

For: LeClairRyan, Boston
From: Parness & Associates, Aberdeen, N.J.

FOR IMMEDIATE RELEASE

Attorney Offers Guidance On Accounting Liability Trends, Avoiding Litigation

*--Carefully worded engagement letter, other steps may reduce a CPA's exposure to liability says
LeClairRyan's Nancy Reimer at AICPA Engage 2018 conference*

LAS VEGAS (6/18/18)— A well-written engagement letter may help CPAs avoid or at least limit legal liability down the road, attorney Nancy M. Reimer told an audience at the AICPA's just-concluded Engage 2018 conference in Las Vegas.

"Often, the ability to reduce the liability of a CPA firm or individual practitioner is attributable to steps they took before or at the early stages of an engagement," said Reimer, a Boston-based member of the national law firm LeClairRyan, who delivered a talk on trends in accountant liability and avoiding litigation. "Many of the cases brought against accounting firms, including almost all securities class actions, are resolved before trial. A well-crafted engagement letter, followed by firms performing their services in accordance with the terms of the letter without jeopardizing their status as independent auditors, led to the early resolution of many of these cases."

Her presentation focused on "hot button" issues that can spark liability claims against accountants, including audit scope and responsibility; fiduciary duty; technology; and confidentiality of tax return information.

"Audit engagements are a major concern," she advised. "They often arise because of an expectation gap stemming from a client's misunderstanding of the purpose and scope of an audit. That's why it's important for the engagement letter to concisely lay out the terms of the audit — including the limitations on uncovering fraud and other abuses — in a way that clearly defines them, so they're understood and agreed to by both parties prior to commencing the engagement."

In fact, a well-written engagement letter can be a controlling factor if a court considers the responsibilities of the client and the CPA, she added. "The engagement letter has been a significant factor in limiting a CPA firm's liability in *Newman v. Founding Partners Stable Value Fund, LP, et al* and other cases."

On another topic, Reimer noted that when management fraud or other malfeasance is involved, an auditor may be able to base its defense on the doctrine of *In Pari Delicto*, the concept that a plaintiff should not benefit from a wrong that was caused in part by the plaintiff's actions. In *Baena v. KPMG.*, 453 F.3d1, 7-8 (1st Cir. 2006), summary judgment for the auditor was granted based on *In pari delicto* on the claim by the Bankruptcy Trustee," she said, illustrating why it's so important for auditors to carefully document their audit procedures. "This is a defense based on management's or the client's employees actions," Reimer explained. "The concept is to protect the auditor from liability where management has either withheld key documents from or lied to the auditor, making it difficult to detect fraud."

Addressing the issue of fiduciary duty, she noted that in the ordinary course of business, an auditor is generally held to be independent from its client. "But an accountant may cross the line when offering investment advice and strategies, and engages in business or other transactions on behalf of the client," Reimer said. "In *Commscope Credit Union v. Butler & Burke, LLP*, the North Carolina Supreme Court ruled

that a fiduciary relationship may be established by the facts of a particular case, but merely performing annual audits was not sufficient to establish a fiduciary relationship.”

Reimer added that technology is a key part of a CPA’s toolbox today, but computer hackers, ransomware, wire transfer fraud and other threats can pose a liability risk. “The good news is that expertise and resources are available to help avoid or mitigate the damages and aftermath of an attack or breach,” she noted. “Ransomware and other losses may also be avoided by creating user awareness and training everyone in the firm to be cautious about unsolicited or questionable attachments, hyperlinks or requests.”

“In general,” she concluded, “before taking any significant activity in these or other matters, you may wish to consult with your legal advisor. Doing this early on may save you from a lot of trouble later on.”

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