reducing the risk of malpractice claims in the wills and estate field is possible through the use of good practices and procedures. The tools to implement these practices are readily available to the profession. While you cannot totally eliminate the risk of a malpractice claim, you can improve the odds of avoiding a claim by integrating risk management strategies into your practice.

Pauline R. Sheps is a claims counsel specialist in LAWPRO's Primary Professional Liability Claims Department.

Resources and CPD for Lawyers

LAWPRO's Practice Management Resources	
Wills: Why you should send clients detailed reporting letters	What is the purpose of and examples of what to include in a reporting letter.
Retainers and non-engagement letters	Model retainers and agreements provided for your consideration and use when you draft your own documents.
The importance of reporting letters	Why reporting letters can be helpful to a lawyer's defence.
Additional Resources	
LSO: Retainer and Non-Engagement	Resources include checklists for retainers and non-engagement letters and sample non-engagement letters.
CPDs for Lawyers	
LSO: Wills and Estates Refresher 2024	"…Our expert panel engages in meaningful discussion through real-life scenarios as they guide you through the essentials of taking client instructions, drafting considerations, managing ethical dilemmas, and more. A must-attend program for those starting out, or anyone seeking practical guidance on fundamental principles."
LSO: 26th Estates and Trusts Summit	"Day One addresses the latest information on estates, trusts, and capacity/elder law litigation, while Day Two focuses on the estate solicitor's practice, including planning, administration, and tax. "

SPEAKER BIOS

Tamar Silverbrook

Tamar is a member of the Fasken's Private Client Services practice group. As part of her practice, Tamar advises clients on a variety of wealth management, estate, and family planning issues. In addition, Tamar assists clients with Wills, powers of attorney, domestic contracts, trusts, insurance directions and other documents relevant to succession planning.

Tamar has a broad estates and trust practice, with a focus on succession planning. Tamar works with high net worth clients, entrepreneurs and professionals to help navigate complex matters and develop customized strategies that reflect clients' short and long-term estate-planning goals. These strategies are implemented through cohesive estate plans.

Tamar also advises executors, trustees and beneficiaries in respect of ongoing estate administration issues.

Sandra Monardo

Sandra completed an undergraduate degree at the University of Toronto in international relations and languages. Before going to law school, Sandra interned at the Canadian Embassy, in Rome, Italy. She completed her law degree at the University of Windsor and her articles as a clerk of the judges of the Ontario Superior Court of Justice.

Sandre bring almost 20 years of legal experience to resolving your estate-related issues. Since her call to the Ontario Bar in 2005, Sandra practices civil and commercial litigation exclusively for the first 12 years of her career and then focused on estate planning and estate litigation since while at her prior firm – a well regarded estate an trust boutique firm in Toronto where she became partner.

Kiran Arora

Kiran has spent the bulk of her legal career practising in the area of estates, with a focus on advocating on behalf of minors. She is passionate about access to justice and providing legal services to people during times of crisis. Kiran believes that a big part of being a good lawyer is being an effective listener. Kiran brings both empathy and pragmatism to her practice. She has a sharp attention to detail as well as a knack for providing legal information in plain language.

Kiran has extensive experience in the area of estate litigation and understands the value of estate planning in avoiding future conflict. She has appeared at all levels of court in Ontario.

Chris Stankiewicz

Chris is a Claims Counsel at the Lawyers' Professional Indemnity Company (LAWPRO), where he deals with professional negligence claims brought against lawyers practicing trusts and estates, family law and other areas. Prior to joining LAWPRO Chris practiced exclusively in the areas of family law and estates litigation in Toronto. Chris has litigated matters before all levels of Ontario Courts and the Supreme Court of Canada.