



## BUSINESS PRACTICE SERIES

# LITIGATION RED FLAGS FOR THE TPA OWNER

Workshop 65

*Presented by*

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## Why Do TPAs Get Sued?



## Why Do TPAs Get Sued?

- Professional Negligence
- Misrepresentation/Detrimental Reliance
- Breach of Contract



## Why Do TPAs Get Sued?

- Professional Negligence
  - Duty
  - Breach
  - Causation
  - Damages



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## Why Do TPAs Get Sued?

- Professional Negligence
  - Duty
    - Contract, promise, representation
    - Holding your self out as expert or one-stop solution



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## 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



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## Why Do TPAs Get Sued?

- Professional Negligence
  - Causation
  - Damages



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## 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



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## Why Do TPAs Get Sued?

- Breach of Contract
  - Ambiguities and interpretations of contracts



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## 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



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## 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)



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## 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 ...



## Client Communications

- 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



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## QUESTIONS?



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