



## WILL DRAFTING & THE STANDARD OF CARE

*By Suzana Popovic-Montag* - November 2023

For lawyers practicing in Ontario, including estates practitioners, professional liability insurance is a must. This month's Solicitor's Tip is the first in a series that will explore the potential liability of solicitors who assist with estate planning and will drafting. This month's Tip will focus on a critical issue – the standard of care expected of a solicitor who works in wills and estates.

### General Standard of Care

As noted by the Supreme Court of Canada, “[a] solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which [they have] undertaken”.<sup>1</sup> Lawyers, however, are not to be held to a standard of perfection. The fact that a lawyer could have done a better job, or that counsel's work may be subject to criticism, does not mean that the lawyer fell below the applicable standard of care.<sup>2</sup> The courts have confirmed that a lawyer's obligations include being “skillful and careful”, “carrying out [their] instructions by all proper means”, and consulting with the client on questions of doubt.<sup>3</sup>

When assessing the reasonableness of a lawyer's conduct, other factors that may merit consideration include the amount of time available to complete the work, the sophistication and experience of the client, the form and nature of the client's instructions to the lawyer, the precautions a competent solicitor may be expected to take, and whether those precautions were, in fact, taken.<sup>4</sup>

### Standard of Care – Drafting of Wills

The courts have confirmed that practitioners retained to prepare a will are expected to make any inquiries necessary to ensure “that the wishes of the testator will be honoured and given proper legal expression”.<sup>5</sup> If there are unusual circumstances or inadequate instructions, counsel should take action, if appropriate, “to ensure that the will ... meets the wishes of the

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<sup>1</sup> [Central Trust v. Rafuse, 1986 CanLII 29](#) (SCC) at para. 58.

<sup>2</sup> [Zabel v. Brechin, 2023 ONSC 1784](#) at para. 232; [Odobas v. Yates, 2022 BCSC 186](#) at para. 127 [Odobas]; [Pilotte v. Gilbert, Wright & Kirby, Barristers & Solicitors, 2016 ONSC 494](#) at para. 32.

<sup>3</sup> For the full list of obligations, see *Odobas, ibid.* at para. 103; [Zink v. Adrian, 2005 BCCA 93](#) at para 23; [Meier v. Rose, 2012 ABQB 82](#) at para. 19 [Meier], to name a few cases.

<sup>4</sup> For the full list of additional factors, see *Zabel, supra* note 2 at para. 234; [Pilotte v. Gilbert, Wright & Kirby, Barristers & Solicitors, 2016 ONSC 494](#) at paras. 39-40.

<sup>5</sup> [Hickson v. Wilhelm, 1997 CanLII 11088](#) (Sask. KB), appealed on other grounds [2000 SKCA 1](#), leave to appeal refused [2000] S.C.C.A. No. 124 (SCC); *Meier, supra* note 3 at para. 21.

client while at the same time minimizing adverse consequences which can legally be avoided by due diligence”.<sup>6</sup>

To avoid falling below the standard of care, wills and estates practitioners may wish to consider the following best practices:

- Ensure that retainer agreements are in writing, if the lawyer is retained. The terms of the retainer will inform the standard of care as to the scope of work to be undertaken.<sup>7</sup> If a retainer is not in writing, the onus is on the lawyer to satisfy the court as to its terms.<sup>8</sup> If the lawyer has not been retained and will not be taking any steps on behalf of the prospective client, the lawyer should document this in writing.
- Utilize a questionnaire to standardize the intake process and information requested from clients for creating an estate plan, and update it regularly as the law evolves.
- Take thorough notes of a client’s instructions. If a lawyer makes a mistake when drafting a will due to misunderstanding the client’s instructions, those notes may enable the beneficiaries (or intended beneficiaries) to seek rectification of the will.<sup>9</sup>
- Avoid unreasonable delay when drafting clients’ wills. Salient factors when determining whether a solicitor has acted reasonably when preparing a draft will may include the terms of the retainer, the complexity of the estate plan, whether any delay was caused by the client, and the state of the client’s health.<sup>10</sup> If a lawyer cannot accommodate a prospective client’s requested timelines, it may be best to decline the retainer.
- Take extra precautions when working with vulnerable clients, including clients whose capacity may be questionable, or where undue influence may be alleged at a later date. It may be prudent to go into greater depth when interviewing such clients, ensuring that proper interview conditions are in place (for example, meeting with the client alone), or even asking such clients to undergo capacity assessments.
- Proofread all wills and/or have someone else proofread them.

If a lawyer has a solid process, built on good habits and consistent procedures, the risk of falling below the standard of care ought to be reduced. To learn more about this topic, see LawPRO’s 2019 article, “Landmines for lawyers when drafting wills.”<sup>11</sup>

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<sup>6</sup> *Ibid.*

<sup>7</sup> See [Boland v. Sean Schaefer Professional Corporation, 2020 ABQB 551](#) at para. 42.

<sup>8</sup> [Skrepnek v. Krochak, 2014 ABQB 358](#) at paras. 42-43. See also *Meier, supra* note 3 at paras. 23-28.

<sup>9</sup> See, for example, [Gorgi v. Ihnatowych, 2023 ONSC 1803](#).

<sup>10</sup> See [McCullough v. Riffert, 2010 ONSC 3891](#); *Rosenberg Estate v. Black*, [2001] O.J. No. 5051 (SCJ).

<sup>11</sup> Available online: <https://www.practicepro.ca/2019/06/landmines-for-lawyers-when-drafting-wills/>.