

# 5 EASY WAYS TO PROTECT YOUR PRACTICE



— By *Thomas R. Kestler, CFP, CLU, ChFC, CMFC* —

As children, we learn from our mistakes. And, as we grow older, our mistakes help us set boundaries that guide us through life. Unfortunately, as adults, our mistakes can cause considerably more damage to ourselves and others.

I have had over 30 years of supervisory experience and often act as an expert witness in cases involving securities and insurance related issues. This experience, along with the experience of dealing with industry regulators, has provided a unique perspective on mistakes - both intentional and unintentional - and the consequences to advisors and their clients.

With that in mind, here are five items to consider in order to make your practice bulletproof.

## 1. CLEAN FILES AND CONTEMPORANEOUS NOTES ARE YOUR BEST DEFENCE IN AN ARBITRATION

The cases you are working on today are the potential arbitrations down the road. Friendly Mrs. Jones who referred you to her bridge group isn't the person you need to be concerned about. It may be Mrs. Jones ten years down the road where she starts to become a little forgetful. It may also be her children - who were never involved in her finances until her health began to decline. Anyone can make a claim of malpractice and it will be up to you to defend your reputation when that occurs.

Your detailed client file will be your best - if not only - line of defence. Memories fade over time. They can also be influenced by children or plaintiffs' attorneys. Unfortunately, in a contest of he said - she said, the decision almost always comes down on the side of the client.

A wise old attorney once told me, "The simplest note written at the time of the transaction will always carry more

weight than recollections of the parties - especially after the attorneys have helped to "clarify" those recollections." The moral is: document, document, document.

An arbitration or trial is typically preceded by a process of discovery. The discovery process is where each side essentially says, "Show me all of your stuff and I'll show you all my stuff." Discovery demands by an opposing counsel can be overwhelming and the time to think about how you will provide this information is now - not ten years from now. Are you confident that your client files contain everything necessary to validate your recommendation and nothing that would incriminate you in the future?

In the supervision of hundreds of registered reps over the years, I have reviewed more than my share of client files. When I see a frayed folder with papers strewn everywhere, I know a plaintiff's attorney would have a field day with this rep. On the other hand, when a file is neat and organized with meticulous contemporaneous notes, that same attorney can also recognize that he may have an uphill case and advise their client to reconsider.

## 2. MARKING UP BROCHURES AND ILLUSTRATIONS CAN BE HAZARDOUS TO YOUR HEALTH

We've all been there. You provide your client with an illustration using the carrier's software and the endless numbers make their eyes roll back in their head. You want to draw their attention to a specific topic or number and you circle it. Chances are you just gave a plaintiff's attorney incriminating evidence. Consider this: The annuity illustration displays the best ten years, worst ten years and last ten years. You circle the return for the best - you lose. Making any marks or highlighting any areas in illustrations or brochures can always come back to bite you. In fact, this practice is prohibited by most regulators.

## 3. CORRESPONDENCE IS YOUR FRIEND

In the securities industry, advisors are required to keep a log and a separate, chronological file of incoming and outgoing correspondence. That log and file is reviewed on a regular basis by his or her supervisor. Some advisors, in an effort to reduce their own paperwork, rarely if ever correspond in writing. All their communication with a client is in person or over the phone. While this can assist in building a personal relationship, as mentioned above, absent clear contemporaneous notes or correspondence, you are back to a he said - she said argument which you are likely to lose.

Consider a combination of communication styles. Meetings and phone calls are great to help draw out a client's concerns. Be sure to make detailed notes at the time to memorialize the conversation. I've encouraged our reps to use a form we created called a Client Contact Memo for phone conversations with clients. It is a simple form with spaces for the client's name, date time, phone number and account number. There is an open area to make notes as you are talking and an area at the bottom for your action items after the call. Once the action items are completed, the form is stored in the client file.

Written correspondence can be a lifesaver (or a land mine) in an arbitration. Try to discuss benefits as opposed to features. Specific product features change over time. Benefits can last a lifetime.

I encourage the use of what I call a Keep Warm letter. It accomplishes three goals:

1. It helps to eliminate buyer's remorse by showing professionalism and reviewing why they made the decision in the first place

2. It allows you the ability to summarize the benefits of their decision, and
3. It creates a clear paper trail of disclosure

A typical Keep Warm letter may look something like this:

*Dear Mrs. Jones:*

*Thank you again for your time on Tuesday. It's always a pleasure meeting with people who are sincerely interested in planning their financial future.*

*I have submitted your annuity application to XYZ Life Insurance Company and will be in touch with you once your policy is issued to arrange a convenient time for delivery. Please allow several weeks for this process to take place.*

*As we discussed, you chose the ABC Indexed Annuity for the following reasons:*

- *You are uncomfortable with market risk and wanted to be protected from losses that could accompany stock market fluctuations.*
- *You liked the idea of earning a fraction of the upside of growth in the S&P Index without the risk of loss.*
- *The XYZ Income rider, at a fee of 0.95%, provides an extra layer of protection by ensuring that, if used properly, it can provide a lifetime of income that can't be outlived. Please read and retain the brochure I provided at our meeting.*
- *The 10-year surrender charge only applies to those policyholders who surrender their policy early or take withdrawals in excess of the 10% available annually. This surrender charge declines to 0% over the first 10 years.*
- *You have named your daughter, Mary Johnson as your primary beneficiary. In the event of your death, she will receive the proceeds free of surrender charges or the expense of probate. This designation can be changed by you at any time.*

*I if your understanding is different than what I have outlined above, or if you have any questions whatsoever, please call my office at 800.699.0299.*

*I look forward to seeing you soon!*

*Sincerely,*

*Thomas R. Kestler, CFP, CLU, ChFC, CMFC*

## 4. NEVER SELL A PRODUCT YOU DON'T OWN YOURSELF OR WOULDN'T SELL TO YOUR MOTHER

I know it's impossible to actually own every product you recommend but it's important to ask yourself, "Would I sell this to Mom?" If the answer is no, maybe you should reconsider why you are selling it at all. Better to ask yourself now than to have a plaintiff's attorney ask you in an arbitration hearing. On the other hand, if you answer yes, your clients will hear your passion and trust your recommendation.

Another way to look at this point is to realize you wouldn't purchase a financial product for your own portfolio unless you took the time to thoroughly understand its features, benefits and limitations. Do you thoroughly understand the products you sell today?

## 5. WHEN DEALING WITH WHOLESALERS - TRUST BUT VERIFY

Financial product wholesalers provide a valuable service to all producers. It's their job to educate you on their product and provide support throughout the sales process. They are not attorneys or CPAs. Beware of any legal or tax advice they provide.

In a perfect world, they should know their product inside and out. However, they are often given "talking points" by senior management and often focus on the "shiny object" without regard to the potential "gotchas" found in every product. Remember, they also receive a commission if you sell their product – not if you sell someone else's.

It is your job to provide a fair and balanced explanation to the client. In an arbitration, "The wholesaler told me it worked that way" won't help your defence. It is always the responsibility of the rep to do their own due diligence on every product they sell.