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Liability Lessons

Engagement Letters for Consulting Never More Important

By Jonathan S. Ziss, JD

Insightful lessons can be learned by reviewing professional liability issues. With this in mind, Gallagher Affinity provides this column for your review. For more information about liability issues, contact Irene Walton at irene_walton@ajg.com.

As the CPA community entered March, it looked like another routine tax season. With another year of the Tax Cuts and Jobs Act under the belt, we were beginning to feel comfortable again with the tax code and in the rhythm of the compliance calendar.

The coronavirus was a concern, but no anvil had fallen out of the sky and conked us on the head (for those of you familiar with Wile E. Coyote) ... until one did.

On March 6, the Coronavirus Preparedness and Response Supplemental Appropriations Act became law. On March 11, the World Health Organization declared COVID-19 a global pandemic. On March 18, the Families First Coronavirus Response Act became law. On March 21, the IRS extended the federal income tax filing due date from April 15 to July 15. On March 27, the Coronavirus Aid, Relief, and Economic Security (CARES) Act became law.

Boom! The anvil fell and kicked up enough dust to change the way we saw the world. In the span of just three weeks, the two certainties of death and taxes suddenly took on an entirely new appearance, disorienting us in the workplace, at home, and everywhere in between.

Yet, in short order, the CPA community shook off the dust and reoriented itself to tackle the needs of its clients. And, oh my, there were needs.

Americans Turn to Their CPAs

Designed for the critical objective of keeping people employed, the CARES Act included benefits of unprecedented

scope and scale. These included the Paycheck Protection Program (PPP), an emergency Economic Injury Disaster Loan program, emergency unemployment relief for governmental entities and nonprofit organizations, an employee retention credit for employers subject to closure due to the virus, an allowance of partial above-the-line deduction for charitable contributions, and modifications of limitations on charitable contributions during 2020.

To participate in this \$2 trillion stimulus, America turned to its CPAs for assistance with clarity, eligibility, and application. There were myriad questions, from IT/remote work solutions (including data security) to talking with banks about a new way forward. All hands already on deck for tax season were repurposed to address the various relief programs' compliance requirements.

What Engagement Letter?

If you issued engagement letters to every client for whom you provided economic-stimulus-related services – whether helping with applications, talking to banks, or discussing changes to tax planning – you should be highly commended! But I have a feeling not many will be getting gold stars. The overwhelming sense is that practitioners found themselves at first caught off guard by swelling client demand, and then entirely too busy keeping up with phone calls and emails to draft and send out engagement letters for pandemic-related professional services. This is understandable. After all, in many instances there was no telling what would follow from that initial phone call or emailed question. Would this be a quick Q&A for which it wouldn't be worth sending a bill (let alone an engagement letter), or would this be the start of a 10-hour frenzied collaboration?

Though it may be understandable that services were provided without a corresponding engagement letter, it is hardly excusable. Because of the novelty of economic-relief-related work, engagement letters should have been sent.

Engagement Letter Basics

A primary purpose of an engagement letter is to confirm what you were hired to do. Put another way, what are a client's fair expectations, and, correspondingly, what should the limits of those expectations be? Without an engagement letter, expectations are free to roam where they

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will and elude limitation. Misunderstandings are perhaps unavoidable, but in the absence of an engagement letter scope-of-work misunderstandings become more the rule than the exception.

A good engagement letter will state the purpose of the engagement and will define the scope of what you will and won't do. It will note the client's instructions, if any, along with the client's responsibilities, deliverables, and dates. It will note reliance on facts and representations provided by the client, and it will outline the terms of compensation and the consequences of late payment.

Additional topics can and should be considered, such as an arbitration clause for fee disputes, a limitation of liability, and perhaps a limitation on the time within which any claims arising from the services may be brought.

The letter should note that additional services are available, and that if any such services are requested a subsequent letter or some other written confirmation of the expanded scope will be issued. This clause reinforces the original limitation while inviting further business development.

Your Declaration of Independence

For practitioners with audit and attest practices, engagement letters for economic stimulus consulting can be critical to maintaining independence. As the U.S. Securities and Exchange Commission Office of the Chief Accountant noted earlier this year,¹ promoting advisory services apropos of the pandemic, "Auditor independence is foundational to the credibility of the financial statements. As we have consistently noted, auditor independence is a shared responsibility among audit committees, management, and their auditors. Management and audit committees should be aware of how an auditor independence violation may affect the company's required SEC filings."

Independence in connection with audit engagements, needless to say, is not limited to public companies. Therefore, care must be taken with any attest client for whom consulting services of any kind are to be rendered to clearly define and limit those services so as not to compromise independence. No engagement letter? No clarity.

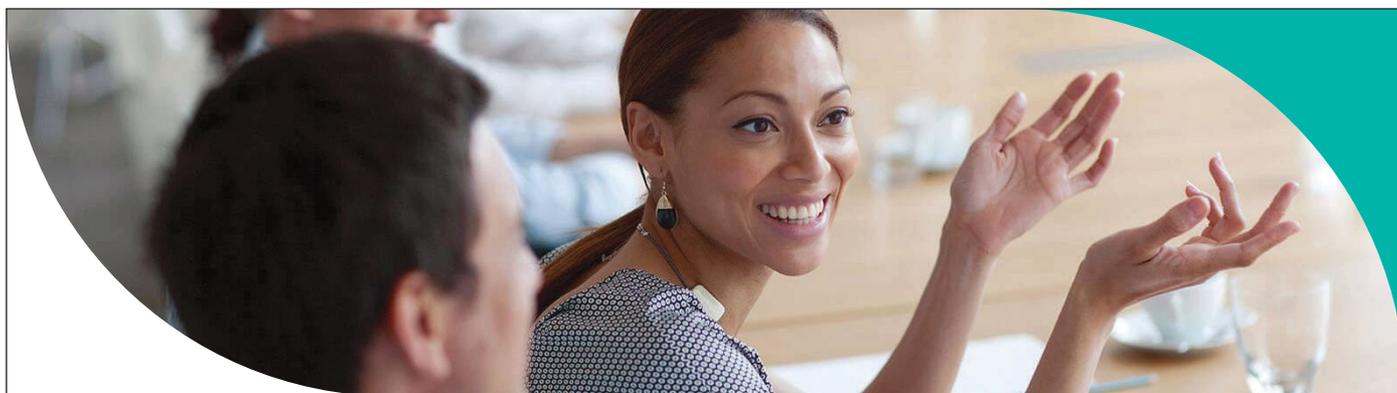
It's Never Too Late

Who can say what society or commerce will look like six months from now, or six months from then? But, as the saying goes, the more things change, the more they stay the same. So, for those who may have neglected to use engagement letters during the first stimulus wave, I urge you to take this as a teachable moment. Have a general engagement letter template on hand. Then, should a similar situation arise, simply insert a line or two describing the scope of work to be performed, and hit "send."

Assistance with engagement letters is available through your professional liability insurance broker, insurance carrier, and through knowledgeable legal counsel. 

¹ Sagar Teotia, "Statement on the Importance of High-Quality Financial Reporting in Light of the Significant Impacts of COVID-19," U.S. Securities and Exchange Commission (April 3, 2020).

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