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Better Ways to Protect Your CPA Firm From Legal Liability

No one wants to get sued, least of all a CPA firm. The pain and expense simply are not worth it, said Mary Eklund, managing shareholder with the law firm of Eklund Rockey Stratton PS (Seattle). Eklund defends accountants in malpractice suits, so she is very familiar with how such lawsuits unfold and what the ramifications can be.

Eklund shared insights and provided suggestions on how CPA firms can better manage risk during a luncheon presentation at the AICPA Practitioners Symposium in Las Vegas.

The law will usually—though not always—be on your side if your firm “does right.” There are various ways to look at evidence, however, and you want to be sure that if a lawsuit is filed, the evidence will not be the kind that leads juries to a misguided conclusion.

The lessons of Enron and Andersen clearly illustrate how the law can appear to be out of hand at times, she noted. The accounting profession became the first focus of change after the Enron and other corporate scandals came to light. The case against Andersen ultimately boiled down to a cover up—a single change in a single e-mail is what got the jury’s attention. That, plus erroneous jury instructions noted later (too late for Andersen) by the Supreme Court, is really what brought Andersen to an end. Contributors to its fall: client selection and retention and documentation. Eklund noted that these can be dangerous to a firm of any size when it comes to legal liability.

Know that documentation is king. “Documents are the best defense and the worst enemy” of CPA firms, she explained, noting that CPAs tend to have too many or dangerous ones. “Work papers, correspondence, and e-mail—you don’t consider where they may show up later.” But you must, if you are to protect the firm adequately through policies and procedures on handling documentation.

● **Understand the difference between electronic and paper documents and manage the risk.** “Electronic records live forever,” Eklund said, and they may live on buried in meta files or other places that are not accessible to the casual user. Just hitting the delete key may not be enough to remove files your firm does not need to retain.

Lawyers may seek out graphics files, voice mail, e-mail, instant messaging or chat programs, Web site files, temporary files and cookies, and even deleted files.

You need to be aware of the risks involved in electronic information and manage that risk, she said. Two obstacles to successfully managing the risk are client priorities and loyalties by co-workers (including partners). For instance, the drive to boost revenues and profits can be a challenge when it comes to risk management, and so too the language of your marketing materials, which could be deemed promises in the eyes of the law.

“E-mail is where plaintiffs’ lawyers go first now. They don’t even want to see work papers any more,

and they don't understand them anyhow," Eklund said. Know that it isn't necessarily the e-mails between partners that lawyers are looking for. "Instead, it could be your Generation Y millennials who are texting, e-mailing, and voice-mailing. Electronic data is everywhere, and it is a gold mine for plaintiffs' lawyers."

- **Review documents before storing them.**

Ask: Are they needed to protect you or to comply with law or professional standards? Could you show them to the world? Prepare and follow a document retention policy for paper and electronic files so that your firm retains what it must.

- **Be sure you are retaining what you must.**

Failure to preserve evidence, known as "spoliation of evidence" in legal terms, can be an issue that can bring civil and criminal penalties, as well as violations of the Sarbanes-Oxley Act. You have a duty to preserve the documents that you know, or reasonably should know, may be relevant to litigation, potential litigation, or reasonably could lead to the discovery of admissible evidence. You can't change such documentation, and, if you attempt to do so, the computer will record your action.

- **Have a policy—and follow it.** How to store, retain, and destroy documents—especially electronic files—must be controlled by a central policy. Being able to demonstrate the existence of such

a policy and adherence to it will be a help to your firm in the event of legal action. The development and implementation of such a policy must begin with the managing partner and be a top-down initiative, Eklund said. "Millennials have a limited sense of loyalty to your firm's future, so you must have accountability from the top."

- **Provide clear information about services and engagements.** Let your clients know in detail what you offer and what is included in what is charged. This can be great evidence later on, Eklund said. "Juries understand 'you get what you pay for,' as do clients." An engagement letter that becomes like a checklist and is clear to anyone reading it can be a tremendous asset if your firm faces a legal challenge.

Other advice. She listed other "lessons learned" to help protect CPA firms against lawsuits or poor outcomes in them, including:

- Don't accept a "reject" client.
- Don't delegate the responsibility for setting and enforcing a policy to manage information in your firm. "It starts with the managing partner."
- "Just do it"—that is, follow the practices and procedures.
- Remember that "no fee is worth the expense personally of a lawsuit." □

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