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62140.00

## Drafting Considerations for Wills and Estate Practitioners

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ISBN-10: 1-55093-735-9  
ISBN-13: 978-1-55093-735-0

# View From the Bench: Top 10 Ways to Avoid Getting Sued for Negligence in Will Drafting or Acting for an Executor

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Legal Education  
Society of Alberta

For: *Drafting Considerations for Wills & Estates Practitioners*  
Calgary, Alberta – November 7, 2019  
Edmonton, Alberta – November 14, 2019

**VIEW FROM THE BENCH: TOP 10 WAYS TO AVOID GETTING SUED FOR NEGLIGENCE**

**IN WILL DRAFTING OR ACTING FOR AN EXECUTOR**

Will Drafting.....2  
Acting for the Executor .....4

## WILL DRAFTING

1. **Age of the Testator** - If he/she is over the age of 65, it is highly unlikely that you are the first lawyer they have seen to draft their Will. Find out why they are coming to you and ask who their previous lawyer was and ask to review their previous Wills. Do not do their new Will without these issues being resolved to your satisfaction and do not rely solely on what you are being told.
2. **System Check** - Consider instituting a new way of monitoring your Wills practice at the outset. If your assistant makes the appointments over the phone, record in your file who made the appointment, particularly if it is NOT the Testator. If it is a family member or a spouse, a small red flag should be flying. This will be self evident with the cautions below.
3. **Who Attends at the Appointment?** - Ideally it should only be the Testator but most often couples appear to do their Wills together. This is fine if the parties have only been married once and there are children only from that union. Even then, issues of trusts often become problematic depending on the kind of assets the parties have. If collaterals attend in widow or widower situations your spidey sense should go up particularly if there are children or step-children. Your file should record who attended and make sure they are not in the room with you to give instructions even if the Testator requests they stay.
4. **Fundamental Questions That Must be Asked** - This is relatively straightforward but the obvious is: Why are they changing their will at all? Updating is the stock answer but you have to go further particularly if there are changes affecting any beneficiary or if a new class of beneficiaries are being added. How did they get to your office and do they have their old Will? Do not discount family conflict which the Testator may not share with you.
5. **Second Marriages** - Biggest red flag of all. It is essential that you understand the dynamic of the family and what the parties' intentions were at the time of their marriage. It is quite common with second marriages late in life, that each side wants to preserve the estate they had prior to marriage for the children of that union. Caution your clients that leaving everything to the survivor to do "the right thing" is never a good idea. This is so even if the second marriage is decades long. It is also common to have a pre-Nuptial agreement to further the division of their estates but that does not prevent an application being made for support. Perhaps an "*in terrorum*" clause may have to be considered. Make sure you have not only recorded everything you were told but also, as a prudent lawyer, send a letter to the client if you feel that the Will they have decided upon will likely attract a lawsuit. Why would