



**Law Society**  
of Ontario

**Barreau**  
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**TAB 7**

## **Practice Gems: Administration of Estates 2020**

Dealing with the Discharge of a Solicitor's Duty in the  
Context of an Administration - Protecting your File -  
Defensive Practice Tips to Avoid Liability

**Dawn Phillips-Brown**  
*Madorin Snyder LLP*

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## **Dealing with the Discharge of a Solicitor's Duty in the Context of an Administration**

### **Protecting your File – Defensive Practice Tips to Avoid Liability**

Dawn Phillips-Brown, Madorin Snyder LLP

When negligence is alleged against a lawyer in Ontario, the reasonableness of a lawyer's actions are assessed. This often occurs through use of expert evidence seeking to consider whether or not a reasonably informed and competent practitioner would have acted the same way.

Estate administration can attract a variety of negligence claims. If an allegation arises, the contents of your file are your best, and often only, way to defend your work and interaction with the estate trustee or beneficiaries. It is tremendously frustrating for a lawyer to know they did not do what is alleged, but to be unable to prove it.

If an expert opinion on whether the conduct of a lawyer breached the standard of care is being sought, the lawyer's file is the primary source of information considered. Memories fade. Further, from the Court's perspective, where a client and lawyers evidence differ, and there is no issue of credibility, the client is generally to be believed if the lawyer has no notes to contradict them.

The following are some tips and tricks to ensure you have a well documented Estate Administration file:

#### **A. Give a Job Description**

When acting for an Estate Trustee, recall that they may not know what the role entails – and they may think they need to take on the job.

Give the client a thorough overview so they do not realize after its too late. Blame can be laid on the lawyer for failing to properly explain the role early, before it is taken on. Create a handout to give to all estate trustee clients with basic information, and keep a copy in your file to show it was given.

At the initial meeting, explain:

- a. Renouncing before intermeddling
- b. Executors insurance
- c. Securing assets
- d. Record keeping requirements – hopefully in Court form
- e. Accountability to beneficiaries
- f. Difficult decisions – the Court won't make them
- g. Review the Will to verify its terms, and the rights and powers of the estate trustee, are understood

Follow up the discussion with a letter.

## **B. Communicate, Communicate, Communicate and Personalize It!**

Communication issues are the largest cause of all malpractice claims relating to Estates and their administration.

What may seem obvious to you, is likely not to an Estate Trustee who has never carried out that role. Communicate often and document, document, document.

Dictate memos, or review and perfect meeting notes at the end of a meeting. If you don't document it, you cannot prove it happened.

For those without dictation staff, try some of the many great apps or computer programs. Even with short form or typos, a memo to the file is a lawyer's best friend.

Although template reports are a great idea to ensure nothing is missed and useful and necessary information is provided, be sure to ensure any report sent considers the unique nature of the Estate. If you are going to use a template report, always have at least one full paragraph dictated specific to that Estate. Give every report a fresh read before it is sent out and add in any unique statements or features necessary.

Reports need not only come at the beginning and the end. They serve a purpose throughout the file.

## **C. Ask, ask, ask!**

Not all Estates are created equal – have a detailed checklist and questionnaire to clearly understand potential issues that may arise. Provide general information sheets outlining key duties and responsibilities. Make sure to document that you gave consideration to the following:

- a. A family tree
- b. Marriage contracts
- c. Common law partners or longer term relationships
- d. Family history
- e. Non-issue treated like children
- f. Search of title, verify type of ownership
- g. Foreign assets
- h. Minor children

- i. Vacant possession/occupation rent
- j. Beneficiaries undetermined
- k. Taxation

**D. Know your role!**

Clarify your role, and their role – who is doing what?

Diarize follow-ups to ensure the client completes the tasks identified.

Don't let them wear their beneficiary hat when they instruct you.

Tell them what you are not going to do – write it down.

Always have a retainer signed.

**E. Document, document, document!**

Do not have any conversation by phone, or in person, with the estate trustee, a beneficiary, or an interested party, without a docket, telephone record/note, dictated memo to file or confirming letter to the party you spoke to.

Remember to explain who, what, when, where and list what was discussed.

Consider keeping a docket on flat fee billings, if even for use as a history of the file.

**F. Don't over step!**

When in doubt – seek, or advise to seek, advice on tax issues, investment questions or property valuations.

You may think you know, but leave non-legal advice to non-lawyers.

Document your recommendations to show the boundaries you have drawn.

**G. Manage the Risk!**

Be on the lookout for claims against the Estate or your client – Courts are willing to imply a term of a retainer that there is a duty to warn of potential risks. This includes limitations periods.

Consider:

- a. The *Succession Law Reform Act* – Dependant's Relief
- b. Insurance policies and other section 72 clawbacks
- c. *Family Law Act* Elections
- d. Claims by or against Estate
- e. *Quantum Meruit* and caregiving
- f. Accountings by Powers of Attorney

#### H. **Avoid Conflict(s)!**

Be on the lookout for conflicts of interest.

Who do you act for – do you need a joint retainer? Beware of disagreements.

Is there any contention over a Will you drafted? If so, refer the dispute away.

Do you also act for beneficiaries and other family in their personal matters?

#### I. **Don't Handover your File!**

It is not uncommon where there is a potential Estate dispute, or question about intentions, that the drafting solicitors file is requested.

If it is your file being asked for, even if you think it was done properly, privilege and confidentiality are an issue to consider.

Any challenge to a Will is a challenge to the Estate Trustee's authority to waive privilege.

Call Lawpro – real or potential claims require notice.

You must ensure necessary Orders are obtained.

Keep a separate file for all administration – the Deceased did not retain you.