

Wills & executries

Avoiding complaints: a guide for Scottish solicitors



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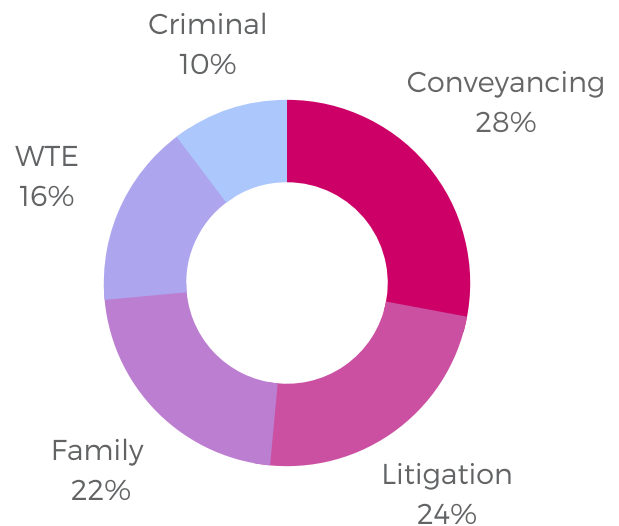
introduction

complaints about wills & executries

As can be seen from the chart, wills, trusts and executries (WTE) rank in the top five business areas which attract the most complaints.

Although wills, trusts and executries make up one business area, the making of a will and dealing with an executry are both very different from dealing with a trust. They attract different issues of complaint.

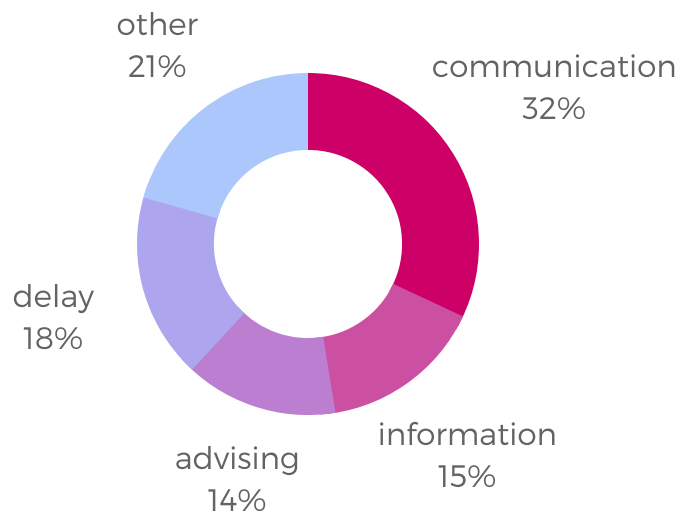
Drawing on the most commonly complained about issues about wills and executries, this guide is specifically aimed at avoiding complaints in this area.



Throughout the guide you will find anonymised case examples and best practice guidance.

Because this guidance is based on real complaints that we have dealt with, it should be of practical assistance in helping you to avoid complaints in this area.

introduction



most common complaints

The above chart shows the most commonly complained about issues specifically in wills and executries.

Ineffective communication remains the most frequent type of complaint across all areas of law. Communication related complaints account for 43% of all the complaints we see at the SLCC.

One fact which separates wills and executry complaints from those in other business areas is that they attract almost three times more complaints from third parties than any other area of law.

It's a good idea, therefore, to put procedures in place to deal with all kinds of complaints and complainers, bearing in mind that complaints can come from anyone, not just your own client.

terms of business

clear and specific

Your Terms of Business letter is a critical tool in reducing the likelihood of complaints. The more clearly you can set out the arrangements at the outset, the lower the risk of confusion and ultimately, complaints.

Your Terms of Business letter will be an important consideration in the event of the SLCC requiring to investigate a complaint.

best practice

- Terms of Business letters should be sent as soon as is reasonably practicable after instructions are accepted.
- Be aware of the [Law Society of Scotland's guidance on Terms of Business](#) letters and of any recent changes.
- Terms of Business letters should be clear in the first instance and suitably revised as and when circumstances change throughout the case; for example, changing costs, scope of work, responsible fee earner, or Client Relations Manager.
- Stress the importance of reading and understanding the Terms of Business letter to clients, inviting them to ask questions if there is anything they do not understand.

terms of business

case example

The complaint:

The solicitor failed to communicate effectively with the complainer by failing to provide him with a Terms of Business letter.

The outcome:

Rule B4 of the Law Society Practice Rules 2011 requires solicitors to provide clients with a Terms of Business letter at the earliest opportunity. In this case, the SLCC received no supporting documentary evidence that a Terms of Business letter had been issued to the client. Nor did the firm respond to the SLCC in relation to the complaint.

Accordingly, it was determined that the complaint was an eligible conduct issue, because if upheld following investigation, it could amount to a breach of Rule B4.

The complaint was accepted at eligibility and sent to the Law Society of Scotland for a conduct investigation.

important update

From 1 April 2017, the time limit for making a legal complaint has been extended from 1 year to 3 years. For service complaints this only applies to complaints about new business which commenced on or after that date. For complaints alleging unsatisfactory professional conduct or professional misconduct this only applies if the incident complained about happened on, or after, 1 April 2017.

All firms are required to change their Terms of Business issued from that date and to make any necessary changes to their internal complaints procedures.

roles and responsibilities

common issues

Many complaints we see are as a result of people not being sure what their roles and responsibilities are. Get to know your client, take time to explain the different roles e.g. executor, beneficiaries and the importance of selecting the right person(s) for the job.

Clients won't always be aware that it is common practice for the solicitor to be named as an executor in a will. Providing a clear explanation of what your role as executor would involve, will help provide reassurance that this is common practice during the drafting of a will and the winding up of an estate.

best practice

- Encourage your client to discuss with those affected by the will, their roles and responsibilities.
- Be aware of the Law Society of Scotland's Rules and Guidance for [Solicitors Acting as Executors and Agents](#).
- Explain the importance of your client being open and honest about their personal circumstances. Follow up any meeting with a letter confirming what was discussed and any agreed actions.
- Explain that you will need to seek instructions from your client regarding communication with beneficiaries and other parties.

roles and responsibilities

case example

The complaint:

The complainer thought that as she was a named beneficiary in her late husband's will, the firm had a duty to provide her with information about the winding up of the estate.

The outcome:

The complaint was rejected as being totally without merit on the basis that the firm being complained about sought instructions from the named executor about whether they should provide the complainer with the information she requested. In this case, the executor instructed not to disclose the information to the complainer.

modern times

With 80% of all Scottish households having access to the internet, for many of us, our lives are fully documented online. Discuss digital assets and digital legacies with your client, and advise them to appoint at least one computer literate executor/administrator.

Having your client provide a list of online accounts, such as email, banking, investments and social networking sites will make it easier to piece together a person's digital legacy.

capacity & attorneys

one size does not fit all

We sometimes see complaints about solicitors failing to ensure their client had capacity to give instructions or whether there was any undue influence.

One size does not fit all when it comes to drafting wills and powers of attorneys. With each client needing different things, ensure that the drafting matches the intentions and best interests of the client and that this is obvious from the file.

best practice

- Keep detailed notes of all instructions received and advice given. Follow up any agreed actions with a letter confirming instructions.
- Be aware of the Law Society of Scotland's Guidance on [Vulnerable Clients](#) and [Continuing and Welfare Powers of Attorney](#).
- If you are satisfied that your client has capacity to grant a power of attorney ask them if they wish to state in the document how their incapacity will be determined.
- If there is any doubt about capacity then seek the opinion of a doctor or psychiatrist.

capacity & attorneys

Case example

The complaint:

The solicitor arranged for a new power of attorney to be executed during a 30 minute visit to the client's care home without taking adequate steps to ensure the client had capacity.

The outcome:

The complaint was categorised as conduct and sent to the Law Society of Scotland for investigation. The Law Society was of the view that the solicitor must have had some doubt regarding capacity as he had written to two medical practitioners, albeit had received no response. The Committee concluded that the solicitor was not entitled to accept instructions without awaiting medical evidence, given the vulnerability of the client.

The Committee determined that the conduct of the solicitor amounted to Unsatisfactory Professional Conduct. The solicitor was censured in terms of Section 42ZA(3) of the Solicitors (Scotland) Act 1980.

professional appointments

If you, or someone within your firm, is being appointed as an attorney or guardian in a professional capacity, be sure to take clear instructions from clients about what should happen in the event that you or one of your colleagues:

- Resigns
- Loses capacity
- Dies

storage

safe keeping

Once a will has been drawn up, signed, dated and witnessed, it should be kept in a safe, and secure place. Any damage to the document can lead to challenges in court and legal problems with the administration of the estate. Loss of the document will of course, cause even greater problems.

To avoid any of the above, it is essential that a firm has a clear policy for the storage and destruction of original files and documents.

best practice

- Be aware of the Law Society of Scotland's [guidance on retention and destruction of files](#).
- Remind clients to keep their copy of the will safe and to tell family and friends where it is.
- Ensure your Terms of Business includes information about the intention to destroy files and documents.
- Have a safe and secure filing/storage system in place which allows archived files to be readily retrieved.
- Be sure to advise clients at the outset if there will be costs incurred for storage and if so, outline these costs.

keeping up-to-date

case example

The complaint:

The former firm failed to ensure safe and correct storage of the complainer's father's will.

The outcome:

The former Client Relations Manager of the firm admitted that the will had been lost and referred the complaint to his insurers. The case then went to mediation where agreement was reached between the parties.

The insurers agreed with the mediation settlement and the complainer was paid £2,000 compensation for inconvenience and distress, and £5,135.64 for actual loss incurred in respect of a court action to prove the tenor of the missing will. The case was closed at mediation.

regular review

It is recommended that a person regularly reviews their will and has it updated when their circumstances change. It is important to advise your client of this and what the potential effect of not keeping their will up-to-date may be.

Consider issuing clients with a will review checklist highlighting the instances when a will should be changed/updated, e.g.

When there is a:

- change in relationship
- change in address
- change in assets
- change of heart on who they wish to benefit from their estate

communication with the client

keep clients updated

In executries, some of the most common issues we see are cases in which the complainer feels that they have not been kept up-to-date with developments from the solicitor.

We say in our consumer guidance that clients should make it clear at the start how often they would like to be kept updated and for this to be agreed with the solicitor.

best practice

- Clients should be advised of the key stages of the winding up of the estate and when they can expect to be updated.
- At the outset, agree how frequently and in what format updates will be provided.
- Explain that charges may be made for responding to requests for updates, even where the firm has nothing new to report.
- Be sure to advise executors of their responsibilities and when their input is needed.

communication with the client

case example

The complaint:

The solicitor unduly delayed in responding to the executor's letters regarding missing family documents relevant to the executry.

The outcome:

The SLCC upheld the complaint as inadequate professional service on the basis that there was a 3 month delay before the solicitor provided a satisfactory response to the executor.

The Investigation Report recommended that the issue amounted to inadequate professional service. It was recommended that the firm pay to the complainer £123.99 for actual loss and £250 compensation for inconvenience and distress. Both parties accepted the Report and the complaint was resolved without the need for a formal Determination or finding of inadequate professional service.

the era of instant communication

With email becoming the preferred means of communication, many people feel that there is an expectation of instant response. Responding in haste can lead to errors, especially on smaller devices where it can be difficult to read/review the response.

If clients' expectations are becoming unreasonable, explain to them again, in writing preferably, when they should expect to be updated and the consequences of over communicating with the firm.

At a time when consumer expectations have never been so high, the key is to respond not react.

communication with third parties

the third party

Wills and executries attract three times more third party complaints than any other area of business. This may not be so surprising given that, by its nature, this area of work tends to impact on third parties, with beneficiaries being the most obvious example.

The importance of having an agreed method of communication with third parties therefore cannot be overlooked.

best practice

- Agree with the executor(s) how much communication with beneficiaries and third parties should take place.
- If you start off communicating with beneficiaries on a regular basis, continue to do so.
- Be aware of your duty to maintain client confidentiality.

communication with third parties

case example

The complaint:

Despite repeated requests, the solicitor (who was the sole executor) failed to provide the beneficiaries with information (Form R185) which they required to enable them to prepare their individual tax returns.

The outcome:

The SLCC was satisfied that the failure to respond to the beneficiaries' requests and provide them with the relevant information amounted to an inadequate professional service to the estate, which in turn directly affected the beneficiaries.

This issue was upheld, along with one other issue. The firm was ordered to pay £2,500 to be split between the beneficiaries for inconvenience and distress and a £500 complaints levy to the SLCC.

solicitor executor duties

If you, or someone within your firm, are appointed as sole executor to an estate, be aware of the duty to inform all potential claimants of the scope for claiming legal rights.

The Law Society of Scotland's full guidance on this issue can be found [here](#).

timescales

changing timescales

Naturally one of the first questions a solicitor is asked is - how long will it take?

While it is difficult to predict how long it will take to complete the work, you should provide your client with an outline of the work to be carried out, along with an estimated timescale.

By ensuring that clients understand the common factors which can affect timescales (examples of which are listed in our consumer guide) expectations can be managed and future frustration can be avoided.

best practice

- Include proposed timescales in your Terms of Business letters.
- Set out the stages of the process and where matters are likely to take longer, e.g. ingathering information, obtaining confirmation, HMRC, prior/legal rights claims etc.
- Ensure clients are aware of their own responsibilities to provide timeous information, instructions, documentation etc. and the possible consequences of delay on the part of the client(s).
- Observe and keep to timescales which have been given and keep the client informed should these change.

timescales

case example

The complaint:

The complainer, a beneficiary, complained that the solicitor unduly delayed completing the administration of the estate.

The outcome:

The SLCC identified 34 months of avoidable delay or inactivity by the solicitor. The SLCC was satisfied that the delay resulted in inadequate professional service to the executor, which directly affected the beneficiaries.

The firm was ordered to pay £700 compensation to the complainer.

expectations vs reality

Quite often we receive complaints from people who say that they have been told by their solicitor that an estate is simple and straightforward and shouldn't take long. Manage expectations at the outset. Explain that, as a matter of law, creditors can make a claim up to 6 months after the date of death and that any timescales which are given can, and often do, change due to a number of factors, many of which are outwith the control of the solicitor.

It is also worth advising that some executries which can appear straightforward can prove more difficult and take more time, and vice versa.

costs

preparation & presentation

It is accepted practice that the form in which a solicitor presents an account is a matter for the solicitor's personal preference.

In the absence of being able to provide an exact estimate of costs for the work to be carried out, there is a need to have clear and agreed feeing arrangements in place. Complaints tend to arise from people who have not been fully advised about fees, or if a bill has been received unexpectedly.

Being upfront and honest with clients, and keeping them regularly updated about fees, will help avoid complaints.

best practice

- Set out clearly in the Terms of Business letter how fees will be charged i.e. fixed fee, hourly or a percentage of the estate, frequency of billing etc.
- Be clear whether any figure stated is about the final fee or an estimate, and contact the client if there is, or is likely to be, any increase in costs from the original estimate.
- Confirm if fees and outlays will be deducted from the estate at the same time as the fee note is issued.
- If a breakdown is requested give as much information as can readily be derived from the records, without charge.

costs

case example

The complaint:

The solicitor had failed to advise that the fees would be materially higher than the percentage of the value of the estate which was originally quoted, or that the limit of the original quote had been approached.

The outcome:

The issue was categorised as conduct and sent to the Law Society of Scotland for determination.

The Society was satisfied that the solicitor had failed to properly advise the complainers on the level of fees which were being incurred or that that fee was likely to be exceeded. The Sub Committee determined that the conduct of the solicitor amounted to a serious and reprehensible departure from the standard of conduct to be expected of a competent and reputable solicitor, was capable of being proven beyond reasonable doubt and could amount to Professional Misconduct.

This complaint was consolidated with a number of others and the solicitor is due to be prosecuted before the Scottish Solicitors' Discipline Tribunal.

auditor of court

If you find yourself acting as an administrator of a client's funds in a representative capacity, e.g. sole executor, power of attorney, guardian etc. you may wish to forward your file to an auditor for assessment of the fee.

For many, this independent approach provides reassurance to those interested in the estate, without the need for a formal taxation.

codes of practice, rules and standards

professional judgement

In our consumer guidance we explain that solicitors will exercise their professional judgment when deciding the best course of action for winding up an estate.

We also advise consumers that solicitors must still adhere to the Codes of Practice, Rules and Standards.

best practice

- Be aware of the current Codes of Conduct, the service standards and any s.40 guidance which has been issued by the SLCC.
- Explain to your client why you think a certain course of action is the best in the particular circumstances, and agree the way forward.
- Clearly communicate any change in advice.
- If you are asked to follow instructions or take action which you are uncomfortable with, seek advice from a colleague, or from the Law Society of Scotland's Professional Practice Department before entering a situation which might lead to a contravention of the Practice Rules, or worse, the law.

codes of practice, rules and standards

case example

The complaint:

The solicitor charged against the executry ledger fees of approximately £10,000 in respect of work which was assessed by an interim auditor of court as justifying a fee of approximately £650.

The outcome:

The complaint was categorised as conduct and sent to the Law Society of Scotland. The Sub Committee determined that the actions of the solicitor amounted to a breach of Rule (6)(d) of the Solicitors (Scotland) Accounts etc Rules 2001 and could amount to Professional Misconduct.

This complaint was consolidated with a number of others and the solicitor is due to be prosecuted before the Scottish Solicitors' Discipline Tribunal.

future challenges

Many complaints we receive are about the advice given or instructions received when a will was drafted, and are usually made once the client has passed away.

To help deal with any potential challenges further down the line, we recommend that records are kept with wills explaining that appropriate advice was given to the client at the time of making the will, particularly in relation to any controversial or unusual instructions given by the client.

"the most important thing to protect your position is to know it..."

internal complaint handling

why bother?

A good complaints handling system not only contributes to better client retention, but allows complaints to be looked at positively rather than defensively.

If approached well, complaints can provide a better insight into the needs and expectations of clients and, where justified, can be used to improve the service provided.

best practice

- Your firm must have an appointed Client Relations Manager, a clear written complaints process and an up-to-date complaints log.
- The Terms of Business letter should explain who clients should contact in the event of a complaint.
- Be open to discussing concerns as soon as possible after they arise.
- If matters cannot be resolved, you must signpost the complainer to the SLCC, as the 'Gateway' for all legal complaints.
- Information on the complaints process should be freely available to staff and complainers.
- Procedures should be in place to deal with all kinds of complaints and complainers, bearing in mind that complaints can come from anyone, not just your own client.

internal complaint handling

case example

The complaint:

The firm failed to respond to the complainer's initial complaint, to the intimation of the complaint by the SLCC or to the recommendations in the Investigation Report.

The outcome:

The Committee noted that the firm failed to respond on numerous occasions. The Committee also considered that there was more than one issue upheld.

After taking into account all the foregoing factors, the Committee decided that a levy of £1,700 was appropriate in this complaint.

section 40 guidance on first tier complaint handling

Under Section 40 of the Legal Profession and Legal Aid (Scotland) Act 2007, the SLCC may issue guidance in the form of "Best Practice Notes". The notes make specific recommendations about standards expected in relation to systems operated by practitioners for dealing with complaints.

All practitioners, not just Client Relations Managers, should ensure that they are aware of the guidance, advice and information issued by both the SLCC and the relevant professional organisation when dealing with all expressions of dissatisfaction.

The SLCC published [First tier complaint handling - a guide to effective and efficient complaint handling for Scottish solicitors](#) in June 2017.

Whilst this guidance is not mandatory, non-compliance will be taken into account where a complaint has been made. Any alleged failure to follow the guidance may result in an additional service or conduct complaint being admitted for investigation.

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