

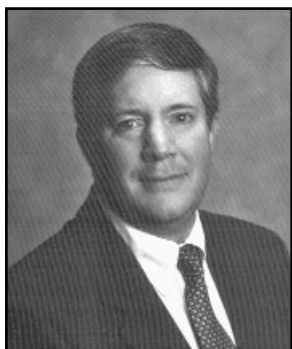


We Are Here for You

A positive outlook on handling claims

Carl Younger, President

At our December Risk Management seminar in Charlotte, I was approached by an experienced lawyer who indicated that he regularly attended our programs. He



Carl Younger
President

complemented us on their quality and their relevance. He noted, however, that he was partially depressed after the presentations as he considered all of the ways he might fail in his practice. He asked if we couldn't provide a more "hope-filled" forecast.

Protecting Your Practice

That criticism reminded me, and our Lawyers Mutual staff, that the vast majority of our insureds will not have a claim this year. That's wonderful for you and for us. What we do not emphasize enough in our presentations is that our claims staff excels not simply in defending claims, but also in solving the underlying problems that created the alleged claim. We are a source of help and hope for covered claims.

If you have a covered claim, we have experts who in many cases can assist in resolving that difficulty. Our efforts are greatly enhanced when you give us early notice of a possible claim and when you cooperate with staff in our attempts to find a solution. Many of the items reported to us are resolved without major disruptions to your practice -- a goal for us and you.

Understanding the Personal Impact

As North Carolina lawyers, we also understand the personal impact a claim can have. Where the personal strains on an attorney are great, we have directed lawyers to programs run by various bar associations -- PALS, FRIENDS, BAR CARES. Coping with the personal side of a claim can often require an attorney to reexamine her or his life and practice.

Such a reexamination can take many forms. Don Carroll described one form in his recent article on "Happiness" in the Campbell Law Observer. An underlying theme of the article is the tension and frustration we have as lawyers in attempting to maintain control and obtain perfection in an uncertain and imperfect world. Don noted: "The paradox for us as lawyers is to be able to fight passionately against injustice and unfairness, but at the same time accept on an emotional level there is unfairness and injustice that we can't do anything about."

We know that a claim in fact can be unfair or unjustified. We have listened to your anger and frustration when considering these types of claims. Please understand we care -- as fellow North Carolina lawyers -- and will lend our legal expertise to you in these fights. We also want to work to help with the healing of emotional scars. A claim should not disrupt either your practice or your search for happiness. That's the positive message that should come not just from our CLE programs but also from all we do. Thank you for giving us the opportunity to help.

February 2004

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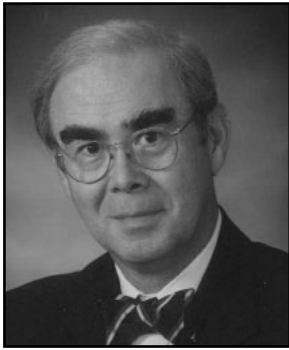


Advising Clients on Investment Opportunities

For the very brave or the very foolish

Jerry Parnell, Guest Columnist

When Toyota began selling Lexus automobiles in the United States, a droll law partner of mine, after he had bought one, started telling his clients, "It's my best legal advice to buy a Lexus." Every time I heard him say it, I winced and reminded him our firm was not set up to carry out warranty work for Lexus. Recommending investment opportunities to your clients is like that: don't recommend anything your checkbook can't repair.



Jerry Parnell
Poyner Spruill

Before you advise a client to make an investment in anything, and particularly something in which you have an ownership or other pecuniary interest, think about this:

The Investment Fails

If the stock or other investment goes down in value or it does not go up as quickly or as far as the client claims you said it would, you will be sued for malpractice. Professional responsibility duties imposed on lawyers include the exercise of reasonable and ordinary care and diligence in the use of your skill and in the application of your knowledge to the client's cause. *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954). Generally speaking, in order to get a legal malpractice case to the jury the client is obliged to produce expert testimony of a lawyer familiar with the applicable standard of care in the jurisdiction at the time services were rendered, who is prepared to testify that the lawyer committed professional negligence. *Progressive Sales Inc. v. Williams, Willeford, Boger, Grady & Davis*, 86 N.C. App. 51, 356 S.E.2d 372 (1987). In simplest terms, if you advise a client to make an investment, if the investment goes sour, if the client can find a lawyer who is willing to testify that the advice you gave was beneath the applicable standard of care for

lawyers at that time and place, and if the advice proximately caused the client's losses, the client has a malpractice claim against you and will probably bring it.

Lawyers Aren't Stockbrokers

Stockbrokers could not stay in business if they had to comply with the professional standards imposed upon lawyers. If a disappointed client of a stockbrokerage could develop a valid cause of action by simply demonstrating that the stock broker made an investment recommendation, the stock dropped and can produce another stockbroker to swear it was bad advice, the Dow Jones industrial average would be around two hundred instead of hovering around ten thousand. Generally speaking, stockbrokers simply suggest their clients review financial disclosures contained in a prospectus and make an appropriate decision concerning the client's investment situation.

Investment Advice is Not Covered

If you make an investment recommendation to your client which sours and you get sued, you are on your own. Malpractice insurance policies typically expressly exclude coverage for investment advice. 5 *Mallen & Smith, Legal Malpractice*, § 34.9 (2002). Lawyers Mutual's policy, for instance, only provides coverage for "actual monetary loss caused by any act or omission of any insured in rendering or failing to render *legal services* for others," and excludes coverage for "any claim or suit based solely upon an alleged error in exercising or failing to exercise investment judgment." Furthermore, Lawyers Mutual's coverage does not "apply in any respect to claims against any insured for damages which are alleged to have resulted from the alleged error of any insured in exercising or failing to exercise investment judgment . . ." Getting sued by a client and finding out you have no coverage for the plaintiff's alleged huge damages is enough to make one consider a career in shoe repair.¹

Continued on pg. 3

Jerry Parnell is a Past President of the North Carolina State Bar, having chaired the State Bar's Ethics Committee, Professionalism Committee and currently serves as a member of the ABA's Standing Committee on Ethics and Professional Responsibility. His practice includes defense of lawyers in legal malpractice actions.

Remember Rule 1.8

It is particularly important not to advise a client to enter into an investment in which the lawyer has a financial stake without carefully adhering to the ethics rules applicable to North Carolina lawyers. Rule 1.8(a) of the Rules of Professional Conduct of the North Carolina State Bar provides, in pertinent part:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest directly adverse to the client unless:

- 1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- 2) The client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- 3) The client gives informed consent in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Unhappy Clients File Grievances

In addition to suing the lawyer for malpractice, the client who has invested in a business in which the lawyer has "an ownership, possessory, security or other pecuniary interests" who is later disappointed, will likely file a grievance with the North Carolina State Bar against the lawyer alleging that the transaction was not "fair and reasonable," that it was not "fully disclosed," and that the lawyer "did not give the client adequate, informed consent."

Although it is now unmistakably clear that an alleged violation of the Rules of Professional Conduct cannot serve as the basis of a claim for legal malpractice, *Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 558 S.E.2d 871 (2002), lawyers representing plaintiffs in malpractice cases continue to assert violations of the ethics rules as the basis for liability claims.

In summary, if you are prepared to guarantee the future performance of whatever investment you propose to your client, if having a law license is not an essential component of your business plan, and if you are prepared to respond in damages without the assistance of your malpractice insurer, go ahead and make investment recommendations to your client and hope for the best.

¹ I got sued once and Lawyers Mutual declined to provide defense or indemnity because of allegations of willful and unconstitutional conduct. At the time I was serving as an Assistant United States Attorney in the Western District of North Carolina and I got sued by some members of the American Nazi Party because I refused to indict both the federal judge who had presided over their trial and had sentenced several of them to prison, and the federal prosecutor who put them there. Not surprisingly, that same federal judge dismissed the suit and the Circuit affirmed.



NOTE: Previous issues of **LML Today**, beginning with January 2003, are now available at our website. We also have application information, Risk Management handouts, and CLE seminar information. Stop by www.lmlnc.com today!

Have You Checked for Conflicts?

Guidelines for establishing a conflicts of interest checking system.

Louise Paglen, Vice President of Risk Management

Lawyers Mutual has been touring the State offering our free three-hour Practical Risk Management program to insured lawyers and their staff. During these presentations, much of our focus has been on the ethics rules governing conflicts of interest. A conflict of interest may arise anytime a law firm finds itself in a position adverse to a client.

Revised Rules of Professional Conduct 1.7 through 1.12 and 1.18 and 1.19 describe in detail the circumstances that create a conflict of interest and the accompanying duty to decline representation, withdraw from representation or properly waive the conflict. These Rules, as well as the comments to the Rules, may be easily accessed by visiting the State Bar website at www.ncbar.com. Comment 3 of Rule 1.7 states: "To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to



Louise Paglen
Vice President of Risk
Management

determine in both litigation and non-litigation matters the persons and issues involved." N.C. Rules of Professional Conduct (2003). Comment 2 of Rule 5.1 advises managing partners that their responsibilities include the development of policies and procedures designed to "detect and resolve conflicts of interest." "Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation" of the conflict of interest rules.

Comment 3, Rule 1.7. *Id.* Although the Rules make clear that lawyers have a duty to institute conflicts of interest checking systems, they provide little guidance on how to do so.

An ethics opinion recently issued by the New York City Bar Association offers guidance on the minimum components of an effective conflicts of interest checking system.

- ***All law firms, even solo practitioners, must maintain "records," whether written or electronic.***

- *The records should be maintained in a way that allows them to be quickly and easily checked for conflicts.*
- *To qualify as a "record" the law firm must be able to systematically and accurately check the information when it is considering a new engagement.*
- ***The records of prior engagements must be made at or near the time of the engagement.***
 - *The records should be made within days, not weeks of the initial engagement, so that they may be checked before commencing a new engagement.*
 - *The records should be updated periodically as additional parties or other relevant information is acquired that might create a conflict of interest.*
- ***The records should be organized in a way that permits efficient access to the information contained therein.***
 - *List clients and former clients alphabetically and list engagements undertaken for each client in chronological order under each name.*
 - *Maintain a list of adverse parties cross-referenced to the client and matter in which the adverse parties were involved.*
- ***Certain information, at a minimum, should be maintained in the system***
 - *Client names*
 - *Adverse party names*
 - *Description of engagement*

NYC Bar Ass'n Formal Op. 2003-03.

These guidelines are consistent with those universally recommended by risk management legal professionals and by Lawyers Mutual. The beginning of a new year is always a good time to take stock and reflect on how your office is managed. We encourage you to take a look at your current conflicts checking system and determine if it conforms to the guidelines recommended above.

Representing an Estate Fiduciary

Protecting yourself and your client with a Joint Control Agreement

Patrick O'Leary, The Bar Plan, St. Louis, MO

Here's the scenario: You represent a fiduciary of an estate. You want to make sure she is properly bonded, and then you want to move on to other cases. Right? Not so fast!

The fiduciary has an ongoing responsibility to the estate, and as her attorney, you have an ongoing duty to advise her. If your client makes unauthorized expenditures or imprudent investments, your failure to properly oversee her could result in a liability claim. As a busy attorney, the last thing you have time for is to approve the disbursement of every check.

That's where a Joint Control Agreement ("JCA") can be a useful tool. And if set up properly, a JCA will help you fulfill your obligations while limiting your oversight time and exposure.

How It Works

The JCA requires two accounts: 1) The Principal Account, which requires two signatures for any withdrawals (i.e. yours and your client's), and 2) The Working Account, which the fiduciary has full access to for paying ongoing expenses. These accounts may be established at the bank of your choice.

You start by assisting your client in opening the accounts and developing an estimated budget for the first year's expenditures from the estate. The Principal Account is then funded with the majority of the assets of the estate. The Working Account is funded with enough money to cover the first year's budget.

Thereafter, the Working Account is funded annually to cover the budgeted expenses for the following year. The fiduciary is already required to file an annual account for the court. In conjunction with that filing, she will also develop a budget for the following year's expenses (reasonable estimates are adequate.) A transfer is then made from the Principal Account into the Working Account to cover the annual budgeted expenditures.

How You Benefit

The JCA helps organize and focus your efforts, thus minimizing the hours you spend. You will assist your client

with setting up the accounts initially and with the annual accounting and budgets. Typically, the only additional time you will devote to the estate is if and when an unusual or unexpected expense is incurred that requires your joint signature to withdraw additional funds from the Principal Account.

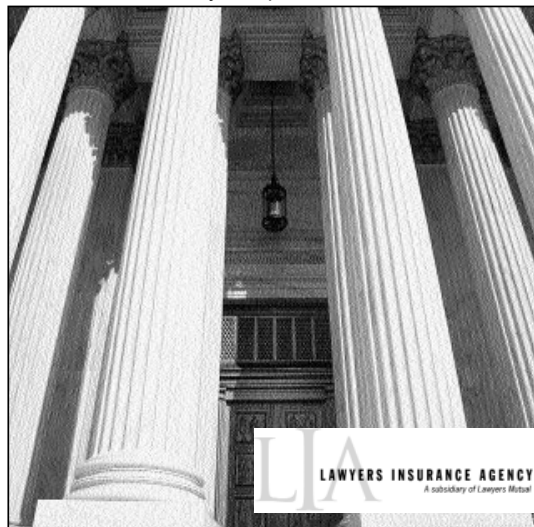
With a minimal amount of time spent, you will know what is going on with the estate and you will have an opportunity to advise your client at all the critical times. Your risk of a malpractice claim is minimized by the built-in oversight procedures, and your monetary exposure is significantly reduced by placing most of the estate's funds out of the reach of your client.

A sample Joint Control Agreement form is available on Lawyers Insurance Agency's web site by going to the *Bond* web page at www.lawyersinsuranceagency.com.

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As soon as they are hired, Lawyers Mutual should be notified.

LML TODAY

The contents of this newsletter are intended for general information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. It is not the intent of this newsletter to establish a standard of due care for any particular situation. Rather, it is our intent to advise our policyholders to act in a manner that might well be above the standard of care in order to minimize a firm's malpractice risk.

Henry A. Mitchell, Jr.
Chairman

Carl Younger
President

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A publication for policyholders of
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