Lawyers Mutual
LML TODAY
A publication for policyholders of Lawyers Mutual Liability Insurance Company of North Carolina

Closing the Sale of a Business without Representing the Lender

Representing multiple parties in a business transaction is one of the leading sources of malpractice liability. North Carolina attorneys who are comfortable with representing all parties to a traditional residential real estate transaction often assume they can represent both buyers and sellers of businesses, particularly when the size of the deal doesn't warrant more than one attorney. In these instances the buyer and seller of a business may contact an attorney after they believe they have negotiated all the terms of the sale, and request that the attorney represent both of them and "merely" document the deal. While ethics rules may not prohibit this type of representation with appropriate waivers, it is sometimes fraught with peril. An attorney representing both buyer and seller or only the buyer in a business-acquisition frequently discovers that the lender is also relying on the lawyer to serve as its counsel.

The North Carolina State Bar has issued a number of ethics opinions relating to multiple representations in residential real estate closings that may provide some guidance.[1] An attorney may represent the sellers, buyers and the bank in a closing for residential real estate. *See 97 Formal Ethics Opinion 8 and RCP 210.* An attorney may represent both the buyer and the seller in a traditional residential real estate transaction after the terms of sale have been resolved if the lawyer concludes there is little likelihood of actual conflict, he will be able to act impartially, and he obtains informed consent from both parties. These opinions are based on the assumption that real estate documents are standardized and there will be no negotiation of terms. One reason the State Bar has approved single-lawyer traditional real estate closings is that once the terms of sale have been resolved; the parties have a common objective: the transfer of the property.

The same, however, is not always true for the sale of a small business. There are generally issues neither businessman has considered and they assume the lawyer can advise them appropriately, even if their interests diverge. The lawyer may be faced with a situation where it becomes apparent that one party to the transaction is less sophisticated than the other and may not know to ask for important protections. The lawyer may also learn information that one of the parties asks him not to disclose to the other party. In these situations,

continued on page 3

LeCarpentier named Director of Lawyers Structured Settlements

Lawyers Mutual Liability Company of North Carolina announces that Edward C. ("Tacker") LeCarpentier III, a former partner at Raleigh law firm Cranfill Sumner & Hartzog and a former law clerk to then-Chief Justice James G. Exum Jr. of the North Carolina Supreme Court, has been named Director of Structured Products at Lawyers Insurance Agency, a Lawyers Mutual subsidiary. Lawyers Insurance Agency is the official agency of the North Carolina Bar Association and is based at the North Carolina Bar Center in Cary. Mr. LeCarpentier will be leading the Agency's sales and marketing efforts for structured settlements in personal injury cases and select non-personal injury cases, as well as introducing the new structured sales product to business and property owners throughout the Southeast. He was most recently a co-founder and President of the first company in the country devoted exclusively to marketing the structured sales product. For structure proposals, he can be reached at (866) 450-4496 or at tacker@lmlnc.com.

Volume 28, Issue 4, Fall 2006

In this issue:

Lawyers Mutual Liability Insurance Company of North Carolina Founded by the North Carolina Bar Association in 1978

www.lmlnc.com

Our Profession In Transition

Retirement Does Not Mean Inactive

Carl Younger, President

Personal retirement planning is imperative for anyone who is considering leaving active practice, even if that departure is years away.

During a recent insurance conference, I was again reminded that I and many other attorneys are aging and that new generations of attorneys are bringing fresh insights and expectations to the practice of law. The average age of all practicing attorneys is steadily increasing and is expected to approach 49 by the year 2015. Many "Baby Boomers" simply do not want to retire yet. Nevertheless, the American Bar Association has indicated that over 400,000 attorneys are expected to retire over the next 10 to 15 years.

That "block" of attorneys represents almost half of the current number of practicing attorneys in the United States. Many current judges, professors, and bar leaders are among the group who will be retiring. Two questions seem to dominate discussions surrounding this "transition": how can legal practices be transferred smoothly to other attorneys and how can the expertise and wisdom of the "retiring" attorneys be captured to improve our society.

Get Your Own House In Order

Personal retirement planning is imperative for anyone who is considering leaving active practice, even if that departure is years away. Discuss your will and financial planning with your spouse and family. Let others understand your desires with regard to your practice. Create a personal time line to help with your planning.

Consider Clients and Staff

Many clients and staff depend on us for advice and guidance. Clients depend on us as the depository of important papers and history. Our staff depends on us for their well-being and economic livelihood. In any evaluation of a transition in your practice, consider what steps should be taken regarding the work done for individual clients. If possible, propose another attorney to clients, an attorney in whom you have confidence and who has or can easily develop the expertise needed to do the work in question. This search for a "substitute" attorney is most critical, and most difficult, for solo practitioners. However, even though difficult, the process cannot be ignored. Furthermore, where possible, attempt to assist staff in their relocation.

Have a Post Transition Plan

Several retiring attorneys have noted that leaving active practice has allowed them the opportunity to travel, to relax, and to focus on special family matters. Many of these desires, especially travel, are satisfied rather quickly. Carefully consider what other things excite you and have a plan for initiating those activities after the first round of travel or multiple rounds of week-day golf.

Consider Yourself To Be A Resource

An incredible investment in time, wisdom and knowledge has been made in the 400,000 attorneys who will be retiring. Numerous organizations are focusing on how to harness this talent. Pro Bono programs are being created to allow retired attorneys to provide assistance to non-profit organizations as well as "low profit" start-ups. Be pro-active and seek information from a local chamber of commerce or the North Carolina Bar Association on what you can do.

Lawyers Mutual Has Not Forgotten You

If you decide to retire, tell us. If you retire during a policy year, we will refund any unused premiums to you. In addition, if you are over 60 and have been an insured of Lawyers Mutual for over 10 years, we will provide a free four-year extended reporting endorsement to you. That's our way of giving something back to you for your years of service and your patronage of our Company.

Transitions, like change, are a natural part of life — even if we attempt resistance. Be active in approaching a transition in your practice, whether you are an experienced attorney nearing the end of active career or a younger attorney who is assuming responsibility for transferred clients. Seeking an orderly transition is one of the best actions we can take for ourselves, our staff, our clients and our profession.

Continued from page 1

the attorney should withdraw from representing either party and should tell both parties to seek separate counsel. Doing so, unfortunately, drives up the cost of representation, which is exactly what the parties were trying to avoid.

In the case of an attorney representing a purchaser and a lender in the purchase of a small business, there may be many areas of negotiation: 1) Will the lender change the attorneys' fees provision from "reasonable" to "reasonable and actually incurred"? 2) Will a guaranty be required? 3) Can the scope of the guaranty be limited? 4) Do the bank's documents require waiver of certain rights that can be negotiated?

The second and more troubling issue arises when attorneys representing buyers of businesses find themselves in situations where the lender providing financing to the buyer expects the buyer's lawyer to protect the lender's interests as well. At a minimum the lender may assume the borrower's counsel will provide an opinion regarding effect and execution of the loan documents. Attorneys who do not frequently close financial transactions may not be aware of the lender's assumption and may not be comfortable with or have any interest in furnishing advice or opinions to the lender.

The State Bar has held that if a closing attorney does not intend to represent both the borrower and the lender in a real estate closing, she must notify the lender as soon as possible so that the lender can find other counsel. RPC 210. If the lawyer does not give such notice, she will be assumed to be representing both parties. *Id.* While there are no similar ethics opinions concerning closing the sale of a business, prudence requires that buyer's counsel notify the lender as soon as possible if she is not willing to represent the lender or to render an opinion. Of course, if the borrower's attorney refuses to give an opinion to or to represent the lender, the lender will be required to obtain separate counsel, and the lender will compel its borrower to pay those additional expenses, driving up the costs of a deal where the parties are trying to use one attorney to keep expenses down.

Given these pitfalls, what should you do?

We believe you should:

1. Determine if lender financing of the transaction is involved. If so, contact a representative of the lender immediately to determine what, if anything, it expects from you.

2. If you are not comfortable with representing the lender or providing an opinion to the lender, notify everyone immediately so that the parties can make an informed decision about representation.

3. Determine if the lender will allow you to close the loan pursuant to the lender's instructions and provide any requested opinions, but not serve as the lender's counsel. If so, document your relationship with the lender as quickly as possible.

4. Determine whether it is reasonable to assume that you can proceed with the multiple representation of the buyer and seller without any conflict.

If you address these issues with any lender involved in the transaction immediately, you can avoid unpleasant surprises. Whatever you do, NEVER disburse the lender's funds from your trust account without a clear understanding with the lender regarding your role.

CALENDAR *Upcoming CLE Programs:*

Lawyers Mutual is proud to announce its CLE seminar schedule for Fall 2006 & Winter 2007:

December 1, 2006 – Charlotte
Charlotte Renaissance

January 5, 2007 – Fayetteville
Holiday Inn I-95

January 26, 2007 – Greensboro
Sheraton Four Seasons

February 9, 2007 – Raleigh-Durham
Sheraton Imperial RTP

February 23, 2007 – Raleigh-Durham
111 Place, Cary

March 16, 2007 – Wilmington
Hilton Riverside

Please visit our website at **www.lmlnc.com** for seminar details and registration forms.

Endnote:

1 These opinions are CPR 100 – representing multiple parties in a residential real estate closings; RPC 101 – Borrower's Lawyer Rendering Opinion to Lender, RPC 121- Legal Opinion for Nonclient; and RPC 210 – Representation of Multiple Parties to the Closing of a Residential Real Estate Transaction.

Understanding Underwriting . . . Q&A.

Q. How do I add or delete an attorney from a firm?

A. Instructions for adding or removing attorneys can be found in your "Users Guide" booklet in your Blue Policy folder.

ALERT

You are now able to fill out your application on line and fax the application to Lawyers Mutual Liability Insurance Company.

Visit our website at www.lmlnc.com and click on "Policy and Application" and then "Application."

Or call us at 1-800-662-8843, and we'll be happy to fax or mail you an application.

Editorial Correction:

The excerpted version of an article by Nancy Short Ferguson titled "The New and Improved 2006 Notary Act," which appeared in the last issue of *LML Today* contained a misstatement. The article included the following sentence:

Under the 2006 Notary Act, "the notarial seal must contain all of the following: (1) Notary's name exactly as commissioned; (2) "Notary Public"; (3) "County" or "Co." of commissioning; (4) "North Carolina" or "NC"; (5) Commission expiration date and (6) Perimeter border visible when impressed."

The original article included a parenthetical explanation noting that the Commission expiration date is optional in the seal, and can now be "imprinted, handwritten or typed" under G.S. 10B-37(d) of the 2006 Acts. We regret any confusion or misinterpretation this omission created for our readers. We appreciate you bringing it to our attention and hope this correction clarifies any misunderstanding.

MISSION:
To meet the insurance needs of the legal profession at reasonable cost through innovative personal service and products.

VISION:
To be a leading provider of insurance and other services primarily to the legal profession

CORE VALUES:

Service:	We provide efficient and quality service.
Stability:	Here today. Here tomorrow.
Fairness:	We will treat those we serve fairly.
Integrity:	We operate with high ethical standards

LML TODAY
A publication for policyholders of Lawyers Mutual Liability Insurance Company of North Carolina

Lawyers Mutual Liability Insurance Company of North Carolina®
PO Box 1929, Cary, NC 27512-1929

PRESORTED
First Class
US Postage
PAID
Permit No. 729
Cary, NC 27513