MALPRACTICE CLAIMS REGARDING WILLS AND ESTATES

While wills and estates may never rival litigation or real estate as a risky practice area for lawyers, the average annual number of wills claims continues to rise. Growth in property values renders these errors more expensive and growing complexity in family structures, family law and tax law make them increasingly likely. As the baby boomers prepare to transfer assets to the next generation, we expect to see growing scrutiny of the wills, powers of attorney, trusts and other legal mechanisms used to manage the transition.

One factor that sets wills and estates claims apart from the typical claim profile is the recent emergence of "inadequate investigation of facts" as the most common cause of loss (in most other practice areas, lawyer-client communications are the most common). This trend suggests that lawyers may not be asking enough questions — or the right kinds of questions — when preparing wills and estates.

Key questions that must be asked during the intake interview include: whether the client has an existing will, and how the new one will differ; what circumstances prompted the client to have a will prepared; and whether the assets the client is seeking to bequeath are held in the client's own name, jointly with others or by a corporation. The client should also be asked to describe in detail his or her family history, including both common law and marital relationships, as well as the nature of the client's relationships to children (including adult children) whether or not these will be beneficiaries under the will. Clients should also be asked to provide specific details of their assets. Should the client hesitate to provide these, the lawyer can explain that without information about the location, nature and value of assets, it will be difficult to uncover potential sources of future will challenges.

A significant number of claims against wills and estates lawyers allege an error of law. Estates lawyers must maintain familiarity with increasingly complex legislation and common law in multiple disciplines, including family law and tax. As a result, the practice of "dabbling" in wills as a sideline to another area of practice is becoming increasingly dangerous. Even expert wills lawyers recognize that there are situations that require obtaining outside advice, for example, from a tax specialist.

Dabbling sometimes occurs when a lawyer in a different area of practice prepares "a simple will" as a favour to a family member or a friend, without understanding that in the current legal and sociological context, there really is no such thing as a simple will. It is always best to refer family and friends to an experienced wills practitioner who will create a valid and effective will for them.

Experienced estates lawyers may be better able than generalists to identify situations in which a prospective testator is subject to undue influence or lacks legal capacity. In the case of possible influence, a lawyer should employ strategies to uncover the testator's true wishes and should document the use of these strategies in the file, so that the will is protected as much as

possible against future challenges. Where capacity is in question, the lawyer should take steps to assess whether problems with comprehension are permanent or transient, and, when necessary, request an expert assessment — all the while taking into consideration the degree of urgency involved.

Finally, estates practice offers plenty of opportunities for claims based on clerical errors. Lawyers should take particular care to learn the correct spelling of beneficiary and charity names. Careful proofreading of the finished will help avoid the cut-and-paste errors that can arise from using precedents.

Estates lawyers face significant price pressure from online “DIY will” providers. Providing a high standard of competence, professionalism and accuracy is the best way to offer clients value for money and to avoid malpractice claims.

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