Law Society of British Columbia

Practice Resource

Top Ten Tips for Lawyers drafting wills and administering estates

Introduction

As legal professionals practicing in the area of wills and estates will know, navigating the administration of an estate can be rife with unexpected issues, which can emerge many years after the initial drafting of the will. This resource presents ten tips from a professional responsibility standpoint to help you continue delivering exceptional service to your wills and estate clients. As with any issue arising during the course of legal work, lawyers are expected to use their best professional judgement regarding the applicability of the information found in the following pages. Should you have any questions regarding ethics or professional responsibility after reading this resource, feel free to contact a Practice Advisor.

1. Think twice before saying yes to being an executor.

Acting as an executor of an estate is a role filled with responsibility that engages a myriad of substantive and ethical issues, which may present themselves down the line. Administering an estate can be time consuming and requires ongoing communication between multiple parties. Unnecessary delays for which you are responsible may result in a finding of professional misconduct[1] and may expose you personally, in your capacity as executor. In addition, as a lawyer, a court may hold you to a higher standard as executor than the average person when it comes to administering an estate.[2]

Therefore, it is important to make sure you have the capacity and competency to take on the administration of an estate before accepting the role of executor. Keep in mind that often you will not be called upon as executor until many years after you have drafted the will, when you

[1] *Hossack (Re)*, 2021 LSBC 54 (CanLII); *Lessing (Re)*, 2022 LSBC 2 (CanLII).
[2] Wills and Estates | LIF

may no longer be in a position to administer the estate.

If you are drafting a will for a client and they request that you be the executor of their estate, carefully consider before agreeing. You may want to explore with your client whether there is someone else more suited for the role before choosing you, their lawyer. At the very least you should ensure that they have named an alternate in their will in the event you find yourself having to renounce your duties as executor.

If you are considering accepting the role of executor, you may find it helpful to review the Lawyer's Indemnity Fund's resources on this topic, beginning with Wills and Estates: Risks and Tips, and Executors, Trustees and Other Fiduciaries. The wills and estates section of the Practice Checklists Manual is another valuable resource, which includes checklists for wills procedure, interviewing, and drafting.

2. Avoid drafting a will in which you are a beneficiary.

Have you been asked to draft a will in which you or a close relative will be a beneficiary? Take a moment to review the potential conflicts before proceeding.

Code rule 3.4-38 states that unless your client is a family member, or a family member of a colleague, you cannot draft a will in which you or your colleague, as the case may be, receive a benefit or gift. In addition to the prohibition on drafting wills where you are a beneficiary (subject to the certain exception noted above), Code rule 3.4-39 prohibits lawyers from accepting gifts, including testamentary gifts, that are more than nominal from a client unless the client has received independent legal advice.[3] More generally, Code rule 3.4-26.1 prohibits lawyers from performing legal services if there is a substantial risk that the lawyer's loyalty to or representation of their client would be materially and adversely affected by the lawyer's interest in the subject matter of the legal services.

Lawyers have faced disciplinary action for drafting clauses in which their children were beneficiaries, in which they were a residual beneficiary, and in which they were gifted cash directly from the estate. Drafting a will in which you or a close relative may benefit could raise issues regarding conflicts of interest; it is best to be mindful of the potential problems before taking on a wills file, and to have a trusted colleague (outside of your firm) to refer these files to, where appropriate.

Drafting a will in which you are named as a beneficiary can also put the underlying validity of the will at risk, too. For instance, due to the fiduciary nature of a solicitor-client relationship, a presumption of undue influence might arise in this context pursuant to s. 52 of the *Wills, Estates*

[3] *Sager (Re)*, 2020 LSBC 28 (CanLII).

and Succession Act.

3. Know who your client is.

Code rule 3.2-7 requires that lawyers not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.

When drafting a will, especially for elderly clients, it is imperative to be alive to issues of capacity, undue influence, and fraud. For help identifying red flags that may indicate your client's instructions do not reflect their genuine wishes, see our resources on client capacity, undue influence and mistreatment.[4]

Do not accept instructions from family members and ensure you are taking instructions directly from the will-maker. Failure to properly identify the will-maker client in connection with the execution of the will could also raise questions about the authenticity of the will – was it really the will-maker who signed?[5] This could in turn jeopardize the validity of the will.

If you are retained as a lawyer to administer an estate (or help administer an estate), remember that your client is the executor, not the estate itself, nor the beneficiaries.

4. Say no to acting for family.

Acting as a lawyer for family and friends can impact your indemnity coverage and lead to conflicts of interest – amongst other professional and ethical issues. It is usually best to avoid this scenario altogether by referring close friends and family to another trusted lawyer, especially - but not limited to - situations in which you will benefit from their estate. When considering whether to act for friends or family, be alive to the conflict issues, like the one outlined above in Tip# 2, "Avoid drafting a will in which you are a beneficiary." If you do decide to act for a friend of family member, it is prudent to have a conversation up front clarifying the dual roles you will be inhabiting; one as their lawyer and another as their friend/cousin/grandchild etc. As their lawyer, you should treat them as you would any other client, and make every effort to act in a way that transforms the relationship into a business relationship. For example, meet with them at your office during business hours and only communicate about their file via your work e-mail can help avoid blurring boundaries. For more guidance on navigating this difficult dynamic, see LIF's excellent resource: About to act for family and friends? (Resist – it's just too risky!). In addition, keep in mind that if you provide legal services for a "family" member as defined in your indemnity policy, you will not have any indemnity coverage. For example, if you draft a

[4] See also LIF's excellent video, Undue Influence - Are You Doing Enough? and BCLI's Undue Influence Recognition and Prevention Guide for Legal Practitioners.

[5] This is in addition to any client identification and verification obligations you may have under the Law Society Rules. For further discussion of your client identification and verification obligations see: Client ID & Verification.

will for a "family" member you will not have any indemnity coverage if you make a mistake or someone says you have. To review a copy of your indemnity policy and for more information on your coverage, see LIF's website.

5. Understand executor vs. lawyer duties.

Regardless of whether you are acting as executor or acting for an executor, you must have a clear understanding of the difference between the duties of an executor and a lawyer. The executor's duties are more personal and include tasks like ensuring funeral arrangements are made, notifying the beneficiaries, and taking possession or control of assets.

Whether you've been named executor or have been retained by an executor to help administer an estate, it is prudent to understand the difference between the role of a lawyer and that of an executor, in part to ensure you are charging legal fees for legal services and executor fees for executor services, and to avoid overcharging your client. See below under Tip #6 for further discussion regarding executor fees vs lawyer fees.

For more guidance on lawyer duties in probating and administering an estate, see the wills and estates section of the Practice Checklists Manual. The PLTC Practice Materials on wills is another valuable resource that covers a variety of issues you may encounter throughout the course of your practice.

6. Don't charge lawyer rates for executor duties.

As discussed throughout this resource, if you find yourself in the role of executor and lawyer, take care to think about when you are acting in your capacity as a lawyer versus when you are acting as executor; keeping these roles distinct from the outset helps avoid various ethical pitfalls. When acting as an executor, do not charge legal fees for executor work; charging your $500 hourly rate to take clothes to goodwill, for example, would not be in the best interest of your client. [6] Further, be cautious of double dipping – billing the estate legal fees while also accepting executor fees. A lawyer who received remuneration for their executor duties, while also charging the estate for executor work done by their assistants led to a conduct review.[7]

Another notable detail to take into account when acting as an executor is that the executor fees you earn are taxable as personal income. Further, if the will does not specify a fee, section 88 of the *Trustee Act* of BC states that the fee must be "fair and reasonable" and cannot exceed 5% of the total value of the estate.

[6] *Motiuk, Re*, 2003 LSBC 33 (CanLII); *De Stefanis (Re)*, 2019 LSBC 14 (CanLII).
[7] Winter 2021-2022 Benchers' Bulletin at 14.

7. Detail the scope of work.

When you've been retained by an executor to help administer an estate, take the time to sit down and write out a detailed scope of work. Be clear about the tasks that fall within the scope of a lawyer's duties and the tasks that should be dealt with by the executor or delegated to family or close friends.

In addition the practical benefits of ensuring you and the executor are on the same page and to avoid overlap or duplication of tasks, from a professional responsibility standpoint, being clear about your role and educating your client on their role is an important aspect of our quality of service and competency obligations as lawyers (see Code rule 3.1-2 and Code rule 3.2-1). Remember that although you may have run many probate and administration files, this may be your client's first time dealing with the administration of an estate, or even their first time dealing with a lawyer. Taking the time to agree on a written scope of work can also act as a contract between you and your client, set expectations, and put their mind at ease.

8. Explain joint retainer agreements.

If you are approached by spouses to draft their will, by two or more co-executors to help administer an estate, or by two beneficiaries in an estate litigation matter, carefully consider whether their interests are aligned before suggesting a joint retainer. It will be helpful to outline a plan for if a conflict arises between your clients and give them examples of situations where their interests may diverge. Discuss the implications if one client comes to you with information that they want you to keep confidential from the other client. To reduce the risk having to withdraw, it is prudent to discuss possible outcomes and courses of action with your clients from the outset and be sure to tell them their options regarding independent legal advice.

Code rules 3.4-5 and 3.4-7 require that before a lawyer is retained by more than one client in a matter, the lawyer must explain to each client that the lawyer is acting for all of them, that any information received regarding a matter with one client will not be confidential from the rest, that if a conflict develops and cannot be resolved, the lawyer cannot continue to act for them and therefore may have to withdraw completely – and if the clients are satisfied, you must obtain their consent on these matters. Code rules 3.4-8 and 3.4-9 address ethical obligations when a contentious issue or conflict arises.

For more context and examples of how a conflict may arise in the course of estate litigation, see *Hattori (Re)*, 2009 LSBC 9. You can also refer to the Law Society's resources on joint retainers for more information.

9. If you are being asked to probate a will that you have drafted, consider confidentiality and witness issues first.

Code rule 3.3-2 informs us that when advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter. While simple or non-contentious probate files may not create conflicts between your duty of honesty and candour to your executor client and your ongoing duty of confidentiality to your now-deceased client, it is prudent to consider the risk of potential conflict in the future before agreeing to proceed. Code rule 3.3-1, commentary [6] warns lawyers to take care to avoid disclosure to one client of confidential information concerning or received from another client and directs lawyers to decline employment that might require such disclosure.

Further, if it is likely to be a contentious estate, consider whether you may be subpoenaed or called as a witness. Code rule 5.2-1 provides that, subject to a few limited exceptions, a lawyer who appears as an advocate must not testify or submit his or her own affidavit evidence before a court or tribunal. For further discussion on what to do if you've been subpoenaed, see FAQ #1 here: Practice Advisors FAQs.

10. If you store wills, store them properly.

Don't forget about wills storage! If you agree to store original wills for clients, make sure to follow best practices to ensure wills are safe and accessible when needed. Long-term storage of original wills can present a major inconvenience for lawyers; typically, original wills and wills files should not be destroyed for a minimum of 100 years after the will was executed, unless 10 years have passed since the final distribution of the estate. You may wish to implement a policy of returning original wills to clients for safekeeping after execution and consider creating contingency plans for if your firm dissolves and if you quit or retire. Check our resources on file retention and disposition and winding up a law practice for more tips.

BONUS TIP: Proceed carefully when you receive a request for your wills file.

Lawyers who practice in wills and estates often receive requests for a deceased client's wills file, which can bring up ethical issues regarding confidentiality. For a more robust discussion regarding how to respond to these kinds of requests, please review our resource here: Practice resource: Handling requests for a deceased client's file. For additional support, don't hesitate to contact LIF's Claims Counsel for legal advice about whether to disclose a client's file.

Conclusion

Drafting wills and administering estates present a wide variety of ethical considerations. Keeping these tips in mind are intended to help you navigate the complex landscape of ethics and professional responsibility in your wills and estates practice.

Questions

If you have further questions, or would like to discuss a particular issue, please feel welcome to contact a practice advisor.

Lawyers must exercise their professional judgment respecting the correctness and applicability of the material. The Law Society accepts no responsibility for any errors or omissions and expressly disclaims any such responsibility.

This resource was published in September 2025. The Practice Advice team extends special thanks to Rose Morgan, articled student, for her extensive efforts in the preparation of this resource, and to J. Jeffrey Locke and Janis Ko for their substantive review.