Why Do TPAs Get Sued?

• Professional Negligence
• Misrepresentation/Detrimental Reliance
• Breach of Contract
Why Do TPAs Get Sued?

• Professional Negligence
  – Duty
  – Breach
  – Causation
  – Damages

• Contract, promise, representation
• Holding your self out as expert or one-stop solution
Why Do TPAs Get Sued?

• Professional Negligence
  – Breach
    • Failed to do what you said you would do
    • Failed to perform services in accordance with accepted standards of practice

Why Do TPAs Get Sued?

• Professional Negligence
  – Causation
  – Damages
Why Do TPAs Get Sued?

• Misrepresentation/Detrimental Reliance
  – Negligent (or intentional) misrepresentation to client
  – Intended, reasonably expected, knew, or should have known that client would rely
  – Client reasonably relies
  – Damages

Why Do TPAs Get Sued?

• Breach of Contract
  – Did not perform according to the terms of the service contract
Why Do TPAs Get Sued?

• Breach of Contract
  – What constitutes the terms of the “contract”?
    • Written/signed Service Agreement
    • Correspondence/emails
    • Oral conversations in person or by telephone -- He said/She said

Why Do TPAs Get Sued?

• Breach of Contract
  – Ambiguities and interpretations of contracts
Why Do TPAs Get Sued?

• Managing Litigation Risks
  – Written/Signed Service Agreement (more later)
    • Update/Revise in Writing if Services Change
  – Identify and Adhere to Industry Standards of Practice
  – Checklists – use them
  – Training
  – Document/confirm communications with clients
  – Insurance

Written Service Agreements

• Clearly identify who is the client
  – Plan sponsor?
  – Plan/Trust?
  – Fiduciaries?
• Who is responsible to pay your fees?
• Fee disclosures (good idea, even if the Plan is not paying)
Written Service Agreements

• Due Diligence
  – Does the client have a website?
  – Are they registered with the State?
  – Confirm who may authorize changes or new services
  – Confirm who will provide necessary data and whether it needs to be reviewed before it is sent to you

Written Service Agreements

• When does the contract become effective?
  – After review of records and acceptance?
  – What do you need from the client to get started?
  – When the check clears?

• Which Plan Year(s) are you responsible for?
Written Service Agreements

• What services will you perform?
  – List in detail
  – Additional services/charges
    • Must client request or approve?

• Are there services that you do not perform?
  – Lawyers vs. the marketing department
  – List in detail
  – Investment, fiduciary, document retention?

Written Service Agreements

• What are the Client’s Responsibilities?
  – Timing
  – Related businesses
  – Identifying HCEs and family members?
Written Service Agreements

• Termination of Services
  – When?
  – How?
  – By Whom?
  – Payment of fees?
  – Providing records?
  – Deadlines?

Written Service Agreements

• Should you attempt to limit your liability?
  – $$ amount
  – Only liable for gross negligence or intentional misconduct?
  – May offend prospective clients
Written Service Agreements

• Non-Engagement Letters
  – You have not engaged us
  – We will not be filing your Form 5500 that is due tomorrow
  – Steps to engage/retain

Client Communications

• Communicate regularly
  – Changes in law and regulations
  – Upcoming amendments
  – Changes in the client’s business
  – Changes in your business/relationships
Client Communications

• Communicate in plain English
  – Your IP address is not registering with your firewall ...
  – Your creatinine levels are unusually high ...

• Emails
  – Tone can be easily misread
  – Emails should be treated as formal communications
  – More than two email rule
Client Communications

- Document important communications

Dealing With Problems

- Analyze problems/issues fully before talking to the client
  - Better to provide a solution (or range of solutions)
- Communicate clearly
- Bad news does not get better with age
- Elevate client problems/complaints where appropriate
E&O Insurance

• Provides some protection against the costs of litigation

E&O Insurance

• Review your policy (preferably get a sample policy first)
E&O Insurance

• Who is covered?
  – Company
  – Employees
  – Contractors
  – Related companies

• Make sure to update as needed

E&O Insurance

• Policy limits
  – Retention/deductible (you pay first $$$)
  – Is it a “liquidating policy”? 
E&O Insurance

• Exclusions – Read Carefully!
  – Intentional acts
  – Company stock/ESOP
  – Taxes/Penalties
  – Attorneys’ Fees/Defense

E&O Insurance

• What is a “claims made” policy?
E&O Insurance

- What is a “claim”?
- When should/must I notify my carrier?
- Pros and cons of early notice
- Don’t settle claims without notifying the carrier

Hiring/HR Issues

- Hiring – document offers to prospective employees
  - At-Will
  - Start date
  - Hours
  - Pay (hourly or salary)
  - Vacation
  - Benefits
  - Job description
Hiring/HR Issues

• Employment manual
  – Have one
  – Use it

Hiring/HR Issues

• Performance evaluations
  – Use to document
    • Poor performance
    • Attitude
    • Other issues and concerns
    • Policy violations
Hiring/HR Issues

• Security/Privacy
  – Should have policies
    • Phones
    • Computers
    • Work at home/access
    • Taking documents out of the office
  – Potential data breach consequences and liability

Hiring/HR Issues

• Wage and Hour Issues
  – Overtime rules
  – Exempt employees
  – Answering calls-emails after hours
  – CA: meal breaks
Hiring/HR Issues

• Sensitive issues
  – Consult counsel
  – Have a witness present
  – Document

QUESTIONS?
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