



Moss & Barnett

A Professional Association

RESPONDING TO PROFESSIONAL DISCIPLINE

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A Matter of Concern

CPAs face ever-increasing scrutiny from state boards of accountancy, federal agencies and their own self-regulatory organizations (American Institute of Certified Public Accountants and its state counterparts) (“SRO”). Increased regulatory scrutiny and more aggressive approaches toward the pursuit of malpractice claims make it more likely than ever that a CPA will be faced with the need to respond to an official inquiry that could lead to professional discipline.

Examples abound of increased regulatory scrutiny of CPAs. The United States Department of Labor has a policy of referring CPAs who omit to report client violations of ERISA to the Professional Ethics Executive Committee of the AICPA, and the Federal Deposit Insurance Corporation has begun to refer allegations of departures by bank auditors from professional standards to state licensing authorities. And that list does not include the scrutiny of public company auditors by the Public Company Accounting Oversight Board.

In our CPA defense practice, we have noted a pronounced tendency in recent years by claimants and their lawyers to present their alleged claims to the Minnesota Board of Accountancy at various stages of the litigation process. Some claimants attempt to use the board to gain leverage in settlement negotiations, while others seek to “flush out” evidence or force the CPA to issue

a definitive written statement for later use in contemplated litigation. Still other claimants vent their spleen after the conclusion of a case (even if settled out of court) by lodging complaints with a state board or self regulatory organization. And the enforceability of settlement clauses barring a claimant from doing so is -- to say the least -- highly debatable on grounds of public policy.

In one bizarre scenario that we encountered, the claimant's expert witness in a lawsuit filed a complaint on his own motion against the defendant CPA for alleged substandard professional services, even though the matter had already been amicably settled out of court with the claimant and his attorneys. Even more importantly, the CPA was debarred as a result.

In short, it is indisputable that regulators, governmental agencies and disappointed or unhappy clients (or their lawyers or experts) are now more inclined than ever to take "official action" against the CPA -- rather than attempting to resolve issues on an informal and private (strictly monetary) basis.

The CPA facing a complaint for professional misconduct faces possible outcomes ranging from complete exoneration to a warning, a fine, the imposition of supervision, mandatory CPE, or the suspension or revocation of his or her professional license. With that in mind, we will lay out the regulatory framework in Minnesota and then discuss recommendations for responding to such threats.

The Minnesota Board Of Accountancy

The Minnesota Board of Accountancy has plenipotentiary authority over the granting of a CPA license and setting the standards of conduct that govern continuing licensure. Thus, the board establishes entrance requirements, continuing educational requirements, the need for peer review and the standards of conduct (including professional ethics) that all CPAs licensed in Minnesota must abide. The board has purview over all licensees -- CPAs do not, therefore, have the ability to opt out of board regulation.

The Minnesota Society Of Certified Public Accountants

The Minnesota Society of Certified Public Accountants is an association comprised of certified public accountants who are practicing public accounting or employed in private industry or government. While membership is voluntary, it does entail submission to the association's rules of professional conduct and disciplinary procedures. And remember, you cannot withdraw or resign from the Society (or the AICPA) to avoid a complaint or resulting discipline once the complaint has been filed.

The American Institute of Certified Public Accountants

The American Institute of Certified Public Accountants (AICPA) is also a voluntary, self-regulatory organization for CPAs. The institute is the leading governance and regulatory body for the accounting profession. Its Code of Professional Conduct is, for example, incorporated by reference by the Minnesota

Board of Accountancy into substantive state law. The AICPA also codifies or establishes professional standards or guidance on virtually every aspect and facet of the practice of public accounting (auditing and review, compilations, consulting and tax services).

Members of the AICPA are subject to scrutiny by the Professional Ethics Executive Committee ("PEEC") of the AICPA. As noted below, PEC serves as the AICPA's forum for regulating the compliance of its membership with professional standards and ethics.

Joint Ethics Enforcement Program (JEEP) Manual of Procedures

The AICPA and each of the state societies have respective codes of professional conduct. Recognizing that many state law provisions are identical with the AICPA's Code of Professional Conduct, and because it is not uncommon for a CPA to belong to both the AICPA and one or more state societies, the AICPA and virtually every state society (including Minnesota's) have created the Joint Ethics Enforcement Program. The coordination of professional disciplinary proceedings between the AICPA and affiliated societies enhances the uniformity of practice standards at the national and state levels, while streamlining and reducing the cost of enforcement and response. Thus, under the JEEP agreement between the AICPA and the Minnesota Society of Certified Public Accountants, the two organizations have agreed to jointly enforce their

respective codes of professional conduct by means of a single investigation and, if warranted, a single settlement agreement or joint trial board hearing.

The AICPA's PEEC ordinarily refers complaints to the appropriate state society, but preserves for itself complaints that involve matters of national interest, relate to litigation, involve more than state society, or are based upon a complaint or referral from a governmental agency.

Responding to a Complaint

In our experience, complaints against CPAs range from providing almost no clue as to what is at issue, to manically recounting every detail in a stream of consciousness narrative. In either case, here are the steps that a CPA receiving a complaint should take.

- 1. Check your professional liability insurance policy.**

Many malpractice insurance policies provide a "loss prevention" feature that affords CPAs with legal representation for responding to complaints made to a state board, or to the ethics enforcement committee of an SRO. Many insurers offer that benefit without any charge against a deductible, at least up to a certain limit. It is no secret that the insurance carriers offer this benefit because they have learned the hard way that failing to take proactive steps to safeguard against a bad outcome at the earliest possible stages can lead to significant financial losses if a civil damages claim later ensues.

(The fact that insurance companies are willing to spend *their own money* to head off complaints filed with a state board or self-regulatory organization should provide practitioners with a big clue that they, too, need to view such complaints with the highest degree of respect and a healthy measure of alarm.)

2. **Do something!**

If you receive notice of a complaint, action is mandatory (and not optional). If a written response is required by a date certain, it is important to either provide an adequate written submission on or before the deadline -- or at a minimum to call the designated investigator and request additional time for your response. Such requests are often granted, and state boards are aware that practitioners are simply overwhelmed during "busy season" and at other tax compliance and financial statement reporting deadlines. Since the failure to cooperate with an investigation can itself be the basis for discipline, and since the complaint will never go away by itself, the CPA simply must be certain to respond.

If, in attempting to respond, you find yourself tied down by inertia or overcome with feelings of sadness, loss of appetite, sleeplessness or other symptoms, you may be suffering from depression. As we are increasingly learning, depression is a "sneak thief" with many causes that takes over our thoughts and robs us of motivation and energy, without warning, often paralyzing victims from participating in normal activities. If you find yourself

suffering from anxiety attacks, lethargy, an inability to sleep or eat, or have a pervasive feeling of "the blues," you should consider seeking professional treatment or calling on a friend or colleague for help. There are now many resources for assisting with depression.

In any case, it bears noting that the best way to avoid the complaint is to file a cogent, persuasive, comprehensive and appropriately documented written response to the complaint. Doing so will maximize the chance that the complaint will be dismissed at the preliminary screening stage -- thereby avoiding the need to appear for an interview or hearing.

3. Be prepared!!

Some matters presented to a state board or SRO are not resolved solely on the basis of the CPA's written response to the initial complaint. If so, the CPA may be invited to appear for an informal interview with the complaint committee or a PEC technical standards subcommittee. While voluntary, the request will note that if you choose not to cooperate, you may nonetheless be subpoenaed to appear (or, in the case of PEC, that your absence may itself be grounds for discipline). The notice from the government also has a "Tennessee Warning," which states that anything you say at this informal session can and will be used against you if the state board determines that disciplinary action is warranted.

Sometimes practitioners appear before the complaint committee without adequate preparation and find themselves addressing questions and issues that

either were not a part of the original complaint or that they did not view as being included in the original complaint. In either case, ill-prepared practitioners sometimes land in unexpected or deeper trouble on the basis of off-the-cuff, ill-considered or inappropriately worded responses to inquiries by the interrogating committee members.

The lesson to be learned and applied is that an appearance for even the most palpably flawed complaint should be carefully and thoroughly considered, with special attention being given to possibly hidden issues lurking in the complaint or other possible issues surrounding the engagement, but which are not implicated within or evident from the four corners of the formal complaint.

4. Get help.

Even if you are uninsured or your carrier does not offer loss prevention assistance, you may want to retain legal representation. A lawyer can often make useful suggestions for maximizing the effectiveness of your initial written response, in order to obtain summary dismissal and avoid the need for an interview. If an appearance is required, rest assured that it is not an admission of guilt or fault to bring your attorney into the hearing! If nothing else, having an attorney by your side may simply help you to feel better and more self-confident in stating your case. An attorney may also be able to offer perspective to the panel, or offer helpful clarification of both the questions and your answers.

The consequences of an adverse outcome – in terms of publicity, censure, reprimand, suspension or loss of certificate, fines and potentially negative impact on civil damages claims – are simply too great to ignore, slough off or to treat with disdain. Every single complaint to a state board or an SRO must be treated with careful attention and preparation, thoughtfulness and professionalism. You should approach such proceedings as though taking a final exam -- which it could well end up becoming!

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