CPA LIABILITY FOR ESTATE PLANNING IN WISCONSIN

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April 20, 1998 (Revised)

1. **CPA LIABILITY FOR ESTATE PLANNING IS UNCHARTED LEGAL TERRITORY IN WISCONSIN.**

Judicial decisions, legislative enactments, and administrative regulations provide little guidance to Wisconsin CPAs regarding estate planning engagements. The most useful guidance regarding the standard of care in such engagements is found in the AICPA's Statements on Responsibilities in Personal Financial Planning Practice, but it is questionable whether compliance with those Statements is a defense in a malpractice action.

a. **Judicial decisions.**

i. No reported Wisconsin appellate decisions specifically address CPA liability in the estate planning context. Some Wisconsin decisions discuss CPA liability in other contexts, most importantly *Citizens State Bank v. Timm, Schmidt & Co.*, 113 Wis. 2d 376, 335 N.W.2d 361 (1983), which established very broad CPA audit engagement liability to non-clients. This decision will almost certainly apply in the estate planning context, where ordinarily only non-clients can sue the CPA when testamentary plans misfire.

ii. Estate planning malpractice decisions from other jurisdictions illustrate potential risks, but because those decisions rely on common law unlike Wisconsin's, they are more important for their fact patterns than their legal analysis.

(1) As a rule of thumb, Wisconsin is more permissive than most other states regarding third-party negligence suits against professionals, including CPAs, insurance professionals, brokers and financial consultants. See *Citizens State Bank v. Timm*, above.

(2) Lawyers are an exception to this rule. In Wisconsin, lawyers are normally liable for malpractice negligence only to their clients. To recover damages from a lawyer for negligence, the plaintiff must prove "privity," i.e. the existence of a contractual relationship between plaintiff and lawyer. (Privity is required only for negligence claims, not for intentional tort claims against lawyers.)

(3) This exceptional (for Wisconsin) privity requirement in turn has its own exception: In the estate planning context, lawyers may be liable for negligence to non-client intended beneficiaries. See *Auric v. Continental Casualty Company*, 111 Wis. 2d 507, 331 N.W.2d 325 (1983); *Anderson v. McBurney*, 160 Wis. 2d 866, 467 N.W.2d 158 (Ct. App. 1991).

(4) *Zimmerman v. Pokart*, 662 N.Y.S.2d 5 (1997) illustrates the difference between Wisconsin law and that of other states (here, New York). Zimmerman, a co-executor, sued the estate's CPAs and attorneys for negligent failure to consider his eligibility, as remainder beneficiary of an inter vivos trust, for the generation skipping transfer tax exemption. The New York court dismissed Zimmerman's claims because he lacked privity: Zimmerman was a client of the estate's professionals only in his capacity as co-executor, not personally and individually. But a Wisconsin court would not dismiss Zimmerman's claim against the CPAs (privity not required), and perhaps would not dismiss his suit against the lawyers either (intended beneficiary exception to the privity requirement). Moral: Do not rely on decisions from other states regarding CPA liability.

b. **Legislative enactments and administrative regulations.**

i. Nothing in chapter 442 (Accounting Examining Board) or other Wisconsin statutes applies specifically to CPA engagements in the estate planning context. The Rules of Conduct in Chapter Accy 1, most of which are regulatory versions of rules in the AICPA Code of Professional Conduct or other AICPA Professional Standards[1], apply to aspects of estate planning engagements which fall within their terms. But none of those rules applies specifically to estate planning engagements.

ii. Under certain circumstances provisions of the Administrative Code are admissible in negligence actions to prove the standard of care with which one subject to those provisions must comply. *Heyden v. Safeco Title Insurance Company*, 175 Wis. 2d 508, 521-526, 498 N.W.2d 905 (Ct. App. 1993) (section Ins 6.11of the Wisconsin Administrative Code admissible to prove the standard of care applicable to insurance company). But it is open to question whether the standards of Chapter Accy 1 are ever admissible for that purpose, and even open to question whether they have been promulgated in accordance with Wisconsin law. *Chevron Chemical v. Deloitte & Touche*, 168 Wis. 2d 323, 483 N.W.2d 314 (Ct. App. 1992), aff'd on other grounds, 176 Wis. 2d 935, 501 N.W.2d 15 (1993) (rejecting use of section Accy 1.301(4)(a) as standard of care); Gary M. Young, "Unanswered Questions in Accounting Malpractice Law," *Wisconsin Lawyer*, May 1994, pp. 15-17 and 60-61.

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[1] Note, however, that chapter Accy 1 is not entirely consistent with the AICPA Professional Standards. For example, the AICPA's definition of "attest engagement" excludes compilation engagements (see AT § 100.02d), some of which are expressly included in the Examining Board definition. Accy 1.302(1)(a) (numerals added), derived from ET § 302.01 (which however does not define or refer to attest engagement). On the other hand, the AICPA's definition covers attestations regarding statements not enumerated by the Examining Board, including pro forma financial information (see AT § 300), statements on an entity's internal financial control structure (see AT § 400), statements regarding an entity's compliance with specified requirements, and statements regarding the entity's internal control structure over specified requirements (see AT § 500).

c. **Professional Standards.**

i. The AICPA Professional Standards most relevant in the estate planning context are the Statements on Responsibilities in Personal Financial Planning Practice (SRPFPs). Of special relevance to topics in this outline are sections 100 and 200 of the SRPFPs. The are available from the AICPA. For further information on the Internet, go to http://www.aicpa.org/index.htm.

ii. The SRPFPs in turn refer to a variety of other Professional Standards which might apply, depending on the nature of the personal financial planning services provided, including standards applicable to the provision of tax advice, review and compilation engagements, other attest engagements including those relating to financial forecasts and projections, and consulting services. PFP § 100.06-.10. It is beyond the scope of this outline to discuss this wide range of services. See *Accounting Malpractice Law In Wisconsin* (1995), especially the chapters on liability arising from attest engagements; compilation engagements; review engagements; reports on forecasts, projections, and pro forma financial information; litigation engagements; consulting engagements; and tax engagements.

iii. The SRPFPs are not enforceable standards under Rule 202 of the AICPA Code of Professional Conduct. Moreover, it is questionable whether they or the other professional standards to which they refer are admissible to show the standard of care in malpractice actions arising from services to which they apply. *Chevron Chemical v. Deloitte & Touche*, 168 Wis. 2d 323 (Ct. App.) (rejecting use of AU § 561 as standard of care); Young, "Unanswered Questions in Accounting Malpractice Law," above; see also *Peck v. Meda-Care Ambulance Corp.*, 156 Wis. 2d 662, 669-674, 457 N.W.2d 538 (Ct. App. 1990) (violation of ethical proscription did not show attorney's negligence *per se*); *Tackes v. Milwaukee Carpenters District Council Health Fund*, 164 Wis. 2d 707, 715-16, 476 N.W.2d 707 (Ct. App. 1991) (code of ethics of Professional Insurance Agents of Wisconsin does not establish standard of care).

d. **Practice and litigation tips.**

i. Even if provisions of chapter Accy 1 or AICPA Professional Standards are not themselves admissible, expert witnesses may nonetheless rely upon them in forming their opinions regarding the applicable standard of care. Section 907.03, Stats.; *Heyden v. Safeco Title Insurance Company*, 175 Wis. 2d 508, 521-522, 498 N.W.2d 905 (Ct. App. 1993).

ii. Comply with applicable provisions of chapter Accy 1, SRPFPs and other AICPA Professional Standards. Do not take the *Chevron* court of appeals decision as license to ignore those provisions.

2. THE PRIMARY MALPRACTICE RISK IN ESTATE PLANNING ARISES FROM THE DIVISION OF LABOR AMONG ESTATE PLANNING PROFESSIONALS.

The most distinctive source of malpractice risk in estate planning is the division of labor among different professionals, including the CPA, the lawyer, the insurance agent or broker, the financial advisor, and the trust officer, in the provision of services. Especially in areas like taxation, where several professionals are competent to provide advice and services, there is a significant risk that a job will not get done because each professional will think that another will or should do it. The job then falls into a crack between the professionals. Risk management requires that you clearly define your division of labor and work together as a team.

Cooperate and communicate. Remember that if the client sues one of you, the client will sue all. Don't assume that if another professional is negligent, it won't hurt you.

a. Estate planning engagements are unique, because in them the CPA will almost always need to work with an attorney -- something CPAs can avoid in all other engagements except litigation engagements.

i. The CPA must work with a lawyer because of the statutory and regulatory definitions of the different professions, especially law, and related licensing requirements. These licensing requirements can be defended as essential to consumer protection. They can also be attacked as anticompetitive barriers to entry which permit the extraction of higher fees from consumers, thereby increasing professional incomes and excluding lower-income persons from access to professional services. See Richard A. Posner, *Overcoming Law*, chapter 1, "The Material Basis of Jurisprudence"; "Half of low- and moderate-income U.S. households face legal needs," News Briefs, *Wisconsin Lawyer*, vol. 67, No. 8, Aug. 1994, 5[2]; David Tenenbaum, "Unauthorized Practice of Law: Protection or Protectionism," *Wisconsin Lawyer*, vol. 67, No. 9, Sept. 1994, 14-17, 60.

(1) Only licensed attorneys may represent other persons in any Wisconsin state court, including probate court. Section 757.30 (1)-(2), Stats.; *State ex Rel. Baker v. County Court*, 29 Wis. 2d 1, 138 N.W.2d 162 (1965).

(2) Outside the courtroom, only a licensed attorney may give *professional legal advice* not incidental to his or her usual or ordinary business, or render any *legal service* for any other person, or any firm, partnership, association or corporation. for compensation or pecuniary reward. Section 757.30 (1)-(2), Stats. To apply this rule we need to know what counts as "professional legal advice" and "legal services." As a rule of thumb, any advice relating to someone's legal rights or obligations will count as "professional legal advice," and drafting any document which purports to create, eliminate or alter legal rights and duties will count as a "legal service." See generally OAG 64-76, 65 Op. Att'y Gen. 173 (1976) (drafting of articles of incorporation constitutes the practice of law). To draft wills and trust documents is to practice law.

(3) Therefore in most estate planning engagements -- certainly any in which legal documents must be drafted or appearances made in court -- the CPA will need to work with an attorney, to avoid the unauthorized practice of law.

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[2] This article reports on the ABA's 1993 Legal Needs Study. Regarding wills and estates, the article states: "Both income groups cited needs for estate planning and will preparation. Moderate-income households listed estate administration and drafting powers of attorney and other such advance directives. Low income households frequently reported as legal needs disputed wills or competing claims to portions of an estate."

ii. The lines separating the professions are under attack and might shift or disappear. Regarding the perception of some attorneys that the accounting profession, or at least the Big Few, are attempting to usurp traditional lawyers' turf, see: Philip S. Anderson, "We Must All Be Accountable," *ABA Journal*, volume 84, October, 1998, 6; John Gibeaut and James Podgers, "Feeling the Squeeze," *ABA Journal*, volume 84, October, 1998, 88-89; John Gibeaut, "Squeeze Play," *ABA Journal*, volume 84, February, 1998, 42-47; "Big Six In Hot Pursuit Of Legal Biz," *National Law Journal*, August 18, 1997, A1and A13. As Gibeaut notes, "the conflict is raising questions about the fundamental differences between the two professions: accountants' duty toward objectivity and public disclosure of financial statements, and lawyers' obligations to act as advocates and guard their clients' secrets." On this conflict, see the famous statement of Chief Justice Burger in *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-818 (1984):

> The private attorney's role [is] as the client's confidential adviser and advocate, a loyal representative whose duty it is to present the client's case in the most favorable light. An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, *the independent auditor assumes a public responsibility transcending any employment relationship with the client.* The independent public accountant performing this special function owes *ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public.* This "public watchdog" function demands that the accountant maintain *total independence from the client at all times* and requires *complete fidelity to the public trust.* ... [The accountant is] a disinterested analyst charged with public obligations.

(Emphases added.) However, it is doubtful that this conflict arises in estate planning services, which do not commonly include an attestation component. When PFP 100.07 lists the provisions of the Code of Professional Conduct that apply to personal financial planning, it omits ET § 101, Independence. (It does include ET § 102, Integrity and Objectivity, however.) What are the implications of this for (a) an accountant-client testimonial privilege for personal financial planning engagements, and (b) licensing accountants to draft wills and trust documents and even to represent clients in probate court? Does it matter whether the CPA also provides attestation services to the estate planning client?

b. Sometimes attorneys do not feel entirely comfortable or confident about their understanding of, say, a difficult taxation issue. So to get help, or to avoid the malpractice risk, an attorney might decide to retain a CPA, or ask the client to retain a CPA, for tax services in a complex estate matter. Indeed, in such circumstances an attorney might have a legal duty to consult with a CPA, or refer a client to a CPA.[3]

i. PFP § 200, *Working With Other Advisers*, addresses this issue. See also AT § 100.09.-.10, AT § 500.42, and AU § 336, *Using the Work of a Specialist.*

ii. Such an association of professionals can create uncertainty regarding the allocation of professional responsibilities. A useful case study of this uncertainty is *Kinney v. Shinholser*, 663 So.2d 643 (Fla. App. 1995). Ruth Kinney retained Attorney Moncrief to probate her husband's estate, which included a general power of appointment over the assets of the testamentary trust. Moncrief suggested that Ruth retain a CPA to prepare the federal estate tax return, so Ruth hired CPA Hartsock. Ruth did not disclaim the power of appointment within nine months after her husband's death. She then died, and her son George sued Moncrief and Hartsock for negligent failure to warn Ruth and George about the tax consequences of not disclaiming the power. The trial court granted summary judgment to both professionals, and the appellate court reversed, with one dissent. The split in the appeals court reflects opposite about the engagements undertaken by the lawyer and the CPA.

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[3]Compare: “The cardiologist who negligently attempts treatment outside of his or her expertise is not, however, thereby immunized from liability. If competent evidence establishes that the average cardiologist would either refer the cancer patient to an oncologist or would consult with an oncologist, the cardiologist could be found negligent for not referring or consulting. Under the current state of Wisconsin law, however, the cardiologist is not held to an oncologist's standard of care.” *Johnson v. Agoncillo*, 183 Wis.2d 143, 152, 515 N.W.2d 508 (Ct.App. 1994).

(1) The dissent reasons that although Moncrief "agreed to probate the estate, [he] advised Mrs. Kinney that he did not handle the tax aspects of large estates and that she would need to retain a tax specialist to advise her on tax matters and to file the tax return for the estate." The dissent concludes that this sufficed to get the attorney off the hook: The CPA was then the only proper source of tax advice; the lawyer had no obligation to draft a waiver unless the client instructed him to do so, and the client never did. Does that persuade you?

(2) The concurring opinion (written in response to the dissent) expresses doubt that in an estate planning engagement an attorney can simply disclaim "any responsibility for estate tax issues," and said he would rely "upon expert testimony to determine whether [the lawyer's] actions were appropriate." If you were the expert witness, what would you say?

iii. This is *the typical malpractice lawsuit against CPAs in the estate planning area*: a suit against both lawyer and CPA for negligence relating to the tax consequences of the estate plan or tax consequences of post-mortem choices, such as whether to disclaim a power of appointment. *Zimmerman v. Pokart* and *Kinney v. Shinholser*, above, exemplify this pattern. So do the following cases.

(1) *Linck v. Barokas & Martin*, 667 P.2d 171 (Alaska 1983): A complaint by a widow and her children stated a cause of action against attorneys and CPA for negligent failure to advise her to disclaim her inherited interest in the estate within the applicable time period.

(2) *Fowler & Hammer, Inc. v. Flynn*, Case No. 95-CV-312, La Crosse County Circuit Court: Both attorneys and CPAs were sued for alleged malpractice relating to advice regarding the tax consequences of a recapitalization plan.

(3) *Merow v. Kox*, 212 Wis.2d 640, 570 N.W.2d 61, 1997 WL 408895 (Ct. App. 1997)), and *Merow v. Shinners, Hucovski & Co., S.C.*, 212 Wis.2d 640, 570 N.W.2d 61, 1997 WL 408895

(Ct. App. 1997): Trust sued law firm, accountant and two accounting firms for malpractice arising from undisputedly improper preparation of estate tax returns; court of appeals affirmed summary judgment dismissing claims against accounting firms, and affirmed denial of lawyer's summary judgment motion. The court of appeals reported the trustee's claim "that he did not know which party, [the attorney] or the [accounting] firm, would be completing each of the various forms. Merow expected that [the attorney] and the [accounting] firm would 'work out' those matters themselves." 1997 WL 408895 at *1. These are unpublished opinions which have no precedential value and may not be cited except in limited instances.

(4) *Jewish Hospital of St. Louis v. Boatmen's National Bank*, 633 N.E.2d 1267 (Ill. App. 1994): The CPA, hired as tax expert by the testator and later the estate, owed the remainder beneficiaries a duty in contract or tort, and trial would be necessary to resolve the dispute over whether the CPA breached that duty.

iv. Of course this is not the *only* risk in estate planning engagements. Valuations, for instance, can be a significant source of risk, especially if the CPA does not take care to distance herself from her client's assumptions and representations. But extensive searches on Westlaw in April, 1998, disclosed only the court decisions cited in this outline, and none relating to valuation or other malpractice in the estate planning context.

v. Risk-management for tasks that fall in cracks.

(1) *Engagement letters*. In none of the decisions cited in this outline is there any reference to an engagement letter from either the CPA or the lawyer. An engagement letter signed by the client is the first line of defense against confusion over the division of labor in a multi-professional engagement. See PFP §§ 200.05-.09. In your letter state not only what you will do but *what you won't do.* Also communicate your understanding in writing to the other professionals. *This is especially important regarding tasks that any of several professionals might*

competently undertake, such as advising the client of the tax consequences of certain choices. Do not take it for granted that the other professional will assume the responsibility or the risk for such tasks.

(2) If uncertainty regarding the division of labor arises *during* the engagement, take prompt steps to clarify your responsibilities with the client and the other professionals involved. (Prompt steps are those which get results before the deadline for, say, filing a disclaimer passes.) Discuss the allocation of such tasks with other professionals and with your client, put your understanding in writing, and make sure both the client and the other professional(s) get a copy. Ask the client to return a signed copy, and ask the other professionals to inform you immediately if they disagree with your understanding.

(3) Have a master check-list, like the one you would use for an audit engagement, indicating all tasks that could possibly be included within an estate-planning engagement involving taxation services. For each such engagement, determine which tasks that engagement requires you to do; do not delete any task from the list unless your engagement letter states, in at least general terms, that you are not undertaking it. Sign and date each item when you have completed it. If another professional (e.g. the lawyer) undertakes to complete any item on your list, indicate that on the list, confirm it in your engagement letter or other correspondence to your client, confirm it in writing to the other professional, and attach to the list the other professional's written agreement to undertake that task.

(4) Documentation in your files is necessary but not enough. You must also be able to show that the client and other professionals received all necessary information about what you have undertaken to do. (This is a weakness in PFP § 100.13.)

(5) It is much easier for estate planning professionals to cooperate effectively during the engagement. If they do not cooperate then, they will find it much harder to cooperate when they are all defendants in their client's malpractice suit. Remember, if

any professional gets sued for malpractice in estate planning, *all* professionals get sued. Your client's malpractice lawyer will take aim at every professional in sight. So help each other out during the engagement; don't assume that if another professional is negligent, it won't hurt *you*.

3. SOME OTHER STEPS ACCOUNTANTS CAN TAKE TO LIMIT EXPOSURE.

The following risk management steps, though not specific to estate planning engagements, are useful in some or all of those engagements. Some of these steps have been discussed above, and are repeated here to provide a more complete checklist.

a. **Screening Clients**. If you are authorized to decline to provide services to potential clients, what screening procedure do you have? Is it designed to help you spot persons who are predisposed to bring malpractice claims?

b. **Conflict checks**. Have a centralized, preferably computerized, conflict checking system including at least information regarding all current and prior clients. Always do a conflict check before accepting a new client. If you want to know more about this, ask your lawyer. Most lawyers do this well.

c. **Know who your client is.** This can be in doubt when arrangements are left informal and there are several possible clients involved in the transaction. Is your client the testator or her lawyer? The personal representative or his lawyer or the surviving spouse? The closely-held corporation, the sole owner, the sole owner's trust, or one of their lawyers? Knowing your client is especially important in engagements with issues of confidentiality and conflicts of interest. But even when those issues are absent, it's nice to know who gets the bill.

d. **Engagement letters**. Always send your client an engagement letter, even when AICPA Professional Standards do not require it. In the letter state what you will do *and what you will not do.* Make sure the client returns a signed copy of the letter to you.

e. **Representation letters**. Get client representation letters for all attest engagements, even when AICPA standards do not require it. If a compilation client is not willing to state that he is not aware of any respect in which the financial statements are materially inaccurate or misleading, that is a red flag to skip that engagement. The letters should make it clear that the client takes responsibility for all assertions, and also all assumptions in forecasts, projections and pro formas.

f. **Representation letters, again**. In non-attest engagements, such as consulting engagements (e.g. valuations), obtain a representation letter, in which the client sets forth the representations and assumptions on which you will rely, and says they are the client's representations and assumptions, for which the client takes responsibility and assumes the risk of material inaccuracy.

g. **Termination letters**. When you have completed the engagement, send your client a letter stating that you have completed the engagement. If the client is responsible for any further action relating to the engagement, state clearly what the client is to do and any deadlines that apply. If the client needs forms or other materials or information to take further action, provide the forms, materials and information with your letter.

h. **Confidentiality**. Wisconsin has no testimonial accountant-client privilege. But it is usually improper for the CPA to provide testimony about client matters voluntarily, without subpoena. Before disclosing any client information without subpoena, get written informed consent from the client. If the client does not consent, and you believe you are obligated to disclose the information, consult your lawyer. See PFP § 100.07 c and ET § 301.01.

i. **Billing Clients**. Bill clients promptly and regularly; on your bill, show clearly the services you provided. Be pleasant but firm about payment. Remember that many malpractice claims are defensive responses to collection suits. Think twice before suing.

j. **Documents**. Have uniform rules for document retention and destruction. Follow those rules. In litigation engagements, ask the lawyer who retained you what rules apply to document retention, e.g. retention of drafts and work papers.

k. **Promises**. Never guarantee anything, ever. Never promise you will use the highest standards of the profession. In promotional documents, do not make promises that are inconsistent with your professional independence and objectivity. For instance, in a brochure touting your services as an expert witness, do not promise the potential client "You can count on me!" or "I'm in your corner!" You are no one's hired gun.

l. **Applicable standards**. Always be aware what professional standards apply to the engagement, including AICPA standards, Examining Board rules, and (especially in consulting engagements) any other applicable standards.

m. **Ethics expert.** Is someone in your firm an expert on professional standards and their interpretation and application? In larger groups it is useful to have such an expert to advise colleagues regarding ethical issues.

n. **Keep client representations distinct from yours**. Never put your name or identification as CPA on documents presenting the client's assertions or assumptions, such as financial statements or projections.

o. **Make your responsibility for assertions clear**. Make clear the extent to which you stand behind the client's financial statements. This can be especially troublesome in a review engagement, which applicable Professional Standards leave ill-defined. Consider including, within or attached to your review reports, a more detailed statement, in plain English (language a non-CPA can understand), of what procedures the review did and *did not* include, and what the utilized procedures might reasonably be expected to discover and *not* discover.

4. SOME INSURANCE CONSIDERATIONS FOR CPAS.

Some CPA firms are self-insured, or other-insured with a very large deductible or retention. This outline does not address the issues involved in deciding whether to purchase insurance. It raises questions that apply to CPAs who already have coverage under a professional errors and omissions policy.

a. **Plan Ahead, Before a Claim Arises.**

i. Read your liability policy to see just what protection it gives you. (This is undoubtedly painful to do.) If you cannot understand it, ask your insurance agent or firm's risk manager to explain it.

ii. If you are counting on coverage under the insurance policy of your partnership, LLC, or service corporation, ask: Does that policy protect you, or just the firm?

iii. A liability insurer has two primary duties to an insured: to defend the insured against certain claims, and to indemnify the insured for damages the insured must pay as a result of such claims. Remember that even if you are not found liable when someone sues you, you still must find some way to pay for the costs of your defense -- attorney fees, fees for experts, and incidental costs for court reporters, transcripts, copying, phone calls and the like. An adequate liability policy, or adequate indemnification plan, must provide coverage for these defense costs.

iv. Against what claims does your policy protect you? Look at your policy. Consider these and similar questions:

(1) Does your policy provide coverage for punitive damages?

(2) Does your policy provide coverage for services within the scope of the Statements on Responsibilities in Personal Financial Planning Practice?

(3) Does your policy provide coverage for consulting services?

(4) Does your policy or plan cover your individual liability as a supervisor of a negligent subordinate?

(5) Review the description of *Kinney*, above. Does your policy cover the conduct of the CPA in that case?

(6) Does your policy provide for indemnification or payment of damages awarded for intentional torts? (Look for an intentional acts exclusion.) Does it provide for payment of litigation costs you incur successfully defending against a suit alleging an

intentional tort? If not, what provision can you make against such risks?

v. Some malpractice insurers will work with you to structure your practice to minimize the risk of malpractice. This useful service could reduce your premium and improve your practice. Ask your agent.

vi. Review your policy to see how it defines "claim," and to see how long you have to give notice of a claim. If you do not notify your insurer of a claim, your policy will not cover that claim. You must notify the insurer promptly.

b. **Some Things To Do When a Claim Arises.**

i. Notify your insurer promptly.

ii. Perhaps your policy says that the insurer has the right to choose a lawyer to represent you. But the insurer also has a duty to deal with you in good faith, and if you have a good reason for wanting a particular lawyer, the insurer must take that into account. Good reasons might include a lawyer's special knowledge of your firm, or special expertise in the area of law, or special relationship with you personally. Talk to the insurer about this.

iii. Sometimes a liability insurer will deny coverage. If that happens, talk to your lawyer (not the insurance company's lawyer).

iv. Sometimes a liability insurer will agree to defend you "under a reservation of rights." This means (roughly) that the insurer thinks the policy does not require it to indemnify you for any damages you might have to pay, but it will nonetheless pay for your defense until that question is decided. An insurer defending under a reservation of rights has a conflict of interest with you, and so does the insurer's lawyer. Therefore the insurer should hire another lawyer to represent you. You should confide only in that other lawyer, not in the insurance company's own lawyer.