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Ethical Considerations for Working With Accounting Experts

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Presenter

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- Writes in the areas of products liability, tort liability, work product, civil litigation, and the attorney-client privilege.

Introduction and Agenda

- Background:
 - Rules and duties – attorneys and accountants
- Different perspectives: fiduciary duty vs. independence
 - Relevant attorney and accounting rules and codes
 - Conflicts and the appearance of impropriety
- Working together: accountants as specialists
 - Maintaining confidentiality
 - Competence
- Philosophy, practical tips, and questions
 - Real World “Hypothetical” Case Studies

Background: Attorney Ethics Requirements

- Governed by state rules of professional conduct (court systems and bar associations)
- Guided by case law and ethics opinions
- American Bar Association Model Rules of Professional Conduct (“MRPC”)
- Other risk factors:
 - Legal malpractice (violation of the duty of care, exposing the lawyer to civil liability)
 - Business/client relations issues

Background: Accountant Ethics Requirements

- National and state ethics rules
- National: American Institute of Certified Public Accountants Code of Professional Conduct (“AICPA Code”)
- Each state has its own body of ethics rules

Background: Areas of Overlap (Attorneys)

Competency for attorneys:

- Reasonable skills or resources
 - Forensic Accounting Issues
- Properly supervise other lawyers on your team
 - Oversight of accountants providing assistance

Background: Areas of Overlap (Accountants)

Competency for accountants:

- SSFS No. 1: professional competence, due care, and oversight
- Planning and supervision
- AICPA Code 1.300

Background: Areas of Overlap (Accountants)

- Supervision of technical specialist on management consulting service engagements. AICPA Code 1.300.020.
- Expertise can be difficult to assess
- Rules require a CPA to provide a reasonable basis for his or her conclusions
- Rules require accounting experts to inform clients of conflicts of interest

Background: Areas of Overlap (Attorneys)

Attorneys' Obligations to Act Truthfully:

- An attorney cannot make a false or misleading communication about himself or his services
- Communications with third parties:
 1. Represented by counsel
 2. Court
 3. Generally

Background: Areas of Overlap (Accountants)

Accountants' obligations to act honestly:

- Under SSFS No. 1, accounting experts must serve clients with integrity and objectivity
- They must also inform the client of conflicts of interest, significant reservations concerning the scope or benefits of the engagement, and significant engagement findings or events
- Accounting experts should not subordinate their opinions to those of any other party

Background: Differing Perspectives

- Attorneys are fiduciaries
- Accountants: duties depend on nature of assignment
 1. Standards of advocacy vs. objectivity

Background: Differing Perspectives (Attorneys)

Attorneys as fiduciaries

- Examples:
 1. Notify the client of material errors
 2. Conflicts of interest

Background: Differing Perspectives (Conflicts)

- Attorneys: duties of loyalty and confidentiality:
 1. Conflicts involving current clients
 2. Conflicts involving former clients
- Imputation of conflicts of interest
- Managing the identity of the client
 1. *Upjohn* warnings
 2. Duties to prospective clients
 3. Unintended attorney-client relationships

Background: Differing Perspectives (Conflicts)

Consequences:

- Ethical violation
- Disqualification, disgorgement of fees
- Business and reputational harm
- Areas of emphasis:
 1. Placing client confidences at risk
 2. Appearance of impropriety/damage to profession

Background: Differing Perspectives (Independence)

- Under AICPA Code 0.400.21 titled “Independence,” independence must be both “of mind” and “in appearance” (i.e., form and substance)
 1. Independence of mind
 2. Independence in appearance

Background: Differing Perspectives (Independence)

- Applied to attest services
 1. AICPA Code 0.400.04
- Differently applied to consulting services
- Providing consulting services may preclude a CPA from offering the client attest services

Background: Differing Perspectives (Privilege)

- Attorney-Client Privilege
- Accountant-Client Privilege
- Work Product Doctrine
- Know the lines for each

Hypothetical: Disclosure of Work Product

- Attorney prepares confidential and privileged materials for corporate client
- Company is in midst of annual audit
- Auditors request materials
- Can they be protected if shared?

Disclosure of Work Product to Auditors

- Inherent tension:
 1. Auditors need information to perform their important public functions
 2. Public interest in maintaining attorney-client protections
- History of increasing scrutiny / demands on “secondary actors”
- Balance: compare with government / regulator demands for protected information

Disclosure of Work Product to Auditors

- Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947):
- Established work product privilege
- Waiver = if disclosure substantially increases the opportunity for potential adversaries to obtain the information

Disclosure of Work Product to Auditors

- Is it work product?
 1. Created “for use” in litigation?
 2. vs. created in ordinary course of business
- Was it waived?
 1. Disclosed to adversary / conduit to adversaries?
 2. Most (not all) courts find that disclosure to auditors does not waive the protection
 3. Disclosure to other third parties

Disclosure of Work Product to Auditors

Work product impacting financial statements and shared with auditors:

- Most courts find that disclosure to auditors does not waive the protection
- Not a universal view

Hypo 2:

- Can attorney materials be protected, even when shared?

Disclosure of Work Product to Auditors

- Tips for avoiding waiver:
- Formalize the expectation of confidentiality
- Limit means for disclosing (sight rights, etc.)
- Agreement:
 1. Tap into Rule 301
 2. Common interest doctrine

Hypothetical : Working with Accounting Experts

- Client retains counsel and forensic accountant in matter
- Forensic accountant prepares materials, communicates directly with client
- Can these materials be protected?
- What if the accountant is asked to testify?

Accountants as Experts

Non-testifying experts / consultants:

- FRCP 26(b)(3): work product protection
- Tips to maintain protection:
 1. Retained / overseen by attorneys
 2. Memorialize litigation basis for preparing materials
 3. Label, segregate, share on need-to-know basis
- *Kovel* doctrine

Accountants as Experts

Testifying experts:

- FRCP 26(b)(4) now protects:
 1. Draft expert reports
 2. Certain communications with counsel
- Still not protected:
 1. Documents used in formulating the expert's opinion
 2. Notes, facts provided on which expert may rely
 3. Caution if expert consults and testifies on different issues

Accountants as Experts

Records:

- What records are used?
- How are they provided?
- What about the day-to-day operations?
- What happens when you find an error (and you will).

Accountants as Experts

The “Dual Role” Accountant

- Client has internal CPA
- External CPA
- Want to use in litigation
- Perils/Potential Risks
- How do you handle the day-to-day
- Waiver and discovery issues

Practical Issues for Accountants

- No professional is a guarantor of a successful outcome.
- Client hires CPA to testify as an expert. Expert is excluded – professional negligence claim?
- Client hires CPA to testify as an expert. Expert's testimony is limited – professional negligence claim?
- Client hires CPA to testify as an expert. Expert get hammered on cross– professional negligence claim?
- Immunity?
- Opposing witnesses versus your own witness.

Professional Liability Issues

- Stories from the trenches
- Wrong expert
- No expert
- The expert was wrong

Wrong Expert

- The other side had a better/more qualified/more persuasive expert
- Unfavorable result – verdict, order, settlement, etc.
- Now your client blames you
- Liability?
- Defenses?
- The tax preparer claim

No Expert

- Resolve or litigate a claim without an expert
- Now the client claims they got a bad result and that you should have retained an expert
- Liability?
- Defenses?
- The tech exec case

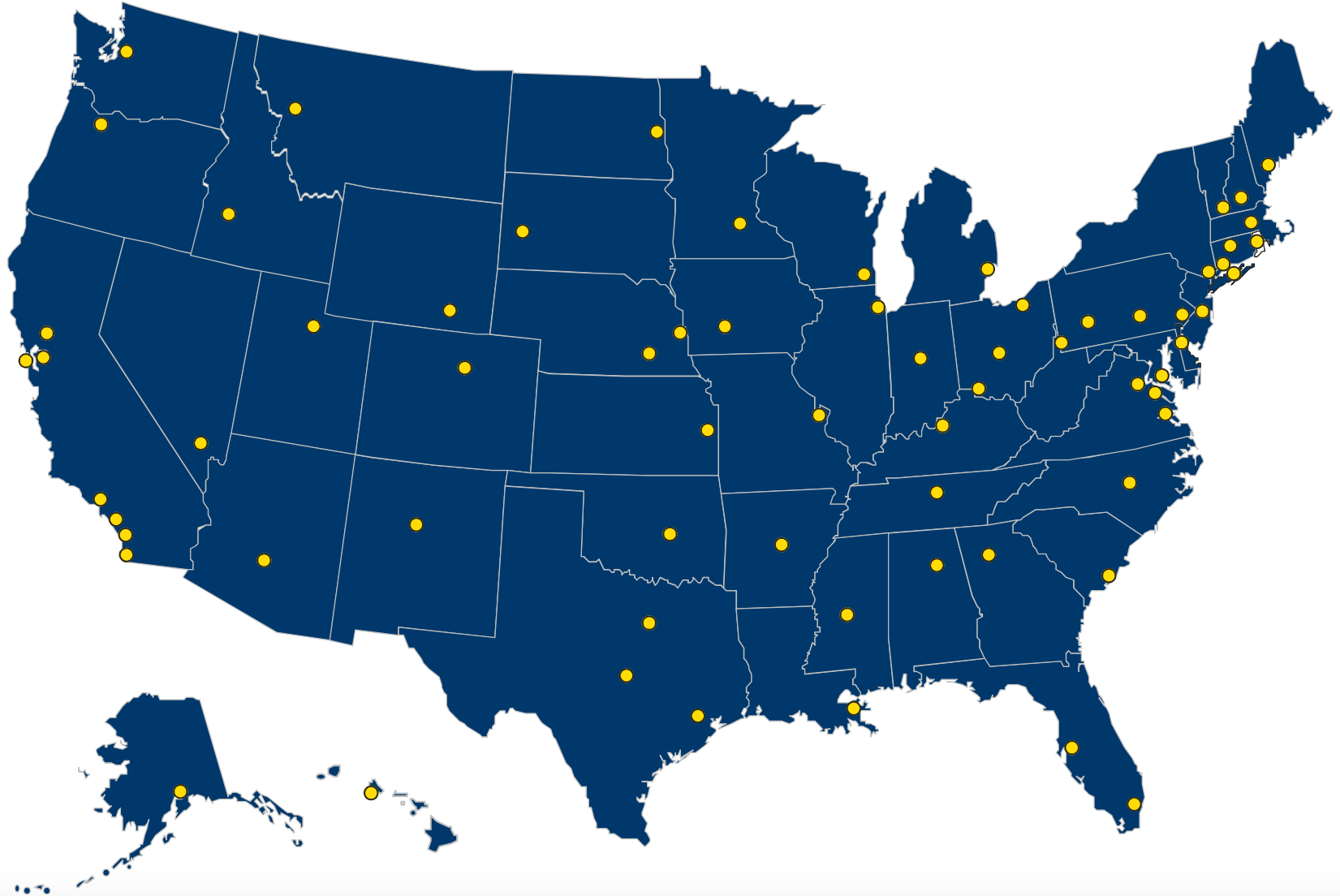
The Expert is Wrong

- Forensic accountant hired to opine on damages
- Opines company records are accurate and damages are \$5 million before a lawsuit is filed
- Later refuses to testify
- New expert says the previous expert was wrong and the company books are inaccurate
- Liability?
- Defenses?
- The hotel claim

Takeaways

- Get your expert involved early
- Understand the accounting
- Involve the client in the case/expert strategy
- Know your expert's limitations
- Know the relative strengths and weaknesses of your positions

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