

# Develop the Helpful Habits to Ward Off Litigation

By Raymond J. Michaud

*Insightful lessons can be learned by reviewing professional liability issues. With this in mind, Gallagher Affinity provides this column for your review. For more information about liability issues, contact Irene Walton at irene\_walton@ajg.com.*

CPAs provide services in an environment that is susceptible to litigation, as they often work on or with financial information on behalf of individual or corporate clients. Any accounting litigation is predicated on a theory of professional malpractice based on the facts surrounding the services provided. This article offers insight into how to prepare for the potential of unforeseen litigation.

A CPA can do little after the fact to prevent a plaintiff's perception that the services provided damaged the plaintiff in some way. The time to prepare for unforeseen litigation is during the opening of an engagement, before any possible litigation tornado begins to swirl. This task requires a basic understanding of the roots of a malpractice claim.

A plaintiff can establish litigation upon very little, even an inconspicuous act suggesting advice beyond your training. There could be an extensive menu of facts or incidents that can be molded into a sustainable cause of action.

Acts are evaluated against various accounting standards, such as generally accepted accounting principles (GAAP). A malpractice claim could arise if there is a perceived deviation from a standard. Unfortunately, a plaintiff's perception becomes a CPA's litigation reality.

A deviation from established standards is characteristically the result of either an affirmative or a negligent act. The prospective plaintiff's malpractice claim must prove that the CPA violated some standard in one of two causes of action: breach of contract or negligence.

When an accountant has affirmatively

(intentionally or otherwise) performed or omitted an act that is a departure from a recognized standard, it is a cause of action for breach of contract. The elements of a cause of action for a breach of contract require the following:

- An agreement for the CPA to provide their professional services.
- A breach of duty owed under the contract (failure to meet an appropriate standard of professional care).
- The failure of the CPA results in damages to the plaintiff.

When a CPA breaches a duty of care owed to the plaintiff it is a cause of action for negligence. A cause of action for

negligence requires the following:

- The CPA owed a duty of care.
- The CPA failed to exercise ordinary skills and knowledge.
- The failure is the proximate cause of the harm.
- The plaintiff sustained damages.

The common thread for a breach of contract and negligence causes of action is the assertion that the CPA deviated from the standard of care by violating some accounting standard. This means the CPA failed to use the skill, learning, and care normally used in similar circumstances. In many cases of malpractice, the CPA will present a fact derivative of the accounting services, and that fact is later deter-

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mined to be incorrect. The rub is that the perceived deviation from the standard is that the CPA should have known the fact was incorrect. While all risks cannot be contained, some can be minimized by trusting your experience, insight, and prelitigation preparation habits.

The first step in developing a defense is in the pre-engagement phase; the cornerstone of which is the engagement letter. The scope of the engagement should be clear and not open for interpretation. Describe the scope of work, how the work will be executed, and the parties' individual responsibilities. Just as crucial, identify the scope of services excluded to reduce any possible misunderstanding or an expansion of services.

You can avoid claims by avoiding engagements outside your professional competency. A modest task can develop into an enormous mistake. Providing extraordinary services to a client may seem appropriate, but the risk is significant. Avoid the risk; instead make a referral to


a colleague with the required skill set and experience.

The second step is to communicate and manage your client's expectations. Communication and the development of expectations are critical to meeting the client's needs and avoiding misunderstandings – the seeds of future litigation. The parameters of accounting services are finite, and you must explain the limitations. Once boundaries have been established, take the next step to manage realistic expectations through a clear and concise explanation of what your services are and what they are not.

Continuous communication with clients allows you to ensure their understanding and keeps them informed of the unanticipated. Clients are often more accepting of changes or issues when these are presented as soon as possible. Keep the client in the decision-making process so they are part of any resolution.

The last critical step is to document, document, document. Contemporane-

ously record everything. A key document prepared during the engagement is an invaluable tool to defend a professional malpractice claim. Develop the habit of keeping records of appointments, correspondence, telephone logs, and notes (amongst other things). You will have a roadmap of dates, topics discussed, and decisions made to refer back to if you are targeted with a professional negligence claim.

It can be a burden to hang up the phone with a client and prepare correspondence to memorialize the discussions and decisions. Often, we believe this is not necessary and slows the process. Don't fall into that perception trap. Protect yourself and your reputation from unfounded claims and misunderstandings. Document everything! 

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